HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Reference: Fair trading

CANBERRA

Monday, 4 November 1996

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Members:

Mr Richard Evans (Chair)

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

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

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

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

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

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

existing State and Commonwealth legislative protections;

existing common law protections;

overseas developments in the regulation of business conduct.

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

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

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

legislative remedies.

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

WITNESSES

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Fair trading

CANBERRA

Monday, 4 November 1996

Present

Mr Richard Evans (Chair)

Mrs Bailey	Ms Gambaro
Mr Beddall	Mr Jenkins
Mr Martyn Evans	Mrs Johnston
Mr Forrest	Mr Zammit

The committee met at 9.47 a.m.

Mr Richard Evans took the chair.

CHAIR—I declare open this public hearing of the inquiry into fair trading. In line with the terms of reference for this inquiry, the committee has investigated claims by small businesses that some firms are not adequately protected against harsh or oppressive conduct in their dealings with larger firms at hearings in Melbourne, Sydney and Brisbane. Today the committee will continue its investigations by canvassing the views of a number of peak bodies here in Canberra. The committee is particularly concerned to determine the extent of the alleged problems and to examine the adequacy of the provisions of the Trade Practices Act and other legislative measures to deal with them. The committee is also seeking views on alternatives to legislative remedies, in particular, voluntary codes of conduct.

[9.48 a.m.]

BARNETT, Mr Guy, Member, Micro Business Consultative Group, c/- Secretariat, Office of Small Business, Department of Industry, Science and Technology, Canberra, Australian Capital Territory 2600

GEORGE, Ms Soula, Member, Micro Business Consultative Group, c/- Secretariat, Office of Small Business, Department of Industry, Science and Technology, Canberra, Australian Capital Territory 2600

CHAIR—I welcome the representatives of the Micro Business Consultative Group. The committee proceedings are recognised as proceedings of the parliament and warrant the same respect that proceedings in the House of Representatives demand. Witnesses are protected by parliamentary privilege in respect of 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?

Ms George—No.

CHAIR—Would you like to make an opening statement?

Ms George—Certainly. I would like to give you some background information on where I am coming from so that you may assess the value of my evidence here today. I hasten to advise that I am a successful business woman so that what I say here today is not put under the category of sour grapes or my evidence brushed aside because I am put into the category of a loser or of being one of the bottom five per cent of small retailers who are doomed to lose because they have no business acumen, et cetera.

That is what has been inferred in the past by Westfield and the like when giving evidence to the parliamentary select committee in South Australia. That committee was set up to look into retail shop lease issues such as harsh and unreasonable rental terms, rights and obligations of parties at the end of a lease, rights and obligations of parties on relocations and refits and unconscionable conduct.

I have been in small business, mainly in the retailing of food, which is the fastest growing sector in the industry, for approximately 20 years. Seventeen of these years have been in a major regional shopping centre. Consequently, I have witnessed first-hand the changes within the industry. I have also seen the deterioration of business relations between landlords, managers and their tenants to such an extent that the malpractice has led to our industry being in crisis. I have also successfully set up a fashion business. I travelled to China and Hong Kong to set up my manufacturing contacts for my new enterprise. I operated this business from home obviously to keep my overheads to a minimum.

During the last two years, I have used my experience in small business in a more visible capacity: as Vice-President of the Small Retailers Association of South Australia. I might add that I am the first woman

ever since inception in 1945 to hold any position. During this period I have been in contact with many hundreds of retailers not only from the food sector but also from hairdressing and fashion. We have discussed the problems facing our industry and the action that needs to be taken.

During my 17 years in a major shopping centre, I have set up and established several successful coffee lounge restaurants and have also bought out several takeaway food shops which had been run down and improved these businesses for resale. I am also director and secretary of a company handling rental properties of both a domestic and commercial nature.

The committee will have already received a submission from the Micro Business Consultative Group and obviously many other submissions Australia wide. I would urge the government, instead of deregulating in this area, to regulate. Legislation must be implemented to address the imbalance of power that exists not only between big business and small and micro business but also between landlords, managers and tenants.

If the government is to be taken seriously in its promise to create an economic climate whereby small business can flourish, expand and employ, then I and hundreds of thousands of small business people Australia-wide look to the government to take legislative action to curb the oppressive, predatory and destructive course of aggressive competition adopted by the big companies in their race to increase market share. They cannot compete against each other because they are on a level playing field; so it is much easier to attack small business and microbusiness—when I talk about small business here I automatically include microbusiness—because they have no line of defence they can fall back on. They are not competing on a level playing field.

We are all aware that small business, especially in the retail sector, subsidises the rentals of big supermarkets by up to 1,000 times more. In fact, in some instances, supermarkets do not pay any rentals for up to as many as four years. We all know that small business pays higher rates of pay per hour. We pay more for the same product. We also pay higher utility charges. And then we are asked to compete.

I believe it is only through a lack of understanding that people outside our industry are in support of deregulation and free competition. Deregulation does not improve competition. In the long term, it actually reduces it by allowing big companies to use their power games, through market dominance, to take small business's market share. It is all about transferring market share from the small operator to the big chain stores. Small business is not afraid of fair competition. Elimination of competitors is the elimination of competition, and it is not in the best interests of the public.

We must all be aware by now that small business does not have the resources to withstand an onslaught of predatory practices or commercial thuggery, nor access to legal counsel. Members of parliament, it is within the power of all of you here today to recommend that legislation be provided to protect the interests of small business in this country, which is vital for the wellbeing of our nation. We recommend that the Trade Practices Act be amended to empower the ACCC and/or the courts to provide protection and adequate compensation for small businesses adversely affected by large businesses in breach of the law. We need legislation to protect tenants from some unscrupulous landlords and their managers—the push once again by the major players in this area for market ratings and the almighty dollar. They are using tactics which, if not criminally illegal, certainly are morally illegal.

These big boys—the main aggressors in the industries being Westfield and Lend Lease—ensure that they use their money to employ top legal advice so that they actually work around the letter of the law. Legislation should be abided by, not only by the letter of the law but by the spirit and the intention of the act. You might well say that retail shop lease issues are governed by state legislation. I would bring to your attention that the crisis in our industry is not centred in just one state but is a nation-wide crisis. I believe that, because it affects small businesses and microbusinesses Australia-wide, because it affects the unemployed Australia-wide, it should be an issue taken up by the federal government.

If states do not have the courage or the foresight to see where the injustices and the commercial thuggery in this area of the industries are leading our country to, and the destruction of the backbone of this economy—bearing in mind that over seven million people earn their livelihood from the small business sector—then it is up to our federal government, which has already identified the main issues of concern for the wellbeing of this nation, which are unemployment and small business, to exercise its powers to force state governments to adequately protect small business.

I was very relieved to hear our minister for small business announce to the Micro Business Consultative Group on 30 October that we now have regulatory small business impact statements mandatory on all proposed legislation. I would also like to take this opportunity to suggest that a task force review committee be set up, comprising suitably qualified business people from all sectors of the small business industry, as a matter of urgency, to review the impact of the Hilmer report on our industry. I would like to say also that, should action not be taken to redress this imbalance and misuse of power between big business and small business, it is quite probable that a lack of action will be taken by the small business sector to mean that our government condones the unconscionable behaviour of big business towards small business and microbusiness. This may follow that all the frustration and anger be redirected toward government and be reflected in the polling booth.

The small business people of Australia can no longer accept lip-service. Action is needed and it is a matter of urgency. The majority of us are dammed good operators but we are not being given a fair go. We are asked to compete on a playing field which is heavily weighted in favour of big business.

In Australia, we enjoy a unique lifestyle with the diversity of language, culture and pallet, and we must maintain this diversity in our business sector. We must allow small business and micro-business to take its rightful place next to big business, because our very quality of life, the well being of our nation and our livelihoods are at stake here.

CHAIR—Thank you, Ms George. Mr Barnett, would you like to add anything to that?

Mr Barnett—Mr Chairman, yes I would. I am a lawyer and consultant in private practice based in Hobart. I practised in law in Melbourne and Washington DC before returning to Hobart. Our office also acts as a secretariat for the Small Business Council of Tasmania.

I will just make some preliminary comments and a message and then five key points as an opening statement. I wish to mention micro-business is defined as any business with less than five employees. There are 660,000 micro-businesses in and around Australia, which is the vast majority of small business. Of

course, most of those are family owned and operated businesses and, on behalf of the Micro Business Consultative Group, we represent them.

I would also like to note, support and highlight the Prime Minister's comments last Friday on receipt of the deregulation task force report where he said he was a fanatic about the role of small business. We are thrilled to hear those comments and look forward to seeing action flow through from those statements. Indeed, we welcome the Red Tape report and look forward to its early implementation. We commend the government on its efforts to initiate such a report.

The message that I think we would like to leave today is this. There should be a level playing field and there should be a fair go for small business and micro-business. We do not want regulation for regulation's sake, but we do want it for the sake of justice and fairness across the board and in recognition of the contribution of small business and, in particular, of micro-business. They are the lifeblood of the economy, particularly in rural and regional areas. As Soula has already mentioned, the Hilmer report will have very significant implications in rural and regional areas.

Of the five points that I would mention in my opening statement, the first relates to anti-merger and trade practices legislation and laws in this country. In essence, it is my view that we lack appropriate anti-merger laws and we lack tough trade practices legislation. At the moment, it has the effect of decreasing competition and increasing the risk of trade practices abuse and it hurts small business. Those matters relate to price fixing, misuse of market power and restrictive trade practices.

Conversely, if the anti-merger laws were toughened and the trade practices laws were toughened, there would be an increase in competition, a decrease in prices and, certainly, a creation of more jobs in the small business area. In fact, that is where the growth in jobs has been in the last decade.

As an example, there is a comparison between Australia, the USA and the UK. In Australia, the retail grocery market is dominated—to the extent of over 70 per cent—by three major corporations, being Coles, Woolworths and Franklins. In Tasmania, two major corporations dominate the market.They are Coles and Woolworths, with over 70 per cent of the market. They have 70 per cent of the market share and hold 30 per cent of the jobs in the retail sector. The independents have 30 per cent of the market and approximately 70 per cent of the jobs. So you can see the 70/30 rule at work there.

With respect to the USA, no one major retailer has more than 12 per cent. Twelve per cent compared to 70 per cent is a vast difference. In the United Kingdom, my understanding is that the largest three retailers have no more than 33 per cent of the total retail market. So you can see the contrasts there between the three countries, and I am sure there are other examples available.

The second point relates to legal costs and delays. Small business and micro business are being disadvantaged under the current situation. In a typical trade practices or franchise dispute, of which there are many, you have to wait up to a year and sometimes over a year to get to the Federal Court. Once you get to the Federal Court, it can take one week, two weeks and sometimes longer, for a hearing. It costs over $1,000 a day. Simply, micro business cannot afford that sort of cost and that sort of delay. It is an impediment to justice and fairness. Justice delayed is justice denied: that is a true saying. We need to create a system which

will reward mediation and a system which rewards alternative dispute resolution measures. We would wish to emphasise that this morning.

The third point relates to the franchise code of practice. I do not pretend to offer extensive knowledge in this area but, from the evidence that I have looked at, the following seems to be clear. I would say, as a preliminary comment, that I support the concept of cooperative federalism wherever possible, believing, as a Tasmanian, that the state governments play a very important role. But in this respect, the federal government may be required to take action to ensure that protection is provided to small business.

There are over 25,000 franchisees in this country and, according to the evidence, 10 per cent are in major dispute or in court at the moment. According to the evidence, 25 per cent of franchisors say they are in major dispute or in court. That is a $40 billion industry growing very quickly and 280,000 Australians are involved. Yet 35 per cent, it is my understanding, of the franchisees are not registered with a franchise code council. Self-regulation, of course, is supported wherever possible, but obviously there is a big gap there. Some sort of safeguard or safety net needs to be provided to ensure a more level playing field for those people who may be oppressed or disadvantaged.

The fourth point, and the second last point, relates to micro business utilities and, in particular, energy charges. I would recommend a review in each state and territory of these utilities and energy charges. In Tasmania, we have recently had a government initiated review, called the Government Prices Oversight Commission. Its finding was that business, including small business, paid an extra $50 million a year more than they would otherwise have been required to pay for power charges. The recommendations from that report are to redress that situation over a period of time. Small businesses in Tasmania pay four times more per unit of electricity than bulk users in Tasmania. They pay approximately double the rate for energy compared to residential users. There is not a level playing field. Small businesses are being disadvantaged quite clearly and we recommend a review.

The fifth point relates to something you may not have come across so far in the hearings. It relates to the National Food Authority and food safety programs. You might wonder what that has to do with fair trading. If I could just explain, new regulations flowed from the Garibaldi tragedy. Of course, we support the intent of improving the standards so that such a tragedy will never occur again in this country, but the outcome and the implementation of the National Food Authority standards are very concerning, indeed, for small business because of the excessive and offensive paperwork that will result and the bureaucratic red tape that will result.

The recommendations are that food safety programs are to be implemented in each and every business. It is easier for major retailers, in particular, who are involved in the food industry to respond than it is for all the various corner stores. I represent a cooperative in Tasmania of 540 independent retail stores in the food industry. They are most anxious about the National Food Authority and about these food safety programs which are about to be introduced. The training requirements and the paperwork requirements are very concerning to them. At a time when the federal government is attempting to cut back the red tape, as we saw last Friday which, I say again that we commend, it seems to be in contrast to that. We do need a happy medium and I simply raise that in my opening remarks as a point of interest.

CHAIR—Before passing to questions, let me just say that a lot of my colleagues here today, who represent electorates from all around Australia, have experience with small business, so they can relate to some of the things you are talking about. I have two questions. Firstly, you mentioned the Trade Practices Act and how you would like to empower the ACCC to be more responsive. How do you think it would change and what sorts of recommendations would you put forward?

Mr Barnett—We both mentioned the need to empower the ACCC and/or the courts to compensate those adversely affected by such actions—abuse of trade practices laws—as well as penalising the offenders. If I can use an example, a recent price fixing case in Tasmania saw some hefty penalties imposed on those that were abusing the trade practices laws with respect to price fixing. But, unfortunately, the small businesses that were adversely affected, meaning those businesses that were paying a higher price than they otherwise would have been and then on-selling it to the consumer—it related to potato chips and take-away stores and the like—have not been compensated in any way, shape or form. So we need to somehow build in a mechanism to compensate the small businesses and micro businesses in that area.

The other initiative that I think needs to be considered—and it is in the third paragraph, on page 3—is that those companies in breach of the relevant laws should be compelled, in my view, to advertise and apologise for their illegal activity. It is all very well for these big businesses to pay a fine. That is appropriate. Of course, there should be tough penalties and so forth, but there should also be some public remorse provided and some sort of public apology provided.

The second area where there should be investigation relates to directors' liability. It is okay for the company to pay these penalties, but if there were some sort of liability on the directors, and they have their own insurance and so forth, it would make them sit up and listen a little and be responsible for the activities of the chief executive officer and others who are involved in these price fixing schemes. So there are two areas where we think legislative reform is possible and appropriate.

CHAIR—Do you have anything specific within the act, though, that you would like to recommend? I know you just covered those two points but, in particular, maybe in 51AA?

Mr Barnett—I am not in a position to provide specific advice in that area.

CHAIR—Okay. The second question I want to ask before passing to my colleagues is that you mention a lot about leases, retailers and all that sort of stuff, and the problems related to landlords extracting premium rents. Do you have any suggestions on how we can solve these problems?

Ms George—Yes, actually. I would like legislation on a nationwide basis to give retailers first right of refusal on renewal of leases. The small retailers of Australia are looking for some security of tenure. We do not have it and that is why we are at the mercy of the landlords when it comes time for the renewal of our lease. Once we become a captive tenant, we have no bargaining power whatsoever. And when I say 'a captive tenant', once we have actually put money into their shopping centre, we cannot just lock up our doors and go.

I will give you an example. My lease was up for renewal, but I was actually negotiating—if you can

call it 'negotiating'—one year before that. The terms that they gave me showed an obvious hike in renewal of lease. We know that key money is illegal. But if you were to have a look at a graph with regard to rentals paid, you would see when that tenant came up for renewal of lease, because it would just go right out of kilter. You might have a 30 or 40 per cent hike.

I said to my landlord that that was illegal. That, in other words, is key money. So what did he do? He just apportioned that hike over the rest of the years of my lease. He said, 'You came to us, we didn't come to you.' If we had security of tenure—I am not talking about perpetual leases; that is an anathema in our industry—unless the landlord could prove that we had been unfit tenants then there should be good grounds before non-renewal of lease. Should he not want to renew our lease and if it had nothing to do with our capacity as a trader or being a good tenant, then we should have compensation. We do have an investment in these shopping centres, regardless of what the big companies like Westfields are now saying, that we should be amortising our costs over the term of the lease. It is rubbish. How can you amortise $300,000, for instance, over a five-year term? It is not possible. Why should we have to amortise goodwill? They want us to say that we no longer have goodwill. They actually want to take our goodwill from us.

When you first are invited to come into these shopping centres, you are told that it is on a partnership level. Without us they do not have tenants in a shopping centre and without them we do not have leasing spaces. But once you have actually invested in that shopping centre, once you have signed on that dotted line and have put in your life savings or mortgaged your home to get in, you can forget that relationship. It just does not exist. Codes of conduct do not help in this area.

CHAIR—Are there codes of conduct?

Ms George—No. They just do not work. There have been a lot of inquiries into these retail shop lease issues; it is not something new. It is being whitewashed through saying that there should be a code of conduct. I think our own Prime Minister said that, as a general rule, codes of conduct do not work.

When politicians are looking at security of tenure, these big companies say, 'Well, we won't invest all of this money in this country.' Let me tell you something. Lend Lease, which is one of the largest investors, have made a commitment and are actually developing in England—I think in Kent, Kew, down there—the largest entertainment centre, or leisure centre as they call them, in the United Kingdom. And there they are offering their tenants security of tenure. The legislation there actually covers the investment of small business; it acknowledges it and compensates it when it is eroded by the actions of the landlord. Why is it that Lend Lease will play by those rules but, obviously, do not want those rules enacted here? They will play by the rules that our parliamentarians will put in place. If we value our small retailers, then they have to abide by the rules that we place here. It is rubbish when they say that they will pull out all these investments, it is utter rubbish.

Although I know this is a bit different, France has legislated against predatory pricing. It is criminal to sell anything at below cost price because the French want to protect their producers and the shop retailers. There is a fine of $95,000 because they believe that 'les grandes surfaces', the big companies, have taken over so much of the market share, the imbalance of power is so great, that they need to do something. I think that all the shopkeepers and producers were actually out on riot in the streets and they had to do something

about it. We do not want to get to that stage, but that is where we are heading.

Mr BEDDALL—I have just a couple of questions. First of all, this group that you represent reports directly to the minister. Have you made these recommendations already to the minister, or is this the first time you have put these recommendations together?

Ms George—Actually, I have made these recommendations to a parliamentary select committee which was set up to look at retail issues in South Australia.

Mr BEDDALL—This submission is on behalf of the whole group, is it?

Mr Barnett—Yes. The submission document that you have in front of you is on behalf of the whole group. Soula is speaking from a perspective from Adelaide and herself in the retail sector.

Ms George—And really Australia-wide.

Mr BEDDALL—I am just trying to get to the point of whether it has gone to the minister as well.

Mr Barnett—It has been tabled at our group and the minister has available to him all the documents relating to our group.

Mr BEDDALL—This, then, is my further question. From a reading of your submission and extrapolating, what you are basically acknowledging is that retail tenancy laws in the states have failed and that there is no possibility of their ever coming to an agreement. I share that view, because I have been trying for 10 years. What I really want to know is this: are you, as a group, recommending a national law that would override state laws? Would you have a national tenancy law that would govern this, maybe under the auspices of the Trade Practices Act?

Ms George—Definitely.

Mr Barnett—Yes. The mechanism for that—Soula may have a different perspective—is open to investigation as to exactly how it happens. I said earlier in my discussion that I support the concept of cooperative federalism.

Mr BEDDALL—What I am saying to you, though, is that I chaired this committee 10 years ago when we dealt with the same issue, and then as a minister talked to all the state ministers. We still do not have national retail tenancy laws. Is it now that your group is biting the bullet and saying to this committee that we should have national retail tenancy laws?

Ms George—May I ask why we do not have national retail tenancy laws, if it was looked at 10 years ago?

Mr BEDDALL—Yes, I can tell you. It is because each state said yes and they all thought theirs was the one we should all adopt. None of the states ever agreed on adopting any. That is the reality.

Ms George—I would suggest that, if a task force were set up to look at legislation on a national level and that task force was truly representative of small retailers and small business people Australia-wide, we would come up with some rules.

Mrs BAILEY—Do you have any knowledge of how laws like this would operate in overseas countries? Do they operate on a national basis or, for example in Britain, is it county by county?

Ms George—In England, which we know is a nation of shopkeepers, they have had legislation going back to 1954 which acknowledges small business investment, which has never been acknowledged here. It actually protects, reimburses and compensates small business and it gives them security of tenure. We do not have it here. In Australia here we are in 1996 4and we still do not have it.

Ms GAMBARO—I have two questions. My first one relates to FCAC and the registering of franchisors. I worked in the industry a couple of years ago and the take-up rate is such that, as I think you mentioned, 35 per cent are still not registered. What suggestions do you have for franchisors to register? Do you feel that the penalties for their not registering are deterring them, or do we need to do something stronger in that regard? What are your suggestions here?

Mr Barnett—I am not sure that I am in a position to respond properly in a detailed manner; in particular, you would have a far better understanding than I have. Clearly, it has been around for a while now. There is growth in the industry and still we have got 35 per cent that are not registered, despite the penalties, despite the incentive to register. The point, I suppose, that I was making on behalf of our group is that there is a gap there and there needs to be a safety net. Those businesses and those people that are not covered do need to be covered, so we need to find a mechanism to do that. A stronger, increased penalty or a greater incentive for them to join is one approach, but another approach is, basically, legislation. There are some base, core safety net values that need to be protected. I guess that is the point. It has been going a while and it is a growth industry. There are 25,000 or more franchisees out there and 35 per cent of them are not getting properly protected. We express concern for and on their behalf.

Ms George—A lot of franchisees are members of small retailers associations. I believe that legislation which would cover small retail tenancies should also, at the same time, cover franchisees. They need the same protection.

It has been said that franchising is really the way to go, in that a small retailer can come into the industry with no experience, be trained by the franchisor and possibly have a high success rate. All I can say is that what has been happening is that the franchisee now is being screwed—and I use the word 'screwed' because it mostly described what every small retailer out there is feeling. You ask them, and that is the first word that comes up. Franchisees are actually being screwed by two people: franchisors and landlords. The trouble here is that the franchisee actually signs over his rights of being able to even talk to the landlord; he goes through the franchisor. Codes of conduct there will not work, either. We need legislation that will cover both franchisees and the independent retailer.

Mr Barnett—Can I make one quick comment? The ideal situation, as I said earlier, is cooperative federalism, if we can get all the states to come in and do what they are supposed to do and legislate.

Mr BEDDALL—It does not work.

Mr Barnett—You might say that it does not work, but we have moved in the right direction since your report of 1987, many years ago. In Tasmania, for example, we still do not have retail tenancy regulations. You might have noticed that a draft was put out last week and, hopefully, that will help and, again, move us in the right direction. But it applies to franchising, as well. We also have to look at the constitution to see what sort of powers the federal parliament has, in any event, to try to do what some people would like to do, and that is to have national uniform legislation. You might have to go down the cooperative federalist track anyway.

Mr BEDDALL—We have had a political cycle that has gone 10 years, such that every state has had a change of government of all political persuasions; and, unless you get a change at the national level, if you want another inquiry, we will be back in 10 years.

Mr MARTYN EVANS—I just wanted to quickly cover the question of extended trading hours, as well, because that has been particularly contentious in our own state of South Australia. That would be something very much more difficult for the federal parliament to pick up. That is still obviously going to be more of a state question. Do you see that being regulated by specific hours? Or do you see it being regulated better by agreements?

Ms George—First of all, I could be wrong, but isn't this deregulation of shopping hours a push by the government to get everybody to abide by the Hilmer report? No?

Mr MARTYN EVANS—I do not think there is too much relationship between the trading hours push and Hilmer.

Ms George—Okay. Right. I would like to see the big supermarkets, the big stores, actually cut back their hours and give small retailers a fair go. This push for deregulation of shopping hours is actually playing right into their hands. We are giving them our market share and, with it, we will have higher unemployment. Everybody talks about investment of big business but I can tell you that, collectively, the investment of small business far surpasses big business's. This is something that we must remember when we are talking about small business. We are only small individually; collectively, we are the backbone of this economy.

Mr Barnett—The best example to support Soula's comments relates to Tasmania and the 70/30 rule. The big boys have 70 per cent of the market and 30 per cent of the jobs; the little fellows, the independents, have 30 per cent of the market and roughly 70 per cent of the jobs. So politicians need to be aware that, when they make the decisions to push for extended trading hours, there will be a direct impact on jobs and there will be a direct impact on market share. It will go to the big boys. That needs to be taken into account and unequivocally accepted in all the various state parliaments around the country.

Ms George—And there is no public benefit in the long term.

Mrs JOHNSTON—My questions follow on from what has been discussed but they will probably be a little more blunt than what we have been saying. Bearing in mind that quite often small business is also

given a rent free inducement to go into shopping centres to fill up space—that does happen, so we should not forget that—are you wanting all businesses, regardless of size, to be legislated for by the national parliament to say, 'Each shopping centre will charge those people X amount of rate per space per whatever site they are at?' Is that what you are saying?

Ms George—No, I am not. To answer the first part of that question, when you say that there are rent free periods for small retailers, there is an inducement where they find that they cannot lease an area. That inducement is so that they will invest in their shopping centre. Once they have done that, I can assure you they pay for that inducement.

CHAIR—Just on that question, do you think landlords use rent free opportunities for retailers to inflate the rents on their other tenancies?

Ms George—Yes, they do.

CHAIR—Therefore, the market next door becomes more—

Ms George—That is right. That is why I would like to see that you have independent and qualified retail valuers, not real estate valuers. They have to be qualified in that area. And market value of a premises should be on an empty site. That would make a big difference.

CHAIR—Could you respond to Ricky's question about—

Ms George—I am sorry, what was that second part of the question?

Mrs JOHNSTON—Are you saying that, regardless of who or what you are, you should be all charged the same amount of rent?

Ms George—No, I am not—

Mrs JOHNSTON—And I am saying that this should be set by the federal government. I have been involved in both small and large business so I can very much empathise with your problem; I have gone through the same things that you have gone through. But you and I know that unless there is some law that says to the landlord, 'You shall charge that,' there is no way that you can enforce that.

Ms George—I think you are getting into an area that could backfire for small retailers. True fair market rental has never existed. Over the last 15 years we have had a recession—we have had very little retail growth but our rentals have not reflected that. Westfield boasts that they are going to get another 30 per cent return for their shareholders. Where are they getting all that money from? Where have they been getting it from? It has not been from retail growth. It is because they are the experts in screwing retailers.

But you cannot say that this will be 'the' rental. It will backfire. If true market forces were to take control you would have an up and down, as you would have in any economy. It would be reflected in the rentals paid. We do not have any bargaining power. We just do not have any power when it comes to a

matter between landlords and tenants.

We are not saying that we want rentals set. If we were to alter the bargaining power of these landlords, if we were to be given access to justice that would not cost the small retailer too much, if we had a mediation tribunal—and I do not know what you would look at, as long as it was not expensive for a retailer to access—and if we had legislation to protect us from unconscionable conduct and give us fair play, we would not need to set the rentals.

CHAIR—I will extend this for five minutes.

Mrs JOHNSTON—I have a second question. You talked about the big players having 70 per cent and small players having 30 per cent—and I can relate to that. Are you suggesting that a percentage should be set at which each retailer cannot acquire larger market share? Are you saying that the Coles Myers, the Woolworths and the Franklins of this world will only have 15 per cent nationally or state wide, for example? Would you like legislation to go that way?

Mr Bennett—In short, the anti-merger laws in Australia are inadequate. So the answer to what you are saying is, in principle, yes. The evidence from the USA, where you can have no more than 12 per cent, and the UK, where it is no more than 33 per cent, is evidence that, yes, we do need tougher laws. The Coles Myer merger should never have been allowed to take place. That is a view that I have. It is not specifically a view on behalf of the group, but it is a view I hold quite firmly. The fact is that it is very unhealthy to have such a big market share.

Of course we need big companies in Australia because of globalisation of the marketplace, and so forth. But I am talking about the retail food market in Australia. It is dominated by those three players; they have far too big a share. So, yes, look at the USA if you want to. Reagan made a hero of himself with his anti-merger, anti-trust laws over there. So if you all want to become heroes in the Australian community, then you can go for it.

Mrs JOHNSTON—Can I suggest that in Western Australia precisely the opposite has happened, particularly in the food area where the independent groceries, which was spearheaded by FAL, actually had a combined 55 per cent of the market share as opposed to the other Coles and Woolworths. This is where your problem arising, where do you set the rules?

Mr Barnett—The same rules apply, whoever they are. If they dominate the market there is a lessening of competition. Section 46 of the Trade Practices Act deals with misuse of market power and that is where the problems will lie.

Mr ZAMMIT—There is no doubt that some centre managements are acting in an unconscionable, dogmatic, arrogant, rude and authoritarian manner which is causing tremendous fear and frustration in the hearts of the retailers. There is a problem, in addition to that, that the retailers do not have someone they can go to and say, ‘Can you help us out’, other than go to their solicitors and we know the cost involved so they get into a hell of a lot of trouble.

They have been coming to me as their local member. I have been circumventing the centre management, going direct to the owners, and in nearly every case I have been able to work out something to everyone's satisfaction. However, only the week before last I was threatened by centre management telling me, in a nice way, that if I keep intervening they will report me to the Trade Practices Commission. I do not know whether they can do that or not and I am getting legal advice myself and I will retaliate.

The point I am making is that we need someone to break the circuit because the view I have is that centre managements are of the view that unless they are very tough with the retailers they will not hang onto their account. The tougher they are the more money they make for the owners. That needs to be looked at.

You have raised two points that I want to ask about. You mentioned, in your own words, that below cost selling is criminal but everyone does below cost selling, even small businesses. It is promotional and it is—

Ms George—No, I did not say it was, I said that in France they have made it illegal because they have got to the stage where they have to protect their small producers and retailers. The only reason that supermarkets and the big chains can actually sell below cost is because they screw the producer, the wholesaler. They get prices that we, the small retailers, cannot get. In fact, we are classed as a rout trade. We actually provide the profits for these producers and wholesalers because they certainly do not get it from the supermarkets.

I will give you an example. We had a case in South Australia where Coca-Cola was putting vending machines into Westfield shopping centres. That had a direct impact on our small retailers who obviously bought from Coca-Cola. The prices they were going to sell at were very low. In fact, our supermarket sold cans of Coke for about 55 cents whereas our retailers could not buy it for anything lower than 90 cents. We had retailers going into the supermarkets and buying them so they could make a bit more money when they sold them because they could not get that price from the wholesaler. We also decided that we were going to have almost a black ban.

We decided that we were going to black ban Coca-Cola products. We were all going to take them out of our machines and stock their competitors. The Trade Practices Commission got wind of this and wrote us a letter saying that we were in contravention and our association had no right to advise tenants, in collusion, against Coca-Cola. Where is the protection for us? They say that if small business bands together we can do things, but we are not allowed to.

Mr ZAMMIT—I have one last point. Time is running out so perhaps you can write to the committee and expand on 2.6 in your submission in regards to the rate for power and other authorities being so much cheaper than it is for small businesses. I find that hard to understand.

Mr Barnett—I can tell you exactly. It is 11.3 cents for small business, which is the tariff 82 in Tasmania. The average for bulk users—there are 20 of them like Comalco, Temco and those sorts of companies in Tasmania—is 2.6 cents. You can see what the difference is, it is over four times. The rate for residential users is 6.4 cents or 6.5 cents. You can see that the difference is quite significant.

Mrs BAILEY—A while ago you flagged your concern regarding the Hilmer competition policy for rural and regional areas. Could you expand on that briefly? If you feel that you have not got time here today, could you provide us with information on that.

Ms George—As you are aware, small business is the lifeblood of these country towns. The only way that they exist and can afford to make some money is because they trade seven days a week, in actual fact, and with supermarkets, generally the big companies do not. Once you deregulate and allow everybody to open up seven days a week, they do not have that little bit of incentive. People will visit the major shopping centres and not go to their corner deli or to their local delis, and small business will die.

Small business people tend to be quite prominent in that community. They tend to be leaders in that community. They tend to use local suppliers, local accountants and solicitors, and so their wealth is spread within that community. The money that big supermarkets and chain stores make does not stay within that community, it goes back to the shareholders elsewhere, and they do not use local accountants. So you actually start to end up with ghost towns.

Mr Barnett—One of our recommendations re Hilmer, Mrs Bailey, relates to the fact that whenever there is legislation to implement the principles of Hilmer, part of the terms of reference for that should be a regulatory impact statement regarding small business. It should not only be a regulatory impact statement, but part of the terms of reference should be 'What is the impact on small business and in particular micro business?'—meaning businesses with fewer than five employees. Rural and regional areas get the lifeblood of their economy from those small businesses. So we would encourage you to please support the inclusion in the terms of reference when implementing Hilmer of the impact that this will have on small business, particularly micro business. We would appreciate that.

Mr BEDDALL—I think what you are arguing, and what has been argued by micro business rather than small business for a long period of time, is in effect a type of consumer legislation for small business. You can call it anything else you like, but in fact it is about protecting small business and micro business in particular from predatory practices of large players and, in essence, giving them many of the benefits that a consumer gets from the same people. Is that right?

Mr Barnett—The principles of what you are saying are correct. We support those principles because I suppose you are just consumers. In the 1970s and 1980s it was consumer protection legislation, and now we are talking small business, micro business, but how that happens, I would say just as an end note, that I would not want the federal parliament as a federalist to rely on some obscure treaty to introduce legislation to protect micro business. I would prefer that it be done through cooperative federalism, but that is just my personal view.

CHAIR—Thank you for your forthright evidence today. It has been helpful for the entire committee to get an idea of what micro business's views are. You were talking about the UK system before and the French one as well.

Ms George—Yes, the French one is just a new act that is being implemented.

CHAIR—If you have any information on that, we would like to get a hold of that. We will do our own research as well, but if you have something that is available we would be grateful for a copy.

Ms George—Yes, I will certainly see what is available.

Mr Barnett—I could happily respond to Mr Zammit's request regarding power prices in Tasmania and forward a copy of the submission relating to that, which would be of benefit, I think, to the committee.

CHAIR—That is fine. I think the secretariat may have some other questions to ask you as well, so we will put them in writing to you. We would appreciate if you could respond to that. Thank you for your time today.

Mr Barnett—We appreciate the opportunity.

[10.42 a.m.]

HENDERSON, Mr Grahame Beresford, NSW and National Chairman, Shell National Action Group, 2 Brunker Road, Broadmeadow, New South Wales 2292

HOWARD, Mr Bruce Anthony, ACT Chairman and National Vice-Chairman, Shell National Action Group, PO Box 922, Dickson, Australian Capital Territory 2602

CHAIR—Welcome. 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 parliament 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 has authorised its publication. Would you like to make any additions or alterations to your submission?

Mr Henderson—No.

CHAIR—We will go now to an opening address, if you would like to make an opening statement before we move to questioning.

Mr Henderson—The papers we have submitted to the committee are basically the same papers that we submitted to the ACCC inquiry into the petroleum industry. They also include our submission to the South Australian parliamentary inquiry into multi-site franchising, and those papers actually show how the oil companies—in particular, Shell—have been behaving to move into multi-site franchising. They also include many issues that this committee would be interested in as far as fair trading goes. We believe that they have been most unfair in many of their actions, and that is one reason why we have been formed as a group. The Shell National Action Group was formed in early 1995 to cover some protection for franchisees who were being treated, we believe, mostly unfairly and unconscionably and were being placed under economic duress to exit their franchises. Basically, we are here today to answer any questions you may have and to help clarify the situation and possibly address some of these problems.

CHAIR—I have a couple of questions before I move on to other members. You say that you were formed last year. Was the perception that the MTAA was not representing your interests? Is that why you formed?

Mr Henderson—There was a perception in some areas that that may have been the case. But, more specifically, we felt that the Shell franchisees in particular were being subject to some serious forms of duress, and that things were happening so quickly that we needed to do something ourselves; and we have worked in conjunction with the MTAA in many cases.

CHAIR—And what sort of action have you taken on behalf of your members?

Mr Henderson—If you will permit me to read, we have a few items which Mr Zammit may be aware

of, because we have burnt out his fax machine in recent days. Some of the things we have done are as follows. We have sent over 250 letters to Senator Schacht's office, as well as numerous personal representations to his electoral office and parliament office. It is interesting that the final wording of his press statement announcing the so-called moratorium contained some precise wording we had delivered to his office in our recommendations just prior to that release.

We have made both written and personal representations to George Gear's office and representations to the Hon. Jeannette McHugh, Minister for Consumer Affairs, and to departmental heads. We have made numerous visits to Senator Grant Chapman's office, both in Adelaide and at parliament, as well as conducting correspondence and meetings with the senator. We have made representations and presentations to the House of Representatives select committees last year and we have had multiple meetings with Senator Ron Boswell, Senator Julian McGauran, the Hon. Tony Abbott, Bob Baldwin, the Hon. Lou Lieberman, Stewart McArthur, the Hon. John Sharp, the Hon. John Howard, the Hon. John Moore and Wayne Swan.

We have had multiple meetings with the NRMA; the New South Wales Farmers Federation; the Orana Development Board; RACQ; RACV; APADA; Professor Fels; ACCC in Adelaide, Sydney, Melbourne, Canberra, Perth and Hobart; and the Federal Bureau of Consumer Affairs. We have made submissions to the Franchising Code Council inquiry and had a meeting with Robert Gardini, the chairman of that council.

We made a submission to the South Australian parliamentary select committee inquiry on petrol and multisite franchising, including two presentations and numerous meetings with MPs for clarification, submission of supporting documents and further detailed correspondence, et cetera. I made submissions to the ACCC inquiry which you have in front of you. We have worked with the MTAACT in obtaining a moratorium in that state, including numerous meetings with the ministers, departmental heads and officers and provision of supporting documentation. We have had activities surrounding the proposed moratorium in New South Wales, including numerous representations to every state MP, ministers and departmental heads, over 3,000 pieces of correspondence, demonstrations outside state Parliament House, assisting in drafting proposed legislation, searching and providing supporting documentation and individual submissions and representations from members to most state MPs. There are another two pages.

Mrs BAILEY—What do you do in your spare time?

Mr Henderson—We try to run a business each.

CHAIR—So it would seem that there are a few people who are upset with the whole system. How many franchisees would have felt subjected to unconscionable acts by or conduct or economic stress from Shell?

Mr Henderson—There were originally about 650 Shell franchisees—single franchised outlets. Some of those were run by distributors and some of them were run by a franchisee running two or three or four sites. The current state is that Shell now control about 400 of those, to our best knowledge, and some of them are still held by distributors. So when we were formed we originally represented over 250 of those franchisees in early 1995, given that a lot of them had already gone by that stage. The numbers have dwindled since then.

CHAIR—Would all of them feel aggrieved?

Mr Henderson—Most definitely. All of them will sit in this room and tell you that our futures have been stolen, and we say that because the Shell franchisees signed a 10-year agreement, basically from 1989 onwards as they came onto the system with the franchising. In 1993 Shell offered, and I was present at the offering, an extension to that 10-year agreement of a further five years under certain conditions; and now they have reneged on that offer. Shell's own documentation provides a statement on how the franchise will be extended beyond the 10-year period and now Shell are reneging on that offer. So, yes, we are all aggrieved, to the point where a group of us are taking legal action against Shell. You are talking about fair trading. Individually, we cannot afford to go to a court and spend $200,000 for such an action, which is a rough estimate of what this might cost. But collectively we can, and we are going ahead with that. So it is only the collective power of these aggrieved people, who are numerous, enabling us to spend the sort of money on a case.

Mr ZAMMIT—I did want to start off the questioning because this issue has been going on for several years and I have been involved with it and I have been briefed on it since my days back in state parliament. I am very supportive of Shell national action group. I think you have had a raw deal, and that is all I am going to say.

Mr BEDDALL—When we made changes to the Trade Practices Act, one of the things we envisaged was cases like yours where the ACCC will take an action on your behalf. We know that the ACCC has always taken big actions on things that get a lot of publicity. Have you approached the ACCC to take action on your behalf, and what was their response?

Mr Henderson—Yes, we have. We have spent quite a bit of time with them and we believe that they have issued papers to the courts on two cases currently, one in Melbourne and one in another state. They have numerous files and documentation from us. Last year we sent probably 50 or 60 cases to their Adelaide office. There was a chap over there coordinating those at that stage. They are now sitting in Paul Rudnev's office in the ACCC in Canberra and they are sifting through it. It would appear that they may have put those things aside while the petrol inquiry was happening, because there appears to be quite some action starting now. But all this is taking a long time. They are looking at the unconscionability aspect of many of the cases that have been put to them, but, once again, unconscionability apparently has never been tested in the courts and there is a lot of legal—

Mr BEDDALL—That is the point I am trying to make to you. The ACCC really has the power to test it but it keeps saying it has never been tested. So why hasn't the ACCC? We get a chance to ask them that this afternoon, actually.

Mr Henderson—We cannot answer that for you, unfortunately.

Mr BEDDALL—No, I know you cannot, but I hope they can this afternoon.

Mr Henderson—From our point of view, we would support most strongly any strengthening of the Trade Practices Act regarding harsh and unconscionable conduct as per Senator Schacht's recommendations

last year, or a stronger version of that if possible. Obviously, we want retention of the legislation, the PRMF and PRMS acts, which is the total protection that is given to franchisees such as us at the moment. There is some talk of repealing those acts, which is outrageous and should not be considered as far as we are concerned.

CHAIR—When we are talking about court cases and when you are actually in court or whatever it might be, I am conscious of the sub judice situation. I caution that we do not get into any detail regarding court cases otherwise we would need to go into camera.

Mrs BAILEY—I want to come at some of these problems from a different angle. A motorist driving around any of the cities—and I will come to the country situation a little bit later—can see a range of prices of petrol. The motorist usually thinks that there is a discount war on or that this is competition at work. Could you tell us what it is that is causing that great variance in prices?

Mr Howard—That is a big question.

Mr Henderson—I do not have a couple of weeks to tell you.

Mrs BAILEY—Just the major points that you have identified.

Mr Henderson—As we see it, there is no competition, truly, apart from a few of the independents. The oil majors would like you to believe there is competition but we believe they have the power to put the price up and down at will to make it look as though there is competition. They are willing to install predatory pricing as we have seen in Western Australia recently against an independent importing product over there. They have done it in the past in Victoria. In other words, if somebody decides to bring in a tanker load of refined fuel, maybe at two or three cents below the current available price in Victoria, and the ship leaves Singapore, by the time it hits the dock in Melbourne the oil majors have dropped their wholesale price to two or three cents below his price and he loses millions of dollars on the deal. That is predatory pricing. They have done it before and they have done it as recently as a month or so ago in Western Australia.

The ability of them to put the price up and down, because there are only four of them, is very easy. There is a lessening of competition because there are only four of them now. The availability of them to collude is greater. I am not saying that they necessarily have colluded but the opportunity is there for them to do that. So the prices that motorists see at the pump are really no reflection of competition, apart from the influence of the independents.

The concern that we have with multi-site franchising is that the independents will be under a lot of pressure because multi-site franchising gives the oil companies the ability to control the price in an area. In the past we might have had 30 or 40 single site franchisees making 30 or 40 individual pricing decisions whereas now we have one franchisee, we believe oil company controlled, making one pricing decision. He or she then has the ability to pick off an independent, one by one, squeeze them out of business, and once the independents have gone there is the possibility for them to then have a margin enhancement exercise and raise the price. Even a one cent a litre for Shell across Australia, for one year, is $20 million on the bottom line.

You and I will not see one cent a litre in the swings and roundabouts that we have in this fictitious price war because pegging up by one cent a litre is something you do not see, but that puts $20 million on the bottom line. We believe that this is not a exercise in cost cutting and profitability and rationalisation because that has all been done before. We are all computerised, we have all been down through that tunnel, we have done rationalisation to the nth degree, it is an exercise of margin enhancement. When you have got those sorts of dollars at the end of the tunnel, the oil companies, we believe, have been doing some things that have been quite nasty to the franchisees, unconscionable conduct, economic duress, forcing them out of their franchises in the early days for very poor prices, until we came along, because the reward at the end of the day is substantial.

CHAIR—What is the reward at the end of the day, in that case?

Mr Henderson—Market control for the oil companies, margin enhancement.

CHAIR—Are you arguing that the multisite franchises are in fact company owned?

Mr Henderson—Company controlled. Yes, this is the problem we have with the PRMF Act and the PRMS Acts. The acts state that the company has control if its controls more than 50 per cent of the shares in another entity, but they have got around that by installing these multiple site franchisees, taking a fellow and saying, 'We are going to make you a multiple site franchisee. You have only got a house and a car but do not worry, we are going to get the bank to loan you $13½ million.' The bank loans the money on a guarantee from the oil company, we believe, and then the oil company has a caveat or changes the articles of association of the company so that they cannot vote or make any decisions within that company without the oil company's permission. So there is a round robin of control. Even though they do not have shares, if they say, 'Do this,' the multiple site franchisee has to do it because of the controls involved. In that way they have circumvented the acts. So the acts need to be strengthened to overcome this, not repealed, and they then have control over this multiple site franchisee who in turn controls, in one case over 60 sites now between Brisbane and Sydney—a group from Brisbane and a group from Sydney for one franchisee.

And where you have got in Sydney three or four multiple site franchisees controlling the price of the petrol right across Sydney, it is a very dangerous situation. Vertical integration and the opportunity to have this margin enhancement exercise is far greater.

Ms GAMBARO—You have answered one of the questions I was going to ask, whether the PRMF Act was working, and you have just spoken about that. Are there are any other difficulties there? Also, franchise code, FCAC, and Oilcode: who do you see regulating the industry? Everyone has had a go at it, from what I can see.

Mr Henderson—The status quo at the moment is that the PRMF and the PRMS acts underpin Oilcode and Oilcode has been one of the avenues for franchisees to take some of their complaints to—not all of them, because Oilcode cuts out the availability for several things, such as group actions and pricing issues. The Franchising Code Council is a body which has no teeth, basically, by admission of its own chairman. They need more power, more teeth, to be able to look at these things. As far as I am aware, the Franchising Code Council passes a lot of its complaints on price of petrol issues over to Oilcode, and I believe the

Franchising Code Council even models some of their other franchisees' complaints on Oilcode. So we have Oilcode as the only alternative to the courts. The courts are expensive. We do not have the proper protection we need from the courts in any case, and we have the Oilcode underpinned by the acts. If we repeal the acts we have lost Oilcode, unless we have some new act covering a son of Oilcode or a restructured Oilcode. If we are going to do that, we need to look at all of the issues very closely, because the oil majors have been trying to get rid of these two acts for a long time and one would have to ask why they want the acts taken away when they give protection to franchisees. What will happen to franchisees when the acts go?

CHAIR—What will happen?

Mr Henderson—They will go. If they are able to steal our futures and do what they are doing under the existing acts now which need some refinement and restructuring, if they take the acts away it will just be open slather. There will not be any franchisees left.

Mr BEDDALL—Can I take it the next step, then, because I think this again, like many of these issues, has been around and around for a long time. If the bastion of free enterprise in the United States can have anti-trust laws, do you think it is about time we did and separated the oil company from the distribution and retailing?

Mr Henderson—Yes, there is a lot of value in that. I was listening to the people presenting previously when they were talking about where you have a landlord and a franchisor. We have got both of those wrapped up in one parcel, so we have got a double-barrelled shotgun up our nose, basically.

Mr BEDDALL—And a supplier wrapped into that.

Mr Henderson—Yes. What we have been advocating is that the franchisee should have the ability to buy a percentage—whether it is 20, 30 or 50 per cent, to be worked out—of their fuel from an alternative source other than their franchisor. There was been some talk about that in the 1970s by the TPC and it was agreed on some grounds in certain states—I think Victoria and Western Australia. But the problem is that most franchisees do not own the block of dirt they are trading on; the oil company owns the dirt and the infrastructure and the tanks, the pipes and the pumps. So the oil company has said, 'Yes, you can buy the fuel and you can sell it, but you can't store it in our tanks, you can't put it through our lines and you can't put it through our pumps.' Also there are passing-off problems. If you have got a Shell pecten out the front and you are buying an Ampol product, you may not be able to sell it as Shell petrol, even though there is a borrow and loan arrangement all over Australia where the Shell tanker pulls into the Ampol terminal and fills up and takes it straight to the franchisee.

There are ways of overcoming the passing-off. One way is to make petrol a generic product Australia-wide so that anybody importing or manufacturing that product has to make it to a specification. Once you have done that, it does not matter whether it is Shell, Mobil or Caltex, you can sell it as petrol. If we were able to buy a percentage of our fuel from another source, that would put true competition back into the wholesale marketplace, where there is no competition at the moment because we are locked into buying at a price dictated by the oil company. We do not have any choice. We cannot say, 'It is too dear today, I do not want any.' You must take it when they say, you must take it in the tanker sizes they say and you must pay

cash on the nose for it. But it would be better if we can say to the oil company, 'No, we don't want it from you today because we are getting a better price down the road here and it is 7c a litre cheaper,' which is a possibility, because when we have a force majeure situation in a strike, we can actually do that. We can get permission to buy outside and we can ring up an alternative supplier and it is sometimes up to 10c a litre cheaper, depending on market forces, but generally 6c to 7c a litre. That would put true competition back into the marketplace. The oil company that is our franchisor would possibly say, 'Look, we will match that price,' or, 'If you do a deal with us, we will do a three-month contract on a special.' It gives us a negotiating power which we have not got at the moment. It puts competition back into the wholesale marketplace, which would reflect in the retail marketplace, where there is no true competition at the moment; it is just a cycle controlled by the oil companies so that it looks like there is competition.

Mr BEDDALL—What do you say about the argument that the oil companies will put—and it is an argument I have heard a number of times—that, in terms of petrol, they go out and they find it is a very difficult thing to find. They then have to bring it to shore, usually—in Australian circumstances—refine it, cart it around the country and give it to you to sell, and the price is cheaper than a bottle of carbonated water. In fact, petrol is the cheapest liquid on the planet because nobody pays the full price that we should pay for water. Do you think that in Australia we are not actually paying enough for petrol, as an economic instrument?

Mr Howard—If I may answer that, that could be argued one way or another. But if you just go back and consider that these oil companies—as they say, it is a very simple operation: you go and you dig a hole, you get the black stuff out of it; you cart it off, you refine it, you put it in a bin and you sell it. That is a simplistic view. But every time there is a movement in that, when they put the hole in the ground and they dig it out and they sell it, they make a profit. They transport it and they make a profit; they refine it, they make a profit; they cart it to the service station and they make a profit; and at the end of the day they sell it out of the end of a bowser and they make a profit. So, I will ask you the question.

Mr BEDDALL—We are paying too much for carbonated water.

Mrs BAILEY—Can I just follow up on something that you were saying before, that if you could buy from other sources that would give you the competition. Wouldn't the system have to be more transparent so that you actually know the cost that you are buying at?

Mr Henderson—I can pick up a telephone now and ring half a dozen oil companies in Canberra and get their prices, just to buy a load of fuel, as long as they do not know that I am a franchisee and I am just doing it for fun to get the prices. But if I am genuine in wanting 30,000 litres of refined product in one go, I can just shop around and get the best price because I am not tied to anybody. As a franchisor I am tied because I cannot store it anywhere else. I do not own the block of dirt, so I cannot put new tanks in without their permission. I do not own the pumps. There is a Shell sign on the pump and if I am buying Ampol product or Mobil product they may say I am passing off, unless I have got special signs on the pumps, even though that happens in a strike situation. So that is the problem we have at the moment. A few things need to be put in place for that to take effect.

It would have a dramatic effect on the marketplace, I can assure you. It would overcome many of the

problems we have got about the so-called country-city pricing issue, because country-city pricing is basically the factors of the long distances, the low volumes that go through country service stations and the reluctance of oil companies to discount in the country areas because the country volume is only a very small percentage of their total throughput. If they are in the discounting market, the city is where the volume is and that is where they would be wanting to discount rather than in the country. Why give away a profit on a marketplace that is basically locked away and is going to make very little difference to your volume and your turnover? This is what this game is all about—volume. You have got to look at volumes all the time, not dollars.

Mr Howard—It also boils down to the oldest story in the book, the level playing field. When different franchisees and people holding retail outlets are able to buy at such huge differentials in product and are then expected to compete in the same marketplace, it just cannot be done. It creates enormous burdens on franchisees when they are tied to buy from their particular oil company when down the road there is an independent person, probably being supplied by the same oil company that they are buying from, at hugely different markets.

CHAIR—Are you happy with the outcome of the ACCC's inquiry into the oil industry?

Mr Howard—No.

Mr Henderson—No. In fact, we are gravely concerned, after hearing some of the statements made by the ACCC, and in particular the general manager, that they do not fully understand the industry and the problems. Any call to repeal these acts is like cutting the parachute from somebody skydiving.

CHAIR—You talk about not repealing the two acts. What recommendations would you have about strengthening them?

Mr Henderson—In particular, I mentioned before that, where the acts talk about the franchisor having influence over another entity, it states that they would have to have a 50 per cent or greater shareholding in that entity to have an influencing factor. We believe that the acts should be changed in that regard more in line with modern taxation law—and we are not experts on that either, but I believe it says that, where it could be seen that one entity has sufficient control to influence the decisions made in the other entity, that it should be deemed as having control without having a shareholding there. This is what we have at the moment. We have the franchisors—Shell and Mobil and soon to be BP, we believe—having sufficient influence in the structures they have set up, with the financial arrangements and the changes to the articles of association of these multisite franchisees, to control what happens inside those companies.

You have even got Shell employees sitting in the offices of these people taking information from pricing, absorbing that and putting back out information on how to set the prices of these service stations. This is a Shell employee sitting in a multiple site franchisee's office, so how can they be independent? It is a fairly senior employee doing this, and the telephone numbers that the people ring to give the pricing information about the competition goes to Shell head office. If that is not control, I do not know what is. So we believe that changing the act in that way would substantially benefit franchisees and competition, and also introducing the availability to be able to buy a certain percentage of our fuel from another source and

introduce true competition into the marketplace.

CHAIR—If you were to buy fuel from another source, wouldn't that be contrary to what the principles of franchising are anyway?

Mr Howard—The principles of franchising are not working terribly well at the moment. And, yes, you are quite right, it probably is, but nevertheless there needs to be a change because they are not working and the companies are now taking what was this golden egg of franchising and it is now being changed. The rules have been changed. When I bought my franchise, there was a certain set of rules in place. They no longer exist as far as the overall franchise is concerned. Shell has taken the group of people, bought them out and changed the whole ratio. Now we find that we single-site franchisees are a very small and diminishing group that are standing out on the end of the cliff face and it is getting worse every day.

Mr Henderson—Three or four years ago you would never have heard a franchisee make a public comment like that because they were just too damn scared. We have got a Shell employee taking notes over here now on exactly what we are saying today so he can run back and make sure that they know exactly where we are. To give you an example of why this franchising is not working: recently a franchisee went to buy a drum of oil and was charged about $650. I do not have the documents with me but I can provide them to you. A friend of his, not connected with the oil industry at all, just a private individual, walked into the same depot, bought the same drum of oil—

Mr Howard—On the same day.

Mr Henderson—On the same day, and paid about $420. As franchisees we pay a fee, we pay royalties, we pay a business value fee to go into the site, basically key money, in the first place—why should we pay a premium? We should be the people who are looked after, we should be the ones buying at the $420 and not the $650. We have got to add a margin to that $650 drum of oil to sell it to cover our business expenses, our royalties, our wages, and this is a private individual, the end user, who walked into the depot and bought it for $420. Franchising is not working, obviously.

CHAIR—Any further questions, colleagues?

Mrs BAILEY—Could you provide that information to the committee?

Mr Henderson—I will.

CHAIR—Is there anything you would like to say in summation?

Mr Henderson—Just briefly—Tony might have something to say as well—the oil companies are predominantly owned by overseas shareholders. By removing single-site franchisees from this industry and controlling the industry in the way they are going, they are taking from Australians one of the last pieces of equity we have in this industry. We do not own very much of this industry at all. The only small part we own of any substance at the moment is the franchisees, who run the businesses and employ local people, invest local money and spend their money locally. The way people are being squeezed out at the moment is

removing one of the few pieces of equity we have in this industry. Do you have anything to add, Tony?

Mr Howard—Not really, except to say that we have just concluded a single-site franchise conference in Coolum the other day for our people who are currently left. The overwhelming and resounding result of that was that they are still screaming out for help and they need help because they are being forced out of business. They want to stay in this business and they want equity for what they put into it, what they have paid.

CHAIR—I would like to thank you for your time today. We appreciate it.

Mr Henderson—Thank you for the opportunity.

CHAIR—Hansard may have a few questions they might want to ask you, so please stand by for that.

[11.17 a.m.]

DELANEY, Mr Michael, Executive Director, Motor Trades Association of Australia, Level 3, 39 Brisbane Avenue, Barton, Australian Capital Territory 2600

FAIRBAIRN, Mr Bob, Director, Motor Trades Association of Australia, Level 3, 39 Brisbane Avenue, Barton, Australian Capital Territory 2600

RICKUS, Mr John, Past President, Motor Trades Association of Australia, Level 3, 39 Brisbane Avenue, Barton, Australian Capital Territory 2600

CHAIR—Welcome. Is there anything further you want to say about the capacity in which you appear?

Mr Rickus—I am the principal of City Mazda in South Australia.

Mr Fairbairn—I am a BP service station dealer, Melbourne, recently Mobil, Melbourne, vice-president of the VACC, 35 years in the fuel industry.

CHAIR—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 required or asked to take an oath or 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 Delaney—Not at this stage, Mr Chairman, but I would, if you and your committee would consent, like to make an opening statement.

CHAIR—Please go ahead.

Mr Delaney—Before I do that, could I to assist the committee advise that I am the executive director of MTAA and also of AADA, the car dealers' association, and I appear on behalf of both those associations. I am a director of the Franchising Code Administration Council and have been since its inception, having been appointed first to the task force that recommended its formation by Mr Beddall when he was the minister. I have also, I should mention for the benefit of the committee, been a director of Oilcode, and indeed its inaugural chairman from its inception until its recent demise. I provide that in case you wish to pursue these matters.

I have with me today two members of the retail motor trades, both of whom have significant standing within our trades and who would wish to speak to the committee about their individual circumstances. They

are, as they have identified themselves, John Rickus to my left, the past president of MTAA and dealer principal of City Mazda in Adelaide, and Mr Bob Fairbairn, a director of MTAA and senior vice-president of the Victorian Automobile Chamber of Commerce, he is a former Mobil franchisee and a current BP franchisee. I should add as well that he has served for a long term as the national chairman of the Australian Service Stations Association, which is part of our federation.

I should perhaps first explain that the Motor Trades Association of Australia is a federation of the motor trades associations and automobiles chambers of commerce in each of the states and territories. MTAA represents all those who sell, service and repair Australia's vehicle fleet. The retail motor trades comprise some 40,000 proprietors who operate about 90,000 outlets. Those businesses provide employment for some 275,000 people and the vast majority of these businesses employ less than 10 people. Most are family businesses; in fact, the majority employ more usually less than five. Others, however, are some of Australia's largest private companies, and I instance there the Sutton group and the Alto group.

The retail motor trades thus represents a significant sector of the Australian economy and MTAA is the largest stand-alone small business representative association. The retail motor trades are highly franchised, particularly in the service station and new motor vehicle dealing sectors. However, there are as well substantial franchising interests in the tyre, battery, brakes, transmission and many other sectors of the retail motor trades.

Our interest in this inquiry is more than just a passing interest. MTAA, since its establishment in 1988 and through its predecessor associations going back to the turn of the century, has been particularly concerned to see the introduction of fair trading relations which would proscribe harsh or oppressive conduct and which would also secure some measure of redress against that behaviour for small business. In recognition of the fact that legislation has of recent times not been a preferred option of governments to regulate commercial behaviour, the association has in the past given its support to the development of self- and co-regulatory codes of conduct, specifically the franchising code of conduct and Oilcode. However, for reasons upon which I am happy to elaborate later, neither of those codes has been able to accomplish that which either the parties to the code or the government of the day would have wished.

Having been involved with both the now defunct Oilcode and the franchising code since their inception, MTAA firmly believes that codes of practice cannot succeed without legislative underpinning which provides some incentive; first, for industry participants to become signatories to the code, and, second, for code signatories to adhere to code standards of conduct.

In the case of Oilcode, which was underpinned by legislation which prescribed the dealings or behaviour which were the subject of the code, the threat of the removal of that underpinning has been sufficient to render the code unworkable and irrelevant, but inimical to the interests of the parties to the code. In the case of the franchising code, a significant franchise sector of the retail motor trades remains outside the code. The motor vehicle suppliers have refused since its inception to become signatories to that code and thus to its standards of conduct. That position remains, despite the best endeavours of ourselves, the current and former chairmen of the franchising code and the intervention of the former minister for small business.

We have therefore strongly recommended in our submission to this inquiry that the Trade Practices

Act be amended to underpin voluntary codes of conduct. We recommended to you that this be achieved by amending section 51AA of the Trade Practices Act to prohibit harsh or oppressive conduct. We propose that because, notwithstanding the 22-year-long debate on this issue since the passage of the Trade Practices Act for small business and in our case for retail motor traders, large and small, there has been no protection secured for them against the harsh and oppressive behaviour of big business. All of the suppliers to the retail motor trades—the oil companies, the motor vehicle suppliers, the insurance companies—are large and in many cases multinational companies with much greater market power than even the largest of our retail motor traders.

Franchised motor vehicle dealers and service station operators are frequently presented with renewal of franchise agreements on a take it or leave it basis, motor vehicle dealers are often terminated at very short notice and without compensation and there is commonly less than full disclosure of material facts by the franchisor prior to franchisees signing franchise agreements. We do not seek to make equal the economic relations between franchisee and franchisor. We recognise that would defeat the purpose of franchising. We definitely seek, though, a redressing of the current widespread abuse of market power which attends franchising.

To date, despite attempts to secure a redress through voluntary co- and self-regulation, our experience has been that suppliers to the trades have been unwilling to alter their harsh and unconscionable behaviour and, faced with the unachievable, extremely high hurdles in the current unconscionable conduct provisions of the Trade Practices Act, retail motor traders have been unable to secure, let alone to seek, redress against that behaviour.

It is for that reason and many others that the Australian Automobile Dealers Association, a member body of MTAA, has in its own right submitted to this inquiry that there is a need for the introduction of generic franchising legislation. The wider view of the MTAA constituency is, however, that, in the absence of such legislation, many of the problems currently faced by franchised or non-franchised retail motor traders alike could be addressed by the amending of the Trade Practices Act to proscribe harsh or oppressive conduct and by the underpinning of voluntary codes of practice.

There are two other matters which I would like to mention, if I may. The first of these is just to report to you on a matter arising out of the Industry Commission inquiry into motor vehicle and marine craft repair and insurance. In that report it was recommended that the insurance and repair industries should jointly convene a forum to determine processes needed to establish a code of conduct for the sector. MTAA has approached the Insurance Council of Australia on this matter and has received a very passive and lukewarm response. Thus, we can only assume that the council has little, if any, real interest in the convening of such a forum.

The last matter to which I would like to make reference is a much quoted and oft referred to survey conducted by the Victorian Employers Chamber of Commerce and Industry as to the impact of unconscionable conduct on its members. The MTAA has substantial doubts about the reliability of the inferences that have been drawn from the results of this survey, which was conducted by VECCI mid-1995 and upon which it relies in its submission, as indeed does the Australian Chamber of Commerce and Industry. We would want to point out to you that the facts of the matter are that only 39 of the 500 questionnaires

were returned, a response rate of eight per cent, which is clearly an inadequate basis on which to make generalisations across the membership of the small business sector. The questions asked were leading and preceded by statements which, for example, claimed that any amendments to the Trade Practices Act would be costly for business. In addition, MTAA believes that the use of open-ended questions, rather than a choice of three broad responses, would have allowed respondents to provide more detailed and accurate information. We make specific reference to that survey because much reliance has been placed upon it over quite some years now, both prior to its being formalised in the survey and since.

That is all I have to say at this stage, Mr Chairman, but I would be happy to answer any questions from you or your committee, as would my colleagues. Mr Rickus, whose circumstances are described at page 52 of the Australia Automobile Dealers Association's submission, and Mr Fairbairn, whose circumstances are referred to in more general terms at pages 51 to 59 of the Motor Trades Association of Australia's submission, will also be happy to answer any questions you or your committee might have. I thank you.

CHAIR—Would either gentleman like to make a comment before proceeding to questions?

Mr Rickus—In my circumstance, I have been asked to come here to give an example of the treatment from franchisors and perhaps the contempt in which they often hold franchisees. My own circumstances date back to the late 1980s. I had been an Alfa Romeo dealer for eight years at that time and during that period been the fourth or fifth largest customer of Alfa in Australia. In March 1989 Alfa came out with a new dealer agreement which they told dealers was very much the same as the previous one. I queried it and there were some new clauses in there specifically regarding advertising and termination. I pulled out some file notes of a conversation I had as well as querying it in writing. I had a call from the then managing director of Alfa who assured me that the agreement was not designed to be harsh or unconscionable in any way and he assured me that we would be treated fairly and certainly not harshly in the event of any dispute.

In August 1991 I received a letter from Guiseppe Sparacino who was then still managing director of Alfa in Australia, informing me that he was leaving Australia. I quote from that letter:

It has indeed been a great pleasure to have enjoyed your cooperation and I would like to take the opportunity to extend my sincere thanks for the support you have given and to wish you a long lasting, exciting and prosperous association with Alfa in Australia. I am confident that you will extend the same attention to my successor.

Six weeks later I got a letter from his successor which said in two sentences that I was sacked from being a dealer with the company. It stated:

We advise that it is not intended that your dealership will continue after 31 December and we hereby give you notice of termination of the agreement effective 1 January.

That came out of the blue. I had never met this new man and I wrote back to him on the same day and said,' Thanks for that,' but that I would certainly like to discuss how it had come about and if we were to get the sack what was going to happen with the stock we were holding because, being when you are a disenfranchised dealer it is very hard to sell the stock that you have. He wrote back and said,'Bad luck, them's the rules.' In fact, in the dealer agreement it did say that Alfa had the right to repurchase the stock if they so choose, but the dealer has no right to do anything.

Eventually I arranged a meeting with him to talk about this in a sensible way, because we had $103,000 worth of spare parts stock and nine vehicles totalling about $170,000. We did meet. He gave an undertaking to review that situation and two weeks later came back with an offer for the spare parts stock that we had paid $103,000 for. The offer totalled $20,436, and at that point I realised that they were probably having a real lend of me. It was the final insult, in fact, two weeks after that letter came—because I had not responded to it—they sent another letter that said they had withdrawn the offer because there had been no response back.

At that stage I was the national president of the MTAA and I took the matter to that body with Michael Delaney. Michael, through his resources, tried to broker a deal through the Italian chamber of commerce and people in there and this went on for a fair while. Alfa made some offers to assist with the disposal of the stock, which they later withdrew, and in fact in September 1992 relinquished the franchises of all the remaining dealers in Australia.

We considered taking legal action against Alfa, but the advice was that whilst we may succeed the cost could well run into $200,000 and should we not be successful then we would have to pay Alfa's legal costs. Alfa in fact sued us for an outstanding parts account that I had refused to pay at the time of the termination. The best we were able to do was to broker a deal to get them to agree to withdraw that action, on the condition we take no further action against them. In total, the losses to my company were in excess of $80,000. That can be quantified. The reason for doing it I am still none the wiser about, because it was not regarding performance or anything else.

Mr Delaney—Can I just say that Mr Rickus's circumstances are part of a description of many cases of the same sort, at pages 49 to 53. I want you to know that there is nothing at all unusual about that circumstance if prevalence and frequency are taken into account. If I could add—

CHAIR—How extensive are those situations? Are they longstanding?

Mr Delaney—It is frequent. As our survey material discloses, we would have something of the order of 20 very serious cases per year around the country, involving large sums of money. The most recent one was that described at page 49—the Alto Group and Ateco Automotive. Mr Altomonte, who is the proprietor and sole shareholder of that group, had intended to come along here today to describe first-hand his circumstance which is a very contemporary one. To our very great pleasure—and just to show that not everyone who appears before you is appearing to whinge—the prospect of his appearance here has seen the matter solved.

CHAIR—What, generally, are the causes of most of these problems?

Mr Delaney—I could come back to that if you like. I did not mean to hold up Mr Fairbairn.

Mr Fairbairn—Thank you. Perhaps by way of example I could briefly demonstrate what is normal behaviour in the oil industry. In the Mobil business that I ran from 1977 until this year, at various stages I operated that as a franchisee and as a commission agent, and in 1993-94 the company was desirous of having the business revert back to a franchise situation.

The interesting set of circumstances, which is fairly normal behaviour in the industry, is that the company approached me with this in view—that they wished to convert the site back to a franchise arrangement. There would be a fee payable by me—$25,000 up-front for the privilege of taking on a franchise for a site that I had already been in for 18 years. They duly presented me with a business plan and set of objectives under which the site would operate in the future. I looked at these in some detail. I chose not to respond to their invitation on the day of the visit, but suggested I would read the material and we would meet again and discuss it further.

On investigating the business proposal that I was presented with, I found there was a shortfall in the expense side of the projections of some $25,000, based on their projections against my actuals for what the site was currently costing to run and my projections of what would be the case in the future franchise situation. This I took up with the territory manager. He chose not to want to take it anywhere. Because of my long experience and history with the company I chose to go far higher up the tree and sought meetings with the state manager and the Australian manager.

I had a meeting with the state manager and we went through this proposal line by line, in particular dwelling at great length on the expense side of the proposition, recognising that the income side is totally controlled by the oil company. We established and reached agreement on an increase of some $20,000 of allowed for expenses in the proposition. We concluded that meeting. I probably mistakenly believed that with my experience with the company over many, many years that was the end of the matter and a favourable deal would thence ensue.

I was amazed when the revised proposition was submitted to me that the company, having allowed for a further $25,000 on the expense side of the proposition, simply chose to increase the income side by $80,000 gross, $25,000 net and say, 'Problem solved. We have acceded to your request. You now have a profitable franchise arrangement.' I protested about that at some length, up to going back to the state manager, and I received in due course a letter saying, 'Bob, sign the deal or get out.' Ladies and gentlemen, that is fairly typical behaviour in the oil industry today and in more recent days. I use that purely as an example to illustrate the way this industry today treats its franchisees. I will be happy to answer questions.

CHAIR—We will go back to what causes the problem. Would you like to expand generally?

Mr Delaney—On our part of franchising?

CHAIR—Yes.

Mr Delaney—In automotive we are the largest group of franchisees in the economy. We have about 5,000 in petroleum at the moment but gravely under threat as to that number, from the recent ACCC report; in car dealing we have 4,500 franchises; in tyres, batteries and all the rest of it we probably have another 5,000 or so. Franchising is extending into body repair. The RACV has just franchised the first of our repair shops in Melbourne recently and we expect that trend to continue throughout body repair over the next few years. We presently have 9,000 body repairers. As you can see, we are a very large group.

The problem is that, at least since the passage of the Trade Practices Act, we as a group of trades—

essentially small to tiny—have sought some sort of capacity to deal with the prevalent market power abuse that we suffer. It needs to be remembered that we essentially are governed in petroleum by four oil companies, in car dealing by perhaps five major franchisors and in insurance by about six major insurance companies, and that is it in all of our dealings. In every respect we are the principal client or buyer from each of those groups of suppliers.

While there are some differences of substance in the dealings as between, say, car dealing, petrol retailing and body repair, they are at core not all that much different. At present, in petroleum we have the two acts which we rely upon absolutely, notwithstanding that they have been defeated in so many respects, and we agree with what SNAG has said to you in evidence but we still rely upon them for their continuing and residual benefits. There, to an extent, but for our commercial circumstances, we do have some of the circumstances that apply to all other small businesses. By that I mean that the two petrol acts provide us with tenure, which tenure all other small business has under retail tenancy arrangements but we do not; we are exempted altogether. If we were to lose our two present acts we would have tenure of about one hour, and that would be a real problem.

Turning to car dealing, the issue there is pretty much the same. Once a franchise is taken on by the dealer, a great deal of compliance has to occur with the franchisor. That is not of itself unreasonable, but what tends to flow thereafter is that the commercial circumstances that are the subject of the agreement are often changed at will without consultation. Tenure can be non-existent or notional only. There is no dispute resolution. We can, in times of recession, for example, be loaded up with stock. Where the agreement and the business plan might say, 'You will carry 20 of these cars,' and there is suddenly a downturn in the car market, it is not 20 anymore, we have to carry 60, even though our capacity to sell is even more reduced because of the recession. It is essentially the lack of all of those things, plus the comprehensive and so often oppressive behaviour that we are subjected to.

In the body repair side it is a little bit different. There it is a case where we are essentially told to repair things for a lower price than our customers expect is being paid and to do it in ways that our customers would not permit. That is it very briefly.

CHAIR—A number of submissions have argued the existing law is adequate. Some have even said that recent cases means that the common law is developing. Have you got any comment to make?

Mr Delaney—I certainly do. We were a party to the amendments that were passed in late 1992, by which I mean we agitated a long time for them. They were a compromise because there were difficulties within the various departments about what should or should not be done. Some argued then, as some do now, that there was not a problem and, therefore, nothing needed fixing. We were able to show that there was a problem. The difficulty, however, is that simply importing into the statute law the common law provisions did not give us anything more than we already had at common law, if we could access it. At its simplest, it formalised and made statute what was already accessible.

Our very great disappointment is that it has taken years of prodding, most recently a somewhat embarrassing exchange with Mr Asher of the TPC in December 1994, before the commission even conceded that that part of the act needed to be employed or tested or applied. Now what we see are a whole lot of

extraordinary wins allegedly coming through, including Hamilton Island and others, but still no one has been in court. We say if no one has been in court then the tests that were put into the act have never been established. We do not know the extent of the exporting of the common law provisions into the statute law, we do not know if the hurdles are the same as they are more generally for harsh or unconscionable conduct and we are, in effect, lost. Here it is four years later which adds another four years to the then 18 years that the TPA had been in place, and supposedly been able to protect smaller parties against larger parties in business, and still nothing has happened.

To return to one proposition made earlier here in evidence by one of the committee members, we essentially say all that we have ever wanted is not a 'return to the past' act or a 'fair trading protect small business' act or anything like that, we just want some recognition that we are consumers too, albeit on a very large scale, and as business people why should we not have the rights of consumers that all other consumers have. To the extent that there are those who argue 'There isn't a problem and it ain't broke', one must ask them why do they not similarly propose in relation to consumers. The answer, of course, is self-evident, that they know perfectly well that we need such measures. That is the problem.

The other parties who propose that there is not a problem, that nothing needs to be done, that the present measures work, are the very same parties who so rigorously and comprehensively opposed Minister Beddall's amendments back in 1992. The same arguments were trotted out, the same thing is again happening. Their purpose in all truth is to deflect and defer and hope another 24 years will go past before anything has to happen.

Mr BEDDALL—One of the things that the MTAA has always done is carry this can on behalf of small business because by its nature it does not have large business membership. From discussions I have had with people, there is now a general agreement amongst people representing small businesses that section 51AA has to be strengthened. Is that a correct view?

Mr Delaney—Yes.

Mr BEDDALL—What would you like to see included?

Mr Delaney—We say in our submissions that where the amendment of 1992 failed was that it only put the common law provisions in. We think there should be an express legislating of a prohibition on harsh or unconscionable conduct, and we say at a minimum you need to do that. We have a number of reasons for saying that. We think behaviour change rather than litigation would result because there is a risk element for everyone under the Trade Practices Act and it does produce behaviour change, and that is a good thing. We think a lot of the problems could be addressed through behaviour change. For example, we do not know that we would any longer be subject to take it or leave it contracts and renewals if there was a risk that there was a head of action. We suspect that if the act were changed in that way we would never have to employ it.

We offer that as well because in New South Wales there have been provisions of a similar character in the statute law there since at least 1951 employing the same doctrine of unconscionability, and commerce and capitalism have been able to get on with it in New South Wales without the world coming to an end as we know it. So we say that there is thus quite some experience.

It is true that it is in the industrial jurisdiction and some would argue that is the wrong place for it and there are critics of how it has worked. However, we say as against that that it has served a useful community and social purpose. In effect, that is what we think needs to be done as a minimum. However, beyond that, our original and probably continuing preference is for a franchise act.

I need to briefly recite a little history. When, upon the report of Mr Beddall's committee back in 1990, there was a recommendation in that report for the passage of a franchising act, we supported that. The then government, however, thought that that might not be wise; so it said that it would try out co- and self-regulation. So Mr Beddall's government appointed a task force. I was asked to serve on it with 13 other people, including a number of franchisors who are no longer in franchising and are before the courts. So I served on that task force. It recommended that co- and self-regulation be given a shot, a trial, for two or three years, with a review thereafter.

We formed the Franchising Code Council and wrote the code. We had the support of most of the governments, franchisors and franchisees, and we gave it a terrific shot. We have all been sitting around as directors of that now for six years. The only problem was that no-one gave us any powers to make it work and no-one gave us any money to speak of to make it work. Far from the Commonwealth—with respect to the former minister—having done the right thing and having said, 'We will make all this happen,' they turned us into a limited by guarantee company and set us loose on the High Street of Sydney and said, 'Now, do it.' Of course, not a lot happened. To be fair, all the good franchisors joined; every last one of them. All the crook ones would not go near it. That remains pretty much the circumstance today.

Earlier in your evidence there was reference to 65 per cent being in and 35 per cent being out, and that is still roughly true. But it is a different 65 per cent every year. It rotates through the membership. So a good one that becomes a bad one will disappear and a bad one that has freshened up its act will come back in. The real problem is that no-one can take it terribly seriously because there are a couple of fatal flaws in it, thus our preference for a franchise act.

Mr BEDDALL—I was going to raise the issue of franchising, because it was always envisaged at that stage—in some sort of moot defence—that we would come back and revisit it.

CHAIR—Does the franchise code that you are suggesting, supported by some legislation, need to go to the ACCC?

Mr Delaney—We think there are a number of ways you could do it. There were two exposure drafts from the then Attorney-General of a franchise act in 1988. They foundered because in the end so much of big business said, 'There is not a problem. They do not do anything.' We would have thought that those acts could be pulled out, dusted off and looked at again. Failing that, if it is our community's preference to do things by self-regulation, co-regulation, voluntary, however, we would be happy enough with that, but there needs to be a measure of inducement or encouragement or penalty, if you like, for people who will not play the game, who will not play it fairly. So you need something in there. My view of the best probable circumstance, absent a franchise act, is if the ACCC had a power to underpin codes of conduct such that membership became evidentiary as a defence and the like or, taking its submission to you, it could seek to

have compliance with codes, as occurs in most jurisdictions in relation to a whole range of consumer issues, we would probably be a fair way towards solving the problem.

The difficulty at the moment is—if you take automotive, for example—the car suppliers and manufacturers have refused from day one to join the national code. So we have got that whole sector—4,500 franchises—exposed and without the benefits of those arrangements. We essentially ask you to note that, for example, recently the Media Council and indeed the advertising standards process have fallen over; the Oilcode has fallen over, because it is essentially proposed by the oil companies and has been proposed by the ACCC and the Industry Commission that our two acts be repealed, and we say, 'You cannot have an Oilcode without the acts because that is what it is built upon.' So it does need this underpinning capacity. What character that might take and what preference people have, I think, turn a bit on fashion in matters of administration and law, and perhaps to an extent on ideology about intervention and regulation.

Mrs BAILEY—Do the practices that you have described to us extend to outlets for farm machinery?

Mr Delaney—Absolutely.

Mrs BAILEY—No-one has mentioned that.

Mr Delaney—I did not want to burden the committee too much. We have 13 national divisions, of which service stations is one and body repair is another, but amongst that 13 is farm machinery dealers. We are down to about 900 dealers nationwide. In their circumstances they are even more oppressed than what I have described at large. We do make passing reference to them in here. But, yes, essentially the whole of Australia's infrastructure of farm machinery dealing and servicing is held and owned by our members and they have dealings with perhaps four major suppliers. The way they are treated is off the scale and no redress is possible.

Mr ZAMMIT—Through you, Mr Chairman, I have a question to Mr Delaney. My personal view, having been in business for some 25 years before entering parliament, is that self-regulation does not work. As part of your committee's inquiry, did you find any industry that had a self-regulation of conduct that worked and, if so, why did it work?

Mr Delaney—No, we did not find a single one. So no—

Mr ZAMMIT—Thank you, you have answered my question.

Mr Delaney—May I just say that, at the time, the Treasury was able to convince the government—as ever—that you have to try these things anyway.

Mr ZAMMIT—But you waited two or three years before you came to that conclusion. I find that hard to understand.

Mr Delaney—We have been very patient. We have played the game according to the rules of fashion that were then operating.

Mr ZAMMIT—The other question is to Mr Rickus. Did you have a distribution arrangement with Alfa Romeo, or was it a franchise arrangement?

Mr Rickus—We had what they term a dealer agreement, what dealers believe is a franchise agreement. That is clearly articulated.

Mr ZAMMIT—Was it just a handshake, or was it a written agreement?

Mr Rickus—No, it was a signed agreement.

Mr ZAMMIT—In that signed agreement—in regard to the problems you have had—did any clause say that the manufacturers can cancel the agreement forthwith, with no further delay, and you get nothing unless they are generous enough to give anything?

Mr Rickus—The agreement was for a one-year run-in term, and renewable, whereas most agreements are for a longer period than that.

Mr ZAMMIT—The point I want to make to you—and we had the same issue raised when we were in Melbourne—is that when I was in business I used to give exclusive arrangements to companies that wanted my product, and I in turn had to get exclusive arrangements from people overseas. I would never ever enter into a contract unless it was firm, binding, long term. Why do you leave yourselves so wide open?

Mr Rickus—There is no alternative. We had dealt with them for eight years on that basis and they chose, without cause or reason, to end that agreement. Was there anything in the agreement about recourse? As I mentioned earlier, there was for Alfa. They had the right if they wanted in the agreement to take the parts and vehicles back at cost, but the dealer had no right to ask them to do that.

Mr ZAMMIT—How do we stop this thing from continuing?

Mr Rickus—Some of these things that have been discussed. We need the underpinning of a franchising code, we believe, or franchising legislation. None of the motor manufacturers have volunteered to be part of the franchising code. Their attitude has been, 'That's for McDonald's and Hungry Jacks and KFC—and we don't sell hamburgers.' In many instances they have also said, 'We don't operate a franchise.' The fact is that there is no franchising fee paid by motor dealers, but the investment required is often hundreds of thousands of dollars that you put into that on the reliance of having an ongoing tenure with that franchise.

CHAIR—But why should they be compelled to participate in a franchising code?

Mr Rickus—Dispute resolution is often the thing that comes up in motor dealer trading when there is a dispute between the franchisor and the franchisee and there is no way of settling that dispute.

Ms GAMBARO—Mr Delaney, you have mentioned that a number of motor vehicle manufacturers and suppliers refused to sign the code.

Mr Delaney—All.

Ms GAMBARO—I have had a number of dealings with people where supply of product has been withheld. They see me about these problems, particularly relating to section 46 of the Trade Practices Act, where a person is a major supplier in the marketplace. How can we redress that situation, and what are your suggestions there?

Mr Delaney—In automotive, we are subject quite frequently to withholding of supply. I will not name any particular supplier but we will often be told, 'You can have one of those which sell, but only if you take five of those which don't.' That is just a variation on it.

In response: we do not propose, and never would because we are such free-marketers in all normal circumstances, that you have to legislate for all these things or that you have to, somehow, anticipate all the circumstances. We do say, though, that the abuse of market power action is near enough to unusable for any ordinary business person, small or medium. The reason is that the action typically is a half million dollar action. How can you do that?

I suppose what we are relying upon is the idea that, to take up an earlier point, if there are code arrangements you have got an opportunity for alternative dispute resolution. The benefit and reason in that, I suppose, is that it saves the community a lot of money and it stops damage being done to the respective parties. But past that, I suppose we would say that, if the behaviour in refusal of supply fell within the doctrine of unconscionability and if you could show it and it was sufficient for you to get an action in contemplation, that is probably a better way of dealing with it. We would rather think that the behaviour change that would come from the Trade Practices Act containing such a provision might see a lot of this sort of behaviour altered.

Ms GAMBARO—On the incontrovertibility aspect, I have had firms who again have gone to the ACCC and have shown numerous occasions where there has been an abuse of this power, and again the ACCC have said, 'Look, we have not got enough evidence.' So that is a real problem that we need to address.

Mr Delaney—It is a problem and may I address that. The evidence problem is always there. The reason is that small business people mostly have so much trouble surviving that they have not got a lot of time to make diary notes, prepare affidavits and so on. So often the evidence is insufficient. Beyond that, a lot of these people are very seriously cowed and that is why they have to hire 'Sir Humphreys' like me. The point is that the minute they stick their head up they are in trouble and they can lose their franchise. Part of our job is almost like a shop steward job: we have to protect them against being dealt with in that way.

The second point there is that often they are too scared to complain until it gets to the last point. Mr Henderson made that point in relation to SNAG; we certainly support that. A lot of them are really very fearful of their circumstances, not least because they do have agreements a bit like the Alfa agreement that Mr Rickus spoke about. May I just explain how that comes about. In the life cycle of a business, turning yourself from a small repairer or perhaps a second-hand car dealer into a new car dealer often involves grabbing the only agreement that is on offer. At the start point you see that it carries all of that risk you have

just related, Mr Zammit, but you take it anyway, because it is the only way you can grow the business. Then over time you come to find it can work against you.

Ms GAMBARO—Could I ask one other, very quick question, please?

CHAIR—Sure. Go ahead.

Ms GAMBARO—You also mentioned an industry inquiry at the moment and you spoke about the insurance council. Another area I would like to ask you a question about concerns motor vehicle repairers and the difficulty they have in breaking into areas where there have been agreements between insurance companies and certain preferred suppliers. Could you expand on that for me.

Mr Delaney—Sure. We are bedevilled by that. We think it is just a prelude to franchising, the insurance companies franchising who the repairers are. Mostly there are approved repairer agreements. It may be said that those of our members—automotive and body repairers—who do not take them on choose not to do so because they cannot meet the requirements, but we think there is actually another level to it. We think the insurers impose standards which are really very high and hard to meet in capital terms, and then swap the necessary economic rates for lower rates which are supposed to be justified by throughput. And, yes, it is the case for a lot of our members that, in the absence of that approved repairer badge, they really cannot compete, and it is very difficult to do so. Our commercial response has been to establish approved repairer schemes of our own of somewhat more standing. We have done that successfully in South Australia and we are shortly doing it in Victoria through our Victorian Automobile Chamber of Commerce member. But, yes, it is a real problem.

Mr BEDDALL—My question is to Mr Delaney. It is in relation to 51AA and the wild claims we have had in recent times that everything from Hamilton Island has been fixed because AA is in the act. The real problem I see—and I would like to get you to verify it—is that the real enemy in this is Attorney-General's, not the Department of Finance or Treasury, because any submission will come from the Attorney-General not from the Treasurer. Their argument was that you needed to get a test case up. It would seem to me that what we were trying to do was quantify the common law by getting a test case up and the Trade Practices Commission as it was then, the ACCC now, was empowered to take action. Are you aware of any actions that they have instigated?

Mr Delaney—Not one, and we note with very great interest in relation to Hamilton Island that it was not until the poor woman and family lost the lot, after failing in a court action, that the commission came in. We have not been able to find out, because of the confidential nature of the settlement, what the character of her action was and what she relied upon. But there are suggestions that she had tried to bring a private action under 51AA and it had not worked. I do not know if that is in fact the case, and you might be able to answer that.

We just say that, quite apart from the difficulty of collecting the evidence, to take a Federal Court action is about half a million dollars. We have had some experience of it, having been sued by the TPC—and we are one of the few parties that won against the TPC. Essentially, it is a flag fall of $100,000. And if you go to three or four days of hearing and then face the prospect of an appeal, which now seems nearly

automatic or inevitable, it is half a million. So, with great respect, we would only say that it is one thing for parliament to put into the law a compromise, as it was—

Mr BEDDALL—If I can interrupt, my point was that the TPC was supposed to take that action and pay for the action.

Mr Delaney—Well they have not, and they do not seem to want to, notwithstanding that they are collecting penalties of the order of $10 million, $15 million and $20 million which one would think would easily fund one.

CHAIR—Mr Delaney, have you any summation comments you would like to make?

Mr Delaney—I would only want to add, to assist the committee, that the Micro Business Consultative Group witnesses who appeared before you made reference to the Landlord and Tenant Act of the UK which was first passed in 1927 and updated in 1954 and 1969, and we can give you that material if you want. Interestingly, it provides for tenure and goodwill. Secondly, reference was made to the Lend Lease development of Blue Water in Kent which is one of the largest retail operations in Europe, it would seem from press reports. Again, tenure and goodwill is to be part of the arrangements.

Beyond that, we would like to make brief further reference to our particular difficulties in relation to the petroleum sector and the proposals of various authorities and agencies to government to repeal the present legislation. That proposal first gained currency out of the Industry Commission inquiry into the petroleum industry. But what the Industry Commission actually said was that if there was a need for franchising legislation it should be generic, not specific. We would agree with that.

We say you cannot take away the only thing that gives us any tenure unless you are going to put something in its place, because our circumstances would be parlous. We say that because in the UK our counterpart service stations do have tenure in a lot of respects. But, surprise, surprise, the oil companies there have sought to defeat that, notwithstanding that you cannot contract out of the Landlord and Tenant Act. They have done that by putting in place quite clever product licences, but that is fortunately not ubiquitous yet.

Lastly, could we direct to your attention the recent sixth report on petrol retailing of the United Kingdom House of Commons Trade and Industry Committee which we can provide to you. Interestingly, it makes 11 recommendations dealing with fair trading matters and in particular with petroleum, against the background that, of course, in the UK there is an office of fair trading and its affairs are monitored by the UK parliament and from time to time the subject of reports of this sort.

Lastly, and beyond that, we thank you very much, Mr Chairman and members, for the opportunity to appear. We should point out that the length of our submissions was partly dictated by the long time we have been involved in this issue. We thank you for your indulgence in reading them and hearing us today. Thank you very much.

CHAIR—We appreciate your substantial submission. We have found it very beneficial. Thank you.

Mr Delaney—Can I just add that there was a third, which was done jointly with the Pharmacy Guild, by way of providing to the committee a history of this issue back to the passage of the Trade Practices Act.

CHAIR—Thank you for that.

Luncheon adjournment

[1.17 p.m.]

BRIGGS, Mr Alan, Chairman, Australian Council of Shopping Centres, and Member, National Council, Property Council of Australia, Level 26, Australia Square, 264 George Street, Sydney, New South Wales 2000

DEAKIN, Mr Geoffrey, Manager, Retail Policy, Property Council of Australia, Level 26, Australia Square, 264 George Street, Sydney, New South Wales 2000

McDERMID, Mr Dale, Member, Australian Council of Shopping Centres, and Member, Education Committee, Property Council of Australia, Level 26, Australia Square, 264 George Street, Sydney, New South Wales 2000

MARTIN, Ms Louise, Member, Property Council of Australia, Level 26, Australia Square, 264 George Street, Sydney, New South Wales 2000

CHAIR—Welcome. Is there anything you want to add about the capacity in which you appear here today?

Mr Briggs—I am the general manager of Westfield shopping centre management company. Mr McDermid is joint managing director of Byvan Management. Ms Martin is the chief executive officer of Lend Lease Property Management.

CHAIR—The committee proceedings are recognised as proceedings of the parliament and warrant the same respect that the proceedings of 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 may ask to do so and the committee will give consideration to your request.

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

Mr Briggs—Not to our submission, no.

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

Mr Briggs—An opening statement would be made by Mr Geoff Deakin as manager of retail policy, outlining our industry. Then I will follow up briefly, as will Mr Dale McDermid.

Mr Deakin—We represent the Property Council of Australia, which was formerly the Building Owners and Managers Association of Australia, known as BOMA. We changed our name on 2 September this year. The Property Council is Australia's peak industry association representing the interests of the property community, principally those who use land or invest in the built environment to generate economic

returns. Our members include half of Australia's top 50 companies, including such major Australian financial institutions as AMP, Lend Lease, Bankers Trust, Commonwealth Funds Management and National Mutual; just a few of Australia's major CBD office and shopping centre space owners.

The Property Council holds that this issue of fair trading does have the potential to impact on all lessee-lessor relationships in both CBD, office, industrial and tourism investment properties. However, the terms of reference of this inquiry refer specifically to retail tenancy issues. Therefore the Property Council members with major investments in shopping centres have a significant interest in the deliberations of this committee and both our submission and our remarks here today will be focused on the shopping centre industry.

We represent 94 of the top 100 owners of Australia's 1,100 or so shopping centres. Shopping centres represent 22 per cent of the total retail space in Australia. Australia's 1,100 or so shopping centres house over 2,000 major retailers and over 44,000 small and medium sized retailers. Construction of new centres and refurbishment of existing centres not only creates a better environment for consumers but more opportunities for retailers. According to the Australian Bureau of Statistics, in the last decade over $15 billion has been invested in shopping centre construction.

Our submission which we have submitted to you outlines the comprehensive, fair and reasonable state based lease legislation that governs most aspects of the lessee-lessor relationships in the retail industry, including shopping centres. A defining feature of Australia's shopping centre industry in the 1990s is the ownership of shopping centres by major Australian financial institutions. Through superannuation funds, life companies and broad based property trusts, millions of Australians have their retirement futures secured by stable investments in our shopping centres. A 1992 study revealed that around 6.9 million Australians share in the benefits of institutional commercial property investment. For the first time ever, major financial institutions invest a larger proportion of their property portfolio in shopping centres than in any other property investment, including CBD office.

The Property Council of Australia argues that the stability of the retail sector is fundamental to the future security of millions of Australians. The industry should be free from unnecessary legislation and regulatory burdens. Cooperation between all stakeholders in the industry is the key and our submission lists many instances of that cooperation between owners, managers and retailers.

Finally, just this year we have established the Retail Industry Liaison Forum, which is a cooperative forum established with the Australian Retailers Association, who have made a submission to this committee. That forum is established to work through issues of common interest and the difficult issues that do face our industry.

Mr Briggs—Mr Chairman, Australia is a country of some 18 million people and I think we have one of the best retail distribution systems in the world. It puts us in a unique position for such a small country. That has been brought about by the cooperation and the talents of retailers and landlords combined, and really is a mark of the way the industry operates within Australia.

The retail property industry has been the subject of state government focus now for a number of years,

as well as federal government focus. As a result, lease legislation which governs all aspects of landlord and tenant relationships exists in nearly all Australian states. Where a code exists, as in the ACT, there is legislation which backs the code, ensuring a degree of compliance. That is in marked contrast to the evidence that I heard being taken before lunch.

The industry has been marked by its ability to discuss and negotiate good practice, as Mr Deakin pointed out. The New South Wales code, in particular, was the subject of direct negotiation between the main parties—the Retail Traders Association, the Real Estate Institute and the Property Council of Australia—assisted by the government. In fact, just recently a number of amendments to that legislation have been put to the government. Those amendments have been negotiated and unanimously agreed by all parties involved. That is a measure of the cooperation of this industry and it is taking place pretty well at all levels.

We believe firmly that harmonised best practice legislation across the country would best serve the needs of all parties. At the moment we have seven different laws governing all of us in seven different states, which is not good either for the landlord or for the merchant.

Mediation has been of assistance. As was outlined before, there have been some 1,627 inquiries in New South Wales since mediation was first put in there. Only 83 of those matters will proceed to become resolved. But it is working fairly well.

Our considerable practical experience is that education and information is one of the most pressing needs in the industry. The economic level of entry into retail is very low. You can lease your fixtures, you can buy your stock on time—60 days, 90 days, whatever. Since we are all shoppers—I see a lot of shoppers around the room here—and we are familiar with it, these factors make it a very attractive proposition for many retail aspirants to come into the industry, to the point that all major retailer property owners now find themselves in the position of providing direct education or working with governments or retail institutions to correct the issue, because there is a very large lack of education. My colleague Mr Dale McDermid will elaborate on the issue.

In essence, we do not subscribe to the view that the Trade Practices Act needs to be strengthened, but more that the various state acts be given the opportunity to establish a track record, as appears to be happening now. It is our view that change to the Trade Practices Act will not, of itself, resolve industry issues. It is more likely to offer a bonanza to the legal profession. We believe that focus legislation is far more beneficial where it does focus on the real issues of the industry.

Mr McDermid—Mr Chairman, I would like to talk briefly about education and then to give some examples of the mediation in the legislation in New South Wales, particularly. Certainly the Property Council of Australia has focused on the area of education for many years. I have been fortunate to have an involvement in that, particularly in the shopping centre area. We have had management and marketing courses of a very high, world practice recognised degree, over the last 10 to 15 years, and those courses have been expanded in the last 12 months to the areas of operations and leasing.

A great number of management personnel that are in the shopping centres around the country have received accreditations through the Property Council and also through other tertiary educational facilities. We

continue to invest heavily in the area of education and, generally, awareness.

Many times, also, these courses have been done in full cooperation with the retailers associations. It really is only with their ongoing support that we have been able to achieve the levels of professionalism that we have within our industry. As an example, my colleague Louise Martin may elaborate later on the activities that Lend Lease in particular, have introduced around their retail skill centres.

My particular position at this table, as Mr Briggs mentioned, is as joint managing director of Byvan Management. Our name is probably not as well known as those of Westfield and Lend Lease but we are a manager of shopping centres of many shapes and sizes down the east coast of Australia, particularly, numbering some 70. So I trust that we can bring to the table not only the view of the major retailers and major shopping centres but also the diversity of the small ones. That small shopping centre and retailer view takes an equal footing around the table at the Property Council, in all the measures that we take.

As mentioned previously, lease legislation is already in place in some form or another in all states. In New South Wales particularly, the act was formulated by the industry in a best practice form of approach. I think that until now in New South Wales, Queensland and South Australia that legislation includes mediation, which continues to play a successful role in resolving those disputes.

Alan briefly mentioned the number of inquiries and the mediations that have been completed. Out of those mediations that have been completed, 70 per cent were successful. As to the source of all those matters, interestingly enough six per cent only came from regional shopping centres, 59 per cent from strip and stand-alone shops and 34 per cent, actually, from landlords. So, although the retailers felt they had the most to gain from lease legislation, I think it has just been shown that there is generally a need for greater awareness and education. The communication has improved dramatically, I believe, over the last three to five years, by both parties. If we continue the way we have been going, with the awareness and education being lifted, it must result in a much more productive relationship for all concerned.

CHAIR—I have two questions and I know my colleagues are pretty keen to talk to you about a few issues that they want to discuss. Does the Property Council of Australia have a code of conduct endorsed by its members, which covers the dealings with tenants? If you do, how is it enforced?

Mr Briggs—We originally had a code of conduct which went back a number of years, and basically all of us subscribed to it. It does not have the ability to be enforced, as many of these do not have the ability to be enforced. We have rather, in the last few years, relied on the legislation, which is pretty consistent, to govern our conduct. We live by the legislation.

Mr Deakin—There was actually a signed code of conduct between the Retail Traders Association in New South Wales, which I am particularly aware of, and the former BOMA. The former New South Wales government said to us, 'Let's move that into legislation,' and that is how the New South Wales legislation came to be. In other words, what was an agreed code, signed by both parties, is now legislation. It is considerably expanded now in legislation.

CHAIR—In New South Wales?

Mr Deakin—Yes, and very similar legislation in almost every other state and territory.

Mr Briggs—The New South Wales legislation has fairly well, but not exclusively, formed the basis of much of the legislation, or improvements to legislation, that has taken place over the last three to five years.

CHAIR—From what you have just said, the code of conduct is enforced by the courts. Is that right?

Mr Briggs—Yes, in that sense.

Mr McDermid—In addition, it goes to the operation of our businesses as being professional members of our industry association and the relationships that we have with the newly formed Australian Retailers Association and all of their subsidiaries on a state level. We have a very good, ongoing, close working relationship with them in all of the major issues, including training and education, conferences and the like.

CHAIR—But there is no requirement for members to meet the code of conduct, it only goes back to a court's resolution?

Mr McDermid—That is correct.

CHAIR—You indicate that there are some areas such as rent reviews and lease renewals and tenancy terminations and things like that which remain issues under discussion. What are the problems associated with these issues, currently, and are there any solutions in your mind?

Mr Briggs—As we said in the beginning, and my colleagues may have some other thoughts on this, the issue, primarily, is education. Many people come into the retail industry underinformed, undercapitalised and uneducated. As a result, the businesses that they run can encounter problems although, interestingly, you are something like three times less likely to suffer a business setback in a managed shopping centre than you are in the industry generally. Some Western Australian figures were brought out that after five years something like five per cent of businesses fail in shopping centres as opposed to 15 per cent of businesses that last for some five years outside of shopping centres.

CHAIR—So what you are putting to me is that it is an education requirement of the retailer going into a shopping centre or a lease agreement prior to them going in. Who should be responsible for that education and where do they draw it from?

Mr Briggs—Generally speaking, the education of all of us is our own responsibility. It is not, with great respect, anybody else's responsibility to educate me. I must educate myself. However, we have been in the industry forced into a situation where we must provide education. Lend Lease provides significant education through the TRACT program. AMP spends half a million dollars on retailer education that I am aware of. We have employed a retail specialist who was a previous owner of 130 retail shops who reports directly to the executive committee of our board and who fights on behalf of the retailers. His biggest issue has been to implement retail training and try to get retailers along to retail training.

We have assumed that mantle. But the retailers themselves, also, are beginning now to do an excellent

job. They have set up retail training and we, in our company, at least work directly with them. We actually provide the catalyst for the training and then we will pass them through to the Retail Traders Association's training schools to lift their skills. It is an issue right around the country that needs to be addressed.

Mr McDermid—One of the positive outcomes of the lease legislation was the fact that there is now an onus on both parties for full disclosure. Both parties now have a greater understanding of the arrangement they are getting into whereas previously it could be held that the retailers really were entering into a relationship where they might have known something about the business they were operating but they did not know a great deal about the environment that they were going into and cohabitating with other retailers in a managed environment.

That in itself, with the disclosure of what is to happen in the property, what their obligations are, what will their outgoings contributions be, what are redevelopment options for the centre and many other examples are all included now as part of those disclosure statements. We have a far better informed business relationship that is being built upon than we ever had previously.

Mr BEDDALL—Listening to the Property Council people you would think there was no problem out there in the retail sector but let me say, if you are not aware, the overwhelming number of submissions to this inquiry are from aggrieved small retailers, and some of the reasons you have given probably tell us why. You indicated that superannuation funds, in particular, are large investors in the retail centres and trading centres. Obviously, that is because of the rate of return that you are achieving. In an industry that is flat—and nobody thinks retail is a growth industry—its rates of return are increasing for shopping centre owners.

The other thing that you fail to identify is that small independent retailers are aggrieved with organisations like the Retail Traders Association. If I am not mistaken, all the majors are members of the Retail Traders Association and many small retailers do not see themselves as represented by those organisations. Even if that perception is wrong, it is a very real perception in the small retail sector. What is fundamentally wrong with a set of consumer type protection legislation for the small retailer?

Mr Briggs—You have made a number of statements there, Mr Beddall, and I will not argue with them, although that I understand that the Retail Traders Association has made a concerted effort to ensure that they cover as many small retailers as they possibly can.

The question that you raise is similar to the statement that I made in the first place, that this industry has been the focus of legislative pressure and legislative effort by all states. The legislation that exists at the moment is focused directly on this industry and talks about this industry's problems in this industry's jargon, in a way that this industry will understand—both retail and property owners. It seems that there is little need to add to what already exists. The rights that they have—and I am not a lawyer—under this legislation already exist and are very clear and pertinent. They are very directed at this industry. That would seem to me to be sufficient.

Again, if you come back to the New South Wales issue, there are 1,500 inquiries—70 per cent of them are settled; 80 of them get down to mediation. Of those 80 that get down to mediation or go through a mediation, only a very small number—a tiny number—will actually get through to a court. I think that is

beneficial in terms of costs, et cetera, to everybody and it seems to be working well. It has only been in New South Wales now for two or three years—it has been in some states for less—and appears to have a track record of success.

I think that we should really give it an opportunity to work and be proved to work, or be proved not to work. If it be proven not to work in three to five years, then perhaps we should examine the question to see what else can be done.

Mr BEDDALL—Then you would rightfully argue that it was just New South Wales. In three to five years you might have a new piece of legislation in Victoria, then we have to wait three to five years for it to enact. What I am saying is that there is an aggrieved group of people out there.

If you do not believe that then I suggest you read some of the evidence. They feel that they are not empowered. They are not empowered to go to the courts. By the time they get to a situation where they need the court, they cannot afford to go to a court and many of them walk away. What I am saying to you—what has been put to this committee—is that a number of people feel there should be protection, as there is for consumers now. What they are saying is basically that a lot of these small retailers are nothing more than consumers.

Mr Briggs—I have to come back and say that, first of all, the legislation that we are talking about—the disclosure statements which my colleagues talked about—is pretty universal right around the country. From the ACT to all the way around the country you can go to mediation in one form or another. It may not exist to everybody's satisfaction, and I think one state is South Australia where they are now putting it in and we are fully behind that. Again, with respect, it would seem that it would be much more reasonable for these kinds of mediation, which are focused on the industry and the industry's issues, to be dealing with industry issues.

Mr BEDDALL—By industry players.

Mr Briggs—No, I am not talking about—

Mr BEDDALL—You are talking about the Retail Traders Association.

Mr Briggs—But the mediators are not drawn from our industry, they are drawn from a number of industries. Again, I am not the expert on this, but I understand that they must have mediation training, et cetera. They are not being drawn from the industry at all.

Mr ZAMMIT—Mr Briggs, I have to agree with Mr Beddall. You are living in a different world to the rest of Australia. We constantly have people coming to our electorate offices to see us to say, 'Help.' Your words were, 'It is attractive to come into the retail business.' Well, the commitment one has to make to go into a retail business is a three-year lease on average, is it not?

Mr Briggs—Five years.

Mr ZAMMIT—Five years—it is even worse than I thought. With a rental of $15,000 to $20,000 a year they have to sign up for $100,000. That is a major commitment on their part. You mentioned something about mediation. You said there are 1,500 cases, mostly successful. How do you define successful? If it means that the small retailer backs down, is that success? For whom?

If you are saying that in some cases they can get 30- or 60-day terms that is great, but when you are setting up a business no-one is going to give you 60-day terms because you have no track record, so whatever you buy you have to pay cash for. The outfitting of the shop is another major commitment. If you are saying that when mediation does not work out then you go to court, the fact is that most of them realise the consequences that if they do not comply with the requirements of the management they are in even deeper trouble. They cannot afford to continue to fork out that money and so they have to buckle under. I can tell you that I am constantly being approached by people saying that something has to be done.

I want to get onto what you leave in the contract and what you do not leave in. One of the major problems is the relocation clause. No management will allow a no relocation clause, and that is one of the biggest tricks that is being pulled against small retailers. They are in there for three to six months, then management comes along and says, 'We are changing things around. To make it more profitable for everybody, you have to move.' The retailer says, 'Fine, all right, if you want us to move, we will move.' The management then says, 'But, you have to outfit your new shop at your expense.'

Mr Briggs—There are a number of issues. Firstly, with the greatest respect, three-year leases were the norm and the retailers insisted, through the legislation and the code, that they go to five years because they felt that they needed more protection for their investment. We have complied with that, with no issue. You raise the myth of management fear. That is something that is constantly raised to us. I do not believe it is real. I believe it is being pushed out in perpetuity by people who have other interests.

Mr ZAMMIT—With due respect, Mr Briggs, I was threatened two weeks ago by a company which is managing one of the shopping centres in my electorate. Threatened! I was told to butt out. People came to me, shopkeepers that I know, saying, 'Please help, they are squeezing us out. They have pulled a trick on us, we had not realised.' I was told to butt out or they will take action against me. I am seeking my own legal action in response to that threat. But if you are saying this action against the little retailer is a myth—I, as a member of parliament, am being threatened.

CHAIR—What is your response, Mr Briggs?

Mr Briggs—I am very sorry. I must apologise on behalf of the industry if that is the case; we do not condone such behaviour at any stage. Mr Zammit, you did ask about the relocation clause. May I say, Mr Chairman, we live in this industry every day. We are very, very well aware of the issues in the industry. Not for one moment do I or my colleagues want to underscore the problems that exist in the retail world; not at all. We live in it, it is our livelihood, and it is to our benefit and the benefit of our investors that we resolve issues between ourselves and retailers. But you asked about the relocation clauses—these are covered in legislation. If a retail tenant has a lease, then they are entitled to removal under that lease. They are entitled to premises; they are entitled to all sorts of things under the auspices of the legislation.

A shopping centre is a living, breathing entity. The raison d'être of managing a shopping centre is that it can be managed to the benefit of all the retailers. So, therefore, there must be the flexibility to continually, very slowly, evolve merchant mixes that the customers themselves desire and want to come to. Indeed, the issues that we have when a retailer is performing poorly in an area, is very often initiated by that retailer's neighbours on either side who feel that they are being disadvantaged. So we have an absolute need to continue to be flexible, to change those mixes very slowly over time.

Mr ZAMMIT—You have not understood what I am saying, Mr Briggs, I am sorry. You are talking around the subject. The fact is, if a retailer is doing well or not doing well, it does not matter; this rort is being pulled throughout the whole nation. They move them and they say, 'You have to spend $40,000, $50,000 or $60,000 to outfit your shop,' when they might only have been there for a short period and have paid for the outfitting of the shop to buy the business from someone else. Let us be honest with each other. These are the problems that we are finding—

CHAIR—Let us get a response, Mr Zammit.

Mr McDermid—It is very clearly covered under the legislation that the landlord must pay for the relocation of that retailer if that—

Mr BEDDALL—In all states?

Mr McDermid—Not in all states, no.

Mrs JOHNSTON—It does not happen. Let me tell you, it does not happen all the time.

Mr McDermid—I am sorry, with respect, in organisations which we believe are professional and reputable and which have their interests in the shopping centre industry, it does happen because we see evidence of it all the time. We pay cheques to pay for the retailers to move. We are in a business partnership. There is not an unending queue of retailers queuing up to get into shopping centres in this country. There is no question that small business is going through difficulties through the economic climate that we are all operating under; there is no question about that. So we do not have our head in the sand.

It is in our interests to build healthy partnerships and relationships with those retailers, but we are in a position where we have a very dynamic trading environment that changes quite quickly and is continuing to change more quickly, as we have seen. For instance, in the fashion industry in the last 12 to 18 months there has been a worldwide trend away from fashion. We have been seeing trading losses of 30 to 40 per cent in fashion retailers. We have to try and work with those retailers and make those changes to try and still have the shopping centre as a viable entity to achieve what the customers' wants are.

We have a very competitive market here. We do not have the abilities like they have in the UK, where they have a protected market that services some eight or nine million people. We are lucky to have 50,000 to 100,000 people in a catchment to service a shopping centre. So it is in all of our interests to build long-term relationships. We do not want to have to go and find a replacement tenant. In fact, it is more costly. We have done our own research on the cost of bringing in a new retailer instead of trying to negotiate with an existing retailer to work out what their problems are so that they can continue. We all have retail

backgrounds ourselves. We have been on the other side of the fence. We are not sticking our head in the sand.

Mr ZAMMIT—Do you still have those figures that you mentioned?

Mr McDermid—The mediation figures?

Mr ZAMMIT—In regard to the cost of putting in a new retailer as against the cost of relocating a current retailer. You mentioned some study.

Mr McDermid—There have been some figures that have been done internally.

Mr ZAMMIT—Who has done that?

Mr McDermid—The major organisations have done their own figures.

Mr ZAMMIT—Can you provide those?

Mr McDermid—I cannot provide them because it is not my organisation.

Mr ZAMMIT—But can you tell us where we can find them?

Mr Briggs—We can certainly provide some examples for you, if that is what you would like.

Ms Martin—It is not common practice with the more professional managers to partake in such a practice. You would only do a relocation if you were doing a major redevelopment and you wanted to remix the centre. As Dale said today, it is very hard to get tenants. You do not move them around willy-nilly, and you are very mindful of the investment that people have made in their shops. We can give you examples of how you would arrive at a decision.

CHAIR—What sort of expenditure is covered under removal compensation?

Mr McDermid—It depends on the retailer, but it is virtually to pick that retailer up in the way they are currently operating their business now and relocate them into another part of the centre so that they can run their business identically to the way they have been running it.

CHAIR—So you would pick up all the costs of removal?

Mr Briggs—It is not unusual, in fact, for a—

Mr BEDDALL—Is that just in New South Wales?

Mr Briggs—No, Mr Beddall. That is, generally speaking, around the country.

Mr McDermid—It started in New South Wales.

Mr Briggs—It started in New South Wales, but it is generally around the country now. Again, we are actually saying that we would like to have harmonised lease legislation so if there is somewhere—and I am not aware of where it is—that it is not, we are saying that it should be. We are actually supporting this as a way of resolving some of the industry issues.

Mrs BAILEY—I would like to follow up on this a little bit more, because we have been talking about companies that seem to be out there, but we do have a representative of Lend Lease here today. Ms Martin, you would be aware that there have been submissions and allegations made against your companies. How do you respond to those allegations that your companies have systematically abused your position of power with your tenants, to the detriment of those tenants?

Ms Martin—How do we address the individual complaints?

Mrs BAILEY—No. How do you respond to those allegations, firstly?

Ms Martin—One, we would refute it. We do not believe we have. If they are any individual cases you would like us to respond to, we can. As Alan said before, a number of complaints may be made, but only one or two ever end up in mediation or in court. Our policy, as it is with most other management companies, is to sit down and work it through with the tenant. That could include a whole range of alternatives with the tenant, ranging from providing them with business consultancy advice through to giving them rental rebates, marketing rebates, et cetera. Taking a tenant to court, not renewing a lease or taking other sort of action is always the last recourse, and we hardly ever reach that spot, anyway.

Mrs BAILEY—There is obviously a chasm between the position that you present and the position that has been presented to us by many tenants. It seems that you do not favour legislative underpinning of codes of conduct. You are stressing mediation as a means, which, in the cases that have been put to us, has failed demonstrably. What other means do you suggest to start narrowing the chasm that obviously exists between, for example, your organisation and many of your tenants?

Ms Martin—First of all I will address that point of the chasm. I represent those who deal with over 3,500 tenants, and at this point we would probably in dispute or whatever with maybe 20 of those 3,500 tenants. Sure, there may be a problem with, say, two dozen tenants but it is not the majority of tenant. Obviously, those people that may have a critical tenancy are very vocal, and it would probably be the same with most management companies. With the balance of those tenants we have a very, very happy relationship.

But to answer your question about what we can do other than go through the mediation process, or whether we can change the legislation, I do not have a firm—

Mrs BAILEY—I am asking you: what do you see as a means of really fixing the problem? There is disparity between the figures that you suggest and others.

Ms Martin—That is fine. We should give the mediation process a further time to see whether that works, and use such bodies as the Retail Traders Association and give that a go for a bit longer.

Mr Briggs—Is it permissible to go on?

CHAIR—Sure.

Mr Briggs—Unfortunately, many times legislation is called upon to resolve what is a commercial business issue, which gets us back to our point before about people being properly informed and educated and so forth. As Louise says, we have the same experience. We are in dispute—we are never going to love one another in our industry, that much we have found, since the first cave was leased by one man to another. We are never going to be exactly together, but we do have a very—

Mrs BAILEY—Surely we have progressed beyond the troglodyte stage, though.

Mr Briggs—We certainly have. We have a very beneficial relationship between the two parties now, in the broad. But we are often called upon to answer what are commercial issues through legislation; we are often called upon to pay the piper for people who have made poor commercial decisions.

Mrs BAILEY—Do you undertake any screening processes before you—

Mr Briggs—We have a quite severe screening process. In fact, we manage to find ourselves in problems then when, for example, a transfer of lease is about to take place between one party and another. We see both of those issues, we are aware of what the business is and how the business has been going, we see the person that is coming in. We have, indeed, a right, because it is the legislation, to actually vet the business acumen and financial backing of these people. Sometimes when we say, 'This person does not have the professional ability' or 'does not have the correct amount of finance,' we then find ourselves in a major problem because the retailer that wants to sell the business suddenly is now accusing us of aborting the sale of that business, when we are in fact trying to protect someone coming in from themselves.

CHAIR—We have got five minutes before question time. It has been suggested by my colleagues that we invite you back towards the end of the hearing, but I want Mr Forrest and Ms Gambaro to ask a couple of questions, if they have them, in the five minutes that we do have. They will be back again—if you want to come back.

Mr FORREST—Just briefly, then: I am swayed by the nature of the submissions that have been made to the committee. Nothing you have said has persuaded me that things are sweet out there. But it does seem to me that, if there is an outcome where the complainant goes away, you take a rosy view of that. But my interpretation, from what I have seen, is that a small retailer is confronted with a squabble with someone with a bottomless cheque book available to them. They are being oppressed by creditors and they, basically, walk away. To me it is commercial reality, in a way, but it could be interpreted as abuse of market power. You have to appreciate that that is the reality of the position. Making a positive interpretation of outcomes like that, when small retailers simply give up and walk away, is not what I read from the submissions I have seen so far.

I note that you are not keen at all on legislative backing for codes of conduct, but would you be prepared to accept some sort of statutory and cheaper mediation? There must be some process here by which we can make it cheaper for those with genuine complaints to have them heard and come to a successful outcome in terms of their position.

Mr Briggs—Mr Forrest, Mr Chairman, it is a misnomer. I do not know whether you have misunderstood what we have said but we are supporting legislation and we are supporting harmonised legislation. We have actually said that a number of times now. Legislation is there; we believe it is working to the benefit of the parties; we have negotiated it between the two parties; it appears to be having some effect; mediation is now happening in New South Wales, but also in the ACT and in other places, and I believe that—

Mr FORREST—I heard you say that, but what you say is that you do not want any tougher legislation. That is what we are confronted with.

Mr McDermid—The thing that perplexes us is not so much any additional legislation. As I mentioned earlier, the shopping centre environment is really a dynamic environment that is forever changing. We only need to go back a couple of years to when there were self-serve lolly retailers all through shopping centres; now there are none. That is just a prime example of how usages come and go. The less flexible things are and the more that legislative requirements are placed on an industry that has the dynamics of this, the more it is going to take away flexibility from both parties. We are not say that well-balanced legislation to assist both parties is not what we want.

What we want to do is to continue to build the communication and the partnerships that we have been endeavouring to build in the last three to five years, particularly, but to do that on a balanced basis so that we do not take away the dynamics of the industry and end up with the rigidity of having a retailer that is in a lease for such a long time that they do not need to focus and concentrate on continuing to operate the best business they can, and you have a shopping centre owner and a manager who also have the same view. All we are going to end up with is a deteriorating industry that is not going to continue to have the position that we have now today as being one of the world's best and most competitive marketplaces in the world.

CHAIR—We are short of time and I think that my colleagues would like to have an opportunity to speak with you again.

Mr Briggs—Is that today?

CHAIR—No.

Mr Briggs—In the future? Absolutely. We are quite happy to come back.

CHAIR—I think that we will allocate some more time on that arrangement, then, because I know that all of us have a lot of queries and questions to ask you about a whole range of different issues, including outgoings. Do you want to make any brief final statements before we finish today?

Mr Briggs—Only very quickly to reiterate what we said before—that is, very simply, we do support legislation. We do support mediation. We believe that it has begun to operate in the interests of retailers and of landlords—do not forget, 30 per cent of complaints were put by landlords. We would like to see that being given an opportunity to work.

CHAIR—Thank you for your time today. We will talk to you again, probably in the new year.

Mr Briggs—Thank you. That will be fine.

CHAIR—I adjourn this hearing until after question time.

Short adjournment

[3.31 p.m.]

MACPHERSON, Mr Ewen Duncan, Manager, Government and Public Policy, Australian Institute of Petroleum, Level 23, 500 Collins Street, Melbourne, Victoria 3000

STARKEY, Mr James Christopher, Executive Director, Australian Institute of Petroleum Ltd, 500 Collins Street, Melbourne, Victoria 3000

CHAIR—Welcome. There are some procedural matters. 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 that 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 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 Starkey—No, Mr Chairman.

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

Mr Starkey—Yes.

CHAIR—Please go ahead.

Mr Starkey—Thank you for the opportunity to address the committee. AIP represents the interests of the major oil companies in Australia. However, in the context of this inquiry we have prepared a submission focused on our four member companies engaged in the refining, distribution and marketing of petroleum products. These are Ampol, BP, Mobil and Shell.

The companies have made a commitment to the Australian economy. Investment by the four refiner-marketers exceeds $4 billion, enabling the companies to meet Australian requirements for petroleum products. The companies have a wide range of commercial dealings with other companies, ranging from major industrial corporations to the smallest of companies. In all their dealings, the oil companies seek to deal fairly with other companies and with individual customers.

The AIP and its member companies fully support the concept of fair trading. Indeed, we believe it is a central plank of a flourishing economy. AIP supports the concept of generic legislation to underpin fair trading. What is crucial is that this legislation is even handed, does not try to disadvantage any particular sector, and allows business to develop in an undistorted manner that reflects the dynamics of a market economy.

The terms of reference of your inquiry address the question of whether the terms of the current Trade

Practices Act are sufficient to protect companies against harsh and oppressive conduct and the roles of codes of practice, self-regulation and dispute resolution mechanisms. The four AIP member companies are all major franchisors through their franchise service station networks. They also all conduct business through networks of distributors. The regulatory framework for the sector encompasses the Trade Practices Act, the industry-specific Petroleum Retail Marketing Franchise Act and the Petroleum Retail Marketing Sites Act, the franchising code, the Oilcode code of practice tailored for the industry and, of course, individual franchise and distributor agreements.

Our submission has focused on this regulatory framework with the aim of demonstrating what we see as the most effective pattern of regulation, having regard for all participants in the industry and the community as a whole. We believe that a robust Trade Practices Act is essential. It should be applied even-handedly and should not inhibit normal commercial dealings by unfairly protecting a particular party. Any attempt to do so will increasingly impede business and economic growth.

We have addressed in our submission the question of whether the current act adequately protects against harsh and oppressive behaviour. Our current belief is that the provisions regarding unconscionable conduct are sufficient but recognise that to date they may not have been sufficiently tested. We are aware of some recent action by the ACCC to test the legislation and the initial indication is that the legislation as currently drafted is effective.

However, if there is a decision to amend the provisions we believe there are a number of crucial factors that should be taken into account. In particular, the legislation must not undermine the primacy of the contract between the franchisor and the franchisee. To do otherwise would negate the concept of franchising. Also, the act should not restrict the ability of a franchisor to direct and operate a franchise to defined standards. Any departure from this principle is a departure from an even-handed approach.

AIP believes that the key to a successful franchise relationship is adequate and comprehensive prior disclosure of the commercial implications of a franchise arrangement. In this way an incoming franchisee can fully understand the risks and rewards open under the contract. It is not the role of legislation to remove the risk from normal commercial dealings.We have argued in our submission that the industry-specific legislation for our industry should be repealed. It is outdated, unnecessary and inhibits the rationalisation and development of the industry which all parties acknowledge is necessary.

We are supported in this view by the recent reports by the ACCC and the Industry Commission. Both bodies have drawn attention to the role of self-regulation in the industry and, in particular, to Oilcode. Oilcode provides a suite of codes defining the appropriate contractual arrangements for a range of industry issues. The aim has been to reduce the likelihood of a dispute. At the same time Oilcode includes a dispute resolution system. We believe Oilcode has proved a success since its inception and we have included some details of that in our submission. This to us underlies the very real role that self-regulation can play in our industry and, indeed, in other industries.

We certainly believe strongly that the industry-specific regulation should be repealed. We believe that a self-regulation framework can more than adequately handle any issues which arise in the industry and, with flexibility, reflect changing circumstances in the industry. We believe there are a number of areas in which

Oilcode can be improved. The Industry Commission and the ACCC recommended that Oilcode should be strengthened before the industry-specific legislation is repealed.

The other participants in Oilcode, MTAA and APADA also believe that Oilcode needs to be strengthened. Through 1995 and 1996 we negotiated with the other industry participants new codes to form part of Oilcode. These new codes go to the issues of prior disclosure and franchise exit arrangements. The negotiation of these codes was deferred while the ACCC completed its inquiry. But last month the MTAA decided to withdraw from Oilcode. This action has been taken to highlight MTAA's view that industry-specific legislation is necessary.

Notwithstanding the withdrawal of MTAA, AIP and its member companies will continue to support Oilcode and to abide by the Oilcode codes of conduct, including the draft codes mentioned above. The withdrawal of MTAA means that changes will be necessary to ensure the retail interests are safeguarded, and we are currently looking at a number of possible ways of achieving that. The aim will be to ensure that Oilcode continues to be a robust code of practice for the industry which meets the requirements of oil companies and their resellers, both retailers and distributors.

We have, in our submission, also commented upon the effectiveness and the potential of the franchising code. We are concerned that the recent funding cut for the council may threaten its viability. AIP is represented on the Franchising Code Council, and we are working with other members of the council to identify options for overcoming the financial difficulties facing the code.

Thank you, Mr Chairman. We are pleased to answer any questions.

CHAIR—Thank you. You mentioned the support for industry-specific codes of conduct. Does the AIP enforce codes of conduct with their own companies, with their own employees, particularly in relation to conduct towards franchisees? If so, how do they go about doing that?

Mr Starkey—The codes are voluntary codes. Each of the companies participates in the preparation of the codes and signs up to the codes, if you like. They are enforced by the way in which the companies themselves operate through the codes. There is no legal binding on them, and membership of AIP is not conditional upon their abiding by the codes. In practice, all of the companies have followed the codes to the letter. There is a process through conciliation. If companies were breaching the codes, then that process would, in fact, identify the breach.

CHAIR—You say in your submission that the franchise agreements of all four refiner-marketeers are clear and explicit on the point that, on the expiry of the contractual term, all rights regarding the service station site and its trade revert to the franchisor and that there is no goodwill due on the expiry of the lease. There is also no right of automatic renewal unless specifically stated. Yet some franchisees gain a perception that their franchises would be automatically renewed. How widespread is this perception amongst franchisees?

Mr Starkey—I have heard the point before, and we do not know how widespread the perception is. It may go to the arrangements under which franchises were negotiated in the past. It may turn on some attitude between managers in the companies and the franchisees. It is not a widespread practice, in our knowledge,

but perhaps I could ask Mr McPherson if he has anything to add on that.

Mr McPherson—Certainly on the issue of renewal. If you go back over the history of the industry, a reasonable dealer would expect over time to see that he would be renewed. So it has been a practice, even though contractually there has been a firm nine or 10 years number, whatever it is. In the past they have tended to carry on. Some have dropped off, but the good ones have carried on. A perception has grown that, in fact, it is automatic. It is not. It has just been this way in the past.

CHAIR—What percentage of agreements are, in fact, renewed?

Mr McPherson—If we go back to pre-1980, there would have been 20,000 service stations. There are now 9,000. So there is a big drop-off there. Of those, probably most would not have been linked to the oil companies. So I cannot quite tell you on that one. I am guessing. I would have to find out for you.

CHAIR—Could you take it on notice and let us know? What are some of the reasons for non-renewal of agreements?

Mr Starkey—The important point is that the industry is undergoing significant restructuring. As has been pointed out, the numbers have come down from 20,000 to 9,000. So the ending of a period of a franchise obviously provides the companies with an opportunity to rethink or reassess the number of service stations that it needs. This process will see further reductions in the number of sites; it is happening all the time. There is no number on what is a rational number for service station sites, but the MTAA is on the record as saying that there should be no more than 6,000. If their view is right, then there will be a lot more franchisees and other people because the franchisees as only represent part of the total number of service stations currently. But there will be a lot more franchises not renewed.

CHAIR—Are you aware of any oral agreements or commitments being made about renewal of agreements that are not being honoured?

Mr Starkey—No.

CHAIR—Is there a duty of care in your mind if an employee of one of your members indicates to a franchisee that there should not be anything to worry about at the end of their lease agreement? As you quite rightly say, there is no automatic renewal, but if an employee is giving that impression through their own personal discussions without wanting to be terribly confrontationist, is there a duty of care there?

Mr Starkey—I would think so because the manager dealing with the franchisee should not be giving him any information which is inconsistent with the franchise agreement. Part of what we were trying to do with the new codes was to increase the amount of information being made available to the franchisees before they sign. These sorts of things, particularly things like your rights at the end of a franchise term, would become quite clear to a prospective franchisee. We included in that provision for a prospective franchisee who might not be particularly familiar with the operations of the industry to seek financial advice from an independent financial adviser and from the industry association concerned—in the case of a franchisee, the MTAA.

All of the background to the life of a franchisee in the oil industry would be made available to a prospective franchisee. That is still something that we are aiming to agree as part of an expanded Oilcode, and until we actually get it formally agreed with MTAA that practice will be followed by the companies.

CHAIR—What is your view of goodwill? Is there goodwill associated with the franchise?

Mr Starkey—That is a difficult one. If you start on the basis that the franchise is for a fixed period, the expectation is that at the end of that period both the company and the franchisee part ways. From the franchisee's viewpoint and from the company's viewpoint, there is benefit in both of them working hard to establish a good commercial arrangement. They both make money if the service station is a success, but at the end of the day it is just a fixed term franchise and both of them are working towards that objective. There is no goodwill.

CHAIR—So you have to return the investment over that period of the lease.

Mr Starkey—Yes.

Mrs BAILEY—Are you saying that applies even if the franchisee has built up the site substantially during the period of the lease agreement?

Mr Starkey—Yes, because he is given the sites with the franchise. There can be any number of conditions attached to the term. He may well be given a renewal option subject to certain conditions being met. That is still possible within the terms of a franchise agreement. But, if the franchise agreement says at the end of the term that is it and everybody understands that is it, then there is no question of goodwill accruing.

Mr BEDDALL—I think the problem is that nobody understands that. We seem to be going through a major change in the oil industry. Of all the industries in franchising, this one is quoted as the worst example of franchising. There has been a history of dispute going back many years. Much of that may arise out of practice, rather than the letter of the law. We have had evidence from people who have belonged to a particular chain for 18 years and then they are out, when they obviously had certain expectations. In effect, the Oilcode is dead if the MTAA is not involved. You cannot have an Oilcode between the four oil producers and not the distributors. I think that is an area of great concern that this committee has to look at. The other area I want to take up is the evidence we received today from the Shell National Action Group. Obviously Shell is one of your operators.

Mr Starkey—Yes.

Mr BEDDALL—It appears that at least 250 of their franchisees are in major dispute with the operator. Obviously the Oilcode is not working if a resolution has not been found to that. It seems to me there is a major shakeout happening by Shell and that the franchisees feel they are the victims. You would be aware of this because it would be one of the biggest disputes in your industry at the moment.

Mr Starkey—Yes. We do not think the Oilcode is dead. It has a lot of support. The set of issues the

MTAA has raised with us are not new; they have been debated for some time. They were part of the process we were going through prior to the last election. In fact, it had come very close to being finalised in a committee process that Senator Schacht was chairing. Nevertheless, the time has gone and we did hold everything up while the ACCC process was worked through. At the end of that, we have a confirmation from the ACCC that self-regulation and the Oilcode are the best way to go.

Mr BEDDALL—In the view of the ACCC.

Mr Starkey—Okay. But it does confirm views that others have put, such as the Industry Commission. If you go back through the 40 inquiries that we have had in 20 years, you would get the same message coming through all the time.

Mr BEDDALL—From the same people.

Mr Starkey—Nevertheless, we have responses for virtually all of the points that the MTAA has raised. The only one that we cannot accept is that it believes pricing issues ought to be discussed within the Oilcode or the subject of Oilcode arrangements. We have quite explicit advice from the Trade Practices Commission before the form of the ACCC that those sorts of things are off limits as far as industry discussions are concerned for the very obvious reason that they are worried about collusion.

On all the other points that the MTAA has raised, we believe that we can work out sensibly amendments to the codes to make them workable. The MTAA has said that it has withdrawn. The reason it has given us for withdrawing is that it wants the protection of the two pieces of legislation. We do not believe that is a necessary preliminary. There is already the protection of the Trade Practices Act and the Franchising Code Council, which has taken our code and acknowledged it as being consistent with its own code. We have made some modifications to the Oilcode to fit into the Franchising Code Council's arrangements. Everywhere we go, people are satisfied that this is the right process to be going through.

At the end of the day, it is only as good as the way in which people work through it. Everybody will concede that some of what has happened in the past has been less than best practice, but the intention is that the new expanded code will form the basis of the company's treatment of franchisees and distributors. You have to think about this in the sense that it is in both the company's interests and the franchisees' and the distributors' interests to make it work. If you are always in dispute, nobody is making any money. In this industry, at the moment nobody makes any money.

Mr BEDDALL—Certainly the Asians would argue that. I take you up on the point of the ACCC. If I remember, from press reports of the ACCC's recommendation, they included the fanciful view that you would have imported petroleum in competition with domestic refining. Now your members control the outlets, and they cannot run other petroleum through those pumps that are owned by Shell or Mobil or whatever, so that competition is illusionary, is it not?

Mr Starkey—It is not. The independent importers are selling through their own independent outlets and that puts pressure onto the company outlets. And it is happening. Woolworths are setting up retailing outlets. That started in Dubbo, shortly in Wollongong; they will be all over the country. Liberty is established

as an independent network. They are very experienced people. The principals were the principals of Solo so they know exactly what they are doing. When you come down then to the franchisees and their relationship with the oil companies, to say that they should be able to go and buy off the independents is a bit like saying that you can go to McDonald's and buy a Wendy's hamburger. The whole point about franchising is that you set up a business relationship between an oil company and a retail outlet in which it is in the interests of both of them to manage the thing as a particular site.

Mr BEDDALL—But the franchisees would say that McDonald's does not go and sell its own hamburgers through Wendy's, whereas the oil companies sell their petrol through independent retailers.

Mr Starkey—That is right, and they sell through an outlet which is better than—it has market attractions and it carries a lot of brand advertising—the other service station outlets, the independents who may be getting the product cheaper.

Mr BEDDALL—But petrol is sold on price alone.

Mr Starkey—Sure.

Mr BEDDALL—You are not saying that if it is a brand it sells better?

Mr Starkey—If that were so, then why on earth are the companies spending so much time protecting their brand images? Of course, it is sold on more than just price.

Mr BEDDALL—But if there is a differential of anything more than one cent—I mean, if it is 10c a litre cheaper, because it does happen, it does happen with independents, the four majors selling through independents—

Mr Starkey—Yes, that is right.

Mr BEDDALL—Then brand loyalty disappears fairly quickly.

Mr Starkey—Across the major markets on any one day the price can vary 10c or 12c a litre.

Ms GAMBARO—You mentioned that you were in favour of strengthening Oilcode. I am particularly interested in the resolution process. I notice that you have here disclosure provisions, nine supplementary codes covering specific issues such as business closure, disclosure on sale or assignment. The process under the FCAC—I am familiar with that. Do you parallel that? It seems to me it is a bit more involved.

Mr McPherson—Yes, it is more involved. We see it as being a kind of cascading process. The aim is to get the two parties back in harmony together. So the first stage is that they must talk to each other, so company to reseller. If that fails, then you bring in the association to talk to the company. If that fails, then you come down to the normal ADR process with the accord group, in our case, who mediate and come up with a suggested resolution. In every case that has been accepted.

Ms GAMBARO—And you have only had 21 disputes that have reached this stage?

Mr McPherson—That was written back in mid-year so it would probably be about 25 now, I imagine.

Ms GAMBARO—Thank you.

Mrs BAILEY—Mr Starkey, I pick up on a couple of points that you have made here today. Firstly, you said that people are satisfied, and I have to tell you that is not the picture that we are getting before this inquiry. And you said that you are looking at ways to protect the retailers. The thing that actually comes to mind, I would have to say, is that it is a bit like putting the fox in charge of the chicken house. I have listened to what you have just said to Mrs Gambaro but, apart from different measures that you say you are looking at to protect retailers, what are you doing to instil confidence in those retailers in the process? I have to say to you that there does not appear to be much confidence.

Mr Starkey—Yes, and I think this goes to the point that I was making about the history of the industry. There is a lot of history to it. The process that we are going through, hopefully, will see a quite different attitude for the future. Okay, there is a group of people in there now that may feel concerned; but the process that we are putting in place with the new codes and so on is all designed to make the understanding of life in the oil industry clearer to everybody, so anybody who goes into the business has got full knowledge of what to expect in the operation and the activities of the industry. The involvement of the associations other than ours—the retailers associations and the distributors associations—has all been designed to achieve that sort of outcome. They are trying to carry their interests through.

Mrs BAILEY—With respect, that is the sort of thing that has been said for years—that the industry is taking different aspects into consideration and they are listening and they are putting measures into place. The problems have not been fixed. So what are you doing that is different?

Mr Starkey—The codes that we are developing are different. They expand the range of information that people will have before them when they make their decisions.

Mrs BAILEY—But you are only one side of the industry.

Mr Starkey—As I say, this decision on MTAA has come out only fairly recently. It is only a week or so old. We were given a letter which said, 'Reply by 24 October or we are pulling out.' We could not do that. In fact, we could not organise the meetings by that time. So MTAA pulled out. We are going to have to look at, and discuss with the companies, ways in which we can bring retail interests back into Oilcode. If we cannot do it, then we will have to think about some other way of managing a process. That is something that we will be discussing with the companies. Hopefully, through the course of your inquiry, we will get it worked out. But, today, I do not have an answer for you.

Mrs BAILEY—Can you understand from the retailers' point of view that, if you cannot reach agreement, for example, with the MTAA, the retailers do not have much confidence?

Mr Starkey—The MTAA is one group that represents the retail business.

Mrs BAILEY—A substantial group.

Mr Starkey—Yes, of course. But each of the companies has got a franchising council. All of their dealers sit with their companies periodically. So there is a process. There is another process by which you can talk, dealers to companies. I am not saying that that is necessarily the way that we should be going. Obviously, the company is going to have to think about it and we are going to have to work out a way of overcoming the problem. It may be—and I hope it is—that we can get the MTAA to reconsider its position, because the points that we have raised, or propose to raise, in response to their list of demands, we believe, are reasonable.

Mrs BAILEY—Could you just explain to me why you think the Oilcode is not dead?

Mr Starkey—The companies will support Oilcode. We have made it clear that, if any of the retailers have a problem in the way in which the companies are operating, then they can still go through the conciliation process. The framework exists and continues to exist.

CHAIR—Are you aware of any cases where oil companies act as guarantors for bank loans of multiple-site franchisees?

Mr Starkey—No, I am not aware. The fuller answer to the question is that we are not privy to the arrangements under which the companies—and we are talking about Shell and Mobil—are negotiating financial or other arrangements with the companies. We do not know the details of those agreements.

CHAIR—It was argued by previous witnesses that the articles of association of multi-site franchise companies give effective control to the oil companies.

Mr Starkey—Again, we cannot answer that. You will need to talk with the companies that are putting the multi-site franchises in place.

Mr BEDDALL—On the argument that you have about the abolition of the two pieces of legislation covering the oil industry, my understanding from MTAA is that they do not actually disagree with that, as long as the franchising code is underpinned by legislation. Do you see that as a fair compromise; that is, that you have franchising legislation for everyone, not just your own industry?

Mr Starkey—We do not think we need industry-specific legislation. We think the provisions of the Trade Practices Act, amended or not, ought to be sufficient to govern the behaviour of industry generally. Within that, or below that, you can have the individual industries with their codes of practice, self-regulatory arrangements.

Mr BEDDALL—Are you talking about legislatively?

Mr Starkey—I am not sure what you would want to cover in legislation.

Mr BEDDALL—The argument about franchising in particular is that all the good franchisees are signed up to the code—

Mr Starkey—That includes us, of course.

Mr BEDDALL—Yes. But once a person is not a good franchisor they hop out for a while—it is a sort of floating thing—whereas legislative underpinning would mean that everybody must be a member of the code to operate as a franchisor. So you do not have the option of just dropping out. The oil industry does not, but in the motor trades industry, as was pointed out, none of the manufacturers are part of the franchise.

Mr Starkey—Yes, I understand that. Again, we do not think it is necessary to have separate legislation. We think that the Trade Practices Act ought to be sufficient.

CHAIR—Is this why you argue for the repeal of the petroleum retail franchise act?

Mr Starkey—The two pieces of legislation we regard as out of date and really unnecessary. They are simply not necessary, and we would be better off having codes of practice which are more flexible and allow the industry, collectively, to change the working arrangements within the industry.

CHAIR—So you would be happy for these acts to be repealed on the basis that the TPA is beefed up a bit with codes of practice?

Mr Starkey—Yes.

Mrs JOHNSTON—That was one of the questions I was going to ask. The franchising within your industry seems to be an animal of its own. It seems to be slightly different from other franchises. But I have noticed that there have been quite a lot of closures of service stations in the past two years. Is that to do with the disputes that you may not be able to resolve between the companies and the franchisees, or is it simply that they have failed to attract market share? Could you give me an explanation of that?

Mr Starkey—No; it reflects fundamental ongoing restructuring and rationalisation within the industry. It is not just the franchise sites; it is sites generally. We were talking before about the number of sites having fallen from around 20,000 to 9,000 now, and there will be more rationalisation. The number of sites is too many for the volume of sales. The only way you can overcome the problem is to reduce your costs and increase your throughputs. The trend in that sense is to bigger service stations in more prominent sites. That is the sort of trend that you would expect to see continue.

Mrs JOHNSTON—Those bigger service stations also seem to have the ability to employ fewer and fewer staff. Obviously, everything is self-service, yet the price that you pay for the petrol is the same as what you pay down the road where you have an attendant who actually serves you. Do you see that trend continuing, or do you see some return to service at the actual driveway?

Mr Starkey—There are still some sites around that offer driveway service. There are marketing opportunities for people to set up their service stations in different ways. Somebody who may be in an area

where lots of people are looking for driveway service will offer that, and maybe even charge a little more for that facility. At the other end of the spectrum, some service stations overseas are currently operated with no staff. You just put your credit card in and away you go. I do not think that all of our service stations—5,000, 7,000 or whatever it ends up being—will run that way. There will be a range. There will be big sites and there will be smaller sites. It really will depend on the acumen of the companies and the service station operators to work out what makes the best mix for a particular area and, in that way, how you get the maximum amount of business through your site.

Mrs JOHNSTON—Do you feel that the industry, with the self-regulation that it has had in the past, is best equipped to get best practices going over the next few years, or do you see that there needs to be some other legislative process involved?

Mr Starkey—We have not had self-regulation in the past. We have had two pieces of legislation that have directed everything that the industry has done, plus control of wholesale prices and control of the way in which we conduct business, how big a convenience store could be attached, and so forth. We are a long way away from self-regulation. The codes that have been set up have been designed to work with the two pieces of legislation, which are now outdated. In the future, without the legislation, there will be a lot more flexibility for the companies and the dealers to interact in a more sensible, market-oriented fashion. The safeguards will be there in terms of the Trade Practices Act, however that might end up, plus codes of practice, codes of behaviour, which the companies and the other participants in the industry agree to work with.

Mrs JOHNSTON—Who would you see representing the other participants in the industry in terms of the codes for behaviour? For example, who represents the franchisee because he or she is really operating on their own and the might of the oil companies is so much larger than what they can do themselves?

Mr Starkey—There are two points. First of all, we hope that we can get the MTAA back into the game. Secondly, there is disproportionate market power but the arrangement is one mutually entered into for the mutual benefit of the participants. The oil companies do not take these franchisees in because they want to lose money, they want to make money, so the partnership that they build with the franchisees is clearly important.

Mrs JOHNSTON—Correct me if I am wrong but did you not say earlier that once the deal is off, or is not renegotiated, then the person who has put the capital and the work into the franchisee has absolutely no goodwill that he or she can take away with them.

Mr Starkey—That is right.

Mrs JOHNSTON—I would not see that as something working for the benefit of both of you. I see that as working for the benefit of the person who has got the might.

Mr Starkey—It may be that the company and the franchisee work out some on-going arrangement. That is always possible. The franchisee goes into the business on the understanding that at the end of a certain period, that is it, and he will run the business on that basis.

Mrs JOHNSTON—In this particular instance, it is not really a franchisee, it is just an employee who actually buys his own site. If you get down to the nitty-gritty, the person is not buying a business because there is nothing at the end of it that a person can sell on. All this person does, instead of the company employing somebody to operate that particular site, that person who operates the site chooses to pay for the privilege of servicing that site. Am I correct in assuming this?

Mr Starkey—That is an interpretation but they are franchises.

Mr BEDDALL—That is the definition of a franchise. All you buy is the right to operate a business for a period of time.

Mrs JOHNSTON—In some franchises, as I understand it, you do get some goodwill out of it when you sell. Am I right?

Mr BEDDALL—No.

CHAIR—What strength did you see in the better business conduct bill provisions? Did you see any strengths at all in that particular proposed bill?

Mr McPherson—We were concerned about the issue of certainty, that what we need most of all is a clear, understood and certain framework of law. We felt that the words put in about harsh and oppressive led to more uncertainty. But if they were to be introduced, we felt they probably was not unworkable, but they should be trialled for two or three years. But most important of all, they should not disturb primacy of contract, they should not be led to understand that a franchisor could not manage his business. So harsh and oppressive could not mean that you could not tell a franchisee what to do in terms of, 'You must operate this way'.

There were one or two other points we mentioned about prior disclosure being important in terms of interpretation of harsh and oppressive as well.

CHAIR—Would you like to make a closing summary or any further comments?

Mr Starkey—No, thank you, Mr Chairman. I think we have said all we had to say. I think there were one or two points you raised that we can come back to you with.

CHAIR—Yes, that would be good. Thank you for coming in today.

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

[4.57 p.m.]

ASHER, Mr Allan, Deputy Chairman, Australian Competition and Consumer Commission, Chan Street, Belconnen, Australian Capital Territory 2616

DEE, Mr William Gerard, Director, Liaison, Australian Competition and Consumer Commission, PO Box 19, Belconnen, Australian Capital Territory 2616

CHAIR—I welcome the representatives of the Australia Competition and Consumer Commission, known as the ACCC. Committee proceedings are recognised as proceedings of the parliament and warrant the same respect that proceedings in the House of Representatives 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 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 Asher—No.

CHAIR—I invite you to make an opening statement before we commence our questioning.

Mr Asher—In the consideration of these issues, too often people have seized on the unconscionable conduct provisions of the act, as though somehow leaving them the same or modifying them is what the whole thing is about. It has been our profound view, ever since we first started consideration of business-to-business conduct and small business-big business difficulties, that to imagine that simply a clause in the law would fix those problems is just looking in the wrong place. So in our submission to this inquiry, in our submission right back to the Swanson committee in the 1970s, the commission has been of the view that what is required is an overall new approach to the resolution of disputes between small and large businesses.

We have been to some pains to spell out in our submission how the use of effective industry codes, conciliation systems, information disclosure, and that whole package of things, is far more important than what is actually done to section 51AA and 51AB of the Trade Practices Act. We do not say that that section is irrelevant, but we do say that a focus on that alone is a way of leading people into error. It is especially the case with representatives of small business that they are going to feel a strong need to have some law to point to. But, in my view, it is a cruel hoax to give people a legal provision that is not enforceable. By enforceable, I do not just mean that there is a legal right but there is some real capacity to be able to use it.

It only takes a moment's thought to see that for any small business, if it has some continued dealing with a large business—whether it is a small manufacturer supplying a large retailer or an individual franchisee dealing with a franchisor, whether it be an oil company or motor dealership or whatever else—the idea of litigation is just not relevant. That is only after a business relationship has ended and you are trying to sweep up the pieces. It does not help, in my view, to focus all the attention on that.

Having said that, the commission itself has endorsed some extension to the act to bring in notions of

economic duress because the current conception of unconscionability is clearly too narrow.

CHAIR—You say in your submission that there are many problems faced by small business in their relationships with big business. What restrictions does the ACCC face in being able to provide just solutions to complaints they receive about business conduct?

Mr Asher—I suppose the most obvious restriction is that it is only actionable on our part if there is a breach of the Trade Practices Act mentioned. That is either part V, which are the general consumer protection provisions—misleading and deceptive conduct; unconscionability et cetera—or part IV, the competition provisions. It might be that the conduct is monopolisation or resale price maintenance—that often affects small business. Mergers sometimes can affect small business as well. Of all the complaints we get, about a third relate to this category. So 20,000 complaints a year received by the commission are from small enterprises, and they will be complaining either about large enterprises or about other small enterprises. But, of that number, we are never going to do anything with any more than about 1,500.

CHAIR—Can I ask why?

Mr Asher—Yes; because the commission was never intended to be an agency for dealing with individual transactions. Our role always was at what you might call the wholesale end of the market, for dealing with system-wide problems or ones with major consequence. Our agency has a total of 300 staff, and we deal each year with what we see as the critical 2,000 of those 60,000.

CHAIR—Who makes those judgments and in what sort of form do you make those judgments?

Mr Asher—We have published priorities that we publish every year to 18 months. They set out selection criteria. That is the level of resources that we have got. In any event, I would have to say that, even if you had unlimited resources, you would still never want to deal with large numbers of complaints, either because they do not raise a valid issue under the Trade Practices Act or because there are better ways of dealing with them.

CHAIR—You have said that 51AA does not really solve a lot of these problems; but is there some legislative change that you recommend we should be taking?

Mr Asher—Yes, there is. I will try to characterise it this way. It is only an approximation. The equitable principles of unconscionability, which are enshrined in section 51 in relation to business transactions so far, have quite high barriers to access. In particular, it is this knowledge on the part of the person engaging in unconscionability of the special disadvantage of the complainant and taking advantage of it.

At the other extreme, you could have, say, 'harsh', 'unconscionable', 'oppressive' or 'unfair' as elements of that, in which case you might catch up a lot of what is natural competitive behaviour. So, between those two extremes—at the moment, we have the current formulation, and there is that other extreme—we think that the act does need to go further than it does now to try and do something about that special disadvantage that is known about and exploited. You could reduce the impact of that by introducing to the statute the notion of economic duress, which is another common-law equitable remedy that just goes a

bit further but not as far as some would want to go. So we would see that as striking perhaps a better balance.

CHAIR—In relation to this, how many cases has the ACCC taken to court; and would there not be a stronger viewing of the TPA if, in fact, there were some litigation from the ACCC?

Mr Asher—Undoubtedly. In relation to litigation, one needs to look at how remedies are best measured. Indeed, this is another thing that perhaps I should have said in the opening. I have got some material here that I would like to leave with you. But it is too often the case that lawyers are going to say, 'You measure the success or failure of legislation through the court cases.' I think that is a very outdated view of commercial regulation. The example that I will give is of Australia's product liability laws, which were introduced just three years ago and which provide for much stricter liability in the case of dangerous products.

But right from the outset, when that legislation was passed the commission and others were saying the measure of the success of product liability laws will not be in how often they are used or how big the awards are, but in how effectively they change business practice—the way products are designed, produced, distributed, the sorts of warnings that are given on packages and things like that—and how effective recall systems are. Undoubtedly, the product liability laws are a tremendous success, even though there have been only four or five matters in the courts in the three years since they were passed. The same applies in general to this area, or it would with a bit more improvement.

How many cases has the commission taken? I can tell you that we have considered—just off the top of my head—about 25 matters that have come to the commission for formal consideration as to whether we should file, using the unconscionable conduct provisions. But what happens quite often in these cases is that we will then put the complaint to the trader who is complained about. In more than half of those cases there is a pretty instant, generous settlement of the problem, so the problem goes away.

With the other half we have found that very quickly the parties either come to an agreement, or it is clear that there is some legitimate alternative explanation for the conduct and thus it does not warrant that action. There have been a number of cases where we have actually failed, but they are very few and that is a bit of a problem.

Let me put the dilemma to you this way: while the commission could pursue an unconscionable conduct action in a particular case, what it would mean is putting at risk the settlement offered to that particular complainant. We would see that as a bit of a moral dilemma for the commission. Should we say to a complainant, 'Look, you should not accept this amount of payment or the continued supply because we want to test this point of law.' We do not think that is an ethical thing to do in case, having done that, the person loses.

CHAIR—That might be the case, but it seems to me that the never-ending complaints of 20,000 odd a year, or whatever it is you are taking, won't reduce until we do that.

Mr Asher—I have misled you if you think I said we had 20,000 unconscionable conduct cases—it is

20,000 cases involving small business.

Mr BEDDALL—Your arguments seem to contradict themselves. I will come back to a few points. You say that in trading business to business nothing is ever resolved from litigation because business still needs to trade. Perhaps the most celebrated case of the old Trade Practices Commission was Queensland Wire v. BHP, which changed business outlooks. It did; the litigation changed.

You also say that you are not there to take individual cases, yet you do not want to jeopardise an individual settlement. In fact I was part of the process that gave section 51AA, and the argument that came from Attorney-General's was that we did not need to make substantial changes to the Trade Practices Act; what we needed to get was a provision in the act that would enable the Trade Practices Commission, as it was then, to take action on behalf of an individual, which would set a precedent. Now it seems to me that, some number of years later, that has not happened.

So we are saying that that particular provision really has never been tested. Therefore it cannot have a cumulative effect on other businesses because it has never been tested. So there is a broader interest than the individual settlement you may have been offered. If you had a very good case, was it not in the interests of the whole business community to take that case one step further?

Mr Asher—Undoubtedly that is so. But let me just amplify those earlier comments about us not being there to deal with individual complaints. What I am saying is that the commission can't deal with every individual complaint and so the complaints that we act on are the ones that perhaps are the worst conduct, or the conduct that involves most parties, or something like that.

Mr BEDDALL—The ones you are most likely to win in court too?

Mr Asher—Naturally. If they are the worst conduct ones, it means that there is the greatest evidence and things like that. Of course, every case we take is an individual complaint, but we generally don't take them just because of the particular circumstances there. We often take them for the demonstration effect. So the Hamilton Island matter, which of course was a settlement, was of such a character, as was the Ultra Tune matter.

Mr BEDDALL—I am not questioning you on that, though. But wasn't that one confidential, so the real—

Mr Asher—I think the only bit that was confidential was a number. Everything else is public. In fact in our submission we deal with the nature of the orders in quite a bit of detail. The only element that is confidential is how much money the complainant was paid.

Mrs BAILEY—That has been touted around too.

Mr Asher—Has it? I do understand what you are saying, but let me comment then on the formulation of 51AA. That is not the one that the commission was supporting at the time of the parliamentary inquiry. Indeed, that was a compromise, I think, reached between the Attorney-General's Department and interest

groups to use that formula about the unwritten law of the states.

Mr BEDDALL—It was trying to get the common law into a test case.

Mr Asher—True.

Mr BEDDALL—That is the way A-G's put it.

Mr Asher—The view that the commission took, and argued at those hearings, was that the simplest way of fixing it at the time is just to delete one sentence from the old section 52A and it would just apply across the board.

Mr BEDDALL—I agree.

Mr Asher—And that would have been a statutory remedy, not the common law remedy, and it would have developed with the Federal Court case law. That was something that the government did not proceed with at the time and we have the provision that we have that calls up the equitable remedy.

Mrs BAILEY—To follow on from Mr Beddall, it seems to me that when you are getting 20,000 cases a year, if you had been successful in having a case tested before the law, that perhaps you would not be getting that number of cases. Do you agree?

Mr Asher—Yes. In fact, let me tell you that ever since the act was passed, we have asked our regional directors to consider complaints that come forward. We have been in touch with the various small business agencies, franchise groups and others, asking them to put before us what they see as the critical cases. There are time limits that apply to this section of the law that do not apply generally, as well; there is a two-year time limit. Often, this sort of conduct is of a longer duration. A contract is entered at one point of time and its enforcement occurs at a different point of time. So by the time you find the ones where there is a remedy possible, that has already cut down a fair bit the number that come into the act. But I have no doubt that if the commission were to be successful in a number of high profile unconscionability cases, that many other traders would behave differently. I would very much like to find those cases to run.

CHAIR—Can I interrupt you for one moment, Mrs Bailey. I will just let two questions from Ms Gambaro and then I will come back to you.

Ms GAMBARO—Thank you, Mr Chairman. How many cases come before you that involve section 46, misuse of market power, of the Trade Practices Act?

Mr Asher—I would think in terms of the complaints that come to us there would be hundreds a year.

Ms GAMBARO—Can I ask you a question relating to an independent film distributor in Queensland?

Mr Asher—Sure.

Ms GAMBARO—The particular gentleman has had dealings with you over a three-year period. He has 32 cases where he has been able to document where film has not been supplied to him—the date of release, when the film was released to the independent cinema owner. They are well documented cases. He has written to you on a number of occasions. The last letter that you sent to him—I do not have the letter in front of me—stated there is insufficient evidence. How much more evidence do you need?

Mr Asher—The evidence that is needed is not the cases where the large production houses or the large distributors refuse to give him the films that he wants when he wants them. That can be taken as objective fact, there is no problem there. But as with the Queensland wire case—

Ms GAMBARO—I am sorry, can I just go back there?

Mr Asher—Yes, sure.

Ms GAMBARO—Objective fact?

Mr Asher—Yes, the fact that he was refused certain blockbuster films at the time he wanted them. Of itself there is no problem in that being the case, and that is the sort of information that comes to us. The evidence that the act speaks of is evidence of the purpose of the other party in refusing to supply it. Section 46 of the act prohibits the misuse of market power for proscribed purposes. We have to be able to prove in court that it was the intent of the person who refused supply to either drive the competitor out of business or to prevent or deter competitive conduct.

Ms GAMBARO—One of those sections goes into what is defined as a major supplier. Again, evidence was given that the particular company involved, a major distributor, had a large percentage of the market. An independent study was done by a market research company to show that, so that particular section was satisfied. So what are you saying to me—that there is not enough evidence?

Mr Asher—I am not sure of the specific case you are talking about, but I can tell you that generally in approaching a section 46 matter there are a couple of elements that one clearly needs to prove. One is, firstly, that the party complained about has a substantial degree of power in the market, and I think you are saying this was a very large distributor.

Ms GAMBARO—There was proof that there was.

Mr Asher—That is one element. The next element is that the power that that person has was used against another party.

Ms GAMBARO—There is proof of that as well.

Mr Asher—The third element is that it had to be for the proscribed purpose: for preventing or deterring competitive conduct. In the case of Queensland Wire, somebody was able to come up with some memos from BHP that more or less said, 'Let's get rid of so and so; he's causing us problems'—blah, blah, blah. In these cases the courts have held—and there are lots of cases where these have been lost—that a

company can escape liability if they can show a legitimate alternative purpose for their conduct, such as supplying their own competing outlet or maximising their own returns. Those are legitimate reasons for acting in that way. But I would certainly happily review the matters that you refer to.

CHAIR—So unless they have from the competitor in writing, 'We are going to put you out of business', it is not going to happen?

Mr Asher—The 'smoking gun' is always the best, but you would also need to have at least something that is not explicable on some legitimate grounds. You would need to find conduct that was clearly something that you could not do if you were in a competitive market, or something that on the face of it appeared irrational. For example, if the distributor in a particular area where he or she did not have their own outlet nonetheless refused to supply someone else, then you might ask that question.

For example, the commission has recently taken legal action against Channel 7 and Channel 9 in Darwin and Western Australia for conduct that just looked inexplicable—exclusive supply arrangements that seemed to be against their own interests. And we are quite happy that we will persuade the courts that there was an unlawful purpose there. But where there is this legitimate alternative purpose, then it gets very hard.

CHAIR—It is an idea to discuss that particular case because I think there is.

Ms GAMBARO—We are probably getting into too many details here.

Mr Asher—I would certainly be keen to get the details, follow that up, and perhaps get back to you.

Ms GAMBARO—Fine.

Mrs BAILEY—Can I follow up again with a general question from the small business angle? There are many small businesses—micro small business as well—which do not have access to the banking ombudsman, for example, so theoretically they look to the ACCC to solve many of the problems. How would you respond to the criticism that the ACCC tends to deal mainly with the big, more high profile complaints, the anti-merger type of work, rather than consumer protection?

Mr Asher—I disagree with that. At the moment we have 37 cases in court. Half of those are consumer protection, half are competition ones. Our complaints each year are about half and half. In fact it is by accident rather than conscious allocation, but it is quite surprising the way that that works out. But do we take higher profile cases?

Do we take higher profile cases? It depends on how you define that. What I say is that we take cases which will have the greatest impact on the greatest number of consumers or where the greatest detriment would occur to the processes of competition. I think that is what we have to do. I think it would be something that other committees of this parliament would be very concerned about if we took, instead of those big ones, minor matters. That is not to say that people do not have legitimate grievances. Let me also say that the commission has put hundreds of its commissioners' staff hours into dealing with trying to develop things like the banking code, and we tried to argue for the inclusion of small business in that. We

argued vehemently for the establishment of Oilcode—in fact, Bill Dee here was the one who did most of the drafting work on that—because we see that, as a complaints resolution system, being much better than people ending up in court. So we have a huge commitment to compliance, making people aware of their rights and responsibilities. But the commission also follows through. We have a huge commitment to enforcement, and we do that well.

Mrs BAILEY—You have mentioned in your submission and you mentioned earlier today the term 'economic duress'. You make it sound as if it is going to be the panacea to fix all problems.

Mr Asher—Oh, well, that is a terrible error. In fact, my whole point was saying that there is no panacea. A large number of the complaints that arise should not have legal resolutions. They should be resolved in other ways. That is to say that they should not have a resolution that ends up in court action. They should be resolved much earlier on.

Let me give you a few examples. In the case of franchising, we recently had a complaint referred to us from the office of the Minister for Small Business and Consumer Affairs, Mr Prosser, and it was a very sad letter. It was a letter from somebody who said that he had recently been sacked by the government, with a payout. There are quite a few people in that situation. He bought into a fairly well-known franchise. He was somebody who had had no real business experience and had not been to an adviser. He had just taken the advice of the franchise vendor, even down to the location from which this franchise would operate.

After three or four months, when it was clear that it was not succeeding, he was advised that what he needed to do was extend the premises and engage in far more advertising. This person then mortgaged his family house; so his wife then became a party to this debt. The business still continued to trade badly. In due course, after three years, all of his equity in his house was gone, all of his payout was gone and the business was broke.

The complaint was: surely this is unconscionable conduct. Of course, in ordinary human precepts, so it was. But, in terms of the law, there was no breach of any act. The real breach was that, in the early part of that transaction, that person really ought to have been required to see a business adviser, an accountant or somebody to explain just what was going to be required to make a franchise like that work, and advice on the location and trading patterns. That is why we argue very strongly that the franchising code should have in it much better disclosure requirements, so that people who invest in that way are not likely to do it if they are unsuitable in the first place; or, if they do it, there are clear information disclosures that put them on objective notice much earlier.

Mr BEDDALL—Can I take this further, because this is probably one of the fundamental points. There are two sets of small businesses. There are those that are dynamic growth businesses that will eventually become, hopefully, big business and big employers. Then there are the vast majority of small businesses which are, in essence, consumers. You are really saying that what we need is some sort of consumer protection for those people who have a payout, not only from government now but also across the spectrum. And the first thing they do is buy a job. It seems to me there is a failing across the legislative process of consumer protection. How best do you think that that can be addressed through your act?

Mr Asher—Through our act there are a number of ways. We recommend in the submission the development of some effective, what you might call co-regulatory approaches: codes of practice, firstly, that try to go some way to ensuring that, as people enter these transactions, they are going to be much better informed. Indeed, what it will do is make it harder for some people to go into some of those businesses, but that might be a very useful means.

Mr BEDDALL—Sure.

Mr Asher—Secondly, something that we strongly advocate is a form of early intervention where there are problems, whether it is in the building industry, the franchising industry, shopping centre tenants and others, so that at the earliest stage where things start to go wrong there is the availability of mediation to try and keep the relationship going before people get so badly out of a relationship with one another that it must end with somebody winning and somebody losing.

Mrs BAILEY—Are you saying that this should just be a voluntary code?

Mr Asher—No, in fact—

Mrs BAILEY—Are you saying that this should be underpinned by legislation?

Mr Asher—I am saying that at the state level, all the states in Australia except one have provisions for calling up mandatory codes and giving force to them. There is no such legislation—the Trade Practices Act does not include it. There are some bits of Commonwealth legislation, such as the legislation setting up the Telecommunications Industry Ombudsman and the Health Insurance Ombudsman, that touch on this. But generally the Commonwealth does not have that for fear that it would breach the Brandy principle of constitutional law. Frankly, I do not think that that is an insurmountable problem, but it is one that has not been dealt with yet.

Mrs BAILEY—But if you are still getting 20,000 cases here—and I would hazard guess that a large percentage of them would fit into this sort of category—does that not suggest that what is in place now does not work?

Mr Asher—Yes, and that is what we have said. We agree that there is a serious problem, but what we say is, 'Don't imagine that a single clause in an act is going to fix it. What is needed is a whole suite of measures to reduce the incidence.' But it is also true that a proportion of those complaints are against things that are just about competition, where somebody buys in bulk at a cheaper price and outcompetes somebody. The law in our system would not want to deal with that. But you would want to deal with it if it meant that somebody was getting some huge advantage.

Mr ZAMMIT—You do say the voluntary code is unsatisfactory. There seems to be a unanimous view on the committee that that is absolutely right. I am a bit concerned that there are so many authorities all doing their own thing. It is very confusing for retailers and people who have complaints in regards to unfair competition and unconscionable conduct. Do you see a case for a central authority that would have branches in each state, that would not be overlapping each other?

Mr Asher—Are you referring there to the small business advice organisation?

Mr ZAMMIT—Yes. Invariably, a small retailer says, 'I'm in trouble. Who do I go to, apart from going to the local member?' They go to the small business advisory body who says, 'Talk to your consumer affairs' or whatever they call them in each state. It has a special name in New South Wales: the Minister for Fair Trading, I think it is. Now the Minister for Fair Trading does not want to get involved in something that may have legal repercussions, so they say, 'We can't really help you.' Should we not have something that is on a national scale that will be able to treat—

Mr Asher—Inevitably, that is called for more and more. I think the whole process of all the Hilmer reforms is about recognising Australia as more of a single marketplace than six or seven small marketplaces. A lot of the trade associations themselves are starting to form national umbrella groups. But many—real estate and also in the oil industry—are state based things. The building industry is also still organised on a state basis. As governments are reviewing their legislation, many of them are repealing state based consumer protection and also small business regulation. That will throw things back on to a national regulator.

In terms of the advice and one-stop shops, that is certainly the way to go. Even if a particular agency is not able to deal with a complaint, in my view, that agency has a responsibility to find somebody who is the appropriate body to deal with it and to pass it on, so that the small business making the complaint is not faced with having to make multiple approaches to multiple organisations. Right now, the commission has signed, with three fair trading agencies, cross-referral agreements. There are a number of state agencies, though, who just do not deal with complaints about small business—the consumer agencies. They say that it is not part of their charter. With those that do, we do have a cross-referral system—if it is lodged with us and we think it is better dealt with by one of the state agencies, perhaps because they have got a network of offices in regional areas or something like that, or vice versa. There are many cases now where we have joint investigations again.

Mr BEDDALL—Can you tell us who does and who does not?

Mr Asher—New South Wales does; South Australia does not; Western Australia does not; I am not quite sure of what Queensland's current arrangement is; and Victoria, at least up until about nine months ago, did not deal with small business complaints.

CHAIR—Tasmania?

Mr Asher—I do not know.

Mr ZAMMIT—The point was put to me by a former employee of a shopping centre, again in my area, who had just recently left the employment of that company. When I discussed a particular case in a retail outlet, I said, 'This guy has got an open-and-shut case against the management.' He said yes. I said, 'But you are advising them, if they do not like it, to go to court. That means you lose.' He said, 'If they had the money, if they could fight us, we would certainly lose. But the fact is that they do not have the money; they do not have the resources; they cannot leave their business for weeks on end to go to court. We win, only because we have got the money.'

CHAIR—The Property Council, when we asked them today about a code of conduct, said, 'Yes, we do have it.' We asked whether they apply it, and they said, 'No, we do not. We just leave it to the courts.' So it really supports what Paul is saying: basically, if you do not like it, get out of here and go into court with it.

Mr Asher—There is an important point I should make about court action on behalf of small business, which is quite different from court action on behalf of consumers. Under the Trade Practices Act, we can actually bring representative actions on behalf of people for breaches of the consumer laws and recover damages for them. But you cannot for the competition provisions of the act. One of our recommendations is that that provision should also be available under the competition provisions. It is slightly misleading, in that often cases under the consumer protection provisions are for small businesses. For example, in South Australia, we recovered some $300,000 in damages for a number of small businesses who had signed various franchises with somebody. So that was using the consumer protection provisions for the protection of small business. We do a lot of those.

In the directory cases, we have got maybe nine or 10 cases in court right now where small businesses are likely to be the beneficiary. But none of those are under the unconscionable conduct ones. They are all under section 52, which is misleading and deceptive conduct, or section 53, which is false representations, or some other provisions. Nonetheless, though, if a lot more of these things were underpinned by arrangements like the banking ombudsman, the telecommunications ombudsman or insurance schemes, that would give vastly greater scope for dealing with large numbers of complaints to individuals. The commission would still see itself as having a role in underwriting those.

For example, where the self-regulatory or co-regulatory scheme refused to act, the commission could strategically take a prosecution or enforcement to drive people back into complying with that scheme. We do that now with lots of industry associations in real estate, in the orange juice industry and many others. Where the scheme works, we let them go on and do their business. Where the scheme breaks down, we will underwrite it through a strategic prosecution.

Mr ZAMMIT—How do we overcome the problem of a retailer in a shopping centre who fears retaliation? What can we do to help them act in a way that will not result in the centre management seeing them as being troublemakers and relocating them to a spot that eventually kills their business?

Mr Asher—You touch on the problem that I raised first up. To use the law means that basically the relationship is over and, even if you succeed, eventually you know that in some legitimate way they are going to be squeezed out. That is why we believe in early intervention before the relationship has broken down to force much higher and better levels of disclosure so that the trader can see what is happening. If a lease means that they are going to be forced to surrender all of the goodwill of their business, if the lease means that after six years they might be looked at to make a big capital contribution to refurbishment, that should be disclosed up front in big letters on the first document instead of being on page 79 in an 85-page prospectus.

There are many things that the commission discovered in its investigations of the insurance industry about plain language communication and summary documents of rights and responsibilities that would

equally apply in small business dealings. I do not want you to get the feeling that the commission does not want to deal with matters. It wants to deal with them in a way that is most efficient and effective, and that is by preventing them, where possible, through having better systems operating.

I have brought a number of the guidelines of the commission to give you an indication of some of the things that the commission does. I would ask permission to tender those to the inquiry. One of them is a document that describes unconscionable conduct in commercial dealings. This is one that we put out at the time of passage of section 51AA back in October 1993, so it is getting on a bit now. Every time there is a change in the law, we put a lot of effort into trying to make all of the participants in the market place aware of their rights and responsibilities.

There is another document on small business. We try to spell out the rights and responsibilities in a very clear way in plain language. I would be the first to admit that brochures are not a way of effectively reaching people, especially people in ethnic communities. We have also engaged recently in a fairly extensive research project to find ways of communicating effectively with businesses in ethnic communities to make them aware of their rights and responsibilities to try to reduce the incidence of problems.

Mr ZAMMIT—Do you use the ethnic media at all?

Mr Asher—Yes, we do. I admit that it is not very successful.

Mr ZAMMIT—Do you have those booklets in other community languages?

Mr Asher—We have a number of brochures that we produce in community languages; a project which we regard as having failed almost totally. Instead, we have a strategy document from a consultant who has advised us on how to get information into community languages by working through community influence leaders and others, where we send our publications and our press releases. An issue I would like to leave with the committee is the detail of a round table conference on small business dispute resolution that the commission has convened for later this month. It is going to be in two weeks time. Some months ago we appointed one specialist commissioner to have particular responsibility for small business matters and he is going to chair this conference. We have had a consultative committee for many years, but we have set up this specific one for small business affairs to see if we can concentrate the advice that comes and to improve our feedback through that sector.

Mr ZAMMIT—One last question: you have put in your terms of reference a lot of information on the concerns that you have investigated and the problems that you see. Do you see any value in these points being included as part of the lease before the prospective retailers sign up? Because a solicitor will look at the documentation and say, 'That's fine,' but he or she does not know the problems that have arisen and will arise.

Mr Asher—With respect, the solicitors almost never say it is fine. They will say, 'You have no rights, they have got you here and they have got you there, but if you want to go into the business you have got to sign it.' That is so often the case. It is a take it or leave it document. I have had even partners of law firms say to me, 'I have no idea what this means, but I want this office and I have to sign it.'

What is needed is a different approach where there are key facts—the key elements in the contracts—that are brought forward to people's attention. Perhaps I could submit later on some of our findings in insurance that I think really do carry over.

CHAIR—That would be helpful. Two questions: one from Mrs Bailey and one from Mrs Johnston.

Mrs JOHNSTON—Thank you. There seems to be a lot of conflict that has been put forth today by all parties that we have heard submissions from, and I think it follows on from what has just been asked. The only commonality that I have seen come out of the hearings today is that all the different parties seem to be, to some degree, agreeing that perhaps an educational or an awareness program may help overcome some of these problems.

There has also been quite a lot of criticism about the role that your organisation plays in trying to put these things to rest. How would you see some sort of awareness program, bearing in mind that small retailers in particular are extremely busy and cannot go to retail association meetings to find out what their rights are. Sure, in the beginning, they may be wrong in not getting feasibility studies done, et cetera, and, as you have just pointed out, they have no option but to sign the lease or the agreement. But surely somewhere along that line we must be able to get something into the system that will make people aware of their rights.

Mr Asher—Yes. There are some other things that the commissioner has done. We produce various compliance programs too. In fact we have a number of staff who are involved full-time in going around to business organisations, explaining to them how to make complaints. I estimate that about half of all of the time in our regional offices—and we have regional offices in every capital plus Tamworth and Townsville—is spent in doing just that sort of thing. We speak at hundreds of business and community functions a year spelling these things out. So I say there is a role for information and education.

Of itself, again, nothing is going to solve all the problems because, partly, the problems are about the marketplace and there are tough things that need to be done.

If I could also mention that the commission has set up some other ways of reaching people. All of our publications are available on an Internet home page, we have very short brochures available and telephone advice, and also all of our regional offices. That goes just a small way to reaching those issues.

Mrs BAILEY—I want to raise the question of goodwill. A number of people who have appeared before this committee have mentioned it, especially those franchisees who signed their franchise agreement; at the end of that agreement it does not seem to matter whether they add to the business or whether they build up that ongoing business, if they do not get their franchise agreement renewed they have lost everything. Now you are getting together a group on small business—given that small business people, in the main, have only the results of their own work and often that is building towards their retirement nest egg, how do we address this question of goodwill?

Mr Asher—There are no legal rights that require franchisors or lessors to hand goodwill to franchisees or lessees. It is a matter, again, for the initial contract between them. It is quite open to a franchisee and franchisor to agree in such a way that the franchisee might receive the goodwill that is built

up in the business. Typically, it is not the case; and, again, this is really an outstanding issue of disclosure. It seems to me that the law is never likely to require the passing on of all goodwill; otherwise Westfield would never build another shopping centre. The problem is that so many people go into business assuming that at the end of the day all of the customer base that they build up they will get, when that is never intended. So it is a case where people go into these arrangements either with their eyes closed or simply not realising that. That is why I say that there are so many of these things that are about equipping people at the beginning of the transaction with much better information.

CHAIR—On that point I think we will end your discussion today. It has been suggested that we should get you back towards the end of this inquiry, and I think that we should do that, for some further questions. I am sure that all of us have got some more questions we would like to ask you.

It is also proposed that the documents presented by the ACCC be taken as evidence and included in the committee's records. Do any members have any objections? There being no objection, it is so ordered.

Thank you very much for your attendance today. We appreciate your time.

[5.49 p.m.]

WATTS, Mr Gerald Allan, General Manager, Australian Petroleum Agents and Distributors Association, 15th Floor, 499 St Kilda Road, Melbourne, Victoria 3004

ZUMBO, Mr Frank, Consultant, Australian Petroleum Agents and Distributors Association, 15th floor, 499 St Kilda Road, Melbourne, Victoria 3004

CHAIR—Welcome. Committee proceedings are recognised as proceedings of the parliament and warrant the same respect that proceedings of 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. However, you are reminded 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 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 Watts—Not to the submission.

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

Mr Watts—Yes, I would, please.

CHAIR—Please go ahead.

Mr Watts—It will be a fairly brief statement. Just for the context, I would briefly describe my own background. I have spent 26 years in one of the major oil companies. I have spent six years in APADA. So I have seen the industry on both sides of the fence. For 1996-67 I am also chairman of Oilcode—or at least I think I am at the moment, depending on what happens with Oilcode. Frank Zumbo who appears with me today—as you are aware, he has appeared before—is a consultant to us, and he wrote the majority of the submission that we put in.

APADA has been concerned, I suppose, about unconscionable conduct for many years. It has been a supporter of changes to the Trade Practices Act for those many years—at least six or seven. We were keen, when 51AA came in, for example, in 1992, to change the original 52A, which of course was the original provision and related only to consumers. However, we have been very disappointed at the outcome of 51AA. We have even had the situation, for example, where Professor Fels suggested that using 51AA in the sort of context that it was intended to be used for, I believe, would be a waste of time.

In 1994, APADA was one of the four organisations which took part in the small business coalition working party which made some recommendations on the unconscionable conduct issue to the then Small Business Minister, Senator Schacht. However, we were then concerned, I suppose, with the outcome of the better business conduct proposal and the bill which was introduced by the previous government on the basis

that it had, in our view, many weaknesses and was far too vague.

Perhaps I should very briefly talk about what distributors are so that you understand our particular sector of the industry. I think Fran may be familiar as she has been to one of our board meetings. Distributors are essentially what you would call the marketing components. They are marketers of petroleum products for the oil companies in country areas. The vast majority of them carry the brand of the oil company; there are some independents.

Contrary to Professor Fels, I believe an independent is somebody who does not carry a brand, is not a distributor for an oil company. He may have a supply agreement but he has, shall we say, a slightly more independent outlook on life. There are not many of them around. They tend to vary in size from $1 million a year turnover to well over $200 million a year turnover, but most are in the vicinity of $40 million to $50 million. Bear in mind they are dealing with oil companies who have turnovers of $3 billion to $4 billion a year. They are very strongly controlled by their oil companies through four means.

There are very tight distributor agreements in place and I propose, with your agreement, to give you copies of the four oil companies agreements—they are quite voluminous, I am afraid. So there are very tight agreements which control what they can and cannot do. Oil companies have total access under those agreements to the information of the distributorship—that is the customers, the volumes, the costs, the turnovers et cetera. Many of them, but by no means all—and it does vary from oil company to company—are 50 per cent owned and a small number are 100 per cent owned by the oil company in question. But it does vary from company to company. The fourth issue which gives oil companies considerable control is the almost universal practice whereby the depot out of which a distributor operates, without which he cannot successfully operate, is owned by the oil company.

That leads to a number of things which build up in a sequence: control of the distributorship which, in turn, leads to control of competition in country areas especially, which is where distributors operate. In turn, that leads to higher prices than there need to be in country areas. In turn, that leads to what I suppose you could call a distorted market.

Closely associated with that full sequence of control—and it is an integral part of it—is the failure of the oil company to be willing to negotiate prices with distributors. In other words, they are dictated. As I said, that in turn has impacts on country prices. I believe that is verging on unconscionable conduct, the failure to negotiate prices. But I am not a lawyer so I may be using the term incorrectly.

Much has been heard recently, including the sessions which Frank has been to on my behalf and the ones I have been to today, about self-regulatory codes of conduct. I have to agree with Mr Zammit this morning who said that codes of practice can only really be successful if they are backed by some kind of legislation, or perhaps the threat of it.

That leads me into Oilcode. I believe I am the second longest serving current member of Oilcode, on the assumption that Oilcode continues to exist, having been involved with it since 1991. Very briefly, Oilcode came into existence in 1989. It addresses a lot of the problems which are faced between resellers, which could be service stations or distributors, and their oil companies.

The current situation is that one party to Oilcode has resigned from Oilcode. In fact, on Friday of this week the remaining members, together with an observer from DIST and an observer from ACCC, will be looking at the situation in terms of whether Oilcode can continue to exist following the resignation of one party. If it cannot exist, what shall we do, firstly with those cases which are under way and, secondly, is it possible to generate something in its place?

However, I think the resignation of that party from Oilcode does highlight some of the problems with it. APADA has taken the position at this stage that it will not resign from Oilcode if it does exist but, as I said, the resignation does show up a lot of the problems.

Oilcode has been reasonably successful in tackling the smaller, less difficult issues. It came into being around about 1989-90. During 1992-93—it might have been 1991-92—over about an 18-month period, a number of subsidiary codes were put in place, namely eight of them, and two more about 12 months later. They tended to tackle the relatively easy issues and even then it took 18 months to develop the codes of practice.

Following the Industry Commission inquiry report which came out in 1994, there was a recommendation in there that the various parties should get together—that is the oil companies, the distributors and the resellers—to tackle the problems which, you could say, have plagued the industry for many years and attempt to come up with some kind of protocol or codes of practice and suchlike to tackle those.

I do not intend to go into the history in any great detail, unless you wish me to, but the history of those negotiations, I believe, is quite illustrative or educational in terms of the context of the success or not of codes of practice. They started in December 1994. There were a few ups and downs, which you would expect, and they ground to a halt in August 1995. I believe that cessation was engineered by the oil companies because it was in their interests to bring the negotiations to a halt.

We were, at that stage, developing two codes of practice. If those codes of practice had been put in place and operated, it would have caused two things: it would have cost the oil companies a lot more money in terms of the exit provisions for those people leaving the industry, and it would have caused them greater difficulty in finding new franchisees and new distributors to come into the industry. Because the intention was that the disclosure would be far greater than had been the case up until that time.

I should add that two parties, myself and one other, because we were considerably concerned about the progress of those negotiations, were actually developing what we called a double disclosure document which, in fact, would have expanded on the code of practice. So you can see that I am, shall we say, casting a fair amount of aspersion on the progress of those negotiations.

I need to talk briefly about rationalisation because rationalisation could be described as the cause of a lot of the problems. Rationalisation is a fancy term which says that we are reducing the numbers of participants in the industry. In 1970 there were 7,000 agents and distributors in my sector of the industry. There are now about 400 and obviously they have become far bigger as they have reduced in size.

APADA is not opposed in principle to rationalisation—it is economically sensible, it is world best practice, it is all those lovely late 20th century jargon terms. So we are not opposed to rationalisation. We are opposed to the way it is being implemented. On pages seven to nine of our submission we have given a relatively small number of the sorts of problems that we have come across in the rationalisation being undertaken by the oil companies.

It might be worth mentioning one thing—it was said in public by Dr Blackburn, who is now the managing director of Ampol, now Australia's largest oil company. In the course of the Industry Commission inquiry he said the following—the words may not be exactly right, but the content is: Ampol was annoyed with an action of the Prices Surveillance Authority—which I do not need to go into—which stopped Ampol from continuing to use the pricing mechanism to rationalise its network. In other words, pardon my French, but it was stopping Ampol from screwing people out of the business instead of fairly negotiating with them. I think he was the general manager marketing then, but he is now the MD of Australia's largest oil company.

That is the sort of situation that we are facing: a pricing mechanism being used to force people out of the industry—people who are from time to time, I hasten to add, described as independent businessmen or an integral part of our marketing network. They are being forced out instead of being negotiated out. In the last session, which Frank and I only heard the tail part of, the question of education came up, and my comments are therefore made in the context of not having heard the earlier comments. But if the education process is simply intended to be one of informing business participants of their rights, I believe that it has very little chance of improving the conditions.

The last thing I would like to say in this opening statement is that we believe it is paramount that there is a change to the Trade Practices Act so that there is one provision in the act that will apply to both consumers and business—and I do say business, not small business—in the context of harsh and unconscionable conduct. We are not looking for any provision that would be a guarantee for a small business or any other business profit.

CHAIR—Thank you. The AIP, in their evidence today, argued strongly to repeal the Petroleum Retail Marketing Franchise Act and the Petroleum Retail Marketing Sites Act. Do you think the repeal is required, and what is your view?

Mr Watts—You are obviously referring to the outcome of the ACCC inquiry. We believe that the repeal of those acts will be a very detrimental action unless certain other things are undertaken. I do have a five-page summary which I could give to the committee. Ms Gambaro has already received a copy of it, and I would quite happy to put that on the table.

Essentially, what the ACCC said—and I will try and keep this brief—is that they recommend deregulation with three provisos. Only two are relevant in this discussion. The first one is to repeal the franchise act if there are satisfactory modifications to Oilcode, and I think I have dealt with that in the last few minutes. The other one was the success of imports.

We had been arguing for a long time that imports would not have that much impact on the marketplace. Importers, by definition, import at import parity. That is hardly an intelligent comment. The

ACCC pricing mechanism is an import parity mechanism. So without some finetuning, there is not going to be much impact on the prices. Even the ACCC, subsequent to the publication of its report and the announcement of Woolworths' entry into the marketplace, has said that they believe that imports will have very little impact on the marketplace.

We believe that the removal of those acts without something else in its place—and that would be a reinforced Oilcode, supported by legislation, I hasten to add—would be a detrimental step.

If I could just put to you one conundrum: the oil companies say each year, through Ernst & Young, that they are making an inadequate return on their investment—and I do not necessarily disagree with them. They then go on to say—having just said that they are not making enough money—'Deregulate and prices will drop, and that will be good for the consumer.'

They go on to say that the maximum endorsed price, in other words the cap which the ACCC put out, holds prices up. They also say that it increases volatility. I think it may increase volatility. So they are saying, 'We are not making enough money. We want you to deregulate, which will reduce the prices, and everybody will be happy.'

I think there is a conundrum in there, which I have never had answered by an oil company. I believe I know the answer. The answer is that in the short term the deregulation could well be good for consumers, because what is likely to happen is the oil companies will scramble for the particular sites they want, scramble for geographical areas they want to be in, and so on and so forth, but in the medium and long term, prices are likely to go up.

There was a report in the *Financial Review* last week which commented on the fact that since the banks were deregulated, the interest rates—I think relating to credit cards—are the highest they have ever been. I believe that what is happening is that the oil companies would love to deregulate and, in the medium and long term, the consumer will be worse off. I am also led to believe that this is borne out by the experience in New Zealand where, since deregulation, prices have gone up—and I believe ABARE puts out statistics which show that New Zealand prices are about 10c a litre higher than they are here.

CHAIR—The AIP say their contracts are fairly clear; that there is no automatic renewal at the expiration of the lease, however—

Mr Watts—Expiration of—

CHAIR—There is no goodwill payable by the oil companies and there is no automatic renewal of the franchise agreement. Yet the perception with franchisees is that this is sometimes the case. Do you have much evidence of where this misconception comes in? Are they being adequately informed up front that they have not got any rights after the 10-year period or whatever period it is?

Mr Watts—I have to answer that in two ways. A lot of the questions which you have just asked apply to service stations and the franchisees. I represent the distributors, which is a different market sector. Most of my members do not have franchises as such; they have commercial agreements—what I like to call

long-term, going-concern commercial agreements. On the termination of their agreements, there are undertakings given, such as, 'Don't worry. You will be renewed'—nudge, nudge, wink, wink. To be fair, a lot of these do go on for many, many years. Unlike, say, most service stations, most distributor businesses are long term. Many of them are father-son. There are a small number which have been in business for 60 years. It is quite common for them to be there for, say, 20 years. But, increasingly, over the last five years in particular, as rationalisation has picked up, a number of them—again, I refer you to pages 7 to 9—have been terminated on 30 days notice.

As far as the goodwill aspect is concerned, I accept the legal side of things, that a true franchise does not have goodwill. I understand that there have been recent articles which suggest that that may not be quite as black-and-white as has been suggested. But, from my sector of the industry, I believe that, on the basis of undertakings given and expectations put in people's minds, where termination does occur then there should, in fact, be goodwill payments. In many cases, there are; but I believe that they are fairly minimal and they have to be fought for very hard.

Mr ZAMMIT—I have a series of interlocking questions. How would you define a small service station and a medium-sized service station in regard to turnover?

Mr Watts—Most of my members, I am afraid, are not service stations. May I answer that slightly differently? If you want to know about service stations, I think you should talk to MTAA. A lot of this stuff is relative. A $50 million turnover distributor may be big business in relation to one of the service stations that it supplies, but it is small business in relation to an oil company. That is why I said, near the end my opening remarks, that we are not looking for a guarantee for business or small business, and we are certainly not saying that the changes to the Trade Practices Act should apply to small business. We believe that it should be a business-wide change. Whether it is small or large tends to be relative rather than absolute.

Mr ZAMMIT—What sort of money would you require to start up and operate a medium-sized business?

Mr Watts—A medium-sized distributorship is probably in the order of $50 million a year. I was not expecting this question. But, thinking out aloud, the depot is likely to cost $4 million, and there would probably be three to four of those. So that is $12 million to $16 million. There would probably be six to eight vehicles, which could be $300,000 to $400,000 each, which is another $2 million. I am sorry; I lost track of my first one. It is probably about $15 million.

Mr ZAMMIT—You are looking at a tremendous amount of money.

Mr Watts—Yes.

Mr ZAMMIT—What is their success rate in regard to the length of time that they remain in the industry? From the time that one starts up to the time that they get knocked out—if they get knocked out—what is the turnover like?

Mr Watts—I think you have asked a very useful question, with respect, because there are relatively

few new distributors coming into the industry. As I have said, they tend to be long-term distributorships. There have been a number put on the market recently by the oil companies, and there have been very few takers. As to whether they are successful, I think they are successful to the extent that the oil company allows them to be profitable in what it—the oil company—regards the allowed level of profitability. It is what I spoke about before—the controlled competition and the access to information and what have you.

Mr ZAMMIT—So if very few of them are going out of business, then one really cannot accuse them—

Mr Watts—No, no. I did not say very few were going out of business.

Mr ZAMMIT—You said long-term.

Mr Watts—Yes, a lot of them are long-term. I said there are some which have been in business for 60 years. They will be, to a large degree, forced out by a number of mechanisms. A lot of distributors have gone out of business. But it is not a question of, shall we say, failing. It is a question of the oil company deciding that Gerry Watts, Toowoomba, for example, is no longer the distributor they want in Toowoomba. They want it to be merged with Brisbane or somewhere—forget the geography. Say Gerry Watts is a distributor for Shell, it does not really matter which one. All of a sudden, Frank Zumbo, the adjoining Shell distributor, is being encouraged into his area. The sorts of prices that Gerry Watts are able to get from his oil company are not as good as are available to Frank Zumbo. After about two or three years, you find Gerry Watts being approached by the oil company and being told, 'You're not making very much profit, you are not being very successful. The best thing we should do for you is to ease you out of the industry. We will come up with a valuation and we'll be good fellows and take you out.' But, of course, the valuation is not nearly what it should be.

Mr ZAMMIT—Are they that mercenary?

Mr Watts—Absolutely.

Ms GAMBARO—I have to share your views on deregulation, considering the elasticity factors of petrol. What are your views on terminal gate pricing?

Mr Watts—This will sound like a smart reply; I assure you it is not intended to be a smart reply. If you had 10 people from an oil industry, you would have 10 versions of terminal gate price. We have a view of terminal gate price. I think we were the first organisation to put anything on paper on terminal gate price. That was back in 1991. Terminal gate price does mean many things to many people. Certain parts of the industry believe that everybody should buy at the terminal gate at the same price and, whether you come in with one vehicle once a month or 10 vehicles a day, you would buy at that price, the same price as everybody else.

We do not hold that view. We believe that a terminal gate price simply means that there should be some reference price—and that is all it would be—put out by, say, the ACCC, just a market price, and around that people would negotiate. If I am a better negotiator, as the mythical Shell distributor, Toowoomba,

and if I were able to negotiate with my oil company, which I am not, and I am a better price than my adjoining Shell distributor, I would get a better price and vice versa.

There will be organisations like BHP, to pick a term, who will buy below terminal gate price. In other words, they will be getting a marginal price. There will be other people who will pay a lot more than that terminal gate reference price. It really is a phrase which is tossed around quite a lot. But there is no real clear definition other than that it would exclude, as a starting point, any of the oil company costs beyond the terminal. But what it actually means beyond that is very vague.

Ms GAMBARO—So you are saying to me that you are in favour of negotiation of prices rather than the current system of dictating prices?

Mr Watts—Let me expand on that, restricting it to distributors. But I think you would find that franchisees at the service stations would have the same problem. Because of those factors that I mentioned before, the control factors, oil companies will say to the distributors, 'The price for you is such and such.' It is not so much a take it or leave it because they cannot leave it, they have to take it.

It may well be that the distributor will buy at the ACCC's maximum endorsed wholesale price, the MEWP, as it is usually referred to. We will say that is 70c. They may trade in the marketplace at anything from 68c to 71c. In other words, with some of the trade they will have made an actual loss. They will then go to their oil company at the end of the month, or whatever the agreed period is, and say, 'Dear Mr Oil Company, I have made these sales at such and such a price.' I need what is euphemistically called 'support'.

The same thing happens with franchisees. The oil company will then say, 'Yes, we will give you 2c to make up your loss, and we will say another 2c to pick a figure, which enables you to make a profit that we, the oil company, believe that you, the distributor, should have.' So we are advocating, and have advocated for quite some time, that there should be commercially negotiated prices, terms and conditions between oil companies and resellers.

If I could give you an example, during the ACCC inquiry a number of private hearings were held, so obviously I will not give you too many of the details. But I went to one of these with five distributors. Four were our members and one was not. In the course of that session, one of the distributors said that he had been able to negotiate a price with my oil company which I had been saying never occurs, so I was worried that my argument was going to be weakened. However, it turned out that this particular distributor, with a turnover of roughly 30 million litres a year—so one of the smaller ones, if you like—had negotiated a 0.2c a litre reduction off the MEWP, the maximum endorsed wholesale price.

In the same discussion it became clear that he supplied as an agent, on oil company paper, product to a local business with 350,000 litres a year—30 million for him, 350,000 litres for this business—at 6c off. The difference there, of course, is that a commercial organisation is able to negotiate prices, terms and conditions; the distributor is not.

Also in the ACCC inquiry a couple of very useful phrases came out. The distributors and the franchisees were referred to as the 'soft networks', in other words the controlled networks through ownership

and other things. Of course, if you have a soft or controlled network you can basically do what you like with it. We did a pricing survey of our members some time ago. One of the things that came out of it was, 'You are a distributor; you are refinery base load trade; you are captive trade; you are not entitled to negotiate a price.' I believe if we had somebody brave enough to stand up and be counted and go to the ACCC with that sort of comment we might be able to get somewhere, but they are all concerned about the impact on their business.

CHAIR—Is there any final summation comment that you would like to make before I wind up today?

Mr Watts—I just wonder if Mr Zumbo would like to add anything to what I have said, if that is in order.

Mr Zumbo—I totally echo what Gerry Watts has said. There is certainly a need to back self-regulatory code with appropriate legislative action. APADA takes the view that appropriate legislative action is to have one provision dealing with unconscionable conduct in the Trade Practices Act, instead of the two existing ones making a distinction between consumers and commercial transactions; and appropriate modifications to the provision as it exists. We certainly support self-regulatory code, but that certainly depends on some legislative backing as Mr Zammit has said this morning.

CHAIR—You were going to give me some stuff. Is it there?

Mr Watts—No, I can give you a copy now of the five-page comments on the ACCC, but I will have to give you the distributor agreements in due course.

CHAIR—That would be good. I thank you for appearing before us today; your time is appreciated.

Resolved (on motion by **Ms Gambaro**):

That, pursuant to the power conferred by section 2(2) of the Parliamentary Papers Act 1908, this committee authorises publication of the evidence given before it at public hearings on this day, including publication on the electronic parliamentary database of the proof transcript.

Committee adjourned at 6.20 p.m.