HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Reference: Fair trading

PERTH

Monday, 11 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

CLARK, Mrs Donna Lorrell, Owner, Gifts R Us, Farrington Fayre Shopping Centre, cnr Findlay and Farrington Streets, Leeming, Western Australia 6149 454

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FISHER, Mr Nigel Bruce, 24 Tallow Ramble, Edgewater, Western Australia 6027 431

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GREIG, Mrs Josephine Bona, 2/54 Preston Street, Como, Western Australia 6152 419

JOUBERT, Mr Phillip Richard, 96 Aulberry Parade, Leeming, Western Australia 6149 419

RATHMANN, Mr Leonard Herbert, Executive Officer, WA Council of Retail Associations, 175 Hay Street, East Perth, Western Australia 6004 403

VALENTIN, Ms Yvonne, Commercial Manager, Laubman and Pank Optometrists, Level 9, City Arcade Tower, 207 Murray Street, Perth, Western Australia 6000 438

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PERTH

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Present

Mr Richard Evans (Chair)

Mr Beddall	Mr Jenkins
Mr Martyn Evans	Mrs Johnston

The committee met at 12.57 p.m.

Mr Richard Evans took the chair.

CHAIR—I declare open this public hearing on the inquiry into fair trading. The terms of reference for this inquiry require us to examine claims by small business organisations that some firms are vulnerable to, and not adequately protected against, harsh and oppressive conduct in their dealings with larger firms.

The committee has now received over 150 submissions. A significant proportion of these are from small business people who allegedly have suffered from what they consider to be unfair trading practices, particularly in the area of retail tenancy. This afternoon we will be interested to here about the particular experiences of people in their business dealings and about the adequacy of the state legislation here in Western Australia to protect small businesses against unfair trading practices.

RATHMANN, Mr Leonard Herbert, Executive Officer, WA Council of Retail Associations, 175 Hay Street, East Perth, Western Australia 6004

Mr Rathmann—I am the Executive Officer of two organisations—the WA Retailers Association, as previously named, and the WA Council of Retail Associations.

CHAIR—I welcome witnesses and observers here this afternoon. I will introduce the committee members. David Beddall, MP, the member for Rankin in Queensland is the Deputy Chair; Martyn Evans, MP, is the member for Bonython in South Australia; and, Harry Jenkins, MP, is the member for Scullin in Victoria. All members are keen to visit Perth.

Committee proceedings are recognised as proceedings of the parliament and warrant the same respect that proceedings in the House of Representatives itself demand. Witnesses are protected by parliamentary privilege in respect of the evidence they give before the committee. You will not be asked to take an oath or make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as a contempt of parliament. The committee prefers that all evidence be given in public, but should you at any stage wish to give evidence in private you may ask to do so and the committee will give consideration to your request. The committee has received your written submissions from both organisations and has authorised them for publication. Would you like to make any additions or alterations to your submissions?

Mr Rathmann—There are no alterations as such, but I would like to elaborate on some of the aspects previously raised.

CHAIR—Feel free to make an opening statement.

Mr Rathmann—Thank you very much. Could I first of all highlight the activities of what is the WA Council of Retail Associations. As I indicated in the submission, it is made up of the major retail groups here in WA, and I will reinforce that by renaming them: the Pharmacy Guild of Australia, the WA Retailers Association, the Motor Trades Association, the National Meat Association of Australia, the Jewellers Association of Australia Ltd—WA region, of course; the WA Accredited Newsagents Association, the Master Ladies Hairdressers Industrial Union of Employers, the Liquor Stores Association, and the Claremont Business Association.

The point here is that we truly represent what we have referred to as the independent retailers here in WA. There are other groups or a group, in particular, that would represent the larger retailers, such as the Coles Myers and so on. We are quite distinct from that group in where we are coming from in our presentation today. We do not have as members those larger groups, and also we do not have as members what we refer to as the transnationals; that is, Katies, or those other groups that do in fact have activities in states across Australia. We tend to be the independent and WA operating businesses. I might add that there are various reports in existence that refer to small business.

Nothing is more disconcerting than to find the gross misunderstanding that exists at the moment regarding what is a small business. If you approach the chamber of commerce and ask their definition, they

will say quite rightly that in manufacturing it is an organisation of fewer than 100 persons. In other activities in small business under the CCI, they refer to small businesses as those having fewer than 20 employees. It is most encouraging to note that the investigation being currently held into micro business and its activities there correctly defines 'small', which is micro, being fewer than five employees. Over 90-odd percentage of our members are in that category, and I stress that point.

Throughout WA the council has not only those members that I have listed but also members throughout the Perth media region and the outer regions in the country areas. We are able to speak on behalf of those who are above the 26 parallel in this state and also down to Esperance and Albany. We have not only a broad cross-section of members but also a very wide participation from all the areas of the state.

What we are discussing now I have summarised, and it can be broken down to highlight any particular differences that may exist between city and country. But, primarily, we will be speaking in general terms. The council is very active in coordinating our members' efforts in conjunction with all the guidelines and services supplied by government departments, particularly the Department of Fair Trading, and also with employee organisations. We are very proud of the fact that our working relationship with our members and with the relevant employees involved is very close. In my position with the WA retailers, on a day-by-day activity I highlight that I need to refer to something like 15 different awards that people might inquire about. So the cross-section of activity and participation with others is very extensive.

The contentious matters that we have to bring to your attention are many and varied. Perhaps I should highlight one particular aspect from the outset, and that is that I mentioned government departments. With federal departments, there are various laws that apply. With state governments, under commercial tenancy and other aspects of fair trading, we deal very closely with the relevant ministers. The third level of government is critically important, as we are finding it at the moment, and that is in the local government area.

The reason I highlight this at the very earliest stages is that even this morning more publicity was given to the fact of increasing developments in WA within the retail industry. Last week, as is typical of my responsibility, I sat down with one of the largest developers in this state to discuss the extensions proposed for the Carousel, which is owned by Westfield. They anticipate almost doubling the size of that centre from 50,000-odd square metres to 94,000 square metres.We have other existing shopping centres like the Galleria operating around 53,000 square metres. So we have these developments that are occurring within the industry which are extremely adverse to the smaller retailers.

The point is being made that all of this development will prejudice the future activities of small retailers. This is happening right throughout Australia, but I want to emphasise the situation. It is known to us that Australia has the largest proportion of retail shop trading space per head of population in the Western world. Western Australia has by far the largest proportion of retail space per head of population in Australia. So follow that to its conclusion. For a reason, WA has been developed out of all proportion to the needs of the consumer and the limited dollar that is available.

We have had situations over the recent years, such as in the 1970s, when the economic situation was challenging. In the 1980s the economy became more buoyant, and the situation was that all parties to the retail situation, by way of the tenant and the agent and the owner, were able to achieve fair and equitable

returns. In the 1990s the purchasing situation is such—and I will not use the word 'recession'—that it is tightened up to the extent that people are not spending as much money as they have in the past in the 1980s. Therefore, the consumer dollar has reduced dramatically.

We still have this situation in which the investor is there, anticipating that he is going to get a fair return on his moneys for the investment that he makes. We have the managing agent who operates on a commission, such that he anticipates getting a return of up to seven per cent on the total moneys he collects in any shopping centre. The retailer is then expected to pay still a high level of rent and variable outgoings. It is the tenant who has to find the money that is to feed all of the requirements above him. If the consumer is not buying, the small retailer is well and truly in a cleft stick. That is exactly the position.

It is now such that, without being emotional in any way, I would like it recorded that all small retailers are now on survival mode. This being the case, I cannot see them recovering from this type of situation in the foreseeable future. People highlight that Christmas shopping is going to at least save them. The situation is that—and I think you will find this from the others who will make their submissions—there is so much owing by the small retailer that any achievements and gains in this coming season will barely, if at all, cover their indebtedness that exists at this point in time. Into the new year we will then have a recurring situation of which they will not be able to work their way out of.

One of the situations is in the commercial tenancy act as it stands. This particular act of 1985 has been up for revision now for many years. Governments of all persuasions have shunned the severity of the situation, and I will say that they perhaps have not appreciated the consequences of ignoring the developments in this regard.

Before the last election, the Liberal government gave assurances that they would make the required revisions to the act and make it more beneficial and more mutually acceptable to the tenants, whereas at the moment it is heavily weighted to the owners and the agents. With four years of government now drawing to a close, nothing has been put before the government in a way in which it could have been processed through government. It is only in the last week, coincidentally, that a green paper has been presented. Copies are now available for members, as I obtained last week. Even that is now being challenged by the Property Council of Australia and large retailers because of their disagreement with the words that are contained. So the commercial tenancy act is still to be reviewed, and it could be some time before it is actually carried out.

Whilst in this particular category, I would also like to refer to the Commercial Tribunal of Western Australia, if I may. The Commercial Tribunal is a forum in which the smaller retailer can be heard and can present legitimately his feelings on the situation that exists. Many cases now exist, and I have sat through those particular proceedings, in which no sooner than the verdict is made—possibly in favour of the tenant; in more cases than not they are that way—they are immediately challenged and put into the District Court.

Once you go into the District Court, it becomes a legal fest. It becomes a situation where lawyers can joust and be expensive in their whole approach such that the smaller retailer has no way whatsoever of being able to sustain the financial pressures that are imposed on them. The owners and the centre managers know this only too well—they are only too happy to admit it to people like me—so that this is exactly the way in which they will conduct the proceedings because they can last longer than those tenants can.

The existing system through the Commercial Tribunal is grossly unfair to the tenants because the commercial registrar does not have the power to make a judgment that cannot be challenged. At the moment the process is treated very light-heartedly, as I know only too well. I have often heard a lawyer in the court challenge the chairman of the tribunal by saying, 'Thank you very much, your Honour. The verdict is against us, but this is only the beginning,' and indicate they were going elsewhere.

I can substantiate this by referring to the Commercial Tribunal of Western Australia report to the Attorney-General for the year ended 30 June 1996. This is an addendum to my previous submission because it came out just recently. In referring to the situation and the manner in which the owners' lawyers adopt the situation, it says:

. . . to be met with, in most cases, massive, costly, petty fogging lawyer or non-lawyer created obstruction and delaying tactics.

That is describing the manner in which the lawyers proceed. In several cases, there have been up to 20 such preliminary direction applications over four years and the matters have still not been disposed of. So, even keeping them within the tribunal, the art of delaying and procrastination is being fulfilled.

There are many other aspects that I must highlight in the limited time that I have available. I would like to elaborate on the issue of management fees that I cite in my report. I mentioned earlier that, under the Business Agent and Real Estate Act, up to seven per cent of gross turnover by way of rents and variable outgoings can be charged by the agent in his management fees. This is entirely paid by the tenants. The situation seems grossly unfair. When we have the situation of negotiating or talking with the management, we find it painfully obvious that the manager is there to fulfil the wishes of the owner not the tenants, yet it is the tenants that pay 100 per cent of his fee. Even then, the managers will try to hide costs by way of their staff costs and so on within some of their variable outgoings. They create quite an exorbitant amount of moneys that are due by the tenants. This must be looked into. We consider it a gross anomaly.

The other item of considerable concern is fund payments. Investigations and cases are now before fair trading here in WA. They are such that it becomes unusual as to the manner in which funds' moneys are used—by way of any selected groupings of money, whether they be for a sinking fund, a promotion fund or a merchant's association fund. They are not being correctly audited and the information relevant to those funds are not made available to tenants.

I cite an example: the promotion fund, into which the tenants pay, was known to be many thousands of dollars. That money had been levied and paid monthly by the tenants. Towards the end of the financial year, the tenants wanted to do a particular promotion and approached the centre manager, saying, 'We know that only very few thousand dollars have been spent, yet there is the considerable amount of money that we have forwarded to you for promotions. Could we now have something special, some particular activity, that is going to promote the centre? The money is there; let's use it.' The answer given was, 'The money is no longer there. We in our wisdom have chosen to use it in other areas'—in variable outgoings, or whatever.

That was being reported to fair trading, and they are now progressing in relation to that particular centre manager and his organisation. It is not only that but other funds allocated for specific uses. It is now

considered doubtful as to whether or not they have been used correctly.

To assist in that investigation, Minister Cheryl Edwardes has instigated and called for a select committee now in WA—which is very much to her credit—to investigate the manner in which centre managers work within the guidelines of the Business Agent and Real Estate Agent Act. It is of interest to note that, whereas that committee called for people to nominate for that committee back on 5 September, as of last week there has been no meeting held, and advice given to me is that it cannot proceed at this point because the Real Estate Institute is extremely reluctant to participate in that committee.

I have had to draw my personal conclusions as to the reasons why they should not participate in a committee which, as we see it, would assist the industry in clarifying just what is going on in this regard.

CHAIR—Mr Rathmann, I am sorry to interrupt you, but I am just conscious of time, and I know that my colleagues want to ask a couple of questions. How far do you have to go?

Mr Rathmann—Could you give me five minutes, and I will clarify?

CHAIR—Sure.

Mr Rathmann—Thank you very much, Mr Chairman, I would welcome the questions. I will quickly reiterate what is happening here in WA at the moment with regard to land tax. They have been increased significantly. Within the city area, the taxes in one group of shops have been increased by over 100 per cent—over double.

In requesting the government to clarify what is happening and how unimproved values could have skyrocketed to such a degree, the answer given at this stage is that wealthy investors of overseas origin have, in fact, purchased upland in another adjacent area. That being the case, then all adjacent areas have now been reconsidered regarding their unimproved value—a most unusual situation in the current economic climate.

Assignment of leasing is another critical one that we would like a following through on this. Some leases allow for the fact that, when a lessee assigns a lease and then no longer has anything to do with the particular shop activity, it is possible for any subsequent repercussions still to come back to the lessee—that is, the original lessee is still guarantor. That exists in most leases. We are now desperately trying to get that removed.

I refer to an example of a couple who, after four months in their existing lease, assigned it. It was subsequently reassigned on two other occasions and on the last occasion, three months before the five-year period of the lease, the building was suspiciously destroyed by fire. The insurance company went back through the assignees and found that the best option they had was to go back to the original lessee with something like an $180,000 claim through the Supreme Court. At this point in time, they look like winning. The original lessee knew nothing about what had transpired. We encourage all our members at the moment to make sure that that does not re-occur.

The final point is about rent reviews. We had a recent case in WA which is referred to now

affectionately as Ossmun v. Woodward in which the rent assessment review was based on CPI, or market, to a minimum of 10 per cent. It was acknowledged by the Commercial Tribunal of Western Australia that that was a contradictory term. If it was fair and equitable and fair market rent, then you cannot say a minimum of 10 per cent; therefore, the ruling was that it was incorrect. It is now being challenged in the District Court by the agents involved. It is highly illogical that considerations and mannering in which rent reviews are drafted should be of that order.

In the consideration of time, and the fact that all other points have been highlighted, could I refer specifically to the situation in Canberra. By far, the most contentious point applying over here in WA also applied in Canberra regarding trading hours and the deregulation that has occurred over there. For the sake of our members, I can assure you that we will be opposing deregulation of trading hours in the strongest possible terms in WA and we look forward to having the support of the political parties in the upcoming election in this regard.

It is noted that Canberra, after their 1993 introduction, are now desperately trying to reinstate and re-regulate trading hours. The other point is that the micro-business consultative group have their reference on fair trading. We concur entirely with all the situations that have been proven under that particular group and support them 100 per cent.

CHAIR—Thank you for the detailed introduction to the Western Australian retail industry.

Mr Rathmann—The WA Council of Retail Associations.

CHAIR—Having had experience in the retail industry over the year, I understand some of the things you are talking about especially the assignment of lease process. It is quite an interesting aspect.

Mr Rathmann—Very good.

CHAIR—The Property Council of Australia met with us last week and they said that every state in Australia and the ACT are pretty happy and that generally fair and reasonable lease legislation was Australia wide, protecting retail lessees shopping centres. Given what you have just said, would you like to comment about that?

Mr Rathmann—I would like to comment on two things regarding the leases themselves. I am called upon a number of times to review leases that are presented to tenants, and even within one shopping centre anything up to five or six different types of leases exist. Also, there is the manner in which they have been drafted and the legalese implied in those.

It was only the week before last where I gave the strongest condemnation that I could impose on a centre manager that such a lease should never have been tabled to a prospective tenant. He did, subsequently, withdraw it and replace it. The two things in WA is that there is no uniformity of lease drafting and, even worse, there are some gross and very blatant over-legal type documents which I would challenge even a lawyer to understand.

CHAIR—The property council also says, as it understands it, that, if a tenant is required to relocate, they will help or 100 per cent fund the relocation. Have you got an opinion on that?

Mr Rathmann—Yes. I had a relocation within a shopping centre on Saturday and I will describe that one first. Relocation was being imposed—I will use the word 'imposed' for a start—on the tenant because it was becoming obvious with the number of vacancies that were occurring it was far better to have all the vacancies in one block. Therefore, they approached the last remaining tenant in that area and said, 'We will relocate you over there, but the cost is going to be of the order of $30,000-odd. We will assist 60-40,' with 60 per cent being for the managing agent.

Yes, relocations occur, but I would highlight first of all why we have relocations. It is being forced on the industry at this time basically because of the disadvantageous situation that is occurring with a number of vacancies.

CHAIR—Before passing to my colleague there are just a couple of minor points from your suggestions. You said that there is a reason for this major development in Western Australia but you did not quote what the reason was.

Mr Rathmann—Thank you, Mr Chairman, I digressed. There is a very obvious reason why that is occurring, and that is local government. Local government is enticing development into their areas to obtain the increased revenue from land taxes and other taxes applicable to the local government. Local governments are vying with each other at the moment to have this sort of development take place.

It said in this morning's paper that Joondalup's development has not proceeded, much to the annoyance of the tenants because they were given grandiose plans of what would happen to the centre and all the developments that were going to take place. They have been charged enormous costs in installing not only themselves but also the rents that they pay there in anticipation of that. Those developments did not take place. Now, of course, Joondalup wants to extend further.

CHAIR—You are suggesting that it is a benefit for the local council to have an increase in retail floor space in their local area because of some sort of transfer of tax?

Mr Rathmann—Correct. They get far greater income from having a shopping centre development in their area than they would through any other sort.

CHAIR—Is that specific to Western Australia?

Mr Rathmann—I can only comment on WA. I have no knowledge of the other states.

CHAIR—I have one last question before passing to my colleague. It has been argued in Melbourne by legal people that there is not enough disclosure prior to going into a lease and that people going into a lease should understand that they should be returning their investment within the lease period and any extension of that really is a bit of a bonus. Generally, are the retailers going into these leases with the full knowledge that they have to return their investment within the lease period?

Mr Rathmann—Here we have a most awkward situation. I would say that in the majority of cases they are advised of what the financial implications are of moving into the situation. What is happening is that the door turnover figures that are given as to the number of customers going to go into those shopping centres are vastly inflated or are overoptimistic, at best.

The tenants base themselves on the fact that, if 40,000 people are going to go into that shopping centre per week, they can get five per cent into their shop and sell $100 per customer. So they can work out what their anticipated turnover is going to be. They are smart enough in their business acumen to understand that. But what subsequently is happening right at this point in time is that the actual numbers of customers are far below what was anticipated.

CHAIR—Do you get the same in established shopping centres? For example, where someone may have four years left on the lease to run, they pay a goodwill and then expect to renew their lease at the end of the four-year period, but at the end of the four-year period the owner says, 'We do not want you or that tenancy any more.' Did they know prior to going in that that might happen?

Mr Rathmann—In the case where they are taking over another lease how you have described it, they should look to the previous tenant's turnover figures to see whether that turnover did exist.

CHAIR—But do these people going into established premises have a certain lack of knowledge? Do they not know the full ramifications of returning investment within that lease period left?

Mr Rathmann—I hear what you are saying, Mr Chairman. Herein lies another major problem—that is, the lack of understanding and knowledge that can exist amongst tenants. Some are more professional than others. We in WA have been through a situation where there has been a considerable number of early retirements. Those people have a considerable amount of money to invest, but find that they cannot get employment elsewhere. So they say, 'Wouldn't it be nice to be my own boss, have some facility that I can move into?' and take it from there.

Unfortunately, I tend to get involved far too late after they have signed the lease. They have had an offer to lease and then they have subsequently signed the lease. Then only a matter of months down the trail, they suddenly find it has not shaped up to the extent that they would have anticipated.

CHAIR—The issue of goodwill can also be debated as to what is goodwill certainly in a retail sense.

Mr Rathmann—My prediction is that in a matter of months goodwill will be a thing of the past. Goodwill is fast disappearing amongst the retail industry at the moment. People who paid about $100,000 of so-called goodwill to buy a business are now finding that they will be glad to get out of it for $20,000, $30,000 or $40,000 losing that goodwill. That no longer exists. More rapidly it diminishes and it is no longer in existence for the next one.

Mr BEDDALL—If I can follow through with a few questions in relation to leases. From the hearings we have had around the country, it seems to me that, obviously, the major cause of dispute between tenants and landlords is leases. You gave an interesting illustration about a person who had signed a lease and,

subsequently, there was a claim. If I remember you rightly, you said that they had only been in the business four months and then they signed the lease.

Mr Rathmann—Yes.

Mr BEDDALL—I wonder where legal representation is. Perhaps you can tell us what sort of relationship you have with the Law Society. For any assignment of a lease no matter what is it in business the lessee is ultimately responsible. That is the law. It has been certainly around the country. It seems to me that there are a lot of lawyers out there collecting fees under false pretences because many people are signing leases that they do not get advice on. Do you have a relationship with a law society? Is there a requirement in the Western Australian act for all tenants to make the lease available to themselves before entering into it? Is there a cooling off period? Finally, it seems to me that all the states have failed in this, and perhaps it is time now for national laws.

Mr Rathmann—Excellent. You have made some very pertinent points. First of all, I know the Executive Director of the Law Society extremely well. I am on two other committees with him, so I meet with him quite frequently. I will be meeting with him again tomorrow night at 5.15. A more direct answer to your question is that we have our own law firm that acts on our behalf. We have concessional arrangements, so to speak and, therefore, we have the strongest and most professional legal representation we can have in this state.

Getting back to the point as to the offer to lease, there is a clause there that recommends that you should thoroughly peruse and review the situation with your accountant and any other adviser, if I remember the quotable quote rightly. I can provide you with that statement. It does not say legal advice—'any other adviser'—but it does say accountant, which I agree with as well. The naivety of the particular tenants, when they move into these situations, never ceases to amaze me at times. There are some who are more professional than others.

As far as any escape clause—a cooling off period—is concerned, unless that is agreed to before, then it is not a standard procedure here in WA to do that. I had better clarify that. With that four months lease situation, they had to give up the business because the wife took severely ill and the husband could not continue. So it was not as though there was a crash of the business in that case. It was a personal situation in which they had to forgo the continuity of the tenancy.

As far as there being a national advisory type group, I feel that there should be something. It should be drafted nationally and covers all of the aspects regarding the legalities, the terminologies and the wording of leases. It is long overdue. For every lawyer in town here, you will come up with a different version of lease. Some of them are so wrong, so outdated and so amateurish that it is a major concern. Something needs to be done for a uniformity of leases.

Mr JENKINS—I want to clarify what Mr Rathmann was actually saying about goodwill. You are saying that, because of the state of retail in Western Australia, the value of goodwill for businesses is dampening.

Mr Rathmann—It is dropping dramatically. I will rephrase that if I did not use that terminology before.

Mr JENKINS—The other aspect was that we have become aware during the inquiry that many businesses are not really aware that goodwill lasts only for the length of the lease and that, at the end of the lease, goodwill will have evaporated. I was just clarifying the two phenomena. But you are definitely saying that the value of goodwill has dropped.

Mr Rathmann—If I may, I will just clarify the situation regarding delicatessens. With regard to delicatessens, you could have paid goodwill by virtue of its clientele, location and so on, especially in smaller suburban areas, in the order of $100,000. That would have been fair some four or five years ago. Now they are worthless. Nobody in their right mind would buy a delicatessen. I strongly advise any prospective member or member that comes into my office not to buy a delicatessen—not even to consider it.

Mr BEDDALL—Plus the unique circumstance of delicatessens.

Mr Rathmann—Do you want to know what the unique situation is of the competitive nature? Or the description of the shop?

Mr BEDDALL—Why has that changed?

Mr Rathmann—Probably No. 1 on the list is service stations now opening up and able to trade as delicatessens, supplying the sweets and the drinks, and so on. It is not that there is no control. I can think of one shopping centre that has 10 shops and six of them now have either the refrigerated cabinets and the sweet type things to complement what they do—even the fish and chip shop, in one case—mainly just to try to exist and have some other product line.

Also, there is pricing. Something that I have not had a chance to mention is the situation with delicatessens. Our existing members—as they do now—watch for the special purchasing that exists. The whole family goes around to Coles, and they buy a carton each of the drinks and take them back to their shop and add a cent, or whatever. That is because they cannot buy through their own cooperative wholesaler cheaper than they can buy from Coles. Service stations do this now. They cannot buy coca cola cheaper from coca cola than they can from Coles. The monopoly that they have is so enormous.

Mr BEDDALL—It is retailing at times in Coles at 42c a can.

Mr Rathmann—They dictate the terms to the wholesaler.

Mr MARTYN EVANS—How are the market forces operating in respect of leases in the context of the situation you described in Western Australia—the highest level of shopping in the world, in effect, and, as you mentioned, a large number of vacant shopping centre premises? Where you have that situation of oversupply and vacancies, one would normally expect, in the other context, that this would put a fair bit of power back in the hands of small business operators. How is that situation working out?

Mr Rathmann—The offers being made by some managers at the moment are six months free rental and three months free rental to entice people into the environment. I might add, the starry-eyed tenant will think, 'Aha! No cost for that period of time, and that will allow me to get established and take on from there.' They had the confidence and the will to be able to succeed. Unfortunately, the practicalities do not win out in that respect in the long run. So there is a lot of competitive bargaining going on at the moment in the sense of enticing people into shopping centres.

CHAIR—Are rent free periods used to inflate rentals, inflate the value of the property?

Mr Rathmann—The nature of the question suggests you have heard something before, Mr Chair. Let me answer the question.

CHAIR—Or done something before, perhaps.

Mr Rathmann—Let me clarify. My discussion last week with, I repeat, a major investor and centre manager—he looks after two of the major shopping centres in this state—was to say that on the books they want to retain a rent value at a certain level, say, $800 a square metre. What the tenant pays is another figure that is lower. So they have an arrangement whereby the so-called rental value of the tenancy is not the same as what the tenant is actually paying.

CHAIR—Therefore, the shopping centre down the road that is looking for a rent review would compare the shopping centre up the road—which has inflated rents—quite innocently.

Mr Rathmann—Exactly. The figures for market rent reviews are like the stock market—I have long since withdrawn from the stock market—because of what happens. Again, they run in cycles. The interesting one that is easy to visualise is coffee lounges. Coffee lounges down in Fremantle are very much the vogue, very attractive—al fresco arrangement, and so on. It is great. All visitors here should go to Fremantle.

The point is that the rents negotiated down there in the environment are such that they can be put at a higher level. Once that level or that plateau is achieved, that is used for consideration for other coffee lounges in Armadale or wherever—all the various locations. The interesting point is, once all those other coffee lounges were brought up to that same level, guess what? They started back in Fremantle again. Now the whole state is paying this, but you are better off because you have better trade. So on it went again.

The interesting point is that sports goods stores were the next ones to follow. Everyone had to have a pair of Nikes. Even grandads like me had to have a pair of Nikes. It was that way. So the whole concept of sports goods and the selling of sports equipment actually rose to a new level. That, again, we noticed immediately amongst our sports lockers and so on. Our members were able to appreciate what was going on. So that manner in which the whole market review system works is done very efficiently by centre managers.

Mr BEDDALL—I will take you back. I think you have quantified a couple of things there. There has been a major shift in spending patterns in Australia, which I think has now been clearly identified. It is from retail to leisure. Whereas your coffee lounges will fit the leisure side, not the retail side; the sports store fits the retail side. I am just wondering whether there is an awareness amongst your membership that that shift

has taken place. Obviously they know the sales are down, but are they aware there is a quantum shift that has taken place? A lot of it is to do with the abundance of gambling outlets, et cetera, that now are right across the country. In fact, those retail sales may never come back, because there has been that quantum shift in spending patterns.

Mr Rathmann—I hear and I agree entirely. To convince people, though, that that is occurring and to get the message through is not an easy task. But, yes, the whole concept is changing. At the moment people are purchasing the basic things, but the exotic lines are no longer now.

Mr BEDDALL—Could I just intercede. You obviously get in with the Property Council on a regular basis as well.

Mr Rathmann—I do.

Mr BEDDALL—Are they aware of that in discussing this with you about the changing pattern that is going to take place?

Mr Rathmann—Yes.

Mr BEDDALL—It is frightening for their big centres.

Mr Rathmann—It is. Yes, I am fully aware and the discussions are there. My opening comment was that our representation is for the micro businesses—the smaller businesses who have fewer than five persons or family concerns. They are not in the same league as the forward thinking—

Mr BEDDALL—They are the ones who are going to take—

Mr Rathmann—They are now in survival mode losing their homes and in some cases, unfortunately, their lives because of the high emotion that exists out there at the moment.

CHAIR—I have one last question. You said on page 8 of the council's submission that you indicate support for amendment to the TPA, Trade Practices Act.

Mr Rathmann—Yes.

CHAIR—What amendments would you like to see?

Mr Rathmann—That is a good point. That is about harsh and oppressive conduct. It is of interest to note that just prior to the last federal election the Labor government, through Senator Schacht, was in the throes of making submissions regarding the harsh and unconscionable conduct laws that exist at the moment. It was not put through parliament, but I may stand corrected. Maybe all of you would be able to help me as to what the situation was in parliament at that time. The situation is that it is now before the Liberal Party. We trust that something dramatic will be done under many different aspects of the Trade Practices Act—

CHAIR—Hence this inquiry. What would you specifically like to see change within the act and this particular harsh and oppressive conduct that you are talking about?

Mr Rathmann—I think it gets back to the point of having something that is more fair and equitable to all parties involved. At the moment, through ACCC or whatever, there are no ways of specifically and positively controlling the conduct of those people who wish to monopolise the market, which is happening with the larger retailers at the moment. I add to that the anti-monopoly situation in particular. Whilst Coles-Myers and Woolworths have just under 70 per cent of the retail market at the moment, they are already indicating to their shareholders that they are aiming for 90 per cent by the turn of the century.

CHAIR—It has been argued before that perhaps retailers needed consumer protection. Would you support that?

Mr Rathmann—Yes.

CHAIR—Would you like to summarise your evidence so far?

Mr Rathmann—Yes, thank you very much. I re-emphasise the particular summary of the fair trading situation as developed by Micro Business Consultative Group. As a group, we were not involved in their original derivation of this document. We were quite enthused to find that we were invited towards the end when a lot of the resolutions had been made to find that so much that they had developed was in keeping with our own thoughts in this regard.

I want to re-emphasise the situation regarding trading hours and their deregulation in this state. Every other state has deregulated. We will be very interested to see what happens in Victoria as a result of the Premier's action recently. I do not know whether WA is peculiar in any way or not. We have a lifestyle and a community existence that does not require deregulation and the extension of trading hours.

The final point is that over recent weeks we as a council have been meeting with persons of all persuasions who intend standing at the next state election. One person who I will not name stands head and shoulders as an independent. His first approach was to go to the seven shopping centres in his electorate and speak to the retailers. Then he spoke to the customers. When he came to us, we sat down and asked, 'What is your impression of things? What is to happen in this state?' He was spot on in our opinion.

He knew what was going on by reading the minds of those that operate in shopping centres. When we had a meeting on trading hours almost two years ago, it was no problem whatsoever to call a meeting of our members and have over 1,000 overfilling the octagon theatre at the university. What we plan on doing for the state election through our members is going to be quite vast and quite considerable. We will very strongly be supporting small retailers whom we will not allow to perish under the situation that exists at the moment.

CHAIR—Mr Rathmann, you also mentioned that you would submit the commercial tribunal report and the green paper from the WA commercial tenancy act. Is that still possible?

Mr Rathmann—There is the commercial tenancy—that is the green paper—and the commercial

tribunal report. They are freely available.

CHAIR—It is proposed that the documents marked *Commercial Tribunal of Western Australia report to the Attorney-General for the year ended 30 June 1996* and the *Commercial Tenancy Retail Shops Agreements Amendment Bill 1996,* which is a green paper, be taken as evidence and included in the committee's records as an exhibit. Do members have any objections? There being no objection, it is so ordered. Thank you for your evidence today. It has been very enlightening.

[1.53 p.m.]

GREIG, Mrs Josephine Bona, 2/54 Preston Street, Como, Western Australia 6152

GREIG, Mr James Angus, 2/54 Preston Street, Como, Western Australia 6152

JOUBERT, Mr Phillip Richard, 96 Aulberry Parade, Leeming, Western Australia 6149

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 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. It has been suggested to me that you may want to go in camera. You either have all in or all out. That is a decision you want to make now.

Mrs Greig—It is all right. We will have all in.

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

Mrs Greig—We have prepared a document which I have made six copies of. I would request that I be allowed to read it. It will take about 15 minutes, if that is all right. Perhaps questions could arise from that.

CHAIR—That is fine. Please go ahead.

Mrs Greig—My name is Josephine Greig. I am speaking on behalf of my partners James Greig and Phillip Joubert about our business called Chicken Feast. I would like to take this opportunity to thank the committee for allowing us to state our case.

When we arrived in Australia four years ago, we decided to invest our life savings in a business in an endeavour to provide employment and to establish ourselves in Australia. While we may not have had retail business experience before, we are all well educated and have had many years employment in the business and educational fields.

When we purchased our business, we were informed by our lawyer and an accountant that the lease was a typical shopping centre lease which was heavily weighted in favour of the lessor but that all shopping centre leases were the same. The pitfalls and dangers of the lease agreement, however, were not emphasised, and we entered into this agreement in good faith. These leases are drawn up by experts in their field and are geared for the sole benefit of the lessor. They do not always operate within

the confines of the limited legislative protection provided to tenants, and any grey or ambiguous areas are exploited to the full.

I would like to highlight some of the important issues that affected us, which eventually led to the closure of our business, as well as some possible recommendations.

1. Leases are totally biased and one-sided in favour of the lessor. Federal and state legislation should be put in place to afford more protection than there is at present for tenants. The Commercial Tenancy Retail Shops Agreement Act should address every single aspect drawn up in a typical lease, and contradictory clauses should not be permitted. The present act is limited and provides very little protection, if any. A government body should be formed to ensure that such legislation is enforced and penalties meted out if necessary.

2. Shopping centres are run by a managing agent on behalf of the lessor. The tenant is required to cover the managing agent's fees, as well as the shopping centre expenses. Managing agents are accountable only to the lessor and themselves and not to the tenant who pays their fees. Managing agent's fees should be borne by both lessees and lessors, and the managing agent should be accountable to both parties. Presently, a lot of managing agents treat many small tenants with contempt and exploit them ruthlessly.

3. It should be a requirement for a tenant association to be formed in shopping centres, incorporating all small tenants, so as to ensure that they are able to participate jointly from a position of strength in matters that affect their future. This is totally contrary to the present set-up whereby managing agents apply the 'divide and rule' policy to their maximum advantage. Association members should also be protected from intimidation by the managing agent and lessor.

4. Often rent levels are based on alternative annual CPI and market rent levels. This was the situation in our case. Market rent levels are determined by managing agents and the lessor and, in many cases, these increases do not conform to the Commercial Tenancy Retail Shops Agreement Act. The act defines 'market value' as the rent obtainable in a free and open market if the premises were unoccupied and offered for rental for the use permitted by and on the same terms as are contained in the current lease. The lessor's current market values lean primarily on the principle of 'comparative market values' irrespective of the nature of the business, which are subjective and open to speculation and manipulation, rather than the principle of a prospective tenant in a free and open market as embodied in the act. This is borne out by a discrepancy, as in our case, of a demanded 33 per cent rent increase compared with a four per cent CPI increase over the corresponding period. How can this be permitted in a static economy?

When an existing tenant is forced to pay an unrealistic rental increase, as in our case, he would be doing so under duress. This increased rental is then used as a yardstick for further rent reviews, thereby inflating true market value which should be based on decisions in a free and open market. Thus we have a situation where there exists two so-called market values: one based on a free and open market, and the other based on what existing tenants are being forced to pay because they are locked into the system and have too much to lose, which undermines the free and open market policy as propagated by the act.

5. The ratchet clause is a contradiction in terms to the free and open market policy propagated by the

act by preventing the reduction in rental levels if so determined and should be abolished in all its guises.

6. Elevating the value of the lessor's investment by unrealistic rental and variable outgoing increases the equity of the lessor while decreasing that of the lessee. It also results in increased land rates which are passed on to the tenants. All this increases costs while reducing employment opportunities further.

7. Percentage rentals on turnover are an additional cost to the tenant and legislation should be introduced to stop this practice, particularly when there is a downturn in business and the tenant is forced to maintain the higher unrealistic rental despite a drop in income and business generally in a centre. The provision of monthly turnover figures provides large conglomerates with the upward and downward market trends in every sphere of retail operation, and fair competition is eroded by this practice. Provision of such figures should not be permitted.

8. Dispute procedures are long, arduous and expensive. Time is of the essence for the tenant but unimportant for the lessor. A quick resolution therefore is not crucial to the lessor as the terms of the lease ensure that he obtains the asking rental increase immediately, and adjustments are only forthcoming after determination. Delay tactics are used by managing agents and lessors in settling rental dispute issues. By the time an agreement has been reached the business could have been forced to close down, as in our case. A government department should be formed, or an existing one should be given more power, to deal with dispute procedures quickly, efficiently and inexpensively for the small tenant. Decisions should be enforceable with large fines or more for transgressors.

9. We were presented with a 33 per cent rent increase three months after the rent review date. The proposed backdated increased rental payment was demanded in full. We informed the lessor that our business could not sustain such an unrealistic increase, and the process of negotiation and dispute began. The delay tactics mentioned above were implemented. We were threatened with legal action at our expense.

During negotiations we were informed that no legal action would be taken until resolution. Shortly thereafter, we were then given 24 hours to pay the disputed backdated increased rental. A summons was then issued on us after we had informed them that we had applied to the Commercial Registrar for resolution. The legal system affords very little assistance to the small tenant and merely contributes to his financial problems. This department should provide all the necessary information to tenants where they have been issued with legal action against them to eliminate the practice of intimidatory tactics.

10. Lessors have large amounts of money budgeted for legal expenses and do not hesitate to verbalise this fact to tenants who may wish to challenge a situation through the legal system. These funds are generally not available to small business operators and therefore an economical and efficient mechanism for the tenant is required to resolve disputes. The legal system benefits the party that has the financial means to sustain legal proceedings. Legal assistance provided to us was costly and with little benefit, as the long-term prospect of protracted legal proceedings prohibited us from following our case through to its rightful conclusion.

11. In some cases the 'anchor stores' pay a fraction of the rental of that being paid by small tenants. While this may be justified in some cases, the difference in rentals should be within reason and not always at the expense of the small tenant. Anchor stores should be forced to pay competitive rentals to level the playing

field.

12. There is no department with the adequate ability to enforce a ruling for the benefit of the small tenant at reasonable cost to the tenant. The Commercial Tribunal needs to be given wider and stronger legal powers. There is no point in a small tenant taking a case before the Commercial Tribunal, winning the case, and then having the same issue challenged in another court. This is happening and, in most cases, the small tenant is worse off for his efforts. Penalties for those who blatantly abuse their positions should be significantly increased and enforced by a government body. A mediation body should be party to the negotiation and decision of leases and lease renewals. Individuals invest large sums of money into businesses and, unless there are serious transgressions of lease agreements, leases should be renewed.

13. Lessors have all the power over the equity in a small tenant's business. There is no impartial body to adequately mediate in dispute situations between lessors and tenants covering aspects right across the board from lease agreements, rent increases, lease renewals, variable outgoing costs, to compulsory membership to tenant associations et cetera, all of which leaves the small tenant open to continued exploitation. Our application to renew our lease was refused on two occasions, thereby removing the equity in our business. We were then subsequently offered a 30-day tenancy, but this affords no benefit to the tenant and should not be permitted.

Bankruptcy rates are up by 60 per cent on the previous year in Western Australia, yet there are no constraints on demands made on tenants. The consequences of an economic downturn should be borne by both the lessor and the lessee. In many cases the lessor's investments are protected by totally biased lease agreements. This must surely be the only business in the world where, in an economic downturn, the lessor continues to secure massive increases in revenue from those that can least afford to pay.

Eleven months have passed since our rent review date. During this time we were forced to close our business three months before the termination of our lease. There are two summonses that have been issued against us by the lessor and are still pending. We have made application to the Commercial Tribunal, and this has been adjourned pending a response from a meeting with the managing agents. Three weeks ago we met with the managing agent in an endeavour to reach a settlement. We are still awaiting their response.

The chain of events leaves one with the strong opinion that shopping centre leases are drawn up and planned in such a way as to extract as much financial gain from a small tenant within the initial lease cycle, leaving the tenant divested of all his equity. He loses everything. They then bring in the next prospective unsuspecting tenant and the cycle repeats itself.

Australia is suffering from a static economy. Because of the lack of government intervention to prevent the exploitation of small business persons, those productive, hardworking, business people are now beginning to say that it is not worth it. We are now in the position where we have to sell our house and car in an endeavour to clear a business loan that should have been reduced over the natural term of the lease. We have been relegated from hardworking, tax paying, employment generating citizens to unemployed, ageing citizens drawing on social security, and we still face the risk of being forced into bankruptcy. A viable small business that sustained full-time employment for five people and part-time employment for four people is now closed, all due to the excessive power in the hands of the managing agents and lessors.

This inquiry and any future legislation has no bearing on our situation, as we are already out of the system. Our contribution is purely because we feel morally obliged to expose our plight and, hopefully, in some small way lay the foundation for future much needed change.

The following is a summary of recommendations which need urgent attention:

1. Federal and state legislation needs to be improved to ensure protection for the small tenant;

2. Managing agent's fees should be borne by both the lessor and the lessee;

3. Compulsory tenant associations should be formed in shopping centres;

4. Market rent level procedures need to be addressed to prevent the exploitation of small tenants;

5. The ratchet clause should be eliminated in all its guises;

6. Protection of the owner's equity at the expense of the small tenant should not be permitted;

7. Percentage rentals on turnover and the provision of turnover figures should be eliminated;

8. Dispute procedures need to be redefined;

9. The legal system needs to provide a more cost-effective service to small tenants;

10. The benefits to anchor stores need to be addressed;

11. A government body should be formed with adequate powers to enforce policies;

12. The equity of small businesses should be protected;

13. Large expenditure requirements, such as the renewal of shop fronts within a lease period, should be curtailed or offset against rental decreases;

14. City planners should be aware of the problems emanating from the continued erection and duplication of retail outlets;

15. extended trading hours should not be enforceable by law.

The most pressing issues here are the need to curtail excessive so-called market rental increases and variable outgoing expenses. Variable outgoing expenditure should be tightly controlled with quarterly audited reports submitted to tenants. Expenditure should be justified, necessary and agreed to in advance by all parties concerned. Mechanisms should be put in place to ensure that this happens. Thank you.

CHAIR—During your submission you mentioned that you had a rent review and that, after 11 months of disputing that rent review, you ended your lease which had three months to run. Did you buy the business as an ongoing business which had only 15 months to go or what?

Mrs Greig—We purchased the business when it was a year old. It was an ongoing business and we ran it for four years. So the three months before the end of the lease was after a four-year run.

CHAIR—Was there only one rental review in that period?

Mrs Greig—No, it was the second market rental review. The first market rental review was 17 per cent, and the second market rental review was in the last year of our operation, which was the largest market rental increase.

CHAIR—Was there any appeal process at all within the lease where you could go to get an independent decision?

Mr Greig—Yes, we went through the whole procedure. It started off with the appointment of a valuer from our site and then a valuer from the lessor's site. They disagreed completely. The lessor's valuer wanted the full increase, and our valuer said there was no justification in an increase in the present economic climate. It was not resolved there. We then applied to the commercial tribunal for resolution. That carried on, with the lessor coming back saying that we were premature in our application. They stalled the situation.

We said that we needed to resolve the situation and that we could not pay this rent increase. They then issued us with a summons, which meant that we had to assess our situation. We had to close our operation. It was unfortunate with three months to go before the termination of the lease. As far as we were concerned, there was no compromise on the rent increase. Once we had closed the business, we met with them and they thought it was a rash decision to make and that it was only words. When you get issued with a summons, it is not only words. We were intimidated by this.

CHAIR—What have they done with the tenancy since?

Mr Greig—It has not been rented out. The lease comes to an end on the 10th of the next month, so it has not been filled.

CHAIR—How many tenancies are there in this location?

Mr Greig—In the food court which we were in, there were eight tenancies. We closed, and I know of others that were having a lot of difficulty. It is really an economic decision and we had to decide. We had to decide with that rent increase whether we wanted to accrue further debts or close our operation. We were forced into closing.

CHAIR—Other than the summons, which is a serious matter in itself, you mentioned that managing agents treat many small tenants with contempt and exploit them ruthlessly. Do you have any other examples of that other than your own case?

Mr Greig—Yes. In the four years we operated, I cannot recall any compromise situation. When we first opened the business, the food court that we operated ran extended hours. The actual shopping centre did not. They closed at 5 and we ran through to 8 o'clock. As a body, we questioned that. We said, 'It is really not worth while staying open those extended hours. People do not know the food court is open because the bulk of the centre is closed.' We were led to believe that there had to be a consensus of opinion to close. Most of the time, it was about 80 per cent agreement but it did not happen.

A proper representation was not made to the owner on this aspect. We questioned the terms of reference, and we subsequently found that it did not have to be a consensus of opinion; it had to be a majority, and the owner had a certain number of votes. It was eventually implemented, but it was a really protracted exercise. We lost money there, and so did everybody else because people did not know that the food court was open. The food court is a very small portion of the shopping centre. That is one example I can quote.

Mrs Greig—I can quote another example. We had a chicken shop which was in competition with Red Rooster and Kentucky Fried. Our line of food was almost identical. When we first moved into the centre, we only had Red Rooster. Some six months afterwards, we received notification that a Kentucky Fried Chicken was being erected and that was normal retail practice. We then applied to centre management to increase our menu slightly to incorporate some lines that had a higher profit margin than chicken alone had. We met with them and they indicated that, if we submitted a written application, it would be given serious consideration. It had a detrimental effect because they came back to us and said, 'We noticed that you are selling one or two items that are not highlighted in your present menu. We want you to stop selling them.' They were high profit selling lines. They also said, 'We are not going to increase your menu in any way at all.'

With the downturn in the economy, Red Rooster and Kentucky Fried Chicken, as you can see from all your TV adverts, have had to drop the price of their food to costs far below what we could afford to pay to bring in. There was no way that we could increase our prices to cover a proposed rent increase that they were asking. That is just one significant issue.

Mr BEDDALL—You said that it was three months before the end of the lease when they came for the rent increase. Do you feel you were being used as a stalking horse for other tenants? I imagine that all the leases were coming to fruition. Is that right?

Mr Greig—Yes.

Mr BEDDALL—So if you paid the 33 per cent rise, market rent for everybody else in the food court would have gone up. Was that the impression you got?

Mr Greig—No. Increases came about with other tenants before us. We were verbally told that we could expect somewhere in the region of 40 per cent. We started questioning that, saying that we need to resolve this before it comes about. We were told that one of the other tenants who has a number of outlets in WA spoilt the situation for the other tenants, because they contested their rent increase. It went to the commercial tribunal and they lost their case. This set that high level. That apparently did not happen. They did take it through and there was a compromise. I gather it was more in favour of the tenant than the lessor. I

do not know if I have answered your question.

Mr BEDDALL—Have we got on record where the tenancy was?

Mr Greig—It is Chicken Feast in Belmont Forum shopping centre.

Mr BEDDALL—Who is the owner?

Mr Greig—It is Perron Investments.

Mrs Greig—I would like to make a statement with regard to the rents. At the meeting we had with the managing agent just a while ago—and I hope this does not compromise the meeting that we had—they indicated to us that they would consider a settlement figure that we proposed. One of the requirements that was intimated to us was that the lessor would accept a compromise on condition that we accepted the proposed rent increase as being market rent.

In a situation like that we have no choice but to say, 'All right. We are in a situation where you are suing us for a large amount of money, and it is increasing daily.' We could refuse that, or we could say, 'Fine, just to get us out of this situation so that we can move on and continue with our lives we will accept that.' On paper they can write and say that the market rent is whatever—$920 a square metre or whatever it is. So they have that rent increase on paper but, in real terms, they do not have the money, and that is what is happening.

Mr Joubert—Very briefly, it was not just the rent increase we were looking at as well. There was also an increase on the variable outgoings to the managing agent which the managing agent and owners seemed to perhaps not always let each other know what was going on. But it was not just a 33 per cent rent increase overall in the business; it was more, if you take into account the variable outgoings.

In relation to the episode that Josephine mentioned on the shopping centre itself, they said that unless all eight members of the food court agreed to close earlier it would not happen. It sounds fair but what actually happened in reality is that the all the doors on all the sides of the centre were closed, so anybody driving past at any time of the night would think, 'Jeez, the shopping centre's closed.'

They still insisted on high rent increases and variable outgoings, not only for ourselves but for the other people in the food court to a degree. But then they started adding on, as Josephine mentioned, Kentucky Fried Chicken. They said, 'But don't worry. It's your fault if you're not a good operator and if you are operating badly. You should be able to compete.' Morley came up during that period. We made requests to the central management and said, 'Look, we're using money operating. It's no good selling $25 worth of food if you have an $80 bill,' or whatever it was at the time, but it was certainly more than what you were getting in in terms of labour. We said, 'At least let us tell people that the shopping centre is open. Let us put a sign outside—like they have at Kentucky Fried Chicken or Sizzler—saying "Food court open tonight. Come in and buy some food."' That was not allowed. It was just thrown out. There was no reason given and we were told not to question it.

One of the suggestions in desperation by another tenant was if we could put a little truck out there with a little sign on it that said 'Food Court' flashing or something. That was not allowed. I just question it in my mind. On the one hand they say you will pay the rent, but on the other they say they will close all the doors so people cannot even walk in, except the one small door next to the food court. It can be in relative darkness. It can be closed so that people do not know it is open, but we will not allow that.

I can only surmise. I do not know. Is it because it was better to look after Kentucky or whatever? I do not know. Conversely, the other thing that flows through my mind is if you are going to not help those tenants, then why not at least close it earlier? Subsequently, after a lot of people lost money over the two- to three-year period, they then had the meeting in which the owner's representative came in and said, 'Oh, no, it doesn't have to be all eight of you confirming that you want to close. You only have to have a majority vote,' but by then you have lost all of that money. During that period, of course, the rents continued to go up.

So that is a small example of what I would say is abuse. You said in one statement, 'Do they treat small tenants with contempt?' I would say that that is a good example of something that is coming out of it.

CHAIR—I just want to qualify something. Are you talking about the agent and the owner's agent as being two separate people?

Mr Joubert—Yes.

CHAIR—You have a managing agent and you have an owner's agent.

Mr Joubert—That is correct.

CHAIR—And the managing agent was the one that said, 'No, you need more people saying yes.' Yet, the owner's agent, when confronted by this directly, said, 'No, that's not the case.' Is that correct?

Mr Joubert—Yes.

CHAIR—So there has been a misunderstanding between the owner's agent and also the managing agent as to the—

Mr Joubert—A misunderstanding, or—

CHAIR—We do not know, but we can only assume one thing. You did not have access at all to the owner?

Mr Greig—No. It was through the managing agent. At one stage the managing agent just said, 'Look, I'm not prepared to pursue this issue any more.' Once we started questioning it, then, for the first time, the owners' representative was present at one of that meetings and that is where we cast the vote.

Mrs Greig—When I attended a meeting in the beginning I requested a copy of the constitution because a meeting is not legal without a constitution. We were told that there was no constitution. I said,

'What is the point of a meeting?' because any decision that is made the owner can then accept or reject. It was only some three years later when I continued to pursue the facts that we need a constitution that one was provided. The owners' representative was then present at that meeting and it was confirmed that in fact a majority—

CHAIR—This is the merchants association you are talking about.

Mrs Greig—That is right. I wanted to highlight a little bit more on intimidation methods. Everything that we may have requested had been rejected over the four-year period and the managing agent has a unique ability to present letters to tenants at opportune moments either when they are having problems disputing rent increases or whatever, and it is usually in the very busy time of their operation. A Thursday night or a Saturday lunchtime is when they will hit you with a summons, or whatever, and in a fast food business where you are running and trying to cope with everything, that sort of approach does not lend itself very well to a person's emotional state job mind. That happened with us and is continuing to happen to other tenants.

Mr Greig—They did not come to see us Monday morning.

Mrs Greig—No.

CHAIR—The point then is how often did you have a one to one with the centre manager? Was it often, or did they deal through phone and correspondence?

Mrs Greig—On a number of occasions—three or four—we had meetings with them. A lot of our negotiation was through letters. We put everything in writing. I have about 75 letters to-ing and fro-ing just in regard to the rent dispute. They are very interesting. In fact, I think there are two major faux pas in the way our situation was handled. I do not believe the lessor has necessarily as strong a position as he might think, but because of my economic situation I do not have the ability to fight it through the courts. I feel that we have been cheated because of that.

Mr BEDDALL—This is my point, and it is a point I have made at a number of meetings. We have commercial laws which are for firms like Kentucky Fried Chicken to deal with the landlord but in many ways we need something better for consumer law. Is that the view you share, that in fact you are outside the law because you do not have the resources to pursue.

Mrs Greig—That is right.

Mr Greig—Yes, very much so.

Mr BEDDALL—Many times you are forced to a compromise because you cannot find the money.

Mrs Greig—Yes.

Mr Greig—The big problem is the leases. That seems to have come up before as well. We are in a fairly dynamic economic environment and when a tenant signs that lease, basically they are signing

everything over to the owner. It is almost like an open cheque. My concern is: as circumstances change, surely there should be a give and take partnership situation. With the leases there is not. The owner can guarantee his return regardless of the economic situation. That is where the tenant suffers, if there is something unforeseen. If you go into a contract where you buy yourself a vehicle, you know what you are getting yourself in for. When you go into a five-year lease, circumstances change and you do not always know that. That is where the problem comes in. We were successful operators but I cannot reconcile a 33 per cent increase with retail trade at the moment. That is something where you can ask, 'How could we even anticipate that?'

CHAIR—Thank you for attending today.

Mr Joubert—Thank you very much for listening to us.

[2.30 p.m.]

FISHER, Mr Nigel Bruce, 24 Tallow Ramble, Edgewater, Western Australia 6027

CHAIR—I welcome Mr Fisher. In what capacity are you appearing before the committee?

Mr Fisher—As a private citizen and as an ex-Copperart franchisee.

CHAIR—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 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 authorises its publication. Would you like to make any additions or alterations to your submission?

Mr Fisher—No.

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

Mr Fisher—Thank you, Mr Chairman. I do not have a great deal to add other than the fact that, as you have seen from the submission I sent to your committee, the bulk of it had already been sent to the Franchising Code Council in February on the belief that it was the protection society, if you like, for franchisees.

From talking to the remaining existing franchisees in the Copperart system, the system which I described in my submission has not changed and in many instances has got worse. Therefore, it comes back to the point that obviously industry self-regulation does not work. I believe there should be parliamentary legislation to safeguard those people going in to the franchise industry as franchisees.

CHAIR—Could you give us a bit of background as to how you got involved with the franchise, what sort of advice you had prior to entering it and whether or not a disclosure document was made available to you?

Mr Fisher—Sure. After 18 years with the Royal Flying Doctor Service, I was tempted away to a major American radio communications organisation. After 11 months with them, that particular company decided that Australia was not making sufficient profit for the American home base and virtually closed its Australian operation. I found myself for the first time in my life redundant and without a job. My wife at that stage was working as a casual shop assistant with Copperart at the Whitford City shopping centre. At that stage we heard that it was franchising.

So, to a degree, the idea of going into a franchise almost seemed like the lifebelt being thrown to the drowning man. However, after getting all of the information which was provided to us by Copperart, we went to an accountant and to a solicitor. Whilst the solicitor said be aware that the agreement is a tad one-sided, the accountant, looking at the figures, said it looks like a very good business. So we invested our money into the company, bought the franchise and off we set.

In the first 12 to 15 months we were very pleased. We worked hard and grew the business. It was then that the franchisor started moving the goalposts a bit. In the last 18 months to two years, the goalposts were so moved that it was impossible for us to make money and we just started losing money hand over fist.

We applied to leave the franchise and asked the franchisor if he would purchase back the franchise from us, and he refused. I then had to take legal redress. I used a solicitor in Sydney and sent a solicitor's letter to the franchisor, which cost me another thousand dollars, and they eventually let us go. So we left the franchise in March. Did I receive any disclosure documents? I received none.

CHAIR—Where were you located?

Mr Fisher—Whitford City shopping centre.

CHAIR—What sort of relationship did you have? Did the centre management deal with you or did centre management deal with the franchisor?

Mr Fisher—Centre management dealt with the franchisor. Except if they wanted to put us in our place, and they would deal with us.

CHAIR—And you paid rent directly to the franchisor who then paid rent?

Mr Fisher—Yes.

CHAIR—So you were totally responsible and tied to the franchisor and there was no communication at all with the centre management? So you paid all your rent, et cetera, to the franchisor?

Mr Fisher—Everything went straight to the franchisor.

CHAIR—Were there other franchisees in Western Australia?

Mr Fisher—Yes. At one stage, we had 10 Copperart franchisees within this state. There are now five franchisees left. Three of them are trying to sell their franchises.

Mr BEDDALL—Is that in Western Australia or Australia?

Mr Fisher—Just purely Western Australia. From an Australian perspective, when we were in, we had up to 85 franchisees. It is now down to about 20 odd.

Mr BEDDALL—What has happened to the rest of the stores? Are they now being run by the franchisor?

Mr Fisher—Yes.

Mr BEDDALL—Or are they closed?

Mr Fisher—No. They have had to be run by the company. They are all now company stores.

Mr BEDDALL—Do you have a feeling there may have been an element of you financing the franchisor for a while until he could get his business back?

Mr Fisher—Yes. He needed the cash injection, and we were the cash injection.

Mr BEDDALL—So rather than grow bigger, he has got back 60-odd stores?

Mr Fisher—Yes.

Mrs JOHNSTON—You said that the goalposts had been shifted in your own case. Could you elaborate on that a bit?

Mr Fisher—Sure. All of the documentation which we received from Copperart to start with stated that we would be getting a 50 per cent margin. Those were the figures that we took along to our accountant along with the previous store trading figures, which subsequently proved to be a bit iffy any way.

Mrs JOHNSTON—You would have known that before you went in, surely?

Mr Fisher—Not for the period of time that the figures were provided. It was before my wife actually joined. In that particular time frame, I had no knowledge. But it made no difference because we made the business grow initially. The things that changed in a major way were the margins which we could get and also the fact that the franchisor suddenly put up another Copperart company store at Joondalup within 10 minutes of our location.

Despite protestations and submissions on my behalf—which basically said that there was not a sufficient population in that particular area who were going to put their hands in their pockets to buy a particular Copperart product and support two profitable stores—the new store still went ahead. We just went down the gurgler from there. In actual fact, the trading figures for both stores now do not even come close to our original figures.

Mrs JOHNSTON—When you take a franchise like that in the initial instance, is there anything within the discussions that you have with the franchisor or in any papers that you sign which says that a store of the same franchise cannot operate within a certain parameter or distance from your own location?

Mr Fisher—No, there is not. A number of more astute franchisees had that placed in their franchise

document. We did consider it in an initial discussion, but we were told we were not allowed to have anything like that in the documentation, so it was left.

Mrs JOHNSTON—Who told you that you were not allowed to?

Mr Fisher—The franchisor. I know of cases where a number of franchisees have had postcode boundaries put around their stores.

Mrs JOHNSTON—So what made the other people more successful in getting the location factor put in? You say you were not allowed to by the franchisor.

Mr Fisher—Because they are in country areas; they are in non-metropolitan areas. Although, in one particular instance, a franchisor in a country area still put in another store and sent that franchisee to the wall as well. In fact, I believe it is now in court in Queensland.

Mr BEDDALL—I wanted to ask you to expand on how the franchisor got you to share the import risk. In your submission you said that all of a sudden you were told you had to become part of an importer as well as a franchisee.

Mr Fisher—We suddenly had to pre-order stock, and we had no idea whether it was going to sell. We did not even know what it looked like. We were told we had to place an order four months in advance for the next three months. So in a few months time we would have to say what we wanted in the fourth month, fifth month and sixth month, without knowing what the product was. When we questioned that and said, 'Well, that doesn't seem fair to us,' we were met with a tirade. They said, 'Well, you have to share our risk.' So we suddenly had to share the risk of being the importer. A question which I asked the FCAC was: why, as a franchisee, do we have to share an importer's risk? It does not seem logical. I cannot see anything in the franchising code of practice which said that we should share the risk.

Mr BEDDALL—That brings me to my final question. You are obviously very familiar with the franchising code—maybe its pitfalls but also its strengths. Do you think that if legislation underpinned the code it would alleviate a lot of the problems you suffered?

Mr Fisher—I believe so. At the present time there are things inside the franchising code of practice. I am not saying it is the best document in the world, but at least it is a starting point. If the franchisor continued to carry on in the way that he currently is, which is contrary to the franchising code of practice, if that were legislation, he would find himself in a court of law. He would be put there, possibly by the DPP, and not have some poor unsuspecting franchisee having to foot some monumental—

Mr BEDDALL—Common law case.

Mr Fisher—Yes.

Mr JENKINS—What was the council's reaction to your complaint against Copperart?

Mr Fisher—Nothing. I just received a letter saying that my submission had been received. A couple of months went by and nothing happened, so I sent three faxes and made a number of phone calls. I eventually got a letter back saying, 'Well, it's not our policy to keep you informed with what is happening.' Obviously not much can be happening, because the franchisor would not be continuing to conduct everything in the way that it is currently being conducted. So I guess that nothing has happened.

CHAIR—We are studying harsh and oppressive conduct. We are looking at some changes, perhaps to the TPA and maybe underpinning legislation for the franchise code. I am just trying to get my mind around the harsh and oppressive conduct that you are faced with. You have talked about importing, and you have talked about—as Mrs Johnston referred to before—changing the goalpost about margins, and things like that. Were there any other examples of this harsh and oppressive conduct?

Mr Fisher—From my perspective, I would consider harsh and oppressive to be when you purchase a product from the franchisor, put it on sale in all good faith and then the product is found to have a flaw and is recalled on a safety issue. In actual fact, it was monkeys. There are a lot of other examples, but this is one that really comes up—little stuffed monkeys. The eyes came out. They were not fixed properly in manufacture. So, rather than take them back and give us some compensation, they told us, 'Pull the eyes out and sell eyeless monkeys for $3 less.' From a retailing perspective—where you are now selling things for less than you have purchased them and are forced into doing that—I consider that to be harsh and oppressive. There are other instances which I have highlighted.

CHAIR—They are other product instances. Was there any accounting instance? You were doing all your payments directly through the franchisor; were there examples of intimidation through this process?

Mr Fisher—The only other intimidatory process was when we were in our store and were paying for 175 square metres of shop space. We did a very quick measurement and suddenly found out that the store was actually only 155 square metres. That problem starts to belong to the centre management, I would presume. But it took me four faxes, three letters and then a solicitor's letter to get our franchisor to actually communicate the problem to the centre management.

I walked up to centre management, and they said, 'We do not discuss that with you; we only discuss that with the lessee.' So I could not get the franchisor to discuss the issue with the centre management. I eventually had our solicitor send a letter to the franchisor, again stating what the problem was and basically asking the franchisor to speak to the centre management of the shopping centre.

I got a five-minute abusive telephone call, which I communicated back to my solicitor. The solicitor then phoned the franchisor, and eventually things got sorted out. I would tend to call that intimidatory conduct. I was not trying to get anything out of the franchisor other than to actually find out how big the store was.

CHAIR—Mr Fisher, how long did you own the franchise for?

Mr Fisher—Two years and four months.

CHAIR—And you settled amicably, or adequately?

Mr Fisher—When we got out of the franchise, the franchisor purchased our stock back at cost price, less 15 per cent. I had $14,000 worth of stock left in the shop. By the time he found out all sorts of other things which he had omitted to charge me for, I got a cheque back for $824 out of $14,000.

CHAIR—What about your fee going into the—?

Mr Fisher—That is gone. You just lose.

CHAIR—You have raised this issue with the council—

Mr Fisher—Yes.

CHAIR—and they have not responded to you in any positive way?

Mr Fisher—No, they have responded and said that they had received my letter and it will be investigated, and that is the end. But I believe that industry self-regulation does not work—never can work. I believe there should be parliamentary legislation.

Mr MARTYN EVANS—Just to put your situation in context, you say that the company has now taken over the vast majority of the stores. Do you see this, in the context of that particular operation, being in decline or in growth phase? Do you think that some of the practices that we have seen in your case and the other stores that have obviously gone back into the franchisor's stable are in the context of a growth in that industry or are these problems being generated partially by the conduct of the franchisor but partially also driven perhaps by a decline in that industry itself? Which way would you see that going, to put it in a national context, so that we can judge the operation better?

Mr Fisher—In a national context—I cannot understand why the franchisor is doing what he is doing because to me franchising seems a good way of having your name spread around the countryside and of selling your product without it costing you an arm and a leg. However, as one of the directors, Mrs Van Roerst, has publicly said, she never wanted franchisees in the situation anyway. A great number of stores were opening directly with a franchisee taking over from a new store. So, in some instances, franchisees helped expand the Copperart network. I question whether they just wanted to use our money, a cash injection, to get them out of a hole. My information is that Copperart have actually franchised on three separate occasions in three different schemes. They started a scheme up, folded it, then started another scheme up, folded it; and then started another scheme up. It seems a relatively good way of raising capital when you need it. I will wash my mouth out with soap and water after I have said that, of course. You also still sell your product and make a mark-up on your products from a franchisee. So you are getting the money in a lot of ways.

CHAIR—Mr Fisher, thank you for coming today. Your evidence is much appreciated.

[3.03 p.m.]

VALENTIN, Ms Yvonne, Commercial Manager, Laubman and Pank Optometrists, Level 9, City Arcade Tower, 207 Murray Street, Perth, Western Australia 6000

CHAIR—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 required 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 Valentin—I have very little to add to the written submission that I put in. However, I would like to take the opportunity to go through the recommendations again.

CHAIR—Please do that.

Ms Valentin—Just for the record, Laubman and Pank Optometrists are a national group of optometrists. It operates 75 retail outlets around the country. I am the commercial manager for the western region. In WA we currently have 18 retail outlets across the state. They are as far up as Karratha in the north west, down as far as Esperance and out to Kalgoorlie. We have 11 in the metropolitan area. The outlets are a combination of being in shopping centres and in strip development type centres.

As a commercial manager, I deal with the property aspects of all those leases, so I am dealing with managing agents on a daily basis. I put in a written submission because we face many of the things that have been spoken about today, although perhaps not as severe—maybe because as a national group we may have more clout. That may be the case. However, there are some things that I feel need to be improved and I have outlined those in the recommendations. I will expand on those as I go through.

I believe that the Commercial Tenancy Act in Western Australia needs to be overhauled and I understand that that is currently occurring, although I feel that the Property Council of Australia will probably oppose a lot of the recommendations that are made. I understand that that is already in place. I am concerned that a lot of retailers, because of the harsh treatment they have received, will not stand up and say what they really believe. That will cause a problem in the overhaul of that act—maybe some of the legislation has to come from elsewhere.

I also believe that it would be preferable if retailers and management could form some sort of a partnership. At the moment it is a real them and us situation. It would be much better if we could both try to work towards a win-win situation. At the moment it is very one-sided. The property owners and managers are in it for themselves with little regard for the retailer.

With regard to variable outgoings, I feel that tenants should be allowed access to the records which currently we are not allowed access to and that there should be more accountability with regard to outgoings. One way of resolving the outgoings issue is a return to gross rents. Some people disagree on that. However, I believe that if we went to gross rents—and that is where the outgoings are in one figure in place of a net rent plus variable outgoings—at least that would force the owners and managers to run the centres more efficiently, because they would have to carry the cost of any failings. I think that would be preferable for the tenants.

I would like to see percentage rent abolished. I believe it is completely unfair practice. In many cases you are paying what is considered by the owner to be the market rent—that is how he refers to it—and then he suggests that there should be percentage rent on top of this. In many cases, I believe it is not because they want to actually obtain that additional rent from you; it is because they want access to your sales figures to use against you at a later time, perhaps when there is a market rent review or when your lease is coming up for renegotiation.

I believe that sales figures should be absolutely confidential and that these should not be disclosed to the owners. I do not believe that the retailer should be penalised for good sales results. If we are achieving good sales results because of marketing or efforts on our own behalf, I do not see why we should have to pay additional rent because of that. It is not always the case that increased turnover corresponds to increased profits. We may have increased turnover which is reflected in the sales, and it may be because we had a sale where we discounted stock or whatever the case may be, and then it may be a situation where we have to pay additional rent through the percentage rent clause where we did not actually make a profit. So that is a problem. And, again, sales turnover information being available means they can then use it to exert pressure at a later stage. There are good reasons to abolish that clause in any lease.

I would like to see some service available where retailers can go to have their leases reviewed. In our case, because we are a bigger organisation, we have a lawyer who looks after our interests in that regard. But, for the small retailer, it would be good if there was some sort of agency set up where they could have their leases reviewed.

What would be better than that would be the establishment of a plain English lease across the board for all retailers that was built in conjunction with the Property Council of Australia and retailers. That would become the standard lease. That lease might then need to go through some sort of agency to make sure that is the lease being used and that the retailers are actually getting the use of that lease.

I believe a more suitable definition of what constitutes market rent needs to be devised. At the moment it seems to be fairly loose. Ideally, a minimum rent should be set at the commencement of any lease, which is the market rent, and that should be reviewed to CPI on an annual base. That would avoid the complexities of a market review during the lease period.

Then a new minimum or market rent can be set on exercising any option period or on a new lease negotiation rather than trying to have market reviews in the lease period which I think is confusing. As the evidence you have already heard today shows, the landlords seem to take advantage of it and exert pressure on tenants for extravagant increases that the tenants cannot possibly afford. We have had a few of those

ourselves.

Another issue is with regard to notice of rent reviews. Landlords need to give better notice. It is written in the lease, but I believe they should be bound to give six months notice to the tenant that the rent review evaluation is coming up so that tenants are aware of it, and when the actual date comes up the landlords then present you with the proposed review.

Many times in our case that proposed review has not come through until months afterwards. Then when it does come through they want to backdate it to the date that it was actually set. In many cases, the lease actually says that they are allowed to do that. In some cases, we have caught them out when the lease actually says that they cannot, but each lease again is different on that and it depends what you have negotiated up-front.

At the moment, when there is a market review and there is a dispute, it is a requirement that you pay the increased rent until the dispute is finalised and then they will give you a credit if you manage to get them to reduce the rent. I believe that, in any dispute period, it should be that you continue to pay the old rent and you pay the new rent once the dispute is over with. We have currently got a situation where we have had rent in dispute. A 22 per cent increase was requested, and we have been paying that higher rent. They have just let the dispute go on and on and on, and you cannot seem to bring it to any resolution with them because they are getting the higher rent.

The other issue I wanted to raise was to do with trading hours. I believe that the core trading hours should be set into the lease. The core trading hours of the shopping centre should be standard retailing hours—that is, 8.30 to 5.30 during the week, 8.30 to 9 on Thursdays and 8.30 to 5 on Saturdays. If the centre wants to trade outside these hours, they should have to go to the retailers and get a 75 per cent majority yes vote to do so rather than just saying, 'The supermarket requires you to be open.' In the lease, very often it just says that you are required to open the hours that the centre dictates. I think it should be more regulated than that for small retailers.

It is often the case where the supermarkets want to open but do not want to carry the cost of the additional outgoings for having the centre open the extra time. So they force the small traders to open at times and on days when we know we are just not going to make any money from opening.

CHAIR—There are 75 outlets Australia-wide. Are they all company owned or are they franchised?

Ms Valentin—Yes, they are all company owned.

CHAIR—Your submission is primarily about Western Australia. Have you experienced similar things nationally?

Ms Valentin—Yes, to some degree, although the Commercial Tenancy Act is different in every state. We do not seem to have as many problems in South Australia where we are predominant. It appears that the Commercial Tenancy Act is better in South Australia than Western Australia.

CHAIR—Is it a view that perhaps the Commercial Tenancy Act in South Australia should be expanded Australia-wide?

Ms Valentin—We would like to see that, yes.

CHAIR—The Property Council of Australia has met with us and said that everything is really pretty rosy around Australia and there are no major problems and everyone is pretty happy and there are pretty much standard leases in place. What would your company's view on that be?

Ms Valentin—We would strongly disagree. I would say that the Commercial Tenancy Act is vastly different in other states. Although I have not read them all myself, I understand from the commercial managers in the other states that they are quite different and that South Australia's is considerably better.

CHAIR—In regard to leases specifically, though, do you have a variance of leases in Western Australia from one centre to another centre?

Ms Valentin—Absolutely. Each lease is different in each centre.

Mr BEDDALL—You are an unusual witness for us in the sense that you do have market power. You still have variance of leases. Do you have a list of standard contracts you try to get inserted on your behalf in each lease?

Ms Valentin—Yes, we do have a list. We have items that are non-negotiable and items that are negotiable on that list. We find that generally we get through all the non-negotiable items and then we get about 50 per cent of the negotiable items.

Mr BEDDALL—Whilst you are not a core tenant, I would have thought you would be a tenant of great attractiveness to most shopping centres.

Ms Valentin—Yes. We are probably second preference in Western Australia. In South Australia we would be first preference where our market share is greater.

Mr BEDDALL—When we talk about anchor tenants, we talk about Coles-Myers, et cetera. I would imagine you would be at the level just below that.

Ms Valentin—Just below that, yes. We are a national tenant, and we are keenly sought after by shopping centre owners. In terms of what we do as optometrists, we are second in Western Australia.

Mr BEDDALL—You are also in a position of buyer beware. You have bought 18 already. When you are looking, how would you differently assess a market to, say, the one-off tenant? Obviously you have your eyes open because of all those other things and are not beguiled by passing trade.

Ms Valentin—Yes, I guess we have a range of criteria that we look at when we decide to perhaps open a new practice. A lot of it focuses on the demographics in the area and, more recently, the ability to

perhaps buy existing records from another operator or buy an existing practice. It is becoming more and more difficult to just open up a greenfield site and make a success of it.

Mrs JOHNSTON—Would you recommend that other smaller retailers should have the same sort of awareness that you have in ensuring that, when they do go to gain a position in a shopping centre, they are much more aware of the circumstances?

Ms Valentin—I think that would be nice for them, but I am not sure where they are going to get that information from. I have spoken to a number of them, as I move around the shopping centres, and they simply do not have that awareness. I feel for them because I do not know where they can get that information from other than the Retail Traders Association—and some of them do not belong to it—and they really need somebody to help them, because it is war out there between the retailers and the owners and managers.

Mrs JOHNSTON—You also mentioned that perhaps you would like to see an agency as perhaps the intervening instrument between the retailers and the shopping centre owners or managers. How would you see that agency operate? For example, would it be a government agency, a national agency? Can you give me some comments or details—any ideas?

Ms Valentin—I do not know. Perhaps through the Retail Traders Association, the Retailers Council, perhaps through a government agency—although that might bog things down. Perhaps that is an unfair comment. But that may make things a bit slower for them. Perhaps just boost up what the Retail Traders Association could do with extra funding from the government.

Mrs JOHNSTON—Another witness mentioned a similar idea—a compulsory tenants association, which obviously would be intended to do the same thing as you are saying. But, again, looking at the smaller retailers, they are often people who have no idea about business, who go out, see a business advertised, decide it is a good idea and buy it. They do not have the time or the extra money to join other organisations. As you said, very few of them even decide to join the Retail Traders Association, which obviously is designed for their protection. I am not quite sure whether this suggestion would get any more fairness into the system.

Mr MARTYN EVANS—I want to clarify the nature of the operation. Do I understand you correctly to say that they are all company owned sites—there is no element of franchise in each operation; they are all employees of a national company?

Ms Valentin—Yes, all employees of Laubman and Pank.

Mr MARTYN EVANS—So you have had some success in negotiating your own terms in the leases. How do you find the reaction of the managing agents and owners when you propose changes to the leases? In my experience, small business has zero option for changing those leases. Do they have an expectation that, because of your national position, you will want to change it? Are they receptive or do you get very much the view that this is our lease and they only negotiate changes at the very end of the day?

Ms Valentin—They are not receptive to changes, even though we are a national tenant. They do not

like to change their leases. However, sometimes they will do it because they want us in the centre. If they are fifty-fifty about having us in the centre, then they will say, 'No, that is the standard lease, and we won't make any changes,' and then we have to decide whether we are going to go ahead or not.

Mr MARTYN EVANS—Do you think there would be advantage in a national framework of shopping centre leasing legal guidelines? Some of the things which you set out are pretty much principles which could be incorporated in a national framework. Obviously, as a national operation yourself, there would be some advantage in that. Beyond your own situation, do you see advantage in having a national framework for these things?

Ms Valentin—Yes, I think that would be helpful for the smaller retailers. I am not quite sure how it would work, though. I cannot quite come to terms with how you would get that operating.

Mr MARTYN EVANS—Do you find that the owners and the managing agents themselves operate in a national context? When you deal with these people, on occasions do you get the view that they are under instruction from head office in the eastern states? I am not sure of the arrangements in Western Australia, whether there are a lot of independently owned shopping centres or whether they are like the other states where there are some major operators. When you are dealing with the major operators, do you get the view that they are under instruction from head office?

Ms Valentin—Occasionally I get that feeling. Occasionally, if the negotiations are not going well, we will take it ourselves to their head office. So we will try to be one step ahead of them and take our issues to their head office.

Mr JENKINS—As to the things that you try to negotiate within your agreements, do you try to cover things like refitting, not being pushed out of sites and things like that?

Ms Valentin—Yes, we try to cover all aspects of refit, particularly so that we are not forced into a refit before the time that we are ready to do one.

Mr JENKINS—What about disclosure beforehand where they might be wishing to set up another optometry practice within the centre?

Ms Valentin—That is a very hot issue at the moment. We often try to factor some exclusivity into a centre, particularly if it is smaller—say, up to about 25,000 square metres. We will try to factor in exclusivity for ourselves. Most often we are met with, 'They will not allow exclusivity in any shopping centres,' and I can see their point of view, but it is also very difficult as a trader to be trading and then for somebody to come in in the same business and suddenly your business is halved. That is exactly what happens. It is very difficult to factor exclusivity into leases.

Mr JENKINS—So you cannot even, with your sway, get them to agree to exclusivity?

Ms Valentin—Very occasionally we can.

Mr BEDDALL—One of the other issues raised today was the assigning of leases. Obviously, now that you are looking at acquiring existing practices, you would be coming into the genre of hiring leases. When you see some of the leases that other people have signed and they are obviously something that you would not have signed, how are you going about renegotiating? Do you go for assignment or do you try to get a new lease from the date of occupancy? If you do try, are you successful?

Ms Valentin—We have only just started doing that because of the change in the business environment where we are actually going out and buying practices rather than opening up greenfield sites. We do not have a lot of experience in it. We are aware of the difficulties with assigning leases and, in fact, we have assigned a couple of our own leases and we know that we are still responsible at the end of the day for what happens with those leases. It would be our preference to try to negotiate a new lease when we are buying an existing business, but we know that sometimes that is not going to be the case. We would certainly review the lease and, if there were something in there that we really disliked, then we would definitely try to renegotiate that lease with the centre owners.

Mr BEDDALL—If they were not prepared to negotiate the lease, would that be a red rag in a sense? If it only has two years of five to go and they will not renegotiate, then perhaps you are facing some hurdles in two years time that you do not want. Is that a warning light to you, if they would not renegotiate?

Ms Valentin—Yes.

CHAIR—We have heard a lot about goodwill in this particular inquiry. In the retail sense, the general consensus is that there is not goodwill. As a national operator, what is your view about that?

Ms Valentin—Goodwill between tenants and—

CHAIR—Goodwill between the tenant and the business and whether it is something sellable.

Ms Valentin—It depends on each business. You really have to look at that individually. We certainly believe that there is an element of goodwill when a business is to be sold. We have not sold any of ours, but when we are purchasing we believe there is an element of goodwill. Again, that is dependent on the length of time there is to go on the lease and how we feel we would go negotiating a new lease.

CHAIR—This inquiry is looking into harsh and unconscionable conduct. You mentioned that you have your own solicitors who operate in negotiation and you mentioned the word ‘war’ before, that retailers are at war with owners. Have you any ideas about how we can change the relationship or perhaps the Trade Practices Act to overcome this perceived war?

Ms Valentin—I think it is a shame that we have to legislate to make people negotiate better with one another. I do not see why we cannot form a partnership. I do not see why the Retail Traders Association cannot work better in conjunction with the Property Council of Australia, but it appears that is not the case. Other than trying to make better legislation, I do not know any way to resolve that issue. I would personally like to see retailers and shopping centre owners and managers forming a working relationship, but that is very difficult to do.

Mrs JOHNSTON—Would you not say that in some instances it does work in a very good way? I do not think that every retailer in Australia is entirely dissatisfied with every owner of a shopping centre.

Ms Valentin—No.

Mrs JOHNSTON—So there are some examples out there where it can work very well. It may require more education on behalf of all the parties to show the good examples of parties working in harmony for the benefit of all to secure a win-win situation.

Ms Valentin—I think there are examples out there where it has worked very well, but I think they are mainly for the national retailers and not the small retailers. I believe the owners and managers think they can exert more pressure on the small retailers. As someone who sits in the middle, they try to exert pressure on us too. Sometimes they win, but we probably have a little more clout than the smaller retailers.

CHAIR—You mentioned the retail traders association. Are you meaning the bigger organisation or are you talking about the Western Australian Council of Retail Associations?

Ms Valentin—The Western Australian Council of Retail Associations.

CHAIR—Thank you very much for your attendance today.

[3.30 p.m.]

DWIGHT, Mrs Marion, 28 Naturaliste Boulevard, Iluka, Western Australia 6028

CHAIR—I welcome Mrs Dwight. In what capacity are you appearing before the committee?

Mrs Dwight—As a private citizen.

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 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 an opening statement before we commence our questioning?

Mrs Dwight—I have not got that with me today, but on 14 August the locks were changed on my shop and I was locked out.

CHAIR—Could you give us some background to the whole story?

Mrs Dwight—I had a novelty gift shop in Belmont Forum Shopping Centre. Before entering into the lease, they told me verbally that an opposition to what I sold would not go into the centre. There were a few other novelty shops in there any way, so there was enough. The first eight months of trading were hard, but we built up a business. In the next 18 months, we were doing very well.

We had a CPI increase and then we had a market increase—and that was on our very good year—of 33 per cent. We did oppose that and then we did get it down, I must admit, to 15. So that was fine and we were still doing quite well. Then two years ago we learned that they were going to bring in an opposition to the shopping centre. Where the shop was going to go there was a toy shop already. There wasn't another toy shop in the centre. I did say, 'Why bother changing over when we haven't got a toy shop—change into a shop that would sell 75 per cent of what I sold?' It was an eastern states group.

After much toing and froing, it still went in. From July to September, my figures were $25,000 up on the previous year, so I don't think my retailing was bad. I could see myself as being a good operator. Then this shop opened and I knew within six months that our business was going. We did talk to the managing agents and eventually, after about a year I think, we did get rent relief but it was still was not enough.

In the meantime, of course, another centre had reopened with a big extension and we lost a lot of our customers to that big shopping centre. In short, we ended up closing the shop. We were in debt, we could not pay our rent, and they literally told us that if we did not pay by the end of November—by the beginning of

December—they would close us down. So we borrowed the money and we paid the rent. Christmas trading was pretty good and we managed to pay back the debt that we owed. But within two months we knew that we were going to be putting more and more into that business and we just weren't going to get anything out of it, and we closed. We decided ourselves to close.

Then they took us to court and we had another debt to pay then, because really we should have gone to the end of the lease. But we could not afford it. In the meantime, we had had a buyer for that shop. But, somehow or other, this buyer knew that there were going to be extensions coming to this shopping centre and eventually he gave up on the idea of actually buying the shop. We lived about an hour's drive from where the shop was and we decided that, with the money that we sold the shop for, we would open another shop because it is a good business—we knew it was a good business. We would open nearer to where we lived, which was Joondalup.

In the February we closed the Belmont shop because I knew that we couldn't run the two shops since we now had a loan and tried to concentrate on bringing Joondalup up as it just was not doing what it should have done. I do not think the shopping centre really did what they said they were going to do in bringing the bigger retailers into the shop. It ended up that a shopping centre not far from us, Whitford's, extended at the same time that Joondalup opened. Of course it is a much bigger and, from what I can see, better centre. We did not get the traffic flow that we should have got.

By August this year, we had talks with Pandora, the managing agent. She is the centre manager. We had had rent relief, and there was no doubt that we were on track. But we were not travelling that well; it was not going too well. We got a letter two weeks after we could not pay our rent. It was a solicitor's letter saying that, on our lease, they could come into our shop and take over. I thought it was not worth talking to the centre managers, because they just don't listen to you. So I wrote to the solicitors stating that, if they could give us at least another month, we had got an extra loan out and we were getting more stock in and really trying to put everything we could into that shop to keep it going. Sure enough, two weeks after that, at the end of the month, they came in and changed the locks. I never received a letter back from the solicitors.

When I went to the centre manager's office and asked them why they had done this they said that they were sorry, that it was nothing to do with them now. They said, 'There is nothing we can do about it. We do not have anything to do with that shop now.' They said that we had to see a solicitor and that, after that date, when the shopping centre was closed, we had to go in and get all our stock and clear the shop out. So I went to see a solicitor, and he more or less said, 'It is going to cost you a lot of money. Have you got it?' We didn't. If we were to fight to stay in there, was it really worth staying? It was not really. You only have to look at the figures and you know it was not worth all that fighting.

There was no-one there that would sit and talk; there was no communication whatsoever. I just think what they did was wrong. I have now got to go to court because they want a month's rent, and I am told that I could still be liable for the rest of the lease, even though I cannot go in my shop and trade. And that's it.

CHAIR—Thank you, Mrs Dwight. Just to focus you back on to Belmont, you spoke about Belmont management allowing other product lines in the shopping centre. What year are we talking about here?

Mrs Dwight—About the new shop coming in to the centre?

CHAIR—Yes.

Mrs Dwight—We had been there four years, and that was two years after we had been there.

CHAIR—What year is that?

Mrs Dwight—1994.

CHAIR—Are you still dealing with that particular shop out there in Belmont?

Mrs Dwight—No, we have closed down the shop there.

CHAIR—Yet you said that they were still wanting rent until the end of the lease again?

Mrs Dwight—No, that is Joondalup. We went to court with Belmont and, through a solicitor, we did all that. We came to an agreement and we paid what we had to pay. They did not make us go to the end of the lease, but it was better to pay than to carry on.

CHAIR—Is that shop in Belmont now occupied?

Mrs Dwight—No, it is not.

CHAIR—So it remains unoccupied. You moved into Joondalup at the same time you were dealing with people out at Belmont. Is that right?

Mrs Dwight—Before. In the same year that the shop was really going well we opened Joondalup. That was in 1994. The opposition came into the Belmont shopping centre in the August—I think it was at the end of August or something like that. The new shopping centre at Joondalup opened in the September.

CHAIR—So you were part of the first tenancies in Joondalup?

Mrs Dwight—Yes.

CHAIR—Okay. They closed you down for what reason? Was it arrears?

Mrs Dwight—Because I could not pay my rent.

CHAIR—How much arrears were you in?

Mrs Dwight—At the time I got the solicitor's letter I should have paid on 1 July, but I could not pay.

CHAIR—Was it a month or six months?

Mrs Dwight—It was a month.

CHAIR—So they closed you down over a month?

Mrs Dwight—Yes.

CHAIR—For being in arrears for one month?

Mrs Dwight—For being in arrears for one month.

CHAIR—They normally ask for rent in advance, so you were one month down and one rent in advance?

Mrs Dwight—No, when I got the letter from the solicitor I was only two weeks behind with my rent. I should have paid it on the 1st, and I think I got the letter from the solicitor on the 21st—something like that.

CHAIR—There was no prior warning from the management?

Mrs Dwight—No, nothing whatsoever.

CHAIR—In relation to this particular issue, was it part of your lease that they could take back the property?

Mrs Dwight—As far as the solicitor could see in the lease, if I did not pay my rent they could come in and—

CHAIR—It was part of your lease?

Mrs Dwight—It was part of my lease as far as they are concerned if I did not pay my rent. They did not say how long it was going to go before they decided that.

CHAIR—It is a tragic story, David.

Mr BEDDALL—Yes. Can I get some concept of this. I am from the eastern states. On the bottom of the letterhead there is a series of names. Obviously they are the Showbits stores, are they?

Mrs Dwight—Yes.

Mr BEDDALL—So you were the one at Joondalup?

Mrs Dwight—I was the one at Belmont and the one at Joondalup.

Mr BEDDALL—Are the others trading?

Mrs Dwight—Karrinyup is not trading any more. That is all.

Mr BEDDALL—Okay. Is it a franchise or is it—

Mrs Dwight—It is a licence. It is not run as a franchise. I paid him to use his name and then he gave me wholesaler information. We do advertising—

Mr BEDDALL—So you order for yourself—not from him, from—

Mrs Dwight—We order for ourselves, but we order as a group. Being in that position you can get a better deal.

Mr BEDDALL—You also said you were still trading but from a market. Is that right?

Mrs Dwight—Yes, that is right.

Mr BEDDALL—So you are still selling product now?

Mrs Dwight—Yes.

Mr BEDDALL—Did you get the product from the shopping centre?

Mrs Dwight—From the shopping centre?

Mr BEDDALL—At Joondalup.

Mrs Dwight—Yes, at the shop. We had to clear the whole place, and that is what we did. To pay the loan I am trading out of the market.

CHAIR—Which market?

Mrs Dwight—Malaga market.

Mrs JOHNSTON—Is the shop in Joondalup now occupied again and selling the same products?

Mrs Dwight—No, it is empty. I still keep in contact with some of the people there. In one instance he bought some of my shop fittings off me. He asked if he could use the shop—I think it was from November through to December—for Christmas for the heavy equipment they use. He was told that he could. They just had to make sure with the owners that that would be all right. He told me that, when he asked what rent it would be and what he would have to pay out, they said to him that he did not have to pay any rent. All he would have to pay would be the variables.

Mrs JOHNSTON—It seems to be happening quite often in the smaller shopping centres when they try to make the empty space look full.

Mr BEDDALL—Where is Joondalup?

CHAIR—Joondalup is north. It is a regional centre of Perth. I have one point, though. If he had charged the rent to this new tenant, that would have overridden your lease. Therefore, you would not be liable any more. They are keeping you liable, and that is why they are only charging you variable outgoings.

Mrs Dwight—Yes, that is right.

CHAIR—This is an inquiry into harsh and unconscionable conduct, and you have given us some serious ones regarding the locking out of the premises. Are there any other instances of the management, at both Belmont and Joondalup, giving you a hard time?

Mrs Dwight—No.

CHAIR—No threatening mail or anything like that?

Mrs Dwight—No. If you can call this threatening, we have only had, 'If you do not pay, solicitors will come into it.' Then, before you have even decided whether you are going to go through solicitors, you are being charged $50 for the letter they have sent you.

Mrs JOHNSTON—I just want to ask one other question. It is about the other tenants who are in the shopping centre who may have had a similar fate to yours. Do you know if anybody else was closed down as quickly as that after not paying their rent or was it just you?

Mrs Dwight—No, I have since found out other information. When I was actually clearing the shop, a lot of the tenants did come. Joondalup has never happened since the day it opened for a lot of people—not everyone. There were a lot of people in there who just were not happy at all. When something like this happens, of course, everybody tells you what is wrong. One person in particular who came into this shop said, 'What's happened?' I told him. He said, not in so many words, that he had better get around to the bank and get an overdraft.

Then I was told something by another tenant—which you cannot listen to, I know, but everyone talks to different people. One person was three months in arrears. That happened to me on, I think, a Wednesday morning. The following Monday morning another shop that I knew of was struggling very badly. The owner literally got on a plane and flew away. She had a delicatessen and just left everything there was in her shop.

Mr BEDDALL—Was there any tie between the Belmont shopping centre and Joondalup? Were the managing agents the same?

Mrs Dwight—Yes, the managing agents are the same.

Mr BEDDALL—So they would have known about the difficulty at Belmont?

Mrs Dwight—Yes. I had a very good talk with the centre manager afterwards. I know Pandora very well and always thought that she was a very fair and decent woman, and I still do. She just has a job to do

and she has been told what to do. After talking to her at length, she did say to me, 'You just were not trading. We have really done you a favour.' I do not know. Has she done me a favour? I have a life now, but I have lost everything that I had.

CHAIR—Thank you, Mrs Dwight, for appearing before us today.

[3.56 p.m.]

CLARK, Mrs Donna Lorrell, Owner, Gifts R Us, Farrington Fayre Shopping Centre, cnr Findlay and Farrington Streets, Leeming, Western Australia 6149

CHAIR—Committee proceedings are recognised as the proceedings of the parliament and warrant the same respect the proceedings in the House of Representatives itself demand. Witnesses are protected by parliamentary privilege in respect of the evidence they give before the committee. You will not be asked to take an oath or 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 authorises its publication. Would you like to make any additions or alterations to your submission?

Mrs Clark—I do need to add to that. I have actually sent you a copy of my recent accolades, or whatever you would like to call them. I checked the name of Farrington Fayre Shopping Centre and found that it was unregistered for some months from November 1995. So I proceeded to register the business name as Farrington Fayre.

I submitted to the fair trading department, business registration section, that they had actually been illegally practising a business for some months and that they should cease on 21 October 1996 when I and another tenant became the proud owners of the name Farrington Fayre. To date nothing has been done by Fair Trading. We have just had a letter back saying, 'Please give us more evidence and more information.' How much more evidence or information do you need when one has been trading all those months—and I am talking about some 10 or 11 months—without a correct registered business name?

CHAIR—You are adding this document as part of your submission?

Mrs Clark—I am, yes.

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

Mrs Clark—Yes, I would. I will let you know who I am and why I have started all of this. It is not just on my behalf; it is on behalf of the other tenants at Farrington Fayre. There has been a lot of stress and unconscionable conduct by the managing agents and the owners with the way they deal with the tenants.

My background is in real estate, printing and second in charge of the Carousel shopping centre, which was the second largest shopping centre in WA at the time I was there. When I was in the managing agent's role, we were told to look after the tenants, make sure they were trading correctly, always be down in the centre making sure that they are okay, use good PR, always make sure the tenants are well aware of what you are doing and how you are doing it, and make sure that they are aware of the facts and figures. If they were having difficulty at all, we were told to make sure that they were looked after in respect of assisting

them in any way, shape or form with either marketing or other items. So, if anything was required, it was always provided in an ethical, professional manner—not the way we are treated now.

The reason we started the investigation was that some three years ago I became a tenant at Farrington Fayre. I have previously been a tenant at Carousel as Greenland Florist. I am well aware of both sides of the fence—being a managing agent and a retailer. I looked at the books for Farrington Fayre and wondered why variable outgoings, rents, et cetera were so high in comparison with Carousel. I still proceeded with my tenancy there because I had done my research and marketing and felt that that was where I needed to be to start my new business.

I did not just go in and say, 'This looks like a nice shopping centre to be in and this looks like a great shop to run, so let's go ahead and do it.' All the proper procedure, business background, marketing and everything was done and put into place. That is why we started Gifts R Us. From that I found that the tenants were already having a problem with the managing agents and the owners at the centre.

We are talking about things like variable outgoings, key money that has been paid by a tenant to control the freehold of his business which he has never got, and managing agents' conduct in the way they speak to tenants. We are also talking about rent reviews which are not to do with market review. They are to do with what the owner needs in his pocket at the end of the day. They do not consciously ask, 'Have we done a proper market review?' It is just, '$320 a square metre looks like a good idea, so let us go with that.'

You have no comeback on those items. What they want is what you do. However, I have put mine in dispute since the day I walked in. Basically, I was asked why I had not advised them properly that I had been in a managing agent's role and had so much knowledge. That is not my problem. It should have been a bonus for them to know that I could handle a retail outlet properly and professionally. My demise of my cost structure at the moment is all to do with fighting this issue.

CHAIR—You have Gifts R Us at Farrington Fayre?

Mrs Clark—That is correct.

CHAIR—Is that a franchise operation?

Mrs Clark—No, it is not yet, but they would like it to be.

CHAIR—What do you mean?

Mrs Clark—The franchise alliance keeps ringing me to franchise it out. But no, I started it and I created it. I have not gone any further with franchising yet.

Mr BEDDALL—Have you heard from Toys 'R' Us?

Mrs Clark—I did actually. A lot of people think I am Toys 'R' Us. I just do not have their bank balance.

Mr BEDDALL—Have they objected to the name?

Mrs Clark—No.

CHAIR—You mentioned that you were formerly in the business as a shopping centre manager and you mentioned the certain style of training that you received. Is there a code of conduct amongst shopping centre management?

Mrs Clark—Are you talking about then or now?

CHAIR—Both.

Mrs Clark—Yes. You were trained to look after your tenant; you were trained because the tenant paid your wages. You went downstairs and you were literally hands-on, professional, ethical—a real person, not somebody who is sitting up in their office with a percolator and a mobile phone and then drives out each night and does not care whether the tenant can or cannot afford their rent. Now it is: do not go and see the tenant, just send them a nasty letter. Be aggressive toward your tenant. Tell your tenant that they are only a tenant and to get back in their shop and try trading instead of talking about things they do not know anything about.

CHAIR—Was it a written code of conduct or was it by a firm?

Mrs Clark—Even with a real estate background—I used to do property management and sales many years ago—that was part of the real estate law that you went for your licence under. I do not think that the real estate law, the licensing, has changed in any way, shape or form between then and now. I think the difference now when you get your licence in real estate is that you throw away the book and make up your own rules. That is the difference.

CHAIR—You would recommend that there be a code of conduct among shopping centre management or property management in particular.

Mrs Clark—I think there should be in any of the above.

CHAIR—We are looking into harsh and unconscionable conduct. In relation to the shopping centre which you now have the ownership of the name for, what are some examples of that out there?

Mrs Clark—I get phone calls every day from other tenants who are not coping and who ask, 'What do I do? How do I deal with this? How do I go about paying my rent?'

CHAIR—But that is not harsh and unconscionable conduct, is it?

Mrs Clark—No, it is not, but it is when they say, 'Look, if you don't pay your rent, we're going to lock you out. You're in breach of contract.' It is harsh and unconscionable when you are in breach of your lease because you have not paid your rent, but they are also in breach of the lease for charging you for

variable outgoings and statutory outgoings and other items that are not part of your lease. Therefore, I think there is a breach on both sides.

They then send you a letter saying, 'Here is a bill for $3,500, but we will be nice people and charge you only $1,800. So pay up your rent or you will be in breach of the lease. We'll send you a summons. It is going to cost a lot of legal fees—not only your own but ours.' They know that you are trading with the wind at the moment because the economy is not such a good economy at the moment. Also, there are so many shopping centre retail outlets being built that we cannot substantiate that type of retail growth without population.

Mr BEDDALL—With regard to Farrington Fayre, where is it, how big is it and is there an anchor tenant?

Mrs Clark—Farrington Fayre is down the freeway south towards Jandakot airport, if you are aware of where that is.

Mr BEDDALL—I am from Queensland.

Mrs Clark—It is probably about 20 minutes from Perth and it is a major offramp of the freeway. It is a shopping centre that has 26 tenancies. The major tenancy is FAL, being Foodland. Foodland is the main lease for that, and then it is subleased to another tenant. The second major tenancy is Shell Australia. We have four vacancies. Those vacancies have been there since I moved in three years ago and there has been no conscious effort to lease those which does not help us to trade properly. If you are having difficulty, they threaten, like they did with the video shop recently, that you do not have exclusive rights on your lease; therefore, they can say, 'We'll put in another video shop.' The shopping centre itself has a decent sort of mix, but the owners I do not think visit the centre and the solicitor who has been acting for the owners has never seen the centre. It is a nice little family centre; it has potential for the future.

CHAIR—If the site needs redevelopment?

Mrs Clark—I do not think they could redevelop because they have not got enough car bays now, which means that cuts down our productivity by the number of car bays that we do not have for each of the tenancies. They do not own the nearby land, so I do not know that they could redevelop other than going up.

CHAIR—In relation to the harsh and unconscionable conduct that you are suggesting is being performed out there, is it reasonable to suggest that it could be a perception that tenants are being treated harshly because of the trading involvement?

Mrs Clark—No, I do not think so at all. Managing agents tell us that we should be more professional and, instead of worrying about whether we signed a lease that we could understand or not, we should be there marketing our own business and doing our own thing. We should forget about the rest and just pay up what we have to pay, and make sure we do so because otherwise we are in breach of our lease, and we know what a breach of lease costs. It is like being offered a freehold on the shopping centre liquor store, paying X amount of hundreds of thousands of dollars for it and then having it ripped out beneath you.

The shopping centre is strata titled and is not actually a shopping centre. We should not be paying variable outgoings at all because they become a strata levy. But we are told to keep paying it otherwise we will be in breach of our lease and will again be out on our ear, even though we have this issue before the commercial tribunal. My issue with fair trading at the moment is that a report is being done by Gavin Wells and Gary Wallace. I believe it has been presented to Cheryl Edwardes, but that has taken over 12 months after giving evidence that there were major problems in that shopping centre.

CHAIR—The point that I again raise with you is: is it harsh and unconscionable or is it a badly organised, badly managed property?

Mrs Clark—It is a badly managed property.

CHAIR—If that is the case, are there not other ways of overcoming that?

Mrs Clark—No, there is not. What other way do you suggest there is?

CHAIR—That is the question I am about to ask you. We spoke to them earlier about having legislation underpinning some harsh and unconscionable activity within the Trade Practices Act. Are you suggesting that we expand and change the legislation to protect tenancies?

Mrs Clark—Yes.

CHAIR—In what way?

Mrs Clark—What we are doing is basically providing our superannuation for our future. We do not go out there to put money in the managing agents' and the owners' pockets. We are trying to survive and live off what we do not get out of our shops. As you mentioned, the economy is not good, but by the same token it should be changed because the tenants need to be looked after if the shopping centre is to survive. Would it not be wise to make sure that your tenancy mix is right, that they are all trading at a profitable rate and therefore your asset as a shopping centre becomes a viable asset for the future? If the tenants are not trading well, it means the shopping centre must not be trading well. Therefore, how are you going to raise the rents in a market that is not trading well? There are a lot of issues that should be dealt with.

Mrs JOHNSTON—Do you think it would be more equitable if all retailers or all people who are lease-based in a shopping centre, regardless of whether they are anchor stores or smaller retailers, were asked to pay rent on the same basis per square metre?

Mrs Clark—I think so because the anchor tenant is not necessarily the one that brings people to the store. It is the tenancy mix overall. Just because Farmer Jack's is in our shopping centre does not necessarily mean that they go to Farmer Jack's just to shop. It is because the tenancy mix is right and the products provided at that particular shopping centre gives a service to cover everything that the customer needs. It is not just the anchor tenant that brings the people in the door. It is the overall marketing of each of those individuals and the services and goods that they provide to those customers.

Mrs JOHNSTON—Would you then say that the fact that you all charge rents at different levels is a harsh treatment by the—

Mrs Clark—I do, yes.

Mr BEDDALL—We have heard a lot of evidence about overbuilding of shopping centres. As I said to the chairman, this might be the most overbuilt state, but certainly the most overbuilt region would be south-east Queensland. Are you facing any of those problems? A lot of the evidence we have is that local governments, because they want to get a higher rate base, increase the amount of shopping centres in their localities. What about Farrington Fayre? Is there a competing centre that has arisen in the last few years?

Mrs Clark—Actually there are several. We have the Lakes Centre which has been opened. It is probably 10 minutes away. That shopping centre is not trading well. It has had probably 75 per cent occupancy since day one. Several of the tenants that are in that 75 per cent have only casual tenancies. Around the corner we have Bullcreek shopping centre, which has just been refurbished. That now gives you 46 speciality stores as well as two Anchor tenants—one is Woolworths and one is Target. That is five minutes away from where I am. Down towards the other way I have got Garden City, which they are trying to refurbish and make into a even larger shopping centre. The population has got to the point where there is no population out there to warrant all those extra retail shops.

Firstly, if you look at the equivalent amount of retail space out there as opposed to the population it is not warranted. Secondly, if you look at the amount of retail space out there that is actually vacant as opposed to what is actually leased, you will find that it is not warranted either. But neither of these items are looked at. It is just councils, managing agents and owners getting fatter incomes.

Mr MARTYN EVANS—You do not seem to have had a lot of success in relation to pursing these issues with the ministry of fair trading in your state government. I think that is a fair analysis of the correspondence. In some ways would you be better off if legislation at either state or federal level set out a series of principles and requirements and you were able to pursue those in some accessible tribunal—a local court or a commercial tribunal which did not lead to a series inextricably through the High Court at ever increasing costs—rather than relying on people who obviously are not necessarily delivering what you want?

Mrs Clark—That is a good comment. Yes, it would help. When you look at fair trading, though, you cannot call it fair trading as one department. If I go to fair trading about the issue of my managing agents not having a written authority to act as managing agents—they still have not, to this date; they are in breach of the law for that—and other issues that we have been charged for and which are not in our lease and sinking funds into other items, okay, that is right, that is one department. But, to talk about business registration, which should have some bearing on that as well, no, that department will not handle that. I have got to go down to St George's Terrace to deal with that. At this point I have gone all the way from Hay Street down to St George's Terrace. They do not want to know what is happening in the other department. The other department does not want to know what is happening there. Nobody wants to get in the middle and see what is happening in the commercial tribunal.

If you change the laws you need to look not only at those issues you raised but also at there being a

standard lease. There should be a standard lease; a lease that everyone can understand. There are all those costs: it costs $600 just to read a lease. When you send it back to them, they just say, 'No, if you want a lease you sign it the way it is. You're not getting any changes. If you really want to be in that tenancy, then you need to sign it the way it is. We are not changing it.' If you are going to change legislation on any level, you need to deal with everything.

Mr MARTYN EVANS—You have currently got the matter before the commercial tribunal, have you?

Mrs Clark—Yes, I have. I have been in there since February.

Mr MARTYN EVANS—That has been active since February?

Mrs Clark—Yes, but we have only got to deal with three points at this stage.

Mr MARTYN EVANS—So you do not find that mechanism terribly satisfactory either?

Mrs Clark—I do not. We actually have a solicitor—Taylor Smart. That solicitor has done everything along the way to the point of the time frames. Everything we have been given we have submitted on time. We have given proof, evidence and documentation to the point where even our business registration formed part of the evidence, which the other party had for some seven months and still did not realise they were not registered. So he was giving evidence and using our evidence as part of his evidence, and he was not even a registered trader. That mechanism takes so much time.

In between that, if you want to change solicitors because you are the managing agent or the owner, you are given an extension of time because it is considered to be the correct thing to do. Even if they did not need a new solicitor, it is a way of slowing down the process and basically draining you dry until you do not have a cent left to fight.

I received a letter today. Whilst I said I was in breach of my lease for not paying my rent, I felt they were in breach as well. I received a letter from their solicitor saying that my legal fees have now—just out of their goodness of their hearts—been credited back to me. They grew from $1,800 to $3,500 for a normal letter, which would have cost $100 to a normal tenant. Because I took the issue to the commercial tribunal, I received a legal demanding letter, which then cost me $3,500. I thought that was fair, considering that it normally costs $100. Anything they want to do they can do. They stop the process. The commercial tribunal has been in deliberation of the three major items for the last month. If I am lucky, I will get an answer before Christmas, but I think Christmas might beat them.

CHAIR—I am interested in the relationship. You are a retailer but you also come from the other side as well. We have had a lot of evidence and discussion about goodwill. Does a retail tenant have goodwill at the end of a lease?

Mrs Clark—No, because at the end of the lease, my managing agent might say to me, 'Look, I really don't like your face any more. We've decided not to renew your lease.' That happened to a good friend of

mine who owned Glass House at Garden City. He was told that they did not require his services in the shopping centre any more, although it had been really nice. After being there since the inception of Garden City—and I do not know how many years Garden City has been around, but it is quite a considerable amount of time—he had to close shop and lose all goodwill.

CHAIR—So, on the basis that there is no goodwill at the expiration of a lease, do a lot of retailers go into business not understanding that principle?

Mrs Clark—I think so, and that is because of the way the leases are actually written. I think that, if you are going to look at a tenancy fairly, what you must say is that every tenancy must be given an option at the end of the five years, and it must be an option that is justified. If I am the managing agent and you are the tenant and we come to the end of the five-year lease and there has been no option on the end of that five years, or even if there is, I think I must justify to you either why you have not been trading well and why that has come about or whether it is partly my fault as well. I think it needs to be justified as to whether I am just shifting you on because that store does not fit into my tenancy mix. If that is the case, I must justify why that is so. It cannot just be a cut and dried issue of, 'I'm sorry. I am not renewing your lease—bye-bye.'

CHAIR—What is your view then, if an agent terminated a tenancy at the end of a five-year period, as they can justifiably, and this tenant has built up a fairly good traffic flow? Say they finish on the Friday and a new tenant moves into the same store with the same type of business on the Monday. Do you think there should be some protection for the tenant going out?

Mrs Clark—I think there should be if they have built up goodwill. Basically, if another tenant has been put in there and it is of similar style and goods and services, I think the managing agent or the owner must give some sort of compensation if they have not absolutely and utterly justified why that tenant has been pushed out the door in the first place—given that they are putting the same goods and services in or given that that tenancy area is then left vacant.

As with our shopping centre there have been many people trying to lease those premises out there that are vacated. But, trying to get the information out of the owners or the managing agent to find out how you go about signing up when you go for a new lease, what you need to do to actually be a good tenant and what you require, you will not get any phone calls back. There is a lack of communication altogether with a new tenancy going in. It is as if the tenants that are there already are paying such high rents and variable outgoings to cover whatever vacant tenancies are there so it really does not matter whether it is vacant or not.

Also, there is an issue in our shopping centre where a shop has actually been sold three times and a managing agent has just said, 'Sorry we really don't like the person who's coming in; so, no, we are not going to authorise that your sale can go through to this person and, basically, unless you remove your claim from the commercial tribunal, your sale won't go through either.'

CHAIR—In relation to your experiences, have you ever been involved with fit-outs or relocations?

Mrs Clark—I have in Carousel.

CHAIR—What was the normal procedure then? Did the owners wear or share the cost?

Mrs Clark—In my knowledge of that part of it—because my role at Carousel was marketing manager—although I did get involved in the leasing and the other items there with Peter Bridgment, I believe that there was a 50:50 split on a lot of costs to not only the tenant being advantaged by being moved but also the shopping centre obviously being advantaged by that person being moved because they were then able to upgrade or put a different tenancy mix in there, make traffic flow better, or something like that. There was always a justified reason behind a tenant being moved.

It is not just like Showbits at Belmont Forum,' that was moved from one area to an area where the traffic flow was not so bright and another store that was very competitive was moved in because it was an eastern state store. 'They obviously signed up for higher rent, so let's give them the prime position and let's move the other tenant down the back blocks.'

CHAIR—Thank you for your time today. Is there anything else you would like to say before you leave?

Mrs Clark—There is one last thing. Economic outcome will not only affect the small businesses—retailers—but also ultimately pass on to the supplier and eventually to the consumer. The ramifications to the government at the end of the day, if these problems and requests before you are not dealt with expeditiously—the burden of all of us and our future—lie firmly in your hands. That is all I have to say.

CHAIR—Thank you.

Resolved (on motion by Mr Martyn Evans):

That the committee receive as evidence and authorise for publication supplementary submission No. 70.1 made to the inquiry into fair trading.

[4.27 p.m.]

WILLEMS, Mr Pieter Johannes, 32 Johnson Crescent, Mullaloo, Western Australia 6027

CHAIR—Welcome. Committee proceedings are recognised as proceedings of the parliament and warrant the same respect that proceedings in the House of Representatives itself demand. Witnesses are protected by parliamentary privilege in respect of the evidence they give before the committee. You will not be asked to take an oath or make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as 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. Mr Willems, in what capacity are you appearing before the committee?

Mr Willems—As a private citizen.

CHAIR—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 Willems—The submission that I have put in is fairly complete. There is very little that I could add.

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

Mr Willems—No, I think I will go straight into the questions.

CHAIR—Could you just give us a brief overview of your submission so we have a background of your own position, and could you also tell us some of the recommendations that you would like to see coming from this inquiry?

Mr Willems—Briefly, we operated a business for some 15 years in one of the major shopping centres in Perth. In the late 1980s—in fact, in 1989—we opted to move into a mall which had not been built at that stage, but we acted on representations given to us. The main part of that was that the mall would be completed within 12 months, that part of the mall would be a very substantial entertainment and promotional area and that the mix of that mall would be about 50 per cent non-food, which was our category, and 50 per cent food. We were still waiting for this mall to be completed some 2½ years later.

We operated for the first few months as the only tenancy in that mall. This was a time when there were hoardings separating the mall from the main centre. In those first three years, we estimated that our losses were in excess of $150,000. We were not able to negotiate a rent reduction, and we were still paying full rent for the whole of that period. Our attempts in 1991 to approach the Commercial Tribunal were unsuccessful, in that when we filed under section 14 of the Commercial Tenancy Act we were immediately hit with demands for payment of arrears of rent.

Our supporting another tenant resulted in the same situation. We were again, within two days,

requested to pay arrears of rental. You will appreciate, having lost that much money at that stage, we could not afford legal assistance. We certainly were not able to keep up with the rent. Although, on the first occasion, which was immediately after lodging the section 14 notice, we had the rent demanded from us. Although in the previous 10 years we had been paying rent in the third week of the month it was due, on that particular occasion it was demanded from us through solicitors in the second week of the month it was due.

For most of that period, the mall was fairly empty. The final tenancy mix was about four non-food stores and about nine or 10 food stores. We finally settled with the centre before it reached the tribunal, because we felt there was a fair bit of pressure on us—we stood to lose the house at that stage. We wanted to keep the centre on site. Whether wisely or not—I do not know—we settled for about $5,000 in compensation, no reduced rent, although that was certainly something that we were still pushing for. That was to settle losses at that stage in excess of $150,000.

In about mid-1992, the mall was somewhere near the stage that we had been advised in 1989 would be the case in 1990, so it was about two years later. About eight or nine months later, in May 1993, a further redevelopment was undertaken to further extend the mall, resulting in that mall being cut off and made into virtually a dead-end sector with very limited access from the main centre. The parking adjacent to the entrance of the mall that we were in was completely demolished. Then for 12 months again we suffered further losses. For six months of that period our trade fell by about 50 per cent.

Again, during that period we attempted to have reduced rentals. We did not try the commercial tribunal again. We did not lodge a section 14 notice, partly because I think the section is deficient in that you cannot ask a landlord to stop a multi-million dollar project because it is affecting your business. That is basically how section 14 of the commercial tenancy act reads.

Twelve months into that project, which would make it August 1994, and at the time of the completion, we were about three months behind in our rent. For the following three months after the new development opened, we were paying virtually double rent, as well as having had to borrow substantially and therefore having to make fairly hefty bank repayments.

As a result, by about December we really did not have much stock to trade with. We closed the doors in February 1995. We were then charged rent, of course, until June 1995 when new tenants took over the tenancy. In February 1995, when we closed the doors, we sold the house to pay off as many debts as we could. We were left with no assets.

In late 1995 we approached the shopping centre, advised them of our financial situation, gave them sworn declaration of the fact that we had no assets left and asked whether they would possibly consider writing off the $40,000 we owed them. That was met with, ‘No, we won’t do it. You might win lotto in the next five years or so, so we can’t write it off.’

I then suggested that we probably had some legal recourse against them and we would be prepared to write that off if they were prepared to write off the $40,000, which I thought was quite a reasonable request, particularly considering that over $20,000 related to the four-month period after closing our doors. The answer to that was quite simple: no, if you even mention legal action or attempt legal action, we will put you

into personal bankruptcy. I think that pretty well covers it.

CHAIR—What was the tenancy?

Mr Willems—Automotive store.

CHAIR—You were promised a couple of things over that five-year period but they did not eventuate.

Mr Willems—Over the five-year period we had about six months of uninterrupted trading. We went into the new mall on the basis of specific promises. Of the promises made, I don't think any were kept. Certainly our obligations were kept. We promised to spend in excess of $50,000 on a fit-out. We did that. We were in by the time that we were supposed to be in, which was October 1990. At that stage, no other tenants were ready to go in. The mall had not been completed and the main area, the promotional area between the new mall and the main centre was still hoarded off; therefore, we were trading under very limited circumstances. Over the course of the next six or eight months a few more tenants came in and slowly the mall started to build up. In 1992 they took down the hoardings from the main mall, you could see our mall from the main centre and you could get a traffic flow from there. For long periods you could not even get through because the place had been six feet deep in water.

During the period that we were negotiating originally with the commercial tribunal, Woolworths, which were on the edge of the redevelopment, successfully gained compensation from the shopping centre for loss of trade. Obviously they considered they were affected by the trade, yet during that whole time they were widely advertised. The centre made a point of putting up big directional signs, 'Woolworths is here.' We were virtually ignored during the whole of that period. Certainly the promises that were made in 1989 were never kept.

Mr BEDDALL—You were not a naive new trader. You had been there 10 years.

Mr Willems—I had been there 10 years. We built it up from a loss proposition. It was running at a loss when we bought it. It took us 10 years to build it up to the point where it was in the top 10 or 15 businesses of its type in the state. We were grossing from it in excess of $90,000 a year which, in the late 1980s, was good money for a small, stand alone, independent shop. That was gone within 12 months. Between 1989 and now we have lost well over $300,000 and our assets are down to a minus figure. I certainly do not think we were naive. I am a qualified accountant. I knew my figures. What I did not do, unfortunately, was be hard enough to distrust them.

We always dealt with the previous management of the centre on a handshake, we dealt with our smaller suppliers on the strength of a handshake and we believed what we were told. Quite honestly, I believe they were lying. I certainly have heard of instances where they have lied to other tenants in the last six months.

Mr BEDDALL—Who is the owner of the shopping centre?

Mr Willems—It is a National Mutual property trust. Permanent Trustees are involved in it and our

current action is against Permanent Trustees.

CHAIR—Have you considered duty of care action against the negotiators with the shopping centre?

Mr Willems—Through legal—

CHAIR—Yes.

Mr Willems—We could not afford it. There is no way, even 12 months into that situation, that we could afford to take legal action. I got legal advice earlier on in the year because, quite frankly, when we were told last year that they would not wipe off the $40 and that they would bankrupt us first, it got my back up. I went to see a solicitor. They had had us tied down for some five years. They tie you down and you have no way to move. We considered we had nothing to lose. It was probably the first time in the last five years we had nothing to lose by taking action. So we saw a solicitor who has had dealings with them before. His opinion was that they would rather spend $200,000 on legal fees to fight you than to pay you the $200,000.

Mr MARTYN EVANS—The moment you talked about going to a lawyer they threatened you with personal bankruptcy in response?

Mr Willems—Yes.

Mr MARTYN EVANS—So there was always that counter response by way of what amounts to oppressive conduct, I suppose?

Mr Willems—Yes. That was very specific.

Mr BEDDALL—Was this from managing agents or representatives of the owners?

Mr Willems—No, this was the shopping centre management.

CHAIR—Basically, we are here to try to see what sort of improvements we can make. What sort of recommendations would you be making?

Mr Willems—As I say, section 14 is deficient in the way it operates under the Commercial Tenancy Act. I believe section 51 of the Trade Practices Act is too broad and does not provide enough scope for action. If, as a retailer, I were to sell deficient goods, I would be claimed against automatically under legislation by my customers, and I certainly believe that that should be the minimum that is available to a tenant in any situation, that it should not be up to the tenant to have to go and spend tens of thousands of dollars on legal fees at a time when he probably has not got the finances left.

We were fairly cash rich in 1989. By the end of 1990, middle of 1991, when we realised that things were not going to improve, we had lost $150,000. That is a lot of money to lose. It means you cannot go out and get legal advice. You are reluctant to. Also, you have to be careful. Your home is normally part of the

package of running a business. I can tell you from experience that the last thing you want to do is put that at risk.

Mr BEDDALL—You want to change section 51AA. One of the problems we come up against are with the people who have a counter argument—and you no doubt would know who they might be—as with commercial transactions. But it has always appeared to us that this is not like versus like. This is not Coles Myer negotiating with National Mutual. There seems to be—for want of a better word—a need for consumer type protection, because in many ways you are a consumer, not a commercial equal to the large shopping centres. Is that the way you see it?

Mr Willems—That is the way I see it. I do not believe you could ever say that anyone at our level has the equivalent bargaining power of the people that we are dealing with. This is certainly something that we found right from the outset in entering agreements with the shopping centre right back in the early 1980s when we took it on. They will work very hard to get you to come into the centre and will offer you very good deals.

Come the rent reviews two or three years down the track—in those days there were fairly lengthy periods between reviews—that became harder. You were always told, particularly at the end of a lease, 'If you don't want the lease, we have 20, 30 people waiting to come in.' Again, you have a very big cost. You have already invested a lot of money, particularly if you have just been through a refit. You have got to be aware of the fact that you have got to walk away prepared to lose $150,000, $200,000, and possibly your home.

There is no equal bargaining power. We saw that through the fact that Woolworths, for instance, were able to negotiate a very substantial compensation package. We had to really sweat. There were days when I sat and cried in the manager's office. We could not take them on face to face. You could not take them on on an equal level.

Mr BEDDALL—Have you ever had any access at all to the owner's representative?

Mr Willems—No, and this is something that I guess bugs me to a certain extent. We never saw the owners. At times we met the owner's representatives. When we did, it was not particularly successful. For instance, in that second redevelopment, we approached them and they were not going to reduce the rent. So we say said, 'All right, what if we spent some money on the shop and the owners put some money into it?' They said, 'Yes, that is a great idea.' We went out and got an architect to draw it all up. At this stage, the centre manager indicated that the owners would probably put in $20,000 to $30,000. We went and did that and then came back with the quote, which was about $40,000. They said, 'That much? Sorry, we cannot help you at all.' At that stage, we had spent another $2,000 on the plans for the improved shopfronts, et cetera.

This was coming from the owner's representatives—at that stage it was Raine and Horne. I do not think anyone within the centre had a really successful run-in with Raine and Horne. To get anything done it was always a case of having to take legal action. To me it is not an ideal situation. I do not believe that should be the basis for a working relationship: that every time something goes wrong you have got to run to a lawyer. But, unfortunately, with these people that is the only way you can do it. Small business are not well

enough resourced to be able to do that every time something goes wrong.

CHAIR—You mentioned moving from one location in a shopping centre to another location in a shopping centre. Was that as at the suggestion of the shopping centre management?

Mr Willems—No, that was at our suggestion. We at this stage had a pretty good growth rate. In fact, we were running at a growth rate of about 25 to 30 per cent per year. We had a fairly small shop; we were outgrowing it fairly rapidly. The new mall was sold to us pretty well. I guess we did not need much selling, either, because obviously it fitted in with our expansion plans. With all due respect to the owners, they were there at that stage with the BLF. I do not believe that the delays in the actual redevelopment were necessarily their fault. I think some of the changes that happened—some of the promises that were made and that were changed at a later date before it was all completed—were contrary to what we had been promised, but the delays themselves were, I believe, largely out of their hands. But what happened in the end was that we paid for it. They did not say, 'All right, we know it's costing you money. Therefore we'll reduce your rent by a couple of thousand a month.' Their view was, 'We won't do anything for this side of it. We'll just make sure that the money keeps rolling in so it pays for the delays.'

CHAIR—We have had much evidence from different states and different cities regarding new retailers getting into the industry, probably with not much experience and little education in these areas as well. Is there a need for increasing the education of people moving into retail?

Mr Willems—No. One of the things that does concern me a bit is that every time you pick up the paper and look at the small business page there are nice glowing reports of what you can do with your own business. You will never see in the papers anywhere the real pitfalls and stories of people losing their money. You will always see on the small business pages the one example of someone who has done very well out of it. But you will never see down there the fact that people actually lose their homes as a result of trading and dealing with larger businesses. Again, I believe that that is because small business is naive when it comes to dealing with big businesses. I have no doubts about that at all nowadays. I think we were very naive. We did not always get it in writing. We were also very scared at times in there too. There were times when the retailers just would not talk to each other in public in the mall for fear of being spotted by the shopping centre manager.

CHAIR—What would happen if that were the case? Were you getting examples of letters or something? What sorts of activities were the managers doing?

Mr Willems—In the centre?

CHAIR—Yes.

Mr Willems—Probably not a lot. They just did not like us communicating. They broke down into groups. We no longer had a merchants association after about 1990. Any time that we did negotiate a deal it was always on a secrecy basis. We were not allowed to divulge information to anyone else. I am not convinced that that is correct. In fact, I believe that that should not be correct.

CHAIR—Did you sign a secrecy clause?

Mr Willems—We would have to sign a secrecy clause. Obviously, we then really could not say anything to anyone else for fear that that clause would be acted upon. So no-one within the centre really knew what was happening. Again, it gives you this basis that you are not on the same level with them. That weakens you even further in that you cannot go to another tenant and ask them for support. We did that with one tenant: we supported one tenant, and within two days we had a letter demanding repayment of rental arrears. It was handed to us in front of customers by a courier. We were not that far overdue.

CHAIR—By a courier?

Mr Willems—Yes.

CHAIR—When the shopping centre manager is on site?

Mr Willems—Yes, they got someone to courier it from the solicitors office and hand it to us. I think this arrived within a day of the tribunal hearing, where the other tenant presented our letter of support. We were not allowed to support each other. There was no opportunity to support each other. Even today I would not sit here and give you information that related to a tenant that is still in that centre.

Mr BEDDALL—Who are the other anchors—Woolworths and who else?

Mr Willems—Big W, Woolworths and Action would be the anchor tenants. I do not really know that that makes a big difference. The anchor tenants will always have a better deal out of the shopping centre management. I think that is accepted. We have always accepted it. We were always prepared to pay very high rentals while the traffic was passing through the malls. I have no complaints about that. I think in 1989 we were probably paying the highest rentals in the state.

Mr BEDDALL—But you had customers.

Mr Willems—We had customers and we were making profits. As I say, we have no complaints about that. When things went wrong, there was no effort made to bend. It was a case of, 'We will put the barbecues on for the BLF guys because they can go on strike.' They would spend $5,000 to $10,000 a week on barbecues. They would provide the meat, the beer and everything. We would sit there looking at the barbecues because we did not have any customers anyway, so we could afford to sit out there and watch the fun on the site. But you could not get them to bend.

CHAIR—You do note that not being aware enough of the negotiation relationship between the tenant and the major party is a factor. You are saying that a lot of tenants are a bit naive when it comes to dealing in that situation.

Mr Willems—Naive to start with. Again, it is not only being naive, you believe what you want, knowing that you cannot do anything about it and you have to fight your way out of it. Retail is a day-to-day thing. If we could not do anything on the legal side, all we had to do is go back to the floor and work that

much harder to try to make it work.

Mr MARTYN EVANS—What is the solution to overcome that?

Mr Willems—I do not know that there are any clear-cut solutions. I will be the first to admit that I do not believe that there are any clear-cut solutions. I know that the Trade Practices Act is being looked at in terms of the oppressive and harsh conduct areas. I really do not know.

I do feel that, at the end of it, there is no support for the small business which cannot afford the legal expense of taking them on. That is a definite deficiency. I could not now tackle them. I believe I have a very strong case on a number of things, but I could never afford to win the case.

Mr BEDDALL—Have you talked to the Trade Practices Commission?

Mr Willems—No, I have not. I do not know whether that would help.

Mr BEDDALL—Can I suggest to you that you do. The Trade Practices Commission has taken action on a number of occasions for clients on unconscionable conduct. None of them have come to court because they were all settled. That is not of great benefit to us because we are trying to get a test case up, but it has been of some benefit to the people who have settled. Obviously, none of the Property Council of Australia members want anybody to win one of these cases.

The Trade Practices Commission was empowered by the previous government to take action on behalf of small business. So it can pay for the action. It may be worth your while to talk to the Trade Practices Commission.

Mr Willems—It is a very difficult one because currently we have a case with the Commercial Tribunal. We have already been advised by the centre manager—we had a very complementary phone call, after he received notice that we were to appear at the tribunal—that this will not stop at the tribunal, we will be taking it to the Supreme Court regardless of whether you win or not.

It is very hard to know which one you hit first—the commercial tenancy act, which was specifically set up to deal with that situation, or the Trade Practices Act. I am more familiar with the commercial tenancy act, I must admit, partly because it is a very simple act in some respects. But, having said that, it also makes it very broad and very loose. Certainly, one of the avenues that I was looking at at a later date was the Trade Practices Act.

But it is very hard to take those paths when you do not have the advice. I am fairly right; I have some sense of where I am coming from. But most people would not have as much as I have in terms of how to go about doing this. When you have nothing, you cannot go out to a solicitor and say, 'Hey, I promise to pay you in two years time.' We are in a situation now where we will never be able to buy a home again, because we owe the centre so much money. I cannot afford to go to a solicitor and say, 'Hey, do this for me.' They will say, 'Put the bond in. Give us $1,000 before we even look at it.' That is one of the areas that I believe could and should be looked at. That sort of advice should be available.

With the small business organisations that are set up by the government, there is plenty of help if you want to set up a small business. You can get all the help in the world. But in this sort of situation, you give them a phone call and they will give you a little bit of advice, but that is where it stops. There is no-one there to say, 'We can give you some specific legal advice to point you in the right direction.' In fact, you will find that when you get to the stage that we were at last year, you are on your own—you really are.

Mr BEDDALL—As the Chairman has pointed out, that is what this inquiry is hopefully about.

CHAIR—How long have you been with the commercial tribunal about your case?

Mr Willems—At this particular time, about a month and a half, I would say. We have had one where the manager was not particularly interested in answering my questions, so I have had to rephrase those. I have put those in again. This is only for the initial discussions, where they try to mediate now. The management has all but indicated in the private conversation—before it even went into mediation—that it will not be up for discussion, there will be no settlement at this stage, it will go through the Supreme Court.

CHAIR—Does the centre have an automotive store now?

Mr Willems—No, it does not. This is one of the criticisms I have of what is happening generally in the shopping centres. Automotive stores are going out of them, hardware stores have definitely gone, toy stores have gone. Looking at Whitfords, which is where we were, there is no games world.

Generally, the independent retailers are disappearing out of those centres. If you look at Whitfords, for instance, you have got clones. Karrinyup is a clone. They all look the same. That to me is not healthy. But then I look at it maybe as an ex-retailer. I do not like what is happening. The centres are now deciding what they are going to offer to that area in which they are located. In Whitfords, for instance, if you want to go to an auto store you have to travel some 10 or 15 kilometres. For toys it is the same.

CHAIR—Either Big W or K-Mart was advertising yesterday, saying, 'These are the brands we handle now.' Obviously they are trying to change the whole buying pattern.

Mr Willems—They are; there is no doubt about that. I do not believe that that alone will drive the smaller retailers out of it. In Whitfords, for instance, we ran 3,500 stock lines compared with about 320 that Big W ran. We were very successful. In the six months of uninterrupted trading that we had between December 1992 and May 1993, we earned a profit of somewhere near $50,000. That was for a six-month period. Small businesses can survive—

CHAIR—If they are niched.

Mr Willems—but only if they are on an equal footing to the people they are dealing with.

CHAIR—Thank you, Mr Willems, for your evidence today. We appreciate it. Thank you to everyone else who appeared before the committee. Thank you Hansard.

Resolved (on motion by Mr Beddall):

That, pursuant to the power conferred by paragraph (o) of standing order 28B, this committee authorises publication of the evidence given before it at public hearing this day, including the publication on the electronic parliamentary database of the proof transcript.

Committee adjourned at 5 p.m.