HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Reference: Fair trading

CANBERRA

Monday, 2 December 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

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STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

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CANBERRA

Monday, 2 December 1996

Present

Mr Richard Evans (Chair)

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

The committee met at 10.04 a.m.

Mr Beddall took the chair.

BASTIAN, Mr Robert Andrew, Chief Executive Officer, Council of Small Business Organisations of Australia, Box E445, Kingston, Australian Capital Territory 2604

HOUGHTON, Dr Kim, Project Manager, Council of Small Business Organisations of Australia, PO Box E445, Kingston, Australian Capital Territory 2604

JUDKINS, Mr Peter, Councillor, Council of Small Business Organisations of Australia, National Press Club, Canberra, Australian Capital Territory

ROBERTS, Mr William Keith, Vice-President, Hunter Small Business Persons Association, c/- Peter Frost, The Boulevarde, Toronto, New South Wales 2283

ACTING CHAIR (Mr Beddall)—I declare open this public hearing of the inquiry into fair trading. During the last three months, the committee has travelled to Perth, Adelaide, Melbourne, Brisbane and Sydney to gather evidence at public hearings. The committee has heard a great deal of evidence about the problems faced by small business in their dealings with larger firms. Now that the evidence gathering stage of the inquiry is drawing to a close, the committee is particularly interested to explore potential solutions to the problems that have been brought to light in this inquiry. Today the committee will be taking evidence from the peak industry bodies and from Professor Alan Millington, a consultant on the retail property market.

I welcome representatives of the Council of Small Business Organisations of Australia. 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 with respect of the evidence that they give before the committee. You will not be asked to take an oath or an affirmation. You are reminded, however, that false evidence given to 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.

Is there anything you would like to add about the capacity in which you appear today?

Dr Houghton—I am currently working with COSBOA on small business in regional areas.

Mr Roberts—I am from Newcastle. I have a bakery and I am in a number of shopping centres, having been there for nearly 19 years.

Mr Judkins—I am a proprietor of a small company which provides management services to industry associations. I am also a council member of COSBOA and a past president.

ACTING CHAIR—The committee has received your written submission and authorised its publication. Would you like to make an opening statement before we commence our questioning, or are there any additions or alterations to the submission?

Mr Bastian—I would like to make an opening statement, though short. The council is concerned that

fair trading legislation is only one of a range of measures necessary to protect the employment base that small labour intensive firms provide. We are deeply concerned that public debate in this area has become polarised on the philosophical issue of whether or not to intervene in markets. We are of the view that the philosophical approach to that central issue is clouding closer analysis of genuine economic issues involved. And that has been the thrust of our submission, to argue that rationalist economics has not in fact been rational enough and has not looked into the corners that we would like to look about.

ACTING CHAIR—Would any other gentleman like to make an opening statement?

Mr Bastian—I would like to go on to say that really we have two major points: to argue that this question of fair trading is an economic argument, not a moral one, but in addition to that to argue that the opinion of small business, what small business actually wants, is stronger centralised trade practices law. That debate has been centred around the issue of black letter law versus codes of conduct. If we can get those two points across forcibly, I think we will have done as much as we can expect today.

Mr Judkins—In brief, I would just like to say that my experience in dealing with fair trading issues goes back to the time of the introduction of the original Trade Practices Act. At that time I can clearly recall that the act was trumpeted as being legislation which was going to be the saviour of small business. It has not proven to be so and I am here, along with my colleagues, to try to impress on this inquiry the importance of black letter law.

I take you back to a number of matters that you, Mr Beddall, would be only too familiar with. We had the price discrimination provisions of the Trade Practices Act, which we thought were going to be of great advantage to small businesses. They did not turn out to be so. We had the section 46 market power provisions. They certainly failed to protect small business because, despite the will of parliament and despite excellent works of people like Professor Allan Fels, the courts have found that provision to be not as generally applicable and helpful as we thought. We then have the unconscionable conduct provisions. I think time has yet to tell how they will turn out, but they are not looking too promising at the moment. For two decades I, as a representative of small business organisations, have been looking for some measure of support and yet the legislation that we have been provided with has so far turned out to be ineffective. It is my belief that black letter law can answer a lot of problems of small business. I would urge this inquiry to give very serious consideration to how that might be effectively implemented.

Mr Roberts—I have been a businessman for nearly 19 years, always in shopping centres in Newcastle. When I first started, I was unaware of the Trade Practices Act, but I can tell you that the relationship between landlord and tenant 19 years ago was excellent. Rent to turnover was about seven per cent in our situation, and it was a pleasure to be there. As it has turned out now, the cost of retail space in Australia, as I have read, is the highest in the Western world. I have been told that in Newcastle it is higher than any other place in Australia. We are just in a state of turmoil. I have been asked to come here and very strongly press the problems that are happening in Newcastle, where small businesses are in trouble.

As far as supermarkets are concerned, I would like you to know that, for every one job created in a supermarket, three people lose their jobs in small business. I have documentary evidence of this—we have it here, and I can present it at a later stage—from the Australian Bureau of Statistics. It shows quite clearly just

that. So how major businesses such as supermarkets are benefiting Australia just beats me.

ACTING CHAIR—I had better explain that there has not been a change of government. The chairman, Richard Evans, is indisposed at an airport somewhere, waiting for a connecting flight. But I do have a sense of deja vu, as Rob Bastian would know. Perhaps we could go to questions and you can expand as we go. Richard, as the chair, has tried to keep these meetings basically informal so we can extract information as much as possible.

It is fair to say that the major focus of this inquiry to date has been on three areas: retail tenancy and commercial retail tenancy in shopping centres; whether or not to underwrite the franchising code or practice with black letter law, as indicated; and the motor trades area, where we have further submissions today. In these particular areas, it seems that the bulk of evidence so far has broken up small business into two basic groups: those that basically need some consumer type protection—we thought we had fixed that up with changes to the Trade Practice Act but, as yet, unconscionable conduct has not been tested in the courts—and other small businesses in the growth phase, which are a very different type of business from what we are talking about here today.

Do you have any comments or views on further amendments to the Trade Practices Act? It is still early days in relation to unconscionable conduct but the Trade Practices Commission, in evidence to this committee, has indicated that every time they get close to a court case the aggrieved party settles. So they have not actually got any precedent in the courts yet. Therefore, they are finding it difficult, again, to pursue that.

Mr Bastian—I would like to comment on that. I have personally witnessed the development of both areas of policy and the fierce debate that surrounded the harsh and oppressive proposals of the previous government. In relation to governments, I would like to say that we recognise very honestly your own personal work, and we welcome the Prime Minister's personal enthusiasm. We do not believe that either side particularly wishes to damage small business. Certainly a lot of votes are involved, but for us the issue is not one of philosophy. It is a practical outcome that we are looking for.

The basic problem that the Libs have with the general position of intervention, we recognise, and we support them in many other areas. But we have analysed this since the moment the Trade Practices Act was brought into being and we can see no other way but to strengthen it to get the sorts of balances that we are looking for.

I believe the Small Business Coalition and indeed the Small Business Forum were generally supportive of the more direct approach proposed by the previous government in harsh and oppressive. We formed that view not because we were waiting for case law on the unconscionable conduct issue but because the unconscionable conduct was being found to be unworkable by all analyses. It was not available to small firms because of the legal definition and legal interpretation of what unconscionable means. It is such an incredibly harsh definition. To prove unconscionability is extremely difficult. In point of fact, we were not waiting for case law. It is our perception that case law was not able to be achieved because of the cost, complexity and length of time involved. It was just another example of small business, like consumers, being unable to gain the theoretical legal recourse available to them because of the mechanics of getting there.

The harsh and oppressive rule was not perceived to be a perfect solution. It was perceived to be a step in the right direction, and not a huge one, at that. We are looking for the recognition that when all the taxes are cleaned up, all of the industrial relations stuff is sorted out, and when all the paperwork is put to bed, which are the three staples of the current government, there is still an imbalance in power in markets which, if left to run free, ultimately comes to monopoly. That is the central issue and that is the way COSBOA has tried to structure its recommendation.

So, in terms of solutions, we are not in any sense against firmer codes of conduct. We are not in any sense opposed to stronger codes of conducts with teeth. We support Geoff Prosser's three hot spots. I think that is a good approach to put focus onto the thing. But the business environment, more broadly, needs the underwriting provisions of the act to be strengthened. We always falter when we get into the act on what is public benefit, and whenever we try to get the Trade Practices Commissioner to determine whether a market has been damaged, whether it has been done conscionably or whether it has been done knowingly and with intent to damager. These things are too vague and the tools that the Trade Practices Commissioner has to work with need to be strengthened. That is the central call.

Before I get off my feet, the government seems to be trying to convince itself whether small business wants a firmer approach or whether it does not. That is a central issue to this whole inquiry. As I understand it, one of the documents on the table is the VECCI survey done in the middle of last year. That survey shows that the trade practices issue was rated 52nd out of 53 questions. I would like to absolutely discredit that and place on the table the papers that I have, which are available to the inquiry. It is my understanding that Charlie Bell, and the deregulation task force, received at least 242 submissions—I would like those numbers checked—and that 99 of them were about trade practices issues, even though trade practices was specifically left off the terms of reference.

I draw to your attention the graphs of the Charlie Bell report in the Chairman's report, which is about deregulation but which raises this issue. There are biographs on page 3 of the first report—I am happy to place them on the record and will do so when I finish speaking—which show that the biochart for small business on the trade practices issue is about four times higher than its concern about the fringe benefits tax at that stage. Can I direct a question to the Chair. Is it your experience, on the basis of the papers that you have received from the small business sector, that small business wants strong law in the Trade Practices Act or would they be happy to receive codes of conduct?

ACTING CHAIR—I would think it fair to say that the majority heard in committee has been for a tougher approach. You have to balance that with the view that the people who were most agreeable were people who would appear. Certainly some sectors of the business community have given evidence that says the approach that is current is satisfactory. They were people who are benefiting from what is current. The committee has not yet come to a view on which direction it will recommend.

Mr Bastian—It was not so much of that I was asking; it was of the opinion of small business that you are having placed before you. Is the opinion of small business you have received on that record that the act is adequate, that it needs to be strengthened—that simple issue of black-letter law versus softer codes of conduct? That is what I am trying to squeeze out here.

ACTING CHAIR—I cannot speak for the Chair. But from my reading of it, there is now, I think, a view that more legislation is required. It has always been the paradox of small business: they want less regulation, except where it affects them. We have moved on from those days when everyone was talking about deregulation as the panacea.

Mr ALLAN MORRIS—Except Treasury.

ACTING CHAIR—But nobody takes any notice of Treasury any more, except the Treasurer.

Mr O'CONNOR—Rod, could you expand on the general statement you made that rationalist economics has not been rationalist enough? This is an argument that tends to gravitate into the ideological area when it should not.

Mr Bastian—No, I agree that it should not. Indeed, we covered that in our submission fairly clearly by quoting Mr P. Barret, the then Chief Executive of the Business Council of Australia in his speech to CEDA last year where they expressed concern about $1 in $5 in the Australian community being passed to the retail community as a transfer payment from government.

Our concern is that we have unemployment locally stuck at about eight per cent, and that is the stated unemployment. We would suspect that underemployment takes the figure higher than that. The amounts of money transferred to people on the dole through revenue are huge. In our opinion, that is dead money in the economy—dead, flat money. It is not earning anything. Therefore, we would argue—and I did not really intend to argue it here—that an economic benefit could be gained by pushing those sorts of people back into the work force, even if it meant supporting directly the labour-intensive firms to employ them.

I have asked Kim to come along, and also we have been working fairly informally at the moment with Fred Argy, the ex-director of EPAC, because there are many costs that can be factored back into an economic argument—not only the dead costs of having people on unemployment in order to hold the work force efficient, but also the costs involved in processing. Competitive theory basically suggests that, if you apply market forces immediately now to an issue, ultimately the market will sort out and it will make that market the most efficient. What is left out of the equation is how long it takes to do that. That is very often longer than the life cycle of many small businesses because of the change and the costs of the change—they are not factored in.

I am not an economist, but that is the essential argument. Just before Alan comes in, I would like to say very clearly that we are not arguing for the protection of small inefficient retailers who have been trading there since their dad was in the job. That is not the issue. The issue is that we believe that small labour-intensive firms have both an economic and a social contribution to make, and that the nature of the way business is conducted at the moment—certainly in retail—is inhibiting that.

Mr O'CONNOR—You refer in your submission to the imbalance of power in many areas of commerce. How do you define that; do you have any evidence, any surveys that would suggest that that is the case?

Mr Bastian—I would like to perhaps defer to Bill on some of the evidence. But I cannot believe that this inquiry has been running for a number of months and not received pretty clear evidence of imbalance of power.

Mr O'CONNOR—We have.

Mr Bastian—To speak to the issue, EPAC prepared a paper in about the middle of last year showing that wealth was polarising not only in Australia. But it was as a result of an OECD document. I would put it to you, although I do not have the capacity to prove it, that the polarisation of wealth is running pretty parallel to the polarisation of commercial power; indeed, one drives the other. You are right: we know very little about small business in this country, and that is another issue. The data to support some of our positions is not there—and, quite frankly, it is government's role to provide it, not mine.

But in terms of the behaviour of commercial power—and just before I kick it across to Bill, perhaps I could go back over some of the evidence, if you wish, about how power is applied—the fact that we are talking about commercial power and its impact is the very issue, because the whole of the Trade Practices Act assumes a market behaviour inside a definable market, be it butchers, bakers, candlestick makers; you figure the market out. Many of the problems occur across markets where a large retailer exerts undue pressure on a small supplier; or where a large supplier treats with disdain or poorly a smaller distributor because he cannot get the economies of scale that he would get from a bigger one.

Those are the market power issues, and they apply not only to very small companies but also to larger companies. Perhaps Bill could talk about that. Examples were what we were asked for.

Mr Roberts—I have not been to an inquiry before, and I am a baker by trade. So the information you will get will sometimes be a little bit lowbrow. But as far as we can ascertain, the imbalance of power is this way. In the last seven years Woolworths, Coles and Franklins have increased their market share from 38 per cent to 70 per cent. Have you heard all this before? I have information here by Dr Robert Baker—

ACTING CHAIR—It does not hurt to have it reinforced.

Mr Roberts—I thought it might have been presented, and I do not want to go over things that you may have heard. It has now got to a stage where businesses have closed—small businesses such as butcher shops, bakeries, fruit shops. But that remaining 30 per cent—and by the information I have here, it may not be 30 per cent now—is really small business.

Where can supermarkets increase their trade? Can more be eaten? No, they have to get any increase off small business—and they are going to get it off small business. The way they will do it is that they will stand outside of a small business, watch the product and then lower the price of that product until the retailer goes out of business. They do this all the time. This is their method. It is not: let's help each other; it is: that's tough.

In America, for instance, the antitrust laws state:

The anti-trust laws limiting market concentration of the three largest food retailers to 17% of total market . . .

That does not happen here. They have open slather; they can do as they want. It is very difficult for us even to appear at a committee meeting and leave our businesses, let alone turn around and fight big business. That is just one indication. We also have a tenancy schedule. It must have fallen off the back of a truck, but we have it here.

Mr Bastian—It is attachment 8 to our submission, which you have. You are concerned about solutions? I cannot believe that you have not heard what Bill is re-emphasising for you, and what that tenancy schedules shows you in spades.

Of course, one can argue that Coles Myer, Woollies and the larger retailers, on the basis on a large amount of space, are entitled to argue a better rental situation—and we are talking about the scale of the thing. The weakness in the issue is that, if you wish to talk market theory, you must have the price of a product out in the marketplace; clear and perfect information as to price is the issue.

The other central issue is freedom of entry and exit. If we are to argue that rental space, which is one of the leasing and tenancy issues—which is one of Mr Prosser's hot spots—is to operate like a market, we must have the price of the product and freedom of entry and exit sorted out. Quite frankly, the leasing processes do not permit freedom of entry and exit; they constrain it hugely—obviously they do.

But one area we could look at is how the price is described. Rent has nothing or very little to do with the price of retail space. Occupancy costs, advertising costs, cleaning costs, security costs, all those issues—and I think Mr Beddall is probably nodding off because I said this straight into his report—

ACTING CHAIR—But we did not fix it though.

Mr Bastian—Those parts of the price are not open in the public domain to be seen. Many of the rental regimes in the states now do require full disclosure of those sorts of things. But if it were made absolutely illegal to have any backyard, underhand or fringe benefits tax type approach to things, if it were made illegal for any occupancy cost that was not stated in the lease to occur, that would strengthen the situation. If the second stage were taken with the price of the product being nailed up on the wall in the shopping centre and, therefore, open to be seen by people, pressure would then come into play down at the coalface.

But right now, the tenant does not have the right to see what his supposedly competing tenants are paying. Therefore, the market cannot work because public information as to price is just simply not there.

Mr ZAMMIT—Mr Roberts, you answered my question in regards to the tenancy schedule of Stockland Mall, Gosford. You said that it just appeared—and that is fine. But if we are to have any credibility, we have to somehow source the correctness of this schedule. In your view, how can we do that?

Mr Roberts—How can you prove its authenticity?

Mr ZAMMIT—That is right.

Mr Roberts—There is no way in the world that I can go to Stockland Mall and ask for a copy—and that is my problem. But it is absolutely common knowledge now throughout the retail market of the disparity of rental—not necessarily, say, supermarkets, but it is common knowledge. I have been given this information; I did not go out and get it. Somebody just happened to bring it up at a very large public meeting at the markets in Newcastle.

Mr ZAMMIT—But at the public meeting did Stockland Mall dispute the veracity of these figures?

Mr Roberts—They were not there.

Mr ZAMMIT—But did they issue a statement?

Mr Roberts—Not a word. Probably that would be the best way to dismiss it and not make an issue of it, because it is something that is known right throughout the industry, right throughout Australia.

Mr ZAMMIT—This is what surprised me, to give you an example. There are two shops side by side, M31 and M32. The shop labelled M31 is NIB Healthcare, where they are paying $589.97 a square metre. The shop right next door is M32 which is Medicare, and they are paying about half the rent.

Mr ALLAN MORRIS—They are different sizes though.

Mr ZAMMIT—No, the rate per square metre.

Mr ALLAN MORRIS—They are different sizes though.

Mr ZAMMIT—They might be different sizes, but it is still a rate per square metre.

Mr Roberts—You never know with your competitors, and you are sworn to secrecy. Another thing: your lease possibly will be ripped up if you make a disclosure to another tenant. If NIB walked up to their competitor and said, 'Look, we are getting rent for half the price that you are', that would be considered to be out of order, and you could lose your lease. So it works against the tenant all the time.

Mr ZAMMIT—There are some coffee lounges there of about the same size, but with a very substantial difference in rate per square metre. The other thing I wanted to ask you about is a call I had on the weekend from one of my local newsagents who has a shop in one of the shopping centres. He went to re-finance his business, they asked for a copy of his new lease and he signed the new lease because he thought it was the same as the previous lease. As part of that, his new lease stated that he is not to use the goodwill in his shop as part of the collateral; he is not to use the length of the lease remaining, or to be extended, as part of the goodwill or as part of his assets in re-financing; nor is he allowed to use the exclusivity factor in his shop as the local newsagent as part of his re-financing.

In his case, he put it to them that he would just close down and get out, and that there would be a

shopping centre without a newsagent. Apparently, they very quickly caved in and allowed him, by special agreement, to use these three specific clauses in re-financing his business. If his shop were not a newsagent's, he would be in grave difficulty.

ACTING CHAIR—One question that has been at the centre of our inquiry is the proposition that some shop owners think that there is a goodwill that extends beyond the lease—and the lease is for five years. There seems to have been a significant amount of evidence that a lot of people do not really accept that that is all they have got—five years. Is that a common view in some areas of the retail industry?

Mr Roberts—I think everybody thinks they have goodwill at the end of their lease. I think that they still think it, but it does not always happen. The second thing is that, once you take your lease out—

Mr ALLAN MORRIS—I am sorry, I think you are being very soft. You can go further than that. If you are renting in strip shops and your landlord will not give you a lease, you can go next-door or up the road and take it with you; in a shopping centre, you cannot.

Mr Roberts—No.

Mr ALLAN MORRIS—That is the big difference. That really is quite fundamentally different. You have no choice to rent alternatively; therefore, there is no competition for you, as a tenant, between landlords.

Mr Roberts—Exactly.

Mr ALLAN MORRIS—That really has been the big change. What is more important here, I think most of all, is not the rentals, but the fact that there are very few of those leases with options at all—which is really quite remarkable. Most commercial leases, until very recent times, always had a lease plus an option.

Mr Roberts—That used to be the case.

Mr ALLAN MORRIS—And in there, I think there are only four with options.

Mr Roberts—It always used to be case that you would get an option.

Mr ALLAN MORRIS—It was always the case.

Mr Roberts—Yes.

Mr Bastian—I would come in on that. Whilst morally and in terms of pain to a small business person that is a major issue, I suspect that your responsibilities will go to the broader community and whether or not the consumer ultimately benefits from this behaviour. We believe that they do not.

Let us take the example in your own area of Maitland, when the strip shops in High Street were fairly severely damaged by the development of a Woollies mega-mart. The effect of that was to take the same number of loaves of bread, the same number of bottles of milk and distribute them through a point source—

perceived efficiency. Of the number of employees along the strip shops, $3.2 million in the first week, I think, was moved across—and from a consumer point of view, maybe this is convenient. But all that occurred there was existing infrastructure, and millions and millions of dollars of it became unused.

Mr Roberts—That is true.

Mr Bastian—More of the nation's savings were expended constructing the Woollies store—a freedom of choice by Woollies. But, nevertheless, standing back and multiplying it right it across the nation hundreds of times, we are burning up a hell of a lot of our savings constructing new infrastructure to do no more than concentrate the distribution of bread and milk through one or two points.

Economically, I find that very suspect. I think that knowledge is not available to the people who allow the development to go ahead because, in the lower regions, they do not understand that economic argument. The local planning authorities do not have the capacity to make a judgment on the economic issues involved. That is the core issue here.

Mr ALLAN MORRIS—And they do not have either the legal or financial capacity to withstand a court challenge as to why they could actually refuse it.

Mr Bastian—Very possibly. But that is the core issue we keep coming back to. We are trying to say that the cost to the Australian community of these sorts of developments and this trend is horrendous. Setting aside all the social costs and things, there is an economic cost which we cannot seem to factor in.

Mr ALLAN MORRIS—I am with that. But I think this argument on goodwill is one of the fundamental issues that has shifted in the last five to eight years. I am absolutely surprised that the commercial community, as a community—not simply small business—has accepted a situation where there are now two kinds of tenants: those who get a lease with an option, and those who do not. The ones who do not get an option appear to be the ones in shopping centres.

ACTING CHAIR—It is even worse than that. If you have a look at who got the options on this—

Mr ALLAN MORRIS—Very few.

ACTING CHAIR—Yes, but those who got the options were national franchises, not the individual shops.

Mr ALLAN MORRIS—Yes.

Mr Bastian—The ones with negotiating power.

Mr ALLAN MORRIS—But if you are a law firm, an accounting firm or a government office renting office space, they want you to have an option; they beg us to have an option. At the idea of the Commonwealth not having an option on its lease, the landlord would be quite upset. They want that security of tenure. But the one area where there appears to be no options anymore is your shopping centre. I am

surprised that the commercial world has not rebelled against that just as a simple principle.

Mr Bastian—I would come back very strongly. The commercial world has rebelled. The reason we are sitting here now and have been flogging away is that it has rebelled.

Mr ALLAN MORRIS—You are, yes.

Mr Bastian—The commercial world is broken into two chunks: the big end of town has the power to push these arguments, and small end of town has not. This is not to say the big end of town is malicious; they have just got the power.

Mr ALLAN MORRIS—This is not big and small. This is where I think some of the confusion lies. The small architect or the small accountant has an option on his commercial tenancy because his landlord wants that security; he wants him to stay there. In your case, the removal of an option means, firstly, you lose goodwill and, secondly, he has an option of changing the nature of the centre on a regular basis. It is not simply big and small; it is simply those in shopping centres who do not have options.

Mr Bastian—But who owns the shopping centres and who owns the strip shops?

Mr ALLAN MORRIS—Yes, exactly. But I am saying that I cannot see why big accounting firms or small accounting firms are not agreeing with you—

Mr Bastian—They are.

Mr ALLAN MORRIS—And legal firms. So it is not big and small. It is simply one group being isolated, which is shopping centre owners.

Mr Bastian—The large-small argument is a very coarse argument, I accept that. But what you are saying in words of one syllable is that in strip shops where you have competition, prices are held down; in concentrated shopping areas where you do not have competition, prices slide up. Basically you are saying—and I agree totally—that the marketplace is not working in a concentrated shopping centre.

ACTING CHAIR—I would come to an issue about the concentration and the changing nature of leases, and we have seen a trend away from the option. But one of the things that seem to have developed rapidly in recent times, and has disturbed this committee with its inquiry, is the movement to market rents and the way that that is manipulated. We have had evidence before this inquiry that, in a time when inflation is two to three per cent, when retail sales are flat, rent increases of 30 to 40 per cent are still not uncommon. Is that a general thing?

I am just looking again at the only thing we have before us: the Stockland Mall sheet. It seems that there is a whole mixture of ways in which the landlord is determining the rent for even this one shopping centre. What is the general experience that you have had, Mr Roberts, in this area and with those people with whom you have dealt?

Mr Roberts—Currently, the situation is that, if you strike a new lease with your landlord, you can do it one of two ways. One is on a five per cent rent increase over the number of years, with a rent review after four years. That means at the end of four years, under the new retail tenancy laws in New South Wales, you can have a reduction or you can have an increase—and I have yet to hear of anyone getting a reduction. But you are open slather at the end of four years: five per cent, four years, and let us renegotiate for that fourth and fifth year.

The other alternative is that you can strike a lease which is CPI, and it remains constant for the full five years. The problem really gets down to where you want to re-lease. You have your infrastructure. It has cost a lot of money. You may have just paid it back by working really hard. You have worked your butt off to get that $200,000 or $300,000 paid off, and over the next five years is where you hope you are going to make your money. Then up goes your rent to 20 per cent. It is not uncommon for rent to turnover to be 20 per cent. Yet the Retail Traders Association of Australia say that the average rent to turnover should be from nine to 12 per cent. But it is not uncommon for it to be 20 per cent.

I just want to tell you one thing that needs to be mentioned. You cannot always blame your landlord for the rent differential. Woolworths, Coles, Grace Bros and David Jones, because they are needed, will barter like crazy to get their rent right down. Perhaps they might say, 'We want three years free rent and a fit-out.' So it is not always the landlord. But then, because the landlord has to agree—and right now Woolworths is wanted all over the place—they come in and they get cheap rent; they may even get free rent.

To give his shareholders the return they want, the landlord has to offset that against us—the small trader. He needs the small trader because that is where he makes his money. The other thing is that shopping centres now are not put there for the needs of the consumer. They are industry driven. They have big returns. Superannuation funds are flocking in there. They just cannot get enough shopping centres at the present time. While we are talking about changing the Trade Practices Act or getting some black and white teeth, which we must have, do not ever allow it to be a gentlemanly arrangement. It will not work; it has got to be black and white and strong.

At the other end of the situation you have the councils who are running away from their obligation to not approve shopping centres. In New South Wales, under the environmental planning scheme, there is a section 90(i)(d) that talks about consideration being given to a shopping centre. When they talk about whether it should go through or not, they say th consideration will be given to the economic and social viability of the project. But they never look at it. The way they do it is to say, 'Yes, we consider it.' This is the advice of the town planner. The town planner says, 'Gentlemen, we want you to consider it, but don't do a thing about it.' The law was never meant that way. I am a realist; there has to be teeth.

Mike Walsh, the entrepreneur who was on the *Midday Show*, wanted to put movie theatre extensions up at Penrith. He had a 12-month wait. He put a DA in and they would not let it through. Lend Lease wanted to put one in and they got it straight away. He then engaged a company by the name of Ibecon, which is a very prestigious good consultant that plays the game right. He engaged them and they sued Penrith council for $10 million. They were going to test this law. Penrith council gave in and said, 'You can both have your approval, let market forces prevail.' They could not test that law.

It is a shame because councils now are saying, ‘We will not involve ourselves in those problems because we believe market forces should prevail’, and they run away from it. They have not got the infrastructure, they have not got the techniques, and they have not got the knowledge. So you really need to clear this whole messy thing up in retail trading right now. You have two major problems: one is the fact that the Trade Practices Act is not strong enough and the other is that the councils, who should be investigating the viability of shopping centres, should be made accountable. I have said enough.

Mr ZAMMIT—My view of the attitude taken by a lot of councils is that any potential new shopping centre causes tremendous angst within the community. As a result, a lot of the councils are saying, ‘The developers of the shopping centre have no votes, the people in the area are the voters. Rather than us reject it or accept it, and risk getting into strife with everybody, we will just reject it and let them go to the land and environment court. Then we can turn round to the community for its approval and say, "What more can we do? We sent it off to the court as a final arbiter."’

Mr Bastian—That is a relatively recent occurrence. There is a fairly strong roll-out of all these—I50 on the books or something—across the nation, to develop concentrated shopping centres, particularly megabarns and things like that. The reason you are getting that flashback from the local communities over the last year to two is because—particularly in the regional areas—there is a stronger sense of ownership of the downside and the problems that relate to the unemployment created by this form of concentration. It is a major issue.

I will put another issue on the table that I believe the committee should perhaps look at, I do not have the resources. The sequence of events that we have seen over in Wagga, up in Tamworth, certainly in Five Dock and I think in the Newcastle region as well, is that the large resources of a large retailer are focused to create a shopping centre. In the building process they then secure a favourable space holding, like the key tenancy or whatever. Then they sell, over a process of three or four years, the asset to super funds. That is occurring quite a lot. Unfortunately I have no research to show the quantities. These people do not release anything that is going to be long-term profit. There is a major social question there as to whether our super funds are buying white elephants because of the oversupply of retail space.

I believe the mayor of Newcastle commissioned—Allan would know more about this than I—a study in the middle of last year which showed that the Hunter region had a 37 per cent oversupply of retail space. That finding was on the table of the Hunter region mayor at the same time as there were applications for eight regional shopping centres going ahead in the Hunter region.

The thing is out of control; it needs to be managed. I am quite concerned personally that the future of my super is being ploughed into shopping centres where I believe there is a huge oversupply. The larger corporations that have the capacity to foresee these things are already getting out of them. This is a major issue.

Mr O’CONNOR—Doesn’t the oversupply get sorted out in the marketplace?

Mr Bastian—No. The oversupply is to do with the distribution of retail product, whereas the rental issue is to do with lemmings. There are a whole pile of small business people trying to get into a

concentrated area and they are churned through in five-year periods and disposed of.

Mr ALLAN MORRIS—It relies on a supply of people with lump sum redundancy payouts to fuel the thing.

Mr Roberts—The greatest source of money for franchises is coming from redundancies. That is true. What do you do with a $350,000 payout? Get into food. That is the way to go.

Mr ALLAN MORRIS—Mr Bastian, we have talked a lot about unconscionable conduct and the fact that, while small business consumers have some protection under the law, small business as consumers seem to have very little protection. It has been put to us that 'unconscionable conduct' is impossible to define, and therefore it would not be enforceable by the ACCC. I notice in your submission you have got some stuff there on public benefit and things of that nature, but are you doing any detail on the definition of 'unconscionable conduct' and how it would apply? 'Harsh and oppressive' and 'unconscionable' are the kinds of words that have been used previously.

Mr Bastian—We were directed to step away from section 46 by Bob Baxt, the previous commissioner for trade practices, in the belief that the extension of the 'unconscionable conduct' provisions of the Act which are basically consumer protection provisions would protect small businesses who are price takers. I stress, small businesses are price takers and that makes them consumers. We went through a three- or four-year loop to pursue 'unconscionable conduct'. These are extremely technical legal terms. I will put on record now with no shame that I did not understand them at the start. I was taking advice of the top competition person in the country to pursue this objective. We struggled for several years, got it up with Mr Beddall's support and found that it really did not work for us as we had hoped. We then clutched at another solution—the 'harsh and oppressive' which is apparently more generously applied in the courts. We got to the eleventh hour and did not quite get that across the line.

The means is not the issue here. Whether 'unconscionable conduct' is the correct solution—I suspect it is not—or whether 'harsh and oppressive' will be a step forward—I and the small business community think it will be—that is not the issue. The issue is that small business is screaming its bloody head off to get a result and all the authorities we put in place and pay millions and millions of dollars to hold them in place—including yourselves, forgive me—are not giving us the results we are calling for.

Mr ALLAN MORRIS—We are the opposition. It is all right.

Mr Bastian—No, no. Forgive me—you are a joint party committee and I said at the opening that this is not a party political issue. It is so fundamental. I want 'harsh and oppressive' personally because I believe, in good faith, it will improve the situation of my members. I cannot tell you here and now it is the best solution—

Mr ALLAN MORRIS—We are being told that terminology has no meaning. How do you define it? The examples that people have quoted—

Mr Bastian—In my understanding and in the understanding of most of the representatives in the

small business coalition, 'harsh and oppressive' is an easier to apply definition than that of 'unconscionable conduct' and would extend the efficacy of the Trade Practices Act purely and simply because it is black letter law that we can pin our hat on.

What we are sick and tired of is the vagary of codes of conduct in precise areas. What we are looking at here now is to develop codes of conduct in 100 different areas, having just wrapped up the blooming Charlie Bell inquiry into deregulation and cutting back paperwork. We are looking for stronger central laws which we can understand and use. I do not say for a second that the harsh and oppressive will provide the full solution, but there are some—

ACTING CHAIR—But is not one of the problems the fact that, as a Commonwealth parliamentary committee, we are somewhat limited in the way that we can impose retail tenancy laws. My view is always that the states would never get it right, and they have not. Six years down the track it is still, in my view, as bad as it was six or nine years ago because there is no independent arbitrator of what is a fair rent. You are in a situation where quite clearly we have talked about the people coming into the industry who are superannuated out early, people who try and basically buy a job.

They never take into account that they do only buy the right to occupy that space for the term of the lease. How do you get that message across to those people in the shopping centre that that is all they are buying? That will, in the end, drive some of the market force. The more that the shopping centres have empty shops, the less their share price will go up on the stock exchange and the less investment they will get and the less super funds will invest with them. This is all being driven by people who—and as you said, churning has become a popular word—are being churned through at five-year intervals, or much less actually.

Mr Bastian—At the risk of overtalking again, this issue of education of small business is used as a panacea for all the problems that small business faces. We employ over half the population and make up 98 per cent of firms by number, so we must be doing something right. Whenever we get into a corner and have to do something proactively about a problem on the government's side, we point to some educational deficiency in small businesses.

I believe that the understanding of the leases and tenancy of small firms is improving and I think that the government should take some credit for that through various inquiries such as your own. We will never, ever end that problem. We will have to keep pegging away at clarity of contracts, disclosure clauses, uniform legislation across the country—all of those sorts of things.

But I come back to it: that is an additive which we would encourage, but there is a central issue where there is a disproportionate use of power, which we have been arguing about, which has a downside, we would argue, in an economic sense, not a moral sense, which regulators have to do something about. Some steps that would be helpful would be, I believe, one of your own initiatives, which is not quite there yet but has been progressing, and that is a national code of leasing and tenancy approach. I think you are aware that some work done has been done on that. I think there is a willingness to accept that.

Indeed, it is coming in, but a more central issue is COSBOA's call for a national approach to the service of small businesses, a national small business plan or act. The reason that is so important in this area

is because the problems that small firms face at the coalface, right down there on the ground—and Bill is one of them—is that the issues he is wrestling with in this area involve trade practices at the federal level. They are quite complex, as we have discussed. They involve industrial relations and trading hours issues at the state level, and they involve development applications and shopping centre spaces and leasing and tenancy arrangements at the coalface. There are three layers of government, totally beyond the average capacity of a small firm which, on average, employs 3.4 people. They are tiny.

We need a cohesive approach. It involves a lot of coordination of different regulatory regimes, but that is what Charlie Bell was talking about. It is absolutely fundamental.

ACTING CHAIR—My moment of glory is over because the chairman has returned. I should finish this session because as a session it has gone five minutes over time. I will just give the witnesses one more opportunity to finish any matter that they wish to—

Mr Roberts—Could I just tell you a little bit about what is happening in franchising. Mainly, the person who has been paid out with a lump sum takes a franchise—that is pretty common knowledge. He uses his money and if he goes broke, as many franchisors do, the franchisee—that is the fellow that owns it—will come and say, 'Sorry, you've gone broke, but I'll tell you what I'll do, I'll buy back your fittings. I know it cost you $150,000, and I'll give you $20,000.' So it is sold back for $20,000. He does it up and sells it back on the road for $150,000 as a new set-up. Landlords would rather have franchises, because it is simple—they do not have the worry of evicting a tenant. They only have to see that the franchisee evicts his sub-tenant and then he brings somebody else in.

I believe that a lot of the franchises are not good. Some are very well run. But even the better ones, like McDonald's, are so oversubscribed now that fellows who paid huge amounts for their site and did well because of the huge investment they paid are now finding there is another one down the road. That is a problem in itself, but with the franchise situation there is a lot that certainly needs to be looked out for. I would not go into a franchise. Why pay 10 per cent to somebody who sets up a good idea and does not maintain it properly, does not run around the countryside doing all the homework? It is not always done well. There are some, but my own figure would be that only 10 per cent would be well run. Franchising is a great worry.

Mr Bastian—If I can come in on franchising as well, the core issue of franchising is exactly the same as the core issue of retail tenancy space. To the extent that a franchisor makes his or her money from the franchisee rather than from the franchisee's clients, then the franchisor is basically in the business of raping the franchisee. To the extent that the landlord makes his or her money out of the rents of the tenant rather than out of the turnover of the tenant—that is, the client, the throughput of the occupancy—then he is raping the tenant. The issue there is a central one because the market for both franchisees and tenants is constrained. In that sense, the tenant and the franchisee is in fact the customer or the market base of the franchisee and the landlord; it is just a client-tenant relationship. The real issue is distribution of product down on the ground, but because there is such a throughput through these areas of trade we have lost the plot on that. It is absolutely fundamental.

Could I close on the bottom paragraph of attachment 5, because we keep sliding back into the pain

and the concern about the sector rather than the economic issue involved. I asked the then minister for consumer affairs, Jeanette McHugh, on 23 August 1995:

If it can be properly shown that concentrated shopping centres and/or extended trading hours cost consumers more in revenue transfers to welfare than they save in prices, will the consumer movement support small firms in opposing them?

That is the core issue. It is not so much that small business is suffering as that we are suggesting that the price of carrots is going up less than the transfer payments, taxes and other costs are going up. That is the core issue. The only reason small business should be protected or supported is because in an economic sense, not necessarily a commercial sense, they are probably delivering more to the Australian public than the lower price of carrots in Woollies.

I also attach a fairly wishy-washy response I got from the then minister and I note that Geoff Prosser has the responsibility for both consumer affairs and small business so I will redirect this question back to him. But that is the core issue, and we find it very difficult to get that economic argument on the table.

ACTING CHAIR—If you have anything further you wish to add, we are quite happy to accept supplementary submissions. Thank you.

[11.08 a.m.]

SOUTTER, Mr Anthony Martin, Assistant Director, Business Council of Australia, PO Box 7225, Melbourne, Victoria 3004

GARDINI, Mr Robert Charles, Solicitor and Regulatory Consultant to the Business Council of Australia, 10 Queens Road, Melbourne, Victoria

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

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

Mr Soutter—No.

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

Mr Soutter—Yes, thank you, Mr Chairman. The Business Council welcomes the opportunity to appear before the fair trading inquiry. In considering any proposal to regulate the affairs of business, there is always a need to consider the basic question of whether there is objective or other adequate evidence to demonstrate the need for some form of regulation, whether that be black-letter law or an industry code of conduct. This is particularly important in Australia as, with moves to open our economy, we increasingly face international competitiveness. The cost of regulatory compliance is one of those issues which must be considered in viewing how competitive this nation is.

Initiatives to reduce red tape and to improve regulatory efficiency are high on the international and domestic agendas for enhancing competition and creating a more favourable environment for business activity. At the international level, the removal of barriers to trade has thrown the spotlight on business regulations which may impose unnecessary costs on business and impact on industry competitors. The industrial world throughout Europe, Asia and North America has moved quickly to identify impediments to business and trade from regulatory requirements and has instituted reform programs.

In Australia, the Business Council, in association with a number of other business organisations, made a case for regulatory reform in our paper ‘Liberating enterprise to improve competitiveness’, in which we stated:

Australia’s regulatory systems require major overhaul if we are to compete successfully in world markets. . . In the push for micro-economic reform, the extent and burden of business regulation has been largely overlooked. Business

regulation has significantly increased in recent years without adequate analysis or debate about its impact on industry and its net benefits to the community.

In general terms, the Business Council considers that business regulation, whether it is in the form of self-regulation or legislation, imposes costs on business and, ultimately, the wider community. Such regulation should only be imposed when a clear need has been made out. In such circumstances, industry self-regulation should be considered before a government should enact legislation. Business also needs to recognise that self-regulation is not some panacea for business. Self-regulation in the form of codes of conduct imposes costs on business, as do government legislation and regulation, and has to be justified in the public interest in the same way as government regulations do.

The former Trade Practices Commission, in its report on self-regulation, acknowledged that the following criteria needed to be considered when exploring the appropriateness of self-regulation: the objective need for some form of regulation, evaluation of the effectiveness of existing government regulation, the scope for replacement or partial replacement and evidence that the industry concerned is in a position to regulate its own affairs. Self-regulation can impose less regulatory cost on business in circumstances where it replaces black-letter law or avoids the necessity for the government to take such steps. Self-regulation is inherently more flexible than legislation. It can be finetuned and changed quickly to meet evolving circumstances compared to the more cumbersome legislative processes. In addition, self-regulatory schemes often include dispute resolution procedures which offer the prospect of a speedier and cheaper resolution of disputes.

The major criticism that is often levelled at self-regulatory codes of conduct is that they lack coverage across industry sectors. In recent years, this has given rise to a debate in Australia about the need for legislative underpinning in the form of co-regulation. At the Commonwealth level, there is presently no general provision in the Trade Practices Act to provide recognition or support for industry codes of conduct. If there was such a provision, it may provide total industry coverage of codes, which would address a major criticism of the lack of coverage for codes of conduct.

I would now like to discuss the issue of unconscionable conduct. Section 51AA was enacted in 1992 following a long period of debate. At the time, the Business Council did not oppose its introduction because the section merely reflected common law principles. In considering the need for any further amendment of the provision or for any new provision, the committee needs to acknowledge that such a provision should sit well with the competition principles which are, by their very nature, deliberate and ruthless, as the High Court noted in the Queensland Wire case. A distinction needs to be drawn between tough business conduct, which should not be regulated, and the conduct which creates market distortions. As the Business Council indicated in its submission to the industry department in relation to the Trade Practices Amendment (Better Business Conduct) Bill 1995, the aim of the bill should be to prevent exploitative conduct that produces harsh or oppressive outcomes rather than to prohibit harsh or oppressive outcomes per se.

In considering the need to extend the operation of the existing unconscionable conduct provision, the Business Council recognises that only a small number of actions have been brought under the provision and that the problem appears to remain largely in such areas as commercial tenancy, franchising and some supply arrangements. The Business Council, however, is concerned about the wide impact of any general prohibition in circumstances where a small number of problem areas have been identified. Generally, the Business

Council prefers a fuzzy-law approach rather than a prescriptive black-letter law.

However, should a general provision of the fuzzy-law type be enacted, there is concern about its application in unintended areas which are not problem areas. In particular, the council would have a concern that the existence of a harsh and oppressive provision may well be used to overturn or delay the action of contracts which otherwise would normally be enforceable. In other words, if the provision was not properly drafted, it could be used as a method of people avoiding contracts which they had properly and legitimately entered into simply because they did not like the outcomes of those contracts.

I would point out to the committee that one area of distinct advantage that this country has in its region is the fact that we have a very good body of law and rule of law built around the enforceability of contracts. In the newspaper the other day, where they were reviewing other nations in this region, they noted that in one country a contract is not really worth the paper it is written on. That does not apply in Australia and I would advise the committee to be very careful about recommending amendments to the law that may jeopardise that position.

In any event, though, should a case be made for some legislative action, the Business Council would urge the committee to recommend that such a proposal be subject to a cost-benefit analysis to be conducted by the Office of Regulation Review within the Productivity Commission. Should the committee form a view that some legislation is required, the Business Council would urge that the courts be given a shopping list of items to be taken into account in determining the scope of the provision.

The committee should also consider whether parties should be required to undertake some form of mediation process before being permitted to commence such an action. In this regard, I note that the Australian Competition and Consumer Commission recently conducted a workshop on dispute resolution in industry. Should the committee recommend any legislative reform, the Business Council would also suggest that the committee include a review of the legislation after a number of years to assess its adequacy and performance.

Finally, Mr Chairman, I would like to make available to the committee a short paper I recently delivered on industry codes of conduct to a seminar arranged by the Department of Industry, Science and Tourism.

CHAIR—We will happily accept that and go through the procedure towards the end. Mr Soutter, thank you for your opening statement. I gather, from what you are saying, that you are fairly happy with the status quo. Is that a reasonable assessment?

Mr Soutter—Yes. It would be at this stage.

CHAIR—You would argue strongly that by putting harsh and oppressive terms like that into the current act, it would create some uncertainty in contract law?

Mr Soutter—Yes. In particular, one of our viewpoints that it is important to be considered is the fact that the idea of putting a harsh and oppressive provision into the trade practices law has arisen because

difficulties have arisen in certain specific areas. I mentioned tenancies, which I heard mentioned earlier—franchising. It would be the business council's belief that where there are specific problem areas, they should be dealt with in a specific way rather than applying a general legal provision to the whole of business in this country.

CHAIR—I would like one more clarification. You mentioned very early in your statement that you would recommend some major overhauls, but you did not actually go on to express further what they might be. What were they? You were quoting from some report—very early—about major overhauls.

Mr Soutter—You are talking about things like Charlie Bell's recent inquiry and this sort of thing in terms of overhauls of government regulation.

CHAIR—Is this what you are talking about, in particular?

Mr Soutter—Yes.

CHAIR—You were reducing the overall paper work and compliance of business?

Mr Soutter—Yes.

CHAIR—Okay.

Mr BEDDALL—The genesis of this inquiry is the fact that your members are happy with the current situation. I would suggest that the Business Council of Australia is happy with the way things are at the moment, whereas, in fact, the small business community feels that it is disadvantaged. The reality is that there needs to be a broader provision for people who we have determined basically are consumers rather than businesses in its true sense.

While you talked about competitiveness, how can Australian business be compared with elsewhere when, for example, Coles Myer has an extraordinary dominance of market power. The Coles Myer merger happened because, overall, both would have collapsed if they had not been allowed to merge at the time. They gave undertakings to the government of the day that they would not abuse market power, yet we are seeing evidence on a regular basis that market power is being abused.

While you may say that that is only one sector of the economy—the retail sector—it is a very significant sector for the small business community. There are a whole range of examples where market power abuse can be identified—not just in those sectors. There seems to be a great disquiet, from the number of submissions that we have had, in the small business community that the big end of town has it too easy. Isn't that reflected in why you are happy with the current situation? Because to take litigation under the common law—

Mr Soutter—I will make a couple of responses to that: firstly, I have recognised in my statement that there are some problem areas. The comment of the business council is that they should be dealt with on a

specific problem area basis rather than on some generic basis. The second is that essentially one must always remember, as I mentioned from the QWI case, that competition is tough out there and that is part of what makes an efficient economy.

At the end of the day it can become, I agree, a hard question at the margin to determine when this has slipped over from being the normal, hard, harsh cut and thrust of the marketplace into unconscionable conduct. But, nonetheless, the parliament should be very careful before it intervenes in such a way as to damage the efficiency of the economy overall.

Mr BEDDALL—The freest market in the world, the United States economy, sees the danger in such a way that there are anti-trust laws that prohibit US companies from operating in many of the ways that large business operates in this country. Coles Myer could not operate in the United States under its anti-trust laws in the way that it operates in Australia.

Mr Soutter—Yes, but the US does not have a harsh and oppressive provision, they have an unconscionable provision. Certainly, they do have provisions, as we have, against elements such as predatory pricing. We are not debating that. Also, they have provisions which we do not have which enable organisations which are deemed to be able to exercise monopoly power to be broken up. But that is not the issue before us today.

Mr BEDDALL—It is the issue in the sense that the issue is about abuse of market power, not just unconscionable conduct.

CHAIR—Mr Soutter, you mentioned in your opening statement as well industry self-regulation, and you support that. You vaguely touched on legislative support. Are you supporting legislative support with self-regulation?

Mr Soutter—It is the Business Council's view that self-regulation and government regulation have two, if you like, fairly distinct roles in the economy. One has to remember the difference between them and what they can do. Government regulation, by its nature, if you like, defines a lower bound of conduct or behaviour beyond which one is deemed to be breaking the law.

Self-regulation, on the other hand, has the capacity to provide for best practice type outcomes. Equally, they may have their problems. With government regulation, because it simply will end up providing a lower bound, it will not encourage best practice. Self-regulation, however, does have the problem that it does not deal terribly well with people who are determined to behave in an egregious way. It therefore seems to the Business Council that there should be some method struck to provide a balance between the capacities of both forms of regulation to deliver the best outcomes for the Australian economy. That may, from time to time mean that there is some form of legislative underpinning for a self-regulatory code.

Mr MARTYN EVANS—My colleague, Mr Beddall, asked about the United States anti-trust provisions. You responded that that was fair enough but they did not have a provision in relation to unconscionable conduct.

Mr Soutter—No. I said they had an unconscionable conduct provision, they do not have a harsh and oppressive. My understanding is they have an unconscionable provision just as we have. Whether, necessarily, it means precisely the same thing in their law as it means in ours is something that I could not comment on.

Mr MARTYN EVANS—We do not know what it means in our laws yet, do we, because it has not been tested?

Mr Soutter—No. But there are some advantages in having a slightly fuzzy approach. I am always reminded that under military law for officers there was a charge of conduct unbecoming an officer and a gentleman, which was about as fuzzy as you can get. But what it did was it enabled you to deal with people who were behaving in egregious ways and dispense with their services. In the broader situation there are some arguments for a degree of fuzzy law. The obvious argument on the downside is the question of business certainty. One has to balance those too.

Mr ZAMMIT—Mr Soutter, I am very concerned by your submission today. I believe that you are either totally out of touch with what is going on or you just want the current unacceptable situation to continue—practices that we have heard before this committee and we as local members of parliament have seen, heard and experienced. If you want that situation to continue, I would suggest you have not done the Business Council of Australia any good by your submission before this committee.

You mentioned fuzzy law. Contracts are being set up because of fuzzy laws in such a way that a lot of harm can be done to people who, in all fairness, in all goodwill, have entered the contract not knowing the loopholes and the tricks that can be pulled. You mentioned something about dispute resolution processes and how you can go to court if you do not like the situation. We have heard repeatedly from people who have said, 'After we've put all of our life savings in the business, finding times are tough, doing the best we can, all of a sudden something comes up and we just cannot cope with it, not because of our doing but because of the centre management's attitude on certain matters, and we cannot afford to go to court.' I am very disappointed, Mr Soutter.

Mr Soutter—That you may be but, with respect—

Mr ZAMMIT—I am.

Mr Soutter—I did not say that there were not problems, nor did I say that those problems should not be dealt with either by self-regulation or, if necessary, by government action. I am not here to defend egregious conduct by some players in business. What I am here to say is that the bulk of people in business are there because they intend to treat fairly in their business relationships and enter into fair contracts. I do not want to see the underpinning for those fair contracts overturned. But that in no way defends bad behaviour by certain sectors of the community.

Mr ZAMMIT—The major thrust of your submission, as I see it, is that you want self-regulation to continue, and that you do not want any government interference through making quite clear the unconscionable actions of certain individuals and businesses. That was the thrust of your submission.

Mr Soutter—The major thrust of the Business Council's submission is that we believe that self-regulation does promote best-practice outcomes and should, where possible, be the preferred approach. However, we are not saying that, where there is widespread evidence of egregious conduct, that should not be dealt with by the law.

Mr ZAMMIT—So you agree that—

Mr Soutter—What I am saying is this: as a general approach to problems and where there is a specific problem area, do not legislate generically so that the whole of business picks up another layer of regulation, but attack the problem.

Mr ZAMMIT—We are attacking the problem.

Mr Soutter—However, our concern is that you will attack it in a generic rather than a specific way.

Mr ZAMMIT—Mr Soutter, I have asked others who have appeared before the committee to name an industry where self-regulation has worked.

Mr Soutter—I can name a large number, certainly in areas like occupational health and safety. I can tell you of companies that are members of the Business Council operating in that area where, increasingly, the outsourcing of contractors is used. These companies will not even consider opening a tender until a contracting company has agreed to apply by their standards of occupational health and safety. That is an example of self-regulation being enforced by industry.

Mr ZAMMIT—Occupational health and safety also comes under state legislation. Are you talking about state or federal legislation?

Mr Gardini—Both.

Mr ZAMMIT—But there are very, very strong safeguards.

Mr Soutter—Indeed. What I am talking about there is best-practice outcome. What the state legislation generally provides for is the minimum lower bound. What I am saying is that a number of our member companies have their own internal or, in some cases, industry codes of conduct in this area which provide for best practice, not simply adherence to the legislative lower bound. That was, at least in part, the point I was making about the relationship between self-regulation and government regulation. At the end of the day, government regulation can only provide for some sort of lower bound of conduct. Overall, what we should be looking for—and what this committee should also be looking for—is how you encourage best practice, as well as—

Mr ZAMMIT—Unless the basic minimum is there, Mr Soutter, it just will not work, will it?

Mr Soutter—No. I have no problem with the basic minimum being there.

Mr ZAMMIT—Fine. You have answered my question, thank you.

Mr FORREST—I wish to follow up on that. It just seems to me, in the short time that I have been listening to the people making submissions to our inquiry, that the real issue is the lack of protection for franchisees or traders. In themselves, they are consumers of something else when, at the end of the line, they have to suffer some fairly strict control over what they do to whomever they sell to. Yet they do not have the same protection or rights. Surely you would agree that if the legislation we are looking at is not providing that, then it should. Surely you would agree with that fundamental right?

Mr Soutter—I have no objection to that. All I am saying is that where there are specific problems which, clearly, this committee feels it has identified, they should be dealt with in a specific way. In other words, a contract that happened to be one for a retail tenancy can contain a different set of problems from those in a supply arrangement or from those in a franchise. It is our view that they are best dealt with in ways which address the specific natures of those particular industries, including crafting appropriate dispute resolution procedures. I suspect that one of the problems from which people suffer in the small business end when they find themselves—let us say—on the wrong end of an arrangement, is that they have difficulty getting redress before the law in an efficient way.

It may well be that changes to the Trade Practices Act are not necessarily going to help them all that much in achieving that. It may well be that we would be much better off providing for a tribunal that would deal with the specific nature of a particular industry, that could deal with it quickly and efficaciously rather than having an issue wind its way through the courts. Small business people can go broke through legal costs, as much as anything else.

Mr FORREST—It seems to me that that is the decision they make when they are confronted with Goliath, and that is what they do. I am interested in your comments in your submission about other examples in Germany and the United States, particularly, the German civil code which obviously must be supported by some legislative stature. Does it allow for this level of commercial transaction? Can you inform us a little bit more about the German—

Mr Gardini—My understanding is that the German civil code has a legislative base to prohibit that conduct, so that in North America and in a very significant European country there is a provision which provides a legal remedy for what can be described as unconscionable conduct.

Mr BEDDALL—I just want to follow up in relation to how you suggest that we should find other alternatives. The problem that this committee has is that it is a federal committee and, quite clearly, most of the evidence we have had to date has been from retail tenancy. The states have had 100 years to fix retail tenancy, but we are still in a situation where nine years after a previous inquiry, we have just as many complaints today as we had then. What this committee has to do is determine in which way it can assist the small business sector. Its options are fairly limited. We do not have a national retail tenancy act. So, the only way that this committee can look at it is through Commonwealth law—how it can assist—if it determines to do so. Therefore, it is by nature a much broader approach than industry specific because the industry specific legislation has had market failure at a state level.

Mr Soutter—I would go back to my comment about the problems of bringing in generic legislation. As you say, you are trying to address a problem which, from your perspective, is largely one of retail tenancy, by legislation which—in one way or another—is going to apply to every contractual arrangement entered into by business in this country. I would just suggest that that is one which needs very close economic analysis before it is entered into to see whether we are not in some sense taking a sledgehammer to crack a walnut.

Mr BEDDALL—So, if you could isolate it, you would support it?

Mr Soutter—If you could isolate it. Our preferred approach, as I have indicated, would be to try and isolate the problem areas and deal with them. I acknowledge the problem is provided for in a federal constitution where the problem, as you perceive it, exists at a state level and the states are dealing with it inadequately. But I would suggest also that the Commonwealth has over time with areas, such as the companies law, managed to provide for a uniform approach. I would suggest that one of the roles of government in this nation at the Commonwealth level is to try and bring the various states together on this and see whether a satisfactory uniform approach to retail tenancies cannot be put in place.

Mr Gardini—I think that Mr Soutter's opening comments are along the lines that, firstly, you assess the social and economic problem. If there is no particular industry solution, you should, therefore, examine self-regulation. If self-regulation cannot adequately provide a remedy in egregious situations, then Mr Soutter was suggesting that you could move to some legislative solution, but in a very tiered approach. Rather than having this generic approach, you would also need to give the courts some shopping list and guidance as to the factors they needed to take into account. There should be a cost benefit analysis to the extent possible of saying, 'This is the only solution in terms of the overall outcome. Does it deliver a better result than the do nothing option?' The legislation would, of course, need to be reviewed to make sure that after a period of time it was working the way that parliament intended.

I do not think there is a view that it is not an option, it is only a matter that there are a number of principles to be applied in getting there. If the evidence stacks up and the committee is well placed to hear the evidence, then it is the fundamental task of the committee to make that assessment. But there is a proper role and these are principles that ought to be applied.

Mr FORREST—Going back to the German civil code, you have suggested that in support of your argument. It is a form of industry self-regulation backed up by legislation. Is that the model that you are suggesting when you say that you would prefer some self-regulation—you would prefer to solve your own problems? Is that what you are suggesting to us?

Mr Soutter—Yes.

Mr Gardini—Yes. The approach is that if the industry is prepared to take ownership of self-regulation and if self-regulation can meet various criteria to deliver effective outcomes, then it needs to be explored as an option. However, if it cannot demonstrate, after some trial period, that it is able to deal with these issues effectively, then you move to a higher scale of regulation, which is legislation. Then the question is: what form does that legislation take? Does it take a specific type, or does it take a general fuzzy law

approach? Clearly, Mr Soutter has indicated that the Business Council generally favours a fuzzy law approach, except where there is a concern in the current case that by having that approach it may have consequences in other areas which go beyond the identified hot spots or problem areas.

Mr ALLAN MORRIS—I think it is quite appropriate. Is your fuzzy law approach based on this new Japanese technology of focusing cameras, called fuzzy logic? If not, can you explain the logic of fuzzy law.

Mr Gardini—The term 'fuzzy law' was developed by Mr Green, a solicitor in Sydney, and it was put before, I think, Cheryl Saunders' inquiry into the Legislative Instruments Bill, or perhaps prior to that. It refers to not legislating in the way that the parliaments have legislated in relation to taxation laws, which is that you specify everything that you can and cannot do. That then becomes 'black letter law' as opposed to 'fuzzy law'.

Mr Green was suggesting that a better regulatory approach that focuses on outcomes is to have a general prohibition and leave it to the courts to work out the statutory interpretation behind that. That does not interfere with businesses ability to determine the outcome.

Essentially, the model we have adopted in this country with the Trade Practices Act is the fuzzy law approach. In terms of the restrictive trade practices provisions, you have sections 45 through to 50, and now that section 49 has been deleted there are even fewer provisions. So, essentially, the Trade Practices Act says, 'Competition is about market forces, but this is conduct which you shall not contravene.' It allows commerce to work out how to comply. That approach has had support from the Business Council.

Whilst the Trade Practices Act is technically complex, notwithstanding its few provisions, compared to the taxation legislation it is much easier to work with. It also is not so open to abuse as is black letter law like the taxation act, where, because it is black letter law, if you have not covered everything and then something changes people can say, 'Parliament didn't prohibit that. I can do that.' So then you get into a series of parliaments amending things to fix up loopholes.

If you look at the history of the Trade Practices Act since 1974 there have been relatively few amendments. When the amendments have come, they have come after periods of considered review and have been implemented in that way. That allows for greater business certainty, notwithstanding that the legislation has changed and it has been altered.

Mr ALLAN MORRIS—Except for one little thing. Perhaps I should say that according to lawyers, all law is fuzzy. They spend all their lives on it and earn an awful lot of money proving it to be fuzzy. It seems that the whole point of law is to be fuzzy. If it was not fuzzy you would not need lawyers.

It seems to me that what you are saying is a very specific point of view, from a particular perspective, because those who cannot afford law and those who do not know what the law means really do not approach it. If you look at the years from 1974 until now at the disempowerment of a whole group of business people, it has been quite massive. There really has been a massive shift in relationships. In your remarks you say that if fuzzy law appears to be failing then we need to do something about it. I would have thought there would not have been anything clearer.

We had an inquiry back in 1988-89 in which all this came forward. Six years later we are finding out it is even worse. We talked to people from all walks of business life. The overwhelming input from people in small business is that it has not only failed, it has failed manifestly and at a huge cost.

I am surprised that you are not saying, 'There have been failures. We accept that'. You can still stick to your fuzzy logic law business—fine. What do you want to call it really does not matter because that is academic. It has no relevance to any of us. Start saying, 'We can see it has failed here and here and here and it needs to be modified here and here.' It would be really good if the BCA—perhaps after today you might, particularly if I ask you to—might consider some suggestions to us as to where your fuzzy law concept has actually failed in terms of a lot of these business regulations. I suppose a logical question to ask you concerns your own tenancy. Do you rent premises?

Mr Soutter—Yes, we do.

Mr ALLAN MORRIS—Has it got an option on it?

Mr Soutter—Yes.

Mr ALLAN MORRIS—Would you rent a place if there was an option? You might have heard us talking earlier about it—I think you were here at the time.

Mr Soutter—My view of the option, frankly, is that it is not worth the paper it is written on.

Mr ALLAN MORRIS—Why not?

Mr Soutter—When I say it is not worth the paper it is written on it is because when the tenancy comes for renewal, it provides that the rent shall, at that point, be renegotiated. That is really the issue whether the Business Council continues to rent those premises or—

Mr ALLAN MORRIS—But renegotiating it gives you a point at law to take someone to court and say, 'Hey, this person is being unconscionable or unfair or unreasonable.' Not having an option does not give you that point. If you read the submissions and sit in on part of the inquiry, you will hear it over and over. What is unfortunate is that we are hearing from one group about their problems and we are hearing from another group like yourselves saying, 'We have this philosophical approach.' If only we could match you and put you together. If you could tell us where the fuzziness needs to be defuzzed—if that is the way of putting it—that would be really helpful to us because at the moment we have got this chalk and cheese problem.

Mr Soutter—As I understand it, in choosing the example of a lease, you are coming back to a fairly specific area. Essentially, in most of these cases somebody has got a retail tenancy but has paid substantial money for a fit-out. If, at the end of their lease, the terms on which a new lease is offered to them are unacceptable then effectively their fit-out becomes worth next to zero and therefore they are under pressure to renegotiate the lease on terms imposed by the landlord.

Mr ZAMMIT—That is only one of the problems, Mr Soutter.

Mr ALLAN MORRIS—That is one of them.

Mr Soutter—I get back to the point that where this issue exists, it is clearly a specific problem in the tenancy law, or in the way that tenancies are negotiated that needs to be addressed.

CHAIR—Which comes back to your point about isolating—

Mr Soutter—Yes, isolate the problem. If it ain't broke, don't fix it. In other words, fix those parts that are broken, not things that are not.

Mr ALLAN MORRIS—Surely from your experiences, and from the inquiry six years ago, all the comments and submissions to us now overwhelmingly say that they are broken. It would be really helpful if the BCA could put forward some advice either saying no they are not broken or if they are, agreeing where they are, and perhaps some suggestion as to how we might address it. There is a danger we will get a particular perspective which may be unbalanced or a poor perspective. The BCA could perhaps give a more considered view.

On page 5 of your submission you say that you prefer an approach to specific target problem areas. Surely by now you know some of the problem areas. Couldn't you please give us some advice as to how we could deal with them so that we have some alternative points of view, not simply what may be seen by Treasury, for example, as a narrow point of view. What is your advice about tenancy laws for example? What is your advice about franchises? Do we need franchising laws?

Mr Gardini—I am here wearing a different hat, but in my capacity in the Franchising Council, the code council believes that essentially a self-regulatory regime can be effective with some legislative underpinning, but if there is not an effective package in that way, then the council would have to consider at some time in the future specific franchise legislation. However, at the moment the council is opposed to that because it believes that co-regulation can work and that if you passed specific franchising legislation, the history of regulation in this country shows that it would inevitably grow. Over a period of time, even if you had a very small act setting out essentially what the code of practice is, that would give you total industry coverage but ultimately there would be pressures to keep adding to it. But that would ultimately have to be—and certainly in terms of the franchising area—a satisfactory solution, if a cheaper regulatory option, but one which must be effective, is not put in place.

Mr ZAMMIT—Mr Soutter, do you have any meaningful dialogue with, perhaps, the Council of Small Business? Do you ever sit with them and talk about mutual problems and try and resolve these problems?

Mr Soutter—Yes. As you might have observed, I do happen to know one of the witnesses who was here before me.

Mr ZAMMIT—Obviously, you have got contacts. You have got what you would describe as meaningful contact. Yet despite all that you are coming before us. And I am surprised, Mr Gardini, that you mentioned again the question of 'leave it to the courts', when we are telling you that small business people

will just not go to court.

Mr ALLAN MORRIS—They cannot afford it.

Mr ZAMMIT—They are scared stiff of going to court. Please do not repeat that before the committee, Mr Gardini, because the evidence we have got is absolute.

Mr Gardini—In relation to that, ultimately you are saying, if you have got some legal sanction, everyone accepts that the cost of going to court is prohibitive in this country. That is why if a code of practice is effective—

Mr ZAMMIT—No, I am sorry, Mr Gardini. It is not prohibitive on fuzzy law, it is prohibitive to the person who has not got something clear-cut before them. It is not prohibitive to the very big end of town because—

Mr Gardini—I am talking about the smaller end.

Mr ZAMMIT—Well, please clarify that because you are giving the impression that, 'If we do not like it, we'll go to court.' It does not work like that.

Mr Gardini—If you have a legislative sanction which is either specific or general, it is very expensive to go before our courts. That raises issues of access to justice in addition to the issues we are discussing. However, if you can have an effective code of practice which is underpinned in some way and it has within it dispute resolution processes, in a staged approach, you can try to get to solutions. But, ultimately, if parties cannot get their solutions through that voluntary process, then essentially if there is some breach of conduct that requires some court action, then you have got to look at the access to it. But it is extremely expensive, and particularly where a small firm takes action against a large firm.

Mr ZAMMIT—In other words what you are saying, Mr Gardini, is exactly what everyone here around this table is absolutely certain of: that small business people will not go to court because they are scared stiff and they cannot access the courts. There is no question about that. The point that we are trying to make to you—and I think Mr Morris made it very clear—here we are five or six years down the track from when all these matters have been brought to your attention. It has been common knowledge that there is a problem. We are all busy people, we have all got electorates to keep an eye on and some of us have got very marginal seats but we are part of this committee looking into something that we really should not be looking into because you guys should have been working this out. It should not have gotten to the stage where we are having to call national inquiries into fair trading. Mr Morris asked you if you are prepared to come back to us. Your submission to us is absolutely useless. If you are prepared to come back to us with some proposals for resolving the situation, and if it means that you have to sit with the council of small business and work out something that is mutually acceptable, isn't that the better way to go rather than have us force upon you, through national legislation, something which you may not like?

CHAIR—Before you respond to that, can I say that your submission is worthy of including into our inquiry but I would support what Mr Morris and Mr Zammit are asking, which is that we are looking for

solutions. From your submission there do not appear to be solutions to the problems that we are facing at the moment and you might have some ideas.

Mr Soutter—My view is that the solutions to the problems, because they are not generic but are industry specific, probably do not necessarily lie with the Business Council of Australia. We are an umbrella organisation. Let us take, for instance, another area of contention: service station leases. That is one which is best dealt with, if I can put it this way, by knocking together the heads of the oil companies and those who represent their tenants and arriving at a solution. In fact, I have had some discussions with the—

Mr ZAMMIT—Mr Soutter, I made specific reference to retail tenancies so, please, do not go off the subject. This is what seems to be one of the biggest problems that has been brought before this committee.

Mr Soutter—I was not going off the subject. I was actually simply giving another example of the same problem. What you do is that you draw together the people who represent the landlords and those who represent the tenants and say, 'Look, you have a problem here. Go and put some damp towels around your head and come back with a solution.'

Mr BEDDALL—People who represent the landlord say there is not a problem. We can give you a copy of that evidence if you like.

CHAIR—Their solution is by going to court. They prefer the court action.

Mr Soutter—At that point, I would, to a certain extent, disagree with their position. Even from a big business point of view, major contracts between large enterprises are written quite often with very specific provisions in them to try to avoid going to court. In other words, you put arbitration or dispute resolution provisions into the contract because the legal system is regarded by large business as being a pretty inefficient way of settling problems. To settle a problem between a large business and small business is even worse.

Mr Roberts—It is very efficient if your tenants cannot use it. I am not sure that you have actually seen any of these tenancy agreements or you are actually aware of some of the things we are talking about. I really do suggest that you and COSBOA might have a look. Since you have cited a number of examples of areas where there is such legislation, I think that if you looked at some of the problems with some of our tenancy agreements you would probably be agreeing with small business about the need for black-letter law in some of those areas. It would be really helpful if we could actually hear the results of such a discussion. We are forced to pit ourselves against people; landlords versus tenants; BCA versus COSBOA. You might think about that.

Mr Soutter—I must confess that, at least in part, it seems to beg the question in my mind as to why people enter into some of these contracts in the first place. If you enter into a contract to lease, let us say, a shop premise—and we heard the example of the $350,000 fit-out—and you work out on the basis of your figures that you will just have amortised that fit-out just at about the time the lease comes up for renewal, then it seems to me you have entered into a pretty foolish lease.

CHAIR—We have spent a lot of time with Mr Zammit and Mr Morris asking for a more considered point of view on this particular issue.

Mr Soutter—Yes, we will certainly take that on notice. Bear in mind, as I say, that the Business Council is an umbrella organisation rather than an organisation representing specific facets of industry and in some ways these problems have industry focuses to them. I am certainly prepared to take it on board.

CHAIR—We would be happy to receive an additional submission.

Ms GAMBARO—I would like to support some of the comments made by my colleagues and others. You mentioned that specific generic legislation is not needed here but there are particular—

Mr Soutter—What I said was that maybe what is needed is a specific treatment, not a generic one.

Ms GAMBARO—Right, I was just getting to that. But in areas where there has been specific legislation, such as the Petroleum Marketing Franchise Act, we have had a number of submissions from people in that area and there have been great problems. We have talked about retail tenancy. There is retail tenancy legislation in most states. Again, they are industry specific, but that does not alleviate the problems that we are having in this area. You were mentioning petrol when Mr Zammit was speaking to you. There are a number of problems in the petroleum act: do you feel that that particular act should be repealed?

Mr Soutter—The act itself is not an area that I am expert in, therefore I would not like to comment on it. The only comment I would make on the views you have just put is that, if the specific legislation is not working, I am not necessarily sure that that is an argument that generic legislation is going to do the job any better. Maybe what does need to be done, I suspect, is to go back and revisit the legislation. I have heard what has been said about the tenancy laws in the various states and I am not going to sit here and dispute that there are problems and that they may well need redressing, but I suspect that they are probably best redressed in some ways by creating some sort of uniform approach to retail tenancies around this country that does provide for fair dealing between both parties. The Business Council certainly would not in any way want to be seen to oppose that sort of approach. I said at the outset I am not here to defend egregious behaviour by people. All I am concerned about is the fact that a generic approach to law may well result in people whose behaviour is reputable and proper being subject to excessive regulation.

Ms GAMBARO—We speak about deregulation and less paperwork and less government intervention. But if we approach each of these industry sectors and bring in some sort of code for each of these industry sections, do you not think we are creating another layer of bureaucracy, and who is going to administer the special industry specific regulations and codes?

Mr Soutter—Firstly, you are not in fact creating another layer. After all, if your argument is between legislating generically for everybody or legislating specifically for somebody, then, by the fact that you have only legislated for somebody and exempted the everybodies, you are creating less rather than more regulation. Secondly, a lot of that regulation already exists. What we are possibly arguing about is the fact that the regulation that exists at the moment is defective and needs to be addressed.

Ms GAMBARO—I am sorry, I do not think it as clear-cut as that. What about if you have companies that are in two industries and you have specific industry legislation for one industry and again a different legislation for another industry? I can just see some problems there. Perhaps you would like to comment on that as well.

Mr Soutter—I would really have to go back to specifics and try and identify an area where you have got a specific area of overlap, and I suspect that overlap probably has to be geographical or at a physical location where you are being regulated at the same location by two different forms of regulation. Without going into the specifics and looking at an example, I cannot really give you much help on that one.

Mrs BAILEY—Given what you have been saying and certainly what I read in your submission that the Business Council favours a stepping back approach and a non-interventionary approach by government, and also given that I have heard you acknowledge, in the short time that I have been here this morning, that there are differences between the problems experienced by large business and small business, does the Business Council itself regard that it has a role in teaching the skills for educating and mediation for small business, or does the Business Council merely see itself, as you have said, as the overarching authority representing big business?

Mr Soutter—I would have to say it is the latter. The simple reason is that the Business Council itself is not a large organisation in terms of the number of people. We are 20 people all up. So we are simply not resourced to fulfil some sort of educative role. That does not mean that I do not believe there is not a need for an educative role somewhere along the way because, clearly, there are people who are entering into contractual arrangements that at the end of the day are severely disadvantageous to them. As I said earlier, I question why you would enter into some of the arrangements that have been cited. It might well be that the euphoria of the moment, or something like this, results in people entering into agreements that they probably should not have. But there needs to be some more education in that area.

Mr ALLAN MORRIS—Or shonky marketing.

Mr Soutter—I do not deny it. I have had people try to sell me some funny propositions in my time. I think if one looks at the small business man or woman as being essentially a consumer in that sense, just the same as there are organisations out there which help to educate consumers, there probably needs to be more help.

Mrs BAILEY—I have one quick follow-up question. When the processes involved fail, what do you see as the answer for those people who are vulnerable within the system who usually tend to be the small business person?

Mr Soutter—I think the answer to that depends on the nature of the failure. If the failure has been caused by sone form of unconscionable conduct, there is already provision to deal with that. There are provisions in various areas of contract law to provide that people have cooling off periods and so on, and maybe that needs to be looked at also. But you really have to go back to the specific cause of failure. At the end of the day, one cause of failure is simply stupidity, and you cannot legislate to protect people against being stupid.

You can, however, provide that there be appropriate provisions whereby they have the opportunity to exercise their commonsense and/or to seek appropriate professional advice. I cannot provide you with one single answer to how you deal with the problem because it really depends on what has caused the problem. People will make mistakes; they will make errors; they will be stupid. Equally, people can be deluded by others, misled, conned or whatever. Those different circumstances demand different responses, and I suspect at one end there is no response. That is why there is a cut and thrust out there in business that people do pay a penalty if they make a mistake.

CHAIR—Mr Soutter, do you have anything you would like to say in summary?

Mr Soutter—No.

CHAIR—Then I move that the document entitled 'Industry code of conduct—industry's perspective' presented by Martin Soutter, the Business Council of Australia, be taken as evidence and included in the committee's records as an exhibit.

Mr ALLAN MORRIS—Mr Chairman, I would like to say to Mr Soutter that the committee is always very grateful for any subsequent submissions. If you and COSBOA happen to have a discussion some time and happen to see some ways in which you may achieve mutual ends, it would be helpful to us to at least hear that.

Mr Soutter—I will actively seek out Bob Bastian and have a chat with him.

CHAIR—Thank you both for your time today.

Mr Soutter—Thank you.

[12.06 p.m.]

BOOTH, Mr Ian, Senior Adviser, Regulation and Environment, Australian Chamber of Commerce and Industry, Level 3, 24 Brisbane Avenue, Barton, Australian Capital Territory 2600

BROCKLEBANK, Mr Brian Jarret, Project Manager, Australian Chamber of Commerce and Industry, Level 3, 24 Brisbane Avenue, Barton, Australian Capital Territory 2600

MARTIN, Mr John Edwin Charles, Executive Director, Australian Chamber of Commerce and Industry, Level 3, 24 Brisbane Avenue, Barton, Australian Capital Territory 2600

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. 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 Martin—Thank you, Chairman. Just briefly, there are a couple of key elements that I would like to emphasise. Firstly, in relation to the background to ACCI and the constituency that we represent, clearly we cover a very large component of small business in the country, through our member organisations and their affiliates. We cover over 300,000 members and, therefore, most of those are small business. There are two points about that, which we have mentioned in the submission. Firstly, we regard this issue very seriously, and I would like to make a few points about that as we go along. We have attempted some surveys, and one in particular was done prior to the election in January this year, where we covered 57 issues of concern to business. There were over 3,000 returns from that survey. The issue of unconscionable conduct—and the role of the Trade Practices Act was an issue mentioned in that—got a very low response rate as an issue of concern to business.

The second survey that I make reference to was conducted by our Victorian member, VECCI. You may well have had comments on that survey as you have gone through your hearings. Secondly, from ACCI's point of view, there is ample evidence that many small businesses encounter problems in their contractual relations with big business and there is clearly a problem that needs to be addressed. Small businesses do face disadvantages when dealing with big business. They are less informed and have fewer resources, and often they do not understand the responsibilities and risks they are undertaking and do not have previous experience to rely on.

ACCI does not consider that more regulation and black letter law, such as broadening the current section 51AA or a new section of a generic type of the Trade Practices Act, will solve the problem. We have had a debate about this within the ACCI constituency for very many years, as many of you around the table are aware. From our debate and largely one in which the organisations that are mainly represented come from

small business, the feeling was that that was not the issue and that there were many downsides from generic additions to the law.

We felt that, after discussion through our organisation, a better solution would be to identify the causes of the problems and to develop specific measures to address them, and that those measures would need to target small business's lack of information and expertise—compared with that of big business—when entering into contracts. We believe that many disputes can be prevented if all likely dispute areas are fully canvassed when such issues as a retail tenancy or a franchise are being entered into. Codes of conduct have been developed to ensure that small business interests are protected by requiring all relevant steps to be taken before signing these contracts.

However, a major difficulty clearly arises when parties signing contracts are not covered by these codes, particularly when this applies to larger business. This might be tackled by reinforcing codes with appropriate legislative underpinning and a stronger campaign to advise and educate small business about the need for them to be fully informed about their responsibilities. We support the ACCC approach that, wherever possible, codes of conduct should be voluntary, but include a provision such as in the Trade Practices Act for a code to be made mandatory to ensure compliance when this is appropriate.

Finally, I would like to wind up by saying that there are clearly complexities in this issue. There are advantages in keeping things simple in taking a proactive view, but we must recognise that in some areas small business is being held back by the lack of bargaining power that they have. We have indicated in our role with the Small Business Coalition where we have the full rainbow of representation from small business—and it is an organisation with which David Beddall was closely involved over time—that we want to take this issue forward, but we want to solve the problem rather than have it made worse by getting into more of a mire of legalistic approaches.

CHAIR—Thank you for that. You have identified that there is a general problem and you have suggested that perhaps we should not be looking at changes to section 51AA. You have suggested that likely disputes should be canvassed prior to entering into a contract, but what is the solution then? I did not hear many solutions from you. What is the ACCI suggesting as a solution? Do you see a mediation process and do you see yourselves being part of that process?

Mr Martin—As we said in our submission, we clearly see that there is a need in the problem areas—because outside the specific areas identified, we do not have evidence of concerns of the arrangements between large and small business. Perhaps 90 per cent of business goes on without these problems. The solutions, as you refer to them, clearly are a combination of things.

As we say, in those areas where the codes should apply and be made to work, it is making those codes more effective, and we are quite prepared to say that there should be a legislative underpinning that requires some mandatory membership of the code and some sanctions in respect of the Trade Practices Act having some application to those codes. That would, therefore, encourage the players involved to come to some conciliatory arrangements.

Certainly, we would see our multi-industry member organisations in the states and territories playing a

greater role in that. They have come forward to us, and probably I think indicated to the committee that they see themselves potentially playing a role in that process.

CHAIR—Do you see these voluntary codes then moving into the franchise so-called industry?

Mr Martin—Yes, we would not draw any distinction. We think that that should apply in the franchising area.

CHAIR—One of the difficulties is actually identifying what a franchise really is. Do you have a clear definition within your organisation?

Mr Martin—ACCI itself has not investigated this. I would have thought that the franchising council and the arrangements that have been put in place have been working on this and we have been very supportive of the process. We saw that as a process that was proceeding fairly appropriately.

Mr BEDDALL—One of the issues that has re-emerged after many inquiries—and it is perennial and all your members would be involved—is retail tenancy. There is, clearly, an abuse of market power and there is, clearly, unconscionable conduct taking place in some, if not a large number of, retail tenancies.

The solution was to try to get uniform national laws. That has obviously failed. What we are seeing is a large number of people who are not well educated in the ways of business entering into contracts. That will continue no matter what, because if one person knocks back a lease on a shop because they are smart enough to realise what is going on, somebody else will take it up. That is clearly the case in major shopping centres.

Where do you see the solution to that? The committee has yet to form its final view, but there is a feeling around that there has been a market failure in terms of the way the states have legislated and there is no uniform law. There is also no equality between the tenant and the landlord, and small business is, clearly, at a great disadvantage. Probably what we are saying is: how do you think we, as a committee, should address, in particular, retail tenancy?

Mr Martin—I would go back to those principles we are espousing rather than argue in any detail about that. That is a difficult area. One of our members—the Australian Retailers Association—clearly put a view to you on this. The same principle applies: there does need to be some arrangement. As you say, the state laws do appear to be working to different effect in different states and, clearly, some degree of consistency would be preferable. I could only state those principles: let us get to some arrangement which nationally has some consistency and which gives a better weighting. We argue that there should be some legislative backing to whatever arrangements are put in place, but we are not, on a day-to-day basis, involved in those considerations.

Mr BEDDALL—Just to follow up: I know the Australian Retailers Association is a member of ACCI, but in evidence to this committee it does not see a problem. This committee has been around the country and there is a problem. If the major body supposed to be representing retail traders does not see it as a problem then we have a gap between reality and the truth. We do not know what the answer is but we need to search and look for some sort of solution.

Mr Booth—I am not a specialist in the retail area myself, but I would have thought that there is a strong case for a standard form of retail tenancy agreement which includes all due process guarantees, full disclosure up-front of both the meaning of legal terms and the commercial implications and a guaranteed dispute resolution. I suspect that perhaps for too long the law councils of the various states have been the main drivers of standard form contracts and I would think there is some room there, though I am not a specialist myself, to get some equity and equitable terms into those standard forms.

Mr FORREST—Your submission argues that a general change to the Trade Practices Act is not justified based on surveys conducted by your organisation. My understanding is that the surveys conducted by VECCI have a very low participation rate anyway—eight per cent or something. That is not a good sample. Maybe your surveys do not really have a good handle on just what a massive problem does exist out there, and the style of people, particularly if they are in tenancies—whether they are in the early stages of their lease arrangements or coming up to the end of it. This applies to petroleum as well as to any other retailing. I would like to know how reliable your surveys are in terms of—

Mr Martin—There have been comments on the VECCI survey that were an interim position. There was certainly a much bigger coverage than given in some comments. I do not know if you have spoken to VECCI.

CHAIR—We have and we did not necessarily take their survey as being one of great sample size.

Mr Martin—They got a relatively low return from—

CHAIR—Basically the survey suggested that one-third of their respondents see there is a problem. They say there are two-thirds say it is not a problem but, alternatively, there is one-third who say there is a problem.

Mr Martin—Eighty per cent did not respond.

CHAIR—Something like that, yes.

Mr Martin—You can read that whichever way you like in terms of the non response rate.

CHAIR—They probably have not got time.

Mr Martin—But our own survey was one that went to 6,000 businesses. It was just really a rating of 57 items and the response on the ‘unconscionable conduct’ brought it in 54th out of 57. It was a big coverage of a lot of small businesses and we have a small business breakdown of that as well.

Mrs BAILEY—Mr Martin, you are not really wanting the government to toughen up the legislation, on one hand. In your submission you are talking about how multi industry chamber bodies could play an honest broker role in developing credible dispute resolution mechanisms. We have been dealing with a lot of problems and I think you and I both know these problems have been around for a long time. Why have you not done something about putting these dispute resolution mechanisms into place before now?

Mr Martin—I think it reflected very much the fact that until 10 years ago all the business organisations were very inward looking. They tended to see their role very much as dealing with their own members, largely as lobby groups. They have got much more into service delivery and catering to both members and non-members. There has been a cultural shift. It has been part of the changes that have been going on in our economy—the internationalisation being more outward looking. An element of this is to take responsibility and see a role for themselves in that type of activity. All the groups are configured differently and they all have a slightly different view of this problem, as we have amongst all ACCI members. But it is not an excuse. I see an evolution occurring in some of these things that were holding back business. There are a whole range of other things that they are involved with too.

Mrs BAILEY—I guess most people would think a decade would be a fair amount of time for industry to become more responsive to the needs that have been obviously coming to the fore within its industry. Can you therefore perhaps understand the small business people's point of view that where their own peak industry bodies have done precious little to help them they are now perhaps looking to government to help them?

Mr Martin—It may be that some people are crying out for a solution. When we talk to them—and I think this is almost universal—the first thing they say, without exception, is they want less regulation, not more regulation. That is the prime issue with them.

Mr Booth—It is an issue of cost benefit. I mean some people who are really hurting I imagine are prepared to consider additional regulation.

Mrs BAILEY—Could I perhaps just suggest to you that most people are not calling out for less regulation? They are calling out for a fair go. It is how we achieve that fair go we are concerned with.

Mr Martin—Yes. We are saying that, in those areas of prime concern, we totally want to see an approach to a fair go. It is a matter of getting the right approach and it is a complex range of things. A lot of it is about educating and informing people because information is the other area in which small business really is lacking.

Mrs BAILEY—A lot of people are saying that but what have you been doing in that area?

Mr Martin—In terms of?

Mrs BAILEY—Educating.

Mr Martin—CAI, before the amalgamation of ACCI, and now ACCI have put out information through our member organisations. I think many of the business organisations have sent information to members. Once again it is an issue of perhaps business generally putting out—

Mrs BAILEY—So you have been tending to inform the people who are well informed?

Mr Martin—Many of them are relatively well informed, but we have been working with the Trade

Practices Commission, certainly since I have been with ACCI, on this issue and they have been trying to improve the information dissemination. That is one of their major roles. We have been saying they should be emphasising it more.

Mr ALLAN MORRIS—This suggestion that business does not want regulation is an absolute furphy. What small business means by that is red tape, where they need five licences, or 15 licences, to run a milk bar. That is what they mean by that. But when you say look at the last 10 years with deregulation I say look at what has happened to small business; it has been disastrous. Shopping hours, financial deregulation—the whole range of deregulation has been quite disastrous. If you actually talked to your members about that individually in detail you will find they do not want deregulation. They want less red tape in the sense of tiers of government running their businesses and licences and all those processes. But open slather on shopping hours? No, they do not want that. Open slather on legal processes? No, they do not want that. They actually want some protection. They want regulation in a range of areas, and I think it is very wrong of you and very misrepresentative of you to put that forward as an in globo response because it really is not. I am sure it is not really what you believe but it has become one of those mantras that really does an awful lot of harm.

Mr Martin—The regulation issue is a difficult one. It is a two edged sword and it very much depends on where particular small businesses are coming from. The ones that are looking internationally—a lot of the manufacturing and service industries—want minimum regulation.

Mr ALLAN MORRIS—On what?

Mr Martin—On the way they operate.

Mr ALLAN MORRIS—No, on what?

Mr Martin—On conditions on which they operate.

Mr ALLAN MORRIS—Hours?

Mr Martin—They want to open 24 hours a day.

Mr ALLAN MORRIS—Yes, they can. I am sorry, I thought you said you never know the detail, because you have got this mantra of deregulation. It was important 20 years ago, now it is a nonsense.

Mr Martin—No, I am sorry, you talked to me about 24 hours shopping hours.

Mr ALLAN MORRIS—You said manufacturers. If you are an industrial estate, as a manufacturer—

Mr Martin—No, I am saying many services—

Mr ALLAN MORRIS—No, you said manufacturers, you actually said manufacturers.

CHAIR—Let us not get into an argument; let us commit to a question.

Mr ALLAN MORRIS—But most people in industrial complexes have no trouble with working more than 24 hours if they want to, but most small retailers do not want 24-hour shopping.

Mr Martin—We do not have any surveys to show us that.

Mr ALLAN MORRIS—Go and talk to your members.

Mr Martin—We have been and we are getting conflicting signals.

Mr ALLAN MORRIS—What I might do, Mr Chairman, is ask Mr Martin to submit to us later in writing the details of particular regulations that small businesses want removed. I think you will find it is more red tape and things like licence approvals for the health department and the planning department—all those things.

Mr Martin—No, it is workers compensation and work cover and unfair dismissals. Those types of areas are the things we get the biggest hits on. They are all regulations.

Mr ALLAN MORRIS—Your submission on page 3 talks about the concept of franchising code and the franchising council, and it says there that it should be further developed with appropriate backing from the Commonwealth and state and territory governments—That sounds to me, by the way, like more regulation. But could you perhaps help us, and not necessarily now because I think this is becoming one of the nub issues of this inquiry. That has been put to us. It would be helpful to get some ideas about how you think that could happen. If you could particularise to some degree what kind of regulation; black law, backing up a code, the code codified?

Mr Martin—Certainly, in very brief terms now in answer to Mr Morris's question, we would see a backing of the code and resources. Your point is quite correct: you never do these things without some incremental increases in regulation. But we have admitted that up front that in the areas—

Mr ALLAN MORRIS—Could you enlarge on that, perhaps later? We could see you about it later.

Mr Forrest—Yes.

Ms GAMBARO—I have a quick question on this survey. To how many companies did you sent it?

Mr Martin—Six thousand.

Ms GAMBARO—And what was the take up rate?

Mr Martin—In excess of half.

Ms GAMBARO—I wonder if you have available—and, again, the committee would probably be very

interested in this—what the take up rate was, by industry? Was the response rate of some industries—let us say car manufacturing, for example—higher than, say, service industries?

Mr Martin—The cut that we have on it is businesses size 1 to 4, 5 to 20 and above.

Ms GAMBARO—By size?

Mr Martin—We have only done it by size, yes.

Ms GAMBARO—You also said, which I found quite interesting, that they were asked to rank items from 1 to 57 in importance and that unconscionable conduct came in at 54. I wonder how many companies were aware of what unconscionable conduct actually meant and had a clear and positive definition of that. Do you feel that there may have been a bit of ambiguity, or did you have that clearly explained in your survey?

Mr Martin—No, it is an issue in any survey. There was a minimum use of terminology. If you were going to go into something in more detail, you would explain it. That is a problem with that type of survey.

Mr Booth—It is also one of the problems with legislating. Inevitably, lawyers cannot use terms with which small business people readily identify. If you wrote something in like 'requirement for fair and equitable trading', it would not have any meaning until there were, say, 10 or 20 years of case law. This is one reason why our preference is for codes, because you can write some language which is meaningful and detailed, sector by sector, to small business people.

Ms GAMBARO—Thank you.

Mr FORREST—We have heard a number of organisations come in now and advise us that they would like to see this whole area managed with a voluntary code of conduct. If that was possible, I cannot see why it has not happened—the problems that have been brought to this committee have been around for a decade or more. What gives you the confidence that a voluntary code of conduct will resolve the horrendous difficulties that people find themselves in with their family businesses—either it is a fuel retail site or it is in a huge shopping complex—when you have got Goliath and just a little David with no rock in his slingshot? What gives you the confidence that a voluntary code of conduct is going to work in that environment?

Mr Martin—We are saying a couple of things which add force to that. Firstly, although we are talking about it initially being voluntary, we are adding the qualification that we would suggest that in the areas where this concern is, there does need to be legislative backing so that the recalcitrants, therefore, would be drawn in by a mandatory requirement that they join the code.

We are, in fact, taking it further—probably further than our organisation has done in times past. We did put a lot of effort into working along with the Trade Practices Commission, as it was then, to have voluntary codes introduced. We are now admitting that there does need to be a bit more force applied.

Mr FORREST—The oil code tried in the oil industry has not worked. It seems to me that it is only with the threat of legislation that it is now being offered as the panacea. If it had the potential to work, it

should have worked before now. It is just the threat of legislation that is causing everybody to offer this as the solution. I have no faith in it that it will work, because it hasn't. In the examples that have been offered it has not worked either. I cannot understand why you would place so much faith in it.

Mr Martin—We are suggesting still better information so that small business is better placed. We talk about, particularly, the underlying problem of monopoly positions in some of these areas, and there does need to be a greater understanding of the implications of that. There is no perfect solution—if anybody thinks there is going to be—in the workings of markets, that is wishful thinking. But we are trying to get to some optimum situation. We do not think the optimum situation at all is further fiddling around with the Trade Practices Act but we think there can be some further manipulation with legislative underpinning in these areas and better pulling the parties involved together.

It is going to take some work and, as we said, we think the multi-industry chambers can play a role in better dispute resolution processes. There is a certain degree of peer group pressure that comes in there among business. I do not think we have utilised that nearly as well as is in some other countries. We do not have a solution but we think there is a range of things that could be done a lot better. Generally, we are fairly happy with a lot of the things the competition commission has put in its submission.

Mr ALLAN MORRIS—Could I sum up two matters. Firstly, Mr Booth made the remark earlier, and I want to put it on the record so that we are clear about it and perhaps you may want to respond subsequently, that he thought it would be appropriate—I think he was thinking out loud—that there be a national tenancy standard which spelt out dispute resolution, equitable bargaining and things of that nature. I think that was a helpful comment to hear. I would be really grateful if you could draw out those comments if you would not mind.

Secondly, regarding the remarks I made earlier concerning franchising, we are mindful of the difficulties of black letter law and fuzzy law, codifying and voluntary codes. We hear those things from a variety of people. We look to our national bodies for some broader insight and broader advice. I would be grateful if the chamber could devote some effort to that. I do not want to put you to too much trouble but perhaps in some way you bring a dispassionate position to this inquiry and it may be helpful as to how you differentiate between the code and the codification, the balance between the two.

There seems to be a fair bit of agreement for that general approach. There seems to be a fair bit of support for that as a principle but I think most of us have trouble asking where does one start and the other finish. I am sure some thoughts on that would be help us understand.

I may have been a bit passionate earlier but that is the nature of politics. I get worried that this question about deregulation really does confuse the issue because people want less red tape and less intrusion but they also want protection. They do not want open slather. Deregulation eventually means open slather, dog eat dog, and the biggest dog wins. People do not want that but they want less interference. We need to draw a line between those two things otherwise we do a great disservice to our community by assuming that deregulation is open slather, which is what people see it as.

Mr Martin—Yes, there is a very important trade-off there.

Mr ALLAN MORRIS—I am sorry if I was a bit passionate but you will understand the nature of this.

Mr Martin—Yes.

CHAIR—Mr Beddall has been pushing a sympathetic line, to most of the people on the committee, that there may need to be somehow introduced some consumer protection. In other words, there are consumer protection laws now for consumers but small businesses being consumers of big business, that there should be some sort of protection for those consumers and currently there is not. What is your view?

Mr Martin—It is not something we have explored in this context. We have traditionally had a view that you are getting onto touchy ground once you start to have something that interferes with the basis of contract and the workings of the market. While we have sympathy with and see as very important addressing some of these things, we think anything general of that nature you would have to be very careful with that it did not actually start to add to the costs of small business because of the wariness of larger business in doing business with them.

Mr Booth—There is a potential for it to rebound because if you are in big business's shoes you might say that the possibility of opening up a contract would harden their resolve to go in with a watertight contract on their terms up-front. That is looking at it from basic commercial instincts.

CHAIR—Wouldn't it be beneficial if that was the case, though—if it was harder up-front and everyone knew what everyone else was doing?

Mr Booth—Yes, that is what we are all looking for. Ideally, we are looking for more certainty, but certainty which is fair and equitable.

Mr Martin—But it is a bit like the general provisions on unconscionable conduct and extending them—in the end, you are not sure of the implications to areas of business that have absolutely no problem in their work. I would have thought 90 per cent of small business and large business was working together pretty well in this country. There is a problem in these particular areas. None of them are internationally focused really, so they are not ones that are competing on—

CHAIR—There are three specific areas: the retail sector—

Mr Martin—Some of the franchising will be eventually.

CHAIR—and franchising and the oil companies. I want to move to that. What is the chamber's view on the franchise marketing act? We have had evidence that oil companies would like to see it repealed. Would you favour that position?

Mr Martin—No, we are saying that is a specific area that does continue to need to be supported. We are certainly not saying that it should be got rid of—quite the contrary.

CHAIR—The argument being put to us is that if it is repealed then the Trade Practices Act is toughened up a bit to account for that.

Mr Martin—It is contrary to our position. We are saying that a general toughening of the TPA is counterproductive. We still think these things should be focused on the area of problem.

Mr ALLAN MORRIS—Mr Chairman, one thing we were discussing earlier with some previous witnesses, before you came in, was the question of goodwill and the changed nature of it. It seems that what has occurred in the last 10 years or so has been that the development of shopping centres has meant the centre captures the goodwill, whereas in a strip shopping area where people can move from shop to shop if they try and increase the rents there is some competition—and often quite reasonable competition—between landlords. In a shopping centres that has gone. Therefore, where businesses in a strip shop can sell with goodwill, in a shopping centre they cannot. The shopping centre has actually captured, if you like, the goodwill of all the businesses that are in there.

In a similar way with franchises there is no goodwill. Similarly with petrol companies—oil companies seem to be in a shift in ownership of goodwill. This seems to be a common phenomena and it seems to be quite deliberate. I do not think it is accidental. I thought that shift in equity, if you like, would have been a concern of organisations like yours over time. I do not know if paradigm is now an allowable word, but there does seem to be an enormous shift in the value system of business so that goodwill is now effectively owned not by monopolies but by very major operations. Has it been canvassed or discussed by yourselves at all in any form?

Mr Martin—It certainly has never been canvassed sufficiently. It is a complex issue and the implications of it are not entirely clear. If that is true—and my reading of the thing is that that has happened to some extent, though it differs in different markets and areas—it is something that we probably need to understand a bit better. It is clearly an issue when anyone is contractually going into a lease or any form of arrangement. They would have to be pretty aware about what happened 10 years ago that meant you ended up with something very saleable after a time. Perhaps it will have to be reflected in—

Mr ALLAN MORRIS—But the idea of putting your savings into a business, building it up and then when you sold it, apart from the capital gains tax which is applicable to it, you had—

Mr Martin—Maybe that is what has been affecting it; maybe capital gains tax has had some insidious effect on it.

Mr ALLAN MORRIS—I suspect it is more to do with the changing ownership of these organisations. Each new set of owners has to get a market surge to justify its investment, so the investment values seem to have changed. I am not really trying to say I know about this myself. I have seen very little debate on it in public forums and certainly in the major organisations. If you know of any information on that or any discussions that have been held it would be of interest. I suspect deep down that people are being badly misled because they assume it is like when their uncle or grandmother or cousin had a business: they worked really hard for long hours and did not make much per hour but, at the end of the day, they had built up a decent business and when they sold it they got their benefit. That is certainly reinforced by, for example,

the current government's policy at the elections of changing capital gains tax for goodwill. One thing was implicit there: people in business had goodwill.

CHAIR—Let's seek a response.

Mr Booth—We alluded in our written submission to the need to assess monopoly situations. The move towards centralising of retailing, through either huge hypermarkets or franchise chains, is inevitably giving rise to this problem of a capture of goodwill. In a sense, it is because shopping centres lessors know that the key in many areas of Australia to volume turnover is to have a location inside one of those shopping centres. The problem is an inevitable result of the change of retailing pattern.

Mr Martin—It is a structural change that we need to work through and understand more. We will certainly follow that up, because some of our member organisations would have a view on it. It is not one that we have specifically—

Mr Booth—The issue certainly comes up whenever a tenancy is up for renewal or the option is to be exercised. Clearly, there should be knowledge up front by both parties, before they enter the initial lease, of the value of that so-called goodwill and what is at stake if the lease is not renewed. I am aware that some landlords try and take advantage of that. They say, 'We will renew the lease, but the new rent will be a percentage of your increased turnover.' So, in a sense, that is one response which shows market forces working. You can make your own judgment about whether they are working well.

The real problem is when you do not get the tenancy renewed. But it does not fall within the traditional concept of goodwill. Goodwill is something that you value when you sell a business to the person who is buying a business. The landlord has no contractual relationship with the tenant in that sense of goodwill—unless, of course, you were to write a whole new concept into a lease saying, for example, that if you terminate the lease without good reason there may be some grounds for compensation. That is a purely personal view, I hasten to add.

Mr ALLAN MORRIS—It is certainly one worth canvassing.

CHAIR—Your colleagues in Victoria suggested that there is no goodwill; that goodwill is only as good as the lease; that people moving into retail environments paying large sums of money to do so should be returning their investment within that lease period; and that any extension of that lease period would then be considered as a bonus, if you like. They also said there was not enough education or knowledge at the very start of an agreement to make sure people understood that they have got to return their investment within whatever lease period is left.

Mr ALLAN MORRIS—Could I put an alternative scenario to you: people enter into contracts and they have a contract in black law—a signed contract; at the end of that period, if they have been harmonious, if you like, and meeting the objectives of themselves and the organisation they have contracted with, there is no reason to assume they are going to be sacked. Basically, what you really want is a law of unfair dismissal on tenants. Tenancies are being terminated without justification and fairness, without any sense of equity, at the whim often of a new owner, because between when they first read it and when it is to be renewed there

has been a change either of the manager or the owner.

It is reasonable that if you are renting a house or a business, or anything at all, you will be able to stay as a tenant if you are a good tenant. What they are saying is that we have to assume that when your lease comes to an end, whether it be a flat, a business or whatever it might be, your landlord will kick you out. That is a very strange way to think about relationships and commercial arrangements.It is a turning on the head of all the old norms of commercial relationships.

Mr Martin—It has also got to do with the nature of good business practice and your relationship with your clients, your customers and suppliers. I think that there is an issue there about how you operate in a market and, clearly, there would have to be questions marks about the approach to doing business of landlords, or whatever, that had a short-term view that they could operate in that way. I do think that there has been structural change that people are still coming to grips with. You were saying that VECCI made a comment about good will which is clearly their interpretation of how the change is affecting—

CHAIR—I think that is the message that we need to get out into the community. If you are investing $200,000 of your payout figure, you have got to return that investment over the period of the lease because beyond that there is no guarantee.

Mr Martin—In addition, we need to understand the position someone is put in that has sunk costs. How can that person be protected in the agreements which he or she has entered into? How can this sunk cost be protected in some way?

CHAIR—In summary, Mr Martin, would you like to make a summary closing statement?

Mr Martin—I think that we have given all of the issues a fairly good airing. In closing, I would just like to draw attention to the point we made at the end of our submission relating to unfair competition from government agencies.

Mr ALLAN MORRIS—Politicians might find ways around it, you said.

Mr Martin—It is an issue that we feel does cut across this to some extent, and competitive neutrality is one of the most important objectives. We feel that, increasingly, this is a problem that is occurring partly because government business enterprises, or some government agencies, are actually getting entrepreneurial—and good on them—and we like to see that, but where they are competing unfairly with smaller businesses, particularly—

Mr ALLAN MORRIS—That is a fair comment on bureaucrats, but really quite unfair about politicians.

Mr Martin—Yes. I am sure I did not put that in about politicians. It must have been a slip of the tongue.

CHAIR—I thank you very much, Mr Martin, for your submission and your evidence today. We

appreciate your time.

Sitting suspended from 12.55 p.m. to 3.30 p.m.

[3.46 p.m.]

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TERRY, Ms Alison, Member, Legal Committee, Federal Chamber of Automotive Industries, 10 Rudd Street, Civic, Australian Capital Territory 2601

CHAIR—Welcome. Do you have anything to add to the capacity in which you are appearing today?

Mr Bayard—I am the Legal Manager of Toyota Motor Corporation Australia.

Ms Terry—I am the Legal Manager of General Motors Holden.

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 authorised its publication. Would you like to make any additions or alterations to your submission?

Mr Pennington—No, but if the committee would so agree, I would like to make an opening comment.

CHAIR—Please do so.

Mr Pennington—Firstly, I would just like to outline the Federal Chamber of Automotive Industries and its role. Basically, we represent all the vehicle manufacturers and importers—some 40 members, ranging from motor cycle companies to heavy commercial vehicle companies. Our role, particularly with reference to this inquiry, is to bring to government an industry position rather than 20 or 30 different views from each individual company.

This issue first came to our attention when I think it was Senator Chris Schacht introduced the Trade Practices Amendment (Better Business Conduct) Bill into the Senate last year and we made a detailed

response to that and, as you know, we have updated that response to this fair trade inquiry. There were three specific points to our response at the time. Firstly, we felt that the existing section 51AA of the Trade Practices Act was still largely untested, and that is no reason to call for a change to it.

Section 51AA can already be used to cover a wide range of circumstances with respect to harsh and oppressive conduct. Who other than Mr Delaney of the MTAA would suggest that that legislation imposes unachievably high hurdles—I think those were the words he used—in relation to unconscionable conduct. We would just refer to the recent Ultra Tune case which seems to support our view in this matter.

We think there is also a lack of a clear definition of just what constitutes harsh and oppressive conduct. I think it is a very hard issue to come to grips with. And we believe that existing legislation adequately covers the arrangements between businesses, such as the fair trading acts which appear in most states; contracts acts, particularly in New South Wales; and the tenancy acts which are in most states and territories.

Probably the major issue in recent times for our members has been the franchising code of practice. It is wrong for Mr Delaney to infer that we have ignored the code—that is certainly not true. The chamber has been involved in discussions on franchising since its inception. We proposed some amendments which would have made the code more workable from the motor vehicle industry point of view, but unfortunately these were rejected outright at the time.

Our chief executives have had meetings with Senator Schacht on two occasions to discuss the franchising code specifically and we repeatedly asked for data on the so-called problems between dealers and car suppliers, but to date we have receive no information at all. Our best judgment is that in about the last six or seven years only a couple of cases of disputes have gone to judgment. It is our view that things are quite good out there.

It was also suggested by one government department that we should sign the code simply as window-dressing—that as the automotive industry, as large companies, if we signed we would bring a lot of other companies in. We did not believe that that was an appropriate course of action. We made a comprehensive submission to the Robert Gardini review of the franchising code and we provided him with copies of the dealer agreement.

I think so far we have covered the issues pretty well in being up front and certainly not ignoring the code at all. We are of the view that our dealer agreements better cover the arrangements between dealers and car companies. They clearly spell out the arrangements and the dealers know their terms before entering into the agreement.

Furthermore, most new dealers have been in the industry before, and they are aware of the way it works. They know their rights and their obligations and how the manufacturer administers the agreement. Negotiations leading to appointment are detailed and generally protracted. New dealers, because they are experienced business people, would seek the appropriate legal and financial advice, as the investment, both initially and ongoing, will be substantial.

It should be made clear that new car franchises are not small business as some might see; they are multi-million dollar businesses. The agreement is not developed on a one-on-one between the car company and a single dealer, but rather between the dealer council or line group and the car company. So it is a much more balanced sort of an approach. They are uniform across a total franchise, with just minor variations to take account of specific issues. As such, the terms are standard, they are well known and understood, and they represent the prevailing market conditions.

The industry is very competitive. Dealers are often multi-brands, which makes us, I think, unique in terms of the so-called franchising phrase, and dealers will change brands to suit their business. They will drop a low profit brand and replace it with a high profit brand. Certainly, that is happening as some of the new Korean companies come in; they are profitable businesses to be associated with.

The industry is very performance based and we always provide a comprehensive range of incentive programs. You have probably seen the advertisements on television that relate to that. Good dealers are not easy to find and, therefore, a performing dealer is not going to be terminated or not renewed. Despite some suggestions, car companies do not terminate dealers without good reason. With the level of competition in the industry, the loss of a dealer means that the opposition will pick up sales in that particular marketing area. Our objective would always be to help the dealer become competitive and profitable. The dealer agreement also specifies the circumstances in which, and how, any termination can occur.

The really important point is that the dealer network is the car company's retail outlet—that is where we sell the cars. It is essential that the network is as competitive as possible. Any disputes between the dealer and the company not only adversely affect the dealer concerned but also the network generally. As such, it is not in its interests for a car company to have disputes and, therefore, they are always resolved as soon as possible. And we certainly use the dealer line groups for that purpose.

In conclusion, the Federal Chamber of Automotive Industries does not support a generic franchise and legislation, or amendments to the Trade Practices Act and or legislation underpinning codes, on the basis that such new legislation or amendments are neither required nor desirable, given the points I have outlined.

What I would like now is to ask Alison Terry to speak, perhaps in a little more detail on franchising, and then Damien Bayard will address the dealer agreements and suppliers to the industry. Perhaps after that we can go to a question and answer period.

Ms Terry—I would like to make a few comments about the concept of franchising and the franchising code, because while, as I understand it, the current inquiry stems from the previous government's better business conduct package, that in turn arose from the inquiry into the franchising industry and the franchising code.

We have had a long history in commenting on the whole issue of franchising and how it affects the car industry. We have maintained a strong and consistent view that that code is not applicable to the motor vehicle industry because we can distinguish the nature of new motor vehicle dealerships, and the contractual relationships that are in place between manufacturers and their dealers, from the franchising sector, which most people understand as being true franchising. By that, I am referring more to the fast food outlets, such

as Big Mac, Hungry Jack's, and all those sorts of things. Those outlets have a few characteristics which put them much more into the so-called definition of franchising which has been included in a lot of the material written about it. And this is where franchisees are licensed to use very strong and recognisable trademarks.

Not only that, they are required to run their businesses in accordance with a very strictly controlled marketing and business plan, and they also typically pay fairly high franchise fees for that right. By contrast, motor vehicle dealerships are truly independent businesses. They are certainly characterised by the right to use strong and recognisable trademarks. However, there are no franchise fees and each dealership operates its business very much the way that that dealer chooses to operate the business, and certainly not in accordance with a master business plan or marketing plan as would be the case for the more true franchising sector.

The other points that we have made in our introduction are that motor vehicle dealers aren't and can't be restricted to the product of one manufacturer. They do pick and choose and typically the larger dealerships would carry three or four brands at any particular time. They are also large public companies and the investment required is many millions of dollars as well as considerable experience over time in the industry. We are not talking about mums and dads with $50,000 worth of superannuation money investing in a so-called franchise opportunity.

In terms of the franchising code, in particular, we have made a number of submissions where we talk about some of the difficulties with that code as it applies to industries such as the motor vehicle industry which is a mature industry. We have very detailed dealer agreements in place with our dealers and to overlay some of the concepts which are included in a document such as the franchising code would introduce a lot of confusion into a contractual relationship that has been developed over quite a number of years.

I am not sure that I need to say anything more by way of general comment so perhaps we will leave it to whether there are any questions after Damien has made some comments. Thank you.

Mr Bayard—I would like to cover some general points that may have arisen out of the evidence that was given to the inquiry by the MTAA and elaborate perhaps on some of the points that either Mr Pennington or Ms Terry have raised.

As Mr Pennington said in his opening remarks, motor vehicle dealers and our suppliers to the manufacturers would generally not be classified as small business as defined by Senator Schacht's package which he released last year, I think, headed 'Creating a better business environment.' In that package a small business was defined to be a manufacturing organisation employing fewer than 100 people, or a service sector organisation employing fewer than 20 people. I think that in the majority of circumstances, most of our suppliers and/or dealers would fall outside that definition if it was the one to apply in this type of debate.

The businesses that are run by both our suppliers and our dealers are sophisticated and we believe that the dealers and suppliers are able to make rational and considered decisions. The agreement is clearly spelt out in written form for them to consider prior to them entering into any contracts with us.

I also would like to mention the fact that I believe that the former proposals put forward were not intended to apply to a simple refusal to deal or to a termination of a contract or lease. In the evidence given

by the MTAA, Mr Rickus spoke about a circumstance which he faced some years ago when Alfa Romeo refused to renew his dealer agreement. That dealer agreement, as I understand the proposals, would not have been and should not have been covered by that proposal in that it was only a short-term appointment, 12 months by 12 months, and therefore would have fallen outside that proposal.

We say that tenure is certainly a matter of contractual negotiation and the franchisee is aware of the tenure position before entering into that agreement. So they know the duration of it, they know the circumstances in which it will be renewed or extended, and take that into account when deciding to make their commitment.

In the Rickus example, as I mentioned, Alfa Romeo determined not to extend that agreement and very shortly thereafter Alfa Romeo withdrew totally from the Australian marketplace. In normal circumstances the dealer agreement would provide the right for a company, if it was intending to withdraw totally from the marketplace, to be able to terminate an agreement. I think that our submission would be that that is not an unreasonable position to be in. If you have no product, if Alfa Romeo Australia was no longer sourcing product from Alfa Romeo in Italy, then there was no product obviously that they could pass on to their dealers and they would have to, in fact, go through a rationalisation program.

I mentioned tenure. I think it is generally accepted within the dealer network that there is a need on the part of the manufacturer to restrict appointment to three years or five years, depending upon the companies involved. I think everybody understands that there needs to be, from time to time, a rejuvenation of the network to take account of the performance of the parties and also changing demographics. I think the dealers that I have spoken to at length about issues that have been raised in this debate believe that it keeps them focused on their performance, knowing that the renewal—whenever that may occur—will be heavily influenced by their performance. They, I think, believe as we do that that would not necessarily be the position with open-ended agreements. They also know that a non-performing dealer will adversely impact upon all of them, as it impacts upon the reputation of the product in the marketplace.

It has been said that the dealer agreements are not terminated without very serious consideration and it seldom occurs that a dealer agreement will simply not be renewed for anything other than very substantial cause. I would also just like to mention the fact too that most transfers of dealer points occur following negotiations between the existing dealer and a new dealer. It is not the manufacturer who in fact is heavily involved in those negotiations and he cannot pass on to the intending purchaser financial information relating to that particular dealer point. That has to happen between the two parties who are negotiating at arm's length. They are independent operators and whilst the manufacturer will be able to assist those negotiations, it is essentially a negotiation between two independent parties away from the manufacturing context.

We have spoken about the degree of uniformity within the dealer agreements. We have said that it is not possible to have total flexibility. However, it is fair to say that generally all agreements, whether they be new agreements or agreements that are renewed, will have special conditions covering specific issues. The conditions in the agreement would not be outside prevailing market conditions because of that standardisation. They are well known right across the network. We only include special conditions to cover specific issues relating to a particular dealer.

In those fairly rare circumstances where termination does occur, it would be most unlikely that a manufacturer would not buy back new car stock and new parts from the dealer who has been terminated. That was a point that was again raised in the MTAA submission as being a concern. The reason why we say that it would be most unlikely that a manufacturer would not buy back new car stock and new parts is that the manufacturer would just not risk the impact that a fire sale would have on the image of the product in the marketplace.

The dealer agreement also generally specifies how the price will be determined for the product in those circumstances. Again, the dealer, when entering into the dealer agreement, knows exactly the circumstances that will give rise to a termination and he knows exactly what the obligations of both the dealer and the manufacturer will be upon a termination.

We, as Mr Pennington has mentioned, have dealer councils or line groups. I believe that they exist in most of the franchises in the motor industry. Those councils which can be both at a state and national level can and do raise issues of concern that their constituents might have directly with the manufacturer. The manufacturers meet regularly with the dealer councils to discuss those particular issues.

I think it is also fair to say that individual manufacturers are dealing with issues that have been raised in the last couple of years in the context of the franchising code and are debating and negotiating those directly with their dealer councils and with any new dealer agreements that are being entered into on a total basis. The manufacturers would most certainly prefer to resolve disputes before the need to go to litigation, and the alternative dispute resolution processes would be the much preferred course.

I think it should also be said that indeed most courts nowadays insist on the parties having negotiated before they will allow matters to be listed for hearing. Certainly in Victoria, where Toyota is stationed, the Supreme Court and the county courts now almost invariably insist that the parties have gone through a full negotiation before they allow the matter to be listed for hearing because of the backlog of cases that was before them and they are trying to get those matters resolved without the need to have them formally dealt with in the court.

Sometimes when matters do get to the dispute stage the franchisees, and in our instance maybe that is the dealers, are often supported financially by industry bodies who may be ignorant of the real nature of the issues. That support, whilst I do not decry it totally, can in fact make negotiations on commercial terms more difficult.

In relation to our supply network, Mr Pennington has mentioned some aspects of that, but again, from a supplier point of view, their contracts will, for all intents and purposes, be for the life of a particular model. It is very difficult, if not impossible, for a manufacturer to change suppliers mid-model. It is very difficult to change midstream, get tooling done and all of those things organised. So essentially, once a supplier is appointed, they are there for the life of the model. That might be for six, seven years or more.

Also, most major tooling, which would be the biggest sunk cost in relation to the supply of product to a manufacturer, is invariably bought by and owned by the manufacturer and it is then passed on and kept by the supplier during the life of the model. The original equipment suppliers know what the international

competitiveness targets are that they have to meet insofar as cost, quality and delivery are concerned and they know exactly what matters they will have to absorb during the run of a particular model in relation to things such as currency fluctuations and those sorts of things. So, again, they are fully aware of those matters prior to accepting the contract.

We would be particularly concerned should a harsh and oppressive conduct provision enable a supplier, for example, two years into a model run to challenge the contract on the basis of harsh and oppressive conduct and have the contract terminated. That would leave the manufacturer in a totally untenable position. We believe we address all of these issues up-front and the uncertainty of having this type of allegation hanging over our head would, we believe, make our industry uncompetitive in the current international marketplace. I will leave it at that, and if you have any questions we will be more than happy to answer them.

CHAIR—I am sure my colleagues would like to raise some questions with you, but I have some questions myself before we do that. I understand the concept of dealership and I understand that your distribution system is really a dealership rather than a franchise. Where is this idea that the car industry is a franchise model coming from?

Mr Bayard—It is coming, I think, from the definition that was put into the franchise code initially. It was also, I think, coming from the fact that certain people wanted the motor vehicle industry to be part of the franchise code. We have a large network and there are lots of people employed in it, and I think it was felt that we would be a handy vehicle, if I can use that expression, to be part of that. But, as Ms Terry has said, there are a number of different circumstances which apply to our industry from those which apply in many others. We do not in fact have a franchise fee, so there is no ingoing charge. The dealers are all independent operators and there is only a certain amount of involvement that we can have under the Trade Practices Act in relation to their operations. So, for a number of those reasons, we just see ourselves as being different from some of the others that are very clearly identified as franchised operations.

CHAIR—You said your dealerships operate under a term of about seven years, is that right?

Mr Bayard—That varies. Our dealer agreements at Toyota are generally for three years. Some others are for four years, some others might be for five. There will be occasions when the dealer agreements might be for shorter periods than that. It could be that a dealer agreement is renewed for a period of 12 months when in fact the performance of the dealer has been unacceptable and the dealer knows the circumstances that he has to meet in that 12-month period. So all of those things are clearly spelt out at the time when the dealer agreement, for whatever period it is, is entered into.

Ms Terry—There are also some companies which do offer unlimited term agreements in Australia. So they have an agreement of unlimited duration which is then able to be terminated according to the rights of termination under the agreement. It really varies from one company to another.

CHAIR—You have given the perception that dealers going into your agreements are very much aware of their contractual obligations going into it. Do they have options at the end of the period, and, if they do not have options, how do you deal with goodwill and how would the association define goodwill? Is there a

goodwill in the industry?

Mr Bayard—Essentially no. If a dealer is not going to be renewed then there must be very good reasons why the manufacturer will not be renewing. If it is for performance, the dealer will be told that his performance has not been satisfactory and is not satisfactory. I have to say that in the time that I have been with Toyota, which is now for a decade, we have not, I think, terminated anybody for non-performance. What happens is that we go to the dealer and we will say many months before the dealer agreement is due for renewal, 'Your performance is unsatisfactory. These are the areas where you need to pick up.' They are given a certain time within which to do that. They are reviewed regularly. And if in fact they are not picking up their game, they will be told, 'Look, we think it's best for you to look for somebody else to take over your business so that this particular outlet can continue to operate as we think it should.' So they are then given the opportunity of finding somebody else who will buy the business from them and they will then move out.

CHAIR—Is it possible then to return the investment within that three-year period with Toyota? Are they able to return their investment in that period, and do they clearly understand that they have got to return their investment in that period?

Mr Bayard—They certainly do. They certainly know the period that the agreement is entered into. They know exactly up-front what it is that they are investing—which is a substantial amount of money in usual circumstances. So they, I think, almost invariably will have financial and legal advice given to them, and we certainly always counsel them in that regard, to have that advice given. So they would be aware of those requirements. Again, it is very unlikely that they will not be renewed at the end of that three-year period. As I say, we are not in the business of not reappointing dealers, because good dealers are not easy to find and, when you have one who is performing up to an acceptable standard, you are going to keep hold of them.

CHAIR—That is with Toyota, but what is it like with the rest of the association members? What is the percentage of renewal? Is it high?

Ms Terry—It is very much along the lines of the figures that Mr Bayard is quoting. Particularly in the longer established networks—Holden, Ford, Mitsubishi, Nissan—typically in the regional centres you need to have a Holden dealer and a Ford dealer and a Toyota dealer, because if Holden goes then you have got no representation. So market forces dictate that you think very seriously before you would either not renew or terminate. Again, if you are wanting some specifics, Holdens would mirror the type of figures which Toyota has given. It is very unusual that a dealer is either terminated for non-performance or is not renewed.

CHAIR—You mentioned that the courts are keen not to see you in front of them and that they try to encourage some sort of mediation. Is there any formal mediation process? Is there an appeal process in place? How do you work that?

Mr Bayard—From Toyota's point of view, that is a matter we have been talking about with our dealer council for the past 15-odd months. I have a national dealer council meeting next Thursday at which we will be discussing the establishment of an internal dispute resolution process. As I say, that has flowed

out of the discussions that have ensued following the franchising code discussions. We are formally going to put in place something which we hope will enable them to raise issues within a formal dispute resolution process.

CHAIR—That is not just Toyota but everyone else?

Mr Bayard—At this stage I cannot speak for anybody else but certainly we are looking at it from our point of view.

Mr Pennington—Certainly, yes, that would apply to most companies.

Mr ZAMMIT—Your words were that you had not terminated any dealer for non-performance in your 10 years with Toyota. What do you terminate dealers for generally, other than perhaps if they are dishonest or something like that?

Mr Bayard—The principal reason we terminate will be if the company goes into receivership. That is a right given to us under the dealer agreement. What, in fact, happens in those circumstances—almost without exception—is that the receiver will be appointed under a new dealer agreement for a period of time to enable that receiver either to turn the business around or find somebody else who is acceptable to the company to take over that business.

Mr ZAMMIT—So basically it is only if they get into financial difficulty that you terminate.

Mr Bayard—Yes, that has been our experience.

Mr ZAMMIT—Do you terminate for any other reason?

Mr Bayard—I cannot think of any, off the top of my head, where we have terminated for any other reason.

Ms Terry—One example might be if a dealer is convicted of a criminal offence.

Mr ZAMMIT—Yes, I understand that.

Ms Terry—There are a lot of enumerated rights.

Mr ZAMMIT—The point I am trying to get from you is that supposing a dealer says, 'I have been dealing with you and I have been buying this brand of vehicle and I think I want to add to my fleet of vehicles with another brand,' would you terminate then?

Mr Bayard—No, we are not able to. We would speak to the dealer about any concerns we have of them losing focus on our particular marque and about any concerns we would have about their financial ability to be able to support two franchises. But after that counselling, if they choose to take on another brand, that is their decision.

Mr ZAMMIT—Would you consider opening up another dealer close by?

Mr Bayard—Under the dealer agreement, the appointment of the dealer to the PMA—the prime marketing area—is not an exclusive appointment but, again we have not—

Mr ZAMMIT—That is the point I am trying to get to because there are words you can use that are in conflict with what you are trying to say to us and the impression you are giving to us. The point that we, as a committee, are trying to get at is that, by a choice of words, you can put yourself in the situation where you seem to be saying, 'We would never do anything that would harm anyone.' One of the problems we have is with people saying there is self-regulation, but self-regulation does not work. That is what you keep talking about—self-regulation. One of the points that has been put to us, and quite fairly, by a lot of people is: should not the dealer be treated as one would treat a consumer? Should it not be exactly the same? A dealer is a consumer—a consumer of your product.

Mr Bayard—I do not think we treat our dealers in any way unfairly.

Mr ZAMMIT—No, we cannot—

Mr Bayard—I think we treat them as one of our customers.

Mr ZAMMIT—You cannot be judgmental in this regard. We are trying to find a way that everyone can walk away and say, 'That is fair' and right now it does not seem to be fair because the example I gave you was an example that was put to me. There are ways and means by which you can vent your anger at a dealer if you so wish.

Mr Bayard—But, on the other hand, Mr Zammit, I think that it is not unreasonable for the manufacturer, when a dealer is appointed to a particular area, to also have the ability to change as circumstances change. The land use in a particular PMA might change dramatically, as might the demographics. That dealer might be at the furthermost eastern point of a particular area and, all of a sudden, the western side becomes very highly developed, and people are not going to eastern side of the PMA. The appointment of somebody else into the PMA in those circumstances may be very commercially justified.

Mr ZAMMIT—So, you can take retaliatory action in a nice way. You keep saying in your submission that if people do not like it, they can go to court. But very few people want to go to court because they just cannot afford to go to court. Apart from what you call 'self-regulation', should there not be any other means by legislation in which someone can feel protected?

Mr Bayard—We would suggest that, in fact, there are adequate provisions already that would enable people in those circumstances if they felt aggrieved, to seek appropriate redress in the courts.

Mr ZAMMIT—In the courts?

Mr Bayard—If that were so, yes.

Mr Pennington - There seems to be a view that the industry is forever cancelling dealer agreements, and that is hardly the case. I suppose most of those that have been cancelled have been either when Alfa Romeo left the market totally, or when Nissan ceased manufacturing and its market share went from 10 per cent to something like four per cent and it had to rationalise its company, its dealer agreements, and the number of dealers. Quite obviously, had it kept the same number of dealers, none of them would have survived.

Mrs BAILEY—Could I just expand on this a little because I have to confess that I am a little confused between those in a dealership agreement and a those in a franchise agreement. Could you just explain to me your dealers? They have the one brand of stock. Are they required, for example, to contribute to the advertising and the promotion of that stock, whether it be in the form of brochures advertising whatever vehicles they are, or other forms of advertising?

Ms Terry—That varies, depending on which brand you are talking about.

Mrs BAILEY—Let us say a Toyota dealership. Do your dealers have to contribute towards the advertising brochures in an advertising budget of your Toyota vehicles?

Mr Bayard—The dealers have, in fact, what is known as a Toyota dealer advertising fund where they can choose to participate in generic advertising programs that the dealerships themselves run. They are not asked to contribute anything towards the Toyota corporate advertising programs, but they can contribute to dealer-run advertising programs.

Mrs BAILEY—And how many of them would contribute to the generic advertising?

Mr Bayard—That varies from time to time, but the bulk of them would choose to do that.

Mrs BAILEY—So, we have got the bulk of them paying an advertising levy?

Mr Bayard—Not to us.

Mrs BAILEY—To promoting your product. They have got a single product. Is there a certain standard or code that your dealers have to adhere to in the presentation of that product?

Mr Bayard—We have a look at the advertising to ensure that it does not offend Trade Practices Act matters. We ensure that it does not breach any trademark matters, and things of that description.

Mrs BAILEY—I have noticed recently that a number of new car dealerships look the same and that they all follow the same pattern. The product is presented in exactly the same way, whether it be red ribbon, or blue ribbon, or with different sorts of gimmickry in the display centre. And what I am really trying to get at is: is there a uniform set of behaviour and conduct in the presentation of your product that you expect from your dealers?

Mr Bayard—I think it is fair to say that in some circumstances there is corporate signage

requirement. For example, there are certain Toyota colours. We would not be happy to have Toyota dealers portraying themselves with blue and white, which are the Ford colours. Those sorts of things will apply.

Mrs BAILEY—I am really getting at the fact that I cannot think of too many differences between a dealership in practice and a franchise in practice, and yet you are telling us that the two are very different and that therefore you should be treated differently.

Mr Pennington—Perhaps I can make one point. If you look at car dealerships, most of them are multi-brand. For example, Gregory's in Canberra has, in the one area, Honda, Subaru and Ford. None of them pay a franchise fee. You would hardly see a McDonalds where you could go and purchase Kentucky Fried and Hungry Jacks but they do pay a franchise fee.

Mrs BAILEY—And your dealers pay no fee; there is no fee whatsoever?

Mr Pennington—There is no fee at all. So I think there are some significant differences.

Mrs BAILEY—What are the differences? I do not know of too many new car sites where there would be more than one brand.

Ms Terry—I could not quote the exact statistics for you but I think the figure for single brand Holden dealerships is less than 20 per cent. It is very unusual, particularly in the metropolitan area.

Mrs BAILEY—What others sites are they with?

Ms Terry—They are with all of them—that is, Mitsubishi, Nissan, Volvo, BMW, all the Korean brands.

Mrs BAILEY—Could you provide those statistics to the committee? So that is one example. Can you tell me any other differences. I want to clarify this point, because I am struggling with the differences.

Mr Pennington—The dealer will also determine the final price of the car. We just provide a recommended price. The actual price that the vehicle is sold at will depend on what the dealer does with the customer in terms of trade-in. There is far more flexibility. If you go to a fast food outlet, normally, the price is the same in every one of them but that certainly does not apply in our industry. You were asking about multi-brand sites. If you go to Gerald Slaven Holden at Belconnen, you will see that right alongside is Gerald Slaven Daewoo.

Mrs BAILEY—Maybe Canberra is very different from Melbourne.

Mr Pennington—I do not think so. With Commonwealth Motors, one half is Holden and one half is Mitsubishi.

Mrs BAILEY—I am also struggling with something that I think Ms Terry said in her opening remarks about a franchising code introducing confusion into the industry. Could you expand on that.

Ms Terry—I did not go into much detail on that because I was not sure how much background you had in the provisions of the code itself. Clause 12 is described as 'standards of conduct'. It states that so-called franchisors should engage in certain minimum levels of conduct, as compared to their so-called franchisees. It uses expressions such as, 'shall not depart from the accepted level of standard franchise business practice.' Those are the types of concepts that it introduces.

Mrs BAILEY—But how would that differ from the standards of conduct that you would want of your dealers?

Ms Terry—I am just not sure how you establish whether you have achieved that. They are expressed in very wide and undefined terms. We have a dealer agreement which, in all cases, is a very detailed document. It describes in a great level of detail the obligations on both sides, what the dealer has to do, what the company has to do, how stock is allocated, how it is paid for. It also describes what happens if the dealership is terminated and the grounds for termination.

The legal effect of the franchising code is to overlay these very broad and undefined concepts into what is a well-defined legal relationship. The concern that we have is that, in the case of a disagreement with a dealer, we would immediately be faced with somebody alleging that we had departed from standard franchise business practice.

Mrs BAILEY—If those codes were spelt out a little more clearly, would you still oppose them?

Ms Terry—It would depend on whether they were inconsistent with our agreements. At the moment, with the way the code is described, a lot of the areas it covers are already covered in our agreements and are therefore inconsistent. As Mr Pennington said in his opening remarks, we spent a great deal of time going through the franchising code and suggesting ways in which we could adopt it as an industry, without introducing these problems of inconsistency and uncertainty. Our submission was effectively dismissed out of hand. It was not addressed in any detail whatsoever. It was about two years ago that we made that submission so it is not that we have stepped back and said we are not having a bar of it. We have gone through that exercise to look at the circumstances in which it would be applicable.

Mr FORREST—I would like to take up Mr Zammit's point. This inquiry is hearing evidence from all sorts of different locations that there is a problem out there. All of the people coming in who represent the big end of town are in some sort of denial, saying that there is no major problem. It is because of this concept of measuring disputes in terms of those that get to litigation, and looking at litigation outcomes and saying it is therefore not a major problem.

I have evidence that 90 per cent of the complaints that are received by motor vehicle traders are never resolved to their satisfaction. The problem is this huge disparity between power and resources: a Goliath, if you like, with a little family owned business which, in the end, if they cannot get it resolved they cave in and accept the decision or walk out of their business. That is the reality. Glossing over it and trying to convince us that it is not there is not going to work. There is too much evidence.

I cannot see that making it clearer what constitutes unconscionable conduct is going to make it more

confusing in the commercial market place. It is going to make it much clearer for the little Davids—the small family businesses—to know what their rights are. They are consumers, and they have to suffer under the obligations of supplying to whom they retail to. The end consumer has a huge amount of rights.

Attempting to gloss over it and say it is not a problem is certainly not working with me. I cannot see how defining unconscionable conduct more precisely introduces confusion. In the Alfa Romeo case, if they are moving out of the market place and the end result is that they have to wind up a contract, I cannot see that that is unconscionable. But forcing a dealer who is not meeting particular aspirations and threatening to open up another dealership down the other end of town has to be unconscionable. I think it is easy to define. I am really getting quite cranky about the suggestion from the Goliaths that there are no problems—there are. That is the objective of this committee—to find a way to resolve them.

Mr Pennington—One of the objectives of the industry for the last two years, including in meetings with Senator Schacht, has been to get some evidence on these so-called problems. We keep hearing that there are problems. Our chief executives met with Senator Schacht and the MTAA and we asked them to give us evidence of these so-called problems. For two years we have received nothing. I do not know what we are meant to be glossing over. We are looking for it and if you have it we would love to see it. We have not received anything in two years. We have written and we have asked in front of Senator Schacht and we have seen nothing.

Mrs BAILEY—What means of dispute resolution do you have in place to handle problems with your own dealers?

Mr Pennington—That will vary between each company and the dealer agreement. Once again, that is spelt out and the dealer knows that before he signs the agreement.

Mrs BAILEY—So it is handled in-house. Is that what you are saying?

Mr Pennington—It is handled between each company in the terms of the dealer agreement itself.

Mrs BAILEY—That is perhaps why you are not getting to hear about the cases that we have been hearing about.

Mr Bayard—Yes, but again, with respect, we have sought that information outside our own operations, such as in meetings with MTAA, VACC and Senator Schacht. We have not been given any specific examples of what those disputes allegedly are. It makes it very difficult for us to be able to respond. On the one hand, we have close relationships with our dealer networks through our dealer councils and so on: we sit and talk to them, we ask them questions as to whether they have got disputes and have the opportunity of raising those.

The evidence is, when we have asked our members that question, there are no issues being raised at that level. On the other hand, we hear word from the representative bodies that there are issues but we have not been able to get that information. It makes it very difficult for us to be able to address the concerns, but we have been trying for the last two years to get details of that.

Mrs BAILEY—What I am suggesting to you is that the reason for that is that the means that is provided with your industry is handled in-house and that is the reason for the difficulties.

Ms Terry—I do not think it is. Our experience with our dealers, who by and large have been Holden dealers for a long period of time, is that they are more than willing to come forward if there is anything which troubles them. It is a very open relationship. I think that is probably true for most of the players in the industry. If dealers have a problem, they do not keep it to themselves.

Mr FORREST—Can I just put an example in front of you. Let us say a country dealer is suffering some really tough times—there has been no wheat crop for two years because there has been a drought—and he just cannot meet an expectation of targets, but he can sell Subaru Brumbies because that happens to be the thing that the clientele out there want. So he wants to have a joint dealership with Subaru, but he is the Holden dealer. How amenable is GMH to this, given that they sell Holden utes, but it is the four-wheel drive Brumby that is wanted? How flexible can you be in your arrangements?

Ms Terry—We are extremely flexible. Our dealer agreement includes whole sections that cover multi-branded dealers. It is a fact of life. If a dealer says to us in that situation that he wants to pick up Subaru, it is just a matter of going through the process. There are obviously some requirements which require that the Holden product is delineated from the Subaru and that there is not a mingling of trade marks and a whole lot of those factual issues.

But, with respect, there seems to be a little bit of a misunderstanding that those from the big end of town are opposed to multi-brand dealers. We are not. We just accept that the vast majority of our dealers are multi-brand. If a dealer wants to pick up another brand, it happens all the time.

Mr FORREST—What happens after that if they are selling more of the other brand than yours?

Ms Terry—Again, that happens as well. To the extent that he is contracted as a Holden dealer, there are formalised performance review criteria that are set at the beginning of each year for each dealer and they are measured against those. If a dealer is not meeting his performance objectives then, again, we have a very detailed process for working with those dealers which would span over typically a minimum of two years. It is not the case that they fall behind and we immediately go in and either close them down or appoint someone else. It just does not happen.

Mr ZAMMIT—Following on from Mr Forrest's question, do you have minimum requirements for stock on the floor?

Ms Terry—I believe so. It is not an area of expertise.

Mr ZAMMIT—That is fine. You have answered it truthfully and that is great. Let us say that a dealer comes to you and says, 'I want to buy a Subaru but I cannot afford to keep the required stock that you want me to have in one brand as well as buy another brand. I would like to cut down so that I can buy the other brand which I think is necessary for my survival.' What would you say then?

Ms Terry—I really cannot comment. It is not an area I get involved in.

Mr ZAMMIT—That is the point we are trying to get to you. You may not receive complaints in writing from your dealers because, I suggest, they know the game that is played and therefore they are not likely to put anything in writing to you because they know the consequences. The immediate fact is that you have answered every question we have put to you except this one, which I think is a very basic straightforward question.

Ms Terry—I have answered it. I said that I did not know. I do not work in the marketing department.

Mr ZAMMIT—Is this not something you strike on a regular basis?

Ms Terry—No.

Mr ZAMMIT—It is not?

Ms Terry—No.

Mr Pennington—I think you have the view that the individual dealer is able to go to the manufacturer with a problem. You are suggesting that he is not going to choose to do that but most of the dealers, if they have a problem, put it to the line group which will counsel, or talk to, the manufacturer. That is far from the big end of town talking to the little end of town.

Mr ZAMMIT—Which group is that?

Mr Pennington—It will be that line group which is a representative body of the dealers. It is not a case of a manufacturer dealing one-on-one with a small dealer. He deals with a representative group of dealers and they will bring the problems up through that group. That takes it away from the big end of town versus the small end of town or Goliath against the little man. It is pretty evenly balanced.

Mr ZAMMIT—I have one last question in regard to what Mrs Bailey raised and in regard to the multi-franchise dealers. I think you said, Ms Terry, that there was only 20 per cent, to your knowledge, that were—

Ms Terry—I actually said that was my belief, but I will check the figure and provide it.

Mr ZAMMIT—Is that for new car dealerships only?

Ms Terry—Yes, we are just talking about new car dealerships.

CHAIR—We have had a submission from the Australian Automobile Dealers Association. Do you have a copy of that submission?

Mr Pennington—No.

CHAIR—It might be an idea for us to pass you a copy because it is a public document. Perhaps you would like to comment on that submission because it does raise a lot of the issues that Mr Forrest, Mr Zammit and Mrs Bailey are talking about. We would like to get feedback on your reaction to what they are suggesting.

Mr Pennington—Yes, certainly.

CHAIR—In summary, you do not particularly support any changes to the TPA?

Mr Pennington—No, we do not. There are a lot of suggestions that things are difficult out there. I can give you very clear examples. For example, Gerald Slaven Holden at Belconnen, which is not far from where I live, also had a Daihatsu dealership. Daihatsu had been going through very bad times. There was no profit in selling Daihatsus. He has changed to Daewoo which, I would imagine, is quite a profitable dealership to have. It is adjacent to the Holden dealership. It would be competing; he would probably be selling far more little Daewoos than little Holdens. However, that has not caused General Motors to cancel his franchise or anything like that. That is the real world.

CHAIR—Is that your final comment on this particular submission?

Mr Pennington—Yes.

CHAIR—That is very kind of you. Thank you very much. Would your colleagues like to make a final comment? No? Thank you for your time. We appreciate it.

[4.45 p.m.]

MILLINGTON, Professor Alan Fred, 43 Keda Circuit, North Richmond, New South Wales 2754

CHAIR—Welcome. Committee proceedings are recognised as proceedings of the parliament and warrant the same respect that proceedings in the House of Representatives itself demand. Witnesses are protected by parliamentary privilege in respect of the evidence they give before the committee. You will not be asked to take an oath or make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as contempt of parliament. The committee prefers that all evidence be given in public but should you at any time wish to give evidence in private you may ask to do so and the committee will give consideration to your request.

The committee receives as evidence and authorises publication of the submission provided by Professor Millington to the inquiry into fair trading. Would you like to make an opening statement before we commence our questioning?

Prof. Millington—Very briefly. My understanding was that the report I did some time ago for the Retailers Council of Australia had been mentioned in evidence at this inquiry and that the members of the committee wished me to come here to be available to answer questions relating to that report which I believe has now been submitted as evidence before the inquiry. My main objective in being here is to assist you by answering as much as possible the questions you may have relating to that.

CHAIR—You might be able to help us by giving a bit of the background to the report and why you were commissioned to do the report and what some of your findings might have been.

Prof. Millington—Yes. I was actually phoned with respect to something I had written in an article which was published by the Australian Institute of Valuers on the valuation of retail property. I made observations which went perhaps contrary to some of the traditional thinking about the valuation of retail property. There is a tradition amongst many valuers of assuming that because one shop lets for X dollars the next shop will automatically let for X dollars.

The content of my article tried to direct valuers towards looking at the potential turnover and the potential profitability of the next occupier as being the main basis and the most reliable basis for valuation. What the last shopkeeper paid as rent is no indication of what the next one can pay. They may come from a completely different trade, they may have different margins, they may have different costs which they will incur in trading and it may be, as well, that they may be taking the total trading in a certain area of retailing over the top in the sense that they may be one trader too many. Their profitability may be limited in view of the fact that competition may be too great. It was as a result of these observations that I was phoned.

To cut a long story short, I was ultimately approached by the Australian Retailers Council who asked me if I would do a general overview of retail property in Australia. I agreed to do that on the basis that there should be no fetter on the way I operated and that I would submit my views without any interference from anybody else and that it had to be a completely free hand that I was given. On that basis, ultimately, I did a report for them which was published in March last year and that was called *Retail property in Australia.* It

was a general overview and in doing that review I came to the conclusion that there were problems in the retail sector which ultimately could create difficulties for landlords as well as the current difficulties that retailers are experiencing and that could, further down the track, have wider economic consequences as well. I think that is summarised in the report which you have.

CHAIR—Are we over catered for with retail space in the suburbs of Australia?

Prof. Millington—I think there is an adequacy of retail space. There is approximately one retail outlet for every hundred members of the population which is a reasonable provision. I do not think, in my own view, that there is a shortage of accommodation but the problem is that accommodation differs widely; we have old accommodation and we have new accommodation. We have the development of shopping centres, which is the modern method of retailing and which is becoming very, very dominant and commands a very large part of the market—probably about 25 per cent of the total retail market. There is possibly not an over provision of that type of accommodation in the sense that whilst there may be a large quantity, there is not much competition between the suppliers.

The effect of planning control is to give a niche market to the people who get the planning permissions to develop shopping centres. In the sense of the retailers being able to choose which centre to go to, there is possibly a shortage of supply in that they can only deal with one supplier if they wish to go into a shopping centre or else move to another location where there is another shopping centre which may be many miles away. There is, in totality, probably not a shortage of shops but it is a segmented market. You cannot transport shops from one area to another so we have wide differentials. They are local markets. Some areas may be very much over-shopped and other areas may be under-shopped. In some areas there may be a dominance of one landlord because of the shopping centre situation while in other areas there may be competition between suppliers of shops in the traditional strip shop centres which, as far as the shop occupiers are concerned, gives them a situation in which they can choose their supplier.

CHAIR—I guess it is the will of those who invest money to get the maximum return for their investment dollar. I imagine that shopping centre owners are no different from anyone else who wants to maximise their dollar. You spoke about valuers before and looking at evaluation down the street basically, in comparing rents. Is that a dangerous precedent they are doing because it basically manipulates the market in regards to rental increases?

Prof. Millington—Yes, it can where the owner of the property is in a position of power. It may be very difficult to do that in a strip centre where perhaps the ownership of properties is split amongst a lot of property owners. If there are a number of vacant shops and if a potential retailer does not like the terms he is offered by one landlord he can perhaps go off and try to negotiate with another landlord who has a property to let.

CHAIR—In the case of a superannuation company, for instance, that might own one shopping centre over here and an original shopping centre over here, it would be in the best interests, would it not, of the superannuation company to raise these rents here and then 18 months later raise these other rents to an equitable level?

Prof. Millington—Yes, precisely.

CHAIR—Is there much evidence of that sort of behaviour?

Prof. Millington—When matters come to court, they will usually quote the highest or best rent that they have achieved and the most recent rent, which may have been achieved from a sitting tenant. The sitting tenant is in a position, very often, where they have very weak negotiating powers. They are likely to have spent a considerable amount of money in fitting out a shop. They may have built up a good amount of goodwill and, on top of that, they know that if they try to move somewhere else they might not find similar accommodation. Even if they do, or if they find other suitable accommodation—they might move out of a shopping centre and into a strip—they are going to have relocation costs to bear. So they have got three costs there: two areas are some costs in the form of the fit-out and the goodwill which they have created—and they have probably spent a lot of money creating that goodwill—and the third area is the costs that they will have to meet if they move. So they are likely to be in a weak negotiating position, and are more liable to agree to a high rent, which the shopping centre owner will then naturally quote to others when negotiating.

CHAIR—Let me ask this last question before passing to my colleagues. Is there any evidence of non-disclosure of rent free periods?

Prof. Millington—It is quite common. One of the things I found very difficult in my investigations was to get hard evidence, because there are many cases of leases where the lessees are signed to commit themselves to not disclosing the precise terms of any leases. They are asked to agree to secrecy clauses. Getting hard evidence is not easy.

CHAIR—Is there a view that rent free periods are used as an incentive to increase rents and therefore the entire shopping centre can use that to benchmark?

Prof. Millington—Yes.

Mrs BAILEY—Professor, I was particularly interested in one of the points that you made about specialty shops, which occupy roughly 25 per cent of the total space but pay about 75 per cent of the total rent. Is this a widespread practice, or is this just something that you found in particular cases?

Prof. Millington—No. It is common. I have good reason to believe that the percentages that I have quoted should be a little wider apart, in that there has been no questioning of those figures from anybody on the shopping centre side. I think that they would have certainly challenged the figures if they had been wrong. The fact that they have remained silent indicates that, if anything, the figures are really probably 25 per cent of the space and perhaps 80 per cent or even more of the rents.

Mrs BAILEY—A related problem that I want to ask about is the research that you quoted from the UK, which showed that large department stores offered little benefit to the performance of shopping centres, in which they are often used as the main attraction to sell space to small retailers. Have you found a similar situation in Australia?

Prof. Millington—No; I cannot say that I have. The research has not gone deeply enough to be able to put anything substantive forward along those lines. But I would be surprised if the benefit of the so-called 'magnets'—the major retailers to the centres—was not overstated, in many cases.

Mr FORREST—Professor, it is good to have you here: you have got no clear axe to grind. That is good. You give an independent assessment. We have heard from the people at the big end of town that it is only inefficient, naive people who get themselves into trouble. We have also heard from the other end about some horrendous positions that some people have been put in. We have heard various sectors of this expanse in denial of some sort, saying it is not an issue. I would like a summary from your experience and work that you have done of how many people enter into tenancy arrangements in some of these big shopping centres but do not read the fine print: they go in with a rosy view of what the future holds, and it is only when they get to the end of their lease that they realise the hole they are actually in. From the other point of view, are there examples you have seen of unconscionable activities of the landlords of big shopping complexes actually bringing on a bankruptcy? Just give us an unbiased view.

Prof. Millington—On the latter point, I do believe that the lease conditions which are incorporated in some leases which allow a landlord of a shopping centre to move tenants around from the property that they originally leased, is completely unfair. And I believe that it goes against the legal concept of 'quiet enjoyment'. It is one of the underlying concepts—and I have experience as a landlord, I should add—that if I lease a property to somebody, I offer that person quiet enjoyment. In other words, I will allow him or her to stop in that property during the duration of the lease and, as long as the lease terms are complied with, the person will be allowed to enjoy the property without interference from me.

But, in many of these shopping centre leases, there are clauses which allow the landlord to move tenants to other units within the same complex, if they so wish, and there is no doubt that this can cause considerable hardship. It is quite unwise of tenants to enter into such contracts, but very often they just do not anticipate the problems that may lie down the track and it is perhaps true to say that they are gullible. But, perhaps, they act on the basis of there being good faith on both sides, and they may act with a little bit of unreasonable innocence.

I have seen instances where people have taken trading positions retailing clothes, and *Just Jeans*, *Country Road* and *Sportsgirl*—that group—have been in the same area of the shopping centre. Then either the smaller retailers have been moved to another shop, or the other people have been offered different shops, and the trading composition of an area has been changed. I believe that to be unconscionable; it certainly would be in my book. To move tenants from a shop that you have originally leased to them because it suits your management objectives I believe to be unfair. That sort of thing definitely causes a lot of problems for tenants.

Apart from anything else, they are often moved, having to leave behind the shop fitout that they have done. Then they end up with having to fit out another shop and then trying to establish goodwill there. It may be that the landlord has let their previous shop to somebody else in the same trade, passing on their goodwill. I believe that practice—and I would not suggest that all landlords do that, but some landlords do—is quite unreasonable and can cause a lot of financial problems for lessees. Similarly, on the other side of the coin, if you leave them there and shift all the people away who originally created the scenario that they rented into,

that can equally well cause problems. And that often happens after refurbishment or extensions.

Mr FORREST—You have got a comprehensive list of current problems being experienced by retailers, and it did appear to me to be quite balanced. It identifies that issue, but it also says that some people in tenancies do not read the fine print—they are my words, you do not use those—and they just need to be much more careful about what they enter into. But, regardless of all that, how do we recommend it be solved? What do we recommend in our report when we finally get one out of this committee? What should we do?

Prof. Millington—That is a good question. It is a very difficult one to answer. In the first instance, at the time when tenants take a lease, it is very difficult to protect people from their own overenthusiasm, innocence and gullibility. That is difficult. I note that many of the shopping centre owners are saying that they are spending a lot of money on improving the retailing performance of their retailers. That is interesting to me. I wonder why the retailers would want to improve their performance if all that is going to happen is that they have to pay more rent as a result of performing better. I would very much prefer the property owners or letting agents to offer much more disclosure up-front.

I do believe that, if they are making predictions verbally to tenants of such things as the number of pedestrians that they expect to pass shopfronts and the amount of turnover that they expect, they should be required to put those predictions in writing, so that there may be some come back in the event that their marketing predictions prove to have been overambitious. So I do believe that there should be a lot more disclosure up-front and perhaps better education of the tenants before they take leases, rather than after they take leases.

Mr FORREST—What about transparency of rents, which is a very secret thing?

Prof. Millington—I cannot think of the right word actually, but I have my doubts over the practice of asking people to observe secrecy, because I do believe that people who insist upon secrecy—

Mr FORREST—They have got something to hide.

Prof. Millington—They may well have something to hide. I do believe that there should be much more disclosure of the general agreements that go on, that exist within shopping centres. If there is to be a fair basis for the negotiation of rents at a renewal of a lease—and I do have definite suggestions regarding renewal situations—there should be the power to demand disclosure not just of the lease agreements that suit the landlords but the lease agreements that the lessees might well benefit from hearing about.

So I do think there ought to be more disclosure and I have misgivings—that was the word—about the requirement that tenants should be sworn to secrecy about lease terms. It does prevent the tenants sharing experiences and information in a negotiating situation. So even where there may be a number of tenants with complaints, with a need to negotiate new leases, they are in a situation where, if they comply with the landlord's requirement not to disclose the contents of their own leases, they cannot compare notes and they cannot operate collectively. I see no solution to the lease renewal situation other than to have legislation rather similar to the legislation that has existed in the UK for many years now and was introduced purely and

simply to protect tenants.

Mr FORREST—In other words, have you got any misgivings about a code of conduct and leaving it to the industry and the people themselves? We have a problem with the UK experience. They do not have the constraints of a federation that we have here in Australia. Tenancy is a state responsibility.

Prof. Millington—That is right. I appreciate that there is a big problem there. The problem with codes of conduct is that they will be observed by the good guys and, unless you have sanctions that can be enforced against the bad guys, there is very little you can do. It is the bad guys that you need to control all the time. It is just like most laws through society. The laws regarding theft and murder are not in existence because most of us go around committing theft and murder. But you have to have controls against a few who abuse and the industry groups do not have the power to sanction the ones who go against any voluntary codes.

I do not see any solution other than a legal code which would at least give people the resort to the courts, as a last resort. The main benefit of a legal code is that it sets the ground rules and it tends to result in most people operating within those ground rules. Legislation has existed in Britain for many years but it does not mean that everybody is running off to court to get decisions. It means that people know they have to decide and they have to operate reasonably or they might end up in court. Most agreements are genuine agreements, landlords and tenants meet and agree.

Mr FORREST—Yes. It puts a stone back in David's little sling at Goliath—that is all it does.

Prof. Millington—Yes.

Mr ZAMMIT—I must say that the 23 points you cover in your report cover nearly everything that has been brought to our attention with regard to complaints and the potential for conflict. Point 16 states:

attempts by landlords to obtain "key money" from prospective tenants, that is a payment simply for being allowed to take a lease, such payment being additional to annual rent and charges for other property outgoings;

How much of that have you found going on and how does it work?

Prof. Millington—Key money is a payment up-front purely and simply for the right to walk in.

Mr ZAMMIT—In tough times, do landlords squeeze tenants out, give them nothing in return, not give them back their key money, and then put somebody else in at perhaps a slightly reduced rent and, of course, ask for key money and money for the fixtures?

Prof. Millington—They may well do it. It does happen, where it is not prohibited by law.

Mr ZAMMIT—Yes.

Prof. Millington—It does mean that a landlord gets cash in advance, in addition to the rent that will

flow in any event. So it is a sum in the hand and it has definite attractions for a landlord. Having been a landlord myself for a good many years, it would have been very nice to get money in advance. I do not see that there is anything wrong with payment in advance, which is a guarantee, because tenants as well as landlords can be bad. We have evil on both sides, occasionally. I think a legitimate deposit, which is held on trust, and which is returned to a tenant—

Mr ZAMMIT—But that is not key money is it?

Prof. Millington—Correct. The key money is playing a market shortage situation to the landlord's advantage. Unless that merges with the rent, I think it is a dangerous practice because it can lead to situations where, if landlords are in a position to get their tenants out, they will obviously want to get a sitting tenant out so that they can get key money off a new tenant.

Mr ZAMMIT—And the fixtures?

Prof. Millington—Yes.

CHAIR—You mentioned the relocation of a tenant within a shopping centre. We have had evidence from the Property Council of Australia that, on most occasions, the owners of the property incur the cost. Do you have much evidence of this happening?

Prof. Millington—I have had tenants tell me that they have been in a position where they have been moved and they have had to bear all of the costs. Different management groups and different property owners will have different practices, and I have no doubt that there are a quite a lot of owners and managers who bear the cost. But it is the cases where this does not happen that one really needs to have consideration.

CHAIR—Is there an argument for a mediator that a tenant could go to rather than to have to go through the court process?

Prof. Millington—I am a great believer in mediation and I think that it would be a very good development to have a system whereby there is some sort of getting together of the parties in an attempt to agree but where there are issues on which they disagree. But I also have misgivings about there only being mediation because, unless it is backed up by the power to go a step further, mediation may become a means of procrastination.

CHAIR—Is there an argument for standard leases?

Prof. Millington—There is. But the problem with property is that property is heterogeneous so there is just as good an argument for landlords being able to make exceptions to standard leases. The problem is that the standard lease is quite likely to operate against the tenant as well as against the landlord. It is a nice concept but I think there are difficulties.

CHAIR—We have also had a lot of evidence from different bodies right across the spectrum of that goodwill. You mentioned goodwill a couple of times now. It seems to us, on the evidence, that goodwill does

not exist and that if it did exist it is only for the length of the lease term because without a lease there is nothing. Should we be advertising the fact more that in getting into the marketplace you need to return your investment over the period of the lease? Are people paying too much going into retail tenancies—paying goodwill to someone else—with no expectation beyond three years of a lease agreement to be able to return their investment?

Prof. Millington—I do believe that happens regularly and this is because many people are gullible when they go into business, and I would not deny that. A lot of people go into business, and I am often amazed by the amount they will pay to walk into a property. This is why one of my suggestions was that there needs to be a longer lease term that tenants can insist upon in the first instance in order to be able to recoup the large fit out costs that they have and in the hope of at least being able to trade for a long enough period to cash in on the money that they spend on creating goodwill. Goodwill is a very difficult thing to describe but it is sometimes described as the prospect of a continuity in business. As far as the trader is concerned, it is being in a certain position, having been there for a number of years, in the knowledge that customers know that they are there and that they can keep coming back to that same trader to do business.

CHAIR—Having been a landlord yourself, do you accept the fact that the landowner does have the right to not offer an option on a lease on the expiration of a lease?

Prof. Millington—That is the situation which exists at present, I think, throughout Australia. I do not think there is any state where there is security of tenure.

I am not sure whether in the long run it is in the best interests of landlords. There were times when I had misgivings about the British system which gives security of tenure to tenants at the end of their first lease. A business tenant in the UK can continue in occupation unless the lease is actually terminated by the landlord at the end of the lease, and the landlord has relatively limited grounds on which he or she can terminate the lease. I do believe that that actually operates, in the long term, as much in the landlord's interests as in the tenant's interest. The only grounds I have for saying that is the experience I had with the UK and seeing it in operation.

It tends to create a partnership between the two where they say, 'We have to work together. The law says the tenant can stop here at the end of the lease so let us create a working relationship.' I do believe that there is much more of a partnership spirit in the UK situation. But as presently constituted, the situation in Australia is that there is no security of tenure and a landlord does not have to offer an option at the end of the lease.

Mr FORREST—We had the Property Council of Australia tell us that the state legislation on tenancy rights is comprehensive and it is fair and it is reasonable and therefore we do not need anymore. But we have discovered evidence that people have been required to sign off their rights under some state law, especially once they get in to dispute. Have you found evidence of that, as well?

Prof. Millington—Yes. Within a month or so of the Retail Leases Act coming into effect in New South Wales, I met a tenant who had been told that they could have a lease as long as they produced a letter indicating that they had been advised of the provisions of the act by their solicitor, but, notwithstanding the

provisions of the act, they were prepared to forego the minimum five year term which was provided for in the New South Wales legislation. So within about a month or so of that legislation coming into effect, I spoke to a tenant who had been asked to sign away some of the rights under it.

Mr FORREST—But why have the tenants in that situation accepted that? Why haven't they just said, 'No, I want my rights.' They are clearly in a state legislative framework. Why haven't they dug their heels in?

Prof. Millington—This comes back to the shopping centre complex situation. If they are in a strip location they would probably be in a position to go and negotiate with another landlord—unless, of course, the strip was under one ownership, which sometimes happens. With regard to a shopping complex I will give you a British example so I do not pick on anybody here. If they want to have a shop in Brent Cross in north London they can only deal with one landlord—the landlord that owns the whole of Brent Cross—so, if they want to trade there, they are in a position of either digging their heels in and perhaps not getting a shop at all, or having to take it on the landlord's terms. That is the problem.

The one particular tenant who told me about this requirement did not sign to it. They said, 'No way,' and they walked away from it. They were quite a biggish group as well, not a small tenant, so even big groups are being asked to do this sort of thing.

Mr FORREST—That is the first warning sign, that this man has got a big long red tail and two horns.

CHAIR—The point you made, though, is that these tenants have to be prepared to walk away.

Prof. Millington—Yes.

CHAIR—And a lot of them are not.

Prof. Millington—A lot of them want to trade from a particular shopping centre. In my view, many of these shopping centres have certainly got a local monopoly. If one does not like the expression 'monopoly', they are certainly in a oligopoly situation where there are a limited number of suppliers within a reasonable geographical area. So the tenant is in a difficult situation.

CHAIR—Professor Millington, my colleagues have finished their questioning and we would like to thank you for your evidence today. When the Property Council comes back to see us in February next year we will be raising with them a lot of the information you have given us today and in your submission. I am sure Mr Zammit will be very keen to raise some of the issues that you have raised. Thank you for appearing before the committee today. I would also like to thank *Hansard*.

Resolved (on motion by Mr Zammit):

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

Committee adjourned at 5.25 p.m.