

SMALL RETAILERS, LEASES

Grievance

MR A.P. O'GORMAN (Joondalup) [9.21 am]: My grievance this morning is to the Minister for Consumer and Employment Protection and it relates to a group of people in this State who are being victimised because of their particular choice of career. The group of people about whom I am talking are the small retailers of this State who lease space, primarily in our large shopping centres. However, it is not confined to those shopping centres; it also happens in smaller shopping centres, as well as on street fronts. Never before have I seen a group of people who were so terrorised. When they came and spoke to me, before they would give me names and contact details of traders around the State, I had to sign a confidentiality agreement. That is how afraid this group of people are of their landlords. Once I had done that, I received a large number of phone calls. Unfortunately, I have not been able to cope with all of them, and I have not returned calls to some of those people. For that, I apologise. However, I will get back to them in due course.

The reason they are afraid is that the centre managers and leasing agents literally have these small business people on the end of a chain. Every time they pull it, the lessees must jump, whether that is to refit their stores, at their own cost and to the centre's specifications - some of these refits can cost up to \$250 000, and in other instances it can be a lot more than that - or whether it is on the renegotiation of a lease. The small retailers are held to ransom because the lessors offer a maximum of only a five-year lease, with no options to further extend the lease in many cases. I am sure that it is not too hard for people to figure out that to amortise a \$250 000 refit over five years is a significant and difficult thing to do.

Rent is another area that has been a bugbear for many of these retailers, because the lessors use very subjective means to determine market rates. They have been known to use rates from all parts of Australia for dissimilar businesses to determine comparisons for setting rents in their shopping centres. One gentleman runs a certain type of shop. I must be careful, because these people asked specifically to not be identified. This gentleman's shop was compared with shops in Queensland that sold quite different types of goods. However, that was the benchmark that was used to set this gentleman's rent.

Of course, all owners and lessors should be allowed to determine the rents and the mix of businesses, but they should not be allowed to determine whether their lessees are permitted to stay in business or not. They do this by using the rent manipulation system and forcing clients out of their centres should they not conform to the wishes of the lessors. I have heard of a couple of cases in which lessees wished to sell their business. They are already at a disadvantage because they can have only a five-year lease, so they do not really have a long-term tenancy to on-sell. However, the lessors must then approve of the person who will go into the centre. In many instances, they do not approve. They just hold back because they do not want that person in the centre, for whatever reason.

In Western Australia, rents have been driven up by between 25 and 50 per cent in recent times across many of the major centres. That seems to indicate that the lessors are conferring among themselves before setting rents for their tenants. One example of this is a small fast-food store. I have been given permission to use the name, but I will not, because I do not want to be the cause of the lessee being victimised further, and this lessee has been victimised quite a bit. The leased area is approximately 60 square metres, and the rent was \$110 000 per annum. On expiration of the lease, the lessee was offered a further five years, but at an increased rent of \$175 000. That is a \$65 000 increase in one year. That rent is just the base rent. On top of that, outgoings etc are added. The lessee also must pay up to 10 per cent of his turnover in rent on top of the minimum rent. This ensures that the centre reaps the maximum benefit from the lessee's efforts, and no refund of rent is offered if the turnover drops or if the centre management introduces another business into the centre with exactly the same product as an established business. This has happened, particularly in a Morley centre. The lessees in that centre are particularly upset about the way in which that has happened.

Since some of the majors have taken over centre managements, this has happened on a regular basis, with one centre increasing the floor area of its food outlets by 5 000 square metres. The same number of customers, or fewer, pass through the centre, so it means less for each outlet. That eventually results in some of the outlets closing due to bankruptcy or, in extreme cases - I was amazed to hear this - death through suicide. I am informed that death through suicide is greatly overrepresented in this group of people in our State. The centres do not let that worry them. They just find another lamb for the slaughter and start again. Should any of the small business owners dare to suggest taking legal action against the centres, those centres are only too willing to take it to court and further drive the small businesses to the wall. After all, for a reasonable outlay, the centres have buckets of money flooding into their coffers. They are doing it off the backs of these small retailers. They are pushing them into the ground. I have been informed of many examples of this throughout the State, so I know that these are not just isolated incidents.

I say to the minister that these businesses need workable and just commercial tenancy legislation, and recourse to a complaints system that will not allow the lessors to use the might and resources of their corporations to bowl over what are essentially legitimate, well-run businesses, most of which are in electorates such as my electorate of Joondalup.

I will briefly talk about one of these centres. A food shop in one of the food halls was infested with white ants because the builder did not treat the area for white ants. When the tenant's counters etc were eaten by white ants, he had to carry out the repairs, at a cost of \$8 000. The centre's attitude was that the tenant could take it to court and sue it for it. That would have cost the tenant \$20 000 or \$30 000, and his lease would not be renewed. I ask that the minister look after these people. It is urgent.

MR J.C. KOBELKE (Nollamara - Minister for Consumer and Employment Protection) [9.28 am]: I thank the member for Joondalup for raising his concerns about this matter. The Government certainly has real concerns and has sought to address these issues. I know that the Minister for Small Business, who is sitting alongside me, has real concerns about small business. He has been urging me, as the minister with responsibility for commercial tenancies, to pursue this matter, and we are seeking to do that jointly.

Labor's 2001 election policy "small business - the way ahead" made clear commitments to assist small business, particularly in this area. Following on from that, the previous Minister for Small Business actually set up a review group to pursue those commitments and address the issues that have been raised in part by the member for Joondalup. In September 2001 the then Minister for Small Business, Hon Clive Brown, initiated a review of the Commercial Tenancy (Retail Shops) Agreements Act 1985. An independent expert committee was appointed by the minister to hold discussions and industry forums with all key stakeholders to help develop the best solutions. We need to respect the rights of parties on both sides, but there is clear evidence that the imbalance in that area needs to be addressed. The Government has sought to do that by addressing the concerns raised by the member for Joondalup in his grievance.

The review committee reported in February 2003. The Government sought to implement nine of the recommendations made by the committee through the Retail Shops and Fair Trading Legislation Amendment Bill 2003, a Bill that went through this House but was defeated by the Liberal Opposition in the Legislative Council. A further 13 recommendations were made that could be addressed administratively and they are well under way. Further recommendations were made involving additional legislative amendment and changes to regulations, but because more work was required those matters are still being pursued. The Minister for Small Business has a very real interest in making sure that those matters are pursued to get results. The review committee was requested, in particular, to consider the most appropriate ways to implement the Government's commercial tenancy election policy commitments in respect of unconscionable conduct, disclosure of turnover figures, merchant associations and standardised commercial lease provisions. The last matter is being pursued administratively by developing model clauses, so I will not address that issue at the moment. The other three recommendations - unconscionable conduct, disclosure of turnover figures and merchant associations - were addressed in the Retail Shops and Fair Trading Legislation Amendment Bill 2003. These address the types of problems that the member for Joondalup has raised. If the Retail Shops and Fair Trading Legislation Amendment Bill 2003 had not been defeated by the Liberal Opposition in the other place, the member for Joondalup could be going to the retailers -

Point of Order

Mr P.D. OMODEI: The minister is misleading the House. The minister knows that the Liberal Opposition does not have the numbers in the upper House, so this legislation was not defeated by the Liberal Opposition. It was defeated by the Opposition, which includes other political parties.

The SPEAKER: That is not a point of order.

Debate Resumed

Mr J.C. KOBELKE: The Retail Shops and Fair Trading Legislation Amendment Bill 2003 would have enabled the member for Joondalup to go and tell the retailers in the shopping centres in his electorate that the Government was addressing this matter and giving them protection. The Liberal Party defeated that legislation in the other place because it did not want to stand up for small business; it was looking after the big property owners. That is what the Liberal Opposition was interested in. It talks about backing small business, but when it had the opportunity to put that legislation through it ensured it was defeated. That is on the record.

On the issue of unconscionable conduct, the member for Joondalup raised the imbalance between small retailers and large shopping centres. He suggested that small retailers often have no choice but to acquiesce to the demands of large shopping centre owners about lease agreements. The Retail Shops and Fair Trading Legislation Amendment Bill 2003 contained provisions to amend the Commercial Tenancy (Retail Shops)

Agreements Act to incorporate unconscionable conduct provisions for commercial tenants and landlords, which mirror the substance of section 51AC of the commonwealth Trade Practices Act, but were specifically tailored to suit commercial tenancies. Specifically, the Bill would have prohibited a landlord from engaging in unconscionable conduct under or in connection with a retail shopping lease. In order to address the issue of power imbalances in the landlord/tenant relationship, the Bill also required that a tribunal consider the strengths of the bargaining position of the landlord and the tenant, whether any undue influence or pressure or unfair tactics were used against the tenant in relation to a lease, and the landlord's conduct in similar transactions between the landlord and other similar tenants. Those matters would have addressed the member's concerns. Those are the matters that the Liberal Party voted down in the other place. It did not want small business to have the protection that this Government sought to provide.

The member for Joondalup also referred to the high cost of refitting or refurbishing a store. As a safeguard against unreasonable demands, the Government's Bill provided that unreasonable refurbishment costs should be included as a matter to which a court can have regard in determining unconscionable conduct. The Liberals voted down the ability for that to have been considered in determining unconscionable conduct. They did not want that protection for small retailers. The member for Joondalup mentioned the high costs facing small retailers who may consider taking court action against shopping centres. To address this problem the government Bill provided that the Commercial Tribunal of Western Australia should have jurisdiction to hear retail tenancy disputes regarding unconscionable conduct. Any appeals from the Commercial Tribunal's decision would be directed to the Supreme Court. The rationale behind this was to enable effective resolution of unconscionable conduct disputes relating to commercial tenancies and to assist in overcoming delays and reducing the costs of resolving tenancy disputes. We all know that small retailers do not have the financial backing to drag litigation through the courts. We were providing a mechanism to help expedite that so they could uphold their rights if they were the victims of unconscionable conduct. The Liberal Party in the other place voted that down; it did not want that protection for small business. The same applied with turnover figures. The legislation that this Government hoped to get through included the misuse of turnover figures as a matter to which the courts could have regard when determining whether a party was acting unconscionably. The Liberal Party voted that down. It did not want small business protected when it came to the use of turnover figures. Those opposite can talk about supporting small business, but when it came to doing something, like voting for good legislation, they did not give it any support at all.