

**COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS AMENDMENT BILL 2011**

*Second Reading*

Resumed from 16 March.

**MR D.A. TEMPLEMAN (Mandurah)** [12.31 pm]: I am not the lead speaker for the opposition on the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011. The lead speaker is the member for Joondalup, who is about to come into the chamber. The Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011 is a very important bill. As I am sure the member for Joondalup will highlight to the house, this issue relates to the bill that was debated last night to establish the Small Business Commissioner. A range of issues continue to cause concern for businesses, particularly small businesses that hold commercial tenancies. The member for Joondalup and others in this place have raised a range of issues over a considerable period. I will follow the progress of this bill by listening to members' speeches and showing great interest in the consideration in detail stage. This bill should be of interest to all members in this place because all members will have in their electorates small businesses that take out commercial tenancies. Some of them take out commercial tenancies in large retail shopping centre complexes and some take them out in smaller complexes. Many of the small businesses that are involved in commercial tenancy agreements raise from time to time with members in this place a range of concerns. Indeed, issues of fairness, equity and protection for small businesses are absolutely critical to the viability of small business operators. I hope that members will engage in the debate on the commercial tenancy agreements bill because we all need to be mindful of the men, women and families who are established small business operators. We in this place should advocate for greater protection and, indeed, greater surety for them so that their small businesses, whether they be in the metropolitan area or throughout regional Western Australia, can be viable, can continue to employ people and can continue to prosper.

Last night I listened closely to a number of members who raised specific circumstances about which small business people are concerned. In many respects, they have not had a great deal of support or, indeed, a legislative framework within which to have their grievances aired appropriately. I hope that members will be interested in this bill, will listen to the debate and will make a contribution, if they feel it necessary, on behalf of the many men, women and families who operate small businesses throughout Western Australia. As I have said, I am not the lead speaker for the opposition. That is the job of a very experienced and knowledgeable member on this issue, the member for Joondalup.

**MR A.P. O'GORMAN (Joondalup)** [12.36 pm]: As has been said, we are dealing with the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011. This bill has come about because of an agreement between the now Premier and the Leader of the Opposition for a small business protection package because the government wanted to extend trading hours in the special trading precincts of Joondalup, Armadale and Midland, along with the previously designated precincts of Perth and Fremantle, and also to extend mid-week trading hours in the metropolitan area until nine o'clock. Part of the agreement to extend trading hours was to put in place a small business protection package. We dealt with the first part of that agreement last night during debate on the Small Business and Retail Shop Legislation Amendment Bill 2011, and now we are into the nitty-gritty of the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011. The reason that the commercial tenancy legislation needs to be changed is that there is a huge mismatch. We have a David and Goliath situation with organisations that are trying to talk to each other to work out reasonable conditions under which a landlord will lease premises to a tenant. Some of these larger landlords are acting in the best interests of their shareholders. Lots of them are multinationals and probably do not see the grief they may cause at the shop level, if you like. Most small businesses that go into commercial or retail shopping centres are mum and dad businesses. They are businesses that people have aspired to over a long period in their life. At some point in their life, an opportunity arises to go into business because the conditions seem right for them, they have an amount of capital, or the opportunity has presented itself because either a new shopping centre has opened up, and everybody likes to go into a new shopping centre, or a vacancy has come up in a shopping centre close to their home. People think that having a small business is Valhalla and a bit of heaven because they can work close to home, be their own boss, determine their own hours of work and generate as much income as they like because the harder they work, the more income they get. That is what people think. However, the landlords on the other side do what they have to do to increase the profits of their shareholders. Landlords want to continue to grow their shopping centres and bring new tenants in.

Quite often when a person goes into a shopping centre with the idea to run a coffee shop, for instance, depending on the size of the shopping centre they may think that it will be the only coffee shop in the centre. The same applies to surf shops, book shops or pet shops, which are all services that are delivered through our shopping centres. Quite often people think that if they get in on the ground floor, they will have the opportunity to be the first one in and hopefully the only one there for a long time. However, the shopping centre landlords have something they like to call "the mix". Landlords adjust the mix based on the figures and data collected from

tenants in the shopping centre, right down to how much each store turns over. Each store hands over that information on a monthly basis, along with their rent check and their outgoings check to show how well they are doing. The shopping centre landlords suggest that the collection of data is about working out the mix. The small business tenants also reckon it is about working out the mix, but for the landlords it is about working out which mix will get the most dollars into the shopping centre so that they can pay dividends to their shareholders. From the tenants' point of view, the mix is about having a large variety of shops across the shopping centre to attract people in.

Shopping centres have retailers called anchor tenants, which are usually larger department stores or supermarkets that get preferential treatment in a shopping centre. Some people argue that the preferential treatment is justifiable because anchor tenants lease large areas of shopping centres and people have to go to those stores because people have to shop in a supermarket. There is no two ways about it; if people do not go to a supermarket, they cannot get food at too many other places. We have moved away from the traditional idea of growing our own food and having a cow and a couple of chickens in the backyard. We now have a conglomeration where everything is kept in one place; it is called a supermarket. Ninety per cent of us regularly visit supermarkets at least once a week. Supermarkets are ideal tenants to have in a shopping centre.

On top of that, department stores provide what we deem, if you like, the necessities of life. Many people might call what we buy at department stores as luxuries, but most of us classify those things as necessities of life. For example, I refer to whitegoods and televisions in Myer and David Jones. The shopping centre's job is to attract those base tenants; it tries to make the lease attractive by making the rent as low as possible, because all businesses are about profit. The first thing people are told when doing a business degree is that it is all about profit: "If you are not turning a profit, you are not running a good business." The end goal of large stores, such as Coles, Woolworths, Myer and David Jones, is profit, and by the same token profit is the end goal of small businesses. Small business owners do not run businesses out of the goodness of their hearts because they want to provide a good service; at the end of the day they want to walk away and say, "I have earned a certain amount of money".

Last night the member for North West mentioned that once a small business has paid its lease, outgoings, staff and the cost of goods sold, what is left is what it gets. If a small business does not have a particularly good month, and the owner has only \$1 000 left, that is the pay for the month. That is below the poverty line. People say those are the bad businesses that probably should not be in business, and eventually those businesses fall over and go.

Last night I mentioned the burn-and-churn phenomenon. The shopping centre is still looking to do what it is supposed to do—make a profit for its shareholders—but a non-performing entity within the shopping centre, a small business, is not turning over enough to give the owner a profit. The two biggest outgoings for small businesses are looked at—labour and lease costs. Certainly for my business, those are the two biggest outgoings; my first two priorities are my labour and lease costs. It is the same for any small business; I do not think we have to be geniuses to figure that out. What happens next? If a shop is not making a profit, it looks at employment and how it can cut back on staff to keep running. A shop owner has a lease, a contract, with the owner of the premises in which they are operating to give the landlord an amount of money every month for five years regardless of whether the business is operating or not. It is irrelevant if a person decides to close their business down for some reason and go home to sit and watch the television. The small business still has to find the \$5 000 or \$10 000 or \$20 000 a month to hand over to the shopping centre. The shopping centre is only interested in getting money for the space it leases to the small business.

A business may be struggling through no fault of its own; it may be as a result of its position in the shopping centre. I have no criticism of Lakeside Joondalup. It is a great shopping centre that provides a very pleasant atmosphere for people to engage in shopping, and a market, if you like, where small businesses can come together and provide services. But, after the reconstruction of the shopping centre and the new part opened, a number of people in the old part of the mall suddenly found themselves at a disadvantage because people, as I said, like to go to new things. People would rather move into a new house than an older house. The same applies to shopping centres: people would rather shop in a new area with new things to explore and different treasures to be unearthed. Some of the older tenants in that shopping centre noticed a lot of their business was sucked out, and they were left in a bit of a vacuum because all the business went to the new part of the shopping centre. As the centre has matured, the spread of business has evened out again, but we found that the small businesses that went into the new part of the shopping centre then felt the vacuum because when business evened out over the shopping centre, it caused a downturn in their incomes. That is what happens with small businesses.

A small business owner has a contract to fulfil with their landlord each and every month whether they turn over money or not. Whether a small business owner has an income or not, they still have to hand over that payment. If a small business is struggling, the first thing an owner can do to make sure they meet the payment is to look at

staffing levels. There are now businesses that trade seven days a week in Joondalup, Armadale and Midland, and it is very difficult for a mum and dad to operate a seven-day business on their own. Yes, it works if they do not see each other, but that puts pressure on the relationship and causes the relationship to breakdown. As a result, mum or dad, or maybe mum and a couple of kids, may be looking for a house and the family unit breaks up. We are attacking the basis of our society, which is the family unit. It is crucial that we get these commercial tenancies right so that the burn-and-churn phenomenon does not occur. As I said earlier, when a small business is not making a dollar but is trying to meet its lease payment, the owner will look at staff. Staff is a small business's second biggest outgoing. The small business owner may start cutting staff, which also has a social impact because it puts someone out of a job and that person has to go back into the job market, and it might take some time for that person to be employed again. Many small retail businesses employ women for the most part. I think the majority of our employees in the small retail sector are female, and those women may be using that money to feed their family, so they have to find another job fairly quickly. Even though we are in a boom state, it is not that easy to walk out of a job on a Friday night with a final payment and hope to find another job to start on Monday morning. We have other social issues that come from that. We really have to examine how our commercial tenancies and our relationships between landlords and business owners work to ensure that we can keep as many of our small businesses in their premises as possible, and therefore keep as many employees in those premises possible.

Students are another major section of our community that retail businesses employ. Again, it is very difficult to work with students in a business, because students have other commitments, as we all have. But a small business employing a number of university or high school students—I have experience of this—must take into account their timetable and that timetable changes from semester to semester. Business owners must try to accommodate that. My wife and I find that very difficult, because a student working on Monday, Friday and Saturday, or Monday and Saturday, who all of a sudden rocks up with her timetable and says that she can no longer work on a Monday, makes it necessary to adjust other staff rostering, and if a number of students are employed, their particular circumstances must also be taken into account, and the business may lose staff. We have lost staff because we have not been able to accommodate the shifts that the students wanted, and needed, to be able to continue their studies and to have a few dollars in their pockets—that is mostly what the students are working for. Many of them are not necessarily there to earn money for the necessities of life, they are there to earn money to put petrol in their cars to get to university and to put some money in their pockets to go out and de-stress on the weekends. It is a difficult situation for small businesses.

The biggest impost on small business is the landlord and the amount of the lease payments paid to the landlord. The lot of a small business is not easy. This Commercial Tenancy (Retail Shops) Agreements Amendment Bill seeks to lighten the load on our small businesses a bit; it tries to balance things up a bit so that we get a better outcome right across our society. Early in the bill is a clause prohibiting the legal costs of landlords being passed on to the tenants. This may not seem a whole lot to an outsider to small business, but to do a simple rollover of a five year plus five year lease, when the end of the first five years comes up, a tenant talks to his landlord—I am glad to say that this bill deals with that again—and until now, the onus was on the tenant to ring the landlord within three months before the end of the lease and say he wants to exercise his option to renew the lease. Nine times out of 10 the lease will state that this must be done in writing. The tenant must then take the time to sit at the computer and write a letter saying, "Dear Mr Landlord, I am so-and-so from XYZ business. The lease is up. I have an option to roll over; I would like to exercise that option." It can cost \$500 or more just to do that. The letter is a two to three-page document and simply rolls over the terms of the lease for a further five years. All that gets changed on the lease are the dates—for argument's sake the date changes from 2010–15 to 2015–20. That is all that changes, nothing else, and that can cost \$500. For a small business to find an extra \$500, when we take into account outgoings of wages, lease payments, cost of goods sold, utilities and all those other things, it might mean having to turn over, depending on how the business is set up, anything between, \$1 500 and \$2 000, just to make that \$500 payment. That is one of the things that small businesses sometimes do not budget for—the business has a five-year lease, the lease renewal is way down the track, \$500 does not seem like a lot and the owners are not thinking about it, so they do not put that little bit away every month or year to ensure that they have that \$500 sitting there.

The prohibition, in the bill, on legal costs being passed on from landlords to tenants also means that no charges will be passed on to the tenant in the initial setting up of the lease. Sometimes those legal costs can be quite expensive. I wanted to bring in a lease, but unfortunately I did not have permission from the tenant to do so in case the document had to be tabled. I have seen leases that are thicker than some of the bills put through this place—the leases can be something like 800 or 900 pages long. When small business operators look at a lease that is 500, 600 or 700 pages long, they say, "I'm not going to read that. It is against my better judgement, but I'm not going to understand it, so why would I read it?" They just look at the parts that they think will affect them—the amount charged per square metre, the cost of outgoings and the term of the lease, five years plus years, if that is what they are getting. They also look the annual increment and ask how much the rent increments

that come on every year will be, whether they will match the consumer price index, whether there will be a percentage increase and what happens after the tenant hits turnover of over \$750 000.

The last point is another reason that most of us small retailers believe that the request to hand over turnover figures to the landlord is to enable the landlord to raise the amount he takes from the tenant. From \$750 000, which would be a good amount of money to be turning over, \$110 000 or \$120 000 is ferreted off to the landlord, staff are paid and other expenses are covered. The small business owners, hopefully, if they are lucky have \$50 000 to \$60 000 they can put into their pockets and call profit; that is their income for the year. As soon as the business starts to turn over more than \$750 000—I have just taken that as an arbitrary figure, because in different leases the amount is different—the landlord says, “Oh, you’re doing really well; I’m going to gouge some more out of you.” The landlord grabs another one or two per cent of turnover over and above that \$750 000. That is one of the things that we were asking for. I know that it did not make it into this legislation, but we still need to think about the reason for tenants having to inform landlords of turnover figures. What is the purpose of it? There is no reason a landlord should know the turnover figure for a business in their shopping centre. Most shops on shopping strips with street frontage are not required to reveal their turnover figures, but in shopping centres landlords insist on it. My business is not required to do so. I can ring up the management agent of my property if I need to, but why does he need to know my turnover figure? If tenants leasing shops with street frontage do not need reveal turnover figures, why do business owners in shopping centres have to? Milton Cockburn and the Shopping Centre Council of Australia say it is a matter of mix. I spoke earlier about what mix actually means; mix is about shopping centre owners being able to maximise their profits. It the same reason that tenants are required to reveal their turnover figures—a business handing over turnover figures enables the shopping centre to maximise its profits, because the shopping centre landlord says, “I can whittle another one or two per cent out of this guy.” Therefore, the harder people work, sometimes the less they get. It is a really unfair way of doing things.

I mentioned earlier that in the current legislation the tenant has to inform the landlord that they want to roll over their lease and that triggers the actions that roll over the lease. Under this new Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011, the onus for the renewal of the lease switches to the landlord, and the landlord must inform the tenant between six and 12 months prior to the termination date of the lease that it is about to terminate, and that it is time for tenants to start looking at exercising their option for renewal, if they wish to do so. Then they get to work out what the rent will be when the lease is rolled over. There is a clause in most leases which states that on the rollover of the lease, the rent will be determined based on the market rent. People ask me what the market rent is and how they can figure out what it is. It is really difficult.

When we were negotiating for a small business package, we were pushing very strongly for a lease register. We wanted the lease register to be a public lease register held by the government. The government would be an independent operator in the field. It would have information from the landlord and the tenants. The government would hold it and we would have an ideal situation. We have Landgate, a fantastic organisation out in Midland. It holds all our titles. It holds the titles to your house, Mr Speaker, my house and everybody else’s house. It holds all the details of our titles. The titles to every shopping centre and business are held by Landgate. Landgate is so good that it has the facility to take the drawings of this building, put them into its system and drill right down to what is under the ground. It knows where all the power services are, where all the pipes that come into this place are and where the air conditioning units are. If this organisation so desires, it can put everything on this building’s title. Should there be an emergency event, all the Fire and Emergency Services Authority has to do is pick up the phone and talk to Landgate to find out where lots of those services are. It can find out where the fire hydrants are, though it should probably know where the fire hydrants are. FESA can find out where all these other services are so that it can come in and shut down power to make things safe. That is a great resource of Landgate. It would not be too difficult for Landgate to stretch a little further and take the details of a lease and put them on the title. It is not that great a step. It has the infrastructure. Yes, there may be a small cost to government, by way of additional staff, particularly in the early stages when information is loaded, but it would not be that difficult.

Many things can be put on a lease register. Every lease in New South Wales goes on the title. There is a reason for that. The legislation relating to property rights in New South Wales is different from Western Australia’s legislation. If someone does not have their lease on the title and those premises are on sold to another consortium, it is deemed that that person does not have a contract because the person that they were dealing with has changed and they longer own that land. People have taken to this practice of lodging the lease information on the title deed. When that facility sells, the owner has an interest and that interest continues and it flows through. It is different here in WA. We are not quite as bad as that. We have much better protection in our system so we do not have to do that. As I said, every lease in New South Wales is registered. The Shopping Centre Council of Australia is happy with that. It has no disputes with it. The majority of the tenants do not have a dispute with it.

I have just logged into the lease register. It is compiled by an independent organisation. I will not mention its name. It gets this information from the titles office in New South Wales. The cost of getting the information is relatively cheap. It costs about \$10 to access the lease and title in New South Wales. In Queensland it is a little more expensive—\$35 for a lease and \$18 for a title. The NSW equivalent of Landgate holds that information. This organisation has very kindly given me access to its web page so I can see what sort of information it compiles. It gives a prospective tenant an idea of the market rent. Someone who is already a tenant who is going to roll over their lease can get an idea of what the market rent is. The website includes information on the status of the lease, saying whether it is expired or leased; the centre name; the lessor name; the shop number; and the lessor trading name. The page I am looking at shows David Jones, Westpac, Myer, Kmart, Coles and a number of small businesses but they are way down the list. The small businesses are also listed. The types of categories include the shop size, the commencement date of the lease, the expiry date and the term. Some of the larger businesses have 40-year leases, 32-year leases or 25-year leases whereas most of the small businesses can manage to get only a five-year lease. There is no option for the businesses that I am looking at. They have a straight-out 40-year lease. I am sure that a very large organisation can really ramp up that option to roll over.

The register also shows the original base rent per annum, the original base rent per square metre, and the estimated current rent per annum; that is, what it was at the start of the lease and what it will be two or three years afterwards. It shows the current base rent per square metre and the rent increases per year over the term. They usually work on a five-year period. Then we have the percentage rent increase per year and the marketing levy. All these things are really important for a small business to access to determine whether it is feasible or profitable for it to go into a particular shopping centre. With this New South Wales leasing register, a businessperson can compare not only the shopping centre that they are looking to go into but also shopping centres around the state. They can compare types of shop so they get a very good base. Information is power. It gives people a great power base on which to say to the leasing agent what they are prepared to pay because they can see what is paid in Liverpool or Bankstown or, in the case of Western Australia, Lakeside Joondalup shopping centre, Armadale Shopping City, Midland or Fremantle. It gives a great base of power. The Shopping Centre Council has no issue with that. I am sure the minister knows this but in its submission to the previous minister, it said that it would not have an issue. It stated —

The SCCA supports greater lease transparency. In our submission to the Productivity Commission’s Inquiry into the Market for Retail Tenancy Leases in Australia, in July 2007, we argued: “*The SCCA —*

The Shopping Centre Council of Australia —

*believes that a simple solution to address concerns that there is an imbalance in information at the end of a lease, because tenants do not have access to information about rents being paid by other tenants in a shopping centre, is to introduce mandatory registration of leases in those State that presently do not require it,*

The Shopping Centre Council is saying that it is very happy for all the information to go on a transparent lease. It is happy for it to go to an organisation such as Landgate. When the Leader of the Opposition approached the Premier, the Premier was not agreeable to that. Why would the Premier not be agreeable to putting out a public lease register that is accessible and that the Shopping Centre Council is happy about? Most of the larger businesses around the country are accepting of it as well. Businesses such as David Jones, Westpac, Myer and Kmart are happy to put their information on this register because it balances out the perception of small business that big organisations are getting a free ride on their backs, when in fact that is probably not the case.

**Mr T.R. Buswell:** Member, you referred to New South Wales: were there any other jurisdictions that you referred to?

A member interjected: Victoria.

**Mr A.P. O’GORMAN:** Queensland. I did not refer to Victoria. In Queensland, the title and also the lease can be obtained.

**Mr T.R. Buswell:** From a central register or through some other mechanism?

**Mr A.P. O’GORMAN:** In Queensland it is not mandatory. In fact, it is not mandatory in New South Wales; it is only because of the property rights legislation in that state that most people do it.

I know that the government argued about what should be put on a register and how that information would be kept up to date. Obviously it is possible to do that because New South Wales is doing it. In Western Australia, New South Wales has been touted for 30 years as the state with deregulated trading. When I visited the eastern states, I spoke to people in New South Wales and, shock-horror, to my amazement New South Wales has had deregulation only since 2008. That is 2008—or three years ago! But it has had pseudo-deregulation for 30 years.

What do I mean by pseudo-deregulation? Every year, those operators who wanted to open for extended hours including late nights and Sundays, put in for a permit to do that. Small shops did it. Large shops did it. There was no issue about a 13-man rule and whether small businesses can or cannot open, and all those sorts of things. However, I will not say it was backhanded but because the move to extended trading was not regulated by legislation, small businesses in New South Wales did not experience the great increases in rent that we see around our state at the moment. I think it was the member for Kingsley who, yesterday, mentioned that in some of the shopping centres in her area, retailers face 30 per cent increases in rent. It might have been the member for North West. I know that people come to my office saying that there have been 30 per cent increases in rent. That sort of increase is not sustainable for a small business. A 30 per cent rent increase can bowl over a small business. A one-off 30 per cent rent increase in one year can spell the death of a business. It sends businesses to bankruptcy court faster than if the money were gambled away. Therefore, it is really important, minister, that we look at the proposal of a register. I know that in the negotiations my leader had with the minister’s leader, the notion of a lease register held by the shopping centre was put up. The opposition intends to move amendments to the effect of bringing such a register into place. It is not ideal. My preference is that we move amendments to bring in a lease register to be held at Landgate; however, that was not the agreement between the Premier and the Leader of the Opposition. The agreement was to hold the register in shopping centres. What I want is to keep our Premier honest. I want to keep him honest and true to his deal. I know that it is difficult to keep this man honest, but that is what I want to do.

**Mr T.R. Buswell:** You were going along very nicely up until now.

**Mr A.P. O’GORMAN:** That is what I am prepared to do. I am also prepared to keep the minister honest—if he likes. However, the opposition is about protecting small business, about being honest and about recognising that small business is the backbone of employment in this state. Yes, there are the great big mining companies, but they are distorting our economy. They do great things, but by their actions they distort our economy and that is a shame. That is a shame because we now see two different levels in our economy—the haves and the have-nots. The have-nots are coming further up the social scale and are being pushed down harder. Because the wages of the people who do an honest day’s work as a shop assistant, and even some government workers and workers in non-government organisations, have been driven up higher by mining, it is getting harder and harder for small business operators to attract and maintain staff.

Therefore, it is really important that we get this thing that we think does not affect too many people right. My guess is that it affects everybody in this room. It affects everybody in this state in the hip pocket in the form of extra taxes because when we see market failure, many of the people who go into business who are then turfed out of their business, end up turfed out of their homes. In my view that is market failure. It is a failure of society. We have to try to bring back a balance so that the small operator as well as the very large operator, and the other sectors in the community, such as the mining industry, work cooperatively to make this state a better place. It is the greatest place in the world to live. I took a conscious decision that this is the place that I want to live and I moved my whole family out here. I have been very happy living here. I am in politics because I thought Western Australia was such a great place. However, we can do better and that is what I am here for now. I want to do better. I want to be better for our state. I want to do better for our small business operators and for those people in society who are at a disadvantage at this point in their lives. We need the government to prop up people when they hit hard times.

By amending the commercial tenancies act to include just one thing—a public lease register—we can effect an excellent change that will help every man, woman and child in the state. There will be less taxes to pay because there will be fewer people on the public housing list, which I know the minister is responsible for administering. This is not only about big business; we should not be looking after only the big end of town. We have to look after the small guy as well and we have to give people a leg up when they run into difficulties.

Moving on from that, I am sure the minister is aware of the opposition amendments standing on the notice paper. He probably has answers about why he will not accept those amendments; however, we are going to push very hard for those amendments. I hope the National Party and some of the Independents will join with the opposition to ensure those amendments are passed. National Party members are always out in the regions beating their chests and saying that they are for the small people and the people in the regions. Well let every single one of those members stand now—there are four of them—to make a difference. Those four members can make a difference to every small business in this state by standing and saying, “We have the courage of our convictions; we do not just go out in the regions and mouth off about it, but stand up to the government and vote against it in support of things that will help small business.” I know it will upset Milton Cockburn. I know that. I have had the face-to-face meeting with Milton. He is less than happy with me. He was very unhappy with me a number of months back when I brought the Ellenbrook shopping centre issue to this house, member for Swan Hills.

**Mr F.A. Alban:** It’s all okay now.

**Mr A.P. O’GORMAN:** Yes; it is all okay now. Why is it okay now?

**Mr F.A. Alban:** Because I stood up and fought for it and —

**Mr A.P. O’GORMAN:** I will tell the member why it is okay now! It is okay now because when I brought the matter to the attention of Hon Bill Marmion, the former Minister for Commerce, the legal advice he got said that what I was saying was absolutely correct; namely, that Ellenbrook shopping centre was not acting exactly according to the law with its leases. The leases have been changed; that is why it is all right now. It is all right because I raised the issue; I took the heat from the member’s people; I took the heat from Milton Cockburn.

**Mr F.A. Alban:** So it was your idea?

**Mr A.P. O’GORMAN:** No; it was not my idea, but I was the one who raised the issue and I was the one who was told that I was a liar and that I had it wrong—but I was proved to be right. Milton Cockburn wrote an A4 page criticising me, and still I have not had an apology from that man, but I expect one soon. I also expect a phone call from him to criticise me and to have a go at me for suggesting a public register, which we cannot achieve under this government. Ideally, we should have a public register. I think that at the next election, the Labor Party will be saying that it will stand behind small business and put in place a public register; that it will put together a business package that will protect small business, look after small business and ensure the growth of small business in this state.

**Mr T.R. Buswell:** Why wasn’t that part of your policy at the last election?

**Mr A.P. O’GORMAN:** Why was it not part of our policy at the last election? We put it up before. We have it up now as a part of our policy. It will be an issue at the next election. That is what Labor will put up. We will not only be looking after small businesses, because this is also going to look after large businesses. It is going to look after the shopping centres. It will give transparency. It is going to level up the playing field a little. We will never get an exactly level playing field, because the larger operations of course are going to get discounts because of the amount they buy. They are going to be able to import much larger amounts from China, Japan, Korea and all the other places that supply us. Small businesses cannot do that. We can go into conglomerations—sometimes they are called a franchise, sometimes they are called a buyer group—but we can never match the big boys.

Do the big boys give us quality and service? Sometimes they do. Does a small business give it to us all the time? Not all the time. But what is their ambition? The ambition of small businesses is to always give us the best choice and the best service they possibly can. By correcting the inadequacies or inequities in the current commercial tenancies act, we can ensure that those small businesses can continue well into the future, giving each and every one of us the best choice, the best service and the best opportunity for our kids to have after-school-hours work that is paid at a reasonable amount. I think it is a great thing that our young teenagers can get jobs in local stores in their local neighbourhoods. They get a work ethic from a very early age. That is something that small business can do. Yes, I know Coles and Woolies do all that, but if members actually look at what Coles, Woolies and all big those stores do, they take in 15 and 16-year-old employees, but as the employees turn 17, the stores start dropping the hours of the employee. When they hit 18, the stores have to start paying them more. When employees hit 21, the stores have to start paying them an adult wage.

What do small businesses do? If most small businesses are like mine, they value their employees. I have an employee who started with me when she was 15. Six years down the track, I am happy to hand her the keys of my store and say, “Here, you can run it,” because she can. She has had the training, she is competent and I have trust in her. Do we see that with these larger stores? Do we see the larger stores actually working with young people, bringing them up, and giving them a work ethic so that they understand what the organisation is about? They understand that the organisation wants to provide good service. It is not just about profit—profit is the number one factor for any business, because if they do not turn a profit, they do not survive—but about the morale of the staff. It is very difficult to keep up morale among the staff if there is a commercial tenancies act that actually works against small businesses. It is very difficult to keep up morale when one’s own morale is low, because one feels like one has been trodden on by the bigger guy all the time.

With those few words, I commend the bill to the house. We will be moving amendments. I hope that the Nationals and Independents have the courage of their convictions. Quite often we hear the member for Alfred Cove ranting and raving about rights and obligations and what we should do with young people. Here is her opportunity to put up her hand and say, “I am going to vote with the Labor Party. I am going to support these amendments.” They are not ideal by a long shot, but they are a step towards making the playing field a little more stable and level. It is a step towards making this state of ours an even better state than what it is today.

**DR A.D. BUTI (Armadale)** [1.23 pm]: I rise to make a few comments with regard to the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011. I commence my contribution by quoting the second reading speech given by the Minister for Transport, in which he concluded —

The amendments contained in this bill will provide improved protections for tenants, while balancing the need to provide a regulatory framework that is fair to landlords. In particular, the reforms will promote a more efficient and fair retail tenancy market by reducing disputes between landlords and tenants, reducing the disparity in bargaining power that can exist between parties, and enhancing the clarity and effectiveness of the legislation.

One would hope that this bill does that. We will be closely examining the bill in consideration in detail. As was flagged by the member for Joondalup, we will be moving a number of amendments that we think are necessary to achieve some of the purported aims of the bill mentioned by the Minister for Transport.

Last night we were debating another bill, the Small Business and Retail Shop Legislation Amendment Bill, which in many respects also seeks to assist the workings and the framework in which small business operates. As was mentioned by a number of contributors to the debate last night, small business is in many respects the fabric of much of our economy. Yes, we are a state where the resource industry dominates, but more people are employed in retail than are employed in the mining industry. Unfortunately, the success rate of small business is dismal. I think the member for Rockingham mentioned it last night. What is the success rate for small business?

**Mr M. McGowan:** The failure rate, as I understand, is 70 per cent.

**Dr A.D. BUTI:** The failure rate is around the 70 per cent mark, which is astounding. It is very depressing to consider that many small businesses are commenced by families; they are family units. As the result of the failure of the business, often there are extra strains placed on the family unit. As a result, I am sure it leads to many breakdowns in family relationships.

It is very important that we do whatever we can to facilitate the operation of small business and to protect small business. It is important not only from an economic point of view. As I stated, small businesses are a major engine of our economy; they are a major employer in our economy. What is even more important is that they employ many young people. As mentioned by the member for Joondalup, small businesses employ many students. It is very important from an economic point of view, but it is also very important from a social point of view. As I mentioned, in many respects they are family businesses. If the family business is under pressure, if the family business breaks down, there is often a corresponding breakdown in the family unit. That has ongoing economic and social consequences that governments and society have to deal with. One cannot stress enough the need to do whatever one can—in this respect, in a legislative format—to assist the operations of small businesses.

Much has been made of Sunday trading and extended trading hours. I remember going to a session that was put on by ARBA—the Armadale Region Business Association. The minister knows this organisation very well, because he was the guest speaker at a breakfast at Roleystone last Wednesday. Unfortunately I was unable to attend, but I believe it was a huge success. Around 60 people attended, and the minister was very well received.

**Mr T.R. Buswell:** I do not think they came to listen to me. It was a fundraiser for the bushfire recovery efforts.

**Dr A.D. BUTI:** The minister is very modest.

**Mr T.R. Buswell:** Although, during my attendance my car battery went flat.

**Dr A.D. BUTI:** That is right; I heard that. I think it made the “Inside Cover” column, but at least it was downhill on the way back to the office.

**Mr T.R. Buswell:** I am very good with downhill.

**Dr A.D. BUTI:** Good to see! A meeting was held by ARBA, and Wayne Spencer, director of the Retail Traders' Association of Western Australia, attended the meeting. I was very disappointed by the attitude of Mr Spencer. Most of the people at that meeting were small business operators in the Armadale–Kelmscott region. The discussion was on extended trading hours and also Sunday trading. In Mr Spencer's opinion we should have 24/7 trading hours, and it is really up to the individual whether they want to operate. That is one view at one end. But Mr Spencer would not listen to the concerns of the small business operators who were at that meeting. I recently received a letter from Mr Spencer, which I am sure most members have received, detailing the so-called success of Sunday trading. Armadale is, of course, one of the designated Sunday trading areas. He mentioned that in centres such as Joondalup and Armadale, there has been a 90 per cent increase in retail sales or income derived from extended trading hours. I wrote back to Mr Spencer asking him for a further breakdown of those figures and how they were arrived at, because if one walked through Armadale on a Sunday, it would be very hard to see how there could be a 90 per cent increase in income.

I am not going to get into a debate about Sunday trading or extended trading hours; all I am trying to relay is that the concerns of small business owners need to be taken into consideration, and I do not think that the Retail Traders’ Association of Western Australia has done that—or, at least, it did not appear to have done so at the meeting I attended. If one were to walk through the two major shopping centres in Armadale on a Sunday, one would see that many of the small business operators are not open, because they have determined that it is not worth opening. I have heard—I am unable to verify whether this is the case—that in some cases pressure has been placed on small business operators by landlords to open in Armadale and other designated Sunday trading centres, and if that is the case, it is an alarming trend. One hopes that we, as a Parliament, can somehow prevent that or provide some sort of protection for small business operators.

If one does not understand that small business operators are the little guys of the retail industry, one has only to look at this document; it is a lease document. Members can see how thick this lease document is. The minister will not need his glasses to see it—it is so big, he can see it from where he is sitting. If one flicks through this document, one begins to suspect that a small business operator would have trouble understanding it. It is full of legalese, and words are used in certain provisions that are then repeated in other parts but with a slightly different meaning. It would be very dangerous for small business operators to sign this lease agreement to enter into an arrangement with a landlord if they did not receive legal advice. One might say, “Well, of course they should receive legal advice”, but that, of course, is another cost; another input to the business structure that they have to cover. For a lawyer to go through this document and provide legal advice would be, I suggest, an expensive exercise for a small business operator. If one goes to law school now—this has been the case for at least the past 15 or 20 years—one is taught to engage in plain English. The trend has moved from Latin terms and complicated legal terms to plain English. Unfortunately, whoever drafted this document might fail first year clear legal writing at law school. One must ask: why is this document so complex and so thick? If one was trying to ensure that someone will not understand something, one makes things more complex. What can a small business operator do? They can walk away from it, obviously; they do not have to sign it. But let us think about the reality of commerce and the reality of the world: a small business operator can engage a lawyer to give advice, and then sign the document, but the document is nearly always geared in favour of the landlord, because the landlord has had his solicitors draft the document. That is why we need legislation that seeks to provide some equity or balance between the two parties.

I will be looking at this legislation to see whether there is within it an attempt to achieve the purposes mentioned by Hon Simon O’Brien. I will regard this as a successful piece of legislation if it seeks to change the inherent imbalance between small business operators and large retail landlords. It must seek to redress or equalise the bargaining power between the two parties; it must provide protection against undue influence; it must provide protection against unconscionable behaviour; it must seek to provide remedies in respect of inequitable actions of undue influence and unconscionable behaviour; and it must look at misleading and deceptive conduct. As most members will know, misleading and deceptive conduct is enshrined in the commonwealth Trade Practices Act 1974, which was introduced by the Whitlam government when Lionel Murphy was Attorney-General, or the various fair trading acts that govern the misleading and deceptive behaviour provisions in the various states, including Western Australia. Section 52 of the Trade Practices Act deals with misleading and deceptive conduct, and it is the most litigated section of the act. That illustrates the problem we have with the unethical and immoral behaviour of certain business operators in the business world.

If we are serious about protecting the interests of small business operators, and if we are interested in ensuring that there is a viable small business economy in Western Australia, we have an obligation to ensure that this legislation attempts to address the inherent inequality between most small business operators and larger landlords. With those remarks, I conclude my contribution to the second reading debate.

**MR F.M. LOGAN (Cockburn)** [1.36 pm]: I have the pleasure of being able to contribute to this debate on the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011 as well. I say “pleasure” because we should be reminded that this legislation has come before the house as the result of negotiations between the Leader of the Opposition and the Premier of Western Australia on an agreement to amend the Retail Trading Hours Act 1987 to allow for greater shopping hours deregulation. In return for its support, the Labor Party argued that small businesses needed to be protected and that greater rights and fairness needed to be accorded to small business in Western Australia, particularly in respect of their relationship with landlords, and particularly landlords of shopping centres. The concern was that, should retail trading hours be changed to allow longer hours of shopping, there would be an impact on many of the smaller businesses that operate within shopping centres around Western Australia. The view was that they would be bound to continue to stay open and that pressure would be brought upon them to remain open in accordance with the retail trading hours deregulation and the views of the shopping centres, and that there would be associated costs and imposts on small businesses located in shopping centres across Western Australia. The Labor Party believed that those small businesses

needed to be protected in a more deregulated retail trading hours environment. That is the genesis of this legislation.

I am very proud to be able to stand here and support the bill, albeit with the amendments sought by the member for Joondalup. It will clearly demonstrate to the small business sector in Western Australia that when it comes to looking after and protecting its interests and ensuring fairness and balance in the relationship between landlords and small business tenants, the only political party it can rely upon is the Labor Party.

As members know, for many years the government and the Liberal Party—particularly the Liberal Party, as opposed to the National Party—have argued that it is the party of small business. That is what it likes as its nickname; that is, the Liberal Party represents the rights and interests of small business. As we have seen in numerous administrations in Western Australia, that is just not true. If we look back at the governments of Hon Geoff Gallop and Hon Alan Carpenter, we can see that under those former Premiers of this state the interests of small business were furthered, protected and enhanced by ministers of their governments, in particular Hon Clive Brown and Hon Sheila McHale. Both those ministers, but particularly Hon Clive Brown, brought legislation into this place that significantly enhanced the rights and interests of small business.

Similarly, when the Liberal–National government pushes hard to deregulate trading hours because it says it has an electoral right to do so and has given an election commitment to deregulate trading hours, to a certain extent —

**Mr V.A. Catania:** Don't forget to take the National Party out, thank you very much.

**Mr F.M. LOGAN:** The member for North West said to take the National Party out. I do not remember what retail trading hours policy the National Party went to the election with.

**Mr V.A. Catania:** The status quo, and you know that. Don't mislead the house.

**Mr F.M. LOGAN:** Nevertheless, as a party, that is —

**Mr W.J. Johnston:** I point out that the member for North West went to the election promising the Labor Party's position on trading hours.

**Mr F.M. LOGAN:** Correct.

**Mr W.J. Johnston:** That is what he said he would do, if elected to this Parliament.

**Mr F.M. LOGAN:** Yes.

**Mr W.J. Johnston:** Because he was of course endorsed, and at some considerable effort sought preselection, on behalf of the Labor Party.

**Mr V.A. Catania:** The member for Cannington is misleading the house.

**Mr W.J. Johnston:** You are misleading the house every day you sit here! Every day you sit here you mislead the house.

**Mr F.M. LOGAN:** I think that is a very good point that the member for Cannington has just made.

**Mr F.A. Alban** interjected.

**The ACTING SPEAKER (Ms L.L. Baker):** Excuse me, members, it is not appropriate to be yelling across the chamber and waving bits of paper. The member with the call is the member for Cockburn.

**Mr F.M. LOGAN:** The point the member for Cannington made is a very good one. The interjection by the member for North West about who took what to the election raised a very good point and the house has been reminded of it by the member for Cannington. The member for North West took an entirely different position to the election from the National Party one that he mentioned in his interjection. As members know, he decided to jump the fence to join the National Party.

When we look at the track record of the two major political parties in this state—the Labor Party and the Liberal Party—on protecting the interests of small business, which is clearly the issue I am going on about, we see that it was the Liberal Party that argued it was the party of small business. However, when we look at the track record of who has legislated in support of and for the furtherance and protection of the rights of small business, we see that it was the Labor Party. The runs on the board indicate that legislation for the protection and furtherance of the rights of small business has been brought to this house by only one party; that is, the Labor Party. And here we are again. The Liberal Party argued that when it got to power, it would further deregulate retail trading hours in Western Australia. After a series of negotiations on how that was to take place—not if it should take place but how it was to take place—the Labor Party once again came to the protection of small business by saying that if it were to support any change to retail trading hours, it would ensure that appropriate protections were put in place

for small business, and particularly those that operated out of shopping centres. That, as I say, is the genesis of the bill and why I am very pleased to stand in this place and contribute to this debate.

I also point out to the house the contribution of the member for Joondalup not only to this debate, but also to the debate last night on the Small Business and Retail Shop Legislation Amendment Bill 2011. His contributions on behalf of the opposition to this debate and to debate on the small business bill last night were very good contributions. His detailed contributions reflect the depth of the Labor Party's understanding of the impact of this bill and the small business bill debated last night on the day-to-day operations of small business. The member for Joondalup argued from a point of current experience and from a technical perspective on what it is like to run a small business and the impacts the legislation will have on the operation of a small business. I am yet to hear any contribution from a government member.

**Mr J.E. McGrath** interjected.

**Mr F.M. LOGAN:** I presume the Minister for Transport still has a shareholding or an interest in a small business.

**Mr T.R. Buswell:** Who is that; me?

**Mr F.M. LOGAN:** Was the member for South Perth talking about the minister?

**Mr T.R. Buswell:** No.

**Mr F.M. LOGAN:** No? The minister obviously does not have that interest any longer.

**Mr M. McGowan:** He has misled the house!

**Mr T.R. Buswell:** I do have an interest in it. I am very interested in it.

**Mr F.M. LOGAN:** The minister did have a very strong interest in small business, but he assures the house that he does not have that interest any longer.

**Mr T.R. Buswell:** I sold my share to avoid scrutiny.

**Mr F.M. LOGAN:** It is ironic that, although the Liberal Party claims to be the party of small business, we have not heard any government member debate this bill on small business. However, we have heard members of the Labor Party debate the bill and argue it from a technical point of view because they support small business people. I find that position ironic. There are therefore two points: one is that when we look at the track record, we see that it is only Labor that has protected the rights of small business.

**Mr T.R. Buswell:** You're dreaming!

**Mr F.M. LOGAN:** It is. Just look at the track record, minister. Do not talk about it. Look at the track record. Look who has passed the legislation. It is only Labor that has protected the rights of small business. The second point is that when it comes to contributions to the debate, the most technical and professional contribution made to this house was from a member of the Labor Party. That is a wonderful thing, but I think it is a point of irony particularly for the Liberal Party. Nevertheless, as I say, I still have pleasure standing in this place and supporting the bill, with the inclusion of the proposed amendment that will be sought by the member for Joondalup.

Some of the proposed amendments in the bill to the Commercial Tenancy (Retail Shops) Agreements Act have been made by the Department of Commerce for administrative reasons and for improving the operation of the act. However, the key points in the bill are points that we as the Labor Party put forward to the Premier of the state in a negotiating process to protect the rights of small business. These proposed amendments are not exactly as we sought; nevertheless, they certainly go a long way to meeting the claim—if I can put it that way—that the Labor Party put forward. These amendments go a long way in enhancing and protecting the rights of small business owners who primarily are the tenants operating out of shopping centres in Western Australia, particularly those provisions that go to, for example, disclosure.

I will just run through some of the amendments to the Commercial Tenancy (Retail Shops) Agreements Act that are sought and which we support. Clause 7 of the bill will amend section 6 of the act to provide that a landlord must provide a tenant with a disclosure statement seven days prior to entry into a lease. The clause amends section 6(1) to extend the 60-day period to six months. Obviously, this was a provision that we sought to protect the rights of tenants who enter into a contract but later find clauses in the contract that were not only against their business interests but also impractical, from our point of view, for them to comply with. I highlight to the house why this provision is so important by holding up a copy of a real lease that a small business owner has to read and understand if they wish to have a tenancy in a well-known shopping centre in Perth. Members can see the size of this lease. A tenant who operates a small business has to wade through something like this —

**Mr T.R. Buswell:** Member, have you seen the contracts you have to sign to drive an orange school bus?

**Mr F.M. LOGAN:** I have not seen those documents.

**Mr T.R. Buswell:** A liquor licence needs half a forest!

**Mr F.M. LOGAN:** However, I think there is a big difference between the responsibilities of driving around everyone's precious cargo—children—in a school bus —

**Mr T.R. Buswell:** That's a licensing issue; I'm just talking about the form.

**Mr F.M. LOGAN:** I am just talking about the differences between the responsibilities of driving around people's children and opening a shoe shop in a shopping centre.

**Mr T.R. Buswell:** But it's just another example, because there's lots of red tape.

**Mr F.M. LOGAN:** If the point the minister is making is about red tape, I agree with the minister; clearly, there are lots of examples here in Western Australia that the minister could point to.

**Mr T.R. Buswell:** Not for hairdressing anymore, though!

**Mr F.M. LOGAN:** This is not public sector red tape; this is a private sector lease. The document I am holding is not public sector red tape; it is a private sector contract between two parties. One party has the representation of a well-known, massive, national law firm, and the other party —

**Mr T.R. Buswell:** McDonald's.

**Mr F.M. LOGAN:** No, this is the law firm that represents one party and the other party is mum and dad. Mum and dad have to wade through this document to try to make sense of it. They must look at every clause in this contract to determine whether it has any impact on their ability to operate a company in a shopping centre. If that is not an example of an imbalance of power, I will walk east. I am sure that the Shopping Centre Council of Australia will argue very strongly that it is important to have a document this big. The minister, with whom I have been having a debate across the chamber, would argue that this level of red tape would be unnecessary in the public sector. I put it to the minister that it is probably unnecessary in the private sector as well, particularly when we deal with something as fairly basic as the lease for a shop.

[Member's time extended.]

**Mr F.M. LOGAN:** Nevertheless, this document has a particular purpose—to reinforce this imbalance of power between the landlord and the tenant.

I will briefly deal with other clauses in the Commercial Tenancy (Retail Shops) Agreements Amendment Bill that were key in the negotiations between the government and the opposition on amendments to the act. Clause 8 deals with rent reviews and amends section 11(2) of the act. We support this amendment and I believe that it is a good move that will further the interests and protection of small business.

Clause 10 provides for the tenant's contribution to the landlord's expenses. Can the minister go over that again in his response to the second reading debate to clarify the allocation of operating expenses to retail shop tenants as opposed to the referable expenses? Most of the leases signed for shopping centres in Western Australia are semi-gross leases, and, obviously, there are referable expenses, such as council rates and things like that. Can the minister, in his response to the second reading debate, explain a little further how the amendment to section 12 of the act and the allocation of operating expenses to retail shops will impact on small businesses, particularly those that are on semi-gross leases?

Clause 11 deals with a tenant's rights to a term of five years' tenancy and amends the act accordingly. That was a provision that the Labor Party argued should be clarified. Clause 12 deals with the notice of renewal of leases. This is a provision that we were very strong on, arguing that for the protection of small businesses, they need to be notified at greater length before the end of their lease of what is likely to happen to their tenancy, such as whether the lease will be rolled over or terminated by the landlord. Proposed section 13C, "Obligation to notify tenant of option to renew", is obviously a new provision and provides further protection of small business's rights over the end of the lease.

Proposed section 14A, the relocation provision, deals, again, with an issue that we raised and that obviously had been with the department for a fair while. We support amendments to the act to put further protections on small businesses for when the landlord seeks to relocate that tenant, and that delineate the responsibility of the landlord for notification and payment for that relocation should proper notice not be given.

However, the most important issue that this bill that amends the Commercial Tenancy (Retail Shops) Agreements Act has not clarified and which we believe will be to the benefit of the industry as a whole and small business tenants in particular, is, of course, the lease register. The member for Joondalup seeks to add a further

**Extract from *Hansard***

[ASSEMBLY — Wednesday, 13 April 2011]

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Mr David Templeman; Mr Tony O'Gorman; Dr Tony Buti; Mr Fran Logan

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amendment to this amendment bill that will enhance not only the protection of small business but also the viability of the industry as a whole. The member for Joondalup argued eloquently at length from personal experience about the need for a lease register that would be independently operated above and beyond the responsibility of the landlord. This amendment bill introduces a responsibility only for the landlord to maintain that register. I strongly support what the member for Joondalup is arguing for because, along with the member for Joondalup, I had talks with numerous small business organisations, small business people themselves, and other organisations, such as the Shopping Centre Council of Australia, and sought their theories on the lease register. The member for Joondalup argued that Milton Cockburn, who represents the Shopping Centre Council of Australia, is significantly opposed to our amendment. Milton Cockburn outlined to us in writing the six points for why he believes that type of register would not work. I put it to the minister that the laws governing the Australian Securities and Investments Commission and the regulations that the Australian Securities Exchange uses are about transparency.

Debate interrupted, pursuant to standing orders.

[Continued on page 2988.]