COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS AMENDMENT BILL 2011

Recommittal

HON SIMON O'BRIEN (South Metropolitan — Minister for Commerce) [7.33 pm] — without notice: I move —

> That the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011 be recommitted for the purposes of reconsidering clauses 5 and 9.

By way of brief explanation, members will recall that at the end of June the house established a Committee of the Whole to consider this bill at length. After much discussion a number of amendments were made to the bill. I indicated at the time that the implications and ramifications of some aspects of these amendments were, in part, unknown and certainly, in terms of consultation with the commercial retail sector, were untested. Subsequent to that, there has been consultation with the sector about the nature of the amendments. Advice has been sought from a variety of sources about the impacts and other perhaps unforeseen flow-on effects of some of these amendments. When that information was assembled recently, I made contact with all parties in the house to discuss the matter further behind the chair, as it were. I would like to thank the other parties for participating in the briefings that were offered and for engaging in the discussions that ensued. As a result of all that, I believe we have a good prospect, if we resolve ourselves again into the Committee of the Whole to recommit these particular clauses, of making some final amendments that are generally as set out on the supplementary notice paper. I would like to revisit one or two of those amendments, and I look forward to explaining why when I get to the committee table, if that is the house's will. I also indicate that one of the amendments—again, I will be discussing this if I get to the committee table—has actually been accepted because we think it improves the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011. Taken with some other amendments that I am now proposing to put some things back, we think it probably achieves the best outcome we are going to get at this time. It is important that we make this progress, because this bill promises some other good initiatives for the sector—for small business operators in particular—in a range of matters contained in the bill that are not the subject of the amendments I am talking about. For those reasons, I seek the house's support to recommit those two clauses.

Finally, I notice that provisional notice of a further clause has been provided on the supplementary notice paper. That relates, I think, to clause 7, and a potential amendment standing in the name of Hon Lynn MacLaren that proposes some amendments to another clause of the bill. These are very recent proposals, but I have, over the last day or so, sought some advice about those. I have said to Hon Lynn MacLaren—again, we always have a cordial relationship when we are discussing such things—that although I can actually see what is behind her proposed amendments, this particular amendment is probably misplaced if applied in the way indicated. It needs some more homework done on it; it would not work in the way we might like it to work because of the section of the act that it is proposed to be inserted into. I had some preliminary advice, which I have shared with Hon Lynn MacLaren, but I have some more that I will give to her afterwards, out of session. In our discussions behind the chair, I have indicated to Hon Lynn MacLaren that I would not be including the recommittal of clause 7 because we do not wish to revisit the matters it touches upon. I have given the honourable member the reasons, and I think she agrees with that, although I have certainly given an indication that the other measures going on at this time and our ongoing consultation about matters that touch upon a lease register—let us face it, these are the sorts of matters that these amendments are targeted at—will continue, and I will involve Hon Lynn MacLaren in that dialogue. With that brief explanation of some very complicated matters, I seek now to recommit those couple of clauses.

HON LYNN MacLAREN (South Metropolitan) [7.38 pm]: I rise to support the motion. I am very pleased that the government has taken the time and used some of its resources to carefully consider the amendments made previously in committee, and has sought to improve the bill before we pass it through the house. I acknowledge the work of the minister in examining the solution to a problem that I drew to his attention and that we sought to fix, and I acknowledge that he intends to address that problem in another way. I thank him for his attempts to work constructively to get some good legislation that will enable tenants to access the relevant information they need when negotiating their leases. I support the move to recommit these two clauses.

HON LJILJANNA RAVLICH (East Metropolitan) [7.40 pm]: I am somewhat disappointed that Hon Max Trenorden's amendments will not be accepted in this place because I understood quite clearly that the intention of his first amendment was all about amending the definition of a "retail shop lease". In essence, the member wanted all shops, irrespective of their size, to be treated equally on commercial tenancy matters and by the provisions of the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011. There was no mistake about what Hon Max Trenorden intended to achieve and we have not lost sight of the fact that in our view there

would be enormous benefits if all commercial tenants were treated in the same manner on commercial tenancy issues. That is something to aspire to. However, it has been put to me that we should not risk the passage of the bill, which contains a number of good provisions, for the sake of both of Hon Max Trenorden's amendments. I can accept that, but it does not mean that we are necessarily happy about the way that this has gone.

I understand that the Minister for Commerce consulted with a number of representative groups and sought feedback on their views about Hon Max Trenorden's first amendment. I understand that the Law Society of Western Australia had concerns with it, as did the Western Australian branch of the Pharmacy Guild of Australia, the Retail Traders' Association of Western Australia and the Shopping Centre Council of Australia, and that the Western Australian Council of Retailers Association strongly supported that provision. The sense of what is fair and just needs to be restored to the area of commercial tenancies. There is no doubt in my mind that under the current arrangements some tenants do particularly well. At one extreme we have the anchor tenants, but some smaller tenants, for whatever reason, tend to get preferential treatment compared with other tenants. I am told that food hall tenants are, by and large, treated appallingly as a group of tenants. I do not know why that occurs. Maybe it is because of the churn. I simply do not understand it. However, we need to make sure that we reintroduce a sense of what is fair for commercial tenancy issues and arrangements. I reiterate that the intent of the original amendment moved by Hon Max Trenorden was good in principle and we are saddened that it cannot be supported. However, for the time being we are happy to accept the original clause as it stood.

HON MAX TRENORDEN (Agricultural) [7.44 pm]: I think it is a conspiracy that the Minister for Commerce has accepted the Labor Party's amendment but knocked back my two amendments! I can see the minister smiling.

Hon Simon O'Brien: You're onto us, Max!

Hon MAX TRENORDEN: The minister knows that I am saying that as a joke. However, the activity of some weeks ago was heartfelt, and I do not take one step back from where I was. I will just go back over the position where I was, and I think Hon Philip Gardiner was in a similar place, but I will not speak for Hon Philip Gardiner.

We have an archaic bill. We have 50 years of history of commercial tenancies in which the big boys have had control. We have gone over the hill and we are going down the hill. Retail turnover is dropping. I read an article today that stated that in the eastern states, retail turnover has dropped by 3.5 per cent. The reality is—the truth of it cannot be denied—that the AMPs and others of the world that own these shopping centres must come out with an additional profit this year. That is what the system has been built on for 50 years. They need to do that, so they search to see where they are going to get their blood from a system that, in the eastern states right now, as stated in an article that I read today, has dropped its turnover by 3.5 per cent. I do not say this to the minister tongue in cheek, but I do say it without trying to be nasty to the minister: we have a bill that protects the big ones and does very little for the small ones, and does not recognise the current commercial climate. I will repeat that: it does not recognise the current commercial climate. That is the situation.

This bill, quite correctly, as has been pointed out to me—the debate of some weeks ago or whenever it was did go all over the place—is about renewal of leases or the ability to renegotiate a lease. The reality now is that the tenants are doing that with a lack of information. Why are they doing that with a lack of information? It is because the big boys do not want to give up the ground. They know that the floor is falling from under them, so they do not want to give the people who are going into those shops as tenants the information they need. They do not want to let the world know the market price. That is what the debate was about. I know that the minister has some agreement on this, and, again, I am not going to put words into the minister's mouth. The problem is that Australia-wide, people out there in tenancies are hitting the wall every day, and they are paying above the market price for those tenancies. We have a whole raft of mechanisms in place that do not allow them to get to a market price. Can members tell me of any other market or any other industry in which a government, and particularly a conservative government, does that? Tell me; tell me one. Members will be struggling to do so. We are protecting the obsolete here.

I say to the minister that we are going to support this motion, but I will do so with my head and not with my heart. My heart has not moved one inch. The reason we will do that is that we are going to pick up the whole issue and re-examine it, and we will be introducing a bill on commercial tenancies in the new year. Our intention is to go out and consult—things which the minister has been doing and which his predecessor did. We will go out and ask people about what is appropriate. However, we will want to revamp the Small Business Commissioner's role. We will not have a neutered Small Business Commissioner, as we have now.

Hon Simon O'Brien: We haven't appointed him yet.

Hon Ljiljanna Ravlich: He is not established properly and you know it, and he is not funded properly. Sorry.

Hon MAX TRENORDEN: I know the shot the minister is having at me.

Hon Simon O'Brien: I'm not having a shot at you.

Hon MAX TRENORDEN: No; I am saying that it is the same term as I started with, and I accept that, but the point is that the current legislation that gives the Small Business Commissioner his powers does not give the commissioner any powers other than to negotiate or arbitrate. We will look to do a great deal more than that and we will also look at bringing franchising legislation into the same world. I know that that may not please a lot of people in the Liberal Party, but that is where we will go and we will be doing it as succinctly and as quickly as we can. I am almost heartbroken to say to Hon Lynn MacLaren that we will not support her amendment even though it is a perfectly good and correct amendment.

Hon Lynn MacLaren: Thank you!

Hon MAX TRENORDEN: We will be happy to talk to the Greens (WA) after this debate about what we do in the future, because we agree totally with the intention of her amendment; her amendment is correct.

Hon Lynn MacLaren: We will be happy to support stronger powers for the Small Business Commissioner; good on you!

Hon MAX TRENORDEN: That is where we are at. There has been some fairly robust debate between the National Party and the minister, and we have talked this issue through. Hon Ljiljanna Ravlich has just said that there are good provisions in the bill. Frankly, I am not that kind; I would have thrown the bill out, good provisions and all, because I think that this is just so wrong. It is not really that I am concerned or upset about the fight of big against small, but it is ridiculous to have a bill that does not run with commercial reality. We have a commercial tenancy bill that does not run with commercial reality. Why are we doing that? I know why we are doing it, because it takes two to three years to get a bill, and I know much of this bill was drafted in 2002, therefore it is coming to a decade since the start of the drafting process of this particular bill. People may say they know all that, but that does not make the argument any better. We are working through increments on what has been considered for a period of years to be reform on commercial tenancy, when in fact we should be picking the bill up and throwing it out the window and starting again, because from 2008 the world started again. I feel a bit concerned because my assets register shows that I am a shareholder of David Jones. I read David Jones statements and I read from time to time the CEO stating that all we have to do is wait for the world to go back to where it was and for people to start doing what they used to do. Well, I have a message for that CEO: that will just not happen. I will bring out my crystal ball, and I suggest that members all totally ignore what I am about to say, but I think there is a crunch coming. I love reading about the issues, as I keep on saying, and it is pretty hard to look at what has happened in Italy today, what happened in Greece the other day, and to look at the intransience of some of those people and their lack of capacity to deal with reason, and say that we are not in for a crunch. What does that mean? It means that my argument gets extended. If we are in for that crunch, that reversal in commercial tenancy that I spoke about a few minutes ago will be extended and that will be the rule and not the exception for the next decade. There will be declining positions in supermarkets. Supermarkets will become less and less a place for people to go to and less and less the places to go. Strip shops are getting more popular, buying locally is getting more popular and of course, eBay and the like—buying online—is getting much more popular. We are in a new world.

I just make the point that we support the Minister for Commerce's activities tonight with a serious degree of reluctance. I have only been swayed to the position I am currently in because we will put a lot of effort into rewriting the activity around the Small Business Commissioner in the new year.

HON PHILIP GARDINER (Agricultural) [7.54 pm]: Hon Max Trenorden has painted the very broad picture and structural philosophy, if we like, about why we found the amendments made to the Commercial Tenancy (Retail Shops) Agreements Amendment Bill three or four weeks ago made sense in a changing world. However, I must accept much of the accountability for assisting in framing the amendments, which, in the end, the minister was right about. The minister was right that we had not foreseen all the consequences and I was wrong in making at least two of the three amendments. The second of the amendments, which was moved by Hon Ljiljanna Ravlich, was an amendment that we similarly identified in parallel with Hon Ljiljanna Ravlich, and her amendment is justifiably retained.

The clauses that are being brought back into the bill are being brought back because the objectives that we sought to achieve in this legislation were twofold. One was to increase the transparency of rentals, at least in shopping centres, because that was the limitation or constraint on the bill with which we were dealing. We were not dealing with the issue of a lease register or a lease digest, which has been around for some time but got nowhere; we were dealing with what was being constrained in the bill. We wanted to ensure that the tenant–tenant relationships in a shopping centre were transparent so that each tenant could see that they were not subsidising the other. The premise from which I came—I should not speak for others—was that the small tenants were subsidising the big tenants. That makes no sense to me because the small businesses normally suffer from

the lack of economies of scale, compared with the big anyway. When it comes to market power, of course we all know how that works; the bigger one is almost invariably the stronger one. We were attempting to try to change that so that the transparency of rent had equity to it—not the same price of course because there will always be differences—in that a tenant should be able to at least know what rent a similar tenant or any other tenant pays in a common facility; namely, a shopping centre. This is why Hon Ljiljanna Ravlich's amendment to take out the word "comparable" is important. When rent reviews were done and valuers looked at other rents, they could look at only comparable leases, which is why it is so important to have that word out because it will start us on this path of transparency. The fact that we have not got to where I certainly—and I am sure both Hon Ljiljanna Ravlich and Hon Max Trenorden—would have liked us to be was partly constrained by the bill itself, but is not the end of the story.

The definition of a "small business" as being of no more than 1 000 square metres of rental space and also not a publicly listed company is being brought back. We only moved to take that out so that everyone could have the same properties, if we like, when looking at their rentals. However, elsewhere in the Commercial Tenancy (Retail Shops) Agreements Act 1985—not the bill—disclosures are included to assist small business in making their negotiations. In talking to some of the stakeholders outside of this place, we discovered that if we allowed the anchor tenants to have those same disclosures obliged to be met by the landlord, that just further increased the market power of the anchor tenant in negotiating better conditions for their circumstances with the landlord. In a way, it made the anchor tenant unnecessarily powerful in this particular regard. I agree that that should be brought back to preserve whatever advantages accrued to the small tenant in the negotiation of a lease at the time of the review when they had to use a valuer.

The third amendment—the second one being when we removed the word "comparable"—was partly a language issue because of the use of the word "person" in the bill. We knew from stakeholders and retailers that they had already been affected by sharing information with other tenants. We understood that as a result of sharing that information any reduction in rent debt that incurred a cost to the landlord meant damages could be brought against the tenant who had divulged the lease information. We understood the words in the bill to relate only to tenants talking about their leases, but in actual fact our fault was that we did not pick up that the term "person" related only to valuers. The profession of valuer requires confidentiality. For a person to receive information from a party and to divulge it to someone else is against the profession's ethics—and justifiably so; therefore, we were incorrect to remove the amendment. However, we did it in the belief that it was to do with landlords being able to claim damages from a tenant who had divulged their lease details to someone with a higher rent so that the person with the higher rent could approach the landlord and ask for a lower rent, and as a result the landlord would claim back against the tenant with lower rent who had divulged the information.

I accept the logic of the changes now being proposed. However, assessing the terms of the bill and the act and how they apply to the various stakeholders brings us to another dimension, because there is a lot of talk about making sure we frame legislation in relation to what stakeholders want. However, whenever we cannot get consensus from the stakeholders, we sometimes all resile from taking the leadership position and making the change. That we have begun to make change is something I feel proud to have achieved as a result of making those amendments. That the change goes only part of the way at this time is not disappointing because it is achieving something; however it has to go much further. As Hon Max Trenorden has said, the Nationals are determined that this change will go much further to protect the equity of small business such that it is not the loser when it comes to commercial transactions because of the secrecy provisions or not being able to know what the market is doing, which then entrenches the big boys whose information no-one knows about until we get this bill through. However, we want legislation to embrace not just a single shopping centre, but all—including strip shopping centres.

This is just the beginning, and I am very proud to be part of that. However, when it comes to talking to stakeholders, we all know that when seeking someone's view about something, the first thing is deciding what is the question we are asking. I am very sensitive to how some people have asked questions to get people's view about the particular clauses in this bill we are passing and what we might ask for future provisions to strengthen and give greater equity to small businesses in the whole scheme of commercial rental transactions. It is not just the initial question; it is also the follow-up question to tease out what the real concerns are. For example, if someone asks, "Will you divulge your rent to the public?", the person will say, "I'm not going to divulge my rental conditions to the public so that anyone can look at it. Why would I?" But if the question is, "If you take this part out or that part out, would you divulge those aspects of rental conditions to the public?", their view might be quite different. I have great concern about blanket responses to questions—I do not know what the questions are—when the answers have not been teased out in a way to explore what is practical and relevant as opposed to something that is not well thought through.

We have done our homework with the WA Retailers Association, the Retail Traders' Association, the Pharmacy Guild and one of the landlord groups whose name I just cannot recall now. We already have a pretty good understanding about where the ground lies. I am very confident and will be very determined to get a conclusion. While in this particular bill it is a holding position on the transparency of rental values, we will push with expediency to get a conclusion, because the longer we hang around on this, the implications, about which Hon Max Trenorden spoke, of rentals coming down in a changed environment, will not that easily occur. When there are five-year leases, there are roughly 20 per cent of rentals coming up for renewal every year—maybe more than that. We are determined to get something expediently sorted through, which will encompass the broad range of small businesses so that we can get some sensible transparency with equity in this particular area.

Question put and passed.

Committee

The Deputy Chairman of Committees (Hon Col Holt) in the chair; Hon Simon O'Brien (Minister for Commerce) in charge of the bill.

Clause 5: Section 3 amended —

Hon SIMON O'BRIEN: I move —

Page 4, line 6 — To delete —

> ***retail shop lease*** means any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop —
>
> (a) whether or not the right is a right of exclusive occupation;
>
> (b) whether the agreement is express or implied; or
>
> (c) whether the agreement is oral or in writing, or partly oral and partly in writing.

And insert —

> ***retail shop lease*** means a lease that provides for the occupation of a retail shop, unless —
>
> (a) the retail shop —
>
> (i) has a lettable area that exceeds 1 000 square metres; and
>
> (ii) is not of a kind prescribed by the regulations for the purposes of this definition;
>
> or
>
> (b) the lease is held by —
>
> (i) a listed corporation (within the meaning of the *Corporations Act 2001* (Commonwealth) section 9) that would not be eligible to be incorporated as a proprietary company; or
>
> (ii) a subsidiary (within the meaning of the *Corporations Act 2001* (Commonwealth) section 9) of such a corporation;
>
> or
>
> (c) the lease is held by —
>
> (i) a body corporate whose securities are listed on a stock exchange, outside Australia and the external territories, that is a member of the World Federation of Exchanges; or
>
> (ii) a subsidiary (within the meaning of the *Corporations Act 2001* (Commonwealth) section 9) of such a body corporate;
>
> or
>
> (d) the lease is of a kind that is prescribed by the regulations as exempt from the operation of this Act;

Firstly, the recommittal of a bill is not an unusual thing but I do not recall it happening much in recent years. Sometimes it happens not infrequently and other times we go for a long period without it. Some members may not be familiar with the process. I have not done it when I have been in charge of a bill. I offer some introductory

remarks along these lines. In the course of considering the question of recommitting this bill to reconsider these clauses, we actually ranged over a fair bit of debate from a range of members. In so doing I think we covered a lot of the ground that probably would have normally been covered during this recommittal stage. That is all right because it is timely and relevant, and it all had to be on the record. I thank members for their contributions and also for supporting my opening remarks in which I indicated a lot of work had been done over the past four months to pursue this bill, which struck a bit of an impasse at the end of June. In the course of members' contributions, they explained what they had subsequently considered and how they had done that and what their views now were. In so doing, members probably truncated our proceedings tonight. Together with the lengthy debate we had back in June, we have probably covered most of the things that need to be covered and now we can move towards the mechanics.

I should acknowledge that members have also indicated that they think there is more to be done in this area; there is. That has never been a point of disagreement. When I brought this bill into the house, I made it clear that I wanted to do so to make progress where progress had not been made. Hon Max Trenorden referred to reviews that went back to the start of the decade, or the last decade now, as it happens. I am bringing in a bill to finally get some of those recommendations on the statute book. That is what we are doing, as we all know. There are a lot of things there that are not part of these two clauses. I appreciate the Deputy Chairman's indulgence in allowing me to refer to them. The Deputy Chairman showed commonsense in allowing the debate to continue to develop in the way it did because it enables us to consider all those matters and put this bill to bed. I reject the notion that this is bad or pointless legislation. The principal act has substantial benefits. It is a safeguard and an anchor point for our whole basis of commercial tenancy. Our tenants would be in a very vulnerable position if they did not have this legislation to frame the environment in which they operate. If it was all left to goodwill —

Hon Max Trenorden: Are you looking forward to debate? No, you are not.

Hon SIMON O'BRIEN: Not on that today, but I am paying a courtesy by acknowledging that these matters were broadly raised this evening. I am indicating to the member how I want to meet his needs and his constituents' needs with the legislation before us and other measures that may be yet to come. We have our principal act and we have a swag of amendments in this bill which people have been looking forward to for a long time and which add to the security of the environment in which commercial tenants need to operate.

Again, I look forward to all those other matters that the member raised that are to be pursued on another day. I hope I have given every indication that I am prepared to engage with members when they say that they have a problem in my portfolio area and that they want to develop some ideas but they want me to work with them.

Hon Max Trenorden: Minister, you will not be precluded from anything we do.

Hon SIMON O'BRIEN: Excellent. We will look forward to doing that another time.

Mr Deputy Chairman, I have tried your patience enough. I will now return to the narrow substance that is the matter before the Chair. I have moved in effect to exchange the definition of "retail shop lease" that was inserted in June with the initial definition of "retail shop lease" that is contained in bill 192–2 because, of course, it has not been reprinted. In so doing, I am able to address some of the concerns that were expressed by those who moved and supported these amendments in the first place. One of the broad considerations was that people needed to be able to get access to information to compare the deal that was potentially on offer to them with what others were getting. I speak colloquially but I think that is the gist of it, and I note members nodding. The way that was suggested for that to occur through the amendment was to change the definition of "retail shop lease" in the bill and then, obviously, in turn, in the act. There has already been some discussion about that, and I have indicated that a lot of work has been done outside the chamber, so I will not go through all the matters that were discussed. Most of it was covered when I responded to these amendments in June.

We have examined the matter in more detail and shared that advice and the fruits of consultation with members in the chamber. There now seems to be agreement that perhaps the first amendment was not quite the way to go. Members have already indicated that they support the move that I have now proposed, so I will not say that these are all the problems that might have arisen; some of them have been mentioned before. However, there is some good news, because one of the other things we have done in the course of these proceedings is to identify of course that elsewhere in the bill there are some new provisions, including proposed new section 11(3B) to be inserted into the principal act.

Hon Max Trenorden: You just said "to be" not 3B!

Hon SIMON O'BRIEN: 3B?

Hon Max Trenorden: To be!

Hon SIMON O'BRIEN: 3B not to be.

Hon Max Trenorden: That's right!

Hon SIMON O'BRIEN: It is not that late, Max!

Members will be aware that the text of that proposed new section lies on page 8 of the bill. That new provision states —

> A landlord under a retail shop lease must, to assist in determining the rent payable as a result of the review, within 14 days after being given a written request to do so by a person who acts under subsection (3), —

That is a valuer —

> give that person such relevant information as is requested, including any of the following information, about leases for comparable retail shops in the same building or retail shopping centre —
>
> (a) current rental for each lease;
>
> (b) rent free periods or any other form of incentive;
>
> (c) recent or proposed variations of any lease;
>
> (d) outgoings for each lease;
>
> (e) any other information prescribed for the purposes of this paragraph.

Another proposed subsection goes on to indicate what happens if there is a failure to comply. That will be a new provision in the act if this bill goes through. That provides a lot of things, including information of the sort that the proponents wanted to achieve. One other element has changed here. The clause as it stood referred to "information, about leases for comparable retail shops in the same building or retail shopping centre". As a result of Hon Ljiljanna Ravlich's amendment, "comparable" has been removed so that it now provides for obtaining "information, about leases for retail shops". Retail shops include these anchor tenants that Hon Philip Gardiner and others are so fond of. When we take that proposed section with the amendment to delete "comparable", all of the sudden we move some way towards what was intended within the context of the scope of this bill. That is also important because this bill has gone through a very long drafting period and is engineered to complement the existing structure elsewhere in legislation. Those are some of the reasons why we need to go back to what we had before, noting that "comparable" is now deleted. We think that is an improvement. The government is pleased to accept that amendment after having looked at it in good faith.

I thank members for the support that they have already indicated during their remarks. I now seek that motion to be put, please.

Hon LJILJANNA RAVLICH: Before we go back to where we were, I want to make some comments specifically on the amendment put forward by Hon Max Trenorden. It attempted to amend the definition of "retail shop lease" to remove the exclusion of premises that exceed 1 000 square metres and leases to public companies. I have accepted what the minister said about our amendment to delete "comparable" and how that means it is much easier to compare shops that are not like and like and shops of varying sizes and so on. I am a bit disappointed because I have not really heard a coherent argument for why Hon Max Trenorden's amendment is unacceptable or why it was found to be objectionable.

I want to quickly outline some of the arguments that were presented to me during the briefing I had about the potential implications of Hon Max Trenorden's amendment. I want to do this for the public record. When we look at the arguments one by one we realise that the world is not going to cave in. It would not be the end of the world. I want to make it clear on the public record, because I note that Hon Max Trenorden intends to revisit this area. When he revisits this area, I want him and everybody concerned to have some certainty about what he is doing. Instead of trotting out all the arguments about how we cannot have this and we cannot have that because it will interfere with the symmetry of the bill, and so on and so forth, we want to get some of this information together. I am now going to read out the arguments that have been put forward for why the amendment moved by Hon Max Trenorden could not be accepted. One of the potential implications of Hon Max Trenorden's amendment is that the stakeholders have argued that a number of the protections for small business currently contained in the act are not appropriate for leases to larger tenants. Also, a number of stakeholders have pointed out that the larger tenants often engage in lengthy negotiations in relation to their leases, and are generally represented by solicitors. So what, I say? These stakeholders argue that larger, more sophisticated tenants do not need the protections contained in the act. The question is: would there be any harm in them having the protections contained in the act? I suspect not.

One of the other implications is that the amendments will increase the jurisdiction and workload of the State Administrative Tribunal, the Small Business Development Commission and the proposed Small Business Commissioner. That is not really a brilliant argument for why the amendment could not stand. I mean, it is not the end of the world that the workload of SAT or the workload of the Small Business Development Commission would be increased.

One of the other arguments that was put is that this could potentially increase costs to government and result in delays for small business in accessing dispute resolution mechanisms. That was the second most important reason given for why that amendment could not stand. To go on further, a number of stakeholders have argued that it is inappropriate for government to intervene in commercial relationships between two large businesses. Once again, so what? It is just a matter of judgement. It does not matter that some people have argued that or hold that view, because there will be other people who will hold the view that there are times when there are market failures, and there are times when government should intervene in such matters. If we go on further, it has been argued that the amendment will extend to listed companies the application of the unconscionable conduct provisions in the act, and that will extend the protections beyond those included in the Competition and Consumer Act 2010, the commonwealth act. I do know whether they will or they will not. But even that does not seem to be a matter that could not be dealt with. It is also argued that the amendment will impose a greater regulatory burden on landlords and may therefore make Western Australia less attractive to investors.

I have to say, when I look at all of those reasons for why that first amendment cannot be accepted by the government, that they really do not sound like particularly strong reasons to me. I want to put that on the public record, because I think there are occasions when the government does present a picture of, "We cannot accept this amendment because, if we do, the world as we know it is going to fall apart". Therefore, everyone is thinking that perhaps we are not doing the right thing, because we do not have the resources of parliamentary counsel to help us—we do have some, but we do not have the full extent of the resources contained in government departments and at the Attorney General's office—so we tend to err a bit on the side of caution. When the government tells us that it cannot accept this amendment, we say, "Maybe that is so, because the government has all these resources, and surely it would know best and it has its bureaucrats there to help it". But when I look at the reasons that were given for why this amendment from Hon Max Trenorden could not be accepted, I have to say that the arguments are pretty flimsy at best. I want to put on the public record that I am particularly disappointed about that.

Hon Max Trenorden: I think he favours you over us!

Hon LJILJANNA RAVLICH: He likes me all right! They all do!

Hon Simon O'Brien: What's not to like?

Hon LJILJANNA RAVLICH: I am really pleased Hon Max Trenorden has signalled his intention to bring legislation back into this Parliament to provide proper protections to small businesses and we certainly look forward to working with him on that project. Whilst we accept the amendment the minister will move, it is questionable whether the reasons for not accepting Hon Max Trenorden's amendment were legitimate reasons.

Hon LYNN MacLAREN: The Greens definitely support this amendment. We have carefully examined the further details the Department of Commerce put together following the amendments that were made. Unlike the previous comments, I find the arguments compelling. In our view, the Trenorden amendment extended the application of the act to all tenants regardless of the size of the business or the size of the premises, so we felt that was contrary to what we were trying to achieve, which was to even out the playing field for small business. Unfortunately, the amendment did not quite achieve what we wanted. We believe the protections in the act that were intended to benefit small business would then be extended to cover large tenants. As Hon Phil Gardiner made abundantly clear, that too was not the intent of the act, so, unfortunately, the amendment we made went a bit too far.

It is our view—it has been expressed—that there is often unequal bargaining power between small and large tenants. Unfortunately, the amendment we made does not apply to landlords and large tenants, who can negotiate terms acceptable to them. It is, therefore, not appropriate for large tenants to have the benefit of such provisions. These were the key reasons we felt the amendment failed to achieve what we wanted and the reasons we are supporting the government's amendment today. We do not want large tenants to be able to make void a provision that the tenants are obliged to contribute towards the cost of the landlord's fixtures and fittings unless the effect of the provision is in the disclosure statement, which was clause 10(4) of the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011. We did not feel that the provisions regarding relocation in clause 14 and in particular the requirement for the landlord to pay the tenant's reasonable relocation costs, which were in clause 14(2)(d) and the reasonable compensation provisions in clause 14(2)(c), should be extended to big tenants when, really, we were trying to make sure the small tenants were protected from that, and from liability

for expenses, which was in proposed section 14B. There were various provisions throughout the bill that gave access to the State Administrative Tribunal for the resolution of issues between landlords and tenants. Obviously, that makes it much more affordable to deal with those kinds of disputes. It takes it out of the realm of the Supreme Court. We think those provisions should be protected for small business and not extended to large tenants.

Finally, there will be consequential amendments to the Small Business and Retail Shop Legislation Amendment Bill, which was assented to on 11 July this year. That allows the Small Business Commissioner to provide information, assistance and guidance to tenants under retail shop leases, and we argued strongly for that when we agreed to the extension of retail trading hours. We felt it was a good move to try to assist small business to compete in that new environment. We thought that we did not want to extend that to big businesses. We liked that special protection that small businesses would have. I want to point out that one stakeholder put to us that extending the benefits of the commercial tenancy bill and small business and retail shop legislation to large businesses would dilute the focus on better protecting small business landlords and tenants.

Finally, in proposed section 3(1), in the definition "retail shop lease", paragraph (d) states —

> the lease is of a kind that is prescribed by the regulations as exempt from the operation of this Act;

That would permit small businesses such as garden centres with large premises to still fall within the definition, and hence be afforded the protective provisions of the act. Unlike, the previous speaker, I actually found really sound reasons for this amendment, and I thought it was a good move for the government to bring it back on for discussion. I am, as I said, very interested in any move Hon Max Trenorden makes towards improving the powers of the Small Business Commissioner, and I certainly commended the creativity and commitment shown in trying to amend the bill before us, because we could see that it had that major flaw of not providing small tenants with the ability to transparently review the rent that everybody else was paying. I welcomed that, and I supported the member at the time. I would support a bill that dealt with addressing that further; however, why do we have to wait until the next election?

Hon Max Trenorden: That is a very reasonable argument.

Hon LYNN MacLAREN: I would potentially counsel against too big an omnibus bill, because often we try to be too complex, and instead of really successfully achieving that one goal of the Small Business Commissioner, if we threw too many things in there, such as franchising, we may well risk the success of the bill, and I would like to see the bill go forward.

The DEPUTY CHAIRMAN (Hon Col Holt): Order, member! We need to restrict our comments to this clause of the bill.

Hon LYNN MacLAREN: Thank you, Mr Deputy Chairman; I was merely commenting on the minister's advice to us in moving this amendment, and his rather wide-ranging comments on how else we may address this rather than the way that was put forward. I hope that was not misread in any way.

In the end, I reiterate that we wholeheartedly support this amendment; we can see the clear reasons for it, and we hope it passes quickly and efficiently.

Amendment put and passed.

Clause, as further amended, put and passed.

Clause 9: Section 11A inserted —

Hon SIMON O'BRIEN: Unlike the clause we have just dealt with, this amendment is one that we could not live with, and we looked at it very, very closely. Hon Phil Gardiner, I note, discussed this during his contribution earlier in the debate. I move —

> Page 9, line 7 — To delete "section 11(3B) may disclose that information, with the exception of information relating to financial turnover, to any other person." and insert —
>
> > section 11(3B) must not disclose that information to any other person unless the disclosure is made —
> >
> > (a) for the purpose of, or in connection with, determining the rent payable as a result of the review; or
> >
> > (b) in a way that does not disclose information identifying a particular lease or tenant, or relating to a tenant's business, for the purpose of specifying the matters to which the person had regard in resolving the question concerned; or

(c) with the consent of both the tenant and the landlord of the relevant retail shop; or

(d) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings; or

(e) as required or permitted under this Act or any other law; or

(f) with any other lawful excuse.

(2) Subsection (1) does not prevent a person from disclosing information that is publicly available at the time the disclosure concerned was made.

(3) If a person discloses information in contravention of subsection (1) and the tenant or landlord suffers loss or damage because of the disclosure, the tenant or landlord is entitled to be paid by the person who made the disclosure compensation for the loss or damage —

(a) of such reasonable amount as is agreed between the person and the tenant or landlord; or

(b) failing agreement, as may be determined by the Tribunal on the application of the tenant or landlord.

Again, this is a direct undoing of the amendment that had previously been agreed to. The amendment I have moved will, in effect, restore clause 9 to how it appears at pages 9 to 11 in version 192–2 of the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011. If this bill is passed and completes the other stages, proposed section 11A will be incorporated into the principal act as a new section concerning the confidentiality of information supplied under the considerably extended proposed section 11 that we have just dealt with.

Other members have already discussed this matter in detail, and the mover of the original amendment has given us the benefit of his thought processes as we have worked through this matter since then. He is confident that this is the right way to go, as am I. The amendment removed the requirement for a valuer, or any other person, to ensure that information obtained via the powers contained elsewhere in the act for the express purpose of a market review remained confidential and was used only for that rent review. That is the purpose of this clause. The amendment I am seeking to overturn potentially allowed a person to use the information for a purpose for which it was never intended and, in so doing, to disadvantage the person about whom the information was provided. When we consulted on this, a range of stakeholders expressed their concerns about this provision to allow valuers or others to disclose confidential commercial arrangements to people because of the potential adverse consequences for the businesses involved. For example, knowledge of the terms of the lease and any options could allow a competitor to develop a strategy to counteract the business about which information has been divulged. It would also be inconsistent with other jurisdictions. Retail tenancy laws in New South Wales, Victoria, Queensland and the Northern Territory all contain confidentiality provisions and provide for the imposition of a penalty for the contravention of the provision. Another point that was made clear to me subsequent to the earlier debate a few months ago was that the valuers themselves have code of conduct, or a code of ethics, which, among other things, stresses a requirement that any information of this type that they acquire in the course of their business is to be kept confidential for all except the purposes for which it is explicitly acquired. The previous amendment could have caused some interesting conflicts if we had allowed it to stand.

Hon Max Trenorden interjected.

Hon SIMON O'BRIEN: Without wishing to extend the debate unnecessarily, I indicate that this matter also has been discussed extensively out of plenary session and there are indications of support for it, which were confirmed during an earlier stage of debate this evening and for which I thank all members of the committee. I commend the amendment that I have just moved.

Hon LJILJANNA RAVLICH: I want to quickly go back to Hon Max Trenorden's amendment, which was —

Page 9, line 7 to page 10, line 7 — To delete the lines and insert —

section 11(3B) may disclose that information, with the exception of information relating to financial turnover, to any other person.

In other words, he wanted full disclosure—openness and transparency, and no secrecy. I really do not know how anyone can argue against that when we have openness and transparency in so many other markets. We have it in the stock market and in the real estate market. I do not know what is so exceptional about the commercial tenancy market. I just cannot get my head around why it is the way it is currently. We supported this amendment

because we really want transparency. We were promised that there would be transparency, particularly with leasing. Members might recall that the Premier gave an undertaking that there would be a public lease register.

Hon Simon O'Brien: This is the matter on which you read something into the record some while ago, I think, during the debate.

Hon LJILJANNA RAVLICH: Yes; but, of course, we saw this, in part at least, as increasing the level of transparency, but it was —

Hon Simon O'Brien: Well, it is.

Hon LJILJANNA RAVLICH: I have to say to the minister that he is reinstating his original provision.

Hon Simon O'Brien: No; this bill does provide access to far more information at rent review.

Hon LJILJANNA RAVLICH: I have to tell the minister that we are still not happy with the level of information that is allowed to be provided. The effect of the amendment at proposed section 11A, which deals with the confidentiality of information provided to a valuer, is that it removes the confidentiality provision that was Hon Max Trenorden's amendment, and that was the argument given, to proposed section 11A, accompanying the rights to compensation for breach, and includes a provision specifically providing that information provided to a valuer may be disclosed to any person, except for information about turnover. I think it is fair to say that ultimately we would like to end up with something along the lines of what Hon Max Trenorden originally proposed, and that is full transparency, without the secrecy and confidentiality provisions and being unable to disclose information about all manner of things, including rent payable. Quite frankly, if a person wants to tell somebody how much rent they are paying, it is their business.

Hon Simon O'Brien: They can do that, but you can't require that information of other private parties, because that is what, in effect, you would be suggesting. We have consulted on this, and virtually without exception all stakeholders reject this provision.

Hon LJILJANNA RAVLICH: When I was briefed by the minister's people, I was told that half of the small businesses supported confidentiality and the other half did not support confidentiality. I guess it depends on whether the person is getting the benefits or preferential treatment or whether the person is one of those who are not getting preferential treatment.

Hon Max Trenorden: Or threatened.

Hon LJILJANNA RAVLICH: Yes, or threatened. If a person has a really good business and the landlord wants that person in the tenancy because they are bringing people in through the door, and they are getting all sorts of incentives for being there and getting very good lease arrangements and so on compared with the guy who is probably in the food hall and does not get —

Hon Simon O'Brien: Can I just clarify it for you, if I may, by interjection?

Hon LJILJANNA RAVLICH: Yes.

Hon Simon O'Brien: The Small Business Development Corporation did a survey some time ago of a few hundred retail businesses—this was in connection with the lease register proposal from last year. It found that 51 per cent, I think, of those returned said that they did not want their particulars published on a publicly accessible lease register. That might be what you are referring to.

Hon LJILJANNA RAVLICH: That is what I was referring to, but I have to say to the minister that that is probably because 51 per cent may be getting preferential-type arrangements with the landlord.

Hon Philip Gardiner: Or the question.

Hon LJILJANNA RAVLICH: Or the question. Hon Philip Gardiner is spot on. He actually raised that matter earlier when he said it really depends on how the question is actually framed, such as, "Do you want rent rates made public?" or "Would you mind if your rent rates were given over for a specific purpose of—whatever?"

Hon Simon O'Brien: The purpose of my clarification is to say that that was in respect to the lease register proposal for a shopping centre lease register, whereas the question we are discussing now of course is this confidentiality or whether people can just do what they like with the information. Of however many submissions we got about the amendments, specifically about this amendment (3), all but one were pretty strongly opposed to this. That was the feedback we got.

Hon LJILJANNA RAVLICH: Let me just tell the minister that the Law Society of Western Australia did not support removing proposed section 11A regarding confidentiality of information provided to the valuer—I have

its submission in front of me—because it argued that there is no overriding public interest in the information to be available to the public and the amendment is out of kilter with privacy principles in modern society.

Hon Max Trenorden interjected.

Hon LJILJANNA RAVLICH: That is right. One could easily argue that it is out of kilter with the demand for increased transparency in society also.

Hon Simon O'Brien: Transparency is surely a standard you can apply to government, but when it comes to people's private affairs, that is perhaps different.

Hon LJILJANNA RAVLICH: As I understand it, the Pharmacy Guild did not support the amendment. Its view is that there needs to be confidentiality around disclosure. The Retail Traders' Association of WA did not support it. Centro Properties Group did not support the amendment because it felt it was likely to result in a move away from the use of market review provisions, because landlords and tenants prefer to keep lease agreements confidential, and therefore this change could result in less flexibility through market reviews in favour of fixed rent increases to maintain confidentiality. Therefore, there is no doubt that there is a divergence of opinions in relation to these —

Hon Simon O'Brien: No; every one you have read out is opposed to the doing away of confidentiality.

Hon Lynn MacLaren: That is the amendment; it's not the amendment before us, it's the amendment that was there first.

Hon LJILJANNA RAVLICH: That is right.

Hon Simon O'Brien: That is right. So they wanted us to go back to what I am now proposing. Okay, we're on the same wavelength.

Hon LJILJANNA RAVLICH: That is fine; I still support the intent of Hon Max Trenorden's amendment. There needs to be some freeing up of transparency and there may be some aspects whereby there is a good argument for confidentiality of information to be retained, but certainly not right across the board. Currently, we almost have a confidentiality provision across the whole lot; therefore, it will be interesting to see where Hon Max Trenorden's work on this particular issue goes.

Hon MAX TRENORDEN: I was not going to speak again on this bill, but as the minister challenged me, I will speak on it again.

Hon Simon O'Brien: I didn't challenge you.

Hon MAX TRENORDEN: The minister did challenge me; he challenged me directly and I have something to say about it. The argument about 51 per cent is absolute nonsense. We have been out amongst those groups and cannot find that response at all.

Hon Simon O'Brien: To what question?

Hon MAX TRENORDEN: To the questions about transparency.

Hon Simon O'Brien: No; the question that they were responding to was the proposal for a publicly available lease register based on shopping centres, and 51 per cent said no, they did not want to —

Hon MAX TRENORDEN: I heard the minister. We went out to the small business group. The top end of town agrees with the minister's statement, but we cannot find anyone in the small business section of town who agrees with what the minister just said.

Hon Simon O'Brien: I've given you their identities.

Hon MAX TRENORDEN: I do not agree with them. The point I am making is that I am violently opposed to the words that the Small Business Development Corporation has come up with and I challenge it—I am happy to take it on—to say where it got that information from because we cannot find it.

The minister has challenged me and I am getting angry again, so we will sail into some of these things again. I would love to vote against this clause in a few minutes' time just to get rid of some of the spleen. Let us just look at what we actually do here and the language the minister uses. Proposed section 11(3B) states —

> A landlord under a retail shop lease must, to assist in determining the rent payable as a result of the review, within 14 days after being given a written request to do so by a person …

Meaning "valuer"—"a person" is "a valuer". Everything that will happen from now on has to go through a valuer. If a person gets into a dispute and goes to the Small Business Commissioner, guess what he will do? He

will appoint a valuer! Under this current provision, there is absolutely nowhere a person can go without going to a valuer. We were talking about valuers charging $3 000 or $4 000 per client, but it is going to be $20 000—pick a figure, because we have made them a monopoly. The Liberal Party is making valuers a monopoly. I am really angry about that; I think it stinks! The point is, minister, our information is—I think it is correct—that something like 80 per cent of people do not want to go anywhere near a lawyer or a valuer when they go into lease agreements. The Small Business Development Corporation will quite rightly point out that they should do so, but we will have made a monopoly. Guess what happens when we make a monopoly? The price goes up and the service varies. I am angry about that, as the minister might have worked out. I do not appreciate the minister's earlier words that insinuated that I am agreeing—I will not speak for anyone else—with the amendment because I saw the light. I have not seen the light. I have not been to Damascus and I am not going to Damascus.

Hon Simon O'Brien: I did not say that.

Hon MAX TRENORDEN: Yes, the minister did. There are a lot of things that I could take objection to in this, in particular, the inability to get a briefing on this issue was a real irritation. When I say "real irritation", I mean a major irritation.

Hon Lynn MacLaren: Didn't you get a briefing?

Hon MAX TRENORDEN: We did not get a briefing. We got a briefing very late. We got the briefing when I raised the matters in this place. We could not get a briefing and that is something we are not really happy about, minister. Right now, I am not happy with that either.

We will let this go through the wicketkeeper, but we are letting it go through the wicketkeeper for a purpose. The purpose is not to agree with this bill, make valuers a monopoly or put pressure on the commercial tenancy world, but to let the bill go through for some of the reasons that the minister outlined. However, I do not agree with some of those reasons. Not to pick on Hon Lynn MacLaren too hard because she has been a supporter in this process, but it is absolutely ridiculously to say that if there is a dispute between a manager and a major retailer that they will run off to the Small Business Development Corporation to resolve that. What a joke! Even if the act says they must do that, they will turn up for three seconds, agree to disagree and head off to court, because that is where it is going anyhow. If it is major versus major, that is where it is going, Small Business Development Corporation or not.

I want to make it clear in the minister's mind that Max Trenorden is agreeing with this out of goodwill, not out of any other process.

Hon SIMON O'BRIEN: It might help if I bring this particular part of proceedings to a close on a conciliatory note by offering a conciliatory note.

Hon Max Trenorden should be reassured that I acknowledge—I thought I had in my earlier remarks—that members had, outside these proceedings, agreed to reinstitute the original wording; no more, no less. There was no suggestion of anyone rolling over to have their tummy tickled or anything like that, and if the member inferred that from my remarks, I advise him that there was no element of that.

However, section 11 contains a provision that has been in the act for quite some time—some decades I believe—that outlines the process of what to do at the stage of a rent review. This framework in which to operate is one of the protections for small business already created in legislation. In the case of section 11, it is about what happens during a rent review; this refers to a retail shop lease that the respective parties have already entered into, and has been operating, and the time has come, under the terms of the lease, for a rent review based on a market review. Section 11 contains provisions for what is done if the parties cannot agree. To break the impasse, several options are available in the legislation, including recourse to a land valuer. If the two parties cannot agree, a professional in the area, a land valuer, can be brought in to help them come together, through recourse to comparable locations and —

Hon Max Trenorden: But even in arbitration, minister, you still have to get a valuer in.

Hon SIMON O'BRIEN: Indeed.

The other provisions in existing section 11 provide for avenues of recourse to, for example, the State Administrative Tribunal to assist in determining the outcome. Those provisions already exist. This bill puts in some more provisions for the parties going down the existing section 11(3) route to require the landlord to provide certain information to the valuer, and, what is more—given the amendment we accepted to delete the word "comparable"—that includes information from every other shop in the centre. That information can be provided with some confidence and safeguard for their interests, which as private entities they are entitled to, by virtue of this confidentiality clause.

I am not holding up recourse to valuers as the rock on which we have to base this.

Hon Max Trenorden: But your legislation does.

Hon SIMON O'BRIEN: The legislation already exists that does that and I am now bringing in a bill to make it better by extending it in the direction that the member wanted. No; it does not go as far as the member would have liked it to go. I acknowledge that.

Hon Max Trenorden: And so do I. So that is it; we are in agreement.

Hon SIMON O'BRIEN: Indeed, there we all are. While we are all in furious agreement, I think it is a good time for us to complete the business and thank members for their frank remarks. There is nothing wrong with that. In turn, I hope the member is reassured of my good intentions, particularly when it comes to engaging with members and providing briefings and whatnot.

Hon Max Trenorden: Minister, I think it should be on the record that I do not have a problem.

Amendment put and passed.

Clause, as further amended, put and passed.

Bill again reported, with further amendments.