ANNUAL REPORT

OF THE

COMMERCIAL REGISTRAR

OF THE

COMMERCIAL TRIBUNAL

TO

THE HON. THE MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION

FOR THE YEAR ENDED 30 JUNE 2001

PRESENTED PURSUANT TO SECTION 29 OF THE

COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS ACT 1985

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This is the fifteenth Annual Report of the Commercial Registrar of the Commercial Tribunal presented pursuant to section 29 of the ***Commercial Tenancy (Retail Shops) Agreements Act* 1985 *("the Act")*** for the year ended 30th June 2001.

Under section 29 of ***the Act*** I am required to report to you as the Hon. Minister administering ***the Act*** on the discharge of my duties under section 16 and on the Commercial Tribunal's exercise of the jurisdiction conferred on it under ***the Act***, and bring to your notice those matters that I consider significant concerning the relationship between parties to a retail shop lease, as that term is defined in ***the Act***.

The Commercial Registrar is not a statutory authority specified in Schedule 1 to the ***Financial Administration and Audit Act 1985***.

In respect of the application of section 175ZE of the ***Electoral Act 1907*** to the activities of the Commercial Registrar for the year ended 30 June 2001, any such activities that come within the ambit of that section are reported by the Department of Justice in its Annual Report, or by the Department of Consumer and Employment Protection in its Annual Report, in compliance with that section.

This Report, including the Schedule, but excluding the Index, comprises 35 pages.

Dated: 26 June 2002.

COMMERCIAL REGISTRAR
COMMERCIAL TRIBUNAL OF WESTERN AUSTRALIA

THE MEDIATION PROCESS

Under section 16 of the ***Commercial Tenancy (Retail Shops) Agreements Act*** **1985** ***("the Act")***, a party to a retail shop lease may refer to me any question between the parties to that lease which he, she, or it believes to be "a question arising under the lease". I am required to determine whether or not the question referred to me is "a question arising under the lease" and, if it is, then I am required to hear the question with a view to achieving a mediated solution that is acceptable to the parties to the lease.

Sub-section 3(3) of ***the Act*** expands the concept of what a question arising under a retail shop lease is, so that it includes a reference to –

"(a) a question whether or not a retail shop lease exists or has existed;

(b) a question whether or not a lease is or was a retail shop lease;

(c) a question arising -

(i) in relation to any communication, including a disclosure statement under section 6, between the parties to the retail shop lease, prior to their entry into the retail shop lease, which communication was material to the terms and conditions of the retail shop lease; or

(ii) in relation to the retail shop lease under a provision of ***the Act;***

(d) a matter that is in dispute between the landlord and the tenant under section 12 in relation to -

(i) operating expenses of the landlord under a retail shop lease generally;

(ii) an allocation made under sub-section 12(1)(b) of the proportion of those operating expenses; or

(iii) a determination of the relevant proportion for the purposes of section 12; or

(e) any other matter that is in dispute between the landlord and the tenant in connection with the retail shop lease, whether or not that matter is dealt with by the provisions of the retail shop lease."

The effect of section 16 (in conjunction with section 19), is to give me jurisdiction to mediate a dispute between the parties to a retail shop lease in order to achieve, if possible, a result that is commercially acceptable to them. If my jurisdiction to mediate is challenged by any of the parties, then, after inviting and receiving written submissions from the parties on the issue of jurisdiction and, after having read and considered those submissions, ***the Act*** empowers me to determine whether or not I have jurisdiction.

The Commercial Tribunal has jurisdiction to hear and determine the issue or issues (that the Commercial Registrar has remitted to it under section 22) that arise out of an application made to the Commercial Registrar under section 16 (in conjunction with section 19), but only if the Commercial Registrar had jurisdiction to mediate in respect of the application.

The Commercial Tribunal does however have jurisdiction to hear and determine applications made directly to it under any of sections 6, 6A, 9 and 14 without there having been any mediation conference held.

To date there have been no applications under any of these four sections that have been made direct to the Commercial Tribunal, but there have been applications to the Commercial Registrar for mediation where the issue or issues the subject of the application have related to one or more of sections 6, 6A, 9 and 14, as being "a question arising under the lease".

In relation to mediation applications, if I am of the opinion that –

> *"(a) the mediation application was made frivolously, vexatiously, or for an improper purpose;*
>
> *(b) a solution acceptable to all of the parties to the application cannot be attained by means of a hearing, or any further hearing, under sub-section 16(1)(b);*
>
> *(c) a party to the application, after having been notified of the hearing of the application, fails to attend the hearing;*
>
> *(d) a party to the application who has entered into a mediation agreement which has been filed with me under sub-section 21(1) breaches the terms*

of the agreement;

(e) the question referred to me for mediation has not been resolved within 90 days of its referral to me; or

(f) because of the importance or complexity of the question, or for any other reason, the question ought to be determined by the Commercial Tribunal",

I am required by section 22 to refer the application to the Commercial Tribunal for it to hear and determine. However, if I consider that it is appropriate in the particular circumstances of the case, I may instead refer the application to the Court of relevant jurisdiction.

MEDIATION AND COMMERCIAL TRIBUNAL STATISTICS

An application for mediation before the Commercial Registrar may be filed by a party to a retail shop lease. This normally means that the applicant is either the landlord or the tenant. On occasion, however, the applicant is the guarantor and indemnifier, as a party to the lease.

For the years ended 30 June -

(a) 2001, 67 applications were referred to me for mediation;
(b) 2000, 30 applications were referred to me for mediation;
(c) 1999, 120 applications were referred to me for mediation, and I subsequently referred 1 of those matters to the Local Court at Albany;
(d) 1998, 132 applications were referred to me for mediation, and 1 matter was referred to me by the Supreme Court;
(e) 1997, 125 applications were referred to me for mediation;
(f) 1996, 139 applications were referred to me for mediation, and 2 matters were referred to me by the Local Court;
(g) 1995, 163 applications were referred to me for mediation;
(h) 1994, 93 applications were referred to me for mediation;
(i) 1993, 97 applications were referred to me for mediation;
(j) 1992, 141 applications were referred to me for mediation;
(k) 1991, 124 applications were referred to me for mediation;

During the year, in respect of applications referred to me for mediation, I referred 40 applications to the Commercial Tribunal under section 22 for it to hear and determine, being 13 under section 22(b), and 23 under section 22(e).

During the year 169 mediation sessions were conducted.

Of the matters referred by me during the year to the Commercial Tribunal, and the matters outstanding from prior periods, the Commercial Tribunal conducted 33 hearings, including directions hearings.

During the year -

(i) I did not refer any matter to a Local Court for hearing;

(ii) I did not refer any matter to the District Court for hearing;

(iii) I did not refer any matter to the Supreme Court for hearing;

(iv) the Commercial Tribunal did not refer any matter to the District Court for hearing;

(v) the Commercial Tribunal did not state any case to the District Court;

(vi) the Commercial Tribunal did not refer any matter to the Supreme Court for hearing; and

(vii) 2 appeals were filed in the District Court against decisions of the Commercial Tribunal.

Outstanding applications for mediation include those –

(a) awaiting initial mediation, or further mediation, where a listing has been made;

(b) adjourned at the request of one or both parties, so as to enable them to consider their respective position and to obtain initial or further legal or other advice; or

(c) where I am awaiting written advice from the applicant (where there was an unsuccessful mediation conference, or where there was a partially successful mediation conference), as to whether or not the applicant wishes to discontinue his or her application, or discontinue that part of his or her application that produced no successful result, or have the application, or that part of it that produced no successful result, sent on to the Commercial Tribunal for it to hear and determine.

Outstanding applications before the Commercial Tribunal include those –

(a) awaiting a directions hearing, or a further directions hearing,where a listing has been made,

(b) awaiting the completion of all preliminary matters that have been ordered, by the Commercial Tribunal at a directions hearing, to be done by one or the other of the parties, or by both of them;

(c) awaiting a substantive hearing, where a listing has been made; and

(d) in the course of hearing.

THE MEDIATOR

In respect of applications for mediation, my role as mediator is to seek to procure an agreement between the parties that is commercially acceptable to them, and being one that is freely made between them.

The success or otherwise of a mediation depends greatly on the particular facts of each case, the history of the dispute prior to the application for mediation being filed, the attitude of each of the parties to each other and to the mediation process, and the degree of desire by each of the parties to resolve their dispute at mediation in a way that is commercially acceptable to both of them.

In addition, the success or otherwise of a mediation often depends upon whether one or both parties require an answer to a question of law, in which case mediation usually fails, as a commercially acceptable solution to the dispute is not what is sought. However, at times, even if an answer to a question of law is what is sought in the application for mediation, a mediated solution to the dispute is frequently arrived at.

Another area where mediation may fail, at least in relation to the principal matter referred for mediation, is where the amount of money involved in the dispute is great, and the parties are not able, or are unwilling, to compromise their respective positions, especially if the landlord perceives that there is likely to be a flow on effect to other tenants, or former tenants, if a settlement is arrived at.

REPRESENTATION AT MEDIATION CONFERENCES

The Act contemplates that only the parties to a retail shop lease attend the mediation. It prohibits a solicitor or any representative of a party to the mediation attending on behalf of his or her client or principal, or to represent his or her client or principal, unless the Registrar has first approved.

In relation to a corporation that is a party to a retail shop lease, approval is given as a matter of course for a representative of the corporation to represent it at the mediation, provided the representative is a director, the company secretary, or other officer of that corporation.

In the case of a landlord that is a corporation, and which has no officer resident in Western Australia, such a landlord is usually, but not always, represented in Perth by an agent, often a licensed Real Estate Agent. In the case of a landlord who is a natural person resident in an area of Western Australia that somewhat remote from Perth, or who is resident interstate or overseas, it is common for such a landlord or his, her or it's agent, to apply to me for approval for the agent, or for an employee of the agent, to attend the mediation to represent their principal at the mediation.

In the case of a retail shopping centre, or a retail shop that is not situated in a retail shopping centre, that is managed by an agent, the agent usually (but not always) has more knowledge of the circumstances surrounding a dispute between a landlord and a tenant than has the landlord. Therefore, permission is usually given for a non-solicitor agent to attend a mediation, either to represent the principal at the mediation, or to assist the principal at the mediation.

Approval for a solicitor to attend a mediation to represent his or her client (being a party to the application for mediation) at a mediation has periodically been given where the particular circumstances are considered appropriate. Such requests have not been that frequent in the past, but there is an upward trend in this regard. It is more common for a solicitor to seek approval to attend the mediation, not so much to represent the client at the mediation, but to advise the client during the mediation, in circumstances where his or her client is the active negotiating party. Approved attendances at mediations by solicitors to advise a client during mediation, as distinct from representing a client at the mediation, are increasing in frequency.

The issue as to whether it is appropriate for a solicitor to be present at a mediation, either to undertake the mediation on behalf of his or her client, or to attend the mediation, but only to advise his or her client during the course of the mediation, is not a simple matter to reach any conclusion on. There have been instances where a solicitor has obtained approval to attend in either category, and the mediation procedures were arguably obstructed by the solicitor, and thus no benefit was obtained by that solicitor's presence. Fortunately, such instances have been rare. In most instances however, it has been of positive benefit to the parties to the mediation and to myself as mediator, as in such instances the solicitor has frequently calmed his or her client, and offered assistance in finding, if possible, a pragmatic solution to the dispute.

The presence of a party's solicitor at a mediation conference has frequently been a contributing factor in reducing the duration of a mediation conference. In many applications however, where a solicitor is not present to advise his or her client or to undertake the mediation on behalf of his or her client, it is not at all uncommon for one or both parties to a retail shop lease not to have had any prior advice in relation to the subject matter of the application. A significant number of people, especially, but not exclusively, tenants, have little or no idea on how to negotiate a pragmatic solution to their dispute. Many do not appear to have given much thought, or any thought, as to how far they might and can go in reaching a compromise that is commercially acceptable to them in order to arrive at a successful conclusion, should a compromise be necessary in order to achieve a conclusion.

At the time that a mediation conference is listed, both parties are sent written advice of a general nature as to what is expected of them at the mediation conference, and of the types of things that they need to consider in relation to their preparation for the mediation conference, the expectation being that at the mediation conference peripheral matters which might or would otherwise have been raised by one or the other of the parties will not be raised, unless a party considers it necessary to do so.

The time required for preparation for a mediation conference varies considerably. It depends upon the issues that have been raised in the application, the nature and complexity of those issues, and the volume and content of the papers filed by each party.

Accordingly, actual mediation time, over and above preparation time, varies considerably from application to application. Excluding preparation time, most mediations take from approximately one and one half-hours to half a day, although some mediations take up to one day and sometimes longer.

For varying reasons, many mediations need to be adjourned at different stages of the mediation process, and are later relisted for further mediation.

Reasons for the adjournment of a mediation conference may include the need by one or both parties to seek legal advice, or further legal advice. It is not uncommon, especially in the case of a tenant, for him, or her, to attend the mediation without having a clear idea or a clear understanding of the legal position in relation to the subject matter of the application. The parties are exhorted not to attend the mediation conference without first having sought advice as to the legal position, if this is at all possible.

Another reason for the adjournment of a mediation conference is where it becomes apparent that the real problem underlying the dispute is either not reflected at all, or is not adequately reflected, in the questions that are referred in the application for mediation. In such cases the applicant is required to amend the application and to give notice of the amendment to the other party before the mediation is relisted.

During this year there have been a number of requests from applicants living in country areas in or near Albany, Bunbury, Kalgoorlie, Mandurah and Rockingham, that mediation conferences be held in those places. Where both parties reside in the same country city or town, or in the same general area outside the Perth metropolitan area, the request has always been accommodated.

Where one of the parties lives outside the Perth metropolitan area, and the other lives within the Perth metropolitan area, or if both parties live outside the Perth metropolitan area, but say one in Albany and the other in Broome, as the Registry is located in Perth, then, unless there is a strong reason for the mediation conference to be held in a country city or town, usually the place where the leased premises are located, then the mediation conference is held at the Registry .

COST EFFECTIVENESS OF MEDIATIONS

Parties to applications for mediation generally appear to be of the view that the mediation process is efficient and cost effective to them, and that in most cases it is worth the attempt to have the dispute resolved by mediation, not only from a time point of view, but from a cost point of view. The actual procedures at a mediation conference are as simple and informal as possible. This last point depends on how the mediation progresses. It may however be necessary, in some cases, for the mediation to be conducted in a more formal way.

As mediator, I perform my obligations under ***the Act*** on a part time basis. I am also engaged in other functions under ***the Act*** as Commercial Registrar and under other legislation as Commercial Registrar. In addition, I am the Registrar of the Retirement Villages Disputes Tribunal and of the Strata Titles Referee's Office, and as such, I undertake functions, as Registrar, under the ***Retirement Villages Act*** **1992** and under the ***Strata Titles Act*** **1985**.

SUCCESSFUL MEDIATIONS; PARTIALLY SUCCESSFUL MEDIATIONS; FAILED MEDIATIONS

In respect of mediations that have failed to produce a settlement of matters in dispute that is commercially acceptable to the parties, the principal reasons for the failure, or partial failure, of a mediation conference, include situations where –

(a) one or both parties have no ability or very little ability to compromise, usually, but not always, due to financial constraints;

(b) one or both of the parties have not sought adequate or proper legal advice as to their respective legal position or likely legal position, and therefore have unrealistic expectations as to what constitutes, or what might constitute, a reasonable and realistic commercial settlement of the matters in dispute between them;

(c) one of the parties does not really wish to negotiate a commercially acceptable settlement of the dispute, but rather wants the application to be remitted to the Commercial Tribunal or to a Court in order to test a point of law;

(d) an applicant (either landlord or tenant, but more usually the tenant) wants the mediation process to continue for as long as is possible, in order to attempt to delay or stop the respondent from commencing in the Court, an action against the applicant;

(e) major difficulties arise in respect of the subject matter of the application, or of the mediation process itself, caused wholly, or partly, by the personality of one or both parties, and the attitude of one party to the other, or of each party to the other;

(f) there exists a conflict (often deep seated and of long duration) between the parties to the application, which is of such a magnitude that a negotiated settlement is impossible; and

(g) an amount is claimed by a tenant applicant from the landlord by way of damages or compensation, especially where the tenancy is in a retail shopping centre and the respondent landlord considers that flow-on claims from -

(i) other tenants in the same retail shopping centre; or

(ii) from tenants in other retail shopping centres that the landlord owns, where the issues are the same or substantially the same, and which derive from a common "standard" lease used by the landlord); or

(iii) both (i) and (ii),

are possible or are likely.

GENERAL

The Commercial Registrar's internal administrative procedures and systems relating to the mediation process and applications under ***the Act*** generally, and the Commercial Tribunal's procedures relating to the nature of what it requires as a result of Directions Hearings, continue to be reviewed with a view to improving the time period within which matters might be completed, and to achieving other efficiencies, where possible, given the existing staffing levels and other resources currently available.

The types of disputes that give rise to an application for mediation by a party to a retail shop lease cover the whole ambit of possibilities in respect of the term "question arising under the lease" as that term is referred to in sections 16 and 19, and as the meaning of that term as expanded in sub-section 3(3). The various types of issues that have been, and which can be, the subject of an application for mediation, although not exhaustive, are set out in the Schedule to this Report.

Even though the ***Commercial Tenancy (Retail Shops) Agreements Amendment Act* 1998** ("the ***Amendment Act")***, which came into effect on 1 July 1999, has resolved, or has appeared to resolve, a number of difficulties with ***the Act*** as it was before the ***Amendment Act*** came into effect, and has also to some degree resolved some of the difficulties with ***the Act*** that arose as a result of some Commercial Tribunal, District Court, and Supreme Court decisions over the years, the issues that I have raised in my previous reports to you and in my previous reports to The Hon. Minister for Trade and Commerce when he was the Minister administering ***the Act***, and which were not addressed in the ***Amendment Act***, are still relevant and of general concern to many parties to retail shop leases, as are most of the issues that have arisen from recent cases and which are referred to on pages 19 to 29 of this Report.

All or most of the matters that I have raised in my previous reports still continue to be raised in mediation applications, although at times variations on the same themes arise.

The ***Amendment Act*** inter alia repealed sub-section 3(3) of ***the Act*** and introduced a new sub-section 3(3), which considerably enlarges what is, or what constitutes, a "question arising under the lease", as referred to earlier in this Report. Although the ***Amendment Act*** has expanded the Commercial Registrar's and the Commercial Tribunal's jurisdiction and to some degree the Commercial Tribunal's power to grant a

remedy in certain types of matters such as under the new section 6A, the Commercial Tribunal does not have the power or jurisdiction to award compensation or damages outside of the specific provisions of ***the Act***, being sections 6, 6A, 9 and 14.

Sub-section 26(1) is not generally considered to be a source of jurisdiction or power for the Commercial Tribunal to award compensation or damages to an otherwise successful applicant. It is not clear what the ambit of the Commercial Tribunal's powers are under section 26(1), bearing in mind the decision of the Full Court of the Supreme Court in the case of ***Mavromatidis - v - Dundon & Anor., unreported; FCt SCt of W.A.; Library No. 970395***, whereby the Court read down the provisions of sub-section 26(1).

There are more and more applications for mediation being filed where at least one of the issues sought to be mediated relates directly to issues of alleged unconscionable conduct, usually on the part of the landlord or by the landlord's agent. Other issues raised for mediation often touch on or involve this issue as part of a wider issue or series of issues.

If a mediation is not totally successful, then the application is normally remitted by the Commercial Registrar to the Commercial Tribunal, and in some cases to the state Court of relevant jurisdiction, for hearing and determination, except where the applicant discontinues the application before it is remitted to the Commercial Tribunal or to the Court.

When the Commercial Registrar does remit an application to the state Court of relevant jurisdiction instead of to the Commercial Tribunal, this is usually in circumstances where the application contains some issues where the Commercial Tribunal is known to have no jurisdiction to give a remedy, or where there are other issues that also require determination and which are not the subject of the application for mediation and in relation to which the Commercial Tribunal is known to have no jurisdiction. In such cases it is considered that all matters in dispute should be either consolidated and heard together, or heard consecutively, by the same Court, instead of some proceedings being heard in the Commercial Tribunal and other proceedings being heard in the Court. Applications may also be remitted to a Court in a country city or town when both parties are resident in or in the vicinity of that city or town if it

is considered that overall costs to the parties are likely to be reduced if the application is so remitted.

If the Commercial Registrar remits a particular application to the Commercial Tribunal, the Commercial Tribunal also has the power to remit the application to the state Court of relevant jurisdiction, if it considers it appropriate.

Whilst for the most part issues raised for mediation are within jurisdiction, as has been mentioned above, some of the issues raised are not necessarily issues which, if they are sent on to the Commercial Tribunal to hear and determine, are issues that the Commercial Tribunal has, or clearly has, the jurisdiction or power to give an appropriate remedy in respect of.

Notwithstanding the above, many applicants who have made application to the Commercial Registrar for mediation are dissatisfied where the mediation is not totally successful and the application is remitted by the Commercial Registrar to the Commercial Tribunal at the request of the Applicant, and the Applicant then finds that the Commercial Tribunal does not have the jurisdiction or power, in respect of all matters referred to it that involve a "question arising under the lease", to give the applicant a suitable remedy or a remedy at all, even though it technically has the jurisdiction to hear and determine the subject matter of the application.

Numerous tenant applicants for mediation before the Commercial Registrar have also expressed dissatisfaction about this from a financial point of view and also from also a timing point of view. They have expressed frustration when they find themselves in a situation where, in respect of seeking to obtain a remedy in relation to some or all of the issues the subject of their application for mediation (where the mediation was not totally successful), they must either ensure that the Commercial Registrar remits their application to the state Court of relevant jurisdiction, or commence proceedings in the Federal Court under provisions of the ***Trade Practices Act***. Their express desire in respect of such applications to the Commercial Registrar for mediation was to proceed to have the application mediated before the Commercial Registrar in the first instance and then, if necessary, heard and determined by the Commercial Tribunal. If successful before the Commercial Tribunal in relation to findings of fact, their express desire was to have a suitable remedy given to them by the Commercial Tribunal.

In relation to matters where the Commercial Registrar has jurisdiction under ***the Act*** to mediate in respect of an application, and where the matter would, in the ordinary course of events, if the mediation was not totally successful, have been remitted by the Commercial Registrar to the Commercial Tribunal for it to hear and determine, I recommend that consideration be given to the undertaking of a thorough review of the powers that the Commercial Tribunal has, and what powers it should have, to grant an appropriate remedy to a successful applicant in a commercial tenancy application, out of which would come appropriate recommendations as to what amendments should be made to ***the Act*** and possibly also to the ***Commercial Tribunal Act*** **1984**.

Perhaps consideration might also be given to a review being undertaken of the present role of the Commercial Tribunal (possibly, although not necessarily, as distinct from the role of the Commercial Registrar as mediator in applications for mediation) in the overall legal structure, including how, and to what degree, if at all, the Commercial Tribunal is, or should be, complementary to, competitive with, or a substitute for, the state Courts.

COMMERCIAL TRIBUNAL DECISIONS

The following is an extract from the Annual Report of the Chairman of the Commercial Tribunal to The Hon. Attorney General for the year ended 30 June 2001, made pursuant to section 12 of the ***Commercial Tribunal Act 1984*.**

*"**Retail Shop Tenancies**.*

None of the cases determined during the year by the Commercial Tribunal could be considered to be of general interest, apart from being of interest to the parties themselves. Each case turned on its own particular facts. A summary of some of the cases determined by the Commercial Tribunal during the year is as follows –

Pearce v. Kao Holdings Pty Ltd [CT/1997 – 000772]

*In this case the applicants (tenants) sought compensation against the respondent (landlord) pursuant to section 14 of the **Commercial Tenancy (Retail Shops) Agreements Act 1985**.*

The applicants had been tenants of premises ("the Premises") on the ground floor of the Westcentre in Hay Street, West Perth ("the Centre") from December 1990 to June 1997, from which they carried on a gift shop business.

In March 1995 the respondent carried out alterations to the ground floor of the Centre, to expand the seating of the food court area. The alterations included the conversion of two shops adjacent to the Premises to provide additional seating in the food hall.

The applicants claimed that while the alterations were being carried out, the respondent had hoardings erected, which blocked the view of, and access to, the Premises from the eastern end of the ground floor of the Centre, and that this action by the respondent disrupted pedestrian flow to the applicants' Premises. In addition, the applicants also claimed that the alterations themselves constituted a permanent impediment to the pedestrian flow to *the Premises.*

On or about 22 March 1995 the applicants gave a letter to the respondent complaining about the alterations and the *erection of the hoardings, which notice they claimed was a notice in writing pursuant* to *section 14 of the* ***Commercial Tenancy (Retail Shops) Agreements Act*** *and, as the respondent had failed* to *remedy the matters complained of in the notice, the respondent was responsible for the loss and damage that the applicants allegedly suffered as a result of these alterations.*

The applicants' claim originally amounted to *$180,000, but this was amended at the hearing to a claim for loss of profits of between $30,000 and $40,000, together with the value of plant fixtures, fittings and fittings in the Premises at the time the applicants vacated the Premises.*

At the conclusion of the *applicants' case, the respondent's counsel submitted that the application should be dismissed without the necessity for the Commercial Tribunal to hear the respondent's evidence.*

The Commercial Tribunal was unanimous in determining that the applicants had failed to *establish, on the balance of probabilities, that the erection of hoardings, or the carrying out of alterations to the Centre, or both, substantially altered or inhibited the flow of customers* to *the applicants' Premises within the meaning of section 14 of the* ***Commercial Tenancy (Retail Shops) Agreements Act****.*

The evidence given on behalf of the applicants was simply insufficient to establish a sufficient nexus between the hoardings and the alterations to the Centre, and the alleged reduction in customer sales from the Premises.

There was evidence of a decline of sales prior to these works being commenced, and the Commercial Tribunal was of the opinion that this decline could have been caused by a number of factors. This was acknowledged by the applicants in correspondence with the respondent's managing agent.

Accordingly, the Commercial Tribunal dismissed the application without hearing the respondent's evidence.

Mammone v. Barracuda Investments Pty Ltd [CT/* 1998 *- 000673J]

In this case the applicants (tenants) as *tenants of retail shop premises ("the Premises") at Broadwater Shopping Village, Busselton ("the Village") made an application to the Commercial Tribunal for a refund of strata levies that they paid to the respondent (landlord).*

At the time that the applicants first occupied the Premises, the Village was not strata titled. However, the Village was in the process of being strata titled by the then owner. The strata titling of the Village was completed at or about the time that the applicants and the then owner of the Village agreed the provisions of the written lease document.

The lease document, which pre-dated the strata titling of the Village, contained the usual provisions for the tenants to *pay* a *proportion of annual variable outgoings in respect of the Village, that proportion being the same proportion as the lettable area of the Premises bore* to *the total lettable area of the Village.*

There was no specific provision in the lease that if the Village became strata titled the tenants would pay to *the proprietor of the strata lot that they leased the strata levy applicable* to *that lot. Despite this, the respondent, which owned the Premises from March 1994 to December 1998, charged to the Applicants the strata levies applicable to the Premises over that period, which strata levies amounted to $23,864.26.*

The applicants paid the strata levies charged to them each year by the respondent. The strata levies for the Premises were calculated on the basis of the ratio that the unit entitlement of the strata lot that comprises the Premises bears to the total of unit entitlements of all of the strata lots comprised in the relevant strata plan. This meant that the applicants were being charged strata levies of 7.43% of the total annual strata levies raised by the strata company, instead of 6.55% of the total annual variable outgoings for the Village, as *provided for in the lease, on the basis of the ratio that the lettable area of the Premises bears to the total lettable area of the Village.*

The Commercial Tribunal held that, as a *matter of interpretation, the respondent was not entitled, under the lease,* to *charge any strata levies to the applicants. Further, the respondent's calculation of strata levies by reference to unit entitlements was in breach of sub-section 12(l)(a) of the* ***Commercial Tenancy (Retail Shops) Agreements Act,*** *as there was no statement in the lease as* to *how the strata levies that were charged were to be apportioned, or how, and when, they were to be paid.*

The Commercial Tribunal rejected the respondent's argument that it should be permitted to recalculate the amounts comprised in the strata levies, and to charge the recalculated amounts to the applicants in accordance with the provisions of the lease, as the respondent had failed to provide the applicants with budgets of these amounts as required by sub-section 12(l)(b) of the ***Commercial Tenancy (Retail Shops) Agreements Act****. Budgets of strata levies which had been provided to the applicants were inadequate for this purpose.*

The Commercial Tribunal ordered that the respondent refund to the applicants the amount of $23,864.26."

CASES STATED TO THE DISTRICT COURT

During the year the Commercial Tribunal did not state any case to the District Court.

APPEALS TO THE DISTRICT COURT

The following is an extract from the Annual Report of the Chairman of the Commercial Tribunal to The Hon. Attorney General for the year ended 30 June 2001, made pursuant to section 12 of the ***Commercial Tribunal Act 1984*.**

"Warwick Entertainment Centre Pty Ltd v. McKenzie & Anor. [2000] WASCA 280 (unreported).

This was a decision of the Full Court of the Supreme Court. It arose from an appeal against a decision of the District Court, which dismissed an appeal from a decision of the Commercial Tribunal.

The Commercial Tribunal had held that the sum of $65,000 paid by the respondents to *the appellant, which, according to the lease was for the purchase of a one-eighth share of the plant and equipment in the common area food court, where the leased premises were situate, was a premium paid for the granting of the lease of premises, and was therefore "key money" within the meaning of sub-section* 9(1) *of the* ***Commercial Tenancy (Retail Shops) Agreements Act 1985*.**

Both the District Court and the Supreme Court agreed with the Commercial Tribunal's decision. Accordingly, pursuant to *sub-section 9(3) of the* ***Commercial Tenancy (Retail Shops) Agreements Act*** *the respondents were entitled to a full refund of the $65,000 they had paid* to *the appellant.*

This case illustrates that the Commercial Tribunal must consider the substance of a transaction, and not merely its form, in determining whether or not a payment by a tenant is "key money" within the meaning of sub-section 9(1) of the ***Commercial Tenancy (Retail Shops) Agreements Act.***

The Full Court of the Supreme Court also considered the nature of an appeal from a *decision of the Commercial Tribunal. The District Court had concluded that the hearing of such an appeal was* a *hearing "de novo". The Full Court of the Supreme Court disagreed with this conclusion, but held that the District Court has somewhat wider powers than might normally be exercised by an appellate court conducting* a *re-hearing from another court. The Full Court of the Supreme Court was of the view that an appeal from the Commercial Tribunal involved* a *broad review of the decision and the basis for the decision of the Commercial Tribunal, without there being* a *fresh hearing.*

Spooner v. Ketch Nominees Pty Ltd [2001] WADC* 46 *[unreported]

In last year's annual report the then Chairman of the Commercial Tribunal, Mr I. G. Martin, referred to *the Commercial Tribunal's decision in this case, where the Commercial Tribunal had to determine the floor area of a retail shop which was a country service station / roadhouse and take-away food shop.*

The Commercial Tribunal determined that the floor area of the retail shop included the access driveways and paths, and that its floor area exceeded the statutory cut-off figure of 1000 square metres. This meant that the ***Commercial Tenancy (Retail Shops) Agreements Act*** *had no application to the premises leased by the applicants as tenants, and therefore the Commercial Tribunal had no jurisdiction to hear the matter.*

The District Court dismissed an appeal by Mr and Mrs Spooner against the Commercial Tribunal's decision, holding that the access driveways and paths formed a part of the surface area that was designed and available for use in the carrying on the business of a *service station / roadhouse and take away food shop, and thus were to be taken into account in determining the floor area of the retail shop.*

The sentiments expressed by Mr Martin in his report, when referring to this case, are still relevant, namely that in relation to some retail shops there is still room for uncertainty as to what comprises floor area.

An amendment to the ***Commercial Tenancy (Retail Shops) Agreements Act*** to *simplify the test for determining whether a particular retail shop is or is not covered by the* ***Commercial Tenancy (Retail Shops) Agreements Act*** *should be considered by Parliament."*

FEDERAL COURT CASE.

The following is an extract from the Annual Report of the Chairman of the Commercial Tribunal to The Hon. Attorney General for the year ended 30 June 2001, made pursuant to section 12 of the ***Commercial Tribunal Act 1984***.

"**GC *Berbatis Holdings Pty Ltd v. Australian Competition and Consumer Commission [2001] FCA* 757.**

This case is *of interest, as it originally commenced as an application by a tenant of a retail shop at Farrington Fayre Shopping Centre, Leeming against the tenant's landlord, CG Berbatis Holdings Pty Ltd and others, to the Commercial Registrar, for mediation under the* ***Commercial Tenancy (Retail Shops) Agreements Act****. The matter was recommenced in the Federal Court by the Australian Competition and Consumer Commission as applicant under the* ***Trade Practices Act 1974***.

In this case, at first instance, the owners of Farrington Fayre Shopping Centre at Leeming were alleged to *have contravened section 51AA of the* ***Trade Practices Act*** *by requiring that various of their tenants abandon claims against the owners in the Commercial Tribunal if they wanted their leases renewed. That section prohibits conduct by companies in trade or commerce that is unconscionable within the meaning of the unwritten law, and which is actionable in equity. In 1998 a new section 51AC was introduced into the* ***Trade Practices Act****, which prohibited unconscionable conduct, but without the same limits as section 51AA.*

This case however, had to *be decided under section 51AA. The Federal Court found that the owners of Farrington Fayre Shopping Centre, their agent and his company, had engaged in unconscionable conduct in relation to one of their tenants who wished to sell their business and who, in 1996, needed a new lease for that purpose, as their existing lease was due* to *expire in 1997. Those tenants stood to lose the opportunity* to *sell their business. The tenants' vulnerability was known to the owners, and the tenants were forced to sign a release of their claims against the owners before the owners would grant the tenants a new lease.*

In relation to two other tenants of Farrington Fayre Shopping Centre, the Australian Competition and Consumer Commission alleged that the owners also engaged in unconscionable conduct. However, the situation with respect to those tenants was different, both in terms of their relative disadvantage and in terms of the detailed circumstances of their case. The Federal Court therefore was not prepared to find that the owners of Farrington Fayre Shopping Centre had contravened section SlAA in relation to those tenants.

This case turned on the limited scope of section 51AA. It may have been that a different result could have been obtained under the later and wider provisions of section 51AC.

This case went on appeal to the Full Court of the Federal Court, which upheld the appeal.

The Australian Competition and Consumer Commission has sought leave to appeal to the High Court.

Consideration should be given by Parliament as to whether it is appropriate for the Commercial Tribunal to be given jurisdiction to deal with issues of unconscionable conduct in relation to parties to *retail shop leases, and their agents.*

The Commercial Tribunal already has jurisdiction to deal with "unjust conduct" under Part IX of the ***Credit Act*** *by re-opening a regulated credit contract or mortgage if the regulated credit contract or mortgage is unconscionable, harsh or oppressive, or if the annual percentage rate under the contract or mortgage is excessive.*

The Commercial Tribunal has jurisdiction under Part III of the ***Credit (Administration) Act*** *to restrain "unjust conduct" by credit providers, and also under Part III of the* ***Travel Agents Act*** *to restrain "unjust conduct" by Travel Agents.*

The Commercial Tribunal has jurisdiction to deal with and re-open "unjust transactions" under Part 4, *Division* 2, *of the* ***Consumer Credit (Western***

Australia) Code *that arise under a credit contract, mortgage, or guarantee that is regulated by the Code."*

SCHEDULE

Questions that arise under a retail shop lease, and which are the subject matter of an application under sub-sections 16(1) and 19(1) for mediation under ***the Act***, usually fall within one or more of the following categories –

(a) matters arising under -

(i) ***the Act***;

(ii) a disclosure statement; or

(iii) the retail shop lease; or

(iv) a combination of (i), (ii) and (iii),

and what is the meaning, and implication, of each matter;

(b) matters of alleged representations, or misrepresentations, by a landlord, or by the landlord's agent;

(c) matters relating to alleged oral variations to the retail shop lease;

(d) matters relating to variations, or differences, between the provisions of the disclosure statement; and

(i) the offer to lease documentation;

(ii) the agreement (or contract) to lease documentation; or

(iii) both (i) and (ii); and

(iv) the provisions of the retail shop lease documentation; and

(A) what do the variations, or differences, mean;

(B) was a mistake made, and if so where;

(C) what was the intention of the parties at the relevant time;

(D) does the lease require rectification; and

(E) was a lease ever entered into at all;

(e) matters relating to variations between the retail shop lease documentation; and

(i) the offer to lease documentation;

(ii) the agreement (or contract) to lease documentation; or

(iii) both (i) and (ii),

in circumstances where some of the provisions of the lease are in writing and some are oral, and if so -

(A) what are those oral provisions;

(B) what do they mean; and

(C) how do they relate to that part of the lease that is in writing;

(f) whether a tenant has consented in writing to rent being paid in whole, or in part, by reference to turnover, and whether or not the tenant's written consent, as required by ***the Act,*** has been properly given by the tenant;

(g) (i) whether or not money that is to be paid by, or at the request, or direction of, a tenant; or

(ii) any benefit that is to be conferred by, or at the request, or direction of, a tenant,

by way of a premium, or something of a like nature, in consideration of –

(A) the granting of; or

(B) agreeing to grant –

(1) a lease; or

(2) the renewal of a lease; or

(3) the consenting to an assignment of a lease; or

(4) the sub-leasing of the premises the subject of a retail shop lease, is

"key money", as that term is defined by sub-section 3(1);

(h) whether on or after an assignment of a retail shop lease, the assignor is still liable for the payment of any money that is payable under the lease by the tenant to the landlord, or whether, after an assignment has taken place, the assignor is still liable to perform any covenant under the lease that is of a non-pecuniary nature;

(i) whether or not an assignor of a retail shop lease is required by the landlord to enter into a guarantee guaranteeing the performance by the assignee of the lease, of the tenant's covenants under the lease, as a condition precedent to the landlord consenting to the assignment of the lease, and whether the guarantee is enforceable and, in respect of leases entered into prior to 1 July 1999, whether

sub-section 10(3) as it was prior to 1 July 1999, precludes a landlord from seeking to recover money from a guarantor who is the assignor;

(j) matters relating to situations where a landlord has declined to consent to a request by the tenant to assign the lease, or to sub-let the leased premises, or a part of the leased premises;

(k) matters relating to a rent review that is due under a retail shop lease, in circumstances where -

(i) the rent on the rent review is to be the assessed current market rental value according to the basis contained in the lease, in circumstances where that basis is, or is argued to be, different from the provisions of sub-section 11(2), or where clarification is sought as to the meaning of a lease clause, or the meaning of a section of ***the Act***, that relates to, or which is connected with, a review of rent under a lease; or

(ii) there are differences of view between the parties to the lease in relation to-

(A) who is to undertake the rent review,

(B) how the rent review is to be undertaken; and

(C) whether the provisions of the lease or ***the Act*** prevail if there is a conflict between them; and

(iii) there is or there appears to be no basis or formula for determining rent on a rent review, and whether there is able to be a rent review at all;

(l) contributions to the landlord's expenses that relate to variable outgoings, and whether or not a tenant is liable to contribute towards all, or some, of the landlord's variable outgoings expenses incurred and, if so, what proportion is the tenant liable to pay, and whether or not the variable outgoings provisions contained in the lease (where the lease requires the payment of variable outgoings) comply with the requirements of section 12 and, if not, what are the implications of this, and whether, in respect of retail shop leases where the premises are strata titled, is the proportion of the total strata company levy that is levied against the relevant strata lot payable by the tenant in whole, in part, or at all;

(m) whether any particular item of variable outgoings expense has been necessarily and properly incurred, whether the expense has been properly classified, whether the expense, if or when properly classified, is an expense that the lease requires the tenant to pay in whole or in part, even though it is in the general nature of a variable outgoings expense, and whether the amount of any particular outgoings expense is excessive;

(n) whether the apportionment of variable outgoings between the various tenants is correctly calculated, and whether the basis on which that apportionment is determined is correct;

(o) matters relating to whether the landlord did, or did not, give the tenant a variable outgoings budget at the appropriate time, and what is the obligation of the tenant, if any, to pay variable outgoings to the landlord if the landlord did not give the tenant the variable outgoings budget at the appropriate time;

(p) matters relating to the audit of the variable outgoings incurred, and whether or not the audit was undertaken in such a way so that the auditor could properly and reasonably express an opinion that the variable outgoings expenses, as set out in the lease, that the tenant is obliged to pay to the landlord, equate to the variable outgoings expenses actually incurred by the landlord and, if so, are therefore chargeable by the landlord to the tenant in whole or in part and, if in part, then that that part has been charged in accordance with the provisions of the lease, and whether the total variable outgoings expenses incurred have been properly and necessarily incurred;

(q) whether, in respect of a retail shop that is within a strata scheme or a survey-strata scheme, the strata company levy that is payable by the landlord to the strata company in respect of his, her, or its, strata lot or survey-strata lot, is payable by the tenant to the landlord, in whole, in part, or not at all and, if in part, on what basis is the proportionate part of that strata levy that is applicable to the relevant strata lot or survey-strata lot, calculated;

(r) matters relating to the frequency, the degree, and the standard, required under the retail shop lease in respect of repairs to, and the maintenance of, premises, where the provisions of the lease place on the tenant the obligation to undertake and pay for such repairs and maintenance and, if such cost item is not specifically included in the lease as a variable outgoing expense, is the landlord entitled to undertake such repairs and maintenance at the landlord's cost, and whether, if the lease so provides, such costs may be recovered by the landlord from the tenant, in whole, or in part;

(s) claims made by a landlord or by a tenant for damages or compensation against the other, due to an act or omission by the claimant in respect of an obligation arising under the retail shop lease, or *the Act*, including representations allegedly made by one of the parties to the retail shop lease, and relied upon by the other party to the lease;

(t) disputes relating to redevelopment and relocation clauses in a retail shop lease;

(u) disputes relating to the exercise of an option to renew the term of a lease, and whether the exercise, or purported exercise, of the option, statutory or contractual, is enforceable as against the landlord;

(v) whether a tenant is obliged to contribute to a sinking fund, a reserve fund, or other reserve, or other fund;

(w) whether a landlord has the right, in the circumstances contemplated by section 6A, to terminate the lease and re-enter into possession of the leased premises;

(x) whether a tenant may seek to stop a landlord exercising the landlord's rights under a default notice issued by or on behalf of the landlord, against the tenant, where the landlord alleges that the tenant has not complied with the default notice, or where the tenant alleges that the default notice is in some way defective, and therefore has no legal efficacy; and

(y) for the purposes of measuring or surveying the "floor area", or the "retail floor area", of a retail shop, matters concerning what is and what is not to be taken into account for the purposes of determining what constitutes the "floor area", or the "retail floor area", of that shop, or both.