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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES  
COURT OF APPEAL

IN PROCEEDINGS NO. C.A. 309 OF 1979

BETWEEN: GALTEX OIL (AUSTRALIA) PTY, LIMITED

Appellant (Plaintiff)

AND: PAUL LESLIE FEENAN, MARIE THERESE FEENAN,  
THE INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Respondents (Defendants)

**TRANSCRIPT RECORD OF PROCEEDINGS**

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SOLICITORS FOR THE APPELLANT

Moore and Bevins,  
60 Martin Place,  
SYDNEY.

By their Agents:

Linklaters & Paines,  
Barrington House,  
59-67 Gresham Street,  
LONDON. EC2V 7JA U.K.

SOLICITORS FOR THE RESPONDENTS

Borthwick Wilson Smith & Mitchell,  
13-15 Watt Street,  
NEWCASTLE.

By their Agents:

D.H. Dwyer Forbes & Yeo,  
20 O'Connell Street,  
SYDNEY.

By their Agents:

Charles Russell & Co.,  
Hale Court,  
Lincolns Inn,  
LONDON. WC2A 3UL U.K.

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INDEX OF REFERENCE:

PART I

Documents included in the Record

No.	Description of Document	Date	Page
<u>IN THE INDUSTRIAL COMMISSION OF NEW SOUTH WALES</u>			
1.	Extracts from Transcript of Proceedings before his Honour, Mr. Justice Macken	25, 26, 27, 28 & 29 June, 1979	
	Pages 8 - 15 Mr. Coombs		1
	<u>FEENAN</u> - Paul Leslie		
	16 - 38 Examined		10
	38 - 61 Cross-Examined		37
	61 - 62 Re-Examined		69
	62 Further Cross-Examined		71
	<u>FEENAN</u> - Marie Therese		
	64 - 69 Examined		72
	70 - 78 Cross-Examined		80
	78 - 79 Re-Examined		90

No.	Description of Document	Date	Page
Transcript Continued:			
	<u>PARKER</u> - Gary Lloyd		
Pages	131 - 150	Examined	94
	150 - 178	Cross-Examined	114
	179 - 184	Re-Examined	152
2.	<u>EXHIBITS</u>		
1	- Newspaper Advertisement for Operator of Service Station (Transcript page 9 - see now page 2)		160
2	- Service Station Income and Expense Statement (Transcript page 10 - see now page 3)		161
4	- Licence Agreement (Transcript page 10 - see now page 3)		162
27	- Internal Office Memo (Transcript page 185)	9 October, 1975	168
3.	Reasons for Judgment of his Honour, Mr. Justice Macken	3 September, 1979	169
<u>IN THE SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL</u>			
4.	Amended Summons	23 June, 1980	199
5.	Reasons for Judgment of Court of Appeal	11 July, 1980	202
	Moffitt, P.		203
	Hope, J.A.		206
	Hutley, J.A.		207
6.	Minute of Order of Court of Appeal	11 July, 1980	217
<u>IN THE PRIVY COUNCIL</u>			
7.	Order of the Supreme Court of New South Wales, Court of Appeal, granting final leave to appeal to Her Majesty in Council	31 October, 1980	218
8.	Certificate of the Registrar of the Supreme Court of New South Wales, Court of Appeal, verifying the Transcript Record of Proceedings	14 November, 1980	219
	Index "B"		

PART II

Documents Not Reproduced

No.	Description of Document	Date
<u>IN THE INDUSTRIAL COMMISSION OF NEW SOUTH WALES</u>		
1.	Notice of Motion	22 March, 1979
2.	Affidavit of Paul Leslie Feenan and Marie Therese Feenan	22 March, 1979
3.	<u>EXHIBITS:</u>	
	3 - Statement of Capital Required to Operate the Service Station (Transcript page 10)	
	5 - Income and Expenses Statement relating to the Service Station (Transcript page 11)	26 September, 1979
	6 - Document extracted from First Respondent's site file annexed to a document headed "Caltex Dealer Application Form" (Transcript page 24)	
	7 - Letter from Caltex concerning gallonage (Transcript page 30)	
	8 - Schedule in respect of hours worked (Transcript page 33)	
	9 - Exercise book paper - Record of Discounts (Transcript page 35)	
	10 - File of pink slips - Daily record sheets (Transcript page 35)	
	11 - Green Cash Book (Transcript page 36)	
	12 - Wage Record Book (Transcript page 36)	
	13 - Income Tax Return with attachments (Transcript page 38)	
	14 - Earlier Advertisements extracted from Respondents' file (Transcript page 63)	

No.	Description of Document	Date
<u>EXHIBITS</u> Continued		
15 -	Feenan's bank deposit book (Transcript page 79)	
16 -	Cheque butt book (Transcript page 79)	
17 -	Schedule of monthly purchases of petrol by the Applicants from Caltex during period 1/11/75 to 30/6/76 (Transcript page 80)	
18 -	Schedule of monthly sales for petrol during period at Hexham 1/11/75 to 30/6/76 (Transcript page 80)	
19 -	Schedule of monthly purchases for petrol Hexham Service Station for period 15/2/75 to 31/10/75 (Transcript page 80)	
20 -	Written accounts re Feenan by P.S. Matthews 1/11/75 to 28/2/76 (Transcript page 89)	
21 -	J.R. Bubb Tax Return 1973/1974 and Trading Account including Profit and Loss Account for period 1/7/74 to 14/2/75 (Transcript page 99)	
22 -	Pink slips for last day of month (Transcript page 100)	
23 -	Book containing dealer development course subjects (Transcript page 140)	
24 -	Document regarding hours of labour at service station (Transcript page 140)	
23 -	Dealer Records (Misnumbered) (Transcript page 145)	
24 -	Calculation of Hours (Misnumbered) (Transcript page 145)	

No.	Description of Document	Date	
<u>EXHIBITS (Continued)</u>			
25 -	Records of deliveries of gasoline and distillate with annexure (Transcript page 145)		
26 -	Document headed "Monthly Delivery to Hexham Site" (Transcript page 150)		
4.	Transcript of Proceedings before his Honour, Mr. Justice Macken -		
	Page 1	12 April,	1979
	Pages 2 - 4	27 April,	1979
	Pages 5 - 7	15 June,	1979
	Pages 80 - 107	22 June,	1979
	Pages 108 - 130	28 June,	1979
	Pages 185 - 189	29 June,	1979
	Pages 165 - 189 (duplicate numbering)	30 July,	1979
	Pages 190 - 203	31 July,	1979
	Page 1 (preparatory to Judgment)	3 September,	1979
5.	Minute of Order of his Honour, Mr. Justice Macken	3 September,	1979
<u>IN THE SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL</u>			
6.	Summons	2 October,	1979
7.	Affidavit of Ronald Rene Nathans in Support of Summons	18 September,	1979
8.	Notice of Motion filed by Appellant to vary Summons	19 October,	1979
9.	Affidavit by Ronald Rene Nathans	2 October,	1979
10.	Affidavit by Ronald Rene Nathans in Support of Summons	12 October,	1979
11.	Notice of Appearance filed by State Crown Solicitor	26 September,	1979
12.	Notice of Appearance filed by Respondent	25 September,	1979
13.	Transcript of Proceedings before Court of Appeal	23 June,	1980

No.	Description of Document	Date	
14.	Notice of Motion filed by Appellant for Conditional Leave to Appeal to Her Majesty in Council	25 July,	1980
15.	Affidavit by Ronald Rene Nathans in Support of Appellant's Notice of Motion for Conditional Leave to Appeal to Her Majesty in Council	25 July,	1980
16.	Order of the Supreme Court of New South Wales, Court of Appeal, granting conditional leave to the Appellant to appeal to Her Majesty in Council		
17.	Short Minutes of Order	5 August,	1980
18.	Certificate of Compliance of the Registrar of the Court of Appeal		
19.	Notice of Motion by the Appellant for final leave to appeal to Her Majesty in Council		
20.	Affidavit of Ronald Rene Nathans in Support of Appellant's Notice of Motion		



INDUSTRIAL COMMISSION OF NEW SOUTH WALES

CORAM: MACKEN, J.

MONDAY: 25th June, 1979.

No. 79/200

PAUL LESLIE FEENAN AND ANOTHER v. CALTEX OIL (AUSTRALIA) PTY.  
LTD. AND ANOTHER

Application for order declaring contract void.

PART HEARD.

MR. COOMBS Q.C. appeared for the applicant with MR. MATER. 10  
MR. MORLING Q.C. appeared for the respondent with MR. PETERSON.

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MR. MORLING: My appearance is under protest, that is, about 20  
jurisdiction but I can see that the matter cannot be deter-  
mined at this stage. There is a good deal of documentation  
which has become available to us only about half an hour ago.  
One issue in the case will be the amount of gasoline sold at  
various times. It occurs to me that a lot of time can be  
taken up proving matters on which ultimately there might be  
little or no dispute. I would not wish to waste the time of  
the court but I think a few moments might initially lead to  
some shortening of the time on that issue. If we find our-  
selves pursuing what might be an unprofitable exercise we will  
shorten proceedings on that issue and perhaps we can ask for a  
little more time this morning.

MR. COOMBS: I agree with that course. Some documents are  
involved which were not previously available.

(His Honour mentioned that some attempts should be made  
during the adjournment at settlement of the matter.)

BRIEF ADJOURNMENT.

MR. COOMBS: This is an application for the making of orders 30  
pursuant to section 88F of the Act in respect of a contract  
entered into on 26th September, 1975 between Paul and Marie  
Feenan, the applicants, and Caltex Oil Pty. Limited. The  
second respondent is representative of merchandising area  
manager or a site manager employed by the defendant and I do  
not think there is any dispute about this. Although he has  
not been served personally I can tell you that he is here  
today.

The contract is in a standard form and it relates to the  
working of a service station in Hexham. I will hand you some  
photographs of the service station which includes a cafe.

It appears that in February or thereabouts of 1975 a previous operator ceased to be the person concerned with the conduct of this service station and that thereafter over a period of time Caltex made extensive efforts to obtain another person to conduct the station. They advertised, it would seem, on about 12, 13, or 14 occasions around the Sydney and Newcastle areas in advertisements which we would invite your Honour to infer from them were increasing in their attractiveness to a potential purchaser. The advertisement which attracted the attention of the applicants was published on 16th July, 1975 and it appears in The Sydney Morning Herald on Wednesday of that date. Although the copy is not particularly attractive I will hand it to you. I will hand up with it the original cutting. Without going into the particular details of the differences between this ad and the earlier one, this ad quite clearly gives a most attractive inducement. It suggests that a good operator can expect to earn in excess of \$20,000 a year before tax. Earlier advertisements made no representation about the profitability.

10

(Abovementioned document tendered without objection and marked Exhibit 1.)

20

It is important also to observe that not only the advertisement which has already been tendered but also the other advertisements place a deal of equality of emphasis on the take-away food aspect of the business. That is the situation throughout the series of ads that were placed by the first and second named respondents.

We lay some stress on the question of the take-away food aspect of the business because a substantial representation was made as to the profitability of the take-away food aspect of the business. That aspect of the business was of particular concern and significance to the particular applicants because the applicant's wife had particular experience in cooking and in conducting a snack bar operation. Indeed, from the time she left school she dealt with the feeding of deaf children, had quite a long history of that kind of operation, and she would be, we would suggest, the ideal person to take over the conduct of such an operation. She is, of course, the second applicant.

30

Her husband was a constable of police at the time he saw this advertisement. He was stationed originally in the Newcastle district and had been transferred to Liverpool where he was attached to the detectives division. He had between seven and eight years of seniority built up in the police force at the time when his attention was attracted by the ad and his enthusiasm for the particular operation was fired in particular by what he was told by Mr. Gary Parker about the prospects for those who would conduct the Hexham service station.

40

He left school at the age of 15 after passing his Intermediate Certificate, then worked in a service station at New Lambton for about 14 months as a driveway attendant and doing all the relevant work of a driveway attendant so he was no particular greenhorn when it came to this particular enterprise. His industrial experience included five years as an apprentice boilermaker and working at B.H.P. and thereafter seven or eight years in the New South Wales Police Force.

Having seen the ad he was attracted by the range of the skills and also the presence of the skills that he and his wife had. Mr. Parker was the local representative dealing with the particular site. He was told, that is, the applicant, that the site was at Hexham, that there was a two bedroom residence attached, and it was expressed to him particularly the \$20,000 per annum profit figure. He was told it was a good business and that he could see the figures. He and his wife went to the service station site, made an investigation, and had a conversation with Mr. Parker about the site, the cafe, and snack bar. They asked why the snack bar was not operating and they were told there was not enough business at the weekend and were further told the reason was that people stopped at the Oak milk bar. This was all occurring within days of the advertisement. 10 20

A crucial matter is in the course of that conversation Mr. Parker produced to Mr. Feenan and his wife two sheets of paper. They were photostatted copies produced from amongst a number of similar pieces of paper that were produced to the applicants, namely, a photostat copy. The production of the piece of paper was invited by the applicant asking, "Will I need it to get into the business?" Parker having the two sheets in front of him said, "You will need \$22,290". I will tender the two sheets. 30

(Income and expenses statement relating to the service station tendered without objection and marked Exhibit 2.)

(Statement of capital required to operate the service station tendered without objection and marked Exhibit 3.)

If you turn to Exhibit 3, the man, Parker, said how it is broken up. You will see the first item (read). I point to the date of Exhibit 2 which is 6th May, 1975. After dealing with the items on the sheet Mr. Parker indicates the last figure and said, "This is the figure you will need". Then he turns to the first sheet and he used these words, "Here is what we are doing now. The figures on the first sheet are all gone through". 26,000 gallons is mentioned as well as other details. Then there is a most significant figure: "Cafe nett \$1,000". A grand total of gross income is recorded and the nett profit to the dealer of \$2,121. 40

That attracted the attention of the male applicant and he said, "That is 24,000 for the year", and Parker's response

was, "Yes, it is a good business. Also you must remember that the station is under company management and they only get run down when the company operates them. You can only go upwards from here". He raised the question of his not being a mechanic, and Mr. Parker brushed that aside by saying, "Most of the business outside is petrol and food". His attention was drawn to the number of casual employees in the station so as to produce the nett profit to the dealer and the comment was made about that as follows (read). Then the rent was raised. At first the male applicant was under the impression that the rent came out of the \$2,100 nett per month but it was pointed out to him that the rent came out of the expenses figure and that the figure was a true nett. Thereafter the applicant and his wife took a second trip up there and had some further discussion. They took a third trip alone before they made a final decision and then they rang Mr. Parker and said that they were in favour of the deal and commenced to go about the mechanical details of obtaining a loan from the Rural Bank in order to finance their going into this business. On 26th September 1975 a service station agreement was signed which is called a licence agreement and which I will tender.

(Abovementioned licence agreement tendered without objection and marked Exhibit 4.)

Without asking you to read the whole of the document might we draw your attention to some parts of it: Paragraph 10 (read); Paragraph 11 (read); clause 20 (read) and perhaps that is the most stringent default. There is another waiver, 25 is a repetition, and the total commitment to the oil company is \$700 a month.

On the date of signature of that agreement there was signed and countersigned by the sales manager a document which is in the same form as Exhibit 2 signed by Mr. Parker and this is one which is countersigned by Mr. Holland, the sales manager. That relates to the same site and it shows a cafe nett income of \$500 per month. Without going into detail it shows a nett profit to the dealer of \$1376.

(Abovementioned document tendered without objection and marked Exhibit 5.)

It is the applicants' case that the male applicant never saw that and it indicates, we would suggest, that there is an internal inconsistency at least between what he was told and what the facts might or might not have been.

Then there is in the first respondent's file over the signature --- there is a letter dated 30th October, 1975. It has attached figures which relate to the sales of petrol from this particular site over a period from as early as 1973 to September, 1975. We are in the course of getting the original from the assistant commissioner for business franchise licences by subpoena, but it appears there is a handwritten

statement of what those gallonages are and when it comes we will tender it or the original of it if necessary. The significance that we attach to that is on no basis can be said that the average for the six months prior to the date of Mr. Parker's original application was 26,000 per month and, indeed, for the year prior. For a year or more no figure like 26,000 gallons per month can be averaged on any set of figures. The figure is of the order of 24,000.

MR. MORLING: I object to that. I hand up to you a document showing the precise evidence of the sales of gallons on the site. That has some draft workings and unless my friend can show that that is the company's accurate workings I submit that it has no evidentiary weight. That document cannot be taken as being evidence that the company was putting forward any figures on the handwritten sheet as being official figures. 10

MR. COOMBS: I do not wish to waste time on it at the moment. We are perhaps at the threshold of the difficult problem. My learned friend talks, and I mean no disrespect to him at all, blithely about the computers. I suppose I would be suspected of teaching my grandmother to suck eggs if I said, your Honour, what comes out of the computer does not always reflect what comes out of the tank into the ground. We will be relying on the sales figures. Figures of what are sold day by day as a reflection of what the sales from the site are rather than what a computer tells us what somebody tells it are put into the tanker for delivery to particular sites on particular days. 20

Coming to the particular document in the file the only copy of that given by Caltex to the person it was required to report to is that, so it is a weight question. 30

HIS HONOUR: You do not know whether this will actually be the same as the original?

MR. COOMBS: No we do not but that goes to its weight.

HIS HONOUR: Do you need to tender it at this point of time?

MR. COOMBS: No. I merely want to say that we will show on any set of figures at all that the average gallonage for six months or 12 months, but certainly six months of the period warranted were not 26,000 and were, indeed, something like 2,000 gallons.

HIS HONOUR: You have called on the subpoena for the original. 40

MR. COOMBS: When I say that the subpoena has been delivered but we have not called yet.

HIS HONOUR: Would it not be better to leave this tender until we get the original?

MR. COOMBS: We will prove it is 24,000 gallons or thereabouts. Twenty four thousand gallons, not 26.

HIS HONOUR: That satisfies you, Mr. Morling?

MR. MORLING: Yes.

HIS HONOUR: I will leave it out of the exhibit list.

MR. COOMBS: We have examined the print out documents and without in any sense being precise, we would respectfully suggest that they approximate the figures that we are contending for.

The applicant resigned from the Police Force with the consequent impact on his seniority when he went back to it, as he now has. He attended with his wife the Caltex school. Perhaps it is unimportant in the context but Mr. Parker told him that they would be paid \$25 per day each for the period that they attended the school. In fact, they were paid \$56 each for the whole period, namely, three weeks. Perhaps we ought not worry about that.

10

They moved into the site itself on the last day of October 1975, the 31st, and they opened the site fully for business on the 1st November. The pumps were cut off at 7 o'clock at night on the 31st so the figures for the 1st November include the evening's drawings on that day and, your Honour, let us have at least one cheerful note, the first three days were very good indeed.

20

Your Honour will be told that the B.P. service station which is precisely across the road from this one, just by chance did not trade that weekend, so the optimistic figures that the first two days trading produced were not in the long time fulfilled. Then there was, your Honour will be told never any precise statement made to either of the applicants about hours that have been worked in the past and hours that would be expected in the future, but a conversation to the following effect took place between the applicants and Mr. Parker in response to a question about hours.

30

Mr. Parker said: We can not give you the total number of hours. There is, however, the procedure for a bonus or incentive payment for electricity and so on if you stay open on a late trading basis, the precise fact of which is not clear, but is either after midnight or after 10 p.m. I am not sure.

40

Then there was a discussion about opening time and Mr. Parker said: we have tried opening at 6 o'clock in the morning in order to pick up the B.H.P. workers as they go through. It has not been very successful. Most days we open at 7. At weekends we open at 8. That is in effect what we are doing now and we close at 10 p.m. What about the snack bar? Does

that stay open to 10 p.m.? No way. It is opened 9 a.m. through to about 3 p.m. and we have found night opening not worthwhile. It was suggested that they should give it a try with a personal touch. They may be able to do something with it.

Then the applicant and his wife commenced trading. They had the assistance of a number of casuals. One who had worked there for a deal of time, Steve MacPherson, another who had worked there as a casual, an R.A.A.F. person, Brendan Honn, and various other casuals. Those two are the long term casuals who span the period before the applicant took over and continuing into the period after the applicant took over.

10

The applicant will speak to sheets that he has prepared and I apologise for the fact that these schedules, when they were prepared, not being typed. They are explainable only if they are in three different colours and they are the work of the applicant. It is not possible to put them into typed form. It may be we can do that after your Honour has seen them but in general terms, your Honour, your Honour will be told that the service station was open weekdays 7 a.m. through 9.30 to 10 depending on business. On rare occasions when it was quiet a 9 p.m. closing, particularly Mondays, Tuesdays, Wednesdays. On days around the weekend open till 11 or 12, particularly if there was a good day on and the applicant could see a chance to perhaps make a deal of money because of the advantage of a good day.

20

In general terms, for example, the end of the school holidays was a very good time. It is a dual highway and traffic going north not much use, but the traffic coming back after the school holidays did bring high spots and similarly, weekends. There were motorcycle races, some up north. There would be a great influx of business towards the end of the weekend but in general terms early in the week was quiet, later in the week somewhat better. The casuals always left by 10 o'clock at the latest and apart from weekends there was never an occasion when the service station did not open promptly. Perhaps one or two occasions in the whole time, 7.30., but 7 o'clock was the rule.

30

The weekends were worked and worked thoroughly by the applicant and his wife and the casuals in the whole period. He took off Christmas Day, New Years Day, Good Friday and Easter Sunday and even Easter Sunday the service station was opened by a casual in the late afternoon. He will tell your Honour, and we are, of course, anticipating what we understand will be said by the first respondent at least, there was only one occasion when the service station was not opened at the time in its normal range of hours and that was when the applicant's daughter had to be taken in an emergency situation to a hospital.

40

The applicant will tell your Honour that he, not being a

figure man, was under the impression until about February that the business was going quite well. In November he achieved a gallonage including the lucky weekend and the evening of the 31st October, of 24,000 gallons. December 21,000; January 24,000. Then, your Honour, pink slips as they are called, the daily records, and your Honour sees a heap of the duplicates on the Bar table, which no doubt will be the subject of some admission, but books were kept, wage records were kept, all the ordinary books of account, but by February, by March, it was obvious that the profit figures were not going to be anywhere near the \$20,000 that had been postulated and that gallonage was going to be consistently lower than the 26,000 and in particular it was obvious that the takings from the cafe would in no sense support a profit of \$1,000 a month or anything like it. 10

When your Honour hears the whole of the evidence your Honour will be perhaps not surprised at that because one of the witnesses will be an ex-employee of Caltex who was the manager of this service station during the period between Mr. Feenan's predecessor and Mr. Feenan taking over the site. This is Mr. Gary William Bennett. He will tell your Honour the hours he worked and the casuals worked; what the business was like in general terms. He will tell your Honour that during the time he was there Caltex paid all the wages in respect of the snack bar and he had no need to concern himself with that. That purchases for stock for the snack bar were simply taken out of the till and he did not particularly concern himself with the precise amounts but he will tell your Honour that the takings, that is the gross takings, of this business were between \$40 and \$50 a day, weekdays, and the cafe did not open at the weekends and in his view a good month would gross \$1,000 in the cafe. 20 30

Your Honour will perhaps derive, as the case unfolds, some benefit from the figure, not only the figures of the applicant's case, your Honour, the applicant's case will be that taking everything into account their net income for the whole of the period, that is, the 1st November 1975 until 30th June 1976, their net income was \$3031. That is something of the order of \$1500 each.

Your Honour will have available from the schedules reasonably precise amounts but in general terms, as I said, the male applicant worked long and hard in this business for the munificent return. Perhaps one ought to say one does not take account of the fact there was a residence attached nor that the food that is bought for the cafe was used to supplement the family rations from time to time. Of course, that does not mean you do not have to pay for it. It comes out of purchases side of the business but no doubt there is some advantage in buying in bulk and similarly, if one has to buy one's fuel they buy at the rate one pays Caltex rather than at the rate of retail. Taking all that into account we 40 50



would be suggesting that when your Honour looks at the appropriate awards there is a very great disparity indeed.

Your Honour will have the advantage also, we anticipate, although he is currently doing law exams and it is difficult to actually pin down to an appearance, your Honour will have the advantage of Mr. Steven Gill who will tell your Honour he being the next person to have the service station after Mr. and Mrs. Feenan left it and perhaps I should emphasize to your Honour that it was as early as the end of March when the applicants terminated the arrangement. As your Honour will recall they started to put their books together and see what it all meant by February but it was perfectly clear then that what had been promised, what had been anticipated, was quite impossible of achievement and immediately they gave, perhaps not strictly in accordance with the contract, but they gave three months notice of termination which seemed to them to be appropriate under the terms of the contract and they in fact left at the end of June, precisely three months notice, and there was then an adjustment of stock and other matters which your Honour will hear in some detail from the applicant's accountant. 10 20

Mr. Gill came into the business with an advantage that the applicants did not have. He was the stepson of a man called Barry Watson who succeeded Mr. Parker in the role of area manager or area merchandise officer connected with this particular service station and he will tell your Honour what he was told about gallonage, what he was told about net profit, in the privileged position of having a relative on the inside.

He will also tell your Honour how he went in the business. It is not, your Honour, perhaps precisely comparable or even very comparable because it seems that very shortly, perhaps within two months after Mr. Gill commenced the operation, discounting on a large scale was commenced in the Hexham and Newcastle districts, and the file is full of requests for special allowances and special concessions to be made because of what clearly amounted to a price war in the Hexham and Newcastle districts at this particular time and gallonages, I think, very fluctuational at times were very high. But when one comes to the nitty gritty of the matter Mr. Gill's net profit for the year of operation, the 30th June 1977, your Honour will appreciate that it is perhaps a month not included in that because there was a month's delay between Mr. Feenan's leaving and Mr. Gill taking over, his net profit \$29 in about 11 months. I add that takes into account as a debit drawings of \$100 per week for himself and his wife so that during a period of vigorous discounting and large concessions from the first-named respondent, his net income was of the order of \$10,000. Precisely half of what is postulated for a year earlier when prices were somewhat less. In the year following about \$1,000 a year more. But again nowhere near \$24,000 net profit postulated by the documents tendered to the applicant. 30 40 50

(Luncheon Adjournment.)

MR. COOMBS: In summary, your Honour, the allegation made by the applicants is that there was a representation that it was a good business, that it was financially sound and that it was likely that profits of the order of \$20,000 net were to be made from it. We point your Honour to the fact that the applicants made in eight months something of the order of \$3,000. There was a representation that the average monthly sale was \$26,000. To that we point to two things, your Honour, (1) that in fact Feenan sold something less than 20,000 gallons on his own printout figures and it seems the computer figures still show that there were sales to Feenan by Caltex of no more than 21,000, anyway.

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As we have said to your Honour, there was a dispute about figures prior to Mr. Feenan taking occupation of the service station but on no figure can it be said that an average of \$26,000 was justified. Indeed, if one takes from the computer figures a period of eight months of 1975 before Mr. Feenan occupied the premises, and we have not available the necessary sheets at the moment to take your Honour any further back than that, but the average we calculate is \$22,900. Your Honour, it has been represented that the cigarettes, sweets and drinks that your Honour sees on the sheet will average monthly \$280 net, that the cafe would permit a monthly net profit of \$1,000, a total of \$1,280 and during the period when Mr. Feenan operated the service station, your Honour, the average was \$390 or thereabouts from both cafe and cigarettes, drinks and sweets. There was a representation we would submit, your Honour, that the net profit would be \$2,921 a month and neither the applicants nor their successors nor those operating the station on behalf of the company were ever able to achieve anything like it. Indeed, we would be submitting it was generally something less than \$400 per month. On that basis we would submit that there is at least an opening basis for your Honour that he was a harsh and unfair contractor if ever there was one.

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PAUL LESLIE FEENAN  
Sworn and examined:

MR. COOMBS: Q. Your full name please? A. Paul Leslie Feenan.

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Q. You are a constable of police, presently stationed at -  
A. Newcastle.

Q. You were born in June of 1947? A. Yes.

Q. You are therefore 32 years of age? A. Yes.

Q. I think you presently reside at 29 Murray Road, Cardiff, near Newcastle? A. Yes.

Q. I think you went to school at Hamilton in the Newcastle district? A. I did.

Q. You remained at school until you passed the Intermediate?  
A. Yes.

Q. Did you thereafter take employment at New Lambton?  
A. I did.

Q. In what industry? A. A service station.

Q. In what capacity did you work? A. I worked as a driveway attendant.

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Q. What work did you do as a driveway attendant in that employment? A. I handled the sales of petrol and oils. I was taught to work the lube bay, doing greasing and oil changes, changing tyres and operating the spare parts.

Q. Did you handle that work? A. I did.

Q. Thereafter what did you do? A. I attained an apprenticeship at the B.H.P. steelworks as an apprentice boilermaker.

Q. Did you complete that apprenticeship? A. I did.

Q. Did you become a tradesman? A. Yes.

Q. In 1968 in fact did you join the N.S.W. Police Force?  
A. Yes.

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Q. Did you remain with the N.S.W. Police Force until 1975?  
A. Yes.

Q. Did you resign in order to enter into the licence agreement with Caltex in respect of the Hexham Service Station?  
A. I did.

Q. I think you were married whilst you were a policeman originally to Marie Therese? A. Yes.

Q. You and she have two children? A. Yes.

Q. At the time when you met her she was working at the Masonic Club, or was that after you met her? A. No, that was some time after I met her.

30

Q. Before you were married, is that right? A. Yes.

Q. When she was working at the Masonic Club, she was working as a cook? A. That's right.

Q. Then I think that you remained in the police force up

until the latter part of 1975, by which time you had been transferred to Sydney? A. Yes.

Q. You were living in the Cabramatta district? A. Yes.

Q. Were you working at Liverpool in the Detective Squad there? A. Yes.

Q. Were your children in school at Cabramatta? A. The oldest one.

Q. Both you and your wife lived all your lives in the Newcastle district? A. Yes.

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Q. And you preferred that to the Sydney district? A. I did.

Q. In July of 1975 did you see an advertisement in the Sydney Morning Herald? A. Yes.

(Witness shown advertisement.)

Q. Is that the advertisement that you saw? A. That's it.

Q. Did you see that advertisement? A. In the paper, yes.

Q. Did you discuss it with your wife? A. I did.

Q. Thereafter did you do something? A. Yes I telephoned the number on the advertisement.

Q. Yes, for whom did you ask? A. I asked for Mr. Holland and he wasn't available and I spoke to Gary Parker.

20

Q. Have you seen Mr. Parker here today? A. Yes.

Q. Have you also seen Mr. Watson here today? A. I have, yes.

Q. Did Mr. Parker, in your original conversation, tell you who he was, what his capacity with the company was? A. I don't remember whether he -

Q. Thereafter from time to time when you were in the service station did you deal with Mr. Parker as the company's representative? A. I did.

30

Q. Can you tell us what you said to Mr. Parker and what he said to you, firstly over the telephone? A. I said to Gary, I asked him where the site was at. He said, "At Hexham". I said, "Is it the one near the Oak factory" and he said, "Yes". I was conversant with the site and I said that I was interested. I asked him the type of money that would be involved to take on the business.

Q. Was all this in the conversation on the phone? A. We did run through what I would be up for just briefly.

Q. Just tell us what was said. A. From that I said, "Can I make an arrangement to see you" and we set a date and Marie and I drove up there and seen him.

Q. Was there any conversation on the telephone then about the profit figure referred to in the advertisement? A. I don't know.

Q. Well then, the appointment was made and you have told us that you and your wife went up there to see him? A. Yes. 10

Q. Where did you see him? A. At the service station site.

Q. Do you remember what day of the week it was? A. It may have been a weekend, it may have been a Saturday.

Q. When you first arrived at the service station what did you do there? A. I walked in and I introduced myself to Gary.

Q. Did you then have a look around generally? A. He took us through the site. He said there was a two-bedroom residence attached to it and we walked out and walked through the residence. 20

Q. Can you tell his Honour whether the residence is part of the same building or separate? A. It is attached.

Q. Part of the same building? A. Yes.

Q. From where in the service station part of the building is the access to the residential area? A. Through the snack bar.

Q. After you had looked around the place and through the residence and so on, what happened next? A. I was interested. I said to Gary, "what is the site doing, what is the gallonage of the site? and what could I expect to make". I referred to the ad., I had a copy of the ad. in my pocket. 30

Q. Do you recall where this conversation took place? A. In the snack bar.

Q. Were you standing or sitting? A. No, we were sitting at the tables and chairs.

Q. Can you tell us whether or not the snack bar was open?  
A. No, it was closed.

Q. Was this within a few days of the advertisement? A. Yes.

Q. You were sitting at the table in the snack bar, what

happened next? A. After I had asked him about the figures on the service station he produced a document from his - I think it was a brief case he was carrying.

Q. Was it one or two sheets? A. Two sheets stapled together.

Q. Do you recall whether they were original documents or photocopy documents? A. They were photostats.

Q. At this table who was seated, anybody apart from yourself and Gary? A. Marie, my wife.

Q. What was said next, if anything? A. He said, "This is the document that I have prepared", and he indicated to me on the front of the document the 26,000 gallons a month gallonage that the site was doing and he said that I would require X amount, somewhere in the vicinity of \$20,000 and I said - 10

Q. (Exhibits 2 and 3 shown to witness.) Are those the documents that were shown to you by Mr. Parker? A. Yes.

Q. You have said he told you you would need approximately \$20,000. Did he make any reference to the documents at the time that was said? A. He indicated the amount as \$20,390 on the bottom of the sheet and he said, "this is the capital that you would require to operate the site", and I said, "It seems to be a lot of money." It was a bit of a shock to me and we sat down and piece by piece we went through the items on each one of the items. 20

Q. When you say each one, do you mean from the top down?  
A. From the top down.

Q. Was anything said about the average gallonage shown on the top of the sheet? A. I asked him if the site was doing 26,000 gallons, what the income was, what I would obtain from that and he referred to the second sheet and on the bottom of that sheet, the \$2,121, when he pointed that out to me I said, "That's tremendous! That's a good business, I didn't realise it was that good" and he said, "Yes it is". He said, "It is a good business" and he said, "Where else can you outlay that amount of money for a return of this type?" So then we sat down and we went through the second sheet piece by piece. 30

Q. Can you recall what was said? A. I asked him about the rent of the service station, which he pointed out to me was \$700 a month, because that was a concern to me also because I thought it's going to knock that \$2100 about and he explained to me that, no, the rent was included in fact in the figures before the net profit had been arrived at. So that settled matters a bit. I asked him about the snack bar, why it wasn't opened and he explained that they didn't open on a weekend because the oak factory was just across the road, that it 40

wasn't worthwhile to open the snack bar. He said, "However, the business throughout the week is more than enough to compensate." I asked him what sort of figures the snack bar was doing and he referred to the \$1,000 a month net.

Q. Was anything said about your mechanical ability? A. I brought that up. I said to Gary about the site, I was concerned that I wasn't a mechanic and I said that to him and he assured me that the site would operate quite all right. He said, in fact, that it isn't a mechanical site. He said, "You can see that from the one lube bay". He said, "it's a road-house" and he said, "most of your business will be, in fact, in petrol and in food." 10

Q. Was there anything said about how the site was being managed or operated at the time you were looking at it? A. He did explain to me that the site was under company operation. He said it had been under company operation for some time, but he also pointed out that he said, "as you well know, a site which is under company operation does tend to be run down" and I said, "if it is doing this amount of money on the site, that's \$24,000 a year." He said, "That's right, it's a good business, isn't it?" He said, "You can only go one way from this". He said "you can build on it." 20

Q. Was that the conclusion of the conversation, to the best you can recall it? A. Yes. We had a further conversation at another stage.

Q. Was that on the occasion of the return by yourself and your wife to the site? A. Yes.

Q. Can you recall when that was? A. Off-hand I can't, it may have been a fortnight or some time after we went back for reassurance. 30

Q. And to have another look around? A. Yes.

Q. Was there anything said on that occasion which contradicted anything you had been told before? A. No.

Q. Do you recall in detail any conversation on the second occasion? A. No, I think the conversation that we did have at that time was - oh, I know. This document I had mislaid and while I was there the second time I asked him if I could in fact have a second copy and he still had his brief case and he took out a second copy which he gave to me. 40

Q. Thereafter did you approach the Rural Bank? A. Yes.

Q. For a loan? A. Yes I did.

Q. And did you obtain a loan at the Rural Bank for \$10,000?  
A. Yes.

Q. And did you submit to the Rural Bank the copy documents that had been given to you by ---A. Yes.

Q. Mr. Parker? A. Yes.

(File of documents from Rural Bank containing security documents, some diary notes, etc., tendered.)

(Mr. Morling submitted that what application the client made to finance does not touch on the agreement that is the subject of this dispute.)

MR. COOMBS: Q. Did you make any other arrangements, Mr. Feenan, in order to prepare yourself to take over this service station site? A. Yes, when I had the loan approved and we had made up our mind to take on the business I telephoned Gary Parker and I told him on the phone what we intended to do and he said "You will have to go up and sign a lease arrangement with us" and I said, "Yes". He also explained to me that I would have to attend a Caltex dealership in Sydney. 10

Q. Dealership course? A. Course, in Sydney. At the same time I gave written notice to the Police Department of my intention to resign. 20

Q. Do you recall the date of your resignation? A. It took effect, I think, on the 20th or 22nd October, 1975 and I in fact gave four week's notice.

Q. You had at that time a seniority appropriate to a period from 18th February 1968? A. Yes.

Q. Until 20th or 22nd October, 1975? A. Yes.

Q. When you returned to the police force subsequently, what happened about your seniority? A. Nothing. They sent me back to the Police Academy to start again from Day 1.

Q. So in effect you lost - A. I lost - for the completion of my initial training period they confirmed me permanent after one month so, in fact, they gave me eleven months seniority, which is normal for re-joiners. 30

Q. Out of the seven and a half years seniority, you got eleven months back? A. Yes.

Q. Did you own a home in Waratah at that time? A. Yes.

Q. Did you do anything about that? A. Yes, I put that on the market and I sold that.

Q. Why was that? A. When I transferred to Sydney I was, in fact, starting to rent the premises and when I decided on 40



taking this business I sold it to the person who was renting the house and I used part of that money to pay off my Housing Loan and the rest of it went into this business.

Q. Can you recall what the balance that went into the business was? A. I think it was \$9,900 and something.

Q. Did you sign a lease of the service station on 26th September, 1975? A. Yes.

Q. (Exhibit 4 shown.) Is that the lease you signed? A. Yes.

Q. At the time when you signed that licence agreement, or at any other time, did you ever see any other statement of income or expenditure in respect of this service station site? A. No. 10

Q. Did you ever see any other statement of amount required to take over the business of the sort shown to you previously by Mr. Parker? A. No.

Q. (Exhibit 5 shown.) Before it was shown to you by my learned junior this morning from the company's file, had you ever seen that document? A. No, today is the first time I have seen this.

Q. Where were your furnishings and home items at the time, in Cabramatta? A. Would you say that again please? 20

Q. Where was your furniture and so on, personal belongings?  
A. At a home unit in Cabramatta.

Q. Where did you move those to, Hexham? A. Yes.

Q. When was that? A. About two days before we actually took over the business I rang Gary up, it may have even been three or four days, I just forget now, but I rang Gary Parker and I said, "Can I bring my furniture up there. I am moving on this day, rather than take them to Waratah and move them all again" so it was two or three days before. 30

Q. Did you move your furniture and personal belongings yourself? A. No, I had a furniture removalist.

Q. Who was that? A. John Kent, Waratah Removalists.

Q. Are you able to recall now what the cost of the move was?  
A. I think it was in the vicinity of \$280.

Q. When you left the premises where did you go? A. I went to my mother and father's at Waratah.

MR. COOMBS: Q. Were there moving expenses on that occasion?

A. No, I moved my furniture straight to Hexham, and I moved my wife and family to Waratah.

Q. When you ultimately left the service station where did you go? A. To Waratah.

Q. Were there moving expenses on that occasion? A. Yes.

Q. To whom were they paid? A. It may have been the same removal firm. I have a record of it.

Q. Then on 31st October 1975 did you and your wife proceed to Hexham? A. Yes.

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Q. Did you have the vestiges of your personal belongings and your children with you? A. Yes.

Q. Did you go to the service station? A. Yes.

Q. Was Mr. Parker there? A. Yes.

Q. Was there a changeover at 7 o'clock that night? A. Yes.

Q. Was the till rung off and a new float created? A. Yes.

Q. Did you then commence to trade on that night? A. Yes.

Q. Did you include that evening's tradings on the next day? A. Yes.

Q. Was that with Mr. Parker's blessing and encouragement? A. Yes.

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Q. Did you happen to notice whether the BP service station was open that night? A. It was closed the whole weekend.

Q. Previously you have told us that Mr. Parker had informed you that it was necessary to go to the Caltex dealers' school? A. Yes.

Q. Was that conversation related only to you or to you and your wife? A. It was related to me but she asked if she could, in fact, attend the school and he said, "Yes". It was a paid training school of three weeks' duration, I think, and \$25 a day and I said, "If we both go do we both get the \$25 a day?" and he said, "Yes".

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Q. For how long did you attend the school? A. I think it was three weeks.

Q. You attended each day for the whole of the duration of the school? A. Yes.

Q. Were you subsequently paid for that period? A. Yes, we received a cheque from Caltex for the amount.

Q. How much for? A. I think it was \$56.

Q. Did you receive one cheque each? A. Yes.

Q. Was that the only remuneration you ever received for the period of the school? A. Yes.

Q. I think you have the cheque slip? A. Yes.

Q. During the course what aspects of service station management were covered? A. It was mainly on conducting the site, preparation of pink sheets, the presentation of the site, selling Caltex products. 10

Q. In particular was the emphasis placed on the paperwork? A. Yes.

Q. Was the particular paperwork about which there was emphasis what you call the pink slips? A. Yes.

Q. Are they the large sheets on which you record daily your sales of various items of the Caltex products? A. Yes.

Q. They have been produced and would you look at this volume. Are they what are called the pink slips in respect of your period of occupation of the Hexham service station? A. Yes. 20

Q. Did you keep these slips as best as you could in accordance with the instructions you were given by Caltex? A. Yes.

Q. You believe them to be accurate? A. Yes.

Q. From time to time have you recorded the cash payments made by you to staff? A. Yes.

Q. Were they payments made by you but not recorded anywhere else? A. Yes.

Q. Were they payments that were of a tax advantage cashwise to your casual employees? A. Yes. 30

(Abovementioned volume of papers tendered without objection but not marked.)

Q. Before you took over the site was there any discussion about the hours during which the service station either had operated or would operate during your tenure of it? A. Gary said, "We trade from around 7 a.m. until 10 p.m." He said, "I have been opening earlier than 6 a.m. and trying to pick up

the BHP trade on the way and that, in fact, might be something you can have a look at".

Q. Did you try that? A. No.

Q. He said, "We have tried opening at 6 o'clock to try to get the BHP traffic", or words to that effect? A. At some stage he may have said he did open at 6 but he put to me by opening at 6 I could, in fact, claim the BHP traffic on the way to work.

Q. Were you ever given any sheet of the statement of hours that had been worked or to be worked in the future? A. No. 10

Q. Have you ever seen that document before it was shown to you this morning? A. No.

(Abovementioned document extracted from the first respondent's site file annexed to a document headed "Caltex Dealer Application Form" and between that document and the licensee appointment document dated 13th October 1975 and tendered without objection, being marked Exhibit 6.)

Q. You told us it was opening at 7 a.m. and closing at 10 p.m. Was that on weekdays or weekends? A. I think the late finish was at weekends. I think weekdays he said they were closing at about 9. 20

Q. What was the opening time at weekends? A. 8 a.m.

Q. Was there any conversation about the hours of the snack bar? A. I asked him what the hours were and he said, "It was open from around about 10 a.m. to 3 p.m.", and he said, "It did not open at night time; we found the night time trading is not worthwhile. However, again that is something you might be able to have a look at".

Q. Thereafter did you open the service station on Saturday mornings? A. Yes. 30

Q. You worked in it with the assistance of casual and permanent staff? A. Yes.

Q. What was the permanent staff position? A. One permanent who used to work Monday to Friday from 7.30 a.m., to 4 p.m. In fact, he worked until 5 p.m. The extra hour's overtime each day I paid him for it in cash in his hand for the hour's overtime.

Q. What casual staff did you have? A. I kept on the two casuals that Caltex had; John McEniery and Brendan Hong. 40

Q. What hours in general terms did Brendan Hong work?

A. Only a couple of days a week to start off with; I think it was mainly Wednesday and Thursday nights and he would come on when he knocked off at the R.A.A.F. base and work a minimum of three hours.

Q. When you say "a minimum of three hours" if it were busy?

A. If it was busy he would work longer.

Q. What about Mr. McEniery? A. He worked for a couple of weeks and gave the casual work away for some time and he came back and I think I was working him two nights a week.

10

Q. What about you, yourself? A. I would open the site at 7 a.m. and I would work until closing time and if there were no casuals working I would work right through until I closed.

Q. I think you prepared a schedule for his Honour's assistance? A. Yes.

Q. Except where there is a casual night-shift shown on your schedule you worked until closing time? A. Yes.

Q. The other people shown in the schedule are shown by McPherson first which is shown Monday to Friday 7.30 to 5 p.m.; Hong's hours are shown in black ink; and McEniery's hours in red ink? A. Yes.

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Q. They are prepared from the wage records of the casuals? A. Yes.

Q. Have you also prepared a schedule with your wife in respect of the casual staff employed in the snack bar? A. Yes.

Q. Was that prepared from the time and wages book? A. Yes.

Q. From your own observations of the hours that your wife spent working in the snack bar? A. Yes.

Q. Were there occasions when the snack bar was closed, and when a regular customer would appear and be interested in a meal? A. In the daytime?

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Q. Yes? A. The snack bar used to close at 3 p.m. and Marie would then re-open at 5 until through to 8.30; that was Monday to Friday. Sometimes it would go to 9 p.m., if it was busy but, in fact, it was not very often busy.

Q. After 20th March 1976 did you open the snack bar at the weekends? A. No.

Q. From time to time thereafter did people who had been customers before appear and ask for meals? A. No.

40

Q. Was there any benefit money-wise in staying open at weekends in the snack bar? A. No.

Q. Again on the schedule you have prepared is Lorraine Stewart's hours which are shown in red? A. Yes.

Q. Diana Huntriss' in green? A. Yes.

Q. Dorothy Dunn's in black? A. Yes.

Q. Have you summarised your wife's hours on the right-hand side? A. Yes.

(Two schedule sheets and time and wages record mentioned above tendered without objection and not marked.) 10

WITNESS: In the wage book there are one or two other girls who, in fact, came and worked only a couple of shifts and they finished up and they do not appear on those two schedules.

MR. COOMBS: Q. Were there occasions when business was good and when you would stay on after the casuals had gone home?  
A. Yes.

Q. Were there any particular circumstances that provoked that?  
A. I would work on myself and in the holiday months in the warm weather I would find that the till I had I could keep track of the sales I was doing and when getting up around the thousand gallons I said I would stay on, do my thousand gallons, and some nights it would be 11.30 and some nights 12 o'clock. 20

Q. Did you apply yourself diligently to this business?  
A. I lost two stone in weight.

Q. Did you deal with your customers in as friendly a way as you could? A. Yes, I believe so.

Q. You did your best to make a success of it? A. Yes, in fact, I gave away a good job just to take it on.

Q. You lost two stone while you were running the business? 30  
A. Yes.

Q. There has been a suggestion made that there were occasions when you did not open on a weekday until 9 o'clock in the morning? A. Never.

Q. What was the latest you opened on a weekday? A. Twenty past 7.

Q. Around about 7 o'clock on a routine basis? A. 7 o'clock was the norm. Steve started at 7.30 and he never had a key to open the place.

Q. When you say 7.20 was the latest was that an isolated event or did it happen often? A. It happened once or twice when I slept in, and I had to be woken up.

Q. What about weekends? There has been a suggestion made again that you worked only sometimes half a day at the weekends. What do you say to that? A. There may have been one or two Sundays that I worked half a day.

Q. In what circumstances? A. At one stage I think it was Easter Sunday I worked half a day. I had the day before off and the Sunday came around and by this stage I had nearly worn myself out. I decided not to open and I asked Brendan Hong, "Would you work for me". 10

Q. So there was a short period when you went to get him that the station was closed? A. Yes.

Q. Was there any other occasion when you did not open?  
A. It was a Sunday afternoon and Marie came out and young Sharon, my youngest daughter was in pain. Marie being unable to drive, I closed the site about ten to 4 in the afternoon and I took her to the Mater Hospital at Waratah. We were there for about two hours and when I came back Brendan was working the site. It was about an hour and ten minutes. 20

Q. Apart from that was there any other occasion when the site was not open and functioning? A. I closed on Christmas Day, New Year's Day, Good Friday, and when we were short of petrol.

Q. Easter Sunday? A. Yes, it shows on the pink sheets when I was closed but the site was working from 2 p.m. that afternoon. Those figures then follow up to the Monday's figures.

Q. Did you continue from the beginning of November through until February operating in the way you have described? 30  
A. Yes.

Q. What was your belief about how business was going at that stage? A. I think it was going beaut.

Q. I think in November you had 24,000-odd gallons? A. Yes, about that.

Q. December 21,000 gallons and January 24,000 gallons?  
A. Yes, somewhere around that.

Q. Thereafter did you notice anything about your gallonage?  
A. I noticed that it started to fall away a little bit, but I enquired with the experienced casual, with Brendan, and he said, "Generally speaking expect your holiday time is your best time of the year and, as it starts to fade away into the 40

P.L. Feenan, x

cooler months, you have a slack period". So I wondered what my slack months would be like.

Q. Did you ask your accountant, Mr. Matthews to have a careful examination? A. Yes.

Q. Did you give him all your pink slips, cash payments books, wages books and receipt books? A. Yes.

Q. Were all those kept in accordance with your instructions?  
A. Yes.

(Cash payments and receipt books tendered without objection but not marked.) 10

Q. Did you have a long talk to Mr. Matthews? A. Yes.

Q. Thereafter did you speak in early March 1976 to Mr. Watson?  
A. Yes.

(Applicant stood down.)

(Further hearing adjourned to 10 a.m. Tuesday, 26th June, 1979.)



INDUSTRIAL COMMISSION OF NEW SOUTH WALES

CORAM: MACKEN, J.

TUESDAY, 26TH JUNE, 1979

No. 200 of 1979

PAUL LESLIE FEENAN & ANOR. v. CALTEX OIL (AUSTRALIA) PTY. LIMITED  
& ANOR.

Application for Order declaring contract void.

(PART HEARD)

MR. COOMBS, Q.C., appeared for the Applicants with MR. MATER.  
MR. MORLING, Q.C., appeared for the Respondents with  
MR. PETERSON.

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(Francis Child Hughes appeared in answer to subpoena addressed to The Assistant Commissioner of Business Franchise Licences (Petroleum) and produced subpoena together with documents set out therein.)

MR. HUGHES: I am required to get permission to produce the documents.

MR. COOMBS: From whom do you require that permission?

MR. HUGHES: From the people who supplied the information to us.

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MR. COOMBS: In this case, that means Caltex.

MR. HUGHES: And a Mr. Feenan.

MR. COOMBS: There is no objection taken by Mr. Feenan. Perhaps Mr. Morling would indicate whether he has any objection.

(Counsel granted access to documents produced.)

MR. MORLING: It is clear I could not object to this on the ground of privilege. If my friend indicates the document he wants to tender, I will indicate my objection or otherwise to the particular document.

One can get this evidence out of context. My friend's case is that he was told certain things on behalf of Caltex, and it is also that his trading figures did not support the figures he was told. That is in issue. What anybody else was told, we submit, could not be relevant to that question.

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There will be most precise evidence before your Honour, month by month, of the sales of all products. So one wonders what the utility will be of investigation into matters beyond that, so far as this application is concerned.

MR. COOMBS: Of course, one of the bases upon which we put the case is that we were told certain things about gallonage, and when we did it we did not achieve the results that the telling might have led us to anticipate. There was certainly a letter from Caltex which makes assertions about gallonage covering the same period during which assertions were made to us.

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I wish to tender the letter that I yesterday tendered a copy of.

HIS HONOUR: Show it to Mr. Morling (shown).

MR. COOMBS: We, like Mr. Morling, have not had an opportunity to examine the rest of the file and we would like that opportunity. If this letter can be marked, we can proceed and look at it during the morning.

MR. MORLING: It is not easy to take in a mass of figures. I am sure my friend can recall the witness and I will look at it in the short adjournment.

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APPLICANT

Recalled; on former oath:  
Examination continued:

MR. COOMBS: Q. We got to the point yesterday where you had, from your own figures and from any particular discussions with your accountant, formed some views about your situation. I think this was in or around February, 1976? A. Yes.

Q. Thereafter, did you have a conversation with anybody representing Caltex about your situation? A. Yes.

Q. With whom? A. Mr. Barry Watson.

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Q. Mr. Watson was the successor of Gary Parker? A. Yes.

Q. Can you tell his Honour where the conversation took place?  
A. It was in the office of the service station one evening.

Q. What was the date? A. Some time in March, I believe.

Q. Can you tell his Honour what you said to him and what he said to you? A. I explained to him I was not happy with the figures. I said, "I can't see where this site is doing 26,000 gallons a month". He said, "Why?" I said, "I just don't believe it is doing it. I am not doing it. I have had good months of the year, and I am still not getting anywhere near it." He said, "Who told you it would do 26,000 gallons a month?" I said, "Gary Parker. Gary told me it was a

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\$24,000 a year business." I don't think he sort of believed me, so I said, "Look, hang on a minute, and I will go and get this document." So I brought out the document ---

Q. When you say "the document", do you mean the documents which are Exhibits 2 and 3? A. Yes. And Barry said, "Give us a look." I showed it to him, and I said, "I reckon that those figures there are John Bubb's figures". He said, "What makes you think that?" I said, "Well, I don't think the site is doing it. I believe they are John Bubb's figures. The site was under company operation for almost 12 months before I came here, and I reckon that they have been prepared off Bubb's figures before". And he picked the document up and looked at it and said, "Aren't they John Bubb's figures? What if they are?" I said "Because they have been presented to me as being the figures that the site is doing now." I indicated the date to him on the bottom - I think it was 13th May - when the document was prepared by Gary Parker. And Watson seemed to me to be surprised. 10

Q. Did he say anything? A. He just picked it up and read it, and from there on I went out and served some customers on the driveway --- 20

Q. When you pointed out the date, did he say anything about the date? A. He just said, "Well, if Gary has done that, possibly Gary has made a mistake".

Q. Was there any conversation about the snack bar? A. In the discussion with him about the snack bar, I said, "Caltex are supposed to be taking \$1,000 a month gross in the snack bar." I am sorry - "\$1,000 a month nett in the snack bar." I said, "Look, they have got to be grossing in the vicinity of \$4,000 a month to do anywhere near that. Marie is working her heart out in there. She has built it up; I think she has almost doubled the takings, and yet there is still no way in the world that you can nett \$1,000 a month out of that snack bar. 30

Q. Did Watson make any reply to that? A. He said, "If Gary has done that, he has made a mistake". Barry Watson seemed to give me the impression that he also believed they were figures from John Bubb's site.

Q. What happened in the conversation with Watson at this point? A. I left him them; I was serving customers. I was there on my own, and I was serving customers. I went in and out a couple of times. Whilst I was out on the driveway, Barry walked out and waved to me and away he went in his car. When I came back into the service station site, the document I had shown Barry was missing. 40

Q. That is the photocopy documents which are Exhibits 2 and 3? A. It was not those; it was copies of those.

Q. I think thereafter you obtained other copies from your bank? A. Yes, I rang the bank.

Q. Are you going to tell us more about the conversation with Mr. Watson? A. Yes. When I discussed the figures with him, he asked me the gallons I was getting, and I told him. He said, "Well, perhaps if you trade longer hours ---" (Objected to.)

Q. Did you show him something or tell him something? A. I showed him my gallons I was doing from the previous three months, from the pink sheets. I said, "How are you going to get 26,000 gallons a month?" He said, "Perhaps if you extended your trading hours; perhaps if you traded 24 hours". I said, "Well, I am going to reach a saturation point where it is not going to be worth my while to trade longer hours. Any extra money I do make during the night to increase my gallonage, I am only going to lose through paying an increase in wages." 10

MR. COOMBS: My friend informs me there is no objection to the letter, so I will tender it.

(Letter from Caltex concerning gallonage tendered without objection and marked Exhibit 7.) 20

MR. COOMBS: Q. You told us Mr. Watson drove off in his car. Thereafter, did you have a conversation with Mr. Bubb, after the conversation with Mr. Watson? A. I had had conversations with Mr. Bubb before and after.

Q. In the course of those conversations, had Mr. Bubb showed you certain things? A. Yes.

Q. Did you see Mr. Watson again? A. Yes, he came in from time to time.

Q. On any occasion, did he have a document with him? A. He came in one afternoon with a diary. 30

Q. Had you seen that diary before? A. It was Gary Parker's diary.

Q. Can you describe it? A. It was a business diary. As I recall, it was possibly about six to seven inches long, four inches wide; it was fairly thin; it had a dark hard cover; it may have been navy blue or black.

MR. MORLING: If my friend calls for it, I will produce any documents in our possession without a subpoena.

MR. COOMBS: I call for that notebook. We have been calling for it for some days. 40

MR. MORLING: Mr. Parker, as a respondent, is in Court, of course.

As my friend has indicated, he was replaced by Mr. Watson, who stands in the shoes of Mr. Parker for that period of time whilst Mr. Watson was the relevant man. I am a little handicapped in having Mr. Watson outside the Court. I will simply have to take instructions from him outside the Court. I wonder whether my friend would have any objection to Mr. Watson being in Court for any part of the evidence touching Mr. Watson's part of the matter. Otherwise, I will have to wait for the transcript and take him through it.

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MR. COOMBS: It is a matter for my friend. I do not object to it.

MR. MORLING: There is no answer to the call. We know of no document which would answer the description. There are documents of the kind which I am holding in my hand, which are of the nature of diaries, but none relating to this particular service station (notebook not produced).

MR. COOMBS: Q. You had seen Parker with the notebook and you later saw Watson with it, is that correct? A. Yes.

Q. Did something happen to it after you had spoken to Watson on this later occasion? A. Yes, it was left at the service station site.

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Q. Did you have occasion to look at it? A. Yes.

Q. Can you tell his Honour what it contained? A. It had Gary's name on it. Inside it, there were headings of service station locations, which I assume were service station locations managed by Gary Parker. One page, which was headed "Hexham", had some gallonage figures written beside months; January, February, March, etc.

Q. Can you, from your recollection, tell his Honour what period they covered? A. It was January through to October, 1975.

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Q. Would you look at the documents contained in the folder with the name Paul Feenan on it (shown). Can you tell me what those documents are? A. This is my accountant Peter Matthews' file on my business at Hexham.

Q. Does it contain inter alia an income tax return? A. Yes.

Q. Within the income tax return is there a balance sheet for the year ended 30th June, 1976? A. Yes.

Q. Is there also a statement of income and expenditure from 1st November, 1975 to 30th June, 1976? A. Yes.

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Q. Did you work with your accountant in the compilation of that document? A. I did.

Q. To the best of your knowledge, does that document and your income tax return display accurately what your books show?

A. Yes.

Q. Did you honestly prepare your books? A. I did.

Q. In addition to the income you derived as shown in your profit and loss account, you told his Honour that you had the use of a residence? A. Yes.

Q. I think that was a unit attached to the service station?  
A. It was a two-bedroomed unit attached to the service station. 10

Q. Did it have a lounge room as well? A. There were two bedrooms, a bathroom and lounge room.

Q. Are you able to tell his Honour, from your own experience and inquiries, what the cost of renting such a unit in the Hexham district would be at the relevant time? A. It was in a fair bit of disrepair. Then, I suppose \$30 to \$35 a week.

Q. I think you told us you took your own furniture and so on?  
A. Yes.

Q. In addition to living in the residence, was there any advantage to you qua, for example, fuel for your own motor car?  
A. I used to buy my fuel from Caltex, or I would use that fuel and I would book it out against the business. 20

Q. Did you book it out at retail or at wholesale? A. At wholesale.

Q. The cafe business is for the purposes of food? A. Yes.

Q. Did you purchase your own food? A. We used to buy our own meat and we used to buy some vegetables.

Q. Do you mean, separately from the cafe purchases or with the cafe purchases? A. We used to buy meat and pumpkin and that sort of thing separately. 30

Q. But bread and turnover items you would buy together with -  
A. Yes.

Q. So there was some advantage to you in buying wholesale through the cafe? A. Yes.

Q. Could you give his Honour an estimate of what that advantage might be? A. It wasn't very much - \$10 a week; it would not be much more.

Q. Were there any other advantages, to your mind, in working in the business? A. No.

Q. You told his Honour yesterday that you prepared schedules in respect of hours worked by you and your casuals and also by your wife and the casuals involved in the snack bar? A. Yes.

(Above schedule tendered without objection and marked Exhibit 8.)

Q. (Witness shown Exhibit 8.) Working from that schedule, have you worked out an average of the number of hours worked per week by you in the service station? A. Yes. 10

Q. What was that average? A. Between 85, 86 and 90 hours a week.

Q. When you worked out that average, have you erred one way or the other, do you think? A. I think, any way at all, I have been conservative on my part.

Q. That is, conservative in favour of Caltex? A. Yes.

Q. In order to check your averaging, have you made a number of spot checks in particular weeks from the schedule prepared from the books? A. I have. 20

Q. Did you spot check, for example, the second week? A. Yes.

Q. (Witness shown slip.) How many hours did you work that week? A. The second week I worked 96½ hours; I did the eleventh week which adds up to 92½ hours; the eighteenth week, which adds up to 93½ hours; the thirty-first week, which adds up to 94½ hours.

Q. Did you, similarly, in respect of the hours worked by your wife Marie, work out an average over the whole period? A. Yes.

Q. What was that average? A. About 75 hours.

Q. Have you made any spot checks in respect of those hours, or did you not have time to do that? A. I have not had time to complete it. 30

Q. I show you a slip. Can you tell us from that document what spot checks you have made? A. I have done the second week and the eleventh week. The second week, 64½ hours; the 11th week, 85 hours.

(Above two slips tendered without objection and marked part of Exhibit 8.)

Q. Looking at the weeks as individual weeks, is it possible for you to give estimates of the number of hours you worked on week days and the number of hours you worked on weekends and the number of hours you worked in addition to the eight hours a day? Take a week, starting on the Monday and going through to the following Sunday, and tell his Honour on an average basis what hours you would work after five o'clock and before nine o'clock on the Monday, and so on? A. Mondays, early in the piece, I was working 7 a.m. to 10 p.m.

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Q. Two hours before nine and five hours after five? A. That is right.

Q. Late in the period, did your evening hours change? A. Yes, I was starting at 8.30.

Q. Why? A. It was winter time; it was cold and frosty and miserable, and there was no business.

Q. Take an ordinary Tuesday. Was the situation the same? A. Mondays, Tuesdays and Wednesdays I was working from 7 a.m. to 8.30. Now and again, the casuals may have worked later. In fact, there were a couple of Monday nights when they did in fact go until 9 p.m. But on a whole, Mondays, Tuesdays and Wednesdays the site closed at 8.30.

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Q. You would stop at what time, if you had a casual there? A. The casuals were R.A.A.F. fellows. 5.30 was the normal starting time; they would start when they finished.

Q. When they came, what would you do? A. I just told them what I expected for the night. I might stay there five or ten minutes and then I would leave the site.

Q. With casuals, you would leave before it is underway? A. Yes.

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Q. In respect of Thursday? A. Thursdays were quite good. We used to trade fairly late of a Thursday - around 9.30 on an average, or 10 p.m. Thursday night was speedway night at Jerilderie Park, and they used to come back that way.

Q. So you would pick up the trade as they came back? A. Yes.

Q. Did you yourself work Thursday nights? A. I would only work Thursday nights when there was no casual.

Q. Similarly, Friday? A. Early in the piece, I was only using one casual Fridays and Saturdays. In fact, I was trying to do as much work on the site as I could without using the casuals. Brendan Hong was the only casual I used for a time.

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From around about 28th January, Brendon was doing nearly all Fridays and Saturdays and I was doing the rest of the week, Mondays through to the weekend. I started, towards the end, giving my second casual a few shifts then.

Q. (Approached.) (Witness shown pink slips.) Would you take a white pink slip at random, and explain to his Honour what figures are recorded and where and select, for your sample, one that is a month's end? A. It is a daily sale summary. At the end of the day, I would take the readings off the meters and the pumps. That is the super pump (indicated). I would take the reading from the standard pump and the diesel pump. From that, I would work out the sales of the petrol; that was the cost of the super; the cost of the standard and the cost of the diesel (indicated). By multiplying that out, I could then find out my total cash sales. My credit sales here (indicated), these credit sales I used to enter on a file, which I no longer have. So you end up at the end of the day with your total cash sales plus your total credit sales here (indicated).

Q. Where there were credit sales, was there a special arrangement made between yourself and Caltex about such sales?  
A. Yes.

Q. With whom did you make it? A. I made it with Gary Parker when I first ---

Q. What was the arrangement? A. There was a discount which had been negotiated with certain accounts; the major one being a firm called Carrington Slipways, and the discount then I think was five cents a gallon.

Q. You gave a discount to the purchaser, and you and Caltex between you shared the discount that got the turnover of account customers? A. Yes.

Q. Did you record on the exercise book paper I show you the amounts of credit sales for particular clients and work out on that the discount, and did you claim on Caltex for discount rebates from time to time paid? A. Yes.

(Exercise book paper tendered without objection and marked Exhibit 9.)

Q. When your concessions or rebate cheques were received from Caltex, did you bank them in the ordinary way amongst your takings? A. Yes.

Q. Are they therefore included in the sales summary or designation in your profit and loss account? A. Yes.

Q. I think you had got to the point --- A. This one keeps

a record of your sales (indicated). This is your accumulative totals to the end of the month. This one was a record of the purchases together with the dips of the tanks (indicated).

Q. The monthly summaries are at the top of the page?

A. Yes.

Q. The meter sales are at the left hand bottom of the page, for standard petrol and super petrol? A. Yes.

Q. The distillates are to the right? A. Yes.

Q. And the purchases and dip stick checks are in the centre of the page? A. Yes. 10

Q. What is on the right hand side? A. A banking record.

MR. MORLING: It might be noted this is the page for 31st March 1976.

MR. COOMBS: Q. I think you previously told us that from time to time you paid cash to your casual employees to work an extra hour, or something of the sort, and that those hours are not recorded in your salaries and wages book? A. That is correct.

Q. But you recorded on these pink slips from time to time? 20  
A. Yes.

Q. Would you show his Honour two or three of those, so that he can find and check them and Mr. Morling can find and check them if he wishes? A. That is Brendon, 8.30 p.m., and he is paid there (indicated). That is Brendon, paid 5 p.m. to 8 p.m. (indicated).

(Above file of pink slips tendered without objection and marked Exhibit 10.)

Q. Yesterday you told us you had a docket for removal expenses? 30  
A. Yes.

Q. Can you tell us where that document is at the moment?  
A. It would be recorded in my green cash book.

Q. (Witness shown green cash book.) Can you tell us what the removal expenses were? A. \$45; that was from Hexham to Waratah.

Q. From Cabramatta to Hexham? A. I have no record, because I did not have any of these documents then.

Q. You do not have a receipt? A. No.

Q. But you did tell us yesterday the name of the removalist?

A. That was John Kent.

Q. I think you said the figure was \$268, is that right?

A. I think I said \$288.

MR. COOMBS: Yesterday we tendered the green cash book and my friend wanted to look at it. I now renew the tender, only as the base document for the schedules and the income tax return.

(Green cash book marked Exhibit 11.)

(Wage record book tendered without objection and marked Exhibit 12:) 10

MR. COOMBS: There is a file from the Rural Bank, the necessity for the tender of which is probably marginal. Your Honour will recall that the evidence was that the witness applied Exhibits 2 and 3 to his bank as part of the evidentiary basis for his obtaining a loan. The file shows that the bank received them, and that they got them back to him later on. That is the only purpose for the tender. I don't know if my friend wishes me to press the tender.

MR. MORLING: I do not press the tender.

(Tender of files from the Rural Bank not pressed.) 20

HIS HONOUR: Q. What did you mean by "gallons" for your station? When you were told that the station was doing 26,000 gallons --- A. That was the sales from the site per month.

Q. Sales from the site, or deliveries to the site? A. Sales from the site. That is what I was told.

Q. To achieve those sales from the site, what would the deliveries to the site have to be? A. I should imagine, somewhere in the vicinity of the same ----

Q. Is there no loss from evaporation and spillages? A. At the Caltex school we went to, they did enhance on us the idea of dipping the tanks regularly. They said the tanks don't leak and there is no evaporation. "However, if you keep dipping your tanks regularly and there is a leak, then we can find it quickly and we can do something about it and there will be no loss against you". But on the whole, they maintained the system is very fool-proof. 30

Q. There is no allowance in the price allowed for evaporation? A. No.

Q. So if you buy 26,000 gallons, you would expect to sell 26,000 gallons? A. Yes. 40

Q. There would have to be some loss of fuel, surely?

A. I believe there is.

Q. Just when you spill it, you get petrol all over your car half the time you take it to the station. Do you say that would be marginal in the overall? A. They don't make any allowances for it; you buy 26,000 gallons and that is what you are expected to sell. If you get a tanker load of petrol delivered to the site, you pay for exactly what is on the tanker, and they maintain that they are measured to the last ounce.

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Q. And you would then expect to sell about the same amount?

A. Exactly the same.

MR. COOMBS: Q. Was there particular emphasis at the school you went to placed on the necessity to watch the tanker driver dipping the tank when the tanker arrives? A. Yes, they told us to watch the tanker and watch the tanker drivers when the tank arrives; they told us to get up on top of the tanker and dip the tank with him, and when he loads it to make sure that the tank is empty, because there are ripples.

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Q. From time to time, did you do that with your tanker operators? A. I might have done it once, and I got a very very poor reception.

Q. From your knowledge of the trade, is one of the traps that the tankers do not drop the full load (no audible answer).

Q. I think also from time to time tanker drivers go past and want to sell it to you a little bit cheaper? A. On one occasion, it did happen to me.

HIS HONOUR: There is no issue in these proceedings concerning what the gallonage was ----

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MR. COOMBS: The difficulty with computer findings, on a month-by-month basis, is that deliveries happen at different times in the month ---

MR. MORLING: The document tendered by my friend shows that for January 1974 to December 1974 the Caltex computer delivery records show a total, on average per month, of 26,640. There will always be a difference between sales and deliveries, because they do not coincide.

(Short adjournment.)

MR. COOMBS: Just before we go on, as I take it now there is no dispute, my learned friend having discussed the matter of the division of the amounts of standard and super fuel shown in the letter for the assistance of the franchise, the figure

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that my learned junior put through me was \$25,428 and that is correct. That is the annual figure shown. That figure, it is also agreed, does not include any figure for distillate. I would merely remind your Honour that exhibits 2 and 3 talk about gasoline standard and super, nothing else, and there are some other figures which will appear later.

CROSS-EXAMINATION

MR. MORLING: Q. Mr. Feenan, you had been in the police force for some years prior to 1975? A. Yes.

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Q. That was a secure job? A. Yes.

Q. And you were interested in going into business with your wife? A. Yes.

MR. COOMBS: I did omit to tender and perhaps it is fair to my friend to tender it now, the income tax return together with attachments. Your Honour will recall I was replacing the original profit and loss accounts. I will tender that now.

HIS HONOUR: We will mark it as Exhibit 13.

MR. MORLING: Q. You knew from your past experience as a drive-way attendant and from your general knowledge that running a service station on a highway would involve very long hours of work? A. Yes.

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Q. And of course the advertisement which had taken your eye spoke about an opportunity existing for a business man and his family, did it not? A. Yes.

Q. And you understood that this was a two-person family operation which you were looking at at Hexham before you decided to take up a licence? A. Yes.

Q. And of course you were intending to make it a long-term business venture, you were not interested in just going in and out in a few months, were you? A. That is right.

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Q. And your concern was that you should find out the sort of information about the business which you would need to have, together with an idea of how you and your wife would fare if you took it on.

Q. And the advertisement which you saw suggested that a good operator could expect to earn in excess of \$20,000 a year before tax, right? A. Yes.

Q. So that when you initially made enquiries about the station you were concerned to see how that \$20,000 figure might be justified? A. Yes.

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Q. It was clear to you for instance that the \$20,000 figure was being suggested as being a figure which a good operator and his wife could make from the business? A. Yes, I think that was the wording in the ad.

Q. Now, when you saw Mr. Parker he told you that the company did not have an operator running the business, didn't he?  
A. Yes.

Q. And from your past knowledge of service stations and from your general knowledge you know that it is the almost invariable practice of all oil companies to have lessees or licencees operating their service stations? A. Yes. 10

Q. The reasons you understood it being that they could not make money out of running service stations themselves?  
A. I don't know about that.

Q. Well, that is what you assumed, isn't it? A. No, I don't assume that at all.

Q. Well, you assume, I suppose, that oil companies are in the business to make money? A. Yes.

Q. And you told his Honour a moment ago that it was your understanding that almost invariably they do not run their service stations themselves? A. I do believe that there are a lot of individuals running their service stations, probably more than company-run sites, yes. 20

Q. But what was being suggested to you was that a good family unit could make \$20,000 net before tax from this site? A. That was suggested in the ad.

Q. Mr. Parker told you, didn't he, that the company have only been in occupation of the site in the sense of running it for a couple of months before May 1975? A. I don't remember the exact time. 30

Q. Well, he told you that Bubb had been the operator?  
A. Yes.

Q. And that Bubb had left? A. Yes.

Q. And he told you when Bubb left? A. I don't remember the exact time he left.

Q. But he gave you to understand that Bubb had left earlier in the year? A. Yes.

Q. Indeed, he invited you I think to speak to Mr. Bubb?  
A. He might have, I don't know. 40

Q. Did you in fact speak to Mr. Bubb? A. Yes.

Q. Now I suppose you regarded that as a prudent thing to do if you were taking the big step of leaving the police force and going into business? A. Yes.

Q. Now you regard the document which is now Exhibit 2 which was the service station income and expense statement as being a document which you should have regard to? A. I am sorry, would you say that again please?

Q. When Mr. Parker showed you Exhibit 2 you looked at it very carefully? A. Yes. 10

Q. Indeed, you got at a later point of time a second copy?  
A. I am sorry?

Q. Now I understood you to say this morning that you got a second copy? A. Yes.

Q. And as a police officer you were pretty familiar with reading and understanding forms? A. Yes.

Q. And when you saw that document you saw it was dated 8th May, 1975, didn't you? A. I can't remember the date. I think it was 13th May. 20

Q. Well you think it was some date in May; and you knew very well then that the company had not been operating the site before May 1975, didn't you? A. No. I am under the impression that John Bubb moved out around about November.

Q. Well, that may be your impression now? A. I was under the impression then.

Q. But you spoke to Bubb before you took on this business, didn't you? A. Yes I did.

Q. And you had a friendly conversation with Bubb? A. Yes.

Q. I suggest to you that as a result of your conversation with Bubb he told you that he left in February 1975? A. I can't remember. 30

Q. You know that to be the fact now, don't you? A. I don't.

Q. (Counsel approached.) Mr. Parker told you that the site was being company operated? A. Yes.

Q. Your concern was to know what a good operator and his wife could make from the business? A. Yes.

Q. You knew that Caltex have a paid manager running the

business when you spoke to Parker, didn't you? A. At that stage I don't know. At what stage are you talking about?

Q. When Parker gave you the document, Exhibit 2, Parker made it absolutely clear to you that it was then a company operator site? A. Yes.

Q. And he told you that the company had never made a profit out of a company operated site? A. No, he did not.

Q. Did he not tell you that high wages made it impossible for the company to employ staff and make a profit? A. No. 10

Q. But I suppose you could work that out for yourself, couldn't you, because you appreciated, you appreciate that you would have to work up to 80 hours a week and perhaps longer, didn't you? A. Could you give me the question again?

Q. When you were talking to Parker and before you decided to go into this business you knew that being a highway site it would involve very long hours of work for the operator?

A. I assumed it would.

Q. Something like 80 or 90 hours a week? A. I assumed that.

Q. And you assumed it would mean very long hours of work for his wife? A. Yes. 20

Q. And I suppose that you knew very well that to pay wages for those sort of hours would cripple the profits of such a business, didn't you? A. No, I did not.

Q. Did you turn your mind to what you would have to pay a man on wages to work eighty or ninety hours a week; did you turn your mind to that question? A. At the time, no.

Q. Did you turn your mind to the question how much it would cost to pay a female manageress of a cafe for, say, 70 hours a week? A. No. 30

Q. I suggest to you that Mr. Parker told you that it being a highway site the business would have to operate eighteen hours per day? A. No, he did not speak about that at all.

Q. And he told you that at Christmas and Easter it was a site which in fact worked twenty-four hours a day? A. He told me John Bubb had worked the site twenty-four hours a day.

Q. And I suppose Bubb told you that too, did he? A. He told me he had worked 24 hours a day, yes.

Q. As a result of your inquiries, did you form the view that Bubb was a good operator? A. I had no idea. 40



Q. But you knew Bubb had worked the site with his wife?  
A. Yes.

Q. Well then, whether or not Parker told you the site had to operate eighteen hours per day being a highway site on the outskirts of Newcastle, you knew that after your conversation with Bubb? A. No, I did not.

Q. I thought you said a moment ago; correct me if I am wrong; that Bubb told you that? A. Bubb told me he had worked twenty-four hours at Easter. 10

Q. I am sorry. Thank you; and at Christmas? A. He may have.

Q. Because there is a tremendous amount of traffic coming back to Sydney on the road upon which your site was situated in the peak period, wasn't there? A. I will verify my last answer now. He did not tell me about Christmas at all. He told me that they were working late at the end of the school holidays at Christmas.

Q. One of the things which you were interested in finding out about was how hard you would have to work, wasn't it? A. Yes. 20

Q. And the very best source of information was to go to the man who had been running the site? A. That is correct.

Q. And you went to him? A. Yes.

Q. And Bubb told you he opened at 6 a.m., didn't he? A. I can't remember.

Q. And closed about midnight? A. I can't remember John Bubb's times.

Q. It was Mr. Parker who urged you to speak to Mr. Bubb?  
A. No, it was not.

Q. You referred to Mr. Parker as Gary, didn't you? A. Yes. 30

Q. I take it you were on reasonably friendly terms with him?  
A. Yes.

Q. You knew that he was the man who was going to have a continuing relationship with you? A. Yes.

Q. And I suppose you appreciated that if he was telling you a pack of lies it would be impossible for you and him to have any sort of continuing relationship of a satisfactory kind, wouldn't it? A. At that particular time?

Q. Well, at any time; you see, this was the position,

wasn't it, that Parker was the man who was going to continue dealing with you on behalf of Caltex after you went into the station? A. Yes.

Q. A man to whom you could take the day-to-day problems of the service station insofar as you thought the company could assist with them? A. I knew he was the area representative.

Q. And the man to whom you could go to for financial assistance if you thought it was ---? A. - I never considered that at all.

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Q. Did Parker tell you that Caltex just was not interested in selling food from its point of view, or words to that effect? A. Can I ask you when?

Q. In your initial conversations with him? A. No, he did not.

Q. I suggest to you that he told you that he did not know exactly what Bubb's cafe figures were but that Bubb had told him a good operator could make \$1,000 a month from the cafe?  
A. No.

Q. Did he tell you that? A. No.

20

Q. But that is what you understood? A. No, it is not.

Q. That is what you understood, the document which is now in front of you, Exhibit 2, to say, in part, isn't it? A. No.

Q. (Counsel approached.) I understood you to wish to convey to his Honour that you took the item "cafe net \$1,000" to be a statement that a net \$1,000 per month could be made from the cafe, is that what you intended to convey to his Honour?

A. That Caltex were making \$1,000 a month, not John Bubb.

Q. Did you speak to Bubb about the cafe? A. Yes.

Q. And Mr. Parker told you that Mrs. Bubb was prepared to go down and assist your wife in running the business, assist your wife in understanding the nature of the business? A. Gary Parker did not.

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Q. Did Mr. Bubb tell you his wife was going to do that?

A. No.

Q. Did your wife ever invite Mrs. Bubb to come down? A. No.

Q. Were you on friendly terms with the Bubb's? A. Yes.

Q. Why not seek a bit of friendly advice from Mrs. Bubb about how to run the cafe? A. I did.

Q. And she did not give it to you? A. Mrs. Bubb said she would come and give it to me.

Q. And did she come down? A. No.

Q. Well then, she refused your request? A. I did not ask her.

Q. You did not ask her? A. No.

Q. Did your wife ask her? A. No.

Q. Well is this the position, that Mrs. Bubb offered help but you declined it? A. Yes.

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Q. Mr. Feenan, I put it to you that at the time you signed this licence you knew very well when the Bubb's had left the service station; even if you now have a hazy recollection about what you were told, I am putting to you that as a result of your conversations with Mr. and Mrs. Bubb you were told by them back in 1975 that they had left the service station earlier that year? A. I cannot remember when John Bubb had left the service station. I don't know.

Q. You would not suggest that Mr. and Mrs. Bubb would tell you a deliberate lie? A. No, they did not tell me lies.

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Q. And if in fact they left in February 1975, you would not have any doubt that that was what you were told as their departure date? A. That is what I cannot remember.

Q. But you would not have any doubt that that is what you were told, would you? A. I don't know what I was told.

Q. At any rate, so far as you were concerned, Bubb and Mrs. Bubb were co-operative? A. Yes.

Q. Now, Mr. Bubb had gone to another service station at Mayfield, had he not? A. Yes.

Q. You understood he went for family reasons? A. For family reasons?

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Q. Yes. A. No, that was not the reason that I understood.

Q. Now you told your counsel that Parker told you that the figures on the sheet were the figures which were actually being made by the Caltex operation? A. Yes.

Q. What do you understand by the meaning of the word "estimated"? A. At the particular interview I do not think it even come up.

Q. You were a police officer of several years experience when you saw this document, weren't you? A. Yes.

Q. You knew that Mr. and Mrs. Bubb had been operating the business not long before May 1975, didn't you? A. Yes.

Q. There was a column of figures given below a printed word "actual", wasn't there? A. Yes.

Q. And the word "actual" was struck out and the word "estimated" written over the top of it, wasn't it? A. Yes.

Q. You did not fail to observe that, did you? A. I cannot remember if I seen it at that interview or when I seen it. I know it is there. 10

Q. Mr. Feenan, I am putting to you that the substance of what Mr. Parker put to you was this, that a good operator could make \$20,000 out of this business, that the figures which he was putting in front of you were the sort of figures a good operator had made from the business, but the figures were estimated and that when the company ran the business it could not make a profit out of it; is not that the substance of it? A. No.

Q. I suppose you read the document carefully more than once? A. Yes, several times. 20

Q. What did you think when you saw the word "actual" struck out and the word "estimated" put in its place? A. I don't know. I did not give it a great deal of consideration.

Q. What did you think when you saw the date on the document? A. That that was the day it was prepared.

Q. Did you then understand that as at 8th May, 1975, Parker was putting to you his estimation that a good operator could make 20 odd thousand dollars a year on the business? A. He was putting to me that is what the company was making. 30

Q. And that is what you were interested in, wasn't it; you were interested in what a good operator could make? A. Yes.

Q. Meaning by a good operator you and your wife? A. I suppose so.

Q. You were not interested at all in what a paid employee of Caltex without a wife was making, were you? A. I was interested to know what I could make out of the business.

Q. You were not in the remotest interested in what the financial return might be to Caltex if they were employing a paid manager without a wife; that was of no concern to you, was it? A. No. 40

Q. And I suppose if Parker had said to you, "Look, this is what Caltex are making" you would have said, "Look, forget about that. That is nothing to do with me and what my wife and I make out of it?" A. I wanted to know what the business was making, yes.

Q. You wanted to know what a good business man and his wife could make out of it, didn't you? A. I don't think I'd use those words. No. I wanted to know what the business was making.

Q. But you wanted to know things which would affect your financial future and your wife's financial future? A. Yes. 10

Q. You wanted to know whether you and your wife could make this advertised \$20,000 per annum, didn't you? A. Yes.

Q. And as that was what you wanted to know, that was what you asked about? A. I asked what I could expect out of the business.

Q. But as you wanted to know what you and your wife could make out of the business and in particular whether you and your wife could make \$20,000 net before tax, the things that you asked about and were interested in were things touching that question? A. No, I don't understand you. What do you mean touching? 20

Q. Supposing Caltex; we will take an example; inflated the profits because they were selling petrol to the station at a price lower than it sold petrol to third parties, that would have been a very material thing to take into account, wouldn't it, if you were relying upon the Caltex figures? A. I was relying on those figures, yes.

Q. But I suppose you would appreciate that a company which is running a business itself and producing the motor spirit conceivably might sell petrol to itself at a price different from the price which it would charge its licensee? A. I did not even consider that. 30

Q. But I suppose one thing you did appreciate was that there was no Mrs. Caltex around? A. Yes.

Q. So that to that extent the proper figures derived from looking at a Caltex trading position would be misleading because they would have to replace Mrs. Caltex with hired help? A. Well, I don't know that.

Q. How would they run a cafe without a woman to run it? A. They would have staff. 40

Q. Of course they would have staff; they would have to pay for staff, wouldn't they? A. Yes.

Q. You would have some knowledge from your days in the police force of the penalty rates paid in respect of overtime for early and late work, wouldn't you? A. No. We were not getting penalty rates then.

Q. But your commonsense as an informed citizen led you to believe in 1975 that labour became very expensive if you have to pay overtime rates or penalty rates? A. Yes.

Q. You knew from your conversation with Bubb that he had been in the station for quite some time before he left? A. Yes. 10

Q. You knew the company's operation at the site had been reasonably short without being precise about the length of time? A. Yes, well, I thought about eleven months.

Q. You yourself were intending to go into the business with your wife on a long-term basis? A. Yes.

Q. So it was Bubb's experience which was more important in your mind when gauging how you yourself might do, wasn't it? A. No.

Q. You were going to replace Bubb, weren't you; you and your wife were going to replace Mr. and Mrs. Bubb in the business, weren't you? A. No, I was replacing Caltex. 20

Q. You were going to work, you understood, about the same sort of hours as Bubb worked? A. Yes.

Q. Your wife was going to work, as you understood, about the same sort of hours as Mrs. Bubb? A. Look, I don't think we considered Bubb's hours when we took over the business.

Q. But you knew that you as a family unit were going to be running the service station? A. I knew that.

Q. And you knew that the Bubbs as a family unit had been running the service station? A. Yes, but I still did not consider that. 30

Q. You did not consider it? A. Not greatly.

Q. Do you tell his Honour that you were not concerned to know how your predecessor had been doing in running this business? A. I enquired from him how he had been going.

Q. And the reason you enquired was that was what you wanted to know? A. Yes, that is right, yes.

Q. There would have been no point in making enquiries if you had not wanted to know how he had been doing? A. That is right. 40

Q. I suppose you kept an informed eye on the development of the motor spirit market in your day when you were in the service station; may I put it this way, you knew that petrol sales were increasing slightly each year on a National basis?

A. I did not examine it on a National basis, no.

Q. But you knew that the consumption of gasoline was rising rather than falling? A. I cannot say I knew that at the time either.

Q. You now know, do you not, that taking the full 12 months from January 1974 to December 1974, there were just over 25,000 gallons of gasoline sold on average each month from the site? 10

A. Well, I do not know that.

Q. You do not know that? A. No.

Q. By the way, not many sites sell distillate, do they?

A. No, not a lot of them do, no.

Q. You were one of the relatively few which did? A. Yes.

Q. And I think the dealer's margin was 10.9 cents a gallon on gasoline? A. Then?

Q. Yes. A. Yes, I think it was 10.9 cents. 20

Q. And it was also 10.9 cents a gallon on distillate? A. I have no idea what distillate was.

Q. Well, do you now accept that for the calendar year 1974, just over 25,000 gallons of super and premium combined gasoline were sold through this site? A. I have no way of knowing. I accept it from you.

Q. Do you know how much distillate was being sold from the site in that calendar year? A. 1974?

Q. Yes. A. No idea.

Q. See, to a man like yourself who was thinking of going into this business on a long-term basis a year's gallonage figures was the sort of indication which you would be looking for, wouldn't it? A. I didn't, no. 30

Q. But if you were giving up your career in the police force and going into a business you were not interested in just seeing what had been sold the previous month or the month before that; you wanted a spread of time in which you could see what gallonage was being sold from the site on an average basis, didn't you? A. No.

Q. Would that not have been a prudent measure to look for as to the gasoline sales potential of the site? A. I'd say it possibly would have been something I'd look for now. I didn't then.

Q. Did you have an accountant in those days? A. No.

Q. Do you mean to tell his Honour that when you were considering going into this business you did not think it important to know what a twelve months trading figure would show you as to sales of gasoline? A. Yes, that is exactly right. 10

Q. You did not think it important? A. I didn't at the time.

Q. Well, gasoline was in a sense your life-blood, wasn't it?  
A. Yes.

Q. You had so to speak two life-bloods, the takings of a cafe, and gasoline sales? A. Yes.

Q. And you tell his Honour you did not think that the gasoline life-blood was sufficiently important for you to know what the sales were on a 12-monthly basis? A. Not on a 12-monthly basis, no.

Q. I suppose sometimes there could be strikes which affect sales in a month? A. Yes. 20

Q. And you knew that in 1974 and 1975? A. Yes.

Q. Sometimes you could have a very wet month, other times you could have a fine month? A. Yes.

Q. And you tell his Honour you were not concerned to know what a full 12 month's trading at the site had shown in terms of gallons? A. That is right.

Q. Well now, take the six months before May 1975; you knew that that was the period when the service station had changed hands? A. Yes. 30

Q. Parker had told you that service stations did not do as well under company operation as they did under private licensee operation? A. Yes, that is right.

Q. I just ask you to accept that whilst Mr. Bubb was in the service station just for the moment for the twelve months, full twelve months from January 1974 to December 1974, which was his last twelve months of operation, he sold a total on average of about twenty-six and a half thousand gallons of gasoline and distillate of which about fifteen hundred gallons was distillate; follow me? I just ask you to make that assumption? A. Yes, I understand that, yes. 40



Q. When you left this site in June 1976, do you know how many gallons you were selling? A. Average?

Q. Yes. (No answer.)

Q. Well, do you know how many gallons you sold in June?

A. Not without referring to the sheets I don't, no.

Q. Well, you may take it that your solicitors have said that you sold 14,600 gallons; let us assume that is correct?

A. In June?

Q. Yes. A. Yes.

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Q. Do you think that drop from about 25 to 14½ would reflect that you were not a very good service station operator?

A. No.

Q. What do you think it would reflect? A. Petrol discounts.

Q. And when did discounting start in your area? A. The XL stations opened in the - there was an XL station open. There was a Solo open at Shortland.

Q. I suggest to you that discounting did not commence in your area until well after you left the site? A. What do you term my area? Newcastle?

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Q. In the Hexham area? A. I am talking about Shortland. There was no discounting in the Hexham area at that stage. Shortland, that is about six miles from Hexham, four miles from Hexham.

Q. Do you know how many gallons you sold in May 1976? I suggest to you you have said from your particulars; leave aside for the moment whether it is accurate or not; about 19,244 gallons? A. Yes.

Q. You put that down to discounting too, I suppose, or not?

A. May - I am just trying to think now when the discount stations did open. It was round about that time.

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Q. Well, see going back to April you were even lower, 17,352 gallons according to your own particulars? A. Yes.

Q. Going back further still, another two months, you can take it from me that your own particulars show 19,000 gallons?

A. Yes.

Q. You really were not a very successful service station operator, were you? A. I was not selling very much petrol.

Q. And one reason for that was you did not; and I do not

blame you; like working eighteen hours a day, did you?

A. I was not real fussed about it.

Q. I do not for one moment suggest to you that it would be a very pleasant way to earn a living, but in fact many mornings you were not at the service station before 8 o'clock, were you? A. I was never open at 8 o'clock. I was always open before that.

Q. Did your children attend school at Waratah? A. Yes.

Q. Your wife did not have a driver's licence? A. That is correct. 10

Q. And at peak hours for trading you would have taken them to school, wouldn't you? A. Yes.

Q. Now again, I do not blame you for that if that is the way you wish to have your lifestyle, but to be off the site in peak hours would be about the worst thing you could possibly do if you wanted to make a success of the service station, wouldn't it? A. That was a matter of necessity.

Q. I accept that; and your biggest customer or your biggest source of custom was the Carrington Slipways? A. Yes. 20

Q. How many employees did they have back in 1975, 1976?  
A. Oh, 200 I suppose. 180, 200.

Q. And Mr. Bubb told you that he had, so to speak, set his cap at the Carrington Slipways employees by taking steps to encourage them to the site? A. Yes.

Q. And the result was that there was a great rush of people from Carrington Slipways seeking to buy petrol in the afternoon peak period? A. Yes.

Q. And that was a period when, apart from school holidays, you were not on the site? A. No, that is not right. 30

Q. You were picking up your children from school? A. No, not when the Carrington Slipways knocked off, I wasn't.

Q. What time did they knock off? A. 4 o'clock. 3.30 I think.

Q. And you were sometimes gone for half an hour or more when you went to pick up your children weren't you? A. No. Carrington Slipways knocked off at 4 o'clock.

Q. You lost a lot of Carrington Slipways business, didn't you? A. I doubt that very much.

Q. What type of customer do you think you lost? A. Passing trade.

Q. The Carrington Slipways business involved a bit of paper work, didn't it? A. A little bit.

Q. Did you express disinclination to Mr. Parker to carry out that sort of paper work? A. No, I had been very used to paper work.

Q. Did you spend any money on advertising the business?

A. I had; the only advertising I did, I printed up cards for the Slipway's workers, that was all. They were discount cards, and that is all printed up. 10

Q. That was the only form? A. Yes.

Q. Did you go out and seek any customers like the Carrington Slipway people to try and get some industrial accounts? A. I think we did build up a fair sort of industrial following with the, not so much petrol accounts, snack bar accounts, and that we did.

Q. Well then, you did not get any new industrial customers for petrol I mean? A. I had a few. I did not lose any. 20

Q. But you did not get any new ones? A. I did, a few.

Q. Name a couple? A. Darryl Fletcher at Beresfield. He owns a couple of cars. The bloke that had Jerilderie Speedway, Alan Craig. I was supplying fuel to him for a long time.

Q. But Bubb had been doing that for a long time? A. Not with Craigie. I mean not with Alan Craig. I don't know. He may have.

Q. But you see what Bubb had done with Carrington Slipways was to go and see the management? A. Yes.

Q. And come to an arrangement that he would provide petrol to the employees and bill the company? A. Yes. 30

Q. Which would then in turn bill their employees? A. Yes.

Q. And at the same time offer some incentive in the way of discounts? A. Yes.

Q. You did not seek to maintain that sort of business?

A. I did. It was maintained.

Q. You did not seek then to replace any trade which you might have lost by the swings and roundabouts, if I could use that phrase, to deal with another industrialist? A. No.

Q. And yet you were in an area where there was a great deal of industry? A. Not a great deal. Light industry.

Q. In an area where there were a lot of men who went to nearby places of work? A. Yes.

Q. And I suppose you appreciated the competition as between service station proprietors was pretty keen? A. Yes.

Q. And to maintain your gallonage you had to get back from other proprietors what they perhaps might be able to take away from you, is that right? A. That is right. 10

Q. But you did not take any steps in that regard; you did not advertise, you did not seek to make any arrangements with nearby industrialists that would induce their employees to come to your station? A. The only one that was in the near vicinity, was Hexham Engineering. I did approach them. In fact I knew the fellow that owned Hexham Engineering who had just installed a petrol pump.

Q. Now what about the cafe trade, did you take any steps to encourage people to come into the cafe? A. Not other than brightening it up and putting signs out, putting food signs out. 20

Q. Or to increase the sales in any way? A. I think we doubled the sales.

Q. I suppose the cafe business was a matter which you were particularly concerned to discuss with Mr. and Mrs. Bubb when you spoke to them? A. That is right.

Q. Because you knew that if I could again use the phrase, there was no Mrs. Caltex? A. That is right.

Q. And to get any sort of idea of what a lady, wife of a proprietor, might make from the cafe you had to rely on what Mr. and Mrs. Bubb might have told you? A. Yes. 30

Q. And they told you they were easily making \$1,000 a month? A. No, they did not.

Q. What do you say they told you about that? A. They told me that figure was rubbish.

Q. And what figure did they give you? A. \$50 a day, \$70 a day. That is takings.

Q. So that when you went into the service station you knew then that that figure was not correct? A. No, I did not. I did not speak to Bubbs in relation to the snack bar figure until I got right in to the service station. 40

Q. Oh Mr. Feenan, you knew that there was no Mrs. Caltex, the only people you could get reliable information from before you went in was Mr. and Mrs. Bubb, didn't you, is that right?

A. Yes.

Q. And you told his Honour a moment ago that the cafe business was one of the two life-bloods of the business? A. That is right.

Q. Do you mean to tell his Honour that you went down to discuss this business with the Bubb's before you took over the business and did not ask a question about the takings of the cafe? A. I asked them how the snack bar was going, how they were taking, and he said in the vicinity of \$70 to \$80 a day. Sometimes less, sometimes more.

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Q. Do you swear to that? A. Yes.

Q. Did he show you any records? A. No.

Q. Did you ask to see any? A. At a later stage I did.

Q. When did you last see Mr. Bubb? A. When I was at the service station.

Q. Now then, how many times did you see him before you took up the licence? A. Once.

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Q. And where did you see him? A. At his service station, at Mayfield.

Q. Then what did you ask him about the cafe side of the business? A. Nothing. I only spoke to him for about twenty minutes. We produced no documents whatsoever.

Q. Why didn't you ask him? A. Because I did not have time. I was up for a court matter and I just did not have time.

Q. This was going to be your last business conversation?

A. Yes.

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Q. Do you say that you just did not have time to discuss with him the cafe side of the business? A. Yes, that is right.

MR. MORLING: Q. What day did you go to see him? A. Some time in July.

Q. You took up the licence about four months later? A. Yes.

Q. You did not have time in the succeeding four months to even lift the telephone to discuss this matter? A. I did not have time to make contact with him.

Q. What were you doing in those four months? A. I was working in Liverpool.

Q. The answer you gave his Honour as to the reason why between July and November you did not discuss the question of the cafe with Bubb was that you did not have the time?

A. No, the day I was up there I did not have time.

Q. Why did not you ring him up and take up the question of the cafe with him in your conversation? A. Because I had no reason to.

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Q. But it was an essential part of the reason? A. Yes, I had no documentation to show what the snack bar was doing.

Q. But you had documentation about the gasoline? A. Yes, from the bloke before me.

Q. The "bloke" before you was the "bloke" you would be replacing? A. I did not replace him.

Q. What sort of profit margin were you making on the cafe sales? A. Percentage wise?

Q. If you sold \$100 worth of meals what would your profit margin be? A. Offhand, I don't know.

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Q. Have you any idea? A. I would be guessing.

Q. What is your best guess? A. I don't know, 20 per cent or 15 per cent.

Q. Was that your understanding when you took on the licence? A. The profit margin?

Q. Yes? A. I did not even work out a profit margin.

Q. Do you think the profit margin on fruit would be higher or lower than that on cigarettes, drinks and sweets? A. I have no idea.

Q. You had no idea when you went into the business? A. Other than those figures, no.

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Q. What system did you have for recording the sales of products at the service station? A cash register? A. Yes, I had two cash registers.

Q. Where were they situated? A. One in the snack bar and one in the service station.

(Luncheon adjournment.)

Q. Mr. Feenan, may I take you back to what I was asking you before lunch; you told his Honour that you saw Mr. Bubb about July 1975? A. Yes.

Q. Will you tell his Honour to the best of your recollection the conversation you had with him? A. I just said, "I am interested in the service station at Hexham. I believe you were there. What is it like?" He and his wife were there and they said along the lines that it is a good business, "We did all right out of it", and I said, "Well, that is good to hear because I am considering taking it." I think I asked him why he got out of it and he said, "Because he was after a mechanical site", and he came down because this one had a couple of bays where he could do mechanical repairs but he could not do mechanical repairs at Hexham. I said, "How did you go?" and he said, "Well, we got our house out of it." 10

Q. "We got our house out of it"? A. "We got a house out of it." That was the general trend of the conversation.

Q. Did he tell you where he bought this house? A. He may have. I don't know. 20

Q. Is that to the best of your recollection the substance of what you said? A. Yes, that was the trend of the conversation.

Q. You say you had no further conversation with him? A. Yes, I remember.

Q. You had not been in the site very long before you began to be worried about the profitability of the business? A. I was not real concerned until after the accountant went through the business.

Q. Then when you became concerned did you then have a further conversation with Mr. Bubb? A. Yes. 30

Q. To the best of your recollection will you tell his Honour the substance of that second conversation? A. I quizzed him on the ----

Q. You asked him some questions about it? A. I asked him some questions about it, the paper Parker gave me and said, "Was the site doing 26,000 gallons a month when you were there?" and John said, "I don't know." Pam, his wife, said, "Yes, I think it did," and they pulled the three pink sheets out and they showed me the particular weeks they had, in fact, at some time previous had got high readings, I think around about 29,000 and some other readings were low, but the average was, in fact, just under 26,000. It was not much under. I spoke to him about the snack bar and takings. I cannot remember his figures. 40

Q. But they were on his pink sheets? A. Yes, they were on his pink sheets. I asked him about the figure of \$1,000 net a month and he agreed with me it never got that.

Q. What did he say? A. In exact words I cannot remember.

Q. I thought you said, "That was rubbish". I may be wrong but did you say that before lunch? A. I don't know. I cannot remember.

Q. How long after it was it that you had your conversation with Mr. Watson? A. I spoke to Barry Watson after Parker had left the site so I presume that was some time in March 1976. 10

Q. That was after you had been told by Bubb how he had been doing whilst he was there? A. It was after I spoke to Bubb.

Q. With respect I suggest that that is not true, that Bubb did not say to you, "It was rubbish", or words to that effect, that you could make a thousand dollars a month out of the cafe?  
A. That is not right.

Q. You remember saying before lunch to his Honour when you discussed the matter with Watson you told him the figures which Parker had given you must have been Bubb's figures, not Caltex's figures? A. He was talking about Caltex's figures. 20

Q. But you were concerned about profit? A. At what time?

Q. At all times you were concerned about money coming to you?  
A. Yes.

Q. What you wanted was \$20,000 a year for you and your wife?  
A. I thought we would get more than that.

Q. But that is what you thought you were entitled to. That is right? A. Yes.

Q. After Bubb had said to you, "There is no way" or "It is rubbish that you can get \$1,000 net", you would have said to Watson, "I have spoken to Parker and he tells me that figure of \$1,000 is dishonest"? A. Possibly. 30

Q. But you did not? A. I cannot remember whether I spoke to Watson before or after I spoke to Bubb.

Q. When Bubb told you his turnover figures he had his pink sheets in front of him? A. Yes.

Q. It worked out at something like \$80 a day to the best of your recollection? A. I cannot remember. I seem to think it may have been about that. It may have been 200 but I cannot remember. I spoke to Bubb about his gallonage. 40



Q. His gallonage figures were on the same pink sheets as the cafe sheets? A. Yes.

Q. It is the one pink sheet upon which all income is noted?  
A. Yes.

Q. At any rate, did you leave your conversation with Bubb in the belief that, firstly, he had been operating the cafe for seven days a week? A. I don't know.

Q. Did you leave your conversation with Bubb, having looked at his pink sheets, in the belief that his turnover from the cafe was of the order of \$1800? (Objected to on the ground of the question comprising two questions.) 10

Q. Did you cease your conversation with Mr. Bubb in the belief that on a daily basis the turnover from the cafe was about \$80?  
A. I cannot remember; I cannot remember his snack bar figures.

Q. You did tell me this morning that you did have a recollection of the turnover figures which Bubb gave you? A. He did not give me any figures. I was there with him when he went through his pink sheets and we were checking the gallonage. He flicked through the pink sheets. I did not have an examination of even one of the pink sheets. He was going through with a calculator and I was standing alongside him. 20

Q. But you drew a blank on the gallonage because his wife had told you that the gallonage was about 25 or 26,000? A. Yes.

Q. So that did not give you any cause for dissatisfaction?  
A. No.

Q. You actually checked through his pink sheets to see what his gallonage was? A. No, I stood alongside him while he was doing it.

Q. He was doing it because you had come to him for information on that matter? A. Yes. 30

Q. Because you wanted to check the figure that Parker had given you? A. The gallonage figure, yes.

Q. You wanted to check the cafe profit figure to see how that measured up against Parker's alleged misstatements? A. I may have looked at it then but I cannot remember.

Q. Do you remember saying you wanted to check the figures Parker had given you? A. Yes, I went down there because I wanted to check them.

Q. The figures Parker had given you were not of Caltex but of Bubb? A. I assumed that. 40

Q. But you did say before lunch in answer to a question I cannot remember now from me or Mr. Coombs that Bubb told you that the till turnover figures from the cafe were up to \$80?

A. I assumed. That is from my memory. It was somewhere around about that figure. I cannot remember.

Q. I accept that. Now, accepting that the turnover at week-ends would not have been as high as during weekdays I suppose that led you to assume following your conversation with Bubb that his cafe turnover was somewhere between \$1,600 and - in other words, somewhere between \$400 and \$500 a week? A. Five days at \$80 something for the weekend? A. I do not know whether he was trading at the weekend.

10

Q. Just assume he had been trading at weekends and just assume that your assumption was correct that he was taking about \$80 a day, then he was taking somewhere between \$400 and \$500 a week from the cafe? A. Yes.

Q. Or somewhere between \$1,600 and \$2,000 on a monthly basis? A. Yes.

Q. So it was your belief then that the profit from the cafe side of the business was 10, 15 or 20 per cent, of turnover? A. I had no idea.

20

Q. You still had no idea as at February/March 1976 what the profit on food was? A. No.

Q. You did not know whether it was 4 or 50 per cent? A. I had no idea.

Q. You were the principal of this business? A. Yes.

Q. You would agree you were a very bad businessman, would you not? A. No, I will not agree with that. I had no idea of the profit margin.

30

Q. There was your wife working 75 hours a week and for all you knew she might have been working those hours and not making a cent in profit? A. She was.

Q. Not making a profit? A. No.

Q. It was your belief that there was no margin of profit on the turnover? A. On the snack bar?

Q. Yes? A. As it worked out that is correct.

Q. Did you not make enquiries to satisfy yourself what a reasonable rate of profit on the turnover was for a snack bar? A. No.

40

Q. Would it come then as a shock to you that even with the Caltex operation it was making more than 50 per cent on turn-over? A. No, I did not know that.

Q. You did not know that? A. No.

Q. I am approaching you now with Exhibit 10 and the document which my friend was showing you before was dated 31st March, 1976, was it not? A. Yes.

Q. There is attached to each of the copy pink slips one or more cash register docketts? A. Yes. 10

Q. Each docket has a code number indicating one of nine different items? A. Yes.

Q. These are the cash register records of the sales at the service station? A. Yes, at the service station.

Q. For instance, just so they are explicable to his Honour they run from the top down? A. Yes.

Q. The top being No. 9 is an item of \$8.18 which is what is shown on the pink sheet? A. That is oil.

Q. It looks as though you rang up \$8.16 for oil? A. Yes.

Q. Whereas, in fact, you sold \$8.60 worth? A. Yes. 20

Q. The next item is item 8, \$15, which is a sale of a distillate? A. Yes.

Q. By the way, you told me before lunch that distillate and standard gasoline had a retailer margin of 10.9 cents? A. I am not sure at the moment.

Q. You lumped them together as being a total gallonage?  
A. Yes.

Q. The next item, \$4.55, against code No. 7 seems to be the day's sales of accessories? A. Yes.

Q. Where is the item that shows the sales of food on the code? 30  
A. That is my service station form.

Q. The cash register slips relate only to the service station, not including the cafe? A. Yes, that is right.

Q. Where were the cafe registration slips? A. The till had a continuous taking. I took the till over from Caltex.

Q. There are no docketts to support the cafe takings?  
A. Correct.

Q. Was there some other record kept of cafe takings? A. That is it there (pointed).

Q. You are pointing to the item, \$50, up at the top of the third column? A. Yes.

Q. Will you agree with me that for the most part, in fact I think in every case, the cafe takings are just shown as like a lump sum of \$50? A. That is the cash sales there (pointed).

Q. If you turn back a page it has \$49, the next one \$80, the next one - I cannot tell. A. \$14.09 there (pointed). 10

Q. The first one in the volume has \$90 rung up? A. Yes. That amount there (pointed) is, in fact, the snack bar takings.

Q. You are pointing to the reference to \$90 on the sheet for 28th June, 1976, being the amount written at the top of and, in effect, above the third column? A. Yes.

Q. What you are saying is, as I understand it, that that is the snack bar takings? A. Yes, that figure there is a cash sale and it is the total of that amount of \$90 plus that amount of \$4.81 which was, in fact, cigarettes, sweets and drinks.

Q. At the end of most days what you did, with respect, with the takings, was just to check in more or less a round sum and in that case it was \$90. It is almost unbelievable that the takings would have been \$90 and not \$95.23, or some other odd figure? A. Yes, it may have been. 20

Q. So we have no records at all other than those handwritten notes to indicate what the actual takings were from the cafe whereas we do have an accurate record from the cash register slips of the service station takings? A. That is correct.

Q. You must have been buying a good deal of food to operate the cafe? A. Yes, we were buying food. 30

Q. You surely did not distinguish between a pound of butter bought for the cafe and a pound of butter you used in the same kitchen and used also to feed yourselves? A. No.

Q. If you bought some fruit or vegetables or meat which was cooked in the one kitchen you did not separately purchase fruit or vegetables which were going to be cooked in the one kitchen to be consumed by you and your family? A. I purchased steak separately on occasions and I purchased some vegetables on occasions.

Q. I am not putting anything dishonest at all but what I am suggesting to you is that you and your family lived off the 40

food cooked in the cafe kitchen and purchased for the cafe?  
A. Yes.

Q. How many children did you have in those days? A. Two girls.

Q. They must have been fairly young? A. Three and five.

Q. So that the broad position was that the family was living off the food purchased for the cafe? A. Yes.

Q. I have finished now with Exhibit 10. Now, a document which is headed "PL and MT Feenan, 1/11/75 to 29/2/76" in the cashbook. Is that a document which you or your accountants prepared? A. My accountant. 10

Q. Can I draw your attention to the third page which at the foot of it has a heading "cigarettes, drinks, snack bar"; do you follow me? A. Yes.

Q. It indicates that in the first four months of your trading from 1st November 1975 to 29th February, 1976, your gross sales from cigarettes and drinks from the snack bar were \$8226.01? A. Yes.

Q. That the gross profit after allowing for expenses was \$554.18? A. Yes. 20

Q. My arithmetic is pretty poor but that looks like about 1/15th or 1/16th of sales that were made in profit. As 554 is to 8,026? A. I have no idea.

Q. I suggest it is about 7 per cent. It is a little underneath 7 per cent. A. Yes.

Q. That does not seem right to you? A. They are my figures.

Q. Of course they are. Those figures indicate that even allowing for the profit you were making on things such as cigarettes and drinks the profit from turnover of over \$8,000 was just under 7 per cent? A. Yes. 30

Q. I suppose you must have been making some mark-up on cigarettes and drinks? You were not foolish enough to sell those at cost? A. No, I sold them on the retail cost.

Q. Do you know what the margin was on cigarettes and drinks? A. Not offhand, now; I think about 10 cents a packet for cigarettes.

Q. How much did a packet cost in those days? A. 80 cents; I don't know; I do not smoke.

Q. You would agree with me that if you were making almost anything on cigarettes and drinks that swallowed up most of the \$550 gross profit? A. How do you mean that again? That is where it comes from, do you say?

Q. We cannot tell how much of the 8226 is for cigarettes and drinks on the one hand and the cafe on the other. A. I don't think there is any dissection at all.

Q. Would you be able to agree with me that on cigarettes, sweets and drinks, you would make something like 20 per cent on turnover or do not you know? A. I don't know. 10

Q. Would you agree now that you have no business sense or no head for business? I do not say this offensively. I am just putting to you that if you are running a business and you are selling things in it, if you have any head for business you must have had some general idea whether you were or are making a loss or a profit on it yourself. A. Are you talking about now or then?

Q. Both? A. Now it does not interest me in the least.

Q. But if you knew back in 1976 you surely have not forgotten? A. I cannot remember what the rates are now but I paid an accountant to do this for me. 20

Q. On the document, Exhibit 2 which Mr. Parker gave you there is a 20 per cent figure given? A. Yes.

Q. On cigarettes, sweets and drinks? A. Yes.

Q. Was that generally in line with what you experienced as being your profit margin on that matter? A. I don't know what my profit margin was.

Q. But it was you who was buying cigarettes, sweets and drinks? A. Yes. 30

Q. It was you who was reselling them? A. Yes.

Q. You had been told you would get a 20 per cent markup by Parker? A. On the sheet.

Q. Did you mark up products at 20 per cent? A. I was selling cigarettes at the recommended retail price.

Q. If you were not making 20 per cent you would have said to Parker, "You gave me a wrong steer on that. I am only getting 25 per cent"? A. I told him that the figures were wrong.

Q. Did you tell him you were not getting 20 per cent on sweets and drinks? A. No, I was concerned with the overall effort of the snack bar. 40

Q. You will agree with me then that looking at your own figures if you were making any markup at all on cigarettes, sweets and drinks you must have been earning almost nothing, if anything, in respect of the cafe? A. Yes, I would agree with that.

Q. There was your wife working, as you have told us, 75 hours a week? A. Yes.

Q. For four months selling \$8,000 worth of goods of one kind or another? A. Yes. 10

Q. And not making a cent? Is that right? A. That is correct.

Q. Before you allowed anything for labour cost there is no labour amounts for that? A. My accountant worked that out. I don't think there is any labour in there.

Q. When we talk about the cafe we are talking about things like omelettes? A. Yes.

Q. Would I be wrong in assuming that the cost of a hamburger without its contents would be just a very small number of cents? A. I think a hamburger costs around about - I don't know. I suppose 20 or 25 cents. 20

Q. Do you have any idea? A. We are talking about now or then?

Q. Then? A. About 60 cents I suppose we were selling them for then. I don't know. I suppose it had to break down but I don't know.

Q. What I am putting to you as a man who owned his business is that the whole essence of selling things like hamburgers is that you buy a bun for two or three cents, you put some modest amount of food in it, you make a profit on the labour, and you might sell it, as you say, for 50 cents or 60 cents. That is your understanding? A. Basically. 30

Q. And if you buy a milkshake, you might put ten cents worth of milk in it and a cents worth of flavouring and sell it for twenty-five cents, or something like that? A. I don't know the cost - yes, okay.

Q. If the method of trading in a cafe is anything like that, there would have to be a very great margin of sales over costs, would there not, if you eliminated labour? A. Are you saying you would have to sell more than what you --- would you say that again? 40

Q. If you spent \$6,646 on purchases of goods to sell, and

you put a significant amount of those goods into food items, like milk, hamburgers and the like, you would expect to get a very great deal more than \$6,646 back in takings, would you not? A. Yes.

Q. And yet, in your four months of trading as shown in these figures, you are doing little better than breaking even?

A. That is right.

Q. I suppose there could be a number of explanations for that, could there not? A. I suppose there could be.

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Q. One could be, say, that you were not charging enough, I suppose? A. No, I think we charge about the going rate.

Q. Another could be, that the employees or somebody were not ringing up all the purchases? A. I doubt that greatly.

Q. It is a fairly common experience in the service station operation that not all the purchases are rung up, is it not?

A. Not in my service station.

Q. How many casual employees did you have around the service station in your time? A. I had two that I used mainly.

Q. (Approached). I show you the cash book proper. There is a column headed, "Drawings". Do you see that? A. Yes.

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Q. That is meant to indicate personal expenditure not to do with the service station? A. Yes.

Q. In the period from 1st November, 1975 to the time that you left, the total amount of drawings was \$7,911.08? A. Yes.

Q. You had rent-free accommodation, is that right? A. Yes, that was included in the service station rent.

Q. Your food bills would not have been very great? A. No.

Q. What is your recollection as to where the bulk of the drawings went to? If it is of a personal nature and you do not want to say so, please say so? A. These ones here? (Indicated).

30

Q. There are a couple of big items, are there not; there are some items which are called wages and there is sales and the like --- A. Everything is listed here; where it went to. That includes my own personal things also.

Q. Did you buy a house at this time? A. I put a deposit on a house.

Q. That is David Brown Real Estate, is it not? A. Yes.



Q. Where is that? A. At Mayfield.

Q. Did you go ahead and buy it later? A. No.

Q. You decided pretty early in the piece you did not want to continue with the service station, did you? A. In March.

Q. Do you think that accounts for the fact that you were selling only 17 thousand gallons towards the end of your period on a monthly basis? A. No, because I was putting almost the same hours into it.

Q. Were you long looking around for a house? A. We started to have a house after I gave in my notice to Caltex. 10

Q. When was that? A. I gave them three months' notice.

Q. So you gave them notice at the end of March, did you?  
A. I believe so.

Q. Between the time you left the Police Force, and the time you gave notice, it was about five months? A. Yes.

Q. You had to give notice to the police force before you could leave the police force, did you not? A. Yes.

Q. Did you have a few days off between leaving the police force and starting with Caltex? A. Yes, I may have had a week. 20

Q. Looking at your tax return, you left the police force on 22nd October? A. I believe so.

Q. That would mean that your recollection of a three weeks' training course would be wrong? A. There was a three weeks' training course ----

Q. You would not have commenced your training course until you left the police force, would you? A. I started that prior to my resignation taking effect.

Q. Your expenses in earning the profit which you did for the short time that you were there included an interest on a personal loan of \$876.55? A. Yes. 30

Q. From whom was that loan - was that the Rural Bank loan or another loan? A. I had a Rural Bank loan, a personal loan. That was the interest payable ---- yes, that was a Rural Bank loan.

Q. How much did you borrow? A. The personal loan?

Q. It is called "Interest on personal loan to purchase business". A. \$10,000.

Q. Were there two loans, one from the Rural Bank and a personal loan? A. I had two loans going. The personal loan was an original loan which I had used sometime before to purchase a block of land. That was back in 1973, I think.

Q. In the period when you were in the business, you paid out wages of \$6,672? A. Yes.

Q. Did you check with Bubb to see whether he was employing more labour than you were employing? A. I know he employed a couple of juniors. 10

Q. I suppose in a general sense you only employ more labour if it is profitable to do so? A. Yes, I think so.

Q. I suppose in a general sense the longer your trading hours the more labour you have to employ? A. Yes.

Q. If I suggested to you that in a similar period of eight months at the same service station, Bubb had paid out nearly fifty percent more in wages, that would indicate to you, would it not, that he was probably opening longer hours than you were? A. It would seem to be, yes. 20

Q. Would you tell his Honour again the conversation you had with Watson in March 1976 in relation to your statement made before lunch that the figures which Parker had given you were figures related to Bubb's business? A. Just what I said before. I wasn't happy with the figures; they were purported to me at the time to have been the site's figures that they were doing, and I complained to Watson that I reckoned they were not. When he asked me what I reckoned they were, I said I reckoned they were John Bubb's and he said, "Oh well, if that is the case, Gary must have made a mistake." 30

Q. But you told his Honour half an hour ago, twice, that the figures which you got from the pink sheets from Bubb were the figures which you obtained to check what Parker had told you, do you agree with that? A. I spoke to John Bubb on a couple of occasions; I spoke to Barry Watson, and I complained to Barry that these figures on this --- I said, "There is no way in the world that this site is doing what these figures reckon ---"

Q. I did not ask you that. My question was this: Would you agree that twice since lunch today you have told his Honour that your purpose in checking Bubb's pink sheets so far as gallons of gasoline sales were concerned was because you wanted to check what Parker had told you were the gasoline sales? 40

A. I may have said that; I can't remember what I said before about that.

Q. What was it Parker said to you about a company operation not being as profitable as a privately run operation? A. That is what he said. He said, "This is what the business is doing. You understand that the site is under company operation. You can only hope to do better, can't you?"

Q. When he said that to you, why did you not say to him, "Look, you have a column on this sheet showing actual sales. If you are telling me what the business is doing, why are these not actual figures?" A. I can't remember whether we discussed that or not. I don't know that I did. 10

Q. It was not just a matter, was it, of having a list of estimated sales; the sheet itself showed two columns, one of which was headed "Actual" and had that word struck out?

A. That is right.

Q. If Parker had said to you, "Look, this is what the service station is now doing," why did you not say to him, "Look, if that is the case, why have you called it 'estimated' and crossed out the word 'actual'?" A. "Estimated", to me, means around about what it is supposed to be. 20

Q. What does "actual" mean to you? A. Real.

Q. Did not "estimated" mean to you that that was the sum which was estimated what the newspaper advertisement said could be made by a good operator? A. No.

Q. Was it your understanding that the \$20,000 figure was not what an operator would make? A. I assume it would make more than that, when he presented me with this piece of paper.

Q. Was it Parker or Watson who said to you that if you opened at 6 a.m., you would catch the B.H.P. traffic? A. Gary Parker mentioned it to me, yes. 30

Q. You decided not to do that? A. That is right.

Q. Why was that? A. Because I was working late hours at night myself, and I could not get myself out of bed to open again at 6 o'clock in the morning.

Q. You did not think of employing staff to do that? A. I could not get anybody in that area to go up there to do it.

Q. But you knew Bubb had been doing that? A. I don't think I said that. 40

Q. But you in fact knew that? A. I don't think I did; I don't know.

Q. Coming back to your conversation with Bubb in July, do you remember telling his Honour after lunch what it was about; the substance of it? A. Yes.

Q. It was hardly a conversation which did not allow you sufficient time to ask him things like turnover figures, was it? A. I spoke to him about the site.

Q. But what you told his Honour after lunch, I suggest, would hardly convey the impression that it was so rushed that you did not have time to ask him about turnover? A. I did not go there just to see him for that; I went there to introduce myself to him and find out why he got out of the business up there. I had figures in my hand that I believed to be true about the business, and that was all I was concerned with. 10

Q. You had had no experience yourself in running a service station? A. None whatsoever.

Q. And you did not want to ask him about his assessment of profitability? A. No, I just spoke to him about the site. 20

Q. (Approached). (Witness shown cash book). What does "S.S.A." stand for? A. Service Stations Association.

Q. Who were Geoffrey Smith & Co.? A. My solicitors, in court.

Q. Taking an item like \$357.39 for petty cash on 12th January, 1976, which is listed in the sundries column, what would that be for? A. It was petty cash from 1.1.76 to 11.1.76 off the pink sheets.

Q. What would "Building Society" be for? A. \$1,000 for petrol tanks.

Q. In relation to the document which is in the cash book and the same document I was asking you questions about before, you will see under the heading in relation to cigarettes, drinks, snack bar, an item of outgoings, the first of which is purchases \$6,646.45? A. Yes. 30

Q. The next one is petty cash? A. Yes.

Q. Do you know how that sum is made up? A. Yes, I do. (Witness referred to pink sheets). Each day, as the business progressed, if bread or milk or cakes were delivered I would pay them out of the till and I would record it on the petty cash down here. (Indicated). It also includes wages. So that figure in there in fact is made up of petty cash. What I used 40

to do at the end of a couple of days, I would draw a cheque for the accumulation of those amounts and I would bank the full amount each time I banked.

Q. The petty cash would relate pretty well wholly to the cafe? A. Yes. This does in fact relate to snack bar wages at that time.

Q. I think there is an item in here for the hire of a drink machine? A. Yes.

Q. And there is a cigarette machine? A. No. In fact, there were two drink machines. The accountant suggested I do this. I recorded each day's petty cash and at the end of every couple of days I would draw a cheque for the full amount on petty cash and I would do my banking for the full amount each day. 10

Q. Did you say before lunch words to the effect that you said to somebody in one of your conversations that there was no way in the world a person could make twenty-five per cent on sales through the cafe? A. I don't remember saying it now. Did I say that?

Q. I am asking you? A. No, I don't remember saying that. 20

Q. Did somebody else say it, in any of your conversations, about which you have told us; any of the people involved in this case? A. No, I don't remember that.

Q. So far as deliveries of gasoline to this service station were concerned, the practice was for the tanker/driver to from time to time come to the site and make a drop of products?  
A. Yes.

Q. The practice was that the proprietor would sign the delivery docket? A. There was a docket; I presume I signed it.

Q. If you wished to verify that you were being delivered a number of gallons of product, you were able to check the delivery if you so wished? A. Yes. 30

RE-EXAMINATION:

MR. COOMBS: Q. My friend asked you some questions about the length of your training course with Caltex and the coincidence with your police force. How long before your resignation actually took effect did you in fact cease working for the police department? A. I took some leave that was owing to me so I could attend the course.

Q. Do you recall how long? A. Three weeks' leave I think I took. 40

Q. You finished up with the police force on 22nd October, about nine days before you ---? A. Yes.

Q. As far as the takings recorded from the snack bar on the pink slips are concerned, you told my learned friend there was in fact a round sum recorded in most cases on the pink slip?  
A. Yes.

Q. Was the round sum an approximation too, or different from the actual takings, or what? A. I made it to a round figure. I may have dropped it back 17 cents or I may have put it up 17 cents to make it a round figure. 10

Q. The figure recorded is within cents of the actual takings for the day? A. It is.

Q. Can you tell us when it was that you had the conversation with Mr. and Mrs. Bubb after you had found yourself to be somewhat concerned about your situation after your conversation with your accountant? A. I don't recall exactly, because I had seen the Bubbs a couple of times. I honestly can't say in time how long it was after. It may have been a day or two after; it may have been a week or two. 20

Q. When you say it may have been a day or two or a week or two, do you mean a day or two or a week after you had been in conversation with your accountant? A. Yes. I just can't remember; I just can't think.

Q. Are you able to tell us confidently that it was at a time, however long, after you had the conversations with your accountant? A. Yes.

Q. Is your impression shortly after, or could it have been weeks after? A. I would say, shortly after.

Q. Did you yourself look at the Bubb pink sheets in relation to the snack bar takings? A. No. 30

Q. Do you recall who it was who told you anything about the quantum or the size of the snack bar takings - was it Mr. Bubb or Mrs. Bubb? A. They were both there when we were speaking; I don't know.

Q. Did you in fact have any conversation with them in which you mentioned the figure of \$1,000 a month nett? A. I put it to them at one stage that I could not see the site doing it; that I most certainly was not doing it, and they agreed with me that it had not done that. 40

Q. During your conversations with Mr. Gary Parker about this site, was there any discussion about distillate? A. No; that is not included on the sheet.

Q. Was there any discussion between you as to distillate as opposed to super or standard fuel? A. The only thing that I can recall about distillate from Gary was, I did approach him at one stage about the ----

Q. Was this before you were in occupation of the site or at the time during the negotiations? A. This was during the initial negotiations. I asked him about the selling price, and I am sure there was no fixed distillate price, and I think he did explain that to me.

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FURTHER CROSS-EXAMINATION:

MR. MORLING: (By leave). Q. Caltex arranged your accommodation at a motel, did it not, while you were in the training school? A. No.

Q. Where did you stay while you were in the training school? A. I was living at Cabramatta.

Q. Where was the training school? A. At Gladesville.

Q. You had a number of friends in the police force in the Newcastle district? A. I think I knew all the police in the Newcastle district.

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Q. And they from time to time came to visit you at the station? A. From time to time, yes.

Q. And parked their cars in the parking area? A. Yes.

Q. Was it your practice to wear casual clothes around the service station? A. I used to wear Caltex clothes.

Q. Was it not your practice to wear sports clothes and the like around the service station? A. No.

(Witness retired.)

MR. COOMBS: I tender photocopies of the advertisements extracted from my learned friend's client's file together with a schedule showing the dates upon which advertisements appeared.

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MR. MORLING: If my friend says, as he does say, these were not seen by his client, I object to them.

MR. COOMBS: I press them.

HIS HONOUR: What is the basis of their relevance?

MR. COOMBS: All the advertisements relate to this service station; all the advertisements in the schedule relate to this

service station, and those matters are clear. We would be suggesting to your Honour that there is a clear reluctance earlier on to make any profit statement about the service station, and that it was only in the context of difficulty in closing the site that the step was taken to advertise. We would submit that has some bearing on the reliability of the proper estimate. It does not matter whether we saw it or not; what we are pointing to is the difference between not only promise and performance but promise and the fact.

MR. MORLING: I do not mind your Honour seeing it, but I submit that in no way can it have any relevance in a case which is based on the fact that a contract was made pursuant to an advertisement which this witness saw. 10

(Discussion ensued.)

(His Honour admitted photocopies of advertisements extracted from the respondents' file together with the schedule; marked Exhibit 14.)

MARIE THERESE FEENAN  
Sworn and examined:

MR. COOMBS: Q. Is your full name Marie Therese Feenan? 20  
A. Yes.

Q. I think you are the wife of the other applicant, Paul Feenan? A. That's right.

Q. And you and he, together, for a period of about eight months conducted a service station at Hexham? A. That's right.

Q. And did you concern yourself, substantially, with the snack bar? A. Yes.

Q. But also in other areas? A. Yes.

Q. In what other areas? A. Are you talking about the immediate business, I helped Paul with the petrol, is that what you mean? 30

Q. Yes? A. Yes.

Q. So you helped with the petrol? A. Yes, mainly when the snack bar was closed of an evening and I was waiting for Paul to knock off, I used to help out on the driveway and also with the receipts for the day, we used to go through these together.

Q. So that you, when you were not yourself busy in the snack bar, you helped out? A. Yes, when we had the snack bar closed and it had all been cleaned up then I would help Paul.

Q. I think you left school when you were aged about 15? 40  
A. That's right.



Q. I think you took employment in Waratah? A. Yes.

Q. Where was that? A. It was at the school for the deaf children at Waratah.

Q. I think you were there for something round about four years? A. Yes.

Q. And did your work include the preparation and helping with serving of meals? A. Yes.

Q. Thereafter did you work at the Western Suburbs Hotel in Newcastle? A. Yes.

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Q. I think that employment did not involve you in cooking?  
A. No.

Q. But thereafter you went to the Masonic Club? A. Yes.

Q. And you took work there as a chef's assistant? A. Yes.

Q. Because you were a person who liked to cook? A. That's correct.

Q. I think the cooking was a little on the fancy side at the Masonic Club? A. Yes it was.

Q. I think you, as well as cooking in the kitchen, did some of the table cooking for the more elaborate recipes? A. Yes, we used to cook meals at the table for the flaming dishes.

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Q. In addition, did you also prepare, on your own, breakfasts for people living within the club? A. I did breakfasts for any of the Masons that stayed overnight from the previous night, and Saturday night, some Saturday nights I did the snack bar.

Q. And did the snack bar at the club provide a range of normal snack bar type of food? A. Yes.

Q. Then somewhere in that period you got married and had children? A. Yes.

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Q. And did you, after you were married work at the Newcastle Wests Leagues Club? A. That's right.

Q. Were you there also a cook? A. Yes.

Q. And did you prepare for the smorgasbords and other dishes as well as conducting, yourself, the snack bar? A. Yes.

Q. And did you also work on a part-time basis at the Waratah Rugby Union Club in some kind of way? A. Yes.

Q. I think you and your husband, in 1975, were living at Cabramatta whilst your husband was working at Liverpool detectives? A. Yes.

Q. And did you and he discuss an advertisement that he had seen in the Sydney Morning Herald? A. Yes.

Q. And thereafter did you and he proceed to go to Hexham on a weekend to see a service station there? A. Yes.

Q. And did you meet someone there? A. Yes.

Q. Mr. Gary Parker? A. Yes.

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Q. And did you and he and your husband first of all look around the premises? A. Yes.

Q. And make an examination of the residential area? A. Yes.

Q. Of the snack bar area and service station itself? A. Yes.

Q. And after that examination had taken place did the three of you go to the snack bar? A. Yes.

Q. And did you sit at the table there? A. Yes.

Q. Can you tell his Honour what happened, what was said and by whom, and what happened whilst you were sitting there in the snack bar? A. We sat down with Gary Parker there and he was telling us about all the money we would need that would be involved in taking over the site.

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Q. Can you remember what he said about that? A. He said, that we would require \$10,000 take-over, but we could expect that in return all that in the year, \$20,000 per year, and he also explained to us that the premises were \$700 a month, and that the snack bar was clearing \$1,000 a month.

Q. Were some pieces of paper produced? A. Yes, tissues of paper.

Q. What was done with those? A. We read them and Gary went through it with us and it sounded really good business, and we both discussed it and decided that, you know, it was really good.

30

Q. Was there any discussion, in particular, about staff that was operating the snack bar? A. Yes, he told us that the snack bar was only operating from 9 a.m. till 3 p.m. week days, and that it was not operating at the weekends because it just was not a goer, no business at the weekends, and said, "As you know when things are company run they do get run down," and said, "Once a dealer comes in it can only improve".

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Q. Would you have a look at Exhibit 2 and Exhibit 3, are they photocopies of the sheets that you saw and are the same?

A. Yes.

Q. You have told us that Mr. Parker said that the snack bar was not opening at the weekends, and pointed out to you that it being a company run station things were a bit run down and could only go upwards from there? A. Yes.

Q. Was anything at all said to indicate to you the figures that were being shown to you were not the current figures?

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A. No, I understood that that was what they were making at the time.

Q. Then did you discuss any particular individual who might be able to give you some guidance in the snack bar who worked there previously? A. Only Mrs. Bubb, Gary told us that she had it a couple of years ago, before we had gone in, she had it a couple of years ago.

Q. Was a girl called Ranger mentioned? A. Yes, she was working there for the company.

Q. Was there any discussion about the snack bar opening at night? A. Yes, Gary had told us that it was not operating at night, there just wasn't the business there, he said, however, if we go in probably we could make a go of it.

20

Q. Could make a go of it opening at night? A. Yes.

Q. Is that the best of your recollection of the conversation?

A. Yes.

Q. Thereafter, did you and your husband, in fact, commence to operate the business together? A. Yes.

Q. And as far as the snack bar business was concerned at what times - did you, in fact, conduct this snack bar? A. Yes.

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Q. And did you have some staff? A. Yes.

Q. Who did you have? A. I had Dorothy Gunn and Lorraine Stewart, and they were the more permanent ones, when we first began I kept the girl that was with Caltex and I thought it was best to keep them there until I accustomed myself to the regular customers and got to know them and they got to know me so as not to lose any confidence, and after I could handle it, I knew I could handle it in a couple of weeks, the following week I put the girl off.

Q. You kept her on to maintain continuity? A. Yes.

40

Q. You opened, we know, on the 1st November, 1975, can you tell us what hours you conducted the service station from that time on? A. I worked from 8 in the morning to 2.30 p.m.

Q. What time did you open in the morning? A. 8 a.m. to 2.30 p.m., and again from 5 p.m. till 9 p.m.

Q. During all that time did you have casual help, starting from the beginning and tell me whether there were any changes? A. Yes, we had casual help nearly all the time, they didn't come every night when it was open, I worked the nights that they were not on, but each day I had two girls plus Paul's mum to help me out. 10

Q. For how long did Paul's mother help you? A. The whole time.

Q. And did she ever get any salary? A. No.

Q. What hours did she work? A. She was there from nine to late in the afternoon.

Q. And she did that as a family gesture to help you get working? A. That's right.

Q. She never got any money at all? A. No. 20

Q. Were there a number of regular customers when you began? A. When we began there was a crew from Hickson Engineering, they were our main regulars, they maintained, they stayed with us.

Q. For as long as you stayed there? A. Yes.

Q. What was the main commodity you sold then? A. Sandwiches and hot foods.

Q. Lunchtimes? A. Yes, regular lunches.

Q. Did they come in or take away? A. They used to phone their order through and we did them up and on the bags we wrote on the bag the order, we prepared them at a certain time and they picked them up, sent a driver down. 30

Q. They were the main regular customers? A. Yes.

Q. Any other particular commercial contact? A. Yes we had another group that approached us after we had been there a few weeks, J.A. Brown, they came up and were getting their meals there and we had the same service with them, and other people eventually set up.

Q. Speaking generally is your impression that in the first few months you were improving the business? A. Oh yes, I thought I was doing very well.

Q. Then did you continue to open in the evenings throughout the time? A. Yes, up till about 20th March.

Q. Till 20th March? A. Round about that time.

Q. What was it about 20th March that made you decide not to open? A. Paul's brother was getting married for one thing, we had known previously that there was no business at the week-end and that just sort of clinched it. 10

Q. Was it a decision-making factor? A. Yes.

Q. Before that was there any money to be made staying open at night? A. No.

Q. Was that a change from the holiday months and warm months? A. Holidays it was pretty good, and if there was a motor race on, something like that, that was not very often, of course, we were on the wrong side of the road, all traffic was going north and in the evening when they were coming home most of them had eaten. 20

Q. But you did notice improvement when the motor cycle racing was at Jerilderie? A. Yes.

Q. By March night trade was ---? A. Money was during the day.

Q. The lunchtime trade remained constant and improved? A. Yes.

Q. You told his Honour at the end of the day you would help your husband with the pink sheets and paperwork? A. Yes.

Q. Did you record your takings in the pink sheets? A. Oh yes, every day we would be sitting up, some nights, till 12 or one o'clock, that was in the first couple of months. Paul is a fanatic about figures and keeping records. 30

Q. Were the takings of the snack bar accurately recorded on the pink sheets? A. Oh yes.

Q. If you stayed open at night were there odd regulars that would blow in? A. Yes, we had earth moving people, a fellow used to come in every Saturday and I still prepared his meals, I used to do that on my own personal stove, rather than set up the commercial ones, or fishermen sometimes, or a couple of truck drivers would come in and I would grill them a steak, I didn't want to let them down. 40

Q. Those who had established a contact with you? A. A few that did come in I still maintained.

Q. You told us at the beginning you had casual staff, did you do something about reducing the existence of the casual staff?

A. Yes, as I have been in casual work myself in different clubs I have learned by experience that they used to keep you at a minimum and bring you on at the busy time.

Q. When you say minimum you are talking about ---? A. Three hours was the minimum.

10

Q. Had to put them on for three hours anyway? A. That's right, I was bringing girls on at the time, say, between 10 a.m. and 1 p.m., and the trade that is there that I did, I did all the preparation myself and the cleaning up afterwards to cut down the expenses.

Q. So you would start work at 8 a.m., or thereabouts, and the starter would come on at 10 a.m.? A. Everything would be ready for them to attend to the counter when the lunches were busy.

Q. So that cut expenses to a minimum but efficiency at the best? A. I thought so.

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Q. Tell me this, did you work hard in this business? A. Yes.

Q. And did your husband work hard? A. Yes, very hard.

Q. He has told us he lost some weight, did the pair of you, do you believe, apply yourselves as best you could to this job? A. Yes.

Q. Did you have any other conversation with Mr. Parker or Mr. Watson, or anybody else, about the takings of the snack bar? A. No.

Q. And did you ever discuss the snack bar, or its operation, or its takings with Mrs. Bubb? A. I did discuss the snack bar but not the takings.

30

Q. With Mrs. Bubb? A. Yes.

Q. When was that? A. When we first went there I was introduced to her and I knew that she had had it, and I think Gary advised me that I probably could get some hints from her, so I did ask her how it was going when she had it, and she said it was going well, but she said you must remember, "When I had it I had a staff of five girls every day and Carrington Slipways". They were their major lunch, they had an agreement with them and they were really good, and that required five girls to handle that, and I thought, "Oh well, I will go and approach them".

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Q. Carrington Slipways were the backbone of their business?

A. Gary had told me that they did not deal with him in any food line but they did have accounts there, petrol accounts, but not with food any more and he said that they had approached him about it and he did not have the staff to handle them.

Q. Did you, yourself, make an approach to Carrington? A. Oh yes, I approached them and gave a list of our prices and tried to cut them down a bit to attract them to us.

Q. But that never came about? A. They said they had approach- 10  
ed Gary and he said he did not have staff to cope with them and they had already established themselves further down the road.

Q. They had made contact with somebody else? A. That's right.

Q. What time did your husband start in the morning?

A. 7 o'clock.

Q. What time did he finish? A. 9.30, that would just go by how busy it was, he might work later, in the beginning worked much later.

Q. The snack bar was not open in the afternoon after 2.30 20  
p.m.? A. No, it re-opened at 5 p.m.

Q. During that time I understand you did not drive a motor car? A. No, I did not have a licence then.

Q. Who used to take the children to school and bring them home? A. Paul did, we used to go together in the afternoon to collect them, that was a bit of a break from the business, out in the fresh air.

MR. COOMBS: That is the end of the evidence in chief of the witness.

(Matter adjourned part heard until 10 a.m. Wednesday,  
27th June, 1979.)

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INDUSTRIAL COMMISSION OF NEW SOUTH WALES

CORAM: MACKEN, J.

WEDNESDAY, 27th June, 1979.

No. 200 of 1979

PAUL LESLIE FEENAN & ANOR v. CALTEX OIL (AUSTRALIA) PTY.  
LIMITED & ANOR.

Application for order declaring contract void.

(Part Heard)

MR. COOMBS, Q.C., appeared for the applicants with MR. MATER. 10  
MR. MORLING, Q.C., appeared for the respondents with  
MR. PETERSON.

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(Mr. John Rex Bubb of 7 Pandores Street, Evan Hills(?),  
Brisbane, appeared in answer to subpoena duces tecum and  
produced subpoena together with documents called for;  
access granted.)

MR. MORLING: I told my friend that I did not want to take up 20  
time unnecessarily with Mrs. Feenan on matters relating to the  
accounts of which she has not any detailed knowledge. My  
friend said yesterday, because of a strike somewhere the docu-  
ments in fact did not reach us until during the course of the  
hearing. Some of the matters which I would like to ask her  
about relate to the cafe side of the pink slips. Therefore, if  
she is unable to assist me on those matters, I will ask leave  
to recall Mr. Feenan to see if I can get some better under-  
standing of it from him.

MR. COOMBS: There will be no objection to the recalling. What 30  
I said to my friend was that I do not really know how much de-  
tailed knowledge Mrs. Feenan has of the accounting and my friend  
should take the course of exploring it. But I have said to him  
that as I understand it she does not have any detailed know-  
ledge of accounting.

MARIE THERESE FEENAN  
Recalled; on former oath:  
CROSS EXAMINATION:

MR. MORLING: Q. You had had a good deal of experience in  
serving and preparing food at places like clubs before you went  
to the service station? A. That is right.

Q. But you had never been in business before on your own  
account, had you? A. No.

Q. Indeed, nor had your husband? A. No. 40



Q. You particularly were quite inexperienced in the business side of running a cafe? A. Yes.

Q. I suppose, when you worked in places like the Masonic Club and other such places, the prices at which food was sold were fixed by people other than yourself? A. Yes.

Q. Mrs. Bubb offered to come down to the cafe, did she not, and show you the ropes? A. No, she didn't.

Q. Did you speak to her before you and your husband went into the business? A. No. 10

Q. Did your husband tell you that Mrs. Bubb had offered to come down and show you the ropes? A. No.

Q. Did it occur to you to ask her whether she would do that? A. No.

Q. I think you left school when you were 15, did you not? A. Yes.

Q. In any of the jobs which you had had since you left school, you had never really had to handle money? A. No; just take the money and put it in the cash register.

Q. How old were your children in 1975/1976? A. Four and six. 20

Q. The position was that you had a till in the restaurant, is that right? A. Yes.

Q. And your husband had another till in the service station proper? A. That is right.

Q. As he said yesterday, the money from the cafe went into the till? A. Yes.

Q. If during the day you had to buy some bread or meat or whatever, you would take the money out of the till and you would show the net takings at the end of the day? A. Yes; we used to write a petty cash docket. 30

Q. (Approached.) (Witness shown Exhibit 10.) Do you see the cash register dockets attached to each of the pink slips? A. Yes.

Q. They are the dockets which came from the cash register in the service station proper, as distinct from the cafe, would you agree? A. No, the cafe was added on that.

Q. Do you see these little dockets stapled onto the pink sheets? A. Yes.

Q. Those dockets come from the cash register in the service station, as distinct from the cafe, would you agree with that?

A. Yes, but Paul used to add on the takings from the snack bar -

Q. Those dockets come from the service station cash register?

A. Yes.

Q. When you spent some money on bread or meat or whatever, you would note it, say, as snack bar - and I show you the one for 25th June, 1976 - \$25.43? A. Yes.

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Q. Or in many others - and there are hundreds of them - you can see things like bread \$5.38 noted on the one for 28th June, and cake on the same day? A. Yes.

Q. Eggs and vegetables \$7 on 29th June, 1976, and so on?

A. Yes.

Q. Have you seen these dockets before this case started?

A. Yes.

Q. You would agree that there are scores and scores of entries like those few I have just mentioned to you? A. Yes.

Q. If I can take you in Exhibit 10 to the first month of your trading, taking 10th November, which would have been a few days after you started trading, you had the same system; you would note for that day that you had paid out of the till some money for food and drinks at \$3.84 and fish and vegetables \$5.93, cakes and pies and so on? A. Yes. That one there was never taken out of the till; that was a cheque. (Witness pointed to item headed Coca-Cola \$39.96).

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Q. I suggest to you that you are wrong about that, because if you look at the cash book, which records cheques, there is no cheque which was drawn for \$39.96 on or about 10th November. So, would that mean that it would be taken out of the till?

30

A. If there is no cheque, then it definitely would have been taken out of the till.

Q. It is fair to say that the cheques which were written are shown in the cash book in the various columns, and if there is no entry in the cash book then it was paid out of the till?

A. Yes.

Q. On that day, having paid out the various items of petty cash, you were left with \$62 net for that part of the business?

A. Yes.

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Q. If you take the next day, 10th November, you paid out \$8 for cakes and pies, \$2.92 for bread, so that only \$10.92 was taken out of the till that day, leaving under the heading "Snack bar" on the same page a net figure of \$71.12? A. Yes.

Q. You did not have any accountants helping you with the books when you started the business, did you? A. Not initially - I can't remember.

Q. Did you at any stage have accountants come in and tell you how to keep the books showing how the cafe business was doing? A. I beg your pardon?

Q. At any stage while you were in the service station, did you have a conversation with any accountant as to how you should be keeping the books relating to the cafe business? 10  
A. No.

Q. From time to time supplies of cigarettes, sweets and drinks were purchased for the service station side of the business, is that right? A. We had them in the snack bar as well.

Q. Those that were sold in the service station were rung up on the service station docket, were they not? A. Yes. The sales of individual - you don't mean the actual buying?

Q. The things that you sold in the way of cigarettes, sweets and drinks through the service station? A. That is right.

Q. I show you one or two examples. I show you the entry for 16th February, 1976. If you look at service station cash register docket under code item 3, there is an amount of \$19.21 shown? A. Yes. 20

Q. Under the third column, showing takings, you can see \$19.21 written there, as well as a larger sum of \$94.21? A. Yes.

Q. The \$19.21 is the figure showing sales to the service station cash register of cigarettes, sweets and drinks in that side of the business? A. That is right.

Q. If you look at the sheet for Saturday, 28th February, 1976, do you see that on the cash register docket for the service station there is an amount of \$9.88 under code item 3? A. Yes. 30

Q. You can see that over in the third column you have a total sum of \$36.88, with \$9.88 written above it? A. Yes.

Q. That would indicate to you that there was on that day \$9.88 taken for cigarettes, sweets and drinks through the cash register in the service station, and the balance, which would be \$27, in the cafe? A. I can't remember how that operated, I am sorry. 40

Q. That would have to be right, would it not, because there

M.T. Feenan, xx

is no item of \$27 on the cash register and you were making some money through the cafe? A. Yes.

Q. Who did the banking at the service station? A. Paul.

Q. He kept a bank book, did he not? A. Yes.

Q. Taking that last item, at the end of that day I was just referring to there was \$9.88 in the service station till, being the amount under code item 3 on the service station till docket? A. Yes.

Q. And the balance of \$27 left in the till in the cafe, is that right? A. Yes. 10

Q. If we go to two days earlier, 26th February, on that day you sold \$19.69 through the till in the service station under code item 3? A. Yes.

Q. And the total sales under column 3 is \$59.69? A. Yes.

Q. So that if you take off \$19.69 from \$59.69 you end up with \$40? A. Yes.

Q. So at the end of that day you had got \$19.69 in the service station till for cigarettes, sweets and drinks? A. Yes.

Q. The balance of \$40 in the snack bar till? A. Yes. 20

Q. During the days, you have noted on the petty cash part of the form you had paid out \$27.58 for snack bar petty cash? A. Yes.

Q. So that you were then able to tell yourselves; we have got so much from cigarettes, sweets and drinks, as shown on the cash register at the end of the day, and having paid out the petty cash for the snack bar as noted on the petty cash voucher, you were then left with \$40 to add to the \$19.69? A. Yes.

Q. And that is the sum, \$59.69, which you would then take across to add up as the total net takings for the day and add it to the petrol and other sales? A. That is right. 30

Q. Who actually wrote this book up? A. Paul did. Paul did all the entries.

Q. I am showing you a book which has been produced. Is that the bank deposit book which was used in the business? A. Yes.

Q. That is the only book? A. Yes.

Q. How often did you go to the bank? A. Every day.

Q. Are you sure of that? A. Almost every day.

Q. You left the service station on 30th June, 1976, did you not? A. I beg your pardon?

Q. It was more like once a week, was it not, rather than once a day? I suggest you went once a week? A. I am sorry, I could not remember.

Q. Did you ever deposit any cash, do you know? A. I am sorry, I can't remember. Yes, he would have taken cash down. 10

Q. (Approached.) Can you point to any deposit of cash in the bank deposit book? If you say you do not understand the book, I will accept that as an answer? A. I am sorry, I can't.

Q. You certainly only had one bank account at the Rural Bank? A. Yes.

Q. What steps did you take to see whether you were making a profit or a loss on the cafe side of the business? A. We had Peter Matthews, our accountant, come in February and do a check for us. He did an inventory for us. He did tell me then we were not making a good profit. 20

Q. (Approached.) Your husband told us yesterday that Mr. Matthews, the accountant, produced the document, which is included in the exhibit being cash book, which is headed, "P.L. and M.T. Feenan, 1.11.75 to 29.2.76", which on the third page shows a gross profit of \$554.18 for four months trading for cigarettes, drinks and snack bar, is that right? A. Yes.

Q. Those figures must have been prepared, I suppose, in March, if they are up to 28th February? A. Yes.

Q. Do you know when it was in March? A. No, I am sorry.

Q. Before your accountant produced those figures, you did not really know whether you were making a profit or a loss? A. No. 30

Q. You did not know whether you were making one per cent on your turnover or 100 percent on your turnover? A. No.

Q. Indeed, you did not know whether you were making minus one per cent or minus 50 per cent? A. No.

Q. Did you have a cigarette machine at the service station?  
A. Yes.

Q. And a drink machine? A. No.

Q. When you saw the \$554.18 profit figure, you realised that that was not only for the cafe but also for cigarettes and drinks sold through the service station? A. Yes, I realised that.

Q. You would simply have to make a profit out of that, because I suppose you just would never sell a bottle of drink or a packet of cigarettes or a packet of sweets for a cent less than you had paid the supplier, would you? A. No.

Q. So it was absolutely clear to you that you had been working hard for 4 months probably at a loss? A. Yes. 10

Q. So that that meant, the bigger your turnover probably the bigger your loss would have been? A. No.

Q. Do you know how much in an average week you were grossing in your takings in the cafe? A. No, I can't remember.

Q. You would not dispute there would have been something like \$500 a week gross before you paid out for all your supplies?

A. I can't remember.

Q. After you spoke to the accountant, did you introduce any different system of bookkeeping, so far as the cafe was concerned? A. No. 20

Q. Did you not decide to get out of the business because you realised, so far as you personally were concerned, you just were not a business woman? A. Would you repeat that?

Q. So far as the cafe side of the business was concerned, the accountant told you in March, in effect, you had not made a cent out of the cafe? A. No.

Q. He did not tell you that? A. I can't remember, I am sorry.

Q. Did the accountant discuss with you his calculations of the gross profit from the sale of cigarettes, drinks and from the snack bar? A. He discussed it with us. 30

Q. Did he discuss that part of the document which is on p.3, relating to the snack bar? A. Yes.

Q. Can you tell us what you said about it? A. I can't remember the conversation we had.

Q. I realise you could not remember the details, but can you remember anything at all about what was said? A. I remember him saying that we just were not making enough out of it and putting in all that time and not getting enough back.

Q. When did you shut on Fridays and Saturdays? A. I started 40

at 8 in the morning until 2.30 in the afternoon, then I re-opened at 5 until 9, and then if it was busier in the evening I would work on, or if it was very quiet I would close at 8.30.

Q. Did you open when the raceway crowd was coming home?

A. The raceway crowd that you are talking about, that did not happen every weekend.

Q. But when the motor races were on, did you open for that homegoing trade or not? A. Yes, until March we did.

Q. You closed it down in March because you then decided to leave the service station? A. Yes. 10

Q. A document has been tendered in evidence, produced by your husband, which says that until 20th March you worked from 8 a.m. to 8.30 p.m. on Saturdays and Sundays and until 9 p.m. on Mondays to Fridays, unless things were quiet, in which case you would close at about 8.30, would that be right? A. That is right.

Q. If that is right, you were not opening on any Friday night before 20th March to get the homegoing traffic from the raceway, were you? A. I am sorry, would you repeat that? 20

Q. The latest you opened on Friday nights was 9 p.m., up until 20th March, is that right? A. Yes.

Q. As the races finished well after 9 p.m., you clearly were not getting any of the raceway trade, up until 20th March, were you? A. No.

Q. After 20th March, you and your husband made a firm decision you were going to leave this business, did you not? A. Yes.

Q. So you did not work as hard thereafter? A. Yes, I did.

Q. Your husband has said that after 20th March you worked from 8 a.m. to 2.30 p.m. on Mondays to Fridays? A. Yes. 30

Q. Would that not indicate that you did not work as long hours after 20th March as before? A. We didn't work the same hours, but I put in the same work during the day.

Q. I understand you at all times worked very diligently. But whereas until 20th March you worked until 8.30 or 9 p.m., Mondays to Fridays, you worked until 2.30 p.m. thereafter? A. That is right.

Q. When did you first start to look around for the purpose of buying a house? A. While we were at the business, we didn't look for a house. 40

Q. Was it early in the year? A. No.

Q. Can you remember which month? A. In June, it would have been.

Q. You had paid the deposit long before then, had you not?

A. Not for our home, because we didn't buy a home when we got out of the business.

Q. Did you look at a lot of houses before you paid a deposit on one? A. I am sorry, I don't know what you mean.

Q. Did you put a deposit on a block of land? A. We had land at Penrith that we were paying off. 10

Q. On 20th April, 1976, you paid an amount of \$1,940 to David Brown Real Estate. Can you recall what that was for?

A. That was for a home at Mayfield.

Q. You had looked around for quite a long time before you decided you wanted that place, did you not? A. Yes. I can't recall ---

Q. Would it be a couple of months before you actually decided upon the Mayfield house that you started to look? A. It would have been a month. 20

Q. I think you said yesterday: "I thought I was doing really well in the cafe business". Was that because a lot of people were coming in and buying food? A. Yes, during the lunch time they were.

Q. You thought you were doing really well because your turnover was quite high? A. Yes; I thought I had almost doubled the figures.

Q. When you and your husband were deciding whether or not you would go into this business, you had in mind that if you went into it it would be a long-term proposition for you, is that right? A. Yes. 30

Q. You had in mind to make it a successful business which would, so to speak, replace your husband's career in the police force, as a secure source of future income? A. That is right.

Q. Therefore, you were anxious to know how a husband and wife team like you and your husband, could do in the place?

A. That is right.

Q. You were pretty anxious to know how the last husband and wife team had done in the place, were you not? A. I would not say, really anxious. 40



Q. That, to you, would have been the best guide as to how you and your husband, as a husband and wife team, might do if you went into business? A. I suppose so.

Q. You at all times realised it would indeed be a husband and wife business? A. Yes.

Q. When Mr. Parker spoke to you, he told you it was that sort of business; a husband and wife business? A. Yes.

Q. And a business which would involve working long hours for both of you? A. Yes. 10

Q. And you were prepared to do that? A. Yes.

Q. Can you remember Mr. Parker saying that a business of that kind never made money when it was being managed by an oil company? A. Yes.

Q. I suppose you yourself could see that if you had to pay a woman the wages to recompense the hours that you were putting in, you would have to pay a lot of money for such wages?  
A. Yes.

Q. I think you were in court yesterday when your husband gave evidence? A. No, I was not. 20

Q. (Witness shown Exhibit 2.) Can you remember looking through this document with Mr. Parker before you took up the business? A. Yes.

Q. Do you remember at the very top of the document there is a column headed, "Actual" with that word crossed out? A. Yes.

Q. And the word, "Estimated" over the top? A. Yes.

Q. In the conversation with you, Mr. Parker made it clear that the figures on the sheet were not the actual figures but were the figures which he estimated the husband and wife team, like you and your husband, could make out of the business? A. No, I thought that that was what we would make. 30

Q. Did you ask him why the word "actual" had been crossed out? A. No.

Q. What do you understand to be the difference between "actual" and "estimated"? A. "Actual" would be true, in my mind, and "estimated" would be close to true.

Q. "Actual" you would take to be figures that were currently being taken by way of proceeds and currently being paid out by way of outgoings, is that right? A. Yes.

Q. So that when the word, "actual" was crossed out, you knew the figures were not those type of figures? A. No, I thought that that was what we would make; I did think that.

Q. If actual figures, in your understanding, were figures which were actually being either taken in terms of money or paid out in terms of money, then the fact that "actual" was crossed out led you to believe that the figures were not figures of moneys actually being taken or moneys actually being paid out? A. No.

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Q. Why then did you think "actual" was crossed out? A. I didn't know that it was crossed out.

Q. Would it be true to say you did not really read the document? A. Yes, I did read it.

Q. Did you ask Mr. Parker why he crossed "actual" out?  
A. No.

Q. You knew, of course, that Mr. and Mrs. Bubb had been in the service station until some time early in 1975? A. I knew that they had not been there the year before - I can't remember exactly.

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Q. Did you personally see Mr. and Mrs. Bubb before you signed up for the licence? A. No.

Q. Before your accountant discussed with you in March 1976 the trading figures for the cafe, had you yourself ever totalled up the daily net receipts from the cafe side of the business? A. Yes.

Q. Clearly, you did that everyday on your pink sheets?  
A. Yes.

Q. At the end of, say, a month or a fortnight, did you ever say: I will just see how I have gone in the last month and total up how much I have taken; how much I have had left in the till each day after I have paid out fruit and vegetables and bread and so on? A. Yes, we did do that.

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Q. When did you do that? A. We used to do it each week. I used to tally it up for the week and I would give it to Paul.

Q. If you had done that, you would have known, would you not, whether you were making 1 per cent or 100 per cent, profit or loss, on turnover? A. No.

RE-EXAMINATION:

MR. COOMBS: Q. I am going to ask you some questions about

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the mechanics of bookkeeping. If you do not know the answers, please do not guess. My learned friend has asked you a number of questions about notations on the pink slips about cash being paid for things out of the till? A. Yes.

Q. Firstly, when cash was paid for things like bread and so on out of the till, out of which till was it paid; out of the snack bar till or out of the service station till? A. Out of the service station till.

Q. At the end of the day, was there a system of replacing the money that had just gone out with something else? A. Yes, with the cheque. Paul always wrote a cheque. 10

Q. The cheque was then drawn for petty cash and placed in the till so that the takings of the day were correct as takings appearing in the bank statement? A. That is right.

Q. Was a record made of what that cheque represented in the cash book, breaking it up in accordance with the items thus paid for? A. He wrote the cheque out for petty cash. But I can't remember whether it was broken up into individual - it was just petty cash. 20

Q. (Approached.) (Witness shown Exhibit 10.) Can you tell me what the entry on 21st November is for? A. Drinks, bread and fruit.

Q. A total of \$35.58, is that correct? A. That is right.

Q. Similarly, on 19th November, cakes and drink? A. That is right.

Q. On 12th November, drinks, \$7.68? A. Yes.

Q. On 10th November, as my friend has pointed out, Coca-Cola \$39.96? A. Yes.

Q. And further down, fruit drinks \$3.84? A. Yes. 30

Q. You have told my learned friend that your recollection was that Coca-Cola was normally paid for by cheque and that if there was no cheque those entries must indicate a cash payment? A. Yes.

Q. Would those cash payments be covered by the system you have described, of writing a petty cash cheque at the end of the day? A. Yes.

Q. When a cash book entry came to be made, such items as appeared on the right hand bottom corner of your pink slips would be recorded - (Further leading objected to; withdrawn.) 40

Q. Do you happen to know which column in the cash book such cheques would be recorded in? A. I think it was the third column, I can't remember.

Q. You said to my learned friend that you were puzzled by the suggestion that no cash was deposited, and I think he probably withdrew that. Would you look at the bank deposit book and indicate whether until 30th June bank notes were deposited in respect of every deposit in respect of 30th June (witness shown bank deposit book)? A. Yes.

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(Bank deposit book tendered without objection and marked Exhibit 15.)

Q. My learned friend asked you questions about how you fixed your prices. How did you in fact fix the prices at which you sold various items in your snack bar at the beginning? A. I used the prices that were there, the previous prices, and then as increases came, for instance, if there was an increase in bread I would increase my sandwiches, and I was advised by the people who delivered them what the mark-up would be on, say, drinks.

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Q. When you began, you adopted the current prices; the prices that had been used? A. Yes.

Q. And as things increased in price, you increased the prices either by your own estimate or by the advice of the deliverymen? A. That is right.

Q. You told my learned friend that after 20th March you worked just as hard? A. Yes.

Q. Do you recall he asked you questions about the snack bar hours? A. Yes.

Q. Can you tell his Honour what you did after 20th March that causes you to express the opinion that you worked just as hard? A. I maintained the same hours during the day, and then in the evening and that I would go out with Paul and keep Paul company and just help him on the driveway, pouring petrol and that sort of thing, and taking money and putting it in the till ---

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Q. So that you were not working in the snack bar; you were working on the driveway? A. Yes.

MR. COOMBS: I tender a cheque butt book bearing number 101901 through to 102000, and in particular cheque butt number 101989. I draw your Honour's attention to two dates in the cash book which has already been tendered; 15th December, 1975, where a petty cash cheque has been written, and 23rd December, where a petty cash cheque has been written.

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M.T. Feenan, re-x

If your Honour takes the series of pink slips between those two dates, the amounts shown as cash purchases in the right hand corner total the sum shown on that cheque for petty cash. I am simply verifying the situation which the witness has explained.

(Cheque butt book admitted without objection and marked Exhibit 16.)

(Witness retired.)

(Short adjournment.)

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GARY LLOYD PARKER  
Sworn and examined:

MR. MORLING: Your Honour, I tender a list of monthly deliveries of petrol and distillate to the Hexham site from January 1974 through to 1978. I imagine my friend might think that they go too far. These are the records from the computer print-out of the company of all deliveries to this site from January 1974 to May 1979, and they are all backed up by receipts, from time to time.

HIS HONOUR: Is that of all products?

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MR. MORLING: It is of all super-grade petrol, standard grade petrol and distillant.

MR. COOMBS: I am not impressed by computer print-outs, your Honour.

HIS HONOUR: Do you want to check them first, Mr. Coombs?

MR. COOMBS: Yes, if we could do that over lunch time.

MR. MORLING: Q. What is your full name, Mr. Parker?

A. Gary Lloyd Parker.

Q. You live at 11 Tincan Bay Road, Gympie, Queensland?

A. That's right.

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Q. Are you a farmer? A. Yes.

Q. And did you become a farmer in February 1976? A. Yes.

Q. Prior to that time did you work for Caltex Oil Company?

A. I did.

Q. And for how long had you been working for them until you left back in 1976? A. In excess of three years.

Q. Had your job been merchandising representative for some years before you left the company? A. Yes.

Q. And you had, I think, a number of Caltex service stations in your area? A. Yes.

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Q. What was your area? A. It was the northern half of Newcastle City and environs.

Q. How many service stations did you have in your area?

A. Twenty.

Q. What was the general nature of your duties? A. To liaise between the company and the operators of those service stations,

and as the service stations were vacated to find new operators and install them.

Q. You left the company of your own accord to take up another form of employment? A. Yes.

Q. For how long had you been the area representative for the Hexham site before you left the company? A. For practically all the period that I was in merchandising.

Q. So you knew that Hexham site for a couple of years before you met Mr. and Mrs. Feenan? A. Yes. 10

Q. And you knew Mr. Bubb? A. Yes.

Q. For what purpose would you come in contact with a person such as Mr. Bubb, being the operator of a site? A. My job was to ensure that company property was being looked after, and that the dealer was operating satisfactorily, he had no complaints about maintenance on the service station, or deliveries by the company to the service station, day to day problems that he might have on the site. Even towards staff, he may be short and I may know somebody on another service station that wanted a job, something like that. 20

Q. In that capacity did you get to know Bubb? A. Yes.

Q. And in the same capacity did you get to know the other nineteen operators under your wing, so to speak? A. Yes.

Q. And did you have some sort of relationship with Bubb, the same as you had with the other nineteen operators? A. I did.

Q. And when, I think, Mr. Bubb left the site he went to another Caltex site, did he not? A. Yes.

Q. That was at Waratah? A. At Mayfield.

Q. I think, at the time you had your first conversation with Mr. Feenan the site was being operated by the company itself? A. Yes. 30

Q. Did the company favour, from its point of view, operating sites itself as distinct from having them operated by a licensee? A. No, the company did not like company operations.

Q. We have been told that this was a site that was on the highway at Hexham and had a snack bar attached to it, is that correct? A. That's correct.

Q. Was it a site which, in your opinion, would be suitable for a husband and wife operation? A. Very much so.

Q. And sometime, I think, in 1975, you had a conversation with Mr. and Mrs. Feenan, didn't you? A. I did.

Q. Did you firstly have a telephone conversation with Mr. Feenan? A. Yes.

Q. And was an arrangement made that they would come to the site and have a look at it? A. Yes.

Q. And did they come to the site? A. They did.

Q. And did you meet them there? A. Yes.

Q. He said it was July, can you recall whether that was about right? A. It probably was. 10

Q. Did you show them round the site? A. I did.

(Witness shown Exhibit 2.)

Q. During the course of your discussion did you get down to details of what the Feenans might expect? (Objected to.)

Q. During the course of discussion was Exhibit 2 produced?  
A. Yes, it was.

Q. By you? A. Yes.

Q. Did you have some discussions about it? A. Yes.

(Witness shown Exhibit 3.)

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Q. Was that document, Exhibit 3, also produced? A. Yes.

Q. Did you have some discussion about that? A. Yes, we did.

Q. Can you tell his Honour, as best you can remember now, what you said when you produced Exhibit 2? A. One form relates to the amount of money that I felt would be --- (Objected to.)

Q. What did you say about Exhibits 2 and 3 when you produced them? A. I cannot recall what I said, I know that I showed both forms to them and discussed them point by point, line by line.

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Q. Let me take you to Exhibit 2, was the word "actual" crossed out and the word "estimated" written on the top of it when you produced it? A. Yes.

Q. Did you have some discussions at the time as to who was then operating the site? A. Yes.



Q. And what did you say as to who was operating the site?

A. That the company was operating the site.

Q. Did you say anything as to who had been operating the site before the company did? A. Yes.

Q. What did you say about that? A. That Mr. Bubb had been operating the site and in February of that year the company had taken over.

Q. Did you say anything about where Mr. Bubb was then working? A. At that time, I am not sure.

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Q. In relation to the items which are listed under the column headed "estimated" on Exhibit 2, anything said as to whether they were current work operative figures, or figures of a different kind? A. No.

Q. What was said about them? A. I said under company operation that these figures could not be expected to be achieved, that these figures were based on Mr. Bubb's operation.

Q. Can you recall anything being said about the gallonage figure of 26,000 being shown on Exhibit 2? A. The figure was discussed.

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Q. I know it is very hard after four years, was anything said in relation to gallonage in relation to Mr. Bubb?

A. This 26,000 was the gallonage that Mr. Bubb had been achieving and that it did not relate to company operation. I wanted to make it very clear the point that company operation was a very abnormal type of operation and that I could not present figures based on that because the company does not make a profit in company operated sites.

Q. Before this conversation had you had some previous conversation with Mr. Bubb? A. Yes.

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Q. About his gallonage? A. That's right.

Q. And about his other returns from various parts of the business? A. Yes, only by way of them that I could compile this form.

Q. Some parts of the form, such as the food items, did not form any part of the company's business at all, is that right?

A. I am sorry?

Q. Does the Caltex Company have anything to do with that part of the business related to the cafe? A. No, forgetting my figure, I had to speak to Mr. Bubb, I had no idea what sort of money he would be making in that sphere.

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Q. In terms of gallonage did you have available to you the company's records of the deliveries to the site? A. Yes.

Q. In 1975, did many sites sell distillate as distinct from gasoline? A. No, very few.

Q. What was the dealer margin on gasoline? A. 10.9 cents per gallon.

Q. What was the dealer margin on distillate? A. The same.

Q. Did the Hexham site, in fact, sell a little distillate?  
A. A little, yes. 10

Q. There is no record on Exhibit 2 or 3 of a separate gallonage for distillate, is there? A. No.

Q. Why didn't you list it separately? A. Well, there was no provision for it, and because the sales were minimal, I bulked it in with petrol with the margin of both being the same.

Q. Can you remember now whether you mentioned anything about distillate as distinct from gasoline in your conversations with Mr. and Mrs. Feenan? A. I don't recall.

Q. Did you have any discussion with Mr. Bubb relating to the gallonage that he had been achieving before you wrote 26,000 on the form? A. Yes, monthly, I would go to the site to ask Mr. Bubb what his sales had been for the previous month and I used to record these in my own records as I did with all other service stations. 20

Q. Was there any significant discrepancy between Bubb's figure and the figure which was available to you from the company's delivery docket? A. No.

Q. Did you have any belief when you spoke to Mr. Feenan as to whether under the Feenan's operation the site could achieve a monthly gallonage of 26,000 gallons of gasoline and distillate?  
A. I thought that was achievable. 30

Q. Passing to Exhibit 3, you will observe under existing site figure of 26,000 gallons based on answer placed alongside, which reads, "What is average monthly gasoline gallonage for the last six months"? A. Yes.

Q. What do you say as to the 26,000 figure you have placed there? A. Well, I had explained to Mr. and Mrs. Feenan that under company operation we do very poorly, that these figures do not relate to company operations. At the time of compilation, early May 1975, we had been company operating for two 40

and a half months, I could not produce figures for six months anyway, and the 26,000 recorded related to Bubb's operation, the previous normal operation of the service station.

Q. Coming back to Exhibit 2, you see a number of items such as \$65 for motor oil, \$100? A. That is for lubrication.

Q. And then tyres and battery service and so on, leaving aside the cafe for the moment, before writing these figures there did you make any inquiries? A. Yes, from Mr. Bubb.

Q. Did you look at any documents he produced? A. I didn't look at them. He looked at his own records. 10

Q. Were these figures which Bubb had? A. Yes.

Q. Where did the \$1000 figure against the item "cafe" come from? A. From Mr. Bubb.

Q. And the \$1400 figure for cigarettes, sweets and drinks? A. From Mr. Bubb again.

Q. What was your opinion then as to the percentage which might be made by way of profit on cigarettes, sweets and drinks? A. Twenty per cent.

Q. Upon what was that belief based? A. On my own operation of other company operated service stations, we bought those items and I could work it out from there, that plus it was a well known percentage mark-up on those items. 20

Q. In your job, did you work in contact with other Caltex dealer representatives? A. Yes.

Q. And other Caltex area managers? A. Yes.

Q. And in the course of your job were percentage return figures on sweets, drinks and cigarettes discussed as between company personnel? A. Yes.

Q. And did the twenty per cent figure, which you have placed there, have any relation to the sort of figure which would have been discussed in amongst other company personnel dealing with service station proprietors? A. Yes, definitely. 30

Q. Coming to the cafe figure there was, as we have been told, a snack bar/cafe at the service station? A. Yes.

Q. Had you yourself had any experience in the operation of such a snack bar? A. No, I had not.

Q. Had any of the other nineteen service stations which you were responsible for have snack bar/cafe facilities? A. No, they did not.

Q. In your discussions with your fellow employees, had you had any discussions with representatives who did have some knowledge of service stations running snack bar/cafe businesses? A. Yes.

Q. And did you yourself have any belief, although not from your own experience, as to the sort of return which was made from cafe/snack bar side of the service station business? 10  
A. Yes.

Q. What was your belief? A. 50 per cent to 60 per cent.

Q. Can you recall whether you had any discussion with Mr. and Mrs. Feenan about the \$1000 figure for the cafe shown on Exhibit 2? A. Yes, we went through each item line by line.

Q. What did you say about that? A. I said that that was the figure that the Bubbs had been working on during their period of occupation of the service station.

Q. Was there any discussion as to what part Mrs. Bubb had taken in the management of the service station whilst her husband was there? A. That she operated the cafe and Mr. Bubb looked after the service station. 20

Q. Did you have any discussion about the items under the expenses section of the form, Exhibit 2? A. Yes, line by line.

Q. And in particular, when you got to "labour", did you discuss the hours of work which the Feenans themselves may have to work? A. Yes.

Q. And what did you say about the sort of hours you thought they would have to work? A. I attempted to encourage the Feenans to operate 24 hours, because this was a highway site on the nearside of town, I wanted to have the first 24 hours site in Newcastle for my own benefit. They were not interested in 24 hour trading and I did say that 18 hours would be expected of a highway site, that a highway site would expect to operate a minimum of 18 hours. 30

Q. Did you have some discussions about the hours that Mr. Feenan himself, he personally, would have to work in the service station using the sort of staff which you placed under the columns of "labour - permanent and casual"? A. Not in actual number of hours, but long hours were discussed. 40

Q. Was there any discussion, as to where the one permanent

staff member would work? A. I don't recall the discussion, I believe I would have said that one permanent was to assist on the driveway.

Q. And as to the five casuals? A. That they would be split between the service station side and the cafe.

Q. Split which way, how many for each side? A. Two to the service station and three to the cafe, that was variable.

Q. Using one permanent man on the driveway and the service station, and two casuals, how many hours would the proprietor himself, have to work to keep the station open 18 hours a day? 10  
A. A company operation manager was required to work 55 hours, a dealer would operate 55 hours as well.

Q. Have you calculated out how those hours could be put in with the permanent, casuals working at the station keeping open eighteen hours a day? A. Yes.

Q. Monday to Friday, will you just say how that works out?  
A. The dealer could operate ---

Q. Can I suggest you do it this way, just on a daily basis the dealer works a.m. to p.m. the casual a.m. to p.m., and so on? A. The dealer could put in ten hours a day Monday to Friday. 20

Q. May I ask you to look at some notes that you have made, what hours? A. If the dealer operated Monday to Friday, 6.00 a.m. to midday and 1.00 p.m. to 5.00 p.m., that is a total of ten hours a day, and on Saturday 6.00 a.m. to 11.00 a.m., another five, that would be 55 hours a week. The permanent man would work 8.00 a.m. till 1.00 p.m., and 2.00 p.m. to 5.00 p.m., Monday to Friday, a total of 40 hours. One casual, Monday to Friday, would take over from the dealer at 5.00 p.m. through to midnight. A casual again for Saturday, 11.00 a.m. to 6.00 p.m., again taking over from the dealer at 11.00 a.m., and that same casual, it does not really matter, to continue on Saturday, or another casual working from 6.00 p.m. to midnight. On Sunday strictly casuals on the driveway 6.00 a.m. to 11.00 a.m., and 11.00 a.m. till 5.00 p.m., and 5.00 p.m. to 12 midnight. 30

Q. Have you calculated those hours out? A. A break-up of dealer 55 hours, permanent man 40 hours, and 66 hours allocated to the casuals. 40

Q. Have you costed that up, the wages which would be paid to the permanent-casual staffs on that sort of hourly basis?  
A. At that time?

Q. Is it within the wage amounts which you have listed in the column on Exhibit 2? A. Yes, it is.

Q. My friend can ask you details about that? A. Yes.

Q. If a man wanted to work longer hours than that he could presumably do so, and perhaps earn some more money? A. Yes, that's right, he could reduce his casuals.

Q. Was it necessary to work the hours that Mr. Feenan said he worked in order to efficiently work the service station and at the same time employ a permanent hand and two casuals on the service station side. A. No. 10

Q. You said you went through it item by item; was things like rent discussed, and so on? A. Yes, we discussed that.

Q. Did, at any stage, you say to him that the figures listed under the column "Estimated" on Exhibit 2 were figures which Caltex themselves were trading at the service station? A. No.

Q. Or did you say to him words to the effect that they were figures which the company was making and he could build on the company's figures? A. No, if I can say some more, I put in things like discount, reimbursement, and Caltex incentive, things which the company would be paying themselves. 20

Q. Would you explain this discount, reimbursement? A. Most service stations have a number of credit accounts and the rule of thumb was that those accounts, being regular customers, would be given some sort of discount on their petrol purchases, to assist the dealer in paying these discounts we would reimburse, on an average, about two-thirds of whatever discount he gave.

Q. Did you explain it to the Feenans? A. Yes, that was a monthly cheque. 30

Q. What about the item for \$200 for the Caltex monthly late trade? A. This is where the 24 hour operation came in. The trading out 18 to 24 hours, that Caltex would make available another cheque to assist with the extra lighting, power required, and towards employment of extra staff, certainly not to cover staff.

Q. At any stage of the discussions was anything said by way of suggestion about the Feenans seeing Mr. and Mrs. Bubbs? A. Yes, I knew what the Bubbs' operation had been, and would like the Feenans to discuss the Bubbs' operation of the site. 40

Q. How many discussions have you had with Mr. Feenan before

he signed the licence agreement? A. We met a number of times, I cannot recall how many times.

Q. Are you able now to recall whether your suggestion that the Bubbs be spoken to was made at the first conversation or subsequent conversation? A. No, I can't recall that.

Q. What did Mr. Feenan say when you suggested that the Bubbs may be spoken to? A. I don't remember.

Q. Can you recall whether you told him how long the Bubbs had been in the site before they left? A. Yes. 10

Q. What did you say about that? A. Actually, I was talking about the company operation, that we had been there from February and that we had taken over from the Bubbs who had gone to Mayfield.

Q. Was there any discussion about how long the Bubbs had been at the site before they went to Mayfield? A. No, I don't know, I don't think so.

Q. Did you say anything about how the business was doing under company operation as compared to the Bubbs' operation? A. I said to the Feenans that under company operation that we always made a loss, and that we could not compare the present operation of the station to normal operations. It was because of this that I wanted them to speak to the Bubbs because the service station did not look good under company operation. 20

Q. Why is that? A. It is because we have to employ people at a very temporary level, for a start, I need a manager to run the service station. I could not offer a man any permanent employment, I could not say it would be one or two months, if we get a successful applicant early in the piece he is out of a job, you cannot find people who are prepared to take a job for an indefinite, and definitely short period. 30

Q. Why is it the company does not seem to make a go of company operations? A. We have a rather poor sort of manager, neither good quality and the control of the service station is not as good as it may be, we have to pay him under the Federal award and we have to employ everyone under award conditions to operate the service station eight hours a day, the manager, we paid him extra so he would work 55 hours a week.

Q. Is control of cash receipts important in a cash business such as a service station? A. Very much so. 40

Q. Has the company found difficulty in that regard with its operating the site through paid help? A. Yes, this is the problem, there is so much money they feel some of it should go to them.

Q. In your opinion, as at the time the Feenans took possession of the site, what was its reasonable capacity and under company management so far as gallonage was concerned? A. I felt the gallonage, the 26,000, could be achieved within a couple of months' period, particularly the fact that the Feenans were taking over just before Christmas.

Q. What was your belief as to whether, with reasonable management, the business, and working 55 hours to 60 hours, that the profit figure, what that figure might be before taking out an amount for wages? A. That is an annual figure? 10

Q. Yes? A. \$20,000.

Q. When I said "before taking out wages", I meant wages for the proprietor, not, of course, wages for hired help? A. Yes, I assumed.

Q. Now the Feenans decided to go into the site, I think?  
A. Yes.

(Witness shown Exhibit 5.)

Q. Did you prepare Exhibit 5 for company record purposes.  
A. Yes, I did. 20

Q. Why did you prepare that document? A. I drew it up for comparison purposes, Mr. Feenan was particularly interested in the cafe that did not appear to be operating particularly well, not all that much stock, only one person in it, and did not seem to be open very often.

Q. Did he comment on that to you? A. Yes, he did comment on it, the purpose of this exercise was my own idea to slash the cafe figure exactly in half, that I could show it to him, figures remaining constant, and say even at half the actual amount that Bubb was making in the cafe, the profit margin was still a very good figure of 16-and-a-half-odd thousand, and that I felt he would fall somewhere between these two, between that and the original takings that I had shown him. 30

Q. Did you ever show Mr. Feenan that document? A. Yes, that was the point of the comparison.

Q. Exhibit 5? A. Yes.

Q. Had you had some discussion about the rent? A. Yes.

Q. Was there any company policy about rent revision when a new operator went in? A. Yes, every time.

Q. What was the policy? A. The policy was to put the rent 40



up, if we felt the site was profitable enough to carry that sort of increase. It was also policy during a dealer's occupation to increase his rent periodically.

Q. I think the licence is for twelve months? A. Yes, it is. It is a licence to go in and operate a service station, it does not restrict them to the twelve month period, we have increased rents within that first twelve months.

Q. Whether that be so or not, a twelve month period, within that period it would come up for revision? A. Yes. 10

Q. I am asking you to draw your attention to Exhibit 5 which is the \$500 figure, not the \$1000 figure, follow me?  
A. Yes.

Q. Was there any importance, from your point of view, in that document in relation to the rent provision? A. Yes, I sent this particular document, Exhibit 5, with the formal application to branch Sydney, for their approval of the deal for the Feenans to go into the site, because if I was to show a profit margin that was better than -- the \$700 was fair enough for the final result on that sheet, \$1376 nett profit to dealer per month, if I was to show a greater figure it may be that the company rejected that deal and sent it back and said, "Well look, the situation is that this bloke is making a fair bit of money out of it, we are in business also, it would be fair enough for us to receive a greater rent on these premises". I felt \$700 was a fair deal for new people going into the service station, I did not want that to happen, I wanted it to remain at \$700, it could always be reviewed at a later date. 20

Q. Was there some discussion about some training course which the Feenans might have? A. Yes. 30

Q. Did you arrange for that? A. Yes, I did.

Q. And what was the arrangement about payment for that?  
A. The company would pay an amount of money to assist people going to these training courses. There were two figures, one was if people lived in the metropolitan area, Sydney, because that is where the training centre was, and country people, of course, that was a higher figure because they would have to find accommodation. It was not to cover expenses, but to assist in the expenses.

Q. Mr. Feenan said he was told he would get \$25 a day, was that the rate applicable to country living people or city? 40  
A. I do not remember the figure at that time, but I would have given him the country figure, because we were talking about Newcastle and he would be going to Sydney for the

G.L. Parker, x.

course. In actual fact he was living in Sydney when the course was on and I believe he was paid the metropolitan rate.

Q. Would you look at that document, from your opinion in all the courses, could you tell his Honour whether the topics covered in that document are covered in those dealer/trainee courses? A. Yes.

Q. Have you yourself attended such a course? A. Yes, I have.

Q. And what instruction is given as to book-keeping in a service station? A. Part of the course was to train us in the compilation of pink sheets and, in fact, give us an exercise daily from pink sheet to pink sheet. We were given hypothetical figures and had to draw up pink sheet presuming that that was our trading for the previous day and accumulate it with the previous pink sheet. There was a combination not only for an understanding of how to draw up pink sheets, but actually using them on a day to day basis. Emoluments were discussed, general book work relating to the service station. 10

(Above document tendered, admitted without objection and marked Exhibit 23.) 20

(Document regarding hours of labour at the service station tendered, admitted without objection and marked Exhibit 24.)

HIS HONOUR: Q. You were asked some questions about the rental, I understand those, the tables referred to finance required \$20,000? A. Yes.

Q. What was your understanding of what that was for? A. \$20,000, the purchase of stock, for paying the rental figure. 30

Q. General administrative running costs? A. Yes.

Q. Wages? A. May I refer to the document?

HIS HONOUR: If that is on the document I do not need to ask you any further questions.

MR. MORLING: Q. Is that the sum referred to in Exhibit 3? A. Yes.

(Luncheon adjournment.)

MR. MORLING: Can I now tender, by consent, the monthly records of the deliveries of gasoline and distillate to the Hexham site.

Having been asked to terminate at a given date I will tear off the latter part of the document and leave it at the given date. I wish to tender from January 1974 to December 1976.

MR. COOMBS: There are three supplied on subpoena. The originals are incorrect. Perhaps if they could be corrected between my friends and my own learned Junior. They are the figures for February and March.

HIS HONOUR: You have two other matters to tender.

MR. MORLING: Yes. The other thing was -- I may have to call a company officer just on figures -- we have taken out the income, that is to say, gross income in the cafe and sweets, drinks and cigarettes side of the business during the Caltex company's operation and the purchase of materials in that section of the business for the whole period of the operation. I can tender now, but I may have to call one or a number of clerks to prove it if my friend wishes me to prove it. I can indicate to my friend that so far as there is no breakdown of that figure into snackbar takings and sweets, cigarettes and so on in the service station --- 10  
20

MR. COOMBS: I anticipate there will be no difficulty providing it is clear what profit means is what Mr. Taggart means as to what profit it, namely the takeaway ingredients and the purchases. It is just a matter of checking them.

MR. MORLING: If I could tender it subject to my friend's objection and he could let your Honour know if any part of it is subject to lack of proof, in which case we will call evidence to prove it.

HIS HONOUR: There were two potential exhibits discussed before lunch. One was the dealer records. I do not think that was tendered. 30

MR. MORLING: No, I do not think it was marked.

MR. COOMBS: There is no objection.

(Dealer records tendered; admitted without objection and marked Exhibit 23)

MR. MORLING: The other one is a document which is a calculation of hours.

(Calculation of respondent tendered; admitted without objection and marked Exhibit 24)

HIS HONOUR: These other two documents, do you want to put them in now? 40

MR. MORLING: Yes, half a page is handwritten figures.

(Records of deliveries of gasoline and distillate, with annexure, tendered, admitted without objection and marked Exhibit 25)

HIS HONOUR: Do you have copies of these, Mr. Coombs?

MR. COOMBS: Yes, I have copies of one. My Junior is checking it at the moment. I have copies of the cafe document, which is exhibit 25.

HIS HONOUR: I will get copies. The syllabus is the only one you need. 10

MR. MORLING: Yes.

Q. Mr. Parker, you said before lunch that you had some conversation with Mr. Feenan in which he raised a query as to the state of the cafe side of the business because it was run down, or words to that effect? A. Yes.

Q. You said that you had some discussion with him about even the takings of that side of the business. Do you remember that? A. Yes.

Q. Can you remember when that discussion was? A. No, I do not. 20

Q. You have been in court when Mr. Feenan said that he did not get a copy of exhibit 5. So that there is no confusion about it, I will ask you again. (witness shown exhibit 5) My question is, are you able now to say on your oath whether or not you gave him that document? A. If Mr. Feenan says that he did not see it, I cannot deny that.

Q. It is dated, I think, the same day as the license, is that right? A. Yes.

Q. What was your purpose in putting it with the company papers? A. As I said before lunch, I agreed with Mr. Feenan on a rental figure for the service station and to make sure that that figure would be accepted by the company it was in my interest to put in a return that would not induce the company to consider that my rental figure was too low. It had been increased by \$100 already from the previous dealer,-- that they would consider that a satisfactory figure and accept the deal without question. 30

Q. If there is a discrepancy between gallons delivered to a site, say over a year, and gallons shown as having been sold from the site, what are some of the reasons which might 40

account for such discrepancy? A. One is that there is a leakage in the tanks or a tank.

Q. As to that, were you ever informed that there was a leakage of any magnitude at the Hexham site? A. No.

Q. Yes, go on? A. Misappropriation of petrol. A casual knocking off might fill his car and not pay for it. The dealer himself might even take a few gallons for his own car without recording it anywhere.

Q. Would a casual sell, say, me 10 gallons of petrol and pocket the proceeds himself? A. Yes. 10

Q. If the proprietor was not on the site and hoped to get away with it? A. He could. There would be a discrepancy in the meter readings and the till.

Q. Would one have to carefully read the meters to pick up the discrepancy or what would one do? A. The meter reading is left to the person on duty, so that particular person who filled his own car and did not pay for it could fiddle with the meter readings so that it would not show any discrepancy.

Q. After Mr. and Mrs. Feenan went into the site, did you go on holidays for a while? A. Yes, a couple of days later I went on a month's holiday. 20

Q. When can you recall next having seen him? A. I don't recall the next time I saw him. Christmas followed shortly after my holidays so I may have seen him between the end of my holidays and Christmas and then it would be in the new year.

Q. Can you recall anything that was said of any importance? A. I recall on one occasion -- I cannot say when this occasion was -- when Mr. Feenan was not very happy with his petrol sales. Shortly after that, I arrived on the service station and he was quite happy with the way things had been going. 30

Q. When you say he was not happy, is it possible for you to recall, in the broadest terms, how he expressed his unhappiness?

A. Well, in the first instance he could see that his figures were not coming up to my estimations; on the second time, his sales had improved and it was seen that he could achieve the figures that I had given him.

Q. (approaching) I show you exhibit 10. I wonder whether I could ask your Honour to look over the witness's shoulder to understand the sort of question I am going to put to him. I think it is fair to put it to the witness to give my friend a chance to cross-examine on it because it will be part of my submission. 40

Q. I want you to assume that this exercise has been done. I know it is an exercise that you yourself have not done and it is in respect of the months of November and December 1975 and January and February 1976. Weekly totals have been made of the takings in the snack bar and cafe side of the business?  
A. Yes.

Q. The calculation being made then, and by way of example I have just picked at random the pink sheet for the 2nd January 1976 which forms part of exhibit 10; firstly, reference has been made to the amount shown in the column the third from the left hand side of the page headed "S/B", which I think we can assume is snack bar, so one starts with a figure of \$67.60. One then looks at item 3 on the cash register docket, which we have been told was the cash register in the service station?  
A. Yes. 10

Q. And one sees that \$7.60 was taken in the service station for an amount assumed to be for sweets, drinks and cigarettes in the service station? A. Yes.

Q. But that sum of \$7.60 has then been deducted from the first sum of \$67.60, leaving a balance of \$60? A. Yes. 20

Q. There has then been added to the \$60 a figure, an amount assumed to be already taken that day, but paid out by way of purchases of vegetables, bread, pies, cakes and chips, of \$15.26 as shown in the petty cash section of the form?  
A. Yes.

Q. So that for that day one would end up with \$75.26 being the gross takings from the cafe side of the business?  
A. Yes.

Q. Do you follow me? A. Yes. 30

Q. May I also ask you to assume that for the first two weeks of trading there seemed to be some informalities in the method of registering those amounts. In particular, it is not possible for the first two weeks to identify the amounts sold in the service station for sweets, drinks and cigarettes because there are no cash dockets annexed to the pink slips?  
A. Yes.

Q. I ask you to assume with that exercise being done for the whole of the month of November, it shows that a sum of slightly in excess of \$1,600 was arrived at before adding in the petty cash expenditures and with the petty cash expenditures identifiable with items of food and drink and excluding matters such as wages which have been noted as such, that the petty cash items are about \$895, so that the total of those two sums would be just on \$2,500? A. Yes. 40

Q. Would that indicate to you as to whether the snack bar/cafe side of the business was or was not operating at the sort of level which you discussed with Mr. and Mrs. Feenan that it might operate at? A. Yes. It is very much to the figure that I indicated to them.

Q. I ask you to assume for the month of December the same exercise shows that the total sales, without allowing for payments out for the petty cash items, was just over \$1,800, in fact \$1,856, that the total petty cash items, which seems to be identifiable with the purchase of provisions, is just under \$1,200 and the total of those two sums would not be far short of \$3,000. Would that again confirm that the figures which were in fact achieved were better than you had discussed? A. Yes, far better. 10

Q. And for January the equivalent figures were about the same; your figure would again be the same? A. Yes.

Q. In February the figures fell to just under \$1,300 without the addition in of petty cash items which total about \$900, bringing a total of \$2,200? A. That would bring it just about straight on to that figure. 20

Q. You yourself have taken no part whatever in preparing the figures which are now exhibit 25. (approaching) Do these figures show the trading at the service station whilst the Caltex Co. was operating? A. Yes, they do.

Q. That is your understanding? A. Yes.

Q. I ask you to assume that you cannot tell from these figures at the moment how much of each figure relates to snack bar and goods sold in that side of the business and sweets, drinks and cigarettes in the service station proper, so that you cannot break it up? A. No. 30

Q. But lumping all together from a total sales volume of \$10,260, the purchase amount \$4,873, leaving a profit margin of \$5,386? A. Yes.

Q. Which is, I think, just on 50 per cent of the total sales? A. Yes.

Q. If there is anything like a significant proportion of sweets, drinks and cigarette sales, would it necessarily lead to the result that the profit margin on the cafe side would be well over 50 per cent? A. Could you say that again? 40

Q. If there is included in the takings even a modest amount for sweets, drinks and cigarettes, upon which the profit margin of the sale was of the order of 20 per cent, would the result

be that the profit margin on the food and cafe and snack bar side of the business be well over 50 per cent? A. Yes.

Q. I think, although you yourself have not made the calculations, in fact from the document, which will now be tendered by consent, the deliveries average over a 12 months period between January 1974 and December 1974, to the site 26,640 gallons, all in, of which 1,505 gallons on average were distillate. If those figures are correct, would the delivery figures be in the same order as the estimated sales figures which you gave to Mr. Feenan? A. Yes, they would be. 10

HIS HONOUR: Before you conclude, Mr. Morling, there are a couple of questions I would like to ask the witness which you might like to follow up.

MR. MORLING: Yes, your Honour.

HIS HONOUR: I just cannot follow your mathematics in Exhibit 24 and Exhibit 25. I am wondering whether you could explain them.

MR. MORLING: That is one that was sent out to be copied. I have 25. I have not got 24. 20

HIS HONOUR: Q. I would rather ask the questions so that I can understand. I might just show the witness. If I could ask you to explain this, taking the first two weeks on exhibit 25, do you see the first line is a two weeks period? If I have it correctly, it is a two week period in which there is shown to be a profit of \$550.55? A. Yes.

Q. That is when Caltex were operating it. So, that is a labour cost which is identifiable exclusive of a proprietor. There is no proprietor?

MR. MORLING: 25 is merely the profit. The profit there mentioned is the profit being the difference between his sales and purchases. It has no labour costs. 30

HIS HONOUR: Q. So, if I have on exhibit 24 your estimation of the labour cost that is to come out of the figures on the right of exhibit 25? A. Yes.

MR. MORLING: Q. I think you were careful to see that the hours on exhibit 24 related only to the service station and not to the cafe? A. I am sorry?

HIS HONOUR: Q. So, am I right in assuming that the company must have been making a loss, bearing in mind exhibit 24. There is no dealer amount in it because there was no dealer there at this time? A. That is right. 40



Q. You have there a total labour cost of some \$298 odd a week? A. Yes.

Q. Which is about \$600 a fortnight? A. Yes.

Q. That would be the amount to come out of the \$550 shown for the fortnight? A. This is the service station. The employees --

Q. Take the figures at the top of exhibit 24 and the rates you have got down. You have 40 hour week \$100? A. Yes.

Q. Is that a sort of rule of thumb estimate? That was not the award rate of 1975? A. I had employed under company operation a junior on award rates. That was his wage at that time, at that year, for a junior to 21 years of age. 10

Q. It starts at 30 percent? A. I do not remember the age of the individual, seventeen or eighteen years old.

Q. Does that mean there was no adult in charge of the station?  
A. Under company operation we had a manager.

Q. The manager's rates are not in these figures? A. Those figures were compiled by a dealer operating the service station. We did not get a cost factor on the dealer's own employment, but under company operation we pay a manager and at that time Mr. Bennett said it was \$165 a week. I know it was in that vicinity. 20

Q. Was that a calculation based on what the going rate was?  
A. Yes. Caltex issued a letter stating what a manager of the company operated service station would receive and they supplied the awards for other employees, casuals and permanents.

Q. When you came to do that calculation it ultimately ended up in exhibit 5 being an estimate of wages per month for casuals and permanents - one permanent and five casuals. That wages costs you set out there, is this your award rate? A. Yes. 30

Q. There is a non-cost of about 50 percent of the wages?  
A. Yes.

Q. When you came to pay the rates for a Caltex person would you have to take into account the award rates? You have sick leave, annual leave, long-service leave, administrative costs?  
A. I am sorry. The only person that was a permanent employee under company operation was the manager. I have misled you.

Q. What about the casual? A. Casuals do not have any sick leave or annual holidays, because that is included in their daily payment. 40

Q. They have a loading, the non-cost? A. The loading is in the \$3, whatever it is at the time of the award.

Q. Not all non-cost? A. Yes, it is.

Q. You do not know whether they have workers' compensation?  
A. That was always handled by branch office level. Whether they were or not, I do not know. That was something not left to us.

Q. That had nothing to do with the compilation of the figures, that the manager would have had? A. Yes, the manager received holidays.

10

Q. He is not shown there as a permanent. That is a junior rate? A. Yes. Mr. Bubb had one permanent on the driveway who was a junior, who was 16 or 17. When I took over company operation I had a fellow that I classed as a permanent because he was working 39 hours a week but was paid as a casual, either employed in our service station or employed as a casual. The company would not employ any permanent people except the manager because of the situation.

(Document headed "Monthly Delivery to Hexham site"  
tendered without objection admitted and marked Exhibit 26)

20

MR. COOMBS: Q. You worked for Caltex for something more than three years? A. Yes.

Q. You applied for your job with them as a representative?  
A. Yes.

Q. And you worked throughout your time, in this capacity you have described, as a liaison officer between operator and company.

Q. And in particular Newcastle City and its environs?  
A. Yes.

Q. You, I suppose, became as aware as you could of your company's policy? A. Yes.

30

Q. Did your best with clients? A. Yes.

Q. And it was perfectly clear to you that one thing Caltex regarded to be avoided at almost any price, was conducting its own service stations? A. Sorry, could you say that again.

Q. Caltex did not like operating its own service stations at sites owned by it? A. No.

Q. Your experience at the time you were with the company was they did have losses? A. Yes.

Q. And the primary reason why they made losses was that if they employed staff to conduct service stations they had to pay award wages and they had to face up to costs, what his Honour called the on-going costs of employing labour? A. Yes.

Q. For example, holiday pay? A. Yes.

Q. For example workers' compensation? A. Yes.

Q. For example sick pay? A. Yes.

Q. For example long service leave? A. In respect of the manager only.

10

Q. You are assuming only for short-term operators because managers only embarked upon those operations in a short-term way? A. Yes.

Q. Because they were doing their very best to avoid them? A. Yes.

Q. That was to avoid having to meet the award obligations they would otherwise have to meet? A. Yes.

Q. In your experience the running of a Caltex service station, particularly a highway station, involved the operator in working very long hours? A. Yes.

20

Q. In fairness to you, you were anxious to impress upon Mr. Feenan that this was a long hours job? A. Yes.

Q. Not only long hours for him but long hours for employees? A. Yes.

Q. Because your experience was that those who took on highway service stations in the kind of position that Hexham was, could face up to 80 hours a week or more? A. By long hours, it means to me over 40 hours a week.

Q. Answer my question if you would. You knew from your experience that an operator taking on a highway service station of the Hexham sort was facing up to 80 hours a week or more? A. No, I don't know that.

30

Q. Do you say that was not quite common place? A. I didn't know it was not common place.

Q. Have you any idea of the hours Mr. Bubb worked individually? A. I knew at the beginning of his position at the service station that he was working very long hours when he first went in, and also Christmas and Easter when he was open 24 hours, but I do know he narrowed that down fairly quickly to

a more respectable type of working period for himself by employing staff.

Q. You knew that he worked very long hours indeed the Christmas before Mr. Feenan took over, that is Mr. Bubb had?

A. I did not have any knowledge of that.

Q. You have no knowledge of the precise hours worked by Mr. Bubb at any stage? A. Except for what I said, when he first went in he did work very long hours but did bring them down.

10

Q. You know he worked very long hours in the beginning and less later, but how much at either time? You do not know? (objected to)

HIS HONOUR: Q. Can you add to that? A. Yes, when he got down to an acceptable working period for himself.

MR. COOMBS: By that you mean something that was acceptable to him? A. Yes.

Q. You do not know of your own knowledge or even from what Mr. Bubb told you, what that means in terms of hours? A. No.

Q. What I put to you before was correct, that at the beginning he worked very long hours, without you being able to say how long? A. Yes.

20

Q. You are not able to say anything other than Mr. Bubb was more satisfied with the hours later than with the hours before?

A. Yes, that is correct.

Q. Do you happen to know what hours Mrs. Bubb worked?

A. No, I do not know.

Q. Do I understand you correctly to be saying that you have no knowledge of any other snack bar operation, from you own experience, other than this one? A. That is correct.

30

Q. Can you tell us from your own knowledge what hours the snack bar was opened during the above operation? A. It varied over the 26 months, but when they stabilised, they were opening at 7.30 in the morning and going to midnight.

Q. In the snack bar? A. That is in the snack bar, but not over the whole period.

Q. So either casual labour was being employed in the snack bar or Mrs. Bubb was working? Some casual or Mrs. Bubb was working from 7.30 in the morning to midnight? A. Somebody had to be, yes.

40

Q. When you postulate five casuals, do I correctly understand you to be postulating three in the service station side and two in the snack bar side? A. Well, either way.

Q. Either way, is that it? A. Yes.

Q. But certainly you were envisaging the snack bar being opening from 7.30 in the morning to midnight, in the Bubb time? A. In the Bubb time, yes.

Q. And that is what? 16½ hours? A. Yes.

Q. How many days a week? A. Six days a week. Sunday was less. 10

Q. Sundays were somewhat less? A. Yes.

Q. A very long span of hours? A. Yes. A Sunday?

Q. A very long span of hours in the week? A. Yes, of course.

Q. How many on Sunday? A. I do not know on Sunday.

Q. You do not have any idea about Sundays? A. No.

Q. Did you envisage one casual working in the snack bar or two? A. I envisaged two for sure.

Q. Do you mean at a time, or one at a time? A. One at a time. 20

Q. But you envisage, do you, a need for two people to be there at a time, or do you envisage it being operated by one person? A. One person to operate it most of the time. Lunchtime, of course, three would be required.

Q. Because lunchtime, from your observation, was the key ingredient? A. Lunchtime and night-time on weekends.

Q. Night-time on weekends? A. Yes.

Q. Would you agree the Carrington Slipway and Hexham Engineering were very important to the snack bar operation in Mr. Bubb's time? A. Yes. 30

Q. And your impression from your observation and being there from time to time is that three people were necessary there during that busy lunchtime period? A. Yes.

Q. Say Mrs. Bubb perhaps and two others? A. Yes.

Q. Would you agree in general terms that if you are going to conduct a service station, it is a great enhancement to your profitability if you have a special extra to add to simply petrol sales and the like? For example, to be a good mechanic? A. Depending on the site, yes.

Q. You left Caltex in February 1976? A. Yes.

Q. Was it within your time that the water ski-ing enthusiasts had the service station? A. I do not know of any water ski-ing enthusiasts.

10

Q. You did not know that any person sold water ski boats as an adjunct to his business? A. Anywhere in Newcastle?

Q. Anywhere in Newcastle for a start? A. Selling boats?

Q. Yes? Do you know of that? A. Off-hand no, not now.

Q. Then your view as expressed as to the suitability of this site depended on the employment of at least five casuals? A. Yes.

Q. If we assume that there was needed for the lunchtime snack bar operation two casuals in addition to the proprietress, would you agree it was necessary to employ, say, casuals for a minimum of three hours? I mean you had to pay them for the three hours? A. I am not aware of that particular requirement. It may be true, but I am not aware of it.

20

Q. You had a picture of a casual employed for an hour or two hours? A. I think I did have it, as a matter of fact.

Q. Did you know of a problem that if you employ a casual for more than 8 hours there is a problem with tea money? Do you know about that one? A. With tea money? I know over 5 hours you must give them a meal break.

Q. Meal money? Do you know about that? A. I do not know about that.

30

Q. Mr. Bennett sometimes did a bit of his own casual work? A. Yes.

Q. You knew about that? A. Yes.

Q. You knew his casuals worked under different names, the same person? A. His casuals?

Q. Casuals employed in the service station at the time when he, Mr. Bennett, was the manager of Caltex? A. Mr. Bennett did work under an assumed name.

Q. And others too? A. Possibly, yes.

Q. Do you know why? A. Because as far as Mr. Bennett goes, I was entitled to let him have 55 hours. If we became stuck for somebody to work a shift because they had not turned up, or were late, or knew they were not working, I sometimes asked Mr. Bennett if he felt like working that shift and I would pay him the usual casual wage.

Q. Paying as if he were a casual and in another name?

A. Yes.

10

Q. There was no difficulty for you in obtaining genuine six-month figures for a period of, say, between October/November 1974 and May 1975? A. What sort of figures.

Q. The real figures, the figures that had been pumped through? A. Petrol figures? No.

Q. Indeed, the site file, the company's file in respect of the site, would be full if I chose to open it up, of statements of what the monthly gallonages were while you were attempting to ask someone to take over the operation of the site? A. When you say site file, which file?

20

Q. Did you not receive a report of progress in the disposal of the site? A. Regular report on the disposal of the site?

Q. The failure of the disposal, if you like? A. When I was looking up an applicant, yes.

Q. You reported regularly? A. To my sales manager at Newcastle, yes.

Q. You were attempting to dispose of the site? A. Yes.

Q. Because you knew Mr. Bubb was going? A. Yes.

Q. You were advertising it? A. Yes.

Q. Keeping an eye on what it was doing under the company management? A. Yes.

30

Q. You were reporting regularly what the monthly gallonages were? A. Yes.

Q. It was as simple as looking at your own duplicates to find out what the actual gallonage was? A. Yes it is.

Q. And yet although you had all that readily available to you, you recalled, did you, that the average monthly gallonage for the last six months for the site was 26,000? A. Yes, I did.

Q. That was not right? A. No, it was not right.

Q. The figures were, as I said, as available to you, was the problem of opening your book and looking at your duplicates?

A. Yes.

Q. You had told my learned friend you had a conversation with Mr. Feenan in which you told him that things did not go so well under company management? A. Yes.

Q. You told him that it had been operated by the company?

A. Yes.

10

Q. Did not like company management? A. Yes.

Q. And there was no profit in the operation under company management? A. That is correct.

Q. It was, in fact, an abnormal situation? A. Yes.

Q. And all of that was related to your estimated figures, am I right? A. Yes.

Q. You see, when you were asked about it by my learned friend you used these words "I had explained that under company operation it was very much worse than normal operation"?

A. Yes.

20

Q. You meant profitability, did you not? A. Yes.

Q. I suggest to you, you never once said to Mr. Feenan "Look, where it says average in the last six months that is not right. That is not the average for the last six months"?

A. I did say that to Mr. Feenan.

Q. You went directly to that piece on the sheet? A. I do not know whether I went directly to it.

Q. Why did you say you had explained that things were not so good? (objected to) A. I could not give a six monthly figure for company operation because we had only been just over two months so therefore I went further back and quoted actually a twelve month period of sales by Mr. Bubb. It is not a six months' figure, it is a figure for the whole of 1974.

30

Q. You say that you said to Mr. Bubb "This figure is not the last six months"? Or are you giving me an explanation?

A. Can I say what I did say to Mr. Feenan?

Q. Have you given me an explanation, or what you said to Mr. Feenan? A. No, I am giving an explanation.



Q. Your explanation is there was not a six months' figure for company operation? A. I did not say that to him.

Q. You are saying to me, that is an explanation? A. Yes.

Q. There was not a six months' figure for company operation?  
A. Yes.

Q. But there was an available figure for the last six months?  
A. Yes there was.

Q. And then your second explanation is that you took a twelve month period from Mr. Bubb? A. Yes. 10

Q. Did you have any discussions with Mr. Feenan about this?  
A. No.

Q. Would you agree with me the figure shown is a figure for gasoline gallonage? A. Yes.

Q. Would you agree with me that Mr. Bubb did not achieve 26,000 gallons of gasoline gallonage on a flat or any other basis for the whole year? A. I do not agree with that.

Q. You will not? A. No.

Q. Gasoline alone? A. That is correct.

Q. What do you say? A. I say that I do not agree with your figure. 20

Q. You say he did get 26,000? A. I say he got close to 26,000 - 25,640 gallons.

Q. So that the 500 gallons is neither here nor there?  
A. It was not 500 gallons.

Q. You said he did get 26,000 or near enough - 25,640?  
A. Yes.

Q. Your explanation then, 26,000, it is Mr. Bubb's twelve months figures and it is near enough because he achieved 25,600 average? A. Yes. He made minimum sales of distillate. 30

Q. You are saying that the minimal size of distillate made a difference? A. Yes.

Q. But in any event it does not matter because 25,600 is near enough? A. To the nearest thousand it is 26,000.

Q. And you were adopting, if I understand you, Mr. Bubb's figures for the purpose of filling in this sheet? A. Yes.

Q. Is that actually where you got them? A. Most of them, yes.

Q. When you say most of them, what do you mean by that?

A. I cannot recollect every figure. You are talking on the income side, of course?

Q. Mr. Bubb went away in February, is that right? A. He went to Maitland.

Q. When do you say you got from him the figures that form the basis of what you put in your sheets and what you said to Mr. Feenan? A. Prior to compilation of this document. 10

Q. I daresay, but how long prior? A week, a month, three months, six months? A. I cannot say. I knew Hexham was going to come under company operation for some time. I do not know when I actually started producing figures.

Q. I suppose you would start to fix figures at about the time you were proposing to start seeking some replacement for Mr. Bubb? A. Probably. Around the time we went under company operation is probably when I started collecting the figures. 20

Q. You advertised the site in early January? A. I may have prepared the figures in January.

Q. But the sheet at which we are now looking is dated 6th May and you had been advertising the site regularly since January? A. Yes.

Q. Is there some other document then we can assume has the figures in it? A. At the time there were several of those documents you have read.

Q. They were all the same? Photocopies of one or other? A. Yes. 30

Q. And you had, as it were, a number of them in your briefcase ready to hand to prospective operators? A. As I ran out I ran up another so I had an original and more photocopies.

Q. We are looking at one that appears to have the date 6th May? A. Yes.

Q. Two at a time, when you submitted them to Mr. Feenan, would be pinned together or stapled together? A. That is correct.

Q. You cannot tell me, is that it, when you got the figures from Mr. Bubb? A. I cannot tell you. 40

G.L. Parker, xx

Q. Do you remember where it was you got them from? A. At Hexham Service Station, I got them at Hexham Service Station while he was still back at the site back in January or early February.

Q. Do you think you got them from him at Hexham in January?  
A. I don't know.

Q. Was it only the figures in the top half of the sheet, the profit figures, you got from him? A. No. It is very hard to say. I presume.

10

Q. When did you get the figure "accountancy and insurance \$70? Where did you get that from? A. I have a fair idea of what an accountant charges service station dealers.

Q. Yes? A. For producing an annual return so I divided that by twelve and insurance is more or less, from what I know of what insurance is going to cost.

Q. The highway site, is that a site with which one would expect to sell accessories in large quantities? A. No, not in large quantities.

Q. Usually smaller than a suburban or intra-town site?  
A. Yes, on certain items. On a highway site there are certain items go very well. The highway site could sell car covers, a suburban would never move in a long time.

20

Q. Did you get your gasoline sale figures from Mr. Bubb?  
A. Yes.

Q. You told us that the permanent person employed by the company was a junior? A. Yes.

Q. Had he been there for some time? A. Only for the time of the company operation.

Q. He was not there before? A. No.

30

Q. You have told us that there is, in your experience, a problem with control, in the sense of potentials, short deliveries and so on, in the conduct of the service station?  
A. Yes.

Q. You would not recommend, I suppose, that it is appropriate to leave a junior in charge of a site where there is such a lot of potential for problems? A. No.

Q. So we can take it, I suppose, from your point of view it would be very desirable if the casual is going to be left on the site alone that he be a person of responsibility?  
A. Yes.

40

Q. And some maturity? A. Yes.

Q. So that if you were looking at casual rates you would not be looking for casual rates of 15 or 16 year olds on a highway site of this sort? A. No.

Q. In exhibit 24 you have done some figures. I would like you to take it if you would, and also if you would take another sheet of paper and do a calculation of the same kind in respect of a lady - you can leave her as there in remuneration - and two casuals to run the snack bar on the basis you suggested. I think you thought the snack bar should open, at what time in the morning? A. I did not say that is the time it should open. I said at one time Mr. Bubb was operating those hours. 10

Q. But those hours, Mr. Bubb's hours, - correct me if I am wrong - are the basic figures behind what you say you passed on to Mr. Feenan - Mr. Bubb's figures, Mr. Bubb's profits, Mr. Bubb's costs. Am I right? A. Yes.

Q. Write down on the basis you say Mr. Bubb traded?  
A. Operating as Mr. Bubb did?

Q. Yes, that will do? A. Which was a service station in which casuals would also work in the cafe at a busy period when not busy on the driveway but busy in the cafe. The cafe girls would work on the driveway. 20

Q. Would you work out the kind of calculation you have done there in respect of July? Before you do your sums - the man would go and serve the petrol and give the oil, and then dive in and cut the sandwiches? A. He might even wash his hands on the way.

Q. Yes. Go on? (witness complies) (witness approached by counsel) A. Your Honour, this could take some time. I would have to sit down for some time and calculate when a female proprietor would have to be on the site. Take into consideration the busy periods. I just do not think I can do this fairly quickly. 30

Q. You could do it overnight? A. Yes.

Q. Let us take the one you have already done, shall we? You mention awards. What were the awards you thought were appropriate to the employment of people on such a site in 1975? A. Can you say that again?

Q. When Caltex employed a manager, was he employed under an award? A. Yes. 40

Q. What award? A. Motor vehicle. It was a Federal award.

G.L. Parker, xx

Q. Does the Federal Vehicle Industry Repair Service and Retail Award sound like the one? A. Yes, very likely.

Q. How was the calculation of a manager's salary done from that award? A. It was done at branch office Sydney and I was provided with a figure to pay the managers and casuals on.

Q. Provided with a figure that included 55 hours, did it?  
A. Yes.

Q. But you cannot tell us much of the categories of people under that award were, as it were, upgraded to make allowance for the extra fifteen hours? A. I think it was something like three categories came into it to give him a payment for 55 hours. I think a leading hand had something to do with that calculation. 10

Q. A leading hand's allowance had something to do with that calculation? A. Yes, but I do not know to what extent.

Q. But we can assume one of the categories under that award, perhaps three of them, was amalgamated and adjustment made to produce the figure \$65? A. Yes.

Q. It was that award you would pay your casual driveway attendants? A. Again I was provided with this information from Sydney. 20

Q. I am not suggesting you referred to the award yourself, but it was the category in that award that reference was made?  
A. Yes.

Q. You put on your figure \$100 a week for a permanent 40-hour week, I suppose, driveway attendant? A. Yes.

Q. You agree that is not enough? A. Not enough I suppose.

Q. You said the particular person was a junior? A. Yes.

Q. Do you remember his name? A. This is under company operation. 30

Q. Yes. A. Steve McPherson.

Q. I though you said, and perhaps I am wrong, correct me, in fact he was paid as a casual. A. Yes.

Q. And therefore employed for only 39 hours? A. Yes.

Q. And in order to obviate the necessity to make provision for holidays, long service leave and so on you paid the casual rate? A. Yes.

Q. Do you happen to recall how old he was. A. No, I do not.

Q. He is, in your experience, a person who would be there on his own from time to time? A. No.

Q. Never? A. For half an hour or so, he may be by himself.

MR. COOMBS: Q. In the lunch hour every day? A. No, the manager was on the site during his career.

Q. So that the lunch hour that you provided for driver/manager in your model is not taken? A. There is nowhere to go. He was off at his lunch on the site. There were two of them. 10

Q. But he would stay there? A. Yes.

Q. That was the arrangement you had with Mr. Bennett?  
A. Yes.

Q. Although he technically had a lunch? A. He was not able to go away; he did not want to go away.

Q. You would leave the junior on this site on his own?  
A. Yes, I would in the middle of the day there was no problem.

Q. No likelihood of deliveries of petrol? A. I thought Steve was capable of handling that without any trouble.

Q. When you were doing your calculations as shown on the exhibit what amount did you allow for casuals? \$3 an hour? 20  
A. Yes.

Q. Of course, the rate for an adult casual at the time was \$4.39 at weekends per hour? A. I don't know.

Q. \$3.39 weekdays? A. I don't know.

Q. If those figures are right then your figures are widely inaccurate? A. That would be right.

Q. You have assumed four weeks in every month? A. Yes.

Q. For the purpose of multiplying your costs by four for the purpose of working out monthly totals from weekly totals?  
A. Yes. 30

Q. Again that is not strictly correct? A. No, 4.3, I would say.

Q. When we look at the figures, the two sets of figures, one in which you say you prepared for management in order to keep the rent down virtually, and then the figures you gave to Mr. Feenan? A. Yes.

G.L. Parker, xx

Q. As I understand it you are not prepared to say that the second set, the later set, whenever seen by Mr. Feenan?

A. That is correct.

Q. Are you sure the Steve was a junior? A. I would say that he was.

Q. If I suggested to you that he was born in 1954 that would make you doubt that very much? A. Yes, but we are talking about 1975.

Q. 20, 21? A. Yes.

10

Q. Under this award the figures reached through to a maximum at 20 years and over? A. Yes.

Q. So if he is 20 he is an adult for pay purposes? A. Yes.

Q. Mr. Hong was a casual employed at the service station?  
A. Yes.

Q. A local R.A.A.F. man? A. Yes.

Q. A man well over 20? A. Yes.

Q. He had been there right through the company operation?  
A. Yes.

Q. You would not suggest it would be good business to change a casual of his experience and years just for the sake of a change? A. Just for the sake of a change?

20

Q. It would be good business to keep your casuals on?  
A. What?

Q. For an incoming dealer? A. It was purely up to him.

Q. You would think it was good business sense? A. No, not if he were trying to save rent. If he lives on the site all his casuals can be juniors and on call at any time.

Q. When you said to me earlier you would not think it was desirable to leave a junior casual in charge of that site you have changed your views? A. No, I have not changed my views at all because the dealer is there on the site.

30

Q. 24 hours a day if necessary? A. He lives there in the residence.

Q. I dare say; you live on a farm now? A. Yes.

Q. Do you ever go to the town to the movies? A. Once a year.

Q. It is a normal part of human existence to go out from the place where you live? A. Not very much for a service station proprietor.

Q. That is one, if you like, of the disadvantages of being a dealer in a service station? A. That is what he must expect.

Q. He must accept he either pays senior staff, responsible mature people, or he pays any rate at all to leave the place when it is open? A. Yes, with his wife otherwise if he wants to get away himself his wife is there. 10

Q. Holidays become a thing of the past? A. No.

Q. He takes holidays separately from his wife? A. No, not if he can manage the service station properly.

Q. You told us he could not go out while the service station is open unless he leaves his wife there. He should appoint one of these 'very difficult to find' short term managers that Caltex places on the sites? A. No doubt he has a few friends. 20

Q. You have told us that finding even a half way acceptable manager even for a short term is hard? A. Yes.

Q. Mr. Bennett is working for the company on another site?  
A. For the company?

Q. Yes? A. Not to my knowledge.

Q. He just answered an ad? A. No, I did not advertise.

Q. He came to you from a Caltex site, the railway service station in Newcastle where he had been a manager? A. No, he was not a manager. 30

Q. What do you say he was? A. He was a casual driveway attendant at that service station for a few hours each night.

Q. At which one? A. At this railway garage.

Q. He came from there to Hexham? A. I don't recall, but he was at the railway before he came to Hexham.

Q. He was there as an employee of Caltex? A. While he was at the railway?



Q. Yes? A. I don't know what he was. I do think the railway was a company operation prior to Hexham but I don't recall him being on the operation.

Q. He had experience around service stations? A. You do not need much experience to pump petrol and that was all he was doing.

Q. We are envisaging on your sheet three casuals working as driveway attendants in the hours shown on your sheet?

A. Yes.

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Q. Really, are you seriously suggesting that the same people would work on the driveway as attendants and as lunch hour helpers in the snack bar? A. That happened a lot of the time, not under the company operation because we let the snack bar go down.

Q. "Because we let the snack bar go down"? A. Yes.

Q. In the time you lost your best account it was when the company was managing it? A. Yes, they asked me to take the business but I was not prepared to employ more staff.

Q. They took their business elsewhere? A. Yes.

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Q. There was a deal of it and it had been very useful?

A. Yes.

Q. They took it elsewhere during the time of the company management? A. Yes.

Q. When you were advertising this site you initially avoided giving any profit figure? A. No, I did not avoid giving any profit figure.

Q. When you did what happened? Did you get any flak from the company? A. For putting it in?

Q. Yes? A. No, I was not encouraged to put it in.

30

Q. Was there any policy about putting estimated profit figures in? A. No, we were allowed to advertise as we saw fit.

Q. You did not initially and you later got some advice to do it? A. Yes.

Q. From whom? A. From my sales manager.

Q. Name? A. John Holland.

Q. When you came to prepare exhibit 2 and you cannot say when that was I suppose it was around about 6th May, 1975?

A. I cannot say. That was there as 6.5.75 so it was prepared on that day.

Q. You cannot say however from what you prepared it save only that it was information got from Mr. Bubb but you do not know when? A. From Mr. Bubb and some of it from my own knowledge; the petrol figure again from the records.

Q. You mean from computer printout sheets? A. No, from figures supplied to me from Mr. Bubb. 10

Q. You would get figures from him month by month? A. Yes.

Q. From them you made a record? A. Yes.

Q. Similarly, when Mr. Feenan was on the site you quoted figures from him? A. I don't know. That was in my last month or two. I might not even have got around to doing that.

Q. During Bubb's period, during the period when you were operating the site, that is Bennett's period if you like, you came around and you would put the figures you got into these figures? A. Yes. 20

Q. You do not suggest that you carried these around with you? A. Yes, it was always in the boot of my car.

Q. But you did not record figures on it in the field? A. Often I would take the file away and I would write the figures in but a lot of the time I would just have a notebook.

Q. Do you know where that notebook is? A. Actually I had two; one was a blue Collins diary about an inch thick and I used to record some of these figures in that. About the day before I resigned I went through it to see if I had left any job undone or something I could pass on to my successor. There was not and I dropped it into the garbage tin. 30

The other one was black, a spiral type pad, a loose-leaf thing, and sometimes I would use it to make notes on most of our job references to minor repairs at service stations. There is always something going wrong and I would write a letter about that and throw the pad away.

Q. You would record vandal damage? A. Anything that the dealer had told me or I had seen about that site and that I wanted to remind myself about.

Q. There could not be any doubt that the basis of those 40

sets of figures, that is, the figures of May, that you gave to Mr. Feenan, and the figures of September that you gave to Mr. Holland were the same? A. Yes.

Q. What was the basis of Mr. Bubb's figures or save only that you changed the cafe figure to divide it by two? They were both Mr. Bubb's figures? A. No the May one was Mr. Bubb's figures.

Q. The other one was not? A. Was not.

Q. That was because you regarded the best assistance that you could give to Mr. Feenan, because of the inappropriateness of the company operation figures? The best guidance you could give him was to give him Mr. Bubb's figures? A. Yes, husband and wife; yes, they are the normal figures. 10

Q. So we can take it as clear that your own view was that the best help, the best and most appropriate figures you could give, were Mr. Bubb's figures? A. Yes.

Q. It would be nonsense to say that they were inappropriate for some reason? A. Mr. Bubb's figures?

Q. Yes? A. No. 20

Q. It would be quite wrong to say that his circumstances were peculiar to him and that his figures were inappropriate to be supplied by anybody else? A. Not peculiar?

Q. It would be wrong to say that they were peculiar to him and not appropriate to be supplied to anybody else? A. As a good operator, yes, I suppose peculiar to him in that respect.

Q. Why are you resisting it? A. Resisting?

Q. You have told us that it is your view that the best help you could give to Mr. Feenan was to give him Mr. Bubb's figures? A. Yes. 30

Q. Because they were appropriate and applicable to another house and wife team? A. Yes.

Q. It would be quite wrong to say that they were out of date and therefore inappropriate as at the point when you proffered them in May 1975? (Objected to; question withdrawn)

Q. It is clear to you, that they are questions about the time when you supplied Mr. Bubb's figures to Mr. Feenan? A. Yes.

Q. That has been clear to you for the last 10 minutes?  
A. Yes.

Q. You regarded them as the best help you could give to Mr. Feenan? A. Yes.

Q. And appropriate because Mr. Feenan's circumstances seemed to you to be the same as with Mr. Bubb? A. Yes.

Q. It would be nonsense to suggest they were inappropriate? A. Yes.

Q. And because Mr. Bubb's circumstances were peculiar to him? A. Yes.

Q. I suggest to you that you reported to your state manager within days of filling that form in: "It was considered that the previous operator's figures were out of date"? A. Yes. 10

Q. What you said a minute ago is not true? A. I do not know what the full context is.

Q. You have agreed that at the time when you signed, put your initials on that form, you regarded the best help you could give anybody about this site ---? A. Yes, and I still do.

Q. What I am suggesting to you is that you told your state manager that the previous dealer, Bubb, his operating figures were out of date and peculiar to his circumstances and, therefore, not reflecting a reasonable or normal situation? A. Yes, and I still do. 20

A. I have no knowledge of the letter nor of what I might reply to.

Q. Is it possible that you said something? A. I have no knowledge of that letter.

Q. It is quite clear what you said here (Pointed)? A. Yes.

Q. The signature on the bottom of this sheet is yours? A. Yes.

Q. The writing on the sheet is yours? A. Yes.

Q. The date upon it, 16th October? A. Yes. 30

Q. You were being asked questions about the form that you had supplied, form S274. Correct? A. Yes.

Q. You were being asked why you had used estimated figures? A. Yes.

Q. The answer you gave was: "It was considered that the previous operator's figures were out of date and peculiar to his circumstances"? A. Yes.

G.L. Parker, xx

Q. And, therefore, not reflecting a reasonable/normal situation? A. Yes.

(M.F.I. 2).

(Witness stood down).

(Further hearing adjourned to 10 a.m. Friday 29th June, 1979).

INDUSTRIAL COMMISSION OF NEW SOUTH WALES

CORAM: MACKEN, J.

FRIDAY, 29TH JUNE, 1979

No. 79/200

PAUL LESLIE FEENAN AND ANOR. v. CALTEX OIL (AUSTRALIA) PTY. LTD.  
AND ANOR

Application for order declaring contract void.

(Part heard)

MR. COOMBS, Q.C., appeared for the applicants, with MR. MATER.  
MR. MORLING, Q.C., appeared for the respondents with  
MR. PETERSON. 10

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GARY LLOYD PARKER  
On former oath:

MR. COOMBS: Q. Mr. Parker, I asked you yesterday whether you could do some figuring for me about casual labour? A. Yes.

Q. Have you done it? A. No. May I explain why I did not? That was not how I arrived at my figures on Exhibit 2.

Q. On Exhibit 24? A. No, on the income and expenditure form; one permanent at \$400, five casuals at \$1,200; my method of arriving at that figure was by referring to Mr. Bubb's balance sheets or financial returns prepared by his accountant, and for a full year on one of his balance sheets was quoted a figure of \$17,000 for wages. My method was to come up somewhere near that. 20

Q. All right, I accept that for the moment. We were dealing, however, with the exercise that is done in Exhibit 24. That is an exercise that you did for Mr. Morling, as I understand it? A. Yes.

Q. I thought what I had asked you to do was the same exercise in respect of the snack bar? A. Yes, we are talking about a hypothetical situation. 30

Q. Yes? And so is Exhibit 24? A. Yes.

Q. All right, we will adjourn it for the moment and it may be necessary for you to hypothecate. Regularly during your attempts to dispose of this dealership you reported to your superiors? A. Yes.

Q. You are familiar with the site file system that Caltex operates? A. Yes.

Q. The system is that all communications from you to your immediate superiors which seem to be relevant to the company's operation of a particular site are kept together in a file relating to that site? A. Yes.

Q. It is called site file 2501 in this case? A. Yes.

Q. There are quite well established procedures laid down for the disposal of sites? A. Yes.

10

Q. It was necessary for you in accordance with those procedures to include in a report of an appointment of a new licensee a large number of documents? A. Yes.

Q. One of those documents is one of the documents normally supplied and is called the income and expenditure sheet? A. Yes.

Q. It is quite clear that you never showed to your superiors Exhibits 2 and 3, that is, the two papers you showed to Mr. Feenan? A. Exhibit 3 was sent to the company.

Q. Let us say Exhibit 2 never was? A. No, it was not.

20

Q. You say that Exhibit 3 was? A. Yes.

Q. If it is not to be found in the site file, and Exhibit 5 is or was, can you think of any explanation for that? A. Which one?

Q. If Exhibit 3 was never in the file can you think of any explanation? A. Only that it has been mislaid. There is a covering letter ticking what items are included in that deal and that should be there. It is going back some time.

Q. If we look at the check list we will see a tick that refers to capital required to operate? A. Yes.

30

Q. This is in general terms without figures, that document? A. Yes.

Q. If the document itself is missing from the file, you can offer no explanation? A. No, it is a branch office file, the Sydney file.

Q. Exhibit 2 never was shown to your superiors although Exhibit 5 was? Just to be clear? A. Yes.

Q. You supplied Exhibit 5 to your superiors so as to lead them to the belief that that which you had shown to Feenan and

his wife was Exhibit 5? A. That was never; the company was not interested in what I had shown Feenan. They were purely interested in what I was supplying to them.

Q. So the disposal of the site to a new licensee is solely a matter for you? A. Yes.

Q. The company's procedures do not require you to provide your superiors with any information as to what you had told the incoming licensee? A. There is a usual way of approaching applicants and explaining what the site involves and that was followed, but the company does not require me to report on a day by day basis that I showed them Exhibit 2 or Exhibit 3. In fact, if I could explain the income and expenditure sheet of a station without even producing those papers that was also satisfactory, I would imagine, in the company's eyes. 10

Q. Exhibit 5 was prepared by you? A. Yes.

Q. Simply for the company's information? A. Yes.

Q. It was not shown to Mr. Feenan although Exhibit 2 was and Exhibit 2 was never shown to your superiors? A. Mr. Feenan said he never saw Exhibit 5 and I cannot dispute that. 20

Q. Exhibit 2 was never shown to your superiors? A. Perhaps my sales manager saw it but I do not know.

Q. Of course, there is provision upon it for the sales manager to counter-sign it when he sees it and he never signed it?

A. This was purely to give the applicant some idea.

Q. The object of obtaining the sales manager's signature on this sheet was so as to give the applicant for the licenseeship some extra comfort? A. No, this is an inter-office form purely for office use and it has simply to go to the Sydney office to explain the deal to them. It was not for public exhibition. 30

Q. Why did you say a moment ago that the sales manager's signature on it was for the applicants? A. I did not say that.

Q. That was to give the applicants some idea of the operation of the service station? A. Of the operation of the service station.

Q. How does that relate to the sales manager's signature thereon? A. I don't know. It did not bear the sales manager's signature because I used that as an example. I did not even have to produce that to the applicants. 40

Q. There is provision on the form for the sales manager's signature? A. Yes.



Q. The sales manager never signed it? A. No.

Q. Your answer to that question was that is to give the applicant some idea? A. The form is to give the applicant some idea.

Q. I understand but tell me why there is provision on the form for the sales manager to sign it? A. Because to go to Sydney for approval it must bear the sales manager's signature as other forms bear his signature.

Q. If that form does not bear his signature, it is a reasonable inference that he never saw it? A. No, not at all; I did not even sign it. 10

Q. You see your initials on it? A. Yes, so that I could put a date on it also.

Q. The document is just to give the applicant some idea?  
A. Yes.

Q. There is no system which requires you to tell your superiors what figures you supplied to a prospective licensee?  
A. No.

Q. No requirement for you to pass on to your superiors any written form of supplied figures? A. It was discussed with my sales manager on an informal basis. 20

Q. No provision which required you to supply to your superiors copies of what you had supplied to potential licensees?  
A. No.

Q. This form, S.274, is purely internal? A. Yes.

Q. Not in any sense to supply information to your superiors about what you had said? A. No.

Q. It would be of interest to the company to know what the actual gallonage of the service station was at any time that you reported to them? A. Reported to branch office? 30

Q. Yes. A. There was no point in reporting that. They had the delivery documents.

Q. But did you say that Exhibit 3 did go? A. Yes.

Q. To head office? A. Yes.

Q. Of course, Exhibit 3 contained a statement which was quite wrong as far as its written terms were concerned? A. I do not say it was quite wrong.

Q. It is quite wrong to say that the average monthly gallonage of the Hexham service station for the six months prior to 3rd October 1975 was 26,000 gallons? A. By October 1975?

Q. Yes. A. I do not know how to answer that. That document you have in your hand was prepared at the same time as Exhibit 2 and never altered from that date.

Q. "Never altered from that date"? A. No.

Q. It is your belief that you supplied it to your superiors with Exhibit 5? A. Yes. 10

Q. So you took Exhibit 2 off and put Exhibit 5 on? A. They were all re-written.

Q. Put the two together? A. In the same deal; there were many documents written.

Q. Exhibit 5 found its way into the file and for reasons you cannot explain Exhibit 3 did not? A. If I have ticked that covering letter, it was sent to branch office.

Q. But what happened after that today you do not know?  
A. No. 20

Q. There was no attempt made by the supply of Exhibit 5 to your superior to explain what it was you had said or what representations had been made to Mr. Feenan? A. There was no requirement.

Q. But, in fact, you did not intend your employer to believe that what was in exhibit 5 was what you told Feenan? You supplied Exhibit 5 to your employer? A. Yes.

Q. Are you saying that that was not an attempt by you to tell your employer that that was what you had told Feenan?  
A. That's right because as I said it was not necessary for me to show that form outside Caltex. 30

Q. Why then does it have Feenan's name on it? A. Because it accompanied the deal for Mr. and Mrs. Feenan and that is why it was rewritten on the 26th of the month.

Q. Of course, the cafe is not the only difference between the two documents, is it? A. No.

Q. For example, cigarettes, sweets and drinks, \$500 a month less gross on Exhibit 5? A. Yes.

Q. Motor oil marginally perhaps \$15 a month less on Exhibit 5?

A. No, on Exhibit 5 it is the increase - I am sorry, it is a decrease.

Q. On Exhibit 5 again there is an increase in the permanent salary? A. Yes.

Q. From \$500 a month? A. Yes.

Q. That is a little bit closer to what it would actually cost in an award sense? A. Yes.

Q. You reduce the cash to \$1,100? A. Yes.

Q. You said a moment ago that you got the figures for Exhibit 2 from Mr. Bubb's profit and loss statements as prepared by his accountant? A. No, I did not say that. Mr. Bubb supplied the figures. The wage figure I took from his accountant's finance report. 10

Q. So that you had access to those profit and loss accounts?  
A. Yes, it was a company requirement that Mr. Bubb provided the company with quarterly balance sheets because he had a loan.

Q. Exhibit 20 and 21; we can take it that the Company Taxation Services of Australia (Sydney) Ltd. had prepared and Mr. Bubb had supplied to Caltex financial statements at least quarterly? A. That was a requirement but Mr. Bubb's accountant did not arrive quarterly and we often missed out. I cannot say this with accuracy but I do not think we got them quarterly. 20

Q. It was part of your job to follow that up? A. It was difficult to follow up because the accountant was in Sydney and it was dependent on his visits.

Q. You had access ---? A. To a number of balance sheets, yes.

Q. Without asking you to swear that you saw these actual documents, these documents are of the same type? A. Yes.

Q. Done by the same company as far as you can see? A. Yes. 30

Q. In the same form? A. Yes.

Q. Without committing yourself to quarterly they were regularly supplied or made available for inspection by Mr. Bubb?  
A. Yes.

Q. You say that all you got from those was the wage figures?  
A. Yes.

Q. You did not concern yourself with the profit figures?  
A. No, my experience has shown me that the other figures are

those that Mr. Bubb grossed and to produce for taxation purposes and to the company also. If he shows he is doing too well the company may ask him to repay his loan at a higher rate.

Q. Might put his rent up too? A. I don't know.

Q. It is quite commonplace in the oil business for rents to be put up even during the currency of the licence? A. Rent does go up but I don't know what the policy is.

Q. The rent went up once while Mr. Bubb had it? A. Yes. 10

Q. It was put up again before the transfer to Mr. Feenan?  
A. Yes.

Q. I do not suppose you have any idea of the value of the site at Hexham? A. The real estate value?

Q. Yes. A. No.

Q. The documentation prepared by your employer envisages - I am talking now about the capital required to operate - a 6 months period as being an appropriate period for comparison purposes? A. According to the form; I did not apply that at any time. 20

Q. You ignored the six months and took a year or a month?  
A. No, I would take an average over a number of months, not necessarily a six months period.

Q. If we have a look at what you said in Exhibit 2, and in Exhibit 5, about the cafe, cigarettes, sweets, and drinks; firstly, it is clear that whatever you said you were ignoring the wages point? A. On the income side wages were not included.

Q. When you wrote down "cafe net" you meant "net" in the sense of an excess of sales price over ingredients price?  
A. Yes, after payment for the ingredients. 30

Q. No allowance for any site overheads? A. No.

Q. No allowance for any business expenses at all and no allowance for wages? A. No, that was in the expenses section of the form.

Q. You would agree with me that the most recent period of trading is in general terms the most reliable period for assessing how the business is going? A. Not in Mr. Bubb's case.

Q. In general terms? A. In general terms, yes.

Q. But you were rejecting, you have told us, a most recent period because it was a period of company management? A. Yes.

Q. Again, in general terms, as far as a highway service station and its snack bar were concerned, the holiday and Christmas period is a good period? A. Yes.

Q. If we take just as an example August 1974, in Mr. Bubb's period? You are quite familiar from not only your schooling at the Caltex dealers' training school but also from your experience as a representative with these pink sheets? A. Yes. 10

Q. It is clear from looking at Mr. Bubb's sheets that he chose to put food in the column headed "other"? A. Yes.

Q. Cigarettes, sweets, and drinks, in the third column from the left? A. Yes.

Q. He chose to do it that way, did he not? A. Yes.

Q. It would be the regular way of filling in such a sheet to put in cash sales along the top line, the cash register figures? A. Yes (Objected to on the ground that the witness can be asked questions only about his evidence: allowed as far as the first part of the question.) 20

Q. To include the regular way of entering up the pink sheet of which this is a sample, is to include in the top column the cash register figures? A. Yes.

Q. It would be an irregular way of filling in that form to subtract from that figure, that is, the cash register figure, before including it in the top column or rather any sums spent purchasing out of the till? (Objected to on the ground of what the regular way is can be of no evidentiary weight).

Q. What you told us that Mr. Bubb told you about is cafe takings? A. Yes, \$1,000 for purchases would be a fair figure. 30

Q. A fair figure and without any specification of period?  
A. No specification of period.

Q. Without any identification of other expense quotients that might appear upon that in real profit terms? A. I did not ask him that question.

Q. You have yourself neither experience nor knowledge of the way such cafe snack bars work? A. It depends on what you mean by work. It is selling goods behind the counter and employing staff.

Q. You have told us you made no check to corroborate anything 40

that Mr. Bubb told you about his figures? A. That's right.

Q. You had no idea of what sort of money he might have been making? A. No, but I saw the cafe in operation and it was busy and it was obviously a going concern. I knew he was making a profit but I did not know what sort of a profit he might be making.

Q. Certainly you have told us that you took no notice of any profit figures shown in the profit and loss accounts supplied?

A. I looked at them but I did not take them as true figures. 10

Q. They did not have any impact on your statement of what the net profit to the dealer might be anticipated to be? A. No, not on the profit and loss; the wage figure I should take because that would be factual.

Q. Why would that be factual? A. Because a wages book had to be kept, employees had to sign it, and service stations were visited regularly by labour inspectors, books checked, and if holidays had not been given or the wrong rate had been paid, these would be followed up and the operator would be required to reimburse. 20

Q. You knew very well that any service station from time to time has bogus casuals written into the books? A. I did it under company operation. What other dealers did I did not know.

Q. Are you suggesting you have not heard of bogus names being included in wages books other than in stations under company management? A. I do not know.

Q. Never heard of it? A. Never heard of it in service stations.

Q. But you were prepared to assume that whatever was in Mr. Bubb's profit and loss accounts for wages was reliable but other figures were not? A. Yes, because they had to be supplied. 30

Q. The net profit in Exhibit 5 was \$1,376? A. Yes.

Q. Did you do any calculations on or have any knowledge of Mr. Bubb's monthly profit figures as shown in his profit and loss accounts for the last 7½ months? A. At what time?

Q. At the time you filled in Exhibit 5? A. I cannot answer that.

Q. You do not remember? A. No.

Q. But certainly at the time when you filled in Exhibit 5 you had available to you the gallonage figures? A. Yes. 40

Q. You were attempting to put down figures that would fit in with the company's knowledge of the working of this site?

A. Yes.

Q. Because this was an attempt, as it were, to "pull the wool over the company's eyes" a bit so that the rent would not be put up? A. We are talking about Exhibit 5?

Q. Yes. A. What was the question before that? I have answered it.

Q. Could we have this one for the time being? A. I thought we were referring to Exhibit 2 and the next question is on Exhibit 5 again but I am still thinking of Exhibit 2. 10

Q. Think of Exhibit 5; Exhibit 5 was part of an attempt by you to pull the wool over your employer's eyes a bit so that the rent would not be put up? A. You could put it that way.

Q. It being part of an attempt so to do, you would include in it figures that matched up with figures that the company already had? A. Can you start again?

Q. It being an attempt to pull the wool over your company's eyes, you would include in it only figures that matched up with figures that they already had? You would not, for example, put in a gallonage of 50,000 because they knew very well what the gallonages were both currently and in Mr. Bubb's time? 20  
A. No.

Q. You would not put in figures that were inconsistent with information that they already had? A. No.

Q. As, for example, Mr. Bubb's profit and loss accounts?  
WITNESS: Those balance sheets never went to branch office.

MR. COOMBS: Q. They came to Sydney Branch? A. No, they were kept in Newcastle. 30

Q. Under Mr. Holland's control? A. Yes - under my control. I kept them in my records.

Q. Mr. Holland signed Exhibit 5, didn't he? A. Yes.

Q. You told us that for your own benefit you were anxious to persuade the Feenan's to trade 24 hours a day? A. Yes.

Q. You wanted to get the first 24 hours outside the Newcastle district? A. I would have liked that.

Q. Kudos? A. Kudo?

Q. Money? A. No.

Q. Just kudos? A. Yes.

Q. To help you towards fulfilling ambitions of advancement in the company? A. Probably, yes.

Q. The same kind of logic was operating in your undoubted enthusiasm for the disposal of the site to a new dealer?

A. That didn't have any bearing on my career.

Q. The company doesn't like sites under company management?

A. No, it doesn't.

Q. The quicker you could dispose of the site to a new dealer the happier the company would be? A. I was never pressured by the company to get rid of it. 10

Q. But you would agree with the proposition that the sooner it is disposed of the happier the company will be? A. I suppose so.

Q. And it being your job to dispose of it, presumably the happier they would be with you - A. As I say -

Q. - if companies have happiness in these things? A. I wasn't pressured and I didn't feel the company was looking at me disparagingly because I had a site under company operation. 20

Q. They would have been pleased with you if you got a 24 hour site? A. No, I don't think it affected them much.

Q. Just a feather in your own self-esteem? A. Yes.

Q. If you could get a 24 hour operation going then there is a late trading incentive? A. Yes.

Q. That is \$200 a month? A. That was an estimate. It depended on the gallonage increase. If he didn't get that then I would advise he drops his hours back to a more profitable trading period.

Q. The late trading incentive depended upon 24 hour a day opening plus increased sales, am I right? A. Well, he would get the \$200 but if he wasn't getting gallonage increase then we were paying \$200 and getting nothing back for it. So I would advise him to go back to ordinary trading hours. 30

Q. But as a very first step he had to trade 24 hours to get it? A. Anything over 18, he would have received some proportion of that amount.

Q. Mr. Feenan made it perfectly clear to you, didn't he, that he was not going to do that? A. Yes, I didn't pressure him to do it. 40



Q. Why did you include the incentive for late trading in not only Exhibit 2 but also in Exhibit 5? No way he was ever going to do it, was there? Look at that. (shown). A. It is all the time. All the service stations are trading their hours according to what they feel - that if they alter their hours they can pick up more gallons. This is still a highway site. We would still like 24 hour trading. If Mr. Feenan does well at eighteen hours he may decide to go to 24 within two months and he would still get his \$200. These are estimates.

10

Q. By the time you filled in Exhibit 5 you knew there was no way Mr. Feenan was going to trade 18 or 24 hours? A. I did not know that because certainly 18 hours - because that is what I said would have to be the minimum for a highway site. He was going into a Christmas period. It would be 24 hour trading because Mr. Bubb traded 24 hours at Christmas and Easter generally.

Q. Mr. Feenan told you he was not going to trade 24 hours, didn't he? A. Yes, at the beginning.

Q. And clearly? A. Yes. At the time he would not see the advantages of doing that - going to 24 hours.

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Q. At the time he took the licence there was nothing to indicate he was going to trade 24 hours? A. No, I felt he would.

Q. Nonetheless, you include in an estimate of his profits, not once but twice, \$200 for that late trading incentive?  
A. Yes. If I had done another one I would have put it in.

Q. You thought that 26,000 gallons of gasoline and distillate was achievable, correct? A. Yes, and achieved.

Q. You are not suggesting it was achievable by Mr. Feenan?  
A. No.

30

Q. You have agreed with us that Christmas was the busiest period - the holiday time generally? A. Christmas was a busy period, yes.

Q. Would you agree that the holiday periods for a highway service station are the best periods? A. Yes, yes.

Q. You felt that 26,000 gallons could be achieved within a couple of months, particularly because the Feenan's were taking over just a couple of months before Christmas? A. Yes.

Q. You would agree with me that gallonage is pretty important?  
A. Well, it is one of the profit makers.

40

Q. A crucial matter in the attractiveness or otherwise of a site? A. A service station is a service station.

Q. Your views of the achievable figures - and I think you said it could be achieved - that is what you expected to happen? A. Yes.

Q. You expected that that would be easily achievable within a couple of months because of the holiday period? A. Yes.

Q. And maintained? A. Yes.

Q. Ever tell anybody else that 25,000 was what you expected?  
A. No.

Q. You would not, would you, tell anybody else that? A. I don't know what you mean by "tell anybody else". 10

Q. If you were not only telling Mr. Feenan this was your expectation but also telling your employer this was your expectation and swearing here on oath twice to his Honour that it was your expectation, it is inconceivable you would not tell anybody else any different, is it? A. I suppose so, yes.

Q. What about the people in the Petroleum Licence Section - when the franchise was taken out? A. Yes.

Q. Do you remember they got in touch with you at the time when sites were being transferred from one person to another? A. I don't remember that they were in touch with me. 20

Q. There was a telephone conversation between the Assistant Commissioner, the Business Franchise Licences Employees and yourself? A. I didn't think there was.

Q. If there were inquiries about the transfer or assignment or change of any site, you would be the obvious person to speak to if it happened to be the Hexham site? A. If you are talking about the franchise talks that could well be handled by Sydney office, regardless.

Q. Was your number at Newcastle 049-648101? A. 64 -? 30

Q. 8101? A. That's the service station, yes. I think it was the service station.

Q. At around about the end of October that would be a reasonable place to contact you? A. Yes. If that was the service station, yes.

Q. I suggest to you on 30th October you were telephoned by an employee of the Assistant Commissioner. You told the person you spoke to that the Feenan's would be taking over the site on 1st November, 1975? A. I don't remember the conversation.

Q. Does the name Miss Dalton ring a bell? A. Miss Dalton?  
No.

Q. I suggest to you that you told the employee that it was expected that the new proprietors would be selling about 25,000 gallons of motor spirit a month? A. I can't answer that. I don't recall the call.

Q. (Approaching.) I don't want you to read this document out - A. Are we talking about petrol or distillate?

Q. Read, if you would, that page and that page (indicating). 10  
Have you read that? A. Yes.

Q. I suggest to you again that you told the employee of the Assistant Commissioner that it was expected the new proprietors would be selling about 25,000 gallons of motor spirit per month?  
A. This is what it says.

Q. Does that help you to recollect? A. I don't recall. You are talking about three and a half years ago about a business phone call, which I had all the time.

Q. You would not deny it? A. How can I deny or confirm it?

Q. Would you look at Exhibit 24 which is now shown to you. 20  
Would you agree with me if a casual works more than 39 hours a week he ceases to be a casual? A. Yes.

Q. All kinds of consequences flow from that? A. Yes.

Q. As far as Caltex is concerned, casuals are to be kept casuals? A. Yes. We didn't want permanents.

Q. When you look at that sheet, it is inherent in it, is it not, that the concept you have in mind is of the employment of three casuals? A. Yes.

Q. You told my learned friend that you had worked that sheet on the basis that the dealer would work 55 hours? A. Yes. 30

Q. And that there would be two casuals? A. Yes.

Q. Is that a mistake? A. I think I said it varied from two to three.

Q. It varied from two to three? A. You know, cafe three and service station two, or, you know.

Q. You certainly did say variable, but inherent in that sheet is, disregarding the cafe for a moment, to fulfil the requirements of it you would need three casuals? A. When I drew this

up I was still reflecting that when the driveway was quiet, which it was during the lunch time period - there were very few cars, if any, came in for petrol at that time - that one or two of these casuals was available to assist in the cafe. This was a practice.

Q. You are saying this is something you observed? That people did not come into the service station to buy petrol during the lunch time? A. It was just a very quiet period during the day.

10

Q. At Hexham? A. Yes. Very busy in the cafe and very quiet on the driveway. The busy periods were early in the day and in the afternoon starting - I can't give you a time, but Carrington Slipways was 3.30. That's when it picked up.

Q. There is no doubt at all, is there, that you regard the company using employed staff to run a service station as very unsatisfactory? A. Yes.

Q. Why then do you make the assumption that the proprietor would only have to work the same number of hours as a service station manager under company management? A. Look, I'm sorry, I've lost the point of the question.

20

Q. When you were asked about this by my learned friend you said, "Oh well, under company management the employed manager works 55 hours. A dealer could cope on 55 hours too"? A. Mr. Bubb was working around about that time.

Q. I am just asking you why it is that you can put forward that employing a manager to work 55 hours is quite unsatisfactory - A. Why is it unsatisfactory?

Q. - and to put a dealer in to work 55 hours is satisfactory? A. Have I said a manager on 55 hours was unsatisfactory?

30

Q. I thought you were placing a great deal of emphasis, were you not, on the proposition that management by a manager is unprofitable and unsatisfactory.

MR. MORLING: That is not a fair question. My friend put to the witness 55 hours. What the witness said before was that you did not get the right type of person; not that 55 hours was not a fair amount of work.

MR. COOMBS: I withdraw the question.

Q. Clearly, to maintain the schedule set out in Exhibit 24 you need three casuals? A. Yes.

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Q. One of whom, on week days alone, is up to 35 hours? A. Yes.

Q. He cannot work on the weekends? A. No. He could work another four and a half hours; that's all.

Q. Your proposition is that a casual could work in the cafe at lunch time as well as working the driveway at other times?  
A. Yes.

Q. That, of course, could only happen on the weekends?  
A. You are still talking about the sheet I drew up. I have never drawn up a sheet like that before and my figure was based purely on Mr. Bubb's wage figures and I put down figures here which would come up to something like that. I think they come up to about \$19,000 a year. Mr. Bubb's balance sheet showed in excess of \$17,000 for wages, so I thought that was close enough. I didn't go any deeper into it. This was a very simple way to do it. 10

Q. Your wage figures were way out of date, weren't they -  
A. My wage figures were in excess of what Mr. Bubb was doing and he said in evidence that he employed one permanent and five casuals and I felt as long as that bulk figure came somewhere near Mr. Bubb's figure for payment of wages that this would be satisfactory. I went no further than that. 20

Q. How do you know what Mr. Bubb said in evidence? A. I was here. I was sitting in the Court.

Q. So we can take it that Exhibit 24 is not, in your view, a feasible way of running the service station? It is just some figures that were worked out? A. It is a feasible way to work it out that way and you can do it a hundred other ways.

Q. It is quite inconsistent with this document that the casuals could work in the snack bar on the week days when it was busy, correct? A. No, at lunch time. They could at lunch time. 30

Q. On the weekends but not on week days? A. Why not?

Q. Because there is none there? A. There is a permanent man there.

Q. Now we have the permanent going in the snack bar, do we?  
A. I have explained under company operations there was no permanent man but that a dealer could employ permanents if he wanted to and no casuals. So this is still very hypothetical, which made it so difficult in putting a wage figure into this sheet. It depends on the operator. He could operate in a hundred different ways and, as I said, the simplest task and perhaps the more accurate was to take Mr. Bubb's balance sheet figure and my figure to put a lump in there which would come up near. In fact, it came a couple of thousand dollars over Mr. Bubb's figure. That's the way it was done. 40

HIS HONOUR: Q. Did your job with the company involve you in any duties where the station was handed over, either from one operator to another or from company management to an operator?

A. Yes.

Q. I take it there were some procedures to effect a handover?

A. Yes. There were a number of documents to fill out.

Q. There would have to be a stocktaking of all stock? A. Yes.

Q. Dipping of the tanks? A. Yes.

Q. And then would the incoming operator buy that stock and buy that fuel based on some stocktaking records? A. He would, naturally, buy the petrol and oil products, the Caltex products, because that is the nature of the business. As far as the accessory items and sweets and, if you like, with the snack bar food items, this sort of thing, they were -- 10

Q. Within the discretion of the purchaser? A. No. We used to get an outsider, a man in the trade - the cigarette trade if it was cigarettes, in the food trade, if it was spare parts somebody from that industry - satisfactory to the incoming man to do a stock take and price it at the wholesale price or at the buying price to the proprietor, not a retail price. The incoming operator would then have the choice of taking all, some or none at his discretion. 20

Q. I have not got Exhibit 3 in front of me and I do not particularly want it. The question is aimed at trying to establish whether there is not a significant proportion of that initial \$20,000 capital that would be recoverable. Here as a matter of fact and always as a matter of principle? A. Yes.

Q. Exhibit 3, I think, would set out approximately what that was? A. Yes. 30

HIS HONOUR: I take it this matter has not been canvassed and is not in issue is it?

MR. MORLING: I have not taken it up with the witness.

HIS HONOUR: It may not be a matter in issue but I did not want it to go without my knowing something about that.

(Short adjournment.)

UPON RESUMPTION:

MR. COOMBS: Q. Don't the meters on the petrol pumps go on from day to day? A. Yes, continuous.

Q. That is the very word I wrote down - "continuous"? If I 40

am a casual worker in a service station and I fill my car up just before I leave, it does not matter much what I write on the pink sheet or any place else about what the meter reads today, to make it balance with the cash register. The error is going to leap out of the book tomorrow, isn't it? A. That is right.

Q. So the theory that we can all casually fill up and thus rob the proprietor blind to his ignorance just disregards the facts, doesn't it? A. No, it doesn't. There was a fellow that had \$1400 stolen by a casual in exactly this fashion. 10

Q. In one day? A. Not in one day. It was over a period. He was getting a loss and losses can be in a number of periods and it does take time to find them, particularly if you suspect a leak in a tank - only a suspicion because your losses daily are showing. You have to get Gilbarco out. They come out and do various tests. It all takes time. In fact, this casual was smart enough to put the blame on the fellow that followed him. The losses were always with the following casual, not with the bloke actually knocking it off.

Q. Can I put this to you; as night follows day, the discrepancy would appear? A. It would appear. 20

Q. It would appear to anybody making a careful examination of the pink sheets from day to day? A. Yes.

Q. I mean then or now? A. Yes, yes.

Q. Certainly as far as you are concerned there was never any suggestion of any leakage in the tanks or any discrepancies of that sort? A. No.

Q. You left in February, 1976, didn't you? A. Yes, that's right.

Q. Any conversations you had with Mr. Feenan about this service station occurred before that? A. Yes. 30

Q. What you tell my learned friend is that there was an occasion when Mr. Feenan was not happy with his petrol sales?  
A. Yes.

Q. And later he was? A. Yes.

Q. Indeed, so happy was he that, as you expressed it, "It was seen that he could achieve the figures that I had given him"?  
A. Yes.

Q. On your say so, that happened before February, 1976?  
A. Yes. 40

Q. Do you know what Mr. Feenan's gallonages were? A. Not off hand.

Q. Would it surprise you to learn that he never reached 25, before February? A. It would surprise me.

Q. That would be inconsistent with what you are putting to his Honour about him being content that he had achieved the gallonages you promised? A. No, he hadn't achieved them. It wasn't the end of the month figure he was showing me. This was prior to the end of the month and the figures were showing that by the end of the month it would appear that figure could be achieved. 10

Q. Was that very early on? A. It had to be very early on. He only got -

Q. November? A. I don't know. I was on holidays for most of November.

Q. December, perhaps? A. It may have been December.

Q. You knew, didn't you, that the B.P. across the road had no fuel early in November? It was shut? A. That has been given in evidence. I don't remember it. 20

RE-EXAMINATION:

MR. MORLING: Q. My friend just asked you some questions about Mr. Feenan's gallonage. I think you can assume (Exhibit 18), that in the first month of his trading on his own case he sold 24,060 gallons. I also ask you to assume in the evidence of my friend's case that Mr. Bubb sold in the equivalent last month of his trading - that is to say November, 1974 - 25,701 gallons? A. Yes.

Q. That is to say, Mr. Feenan's figure was 1700 gallons down on Mr. Bubb's figure? A. Yes. 30

Q. In view of the circumstance that the service station had been under company operation for several months before Feenan's first trading month, what would you say as to the gallonage figure of 24,060 being achieved? A. It would seem that there was still some aftermath of the fact that it had been under company operation for eight and a half months.

Q. Exhibit 18 shows that Mr. Feenan by February, 1976 was down to 19,896 gallons, whereas in the preceding February, which was the time when there was a changeover to company operation, the gallonage had been 23,501; that is to say, a drop of something like 4,000 gallons. What, in your opinion, was the likely cause of that? (Objected to; withdrawn.) 40



Q. By 30th June, 1976, as per my friend's Exhibit 18, Mr. Feenan was selling 14,608 gallons - (objected to; not arising out of cross-examination).

MR. MORLING: My friend spent hours putting questions to this witness designed to convey to the Court that he misrepresented the business with, if I may say so, wide generalities. What I wanted to do with the witness was to show him sales of gasoline achieved by Mr. Feenan and to ask him to draw a comparison with the figures actually sold at the same service station and, if discrepancies are gross, to ask him whether the difference might be accounted for by the efficiency of the operation. That would be one way your Honour might draw from such a comparison a conclusion that the business was not misrepresented by Mr. Parker, but that the small gallonage was due not to any misrepresentation but to something else.

10

HIS HONOUR: I allow it.

MR. MORLING: Q. (Approaching with Exhibit 18.) You will have to take my word for it that Mr. Bubb's figures will have to be gleaned from the pink sheets which are in evidence, but in February, 1976 Mr. Feenan sold 17,352 gallons? A. April.

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Q. April 1976, 17,352 gallons. Two years before Mr. Bubb sold 28,300. In June 1976 the Feenan's were down to 14,608 and in the same month two years before Mr. Bubb had sold 24,091? A. Yes.

Q. What, in your opinion, was the cause of that drop? A. It would have to be the management of the service station.

Q. My friend asked you a great number of questions about wages and in relation particularly to document Exhibit 2? A. Yes.

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Q. Which is in your handwriting? A. Yes.

Q. When did you make that calculation? A. Yesterday.

Q. Did you do it at my request? A. Yes.

Q. And, I think, out in the conference room? A. Yes.

Q. Did it form any part of your calculations or thinking when you were having your discussion with Mr. Feenan? A. None whatsoever.

Q. Might I approach the witness with a copy of the exhibit. I show you part of Exhibit 6 which is Mr. Bubb's account for his last 7½ months of trading at the service station? A. Yes.

40

G.L. Parker, re-x

Q. You have told Mr. Coombs this morning that you have - when you have referred to the wages which Mr. Bubb told you about, although at this point of time you can't recall whether you saw these documents exactly? A. Yes, that is right.

Q. In the 7½ months of his last trading, the wages paid are shown as being \$9,375.42? A. Yes.

Q. I think as a matter of maths, that comes out at about \$15,000 on an annual basis, if you extrapolate the 7½ months to 12 months? A. Yes.

10

Q. What do you say then as to the reasonableness of your assessment which I think comes out at \$19,000-odd on an annual basis in Exhibit 2? A. I felt my figure was more than adequate to cover the - to cover what the labour costs would be.

Q. You said in the course of your evidence, "I was entitled to employ a manager for 55 hours"? A. That there was no provision to pay overtime to a manager. He would do his 55 hours for which there was a fixed wage.

Q. You say that there was no provision whatever? A. That any permanent man could be employed for 40 hours a week, over that he would have to be paid overtime and to employ that manager beyond 55 hours would involve very high overtime payments because he was that far over.

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Q. You told my friend in answer to some of his questions yesterday, you said in a document that the previous operator's figures were out of date and peculiar to his circumstances? A. Yes.

Q. And he showed you that document briefly in the witness box? A. Yes.

Q. In what respects, if any, did you regard the previous operator's figures as being out of date and peculiar to his circumstances when you wrote that document? A. Peculiar to his circumstances - (objected to).

30

MR. COOMBS: The witness has firmly said that he did not regard them as out of date or peculiar to the circumstances. That is the sworn evidence to me and this is just an attempt to cross-examine him. I put the document in his hand but that is the cross-examiner's privilege. He is clearly challenging his witnesses own evidence.

HIS HONOUR: He is trying to make something clear.

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MR. COOMBS: With respect, no. The evidence is sworn evidence of the witness that he did not regard the matter as out of date

or peculiar to the circumstances and my friend says, in what respect, if any, do you regard that as being --

HIS HONOUR: That is an objectionable ground, it is misleading.

MR. MORLING: Q. (Previous question withdrawn.) Why did you take the previous operator's figures as being out of date and peculiar to the circumstances? A. Peculiar to his circumstances because in the last few months of his trading, of Mr. Bubb's trading, he knew several months before he actually left Hexham that he was going to Mayfield. As a result of that knowledge he bought a home in Belmont North and moved there and operated the Hexham Service Station, from his home rather than continue living in the residence at the back of the service station. Therefore the operation was dropping off to some extent because of this and his wife was spending more time at home instead of 24 hours on the site, instead of working whether it be in the residence or working in the cafe, and this altered the circumstances in the last couple of months of his trading, the last few months of his trading. That is what I mean as being out of date - peculiar to the circumstances. Out of date was that at the time of writing that letter, some time in October, 1975, I was using Mr. Bubb's figures which related back to late 1974. Out of date in that respect, to relate, to rely on the fact that they were only figures of a husband and wife team in the intervening period, being largely company operated.

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Q. So far as factories in the Hexham area were concerned, have you any knowledge about whether they worked full bore over the Christmas to the end of the January period? A. I don't know. With large heavy industry type factories, my understanding is that a lot of them, the whole factory closes down for the annual holiday period.

30

Q. Would you expect that to have an effect on both the service station and the snack bar? A. Yes.

Q. And my friend asked you a lot of questions about the hours that an operator would have to work and you told him that Mr. Bubb got down to the more respectable hours? A. Yes.

Q. What hours was he working when he was living away from the station? A. I don't know. (Objected to.)

Q. When you have, in your evidence, spoken of the number of hours to Mr. Coombs, that any given owner/operator would work, would you tell his Honour what sort of activity you envisaged in a given number of hours and in particular whether it is the spent hours or a time at which every manager is engaged actually working? A. Especially if they were with a service station with the residence at the back there would never be a ten hours straight period. He would work for a couple of hours and when

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things slow down or if he feels like a sleep from ten to twelve, he could do so. He would be on the site as a floor walker as well as a worker. He would be pumping petrol from six to twelve midnight when he had a residence at the back to retire to at any time in any 24 hour period.

Q. When you refer to the hours of the wife of the operator, have you had in mind the same sort of situation? A. Exactly the same sort of situation.

Q. I will ask you a question by leave (no objection). Who pays the rates on the property, the company or the operator? 10  
A. The company.

Q. And who pays the painting repairs on service station and the cafe and the residence? A. The company, including the water rates.

MR. MORLING: I ask leave to have the schedule of sales during that eight months period of company operation.

Q. Do you remember a few minutes ago I asked you to compare the gallonage of petrol sold from the site in any months of Mr. Feenan's occupation and compare them with the given months of operation of Mr. Bubb? A. Yes. 20

Q. I ask you to assume that in the last month of Mr. Feenan's operation he sold 14,608 gallons? A. Yes.

Q. That is to say in June, 1976, that in June, 1975 after this site had been in the company operation for some three or four months, the gallons sold were 22,513? A. Yes.

Q. That is about 50 per cent more? A. Yes.

Q. You hold the same opinion about the reason for that as you said before for the reason for the discrepancies between Feenan's figure and Bubb's figure? A. Definitely. 30

Q. Again, going to the April figure, I put it to you before that Exhibit 18 shows that Feenan sold 17,352 gallons. If the fact is that under the company operation in the same month they sold 24,807 gallons, would that again confirm your opinion? A. Yes.

Q. You told my friend that the figures in Mr. Bubb's returns, and I hope I do not mis-quote you and correct me if I am wrong, were the figures shown to the company and the taxation department? A. Yes, that is right.

Q. And on what did you base that statement? A. Well, it would be poor form to show a very large profit for taxation 40

purposes because the provisional tax, the amount of provisional tax that would be required to be paid on that sort of money to the company, if the company could show a very good return, they had a loan with Mr. Bubb and his bank also operates, and they may consider increasing his monthly repayment on that loan.

Q. If I might be specific, is it inherent in what you say that Mr. Bubb was not showing the whole of his taking as received? A. Yes.

Q. Did you get in touch with Mr. Bubb during his period of occupancy? A. Yes. 10

Q. And he went to another type of service station? A. Yes.

Q. You told Mr. Coombs that you had no idea of the real estate value of the Hexham site? A. Yes.

Q. Do you have any idea of the value or the cost of improvements on the site as distinct from the value of land?

A. The improvements?

Q. Yes? A. No, I don't.

Q. My friend put to you that here was a bogus way of records kept by Caltex. Did Caltex under your management - by the operator, with your knowledge, from the fact or was the money in fact paid by Caltex in wages correctly noted on the company's records as wages paid? A. Yes. 20

Q. As otherwise they would have increased Caltex's tax? (No answer.)

Q. And you told my friend that, he put to you that --- (withdrawn).

Q. My friend put to you that you were pulling the wool over the company's eyes when you prepared Exhibit 5? A. Yes.

Q. And your answer was "You could say that". Were you, in your view, misleading the company in that document? A. I don't think so. 30

Q. Would there be any policy reason against putting a new operator into a service station with the risk that he might suddenly get an increase, a big increase in rent at the end of the first year of operation? A. Would there be?

Q. Would there be any policy reason against putting in new operator in a service station at a given rental when he -- (withdrawn.)

Q. My friend showed you a copy of some internal record or a 40

G.L. Parker, re-x

telephone conversation which you said you could not remember having had; can you remember that? A. Yes.

Q. I want you to assume for the moment that you did have that? A. Yes.

Q. And that although you can't remember you did say to somebody that you expected the incoming people to sell 25,000 gallons per month? A. Yes.

Q. Was that in your view a reasonable and accurate thing to say? A. Yes.

10

Q. Would you expect a new operator after a period of company operation to achieve a reasonable gallonage in the very first month of his operation? A. No.

(Witness retired.)

MR. MORLING: I would like to tender, but obviously not now, if it is not already in evidence, the records of the sales of gasoline from the service station during the period of the company operation, which was held in evidence, the deliveries.

MR. COOMBS: I think it is in.

(Case for the respondent closed.)

20

HIS HONOUR: Is there any material you want to put in reply?

MR. COOMBS: I tender m.f.i. --- (Objected to).

MR. MORLING: I object on the basis that it can only go to credit. One cannot tender evidence as to a person, one can cross-examine him. The witness did not deny having made the statement.

MR. COOMBS: The issue in the case is not only credit but whether the figures were misrepresentations and here is a statement, by the acknowledgement of the first respondent, who is also the second respondent, that the figures he now shows for the basis of his representation, that they were inappropriate and out of date. That is most cogently relevant.

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HIS HONOUR: What difference do you see that Mr. Parker is a party.

MR. MORLING: None at all, whether the witness's issue is in credit does not make a difference.

HIS HONOUR: Mr. Coombs, how do you say the matter is taken any further.

MR. COOMBS: One of the issues is misrepresentation.

HIS HONOUR: How far do you say the document would take it.

MR. COOMBS: The document is his statement. Firstly, it is an operation by him as a party. This man has acknowledged to be a representative of the first respondent for this purpose, for the purpose of making representations, and here is his own statement that his representation was out of date, inappropriate and peculiar to the circumstances.

SERVICE STATION -  
TAKE-AWAY FOOD.

An opportunity exists for a  
businessman and his family to  
take over this lucrative business  
on the Pacific Highway at:

HEXHAM.

A good operator could expect  
to earn in excess of \$20,000 a  
year before tax.

A 2-bedroom residence is  
part of the Service Station build-  
ing.

This is a walk-in, walk-out  
deal, and finance required is  
\$20,000.

Please ring:

CALTEX OIL  
(AUSTRALIA)  
PTY. LTD.  
NEWCASTLE, 61 6000.  
Ask for Mr. J. Holland or  
Mr. G. Parker.  
Or ring Newcastle 45 2949  
after hours.

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20

Exhibit 1 - Newspaper  
Advertisement for Operator  
of Service Station



**SERVICE STATION INCOME AND EXPENSE STATEMENT**

Dealer ..... Service Station No. ....

Address HEXHAM ..... Town .....

Period covered: Average 19 .. to .. 19 ..  
One Month

		<u>INCOME</u>	ESTIMATED ACTUAL	ESTIMATED *
<u>GASOLINE</u>				
Super	26,000 gals. at 10.9¢/g.	.. ..	2334	
Standard	gals. at .. ..	.. ..		
<u>ALL OTHER</u>				
Motor Oil	130 gals. at 50¢/g.	.. ..	65	
Lubrication Sales, Gross		.. ..		
Deduct Cost of Products	25 @ \$4	Net Lub. Rev.	100	
Tyre and Tube Sales, Net Rev.	} Net	.. ..		
Battery Sales, Net Rev.		.. ..	60	
Tyre Service	} Labour	.. ..		
Battery Service		.. ..	200	
Accessory Sales, Net Rev.	\$700 @ 20%	.. ..	140	
Parking	CAFE Net	.. ..	1000	
Other Service Station Income	Cigs Sweets Drinks	.. ..	289	
Income—Other Sources, Sub-tenants, etc.:	\$1400 @ 20%	.. ..		
Discount Reimbursement		.. ..	100	
Caltex monthly incentive - late trading		.. ..	200	
<b>GRAND TOTAL GROSS INCOME</b>		.. ..	<b>\$ 4,979</b>	

		<u>EXPENSE</u>		
<u>Labour (other than Dealer) Service Station:</u>				
No. permanent	1	.. ..	400	
No. casual	5	.. ..	1200	
Electricity	100	Water -	Phone 30	130
Tools and Supplies, including Fuel		.. ..	20	
Advertising		.. ..	20	
Taxes and Licences (including Pay-roll, Pump Fees, etc.)		.. ..	8	
Stock Losses		.. ..		
Bad Debts		.. ..		
Depreciation on Dealer's Equipment		.. ..	30	
Interest and Bank Charges		.. ..	10	
Accountancy	Insurance	.. ..	70	
Miscellaneous	Stationery, postage, uniforms, etc.	.. ..	70	
Discounts Allowed		.. ..	200	
Dealer Licence Fee		.. ..	700	
(includes residence, 5/station + life facility)				
<b>TOTAL SERVICE STATION EXPENSES</b>		.. ..	<b>\$ 2,858</b>	
<b>NET PROFIT TO DEALER</b>		.. ..	<b>\$ 2,121</b>	

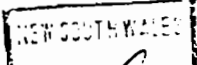
\* Where "Estimated" figures are used on an existing station, please explain on reverse side why actual figures not used.

Prepared by GLP Date 6.5.75 Reviewed by .....

"The prices of products are shown by way of example only & are not as recommended or suggested prices." Sales Manager

Exhibit 2 - Service Station  
Income and Expense  
Statement

Exhibit 4 - S2501



LICENCE

29.4.75 S280 1/70

*[Signature]*

THIS AGREEMENT made the TWENTY SIXTH day of SEPTEMBER 19 75

*[Signature]*

BETWEEN CALTEX OIL (AUSTRALIA) PTY. LIMITED of 167-127 KENT

*[Signature]*

STREET SYDNEY (hereinafter called "the Licensor") of the one part AND PAUL LESLIE and MARIE THERESE FEENAN

of 7/42 MCBURNIE ROAD CABRAMATTA N.S.W.

(hereinafter called "the Licensee") of the other part

WHEREAS the Licensor is the

*[Signature]*

1. Owner/Lessee of the lands more particularly described in Part 'A' of the schedule hereto.
2. Owner/Lessee of the buildings and improvements erected thereon more particularly described in Part 'B' of the schedule hereto (hereinafter called "the licensed buildings").
3. Owner of the plant, equipment and facilities more particularly described in Part 'C' of the schedule hereto (hereinafter called "the licensed facilities").
4. Owner of the goodwill of the business of a Service Station conducted on and from the lands hereinbefore referred to.

AND WHEREAS the Licensor has agreed with the Licensee to allow the Licensee free liberty and licence to use in common with the Licensor its workmen servants and agents the licensed buildings and the licensed facilities in the said Schedule and for that purpose to have access thereto over the said lands described in Part A of the said Schedule AND WHEREAS the Licensor has agreed to grant and the Licensee has agreed to accept a lease of the said goodwill of the said business upon the terms and conditions hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED as follows:

Licence

1. The Licensor hereby grants and the Licensee hereby accepts a licence
  - (a) to use in common with the Licensor its workmen servants and agents;
    - (i) the licensed buildings described in Part B of the Schedule hereto; and
    - (ii) the licensed facilities more particularly described in Part C of the Schedule hereto
  - (b) to have access over the said lands described in Part A of the Schedule hereto for the purposes aforesaid.

No lease to be implied

2. It is expressly agreed and declared that the rights hereby granted shall be by way of licence only and that the Licensee shall not be entitled to exclusive possession of the said land or the licensed buildings or any part thereof and in particular that this document shall not, except in regard to the lease of the goodwill hereinafter contained, be construed as a lease nor confer any tenancy whatsoever upon the Licensee who hereby acknowledges that this Agreement shall constitute the only agreement between the parties in respect thereto and that there is no contract or arrangement in regard thereto between the parties hereto either in writing or verbal or to be implied except such as is contained or referred to in this Agreement.

*[Signature]*  
Term of Licence

3. The licence shall commence on the 1st day of November 19 75 and shall, subject to earlier determination as hereinafter provided, continue for twelve (12) months thereafter.

*[Signature]*

PROVIDED HOWEVER THAT -

- (a) the Licensor may determine the licence at any time within that period without assigning any reason by 30 days notice in writing given to the Licensee;
- (b) if the Licensee shall continue to use the said buildings and facilities with consent of the Licensor after the said period of twelve (12) months he shall remain upon the same terms and conditions as are herein contained PROVIDED HOWEVER THAT the Licensor may at any time determine this Licence by giving 30 days notice in writing to the Licensee and that the Licensee may determine this Licence by giving to the Licensor not less than 3 months' notice in writing expiring at the end of any successive period of twelve months first referred to in this Clause;
- (c) the Licensor may determine the licence without notice in the event of non-payment of any debt owing by the Licensee to the Licensor and remaining unpaid for a period of seven (7) days after becoming due; and
- (d) the Licence shall be personal to the Licensee and shall determine in the event of the Licensee dying or ceasing to carry on business from the licensed premises.

Licence fee

4. The Licensee shall pay to the Licensor for the Licence hereby granted the Licence fee at the times and in the manner in Clause 28 provided.

Trade name

*Q. Smith*

Lease of goodwill

Goodwill rental

*Q. Smith*

Abatement

Removal of equipment

Use of facilities and buildings

Sale of goods

Alterations to land or buildings

Advertisements and signs

Compliance with notices

Compliance with insurance

Restriction on similar trading

Cleansing of premises

Other Licences

5. The Licensor hereby grants to the Licensee the right to conduct and the Licensee shall conduct the said business of a garage and service station in the licensed buildings under the trade name of *Q. Smith* during the period of this Licence and upon the termination thereof shall transfer the said business name to the Licensor or to such other person or persons as the Licensor in writing may direct.

6. The Licensor hereby grants to the Licensee a lease of the goodwill of the said business PROVIDED ALWAYS that the rights and lease of goodwill granted by this clause shall come to an end immediately upon the termination of the licence hereinbefore granted.

7. The Licensee shall pay to the Licensor monthly in advance on the first day of each and every month a rental at the rate of \$ 100 - 00 per month for the lease of the said goodwill the first payment to be a proportionate one if necessary.

8. If at any time during the continuance of the said licence the licensed buildings or the licensed facilities shall be destroyed or damaged by fire except fire due to act of negligence of the Licensee flood lightning storm or tempest so as substantially to interfere with the exercise by the Licensee of the rights hereby granted then and so often as the same shall happen the licence fee and the rental for goodwill hereby secured or a proportionate part thereof shall abate either wholly or to such extent as the Licensor may in its discretion bona fide deem to be fair and reasonable.

9. The Licensee shall not remove from the premises any of the licensed facilities the subject of this licence.

10. The Licensee shall not use the licensed facilities or the licensed buildings for any purpose other than for the operation of a Petrol Service Station Garage and shall be entitled to and shall conduct the said business during all lawful hours and for this purpose the Licensee shall and will apply for and use his best endeavours to obtain from any relevant authority any permission that may be necessary to ensure that the said business may be conducted for the maximum permissible number of trading hours PROVIDED that the Licensee shall take delivery of petrol from time to time required to be delivered by the Licensor in full tank loads at a time convenient to the Licensor or its agents or servants in that behalf.

11. The Licensee shall buy exclusively from the Licensor all petroleum products which may be required for sale at the service station as long as the Licensor shall be ready to supply the same and he shall not directly or indirectly buy receive sell or dispose of or permit to be bought received sold or disposed of on or about the service station petroleum products not actually purchased by the Licensee from the Licensor.

12. The Licensee shall not unless he shall first be expressly thereunto licensed by the Licensor make any additions alterations rearrangements or improvements on or to the said land or the licensed buildings particularly in respect of pumps tanks or other property thereon.

13. The Licensee shall not unless he shall first be expressly thereunto licensed by the Licensor alter remove cover add to or deface any advertisement or sign on the said land or in or on the licensed buildings or on any property located therein nor shall he affix paint or display on the said land or on any portion of the licensed buildings any advertisements plates or signs.

14. The Licensee shall advise the Licensor on receipt of any Notice or request concerning and requiring any work to be done by any such notice served under the provisions of any Act or Regulation or by any competent authority by reason of the nature of the business being or to be carried on by the Licensee on the said land or in the licensed buildings.

15. The Licensee will not do or permit or commit any act matter or thing whereby or by reason whereof the fire insurance premium payable in respect of the licensed buildings of the Licensor may be increased or whereby any policy of fire insurance may be or be liable to be avoided or annulled.

16. The Licensee shall not during the period of this licence be engaged concerned or assist in the sale of petrol or petroleum products at any place other than the licensed buildings within a radius of 5 miles from the licensed buildings.

17. That the Licensee will cleanse and keep cleansed the licensed buildings and every part thereof to the satisfaction of and in compliance with all requirements of the Municipal Council and any other public authority and will from time to time remove or cause to be removed all garbage and refuse of the Licensee from the said land in accordance with the requirements of the said Council or other public authority.

18. The Licensee shall at his own expense do all necessary acts to keep effective all other licences to do business on the said land which may be required by any Federal State or Municipal Law or regulation or by Governmental or other Public Authority or otherwise and shall pay all fees in connection therewith including any charges for inspection of the premises and equipment situated thereon and any fines incurred for any breaches of any such Federal or State Law or other regulation by the Licensee. In consideration of the grant of this Licence, the Licensee during the period of this licence and for a period of three months thereafter irrevocably appoints the Directors, Manager, Assistant Manager and Secretary of the Licensor jointly and severally to be his attorneys and attorney for the purpose of making any application to any governmental or other public Authority or of exercising any or all of the rights and powers in connection with the said business which may be or have been granted to the Licensee by any such Authority and to do all acts, matters and things necessary to comply with all laws, ordinances and regulations for the time being in force affecting Petrol Pumps or Petrol Stations and to sign notice of change of ownership to the appropriate officer for the registration of business name and the Licensee hereby ratifies and confirms and covenants to ratify and confirm all and whatsoever such Attorneys or Attorney substitute or substitutes shall lawfully do or cause to be done in

SCHEDULE OF LICENSED FACILITIES


Part C

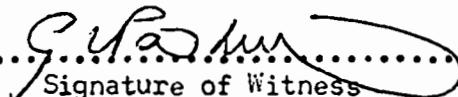
Gasoline meter pumps and electrical accessories supplied therewith.

Lines from tanks to same and underground tanks with dipsticks.

Other Equipment as follows:

- 1 ~~2~~ Grease Reels complete with control valve and hose.
- 1 High pressure grease pump complete with air coupling bayonet connector, lubricator, set of straight swivel, high pressure grease hose and swivel to pipe adaptor. ~~Air and water units with hoses (excluding gauges and nozzles).~~
- 1 ~~Frame contact hoist. Rail type hoist. Repco above ground type hoist.~~
- 1 5 H.P. Air compressor complete.
- 1 Banjo sign plus acrylic/metal insert.
- 1 ~~450 gallon~~ 4 compartment bulk oil tank (130 gallon)
- 1 ~~4~~ Faucet oil bar.
- ~~60 gallon highboys and malco pumps (2)~~
- ~~24 " " " " " "~~
- 1 Fire extinguisher in workable condition.
- Steel/Timber shelving for Sales Room, Storeroom and Lubritorium.
- 1 Office Desk.
- 2 Chairs
- 2 Overhead Thuban reels and pumps.
- ~~2 Thuban outfits complete.~~
- ~~Painted 4/5 gallon drums with chrome taps.~~
- ~~Ajax dispensers~~
- 3 V.O.S. outfits with stands, baskets, bottles & pourer spouts
- 5 Toilet paper dispensers.
- 4 Mirrors
- 1 Rheem Hot water system.
- Pump island luminaires.
- Spotlights
- 2 " " " Paper towel dispensers
- ~~500 Gallon Slop oil tank.~~
- 1 x 150 Gallon L.O.A. tank.

  
 .....  
 Signature of Licensee

  
 .....  
 Signature of Witness

The Branch Manager,  
Caltex Oil (Australia) Pty. Limited,  
167-187 Kent Street,  
SYDNEY N.S.W. 2000

Dear Sir,

Re: Service Station at HEXHAM S. 2501.

In consideration of the Licence Agreement dated 1975, I agree to be responsible for cleaning charges not exceeding \$250.00 incurred by Caltex Oil (Australia) Pty. Limited in respect of the above service station, upon my liability for such charges arising in the following circumstances

- If at any time during the term of the said Licence Agreement, or upon the termination (for any reason whatsoever) thereof, it becomes, in the reasonable opinion of the Branch Manager of Caltex Oil (Australia) Pty. Limited or his representatives, necessary to hire outside contractors to clean the service station as a result of ~~my~~/our failure either
  - (i) to comply with Clause 17 of the Licence Agreement and/or
  - (ii) upon termination to leave the premises in a proper clean and fit state (having regard to the condition of the premises at the commencement of the Licence Agreement)

I hereby undertake to reimburse Caltex Oil (Australia) Pty. Limited for such moneys at any time.

Yours faithfully,

x 

x M. J. Lunn

and about the premises by virtue of these powers and also agrees not to revoke the powers hereby conferred or any of them at any time during the continuance of this Licence and a period of three months thereafter.

Charges for electricity, etc.

19. The Licensee shall during the period of this licence pay all charges for electricity, telephone, gas and excess water relating to the said land and as may be due to the use by the Licensee of the licensed facilities or licensed buildings. Upon failure by the Licensee to pay any such charges the Licensor may pay the same and recover them from the Licensee forthwith without notice.

Default by Licensee

20. In the event of the Licensee failing to carry on the said business for any period during lawful trading hours on any day, or in case of default by the Licensee in payment of any moneys due hereunder or breach of any of the terms and conditions of this licence, or if bankruptcy or insolvency proceedings are instituted against the Licensee, or if the Licensee makes any assignment to a trustee for creditors or commits any act of bankruptcy or if any judgment of any Court is given, or any attachment or garnishee proceeding or execution is levied or instituted against the Licensee, or if he shall be found guilty of any indictable offence, the Licensor may without notice immediately terminate this licence.

Waiver

21. It is agreed that the waiver by the Licensor of any agreement condition or stipulation contained herein shall not be considered to be a waiver of any subsequent breach of same or any other agreement condition or stipulation of this licence nor affect or prejudice any of the Licensor's rights or remedies hereunder.

Notices

22. Subject and without prejudice to any mode of service provided by law notices from the Licensor to the Licensee shall be sufficient if placed in registered post addressed to the Licensee at the address of the said business or if delivered to the Licensee or left at the said address and shall be deemed to have been given at the time of posting thereof or of delivery to the Licensee or being left at the said address and any such notice may be signed on behalf of the Licensor by its Manager or Attorney or Accountant for the time being in the State of NEW SOUTH WALES or by any other person whose authority to sign is subsequently ratified by the Licensor. Notices from the Licensee to the Licensor shall be sufficient if posted in a registered letter addressed to the Licensor's registered office in the State in which the said land is situated.



Acknowledgment and indemnity

23. The Licensee acknowledges that he has thoroughly inspected the licensed buildings and the licensed facilities and that the same are in good and safe condition and repair. The Licensee agrees to protect defend and hold the Licensor harmless from and against all claims for damage to property (including the Licensee's property) or injury to or death of persons (including the Licensee) occurring on or about the said land and licensed buildings arising out of the use made by the Licensee of the said land and licensed buildings and facilities.

Use of equipment

24. Such pumps, tanks, containers or receptacles as have been furnished and licensed to the Licensee by the Licensor shall be used solely for the storing handling or dispensing of the Licensor's petroleum products.



Restrictive covenant

25. The Licensee in consideration of the grant of the within licence shall not within a period of \_\_\_\_\_ months from the termination hereof or any extended licence which the Licensor may hereafter grant to him undertake or carry on or be interested employed or directly or indirectly concerned or interested either as a principal manager or otherwise in any business of selling or reselling of petroleum or oil products at any place within a radius of \_\_\_\_\_ miles from the licensed buildings nor at any time during the same period attempt personally or by letters advertisements or otherwise to solicit or to interfere with any customers of the said business.



Provision of advertising facilities and use of copyright advertising, etc.

26. The Licensor will provide such advertising facilities as it may from time to time deem fit to assist the Licensee to sell the Petroleum products supplied by it and the Licensee is hereby licensed to use all copyrighted advertising matter which the Licensor may from time to time deem necessary to be displayed painted or otherwise affixed to the premises.

Provision of trained personnel etc.

27. The Licensor will from time to time as it may deem fit provide trained personnel to work in and about the licensed buildings at its own expense to advise on such merchandising problems as may arise in connection with the said business of the Licensee and shall give as soon as convenient on request such technical assistance and carry out such tests regarding complaints or otherwise in respect of the quality of the goods supplied as it may deem proper and generally will assist in maintaining the standards laid down by it in connection with its general Service Station policy. In connection with the "Marfak" service it shall from time to time upon request and at its earliest convenience train such employees of the Licensee as may be required to assist in developing the greasing facilities of the said business.

Licence fee

28. The Licensee shall pay to the Licensor for the Licence hereby granted a licence fee as follows:-



(a) the sum of \$ 600 - 00 per month on the first day of each and every month, the first payment if necessary to be a proportionate one, plus

~~(b) an additional sum payable on the next succeeding quarter day equal to one and one quarter cents per gallon for each gallon of petrol in excess of \_\_\_\_\_ gallons delivered to the property the subject of this Licence during the three (3) months period then expiring. Where the Licence commences or ends other than on a quarter day the additional sum payable in respect of such period not being a full three (3) months period (hereinafter called "the broken period") shall be one and one quarter cents per gallon for each gallon of petrol delivered to the said property in excess of that number of gallons computed by multiplying \_\_\_\_\_ by the number of days in the broken period and dividing the result by 91. For the purposes of this Clause;~~



*Q Smith*

(i) the quarter days are the tenth day of the months of January, April, July and October; and  
(ii) a Notice signed and served as in Clause 22 hereof advising the amount of licence fee due at any time in respect of this Clause shall be conclusive evidence thereof.

Workers  
Compensation  
insurance

29. The Licensee shall insure and keep himself insured against any legal liability whatsoever whether arising at common law or by virtue of any statute relating to Workers Compensation or employer's liability to any person employed by him in or about the licensed buildings or the licensed facilities, and shall hand to the Licensor on demand the Policy of Insurance and all receipts evidencing the renewal thereof.

Maintenance  
Service and  
Repair of  
Equipment

30. The Licensee shall take proper care of all the facilities and equipment included in this licence (and any further facilities or equipment hereafter placed on the licenced premises by the Licensor) in the manner prescribed in the Licensor's Dealer Maintenance Handbook 1st Edition (a copy of which the Licensee hereby acknowledges having received). The Licensee shall at his own cost carry out all maintenance service and repair work prescribed in the said Handbook other than the work specifically prescribed therein as to be carried out by maintenance contractors on the Licensor's behalf and at the Licensor's expense. Should the Licensee fail to perform his responsibilities for proper maintenance of the facilities and equipment as defined in the said Handbook and thereby fail to keep them in a proper state of repair, the Licensor and its workmen servants or agents shall have the right to enter the premises to effect all necessary repairs and replacements so as to place the equipment in efficient working order and in a proper state of repair and the cost of such repairs and replacements shall be a debt due and owing by the Licensee to the Licensor

Marginal notes

31. The marginal notes appearing alongside the various clauses of this Agreement are for reference purposes only and shall have no bearing or effect upon the interpretation or the terms of this Agreement.

32. This Licence shall be deemed to have been signed by or on behalf of the parties hereto on the day and year first above written.

PART A.

SCHEDULE

*Q Smith*

DESCRIPTION OF THE LAND: Being all that piece or parcel of land contained in conveyance registered No. 920, book No. 2550 being in the Parish of Hexham, (XXXX) County of Northumberland, City of Newcastle.

PART B.

SCHEDULE

*Q Smith*

DESCRIPTION OF THE LICENCED FACILITIES: A brick one bay Service Station complete with fixtures, shelving and furniture. Cafe and residence constructed of brick comprising of restaurant, kitchen, storeroom, ladies and gents rest rooms, two bedrooms, lounge room, lobby, bathroom and laundry. Fencing.

PART C.

SCHEDULE

*Q Smith*

See annexure listing licenced facilities attached hereto.

SIGNED ON BEHALF OF  
CALTEX OIL (AUSTRALIA) PTY. LIMITED  
By its Branch Manager for Area 05

*[Signature]*

JOHN NOLKOYD HOLLAND  
in the presence of:

*[Signature]*  
SIGNED by the said PAUL LESLIE

*[Signature]*

MARIE THERESE FEENAN  
in the presence of:

*[Signature]*

*[Signature]*

10/68  
TO J. L. Parker  
Hes.

Exh. 27

DATE RECEIVED

DATE 9-10-75  
FROM NSW STATE OFFICE  
REFERENCE RIMCD

RECEIVED  
17 OCT 1975  
EX-100

SUBJECT #33. S/SIN - HEXHAM - S 2501.

On form 3274 "Service Station Income & Expense Statement", it is necessary to follow directions when using Estimated figures - When estimated figures are used in an existing Station, please explain on reverse side why actual figures not used.

I presume the reason for estimated figures is that the site has been under company operations. Would you please advise us soon as possible

correct

Many thanks

SIGNED

Ray McDonald  
Asst State Manager

16/10/75.

Asst. State Manager, NSW,  
SYDNEY.

COPY OF REPLY

It was considered previous dealer's operating figures were out-of-date & peculiar to his circumstances, therefore not reflecting a reasonable / normal situation.

Co-op. operation of the site commenced 15/7/75.

For your info, pse.

SIGNED

J. L. Parker



INDUSTRIAL COMMISSION OF NEW SOUTH WALES

CORAM: MACKEN J.

Monday, 3rd September, 1979.

No. 200 of 1979

PAUL LESLIE FEENAN AND ANOTHER v. CALTEX OIL (AUSTRALIA) PTY.  
LIMITED AND ANOR.

Application for order declaring contract void.

JUDGMENT

MACKEN J.: Paul Leslie and Marie Therese Feenan are applicants under s.88F of the Industrial Arbitration Act, 1940, seeking 10  
to void a licence agreement entered into on 26th September, 1975, between themselves and Caltex Oil (Australia) Pty. Limited (Caltex). Caltex refines and distributes petroleum products of various kinds in New South Wales and elsewhere. The various oil products are sold to the public at outlets located throughout the State at sites convenient to the motor-  
ing public. The outlets are owned and fully equipped as service stations by Caltex. They not only comprise petrol and distillate storage tanks and pumps but it appears that some outlets also provide ancillary services designed to 20  
attract custom and encourage the purchase of the company's products. Such ancillary services include repair shops and lubrication bays and, in the case of the subject service station, a take-away food facility.

Among the many petrol outlets owned by Caltex is one situated on the Pacific Highway at Hexham, a suburb of

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Newcastle. For just over two years prior to February, 1975, this service station was occupied under licence by Mr. J.R. Bubb and his wife, who, in partnership, operated the service station and its associated snackbar, assisted by their older children and one permanent and five casual employees. During the last seven and a half months of operation of the station Mr and Mrs Bubb showed a profit "calculated on an annual basis 10 of \$17,600 per annum." In addition they had certain other advantages in that food and cigarettes and other items were paid for out of the business. In earning this sum both Mr and Mrs Bubb worked for very long hours. He said that he worked from 6 a.m. until 6 p.m. and sometimes through until midnight Monday to Friday. He also worked on Saturdays and for a while on Sundays. He said that he worked for a minimum of eighty hours per week and that his wife worked all day on at least five days per week. Throughout the two years of his occupancy of the Hexham site they did not take any 20 holidays. He came to leave the site in February of 1975.

From the date on which Mr. Bubb ceased to work at the Hexham service station Caltex operated the station by using its own employees. The Manager, Mr. G.W. Bennett, worked for more than fifty-five hours per week. He was paid a salary of \$165 for fifty-five hours work and, when called upon to work for hours beyond the fifty-five, he did so pursuant to a second contract of employment, by which he was

engaged as a casual under "an assumed name."

The suggestion that he work under another name and on a different basis of payment came from Mr. Parker, an employee of Caltex, who at that time was the Merchandising Representative of the company in the Newcastle area. This arrangement provided certain taxation advantages to Mr. Bennett. As a casual working under a fictitious name Mr. Bennett was paid 10 between \$3.40 and \$3.50 per hour (a rate derived from the federal award pertaining to this employment). Working under Mr. Bennett's supervision were other employees who were paid as casuals on the same basis as was Mr. Bennett. The span of hours worked by Mr. Bennett while he was Manager of the Hexham site commenced at 6 a.m., Monday to Friday, and concluded at 5.30 p.m. each day. On Saturday mornings he worked from 6 a.m. to 11 a.m.

During the period in which the Hexham service station was under the management of Mr. Bennett, Caltex was continuously 20 advertising to secure the services of a licensee for the site, as such is Caltex's preferred method of operating its retail outlets. In July, 1975, one such advertisement came to the attention of Mr. Paul Leslie Feenan, the first-named applicant in the proceedings. The advertisement seen by Mr Feenan is in the following terms:-

SERVICE STATION -

TAKE-AWAY FOOD.

An opportunity exists for a businessman and his family to take over this lucrative business on the Pacific Highway at:

HEXHAM

A good operator could expect to earn in excess of \$20,000 a year before tax.

10

A 2-bedroom residence is part of the Service Station building.

This is a walk-in, walk-out deal, and finance required is \$20,000.

Please ring:

CALTEX OIL  
(AUSTRALIA)  
PTY. LTD.,  
NEWCASTLE, 61 6000.

Ask for Mr. J. Holland or Mr. G. Parker  
Or ring Newcastle 45 2949  
after hours.

20

On leaving school Mr. Feenan had had some short experience as a drive-way attendant in a service station where he had learned to handle the sale of petrol and oils and to work in the lube bay greasing and changing the oil of cars. At the time that he saw the advertisement he was a member of the New South Wales Police Force. Mr. Feenan was married and his wife had had some experience in the catering trade; a factor which had a bearing on his decision to enter into the licence agreement which carried with it the right to operate the snack bar at the Hexham service station site.

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Mr. Feenan answered the advertisement and spoke to Mr. Parker by telephone. Subsequently, Mr and Mrs Feenan

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

attended at the service station site with Mr. Parker and inspected the facilities and the two-bedroom residence which was attached to it. Mr. Parker had prepared an income and expense statement containing estimates of the gallonage of petrol and other sales that could be expected. This included an estimate that petrol sales would reach twenty-six thousand gallons per month, while the net takings from the cafe would amount to \$1000 per month. Mr. Parker estimated that the service station would return to a licensee a net profit of \$2,121 per month. 10

Mr. Feenan was told that the capital required to operate the service station would total approximately \$20,400. Mr. Feenan later obtained this capital, in part by raising a loan from the Rural Bank of \$10,000. He told Mr. Parker that he would enter into a licence arrangement in accordance with the terms that had been explained to him. On 26th September, 1975, he signed the licence agreement for the service station, which was to commence from 1st November, 1975. 20

The licence agreement, inter alia, provided that it was to continue in force for a period of twelve months from the date of commencement provided that Caltex retained the right to determine the licence at any time within that period, without assigning any reason, by thirty days written notice to the licensee. No right to determine the licence within the twelve months period was given to the licensee but, at the

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

expiration of twelve months, the licence remained in force with the right being given to the licensee to terminate the licence by giving the licensor not less than three months written notice, expiring at the end of any successive period of twelve months.

The licence was non-assignable and, pursuant to the licence, the licensor granted to the licensee a lease of the goodwill of the business for the duration of the licence. 10  
A rental of \$100 per month was payable for the lease of the goodwill of the service station and a licence fee of a further \$600 per month was payable to the licensor. The licence required the licensee to buy all his petroleum products exclusively from the licensor and certain of the other covenants in the agreement were of a similarly restrictive character.

Mr and Mrs Feenan attended a Caltex dealers' school at which they were instructed as to how to manage the service station and complete the various financial and trading forms 20  
required by Caltex, as well as how to merchandise the products supplied to them by the company.

Prior to operating the service station under the licence agreement Mr. Feenan was told that the hours of work would be long. He was told that the trading hours of the station would be from 7 a.m. until 10 p.m. and it was suggested that he may even open the station earlier. It was clear that the Hexham station was intended to open from 6 a.m. until 10.30 p.m. on six days of the week, and from 8 a.m. until 10.30 p.m.

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

on Sundays. Mr. Parker told Mr. Feenan that the snack bar should open from 10 a.m. to 3 p.m., but that night-time trading had been found not to be worthwhile.

In the actual operation of the station Mr. Feenan said that he opened at 7 a.m. and that he worked until the closing time. The snack bar was opened from 10 a.m. to 3 p.m., and then again from 5 p.m. until 8.30 p.m. or 9 p.m. Mr. Feenan said that he applied himself diligently to working under the licence agreement, that he dealt with his customers in a friendly manner, and did his best to make a success of the arrangement. He said that he lost two stone in weight while he was operating the service station.

10

During February, 1976, Mr. Feenan discussed his figures with his accountant and, subsequently, with Mr. Watson, who had succeeded Mr. Parker as Merchandising Representative of Caltex in the Newcastle district. He did so because he had discovered that the station was not selling twenty-six thousand gallons of fuel per month and that he was not going to receive \$24,000 per year, as he had been told. He had also found out that, despite the fact that his wife was working very hard, the snack bar was not taking \$1000 per month.

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Mr. Feenan said that he had kept a record of the hours he worked under the licence agreement which averaged between eighty-five and ninety hours per week. He said that this estimate was conservative and that spot checks of this average

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

at different periods show that he worked between ninety-two and a half and ninety-six and a half hours in the weeks that were checked in detail. Similar checks of Mrs Feenan's hours of work show that she worked on the average seventy-five hours per week.

There is no doubt that, prior to entering into the licence agreement, Mr. Feenan was aware that both he and his wife would have to work very long hours to make a success of the enterprise, although he made clear from the very outset that he did not intend to open beyond the usual trading hours. In operating the service station there was a rough division of labour between Mr and Mrs Feenan by which Mr. Feenan concentrated his efforts on the sale of petrol and other Caltex oil products, while Mrs Feenan concentrated her efforts in making the snack bar a success. Furthermore, in examining the hours of work of Mr and Mrs Feenan some allowance has to be made for interruptions in the work, notwithstanding that such interruptions occurred while they remained on the premises. In addition, the children of the family were driven to and from school in working hours and such intervals cannot be counted as hours of work for purposes of an application under s.88F.

Once the applicant became aware early in 1976 that the business was not doing as well as he had thought, he gave notice to Caltex of his intention to terminate the licence on



Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

31st March, 1976. Toward the end of the licence period the gallonage of fuel sold declined to about seventeen thousand gallons per month. Mr. Feenan attributed this decline in gallonage to an outbreak of discounting by other petrol stations in the area.

During the period in which the licence agreement was operated by the Feenans their taxation records show that they made approximately \$1500 each. In addition certain hidden benefits attached to them by way of the agreement including accommodation for themselves and their family, and the availability of the snack bar and its stock to reduce the cost to them of food, cigarettes, and the like. 10

Mr. Coombs Q.C., who appeared with Mr. Mater of counsel, for the applicants, attacked the licence agreement, and the arrangement pursuant to which the Feenans operated the Hexham service station, on the ground that it was an unfair contractual arrangement and subverted industrial standards. He said that it was designed to by-pass the objectives of industrial legislation and awards in that it was a system adopted by Caltex to retail their petroleum products so as to avoid the obligation to pay award wages. He claimed that the system avoided all the standard conditions of employment that would flow from the creation of a master-servant relationship; including payment of annual leave, long-service leave, workers' compensation, and the like. 20

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Mr. Coombs also attacked the licence agreement on the basis that it was procured by representations as to gallonage and profit that were false and which must have been known to be false. Mr. Coombs did not press that orders be made against the former employee, Mr. G.L. Parker, the second-named respondent, but he sought orders to be made against Caltex Oil (Australia) Pty. Limited declaring void the contract 10 in whole and ab initio and requiring a return to the applicants of the rental paid during the operation of the licence agreement, together with interest on the capital sum contributed by them. He further sought that wages be paid to Mr and Mrs Feenan, in accordance with the terms of the awards respectively applying to them during the period of operation of the licence agreement, and he sought an order for costs.

Mr. Morling Q.C., who with Mr. Peterson of counsel, appeared for the respondents, opposed the making of any orders pursuant to s.88F. He argued that the contract was of a type 20 that was not within the jurisdiction of the Industrial Commission pursuant to s.88F in that it involved a dealing with property rather than being an agreement leading to the performance of work. He argued that the representations which were made to the Feenans by Mr. Parker on behalf of Caltex before the signing of the contracts were substantially accurate, having regard to the fact that they were only estimates of future business prospects.

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Mr. Morling contended that, having regard to the additional benefits which attach to a licensee operating a service station, it could not be suggested that the hours worked at the station were not adequately paid for. He contended that no capital was lost in the venture and that the licensee system, preferred by Caltex, is not subversive of the industrial arbitration system or the awards made under it. He argued 10 that the contract was not in any way unfair or unconscionable, but rather than the service station was not operated by the Feenans in accordance with good business practice. He concluded by contending that contracts of this type are conventional throughout the Commonwealth of Australia and, having regard to the wide incidence of their use, the Industrial Commission should not interfere with them as a matter of discretion, even if they do fall within s.88F of the Act.

JURISDICTION

There can be no doubt that, having regard to the majority 20 judgments of the High Court in Stevenson v. Barham<sup>(1)</sup>, the licence agreement is a contract which led directly to the applicants working in an industry. As such it is a contract "whereby a person performs work in any industry" (s.88F(1)).

Mr. Morling suggested that because the licence agreement did not provide for the payment of any remuneration by Caltex to the applicants the applicants did not do any work directly or indirectly for Caltex. He argued that, as there was

that s.88F should be concerned. As Street C.J. said in Barham v. Stevenson and Anor (4):

Frequently the real contract or arrangement existing between the parties will best be discovered by examining the actual relationship between them and then regarding this as a manifestation of their contract or arrangement ...  
The Commission's duty is to ascertain the true contract or arrangements; it is this upon which the jurisdiction of the Commission is to be exercised.

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An examination of all of the detail of the arrangement, of which the core is the licence agreement, entered into between the Feenans and Caltex discloses the true character of the relationship entered into between them.

THE CALTEX TRADING SYSTEM

Summarizing the evidence as to the Caltex system reveals:-

20

- (1) The selling by retail of Caltex products to motorists and other users in New South Wales is a labour intensive operation. It requires labour to be present for the sale of petrol, distillate and oil. Labour is also required to sell ancillary products of the company and goods sold from service stations as a service to the motoring public; e.g. cigarettes, sweets and the like, and labour is involved in the performance of services, such as the greasing and oiling of motor vehicles belonging to customers.

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- (2) Not only is the retail selling of petroleum products a labour intensive sector of the oil industry, but the

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

no obligation under the licence agreement for a licensee to carry on the work personally, the contract lacked an essential element prerequisite to s.88F being invoked. In substance Mr. Morling was asking me to apply dicta expressed in the minority judgments of Aiken & Stephen JJ. in Stevenson v. Barham, and import into s.88F an implication that the section be confined to a consideration of work performed by one person 10 "for another". He contended that "an essential figure is missing - the man who stands in the place of an employer and who seeks to get around, or whose activities have the effect of getting around, the award system established by the Act."<sup>(2)</sup>

Apart altogether from being bound by Stevenson v. Barham, were I to apply the criteria suggested as preferable by Mr. Morling, this contract would nevertheless fall squarely within the terms of s.88F.

Caltex retail their products through service station outlets throughout New South Wales which are sometimes manned by 20 their own employees but which, for preference, are operated by licensees when such are available. The licence agreement requires the licensee to continue to trade during normal trading hours and Caltex details the system of operation and accounting for the products provided to the station by the company. Caltex "stands in the place of an employer" and, pursuant to the licence agreement, exercises continuous dominant and detailed control over a licensee in every aspect

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

of the operation of the licence agreement. When the work of a licensee is carried on by an employee it is done so in a manner virtually indistinguishable from the performance of the same work by a licensee. Furthermore, the work, when carried on by an employee, is regulated by awards made by industrial tribunals. The contract has "an industrial colour or flavour" (to revive an expression formerly thought to be descriptive of the limits of jurisdiction exercisable under s.88F.) 10

The point taken by Mr. Morling must fail. The most confined meaning of the terms of the section would allow the licence agreement to be examined by the Industrial Commission pursuant to s.88F.

#### THE REPRESENTATIONS

It is unnecessary for me to canvas in detail the contending viewpoints of the applicants and the respondents with respect to the representations made as to the gallonage of petrol and distillate which could be expected to be sold at the station and the takings of the snack bar. It is unnecessary because I consider the contract contravenes s.88F on broader grounds. The representations as to gallonage were not as significant as the representations that were made as to the amount of money that could be earned per month. It was suggested by Mr. Parker, on behalf of Caltex, that more than \$2000 per month would be earned and the advertisement which 20

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

attracted the applicants referred to the capacity for a good operator to earn in excess of \$20,000 per year. It can be fairly said that this representation went beyond legitimate "puffing" of the business. There was nothing of substance that entitled Caltex to fairly and reasonably predict that any operator was likely to earn this amount of money by operating this station. Even if such a sum of money could have been earned by a "good operator" it could only have been earned by the station trading even longer than the hours during which it was kept open by the Feenans. Thus, the amount of money capable of being earned is related to the number of hours worked, either by the licensee or by his staff. It is to this feature of the licence agreement that s.88F should be directed, rather than to the representations themselves. 10

It should be said, however, that the estimated gallonage of twenty-six thousand per month was not justified by the gallonage sold while the station was under Caltex direct management because such a gallonage was not nearly achieved in that period. The representation as to likely snack bar takings of \$1,000 net per month was claimed not to have been achieved by the Feenans but some doubt exists as to what, in fact, the net takings of the cafe were. Even basing the representations on the trading of Mr. Bubb it must have been obvious to Caltex that the suggested return of \$20,000 per year was not likely to be realized. It was even less likely 20

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

that the sum of \$24,000 per year or more, which was represented as the potential profit of this business, could be earned.

I have no doubt that had the Feenans been aware of the true position as to the likely monetary return for their hours of work, they would never have entered into the transaction at all. When they did discover what the return was to them for their work, they gave notice of termination of the licence agreement immediately. 10

#### THE LICENCE AGREEMENT

There are many disquieting features about the written terms of the licence agreement itself. Many of the covenants are highly restrictive and many of the important terms of the agreement are very one-sided. In particular, the right of the licensor to determine the licence at any time, and for any reason, by thirty days notice in writing is to be distinguished from the corresponding right for the licensee to determine the agreement by three months notice in writing at the end of the initial and subsequent licence period. Furthermore, the licence fee may be increased as a term and condition of the renewal of the licence. Mr. Parker said that licence fees had in some instances been increased during the currency of licences. 20

However, to analyse clause by clause the terms of the licence agreement would be to "take a fragmentary view of the transaction".<sup>(3)</sup> It is with the essence of the transaction



that s.88F should be concerned. As Street C.J. said in Barham v. Stevenson and Anor (4):

Frequently the real contract or arrangement existing between the parties will best be discovered by examining the actual relationship between them and then regarding this as a manifestation of their contract or arrangement ...  
The Commission's duty is to ascertain the true contract or arrangements; it is this upon which the jurisdiction of the Commission is to be exercised.

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An examination of all of the detail of the arrangement, of which the core is the licence agreement, entered into between the Feenans and Caltex discloses the true character of the relationship entered into between them.

#### THE CALTEX TRADING SYSTEM

Summarizing the evidence as to the Caltex system reveals:-

20

- (1) The selling by retail of Caltex products to motorists and other users in New South Wales is a labour intensive operation. It requires labour to be present for the sale of petrol, distillate and oil. Labour is also required to sell ancillary products of the company and goods sold from service stations as a service to the motoring public; e.g. cigarettes, sweets and the like, and labour is involved in the performance of services, such as the greasing and oiling of motor vehicles belonging to customers.

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- (2) Not only is the retail selling of petroleum products a labour intensive sector of the oil industry, but the

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

labour that is required has to be available over the greater part of each day. For all practical purposes a service station must remain open and accessible to the public from about 6 a.m. until about midnight on seven days per week. As Mr. Bubb found, to maximize sales, it should open twenty-four hours per day, seven days per week.

(3) Having regard to the on-costs of labour (annual leave, long service leave, workers' compensation etc.) and the penalty rates which, by award, attach to the performance of work at night-time, on week-ends, and on public holidays, it is not surprising that Caltex consider the operation of service station outlets by use of their own employees to be unprofitable and to be avoided whenever possible. 10

(4) Where circumstances compel Caltex to use its own employees in the operation of a service station it has been found to be necessary for such labour to be employed on a casual basis rather than for permanent employees of Caltex to work at such a site. At least by the engagement of casual labour some of the on-costs of employment can be reduced (e.g. payment for annual leave, sick leave and long service leave) because the casual loading takes into account such benefits. The evidence showed that some Caltex employees, although working as de facto permanent employees, are classified as casuals and paid 20

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

accordingly. One such employee worked for thirty-nine hours instead of forty and was accordingly paid as a casual, for what amounted to a permanent employment engagement. It is not surprising either that, with respect to the one employee who, by necessity, has to be permanent (i.e. the manager) payment of a flat sum for a period of fifty-five hours per week (hours which by industrial standards are inordinately long) was made and, thereafter, he worked pursuant to a second contract of employment. 10

(5) The use by Caltex of its own employees in the retail sale of its products to the public involves the company in having to wait for payment until the product, be it petrol, distillate or oils, is sold. It is clearly of commercial advantage to the company to be prepaid for the products, albeit at a somewhat lower figure, by a licensee, who thereupon, assumes the task of selling the product to the public. A powerful incentive devolves upon such licensee to maximize his sales in order to secure the highest return for his labour. 20

(6) A further commercial incentive prompting Caltex to operate through a system of licensees arises because licensees pay to the company a rental of the goodwill attaching to the station, together with a licence fee. Such rental payments are not received by the company where its own employees are used to man the outlets.

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Furthermore, the capacity from time to time to enter into a new licence agreement at a higher rental figure, or containing a higher licence fee, gives to Caltex a capacity to take advantage of increasing goodwill or increasing sales made from an outlet by skimming the return to the licensee.

In attempting to recognize the essence of the transaction entered into between the Feenans and Caltex it is necessary to bear in mind that the words used by witnesses to describe the arrangements do not appear to have in the oil industry their ordinary and grammatical meaning. 10

The originating advertisement called for a "business man" to take over a "lucrative business". But it is only in the loosest sense that a person operating under a licence agreement containing the terms under which the Feenans operated the Hexham station could be called a "business man". The licence agreement allowed him little significant discretion in the management of the "business". The day-to-day routine of his administration and the provision of his stock-in-trade were governed at every turn by Caltex administration and procedures. Prior to commencing as a "business man" he was coached in the detail of the Caltex system of operation. 20

The high degree of supervision exercised by Caltex over the operator of a service station working under a licence agreement is not necessarily inimical to the interests

of the operator. It is in Caltex's interest that a licensee should make a success of a service station and remain in business thereat. For this reason support facilities were provided by Caltex as a hedge against excessive local competition. However favourable these support facilities are, however, they allow an operator to be an "independant business man" only in a notional sense.

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The same understanding applies to the "goodwill" of the business. Throughout the proceedings both applicants and respondents insisted that "there is no goodwill in the oil industry". By this was meant that a licensee can never acquire any benefit from his efforts to improve a service station beyond the day-to-day return to him from his petrol or other sales or the work performed in the servicing of vehicles. The reason for the licence agreement charging a rental for goodwill is that all goodwill belongs to Caltex. For this reason Caltex is perfectly entitled to attach a rental figure to goodwill; and, indeed, as an operator improves the goodwill of a station, to lift such rental figure; at least for any subsequent operator.

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The word "capital" was bandied about by witnesses as a term descriptive of the \$20,000 which was provided by the Feenans in order to enter into the licence agreement. Caltex described this sum as the "capital required to operate the Hexham service station". But this sum is not "capital" as

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

that term is understood in a colloquial commercial sense. The bulk of the \$20,390 estimated by Caltex to be required by the Feenans to enter into the licence agreement was to be transferred from the Feenans to Caltex to pay for the gasoline, lubricants, automotive parts and accessories needed to operate the station. It was also used to pay in advance the State petrol licence fee and the licence fee to Caltex. \$2,000 of 10 it was allocated to cover the living expenses of the operator for the first month; \$1,600 of which was allowed for wages for the service station staff.

No claim was made by the applicants for a return of this capital because it was not lost. Under the licensing system used by Caltex an incoming operator (whether Caltex or another licensee is irrelevant) buys the fuel and the stock of the service station from the outgoing operator who, thus has his "capital" returned to him. The sum paid is not risk "capital" in the accepted sense, upon which either profit or loss can 20 be made.

This becomes more obvious when it is understood that the word "profit" was used throughout the proceedings in a sense quite unknown in normal business practice. An important part of the respondents' case lay in the evidence of Mr. Taggart, a public accountant, who is a principal of a firm of service station management consultants in Newcastle. He expressed the opinion that with good management a "hard working husband

and wife team" could earn a profit of not less than \$20,000 per annum before tax from the Hexham service station, assuming the site to be selling twenty-six thousand gallons of motor spirit per month and assuming that the snack bar was generating a gross turnover of \$1,500 per month.

By "profit", however, Mr. Taggart meant the monetary return to the licensees for the hours of work which they personally put into the business. He defined "profit" as the return to the proprietor and his wife for their labour. Such a definition equates "profit" with wages. Mr. Taggart, consequently, agreed that whether a profit was good or bad depended upon the number of hours that have had to be worked to earn it. "Profit", thus, means the "hourly rate of pay". 10

The words "profit" and "loss" were used in the traditional sense when they were applied to a service station operated by Caltex with its own employees. It appeared to be common ground between the applicants and the respondents that Caltex could not make a profit from a service station when using its own employees because the obligation to pay award wages and working conditions (e.g. overtime rates, holiday pay, workers' compensation, sick pay, long service leave and the like) in a labour intensive industry, operated over many hours of a day on every day of the week, lifted the operating costs of a station above the return received by Caltex from the sale of products through the outlet. There was, thus, incurred a loss in the ordinary commercial sense. 20

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

It may be one thing to categorize the representations as to the gallonage likely to be achieved and the suggested takings from the snack bar as a legitimate "puffing" of the business, but it is quite another thing to so regard the more fundamental representations which induced the applicants to enter upon this project. The advertisement called for a "business man" and his family to operate the business. Mr and Mrs Feenan were led into the belief that they were partners commencing to operate their own business. In fact they did not become "business men", nor did they acquire a "business" in any relevant sense. The licence agreement allowed them to work from a Caltex site to sell a Caltex product, on terms that were wholly one-sided and in favour of Caltex. They could not build up the "business" pursuant to the licence agreement; they could not sell the "business"; they could not even allow the "business" to fail. At every significant point in the operation they were under the supervision and regular monitoring of Caltex. They could be evicted by Caltex at will and, in certain eventualities, without even the insignificant thirty days' notice provided for in the licence agreement. For their part, they had no such corresponding rights. They had no capacity to realize on their own efforts by way of sale of goodwill and any residual goodwill left in the business as a result of their efforts belonged to Caltex. They were governed in detail as to how the premises could be used and the



trading hours in which they could open. Even after the termination of the licence agreement restrictive covenants had application to them.

Against the background of these characteristics of the agreement it has to be remembered that whatever "profit" resulted from their efforts was calculable only by reference to the expenditure by the Feenans of their own personal labour. The licence agreement itself did not, in terms, require the Feenans to personally work in the business, but it was made clear to them from their very first contact with Caltex that they would have to work in the business themselves and, were they not to work, no "profit" (in the oil industry sense) could be expected.

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It is these features of the licence agreement and the collateral arrangements which attached to it which attract the operation of s.88F of the Industrial Arbitration Act and render the agreement unfair, harsh and unconscionable.

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If more were needed s.88F(1)(d) provides it. Mr. Coombs calculated that Mr. Feenan was underpaid an amount of \$10,995 in accordance with the terms of the relevant award applied to the hours of work which he performed during his occupancy of the Hexham station. In the case of Mrs. Feenan, the calculation, based on the award relevant to her working in the snack bar, amounted to a claim for \$8,858. In neither case was any allowance made for money received in the course of

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

working pursuant to the licence agreement, just as no allowance was made for any advantages of a non-pecuniary kind attaching under the licence agreement.

Mr. Morling did not challenge the accuracy of the amounts claimed, nor the hours of work upon which they were based. However, he claimed that, taking into account the hidden advantages attaching to them as licensees, the Feenans, in fact, each received a total remuneration equal to that which would have been received by a person performing the work as an employee. He pointed out that with respect to some times during the day the work of the applicants was able to be done whilst performing ordinary household chores about the station and its residence. Furthermore, on each day a short time was taken off by Mr. and Mrs. Feenan to pick up the children from school, and of a morning Mr. Feenan drove the children to school. It is reasonable that allowance be made for the fact that the licence agreement provided rent-free accommodation to the Feenans. The Feenans estimated that this was worth about \$35 per week. Similarly, advantages attached to the licensees by virtue of the fact that their food, petrol and cigarettes were purchased cheaply. The opportunity existed for the Feenans to pay less in tax than may otherwise have been the case by virtue of their being able to cater for the family from the food purchased for the snack bar. Such advantages are proper to be brought into account in assessing whether or not the Feenans

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Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

received a total remuneration less than a person performing that work would have received as an employee.

Because I consider that, making liberal allowance for the suggested hidden advantages which attached to the licensees under the agreement, there remains thereafter a considerable short-fall on the sum the Feenans would have received as employees working under the terms of the relevant awards, the contract did provide a total remuneration less than a person performing the work would have received as an employee performing such work. As such it contravenes s.88F(1)(d) of the Industrial Arbitration Act. 10

I do not accept that it is proper to take into account the fact that the licence agreement provided the Feenans with an opportunity to be their own employer. To the extent that this was true under the licence agreement I consider it to be valueless. The opportunity to be their own employer was wholly notional. Similarly, the opportunity to make a profit beyond the estimated \$20,000 I consider to be a fictional opportunity and valueless. It was not practicable for the Feenans working hard to make the \$20,000 let alone to make more. I also treat as valueless the suggested opportunity for Mrs. Feenan to gain an income without leaving home. This was suggested as an important advantage in the Hexham area. Nor do I consider it was within the original consideration for the licence agreement for an opportunity to be placed in the hands of the Feenans 20

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

to engage in some ancillary type of business such as selling cars or boats.

Mr. Morling concluded by arguing that, because licence agreements of this type are conventional throughout Australia, the Commission should not exercise its discretion pursuant to s.88F to interfere with them, having regard to their wide-spread usage. The mere fact that a contract provides for very long hours of work, or even an hourly rate of pay below that which would be payable to an employee working such hours pursuant to the terms of some award, may not be sufficient to attract the jurisdiction of the Commission under s.88F. It may be that the effort put into such work could result in capital gain or some realizable goodwill or it may be that incompetence on the part of an operator is solely responsible for the low return. There may be many reasons why a contract would not be voided by the Commission exercising its discretion under s.88F. Whatever such reasons may be, each case would have to stand or fall on its own facts.

It would be no more appropriate for an application under s.88F to be used as the basis for voiding all similar contracts or arrangements than it would be for evidence of a general usage to be used to justify any and every contract entered into pursuant to such usage. One cannot establish by prescription a right to maintain on foot a contract which is unfair, harsh or unconscionable, or against the public interest, or

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

which otherwise contravenes s.88F.

For these reasons I intend to void the licence agreement ab initio, save in so far as it has returned to the Feenans monies in accordance with its terms. I will make an order returning to the Feenans the amount paid for rent under the contract, less an amount which I allow for the rental of the residence occupied by them. Mr. Coombs informed me that \$5,600 was the rental paid under the licence agreement. From this figure I will deduct the sum of \$2,000 which I assess to be a fair rental for the residence during its occupancy by the Feenans. I reject the claim of the applicants to have the sum of \$1,333 paid to them; being ten per cent of the \$20,000 which they brought into the business. No evidence was led as to the original dispersal nor the ultimate return of the sum to the Feenans.

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I propose to make orders in favour of Mr and Mrs Feenan in the sum which I assess to be appropriate to be received by each of them on account of wages. I have calculated these figures by reducing the amount claimed on their behalf by Mr. Coombs by the amount received by each of them under the partnership agreement, and by a further sum which I have assessed as an appropriate valuation for all ancillary benefits received by them during their occupancy of the Hexham service station site, with the exception of the rental of the residence which has been brought into calculation in the second order.

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Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

I make no order as to costs. I accede to the request that leave be reserved to the parties to argue the question of costs should agreement on the matter not be reached between them.

The orders I make are in the following terms:

ORDER

- (1) That the contract made on or about 26th September, 1975, between Paul Leslie Feenan and Marie Therese Feenan of the one part, and Caltex Oil (Australia) Pty. Limited of the other part and every condition or collateral arrangement relating thereto and every condition and every collateral arrangement between the said Paul Leslie Feenan and Marie Therese Feenan and Caltex Oil (Australia) Pty. Limited hereby are declared void in whole and ab initio except insofar as such contract or any such condition or collateral arrangement provided for the payment of money to the said Paul Leslie Feenan and/or Marie Therese Feenan in accordance with the terms and such contract or any such condition or collateral arrangements for work done. 10
- (2) That the said Caltex Oil (Australia) Pty. Limited pay to the said Paul Leslie Feenan and Marie Therese Feenan the sum of \$3,600 and the Commission declares that the true intention of this second order is that Paul Leslie Feenan and Marie Therese Feenan together are entitled to be paid in all the sum of \$3,600 and no more and to the extent that they are or either of them is paid out by the said 20

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Reasons for Judgment  
of his Honour,  
Mr. Justice Macken

Caltex Oil (Australia) Pty. Limited, their entitlement  
is and his and her entitlement is, reduced pro tanto.

- (3) That in addition to the other orders herein, Caltex Oil  
(Australia) Pty. Limited pay to Paul Leslie Feenan the  
sum of \$8,000.
- (4) That in addition to the other orders herein, Caltex Oil  
(Australia) Pty. Limited pay to Marie Therese Feenan the  
sum of \$6,000.
- (5) I grant liberty to each party to apply (on seven days  
written notice to the other) for further orders as to  
payment of costs of the proceedings; including the  
assessment of the amount of such costs.

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REFERENCES

- (1) 136 C.L.R. 190  
(2) 1971 A.R. 125  
(3) 1965 A.R. 77 at p.86  
(4) 1971 (1) N.S.W. L.R. 31

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IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COURT OF APPEAL

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No. CA 309 of 1979

CALTEX OIL (AUSTRALIA) PTY. LIMITED

Plaintiff

PAUL LESLIE FEENAN, MARIE THERESE FEENAN,  
THE INDUSTRIAL COMMISSION OF NEW SOUTH  
WALES

Defendants

AMENDED SUMMONS

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The Plaintiff claims:-

1. A declaration that the purported decision and orders of the Industrial Commission of New South Wales made on 3rd September, 1979 in proceedings in the Commission No. 200 of 1979 are void and of no effect.

2. An order that Paul Leslie Feenan and Marie Therese Feenan and the Industrial Commission of New South Wales be restrained from enforcing or attempting to enforce the orders referred to in Paragraph 1 hereof.

3. Such further or other order or decision as to the Court seems fit.

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GROUNDS

1. That the Industrial Commission of New South Wales lacked jurisdiction to make the order it made on 3rd September, 1979 in proceedings No. 200 of 1979 because Section 88F of the Industrial Arbitration Act, 1940 did not apply to the contract or arrangement or any condition or collateral arrangement relating thereto between the Plaintiff and the First and Second Defendants.



Amended Summons

2. That the Industrial Commission of New South Wales lacked jurisdiction to make the order it made on 3rd September, 1979 in proceedings No. 200 of 1979 because there was not any contract or arrangement made between the Plaintiff and the First and Second Defendants whereby the First and Second Defendants performed work in any industry.

3. That the Industrial Commission of New South Wales lacked jurisdiction to make the order it made on 3rd September, 1979 in proceedings No. 200 of 1979 because the contracts and arrangements referred to in Section 88F are contracts or arrangements whereby one person performs work for another, and the agreement made between the Plaintiff and the First and Second Defendants was not such a contract or arrangement.

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TO THE DEFENDANTS:

Paul Leslie Feenan,  
Marie Therese Feenan,  
The Industrial Commission of  
New South Wales.

If there is no attendance before the Court by you or your Counsel or Solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence. Before any attendance at that time you must enter an appearance in the Registry.

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TIME:

PLACE:

PLAINTIFF:

Caltex Oil (Australia) Pty. Limited  
167-187 Kent Street, Sydney.

Amended Summons

SOLICITOR: Ronald Rene Nathans,  
C/- Moore & Bevins,  
Solicitors,  
60 Martin Place,  
Sydney. 2000  
Telephone: 232-6800

PLAINTIFF'S C/- Moore & Bevins,  
ADDRESS FOR Solicitors,  
SERVICE: 60 Martin Place,  
Sydney. 2000  
Telephone: 232-6800

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ADDRESS OF Court of Appeal, Supreme Court,  
REGISTRY: Queens Square, Sydney. 2000

R. Nathans

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Solicitor for the Plaintiff

Filed: 23rd June, 1980

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

NO. C.A. 309 of 1979

CORAM: MOFFITT, P.  
HOPE, J.A.  
HUTLEY, J.A.

Friday 11th, July 1980.

CALTEX OIL (AUSTRALIA) PTY. LTD.  
v. FEENAN & ORS.

(Industrial Arbitration - jurisdiction of Industrial commission -  
prohibition - Industrial Arbitration Act 1940 S.88F - Stevenson 10  
v. Barham 136 C.L.R. 190 - question whether Commission has  
jurisdiction under S.88F, where the contract is in the form  
of a licence to operate service station to sell petroleum  
products of oil company - discussion of whether there is an  
"arrangement" which falls within S.88F - discussion of the  
nature of jurisdiction of the Commission and the circumstances  
in which prohibition will lie - finding of Commission that it  
has jurisdiction upheld).

ORDERS

Application dismissed with costs, such costs to include costs 20  
reserved in respect of earlier hearing of the application.

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

C.A. 309 of 1979

CORAM: MOFFITT, P.  
HOPE, J.A.  
HUTLEY, J.A.

Friday 11th July, 1980.

CALTEX OIL (AUSTRALIA) PTY. LTD.  
v. FEENAN & ORS.

MOFFITT, P.: I agree with the judgment of Hutley, J.A. but 10  
wish to state my own approach upon two aspects of the appeal,  
now to be referred to.

In order to determine whether the Industrial Commission  
had jurisdiction to make orders as provided by S.88F of the  
Industrial Arbitration Act 1940 (as amended) upon the basis  
that there was an "arrangement" which fell within S.88F, it is  
at least sufficient if there is found to be evidence upon which  
it was open to conclude there was such an "arrangement" and  
that the Commission did so conclude. The width of the terms  
of S.88F is such that the substance of the relationship of 20  
the parties may provide a basis for jurisdiction. However  
jurisdiction upon this basis will turn upon facts which can  
only be determined as part of the general inquiry into the  
matter being heard. Upon the true construction of S.88F, in  
the context of the Act as a whole, the jurisdiction depends not  
on the actual existence of an "arrangement" which falls within  
S.88F (and hence as determined as a question of fact by this

Reasons for Judgment  
of his Honour,  
Mr. Justice Moffitt

Court) but upon the decision of the Commission that there was such an arrangement upon evidence which left such decision open. Subject to there being evidence to sustain a decision that there was jurisdiction the legislation should be construed as conferring exclusive jurisdiction on the Commission to determine the relevant fact upon which jurisdiction depends.

The applicable principles are to be found in R. v. Nat Bell Liqueurs Ltd. (1922) 2 A.C. 128 at 158, Ex parte Mullen Re Hood (1935) 35 S.R. (N.S.W.) 289 at 300; Parisienne Basket Shoes Pty. Ltd. v. Whyte (1938) 59 C.L.R. 369 at 391 and other authorities discussed by me in Connor v. Sankey (1976) 2 N.S.W.L.R. 570 at 609-611. 10

As the arguments of the claimant company fails, no question arises as to the orders which would have been appropriate to make if our conclusion were otherwise. The question whether it would have been appropriate to grant declaratory relief and whether there was jurisdiction to do so was not debated before us. Accordingly I prefer to express no opinion on these matters. 20

Apart from the conclusion of Hutley, J.A. with which I agree, as to the existence of a contract which fell within S.88F, there was, for the reasons given by Hutley, J.A. evidence upon which the Commission was entitled to conclude and on which it did conclude that there was an "arrangement" which fell within S.88F.

I agree with the orders proposed.

Reasons for Judgment  
of his Honour,  
Mr. Justice Moffitt  
204.

Reasons for Judgment  
of his Honour,  
Mr. Justice Moffitt

I certify that this and the  
preceding pages are a true copy  
of the reasons for judgment  
herein of The Honourable  
Mr. Justice Moffitt.

C. Lindsey  
Associate

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Date 11.7.80

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

C.A. 309 of 1979

CORAM: MOFFITT, P.  
HOPE, J.A.  
HUTLEY, J.A.

Friday 11th July 1980

CALTEX OIL (AUSTRALIA) PTY. LIMITED v. FEENAN & ORS.

JUDGMENT

HOPE, J.A.: I have had the advantage of reading the judgments 10  
of Moffitt, P., and Hutley, J.A. I agree with the judgment of  
Moffitt, P., and subject thereto with the judgment of Hutley,  
J.A., and with the orders proposed by him.

I Certify that this page is a true  
record of His Honour's Reasons  
for Judgment.

M. Schwebel  
Associate

11/7/80

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IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

No. C.A. 309 of 1979

CORAM: MOFFITT, P.  
HOPE, J.A.  
HUTLEY, J.A.

Friday 11th July, 1980.

CALTEX OIL (AUSTRALIA) PTY. LTD.  
v. FEENAN & ORS.

JUDGMENT

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HUTLEY, J.A.: The plaintiff owned a service station at Hexham, of which on 25th September, 1975, it granted a licence to the first and second defendants. On 3rd July, 1979, the Industrial Commission (Macken, J.) made certain orders pursuant to Industrial Arbitration Act, 1940, s.88F.

This is an application by Caltex Oil (Australia) Pty. Limited in which it seeks the following declaration and orders:-

"1. A declaration that the purported decision and orders of the Industrial Commission of New South Wales made on 3rd September, 1979 in proceedings in the Commission No. 200 of 1979 are void and of no effect.

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"2. An order that Paul Leslie Feenan and Marie Therese Feenan and the Industrial Commission of New South Wales be restrained from enforcing or attempting to enforce the orders referred to in Paragraph 1 hereof.

"3. Such further or other order or decision as to the Court seems fit".

The Industrial Commission appeared merely to draw the court's attention to the existence of certain privative provisions contained in s.84 of the Industrial Arbitration Act 1940, which appear to affect the powers of this court and,

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Reasons for Judgment  
of his Honour,  
207. Mr. Justice Hutley



Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley

further, to draw the court's attention to the fact that the plaintiff was appealing to the Full Bench of the Commission against the orders made by Macken, J.

This court, when the matter first came before it, required the plaintiff to elect whether to proceed with its proposed appeal or these proceedings and, after adjournment, the plaintiff elected to have the appeal to the Full Bench of the Commission dismissed. It was then conceded by counsel appearing for the Commission that it could not argue in this court in the light of the decision of the High Court in Stevenson v. Barham 136 C.L.R. 190 that this court did not have jurisdiction to issue orders in the nature of a writ of prohibition but he reserved the issue for argument in a higher court.

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The agreement, dated 26th September, 1975, granted to the first and second defendants a non-exclusive and personal licence to sell petroleum products of the plaintiff at the service station. The conditions under which the service station could be operated pursuant to the licence were spelled out in the agreement and subjected the licensees to rigorous and continuous control of the licensor. It is not necessary to set out all the features of the licence, but by Clause 11 it is provided:-

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"11. The Licensee shall buy exclusively from Licensor all petroleum products which may be required for sale at the service station as long as the Licensor shall be ready to supply the same and he shall not directly or indirectly buy receive sell or dispose of or permit to be bought received sold or disposed of on or about the

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Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley

service station petroleum products not actually purchased by the Licensee from the Licensor".

The licensees were required to carry on the business "for any period during lawful trading hours on any day" and to apply for and use their best endeavours to obtain from any relevant authority any permission that might be necessary to ensure that the business may be conducted for the maximum permissible trading hours. They were prohibited from making "any additions alterations re-arrangements or improvements on the said land or licensed buildings" and, in general, it may be said that the business was to be conducted under the minute supervision of the plaintiff. 10

Though the agreement purported to grant to the first and second defendants a lease of the goodwill of the business, it also provided for the termination of the licence without any reason by thirty days' notice in writing and for immediate termination of the licence, without notice, in the event of a large number of events. 20

The first and second defendants having entered into this agreement, worked in the service station, and, as a result of their experiences, commenced these proceedings against the plaintiff under s.88F of the Industrial Arbitration Act.

In the trial, Macken, J., made the following relevant orders:-

"(1) That the contract made on or about 26th September, 1975, between Paul Leslie Feenan and Marie Therese Feenan

Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley  
209.

Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley

In support of this submission, it relied upon a passage from the joint judgment of Mason and Jacobs, JJ., with which Barwick, C.J. had concurred in Stevenson v. Barham 136 C.L.R. 190 at 201, which reads as follows:-

"It follows, then, that if the contract is one which leads directly to a person working in any industry it has the requisite industrial character - it is a contract 'whereby a person performs work in any industry.' This is the relevant jurisdictional fact which needs to be established." 10

The passage quoted is binding on this court, but I am unable to see how it assists the argument for the plaintiff in any way. The limitation sought to be imported into the section by the plaintiff, namely, that it does not apply to a contract under which a person is licensed to carry on his own business on land where he has a right to do so, is absent from their Honours' formulation, and I can find no basis in their judgment for importing it. 20

The contract referred to above was one which led directly to the first and second defendants commencing to work in an industry, namely, the distribution of petroleum products. It was the inducement which led the first defendant to give up his previous career and embark upon, what was to him, a new occupation.

It was suggested that this meaning cannot be given to their Honours' words, that the words of the Act "whereby a person performs work in any industry" have to be read down in some

Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley

way otherwise every contract for work and labour would be brought within the purview of the section. In my opinion, their Honours have effectively excluded this interpretation by giving full weight to the word "whereby". This word refers to some operational connection between the contract and commencing or continuing with a source of income from working in an industry. The contract or arrangement has to have brought about the performance of systematic work in an industry. The terms of the contract and all the facts bring this case precisely, it seems to me, within their Honours' words. 10

In analysing the case of Stevenson v. Barham, it must be appreciated that the order being sought in that case was an order in the nature of a mandamus to compel the Industrial Commission of New South Wales to continue with proceedings. The Court of Appeal, whose judgment was approved, had ordered:-

". . . that Industrial Commission of New South Wales do duly hear and determine plaintiff's claim for relief under s.88F. . . ." 20

The court made this order on the basis that Kelleher, J., had applied too restrictive a test of jurisdiction in his judgment. The judgment of the majority of the High Court approved judgments which enlarged rather than constricted the operation of s. 88F.

I have so far dealt with the proceedings on the basis that the threshold question is determined by the construction of the contract, which was entered into between the plaintiff and

Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley

the first and second defendants. However, this, in my opinion, is too narrow an approach. The jurisdiction extends not only to the formal contract, but to any arrangement, whereby a person performs work in any industry.

Macken, J., primarily founded himself upon an analysis of the contract, but also he dealt with the whole matter on the wider basis of arrangement, looking at the transaction as a whole from its inception in the first and second defendants seeing an advertisement until its conclusion, when they left the service station. Even if the court considered that on the construction of the contract alone it did not cause the first and second defendants to do work in any industry, that would not conclude the matter, as it would be necessary for this court to find that there was no evidence upon which Macken, J., could hold that the arrangement had the same effect. His Honour pointed out that it was only by an examination of all the details of the arrangement that the true character of the relationship entered into between the plaintiff and the first and second defendants is disclosed. It was with the essence of the transaction that the court, dealing with s.88F, should be concerned and it is from such analysis that his Honour reached the conclusion that there was an arrangement which led the first and second defendants to working in an industry. No attempt was made to show that Macken, J.'s findings of fact

Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley

were incorrect. The only submission appears to be that the threshold can only be crossed where there is a contract by analysis of that contract. This proposition seems to me to give no weight to the term "arrangement" and to be quite unsound.

In proceedings of this nature, this court is not engaged in reviewing the Industrial Commissions's finding of fact. 10  
The Commission, as a superior court of record, is entitled to determine the facts which go to the exercise of its own jurisdiction.

In a classical passage in The King v. War Pensions Entitlement Appeal Tribunal; ex parte Bott 50 C.L.R. 228 at 242, in a joint judgment Rich, Dixon and McTiernan, JJ., said:-

"In the case of a tribunal, whether of a judicial or an administrative nature, charged by law with the duty of ascertaining or determining the facts upon which rights depend, if it has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal. It may be shown that the members of the tribunal have not applied themselves to the question which the law prescribes, or that in purporting to decide it they have in truth been actuated by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void." 20

That case concerned a case of a writ of mandamus, but the language is equally applicable to a writ of prohibition. 30  
The Industrial Commission of New South Wales is a body "charged by law with a duty of ascertaining or determining all facts upon which rights depend that carries with it the determination of

Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley

the facts which provide the jurisdiction for it to determine rights." Only if it can be said that in determining those facts the tribunal applied itself to the wrong question of law can there be any intervention by prohibition.

It was for Macken, J. to determine the facts. This he did in the light of the law laid down by the High Court in Stevenson v. Barham (supra). Under these circumstances, even 10  
if his Honour had misconstrued the formal contract, which I do not suggest he did, there will still be no basis for this court intervening because of his Honour's findings as to the nature of the arrangement with which he was concerned.

I am, therefore, of the opinion that there is no basis for this court exercising its supervisory jurisdiction and the proceedings should be dismissed.

I would further point out that even if the court had decided that it was proper for it to intervene, it would have no jurisdiction to make the declaration which is sought. The 20  
Industrial Commission is a superior court of record (Industrial Arbitration Act, 1940 s.14(1)) and an order of a superior court of record is never a nullity : Sanders v. Sanders 116 C.L.R. 366 at 376, per Barwick, C.J. A declaration produces an authoritative statement of an existing state of affairs, it is not a constitutive act. If the court had intervened, the appropriate order would be Order 2 in the amended summons.

Reasons for Judgment  
of his Honour,  
Mr. Justice Hutley

The plaintiff should pay the costs of the proceedings. When the court stood the matter over to enable the plaintiff to elect whether to proceed in this appeal to the Full Industrial Commission, or to proceed in this matter, costs were reserved. The point that the plaintiff should have to elect was not taken by the defendants. Despite this, in my opinion, the plaintiff should pay the costs occasioned by the adjournment, it being trite law that an appellate court should not proceed to hear an application for an order prohibiting a tribunal while the person applying to it is pursuing an appeal which may involve different findings of fact from those which were made by the tribunal it is sought to prohibit (The King v. Poole, ex parte Henry 61 C.L.R. 1 at 7, Bonds & Securities (Trading) Pty. Ltd. v. Australian Foundation Investment Co. Ltd. (No. 1) 131 C.L.R. 34, especially at 40, 45).

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I certify that this and the preceding 9 pages are a true record of His Honour's Reasons for Judgment.

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K. Cannon  
Associate to Hutley JA  
11/7/80.



IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COURT OF APPEAL

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)

No. C.A. 309 of 1979

CALTEX OIL (AUSTRALIA) PTY. LIMITED

Claimant

PAUL LESLIE FEENAN, MARIE THERESE FEENAN  
THE INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Opponents

ORDER

THE COURT ORDERS:

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1. That the Application be dismissed with costs, such costs to include costs reserved in respect of the earlier hearing of the Application.

Ordered: 11 July, 1980 and Entered 23 September 1980.

By the Court,

A.W. Ashe

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Acting Registrar  
Court of Appeal.

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
SYDNEY REGISTRY )  
 )  
COURT OF APPEAL )

No. C.A. 309 of 1979

CALTEX OIL (AUSTRALIA) PTY. LIMITED

Claimant

PAUL LESLIE FEENAN, MARIE THERESE FEENAN  
THE INDUSTRIAL COMMISSION OF NEW SOUTH WALES

Opponents

ORDER

10

THE COURT ORDERS:-

1. That final leave to appeal to Her Majesty in Council from the Judgment of this Court be and the same is hereby granted to the Claimant.

ORDERED:- 20 October 1980

ENTERED:- 30 October 1980

By the Court,

A.W. Ashe  
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Acting Registrar,  
Court of Appeal

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I CERTIFY this to be a copy of the minute of judgment/order entered in the registry of the Supreme Court of New South Wales Court of Appeal.

DATED this 31st day of October 1980.

for the Registrar (L.S.)

CERTIFICATE OF THE REGISTRAR OF THE COURT OF APPEAL  
OF THE SUPREME COURT OF NEW SOUTH WALES  
VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

I, ALYSON WENDY ASHE, Acting Registrar of the Court of Appeal of the Supreme Court of New South Wales.

DO HEREBY CERTIFY as follows:-

That this transcript record contains a true copy of all such Orders, Judgments and documents as have relation to the matter of this Appeal and a copy of the reasons for the respective Judgments pronounced in the course of the proceedings out of which the Appeal arose. 10

That the Respondent herein has received notice of the Order of the Court of Appeal of the Supreme Court of New South Wales granting the Appellant final leave to appeal to Her Majesty in Council AND has also received notice of the dispatch of this transcript record to the Registrar of the Privy Council.

DATED at Sydney in the State of New South Wales this 14th day of November One Thousand Nine Hundred and Eighty.

(L.S.) A.W. Ashe

Registrar of the Court of Appeal 20  
of the Supreme Court of New  
South Wales