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**TRANSCRIPT
OF PROCEEDINGS**

PRODUCTIVITY COMMISSION

**INQUIRY INTO THE MARKET FOR RETAIL TENANCY LEASES IN
AUSTRALIA**

DR N. BYRON, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT ADELAIDE ON WEDNESDAY, 20 FEBRUARY 2008, AT 9.10 AM

Continued from 18/2/08 in Perth

DR BYRON: Good morning, ladies and gentlemen. Welcome to the final day of public hearings for the Productivity Commission's inquiry into the Market for Retail Tenancy Leases in Australia. My name is Neil Byron, and I'm the presiding Commissioner for this inquiry. The inquiry began with a reference from the Australian government on 21 June last year, and we're instructed to examine the operation of the retail tenancy market in Australia. As we've gone around the country, I've wanted to formally put on record how grateful we are to all the individuals and organisations who have participated in this inquiry by being so generous with their knowledge and experience.

The purpose of these hearings is to facilitate public scrutiny of the Commission's draft report which we brought out in December, as soon as we could after the election. We understand very well how important the matter of retail tenancy can be. It's a huge issue for many small businesses, and there's a great deal at stake, and often passions can be raised, but we've been trying to analyse the evidence as objectively as we can, looking at what's been tried in various places, what's worked, what hasn't, and what more the Australian and state governments should do or not do.

We've held hearings in Canberra on 1 February, then four days in Sydney, then in Brisbane, and Wednesday and Friday in Melbourne last week, then Perth on Monday and, as I say, today is the last day. We've then got about six weeks to digest all the information that we've received from the public hearings and from the submissions on the draft report, and to finalise the report and get it to the treasurer by 31 March. The Commonwealth government will then release the final report when they're ready, but it's usually within 25 parliamentary sitting days of when we give it to them. All participants in the inquiry will automatically receive a copy of the final report once the government has released it.

We always try and conduct our hearings in the most informal way that we can, but we do take a transcript so that people all over the country can follow the hearings through the web site, and because we're taking a transcript, interjections from the floor aren't helpful or useful, but we always give anybody in the room who wants to come forward and say their piece an opportunity before the hearings are finished. So there will be a chance, anybody - whether you've indicated in advance whether you want to say something or not, there's an interpreter for people to spontaneously participate in the inquiry. As soon as the transcript has been checked for any transcription errors, it will be on the web site, and hard copies are also available, and there are order forms from Daniel at the back.

To comply with the Commonwealth OH and S laws, I have to remind everybody that in the extremely unlikely event of a fire, I think the shortest way is straight down the steps and out onto the street. The toilet facilities I think are just

near the elevator, and the last piece of housekeeping is if you could put your mobile phone onto silent mode or off, that would be terrific.

Without any further ado, I'd like to start today's formal proceedings by welcoming the representatives from the Pharmacy Guild of Australia, Angelo Sommariva. We've met a few times before as we've been around, but again I'd like to thank the Pharmacy Guild for your interest and participating in the inquiry, and the quality of the evidence you've been putting to us. If you could introduce yourselves for the transcript, and then take us through the main points you wanted to make, and then we've got probably 30, 45 minutes for discussion on those issues that you raise after that, and thanks for coming today.

MR SOMMARIVA (PGA): Angelo Sommariva, Pharmacy Guild of Australia.

MR SCHULTZ (PGA): Barry Schultz. I'm a councillor on the federal council of the Pharmacy Guild of Australia.

MR SOMMARIVA (PGA): Thanks, Commissioner. Again we have met a few times around the country, and I hope that what we've been able to contribute has been of use to the Commission. It is, as you say, a subject that we take a great deal of interest in, which is obviously why we've appreciated the opportunity to contribute around the country. I won't waste any more of your time by repeating the things that we've said in past hearings. So what I'll do is I'll hand straight over to Mr Barry Schultz to give some real-life case studies about what we're experiencing here in South Australia.

DR BYRON: Thanks, Barry.

MR SCHULTZ (PGA): Thanks, Commissioner. Commissioner, my first comment is that the draft report to me - and again as an individual - implies that there are relatively not major issues within this area for retail leases for small business, and my anecdotal experience is that there are substantial issues to be resolved. My experience relates to generally with small business, and I'm talking about those business which are particularly small, and not perhaps a part of a chain. So therefore it might be a coffee shop, a card shop, a greengrocer, all of these not a part of a chain, and then particularly of course in my area, a pharmacy. We are experiencing significant difficulties, and I would like to be able to at least give some anecdotal experience that I have that suggests there is value in further looking at it beyond those messages that I've read so far in the draft report.

I'll relate perhaps to three particular experiences to be able to give a guide of what I've alluded to, and the first one was in a shopping centre where there was a presentation from the owners of the centre that the rent of a pharmacy in that centre

should increase by 60 per cent beyond the level of the rent that was being paid, remembering that the rent had been going up CPI plus 1 per cent annually over the period of the lease, and then at the renewal of the lease, a demand was made for a 60 per cent increase.

After five months of discussion, we were unable to reach an agreement, and both parties agreed that we would go to the independent umpire. The independent umpire reviewed the circumstances, and came back with a figure of an increase of less than 10 per cent. Even though it may seem that obviously there is a solution: there is an issue that would or could occur with any small business, and the solution is the independent umpire, but I'd like to point out that the pain that the person goes through where their whole livelihood is involved in that business is extreme, the staff that are involved know - and you share these experiences with them - their thoughts that they are likely to lose their jobs is unfair and possibly not necessary.

The second experience again was where a demand was made for a 50 per cent increase, and this time it took eight months before a solution could be found, and there were constant suggestions of possibilities of change, of negotiation, but in the end, there was no change from the stance. It again went to the independent umpire and again the figure came back to a single figure increase which was less than 10 per cent. So that would suggest that I'm unable to believe that the shopping centre owners did not know what the end result would be if it went to an independent umpire, and the knowledge that they have and the background would suggest that they knew what the true market rent was, and that the excess demand was to look to see if there was somebody without any experience who might then accept that particular figure.

Might I also point out at this time that, particularly in the pharmacy arena, a portion of the rent that's paid is reflected then back to the government in the charges or the payment that the government makes for the dispensing of pharmaceutical benefit prescriptions, and as a result, I think it's of value for the government to look at this as an issue to try and see what is fair, both to the shopping centre owner, so that they get a reasonable return on their investment, but also to in this case the pharmacy to ensure that the rent paid is not excessive, and so that the government itself in controlling the cost of pharmaceutical prescriptions is able to maintain that they are getting a fair price in that area of rental.

I would like to make a suggestion to the Commission that when any tenant was having a discussion with the owner of the shopping centre, that in fact they were able to be supplied with a sheet that gave the rate per square metre charged for every tenancy within the centre. Considering the information that's already supplied, I would have thought this was not a difficult request. It would give both parties an understanding of costs and expectations, and it would give the opportunity of having

some reasonable debate because the small business owner doesn't have access to those figures and has great trouble finding them.

It would not be unreasonable to suggest, well, why doesn't a small business owner engage somebody to work on their behalf who has the knowledge. At this stage, the people who do such work take a percentage of the success as a part of their fee plus a base fee. That can be a substantial amount of money. It would then of course encourage these people to begin or to allow the shopping centre to give it a very high figure, because it's the difference between the starting point and the finishing point where the percentage is paid on top of the base fee.

In many of the businesses, and particularly in pharmacy, there is a goodwill segment, and it's very, very hard to walk away from a tenancy when in fact when you enter the tenancy, you pay a substantial figure for a refit. At this stage, if the area was approaching 300 to 350 square metres, that could cost between 450 and 550 thousand. That is a substantial amount of money that's then invested. If the operator works particularly hard and then develops a valuable business, then on top of that is the figure of goodwill. So the shopping centre owner knows that to walk away from that tenancy with the goodwill and the investment already in the shop fit, it's a very hard task, and that gives him a substantial opportunity, shall we say, to be able to debate a higher rent.

I alluded to examples earlier of other small traders, and I am aware of examples where a greengrocer, a coffee shop owner, and also a newsagent and another small store which operated with greeting cards, these people were under pressure, and in the cases that I'm aware of, they chose to, under pressure, accept the rent, and then sell out of the business, and for them it seemed to be the only way to go. I would not expect those people then to be able to present themselves to you, Commissioner, so that in fact they could explain their story, but I will be delighted to, in confidence, supply the details to the Commission at a later stage if you chose, and obviously from my perspective, to name names and figures is somewhat difficult, because there is a certain amount of pressure that's exerted by the shopping centre owners if you're known to be causing an issue for them.

I think that covers most of the points that I believe I can draw to your attention, but I'd be delighted to discuss any of them if you felt it necessary.

DR BYRON: Thank you very much. I guess it's no surprise or not necessarily a consolation though that the same issues have been raised with us by many other people in the hearings, and not just other pharmacists. Just to clarify first of all, in all the subsequent comments you made, were you talking about sort of large managed shopping centres rather than retailing in the high street, in little strips.

MR SCHULTZ (PGA): Yes, I was.

DR BYRON: Is it useful for me or for us to make that distinction? Are they actually worlds apart in terms of what goes on or whether and what sort of problems arise. I think all your comments were about the large centres. Can or should we assume that, apart from the normal tensions and frictions that occur in the high street along the lines of she won't pay the rent, but that's because he won't fix the hole in the roof sort of thing, apart from normal commercial tensions, retailing in the high street basically people just get on with it. So it seemed to me that all the issues you were raising relate to just centres, and the nature of their leases.

MR SCHULTZ (PGA): Commissioner, that is true. May I start off that the high street is what I would call normal commercial discussion and normal commercial results come from it. That's my experience. I am involved in some retail tenancies in the high street, and I don't believe they are unfair, as I say, subject to the normal commercial discussions. I don't believe that there is an issue there that is a significant problem that I'm aware of.

Going back 10 years ago, the major issues appeared to me to be with the large centres, and now it fielded back to the mid-range centres; mid-range being with a supermarket and perhaps one discount department store, and are now roughly 50 retail shops. Now there's a very significant amount of pressure, and it appears that they are following the lead from the larger centres.

Some time ago after a long discussion with one of the biggest of our retail shopping centres, I was asked to further expand my comments, and I did a paper and presented it to their national leasing manager, and pointed out to him that, going forward, it is highly likely in the future that from the pharmacy point of view, because of the continued lowering of margins, because of our association with the federal government and the continued increase of costs in the shopping centres, it's highly likely we will reach a point where there will not be a pharmacy in the large and major centres. That appeared to strike a cord in his interest. The discussion was cordial, and I felt that the paper was accepted and may have been some value to him at the time.

DR BYRON: Just to elaborate a little bit more on that difference, it seems to me that if you're in a strip or high street situation, if you can't reach an agreement with your current landlord, there are plenty of other landlords up and down the street, and if necessary you can move, put a sign on the front door to say, "We're across the road and three doors down," and all your loyal customers will move with you.

MR SCHULTZ (PGA): That is correct.

DR BYRON: You'd probably get a 10 or 15-year lease with multiple options after that, whereas in a centre, you're more likely to get one fixed term of maybe eight or 10 years for your pharmacy.

MR SCHULTZ (PGA): Five.

DR BYRON: Five.

MR SCHULTZ (PGA): That is important, because the five-year lease - and what you've said, may I further highlight that, that you can go across the road or down the street, but when it's a major centre and because there is a line drawn around it by the local council, it may be that you need to move five kilometres away before you can find a site, because the only commercial retail area is zoned, and that complete zone is owned by that major developer who's done the centre. So there is a huge difference between the exclusivity clause which governs the major shopping centre developer, as against the high street where of course you could move, and there is competition.

DR BYRON: It seems to me that all of this is interrelated in that the - I guess what you're saying about the zoning is that if you want to operate in a particular area, you frequently have no choice but to deal with one centre.

MR SCHULTZ (PGA): Correct.

DR BYRON: Can we work through the points you raised about the substantial rent increases when a subsequent lease is offered. Who is the independent umpire that you can turn to in South Australia, because I'm not sure that the other states have one of those.

MR SCHULTZ (PGA): Usually in the lease, and the examples that I've used, one was in New South Wales and the other one was in South Australia and in both cases, it's - I would probably need to check, but it's usually somebody from the - - -

DR BYRON: Australian Property Institute?

MR SCHULTZ (PGA): Yes, it's the Property Institute.

DR BYRON: One of the registered valuers, yes.

MR SCHULTZ (PGA): Both parties have the opportunity of agreeing to who will be the independent umpire. So the Property Institute will put up somebody, and both parties would agree to it, and in both of the instances that I've highlighted, that was the case.

DR BYRON: I'm trying to dig a bit further about your - quote, unquote - "true market rent" in the centre, because again making the comparison between the high street and the centre, it seems to me that in the high street, you are solely leasing the space. You're not paying any management services, you're not paying for anybody to bring lots of customers coming past your door and all the rest of it. But in a centre, the package that the centre management offers to incoming tenants is actually more than just space, isn't it?

MR SCHULTZ (PGA): That is correct.

DR BYRON: They now have some way of getting more people to come in and to open their wallets or whatever through the ambience of the place, putting everything under one roof, and climate control.

MR SCHULTZ (PGA): That's exactly true.

DR BYRON: What's been put to us in all the hearings is that whereas if you're on the strip, every shop, irrespective of the nature of the business, basically pays the going rate per square metre, and if your business is earning a lot more than that, you know, you're making a handsome surplus, which is capitalised as the sort of goodwill value of the business. But if you're in a centre, the centre actually tries to claim a fair bit of that surplus that you generate, and one way they do that is by compressing the lease term and announcing a substantial increase at the end, if you want another lease at the end of five years, not on the basis of that's what everyone else is paying, but it's on the basis of this is how much we think you can afford to pay.

It seems to me a fundamental difference to saying, "Out in the street, everybody is going to pay X, but inside the centre we're going to price for every single tenant, not on the basis of everybody pays X per square metre, but on the basis of how much you can pay. So the greengrocer might be paying a thousand, the dress shop might be paying 2000, but from the pharmacist, we'd like 8000 please." To me that's a fundamental different business model to what we observe out on the street.

MR SCHULTZ (PGA): I absolutely agree, and to extend the business model, it may be that if you are building a centre, you know that your draw card will need to be one of the major food outlets, and you may give them, to draw them into the centre because that's your need, a very, very low rent because you're desperate to have them as an anchor tenant, and then it may well mean that the amount that you charge the other lesser tenants is a substantial amount of money more because that's where you will make your profit.

DR BYRON: What I'm leading to - and the suggestion that you and many, many

other people have made to us - is to have a system of lease registration or something that generates a whole lot of information so that I could get on the web and find out on one sheet of paper how much every other tenancy in the building is paying. I think we could devise a system to do that. We could recommend that all the state governments or the Commonwealth governments do that, and the question is would it actually change things at the end of the day.

If you go to the centre management and say, "The coffee shop is paying X, the greengrocer is paying X plus one, they're paying X plus two, and you want me to pay five X," and if they just say, "We think you can afford five X. Who cares what anybody else is paying. It's not about anybody else, it's about you."

MR SCHULTZ (PGA): Yes.

DR BYRON: So we could set up a system to generate all this information about how much everybody is paying, but would it actually change things. That's what I'm worrying about.

MR SCHULTZ (PGA): Commissioner, I believe it will not be a solution, but I believe it will aid, it will give a more transparent amount of information. It will give both parties a basis for discussion. At the moment, that knowledge is certainly held by the shopping centres of exactly how much and where they want to go, but the retailer doesn't have that available to them. It's just another small area of opportunity whereby they might be able to strengthen their debate.

The point that you make is quite right, and nothing will change the fact that they could say, "We want six times X here, and you will take it or leave it." That's not going to change but it will give us the opportunity perhaps if you choose of bringing in an expert negotiator who will then have a significant amount more of information who may well be able to produce a fairer outcome.

DR BYRON: Because again what people have suggested to us is that one of the reasons that the centres all move to - you know, generally, not exclusively, but to compress terms to the five-year minimum was that what they want to do is to be able to reset rents as often as possible; to reset them not at the current going rate, but to reset it at what's the maximum you can pay, and they'd like to be able to reset that every five years rather than every seven years or every 10 years or every 15 years.

MR SCHULTZ (PGA): How do they know the maximum that you can pay?

DR BYRON: Presumably they - - -

MR SCHULTZ (PGA): They require you as a part of your lease for you to provide

them with your turnover. They will then make a decision as to the margin that you may or may not be able to make, and they'll base that - there is the Jeb Holland Demasi report which in many cases I believe is flawed because of their inability to get true figures, but where it suits the shopping centres, they will quote that as giving the figures as a basis for your discussion with the shopping centre management.

DR BYRON: That's the other question I was going to put to you. Small retailers at every hearing have complained about the general requirement to disclose their turnover figures, and again my question is, okay, what if we recommended that that be prohibited and the recommendation was adopted in all state and territory legislation, would that solve your problem or would retailers simply be able to go round and look at every retail business in their centre and say, "Jeez, you're doing well. I've seen a lot of customers queuing up at the cash register, coming out with their arms full and their wallets empty. This guy over here, his stock hasn't moved for two weeks. Haven't seen a customer in there for the last three days," et cetera, and if they know what they're doing - and I believe that they probably are professionals in what they do - they would have a pretty good stab at guessing rather than knowing how much people could afford to pay.

MR SCHULTZ (PGA): Yes.

DR BYRON: So again I can see that we could make the recommendation, but even if it was adopted across all states and territories, I still haven't seen the evidence that will actually do what people want it to do, that will actually change the system.

MR SCHULTZ (PGA): I agree with you. I would have some difficulty in saying that that would make a significant amount of difference, if they were not required even to ask you for your turnover. I think that's true. They would make an assessment, and they do. They make a judgment. There is no common way in fact of disclosing your turnover, and I've had debates with shopping centre management about why don't we reach a common ground for that to be able to be disclosed.

For example when there's a low margin, if you own a Lotteries agency, you're only required to disclose to the shopping centre owner the margin that you make, not the turnover. So then you go to the margin that we make for example on some National Health prescriptions - - -

DR BYRON: PBS.

MR SCHULTZ (PGA): - - - which can be as low on the PBS as 4 per cent. So that's actually lower than the Lotteries. So therefore I've put it to them, "In that case I will disclose to you the money that I make out of the PBS exactly the same as you request with the Lotteries and present that." There is a certain disquiet about doing

that, and they then say, "If you won't give us the figures, we'll make a judgment based on our knowledge of your figures."

DR BYRON: The particular tension that seems to come up with retailers in the large shopping centre is at the time of renewal, and I'm not sure if it's helpful to talk about renewal if we talk instead about, you know, the finishing of one lease and the offer or non-offer of a second or a subsequent lease. It seems to me that if you have a lease that has a fixed term on it, whether it's five years, seven years or 10 years or whatever, that must put some sort of cap on the life expectancy of this business or at least a big question mark, not only for the owners, but also for the employees and so on as you've mentioned before.

If I've got a lease that says, "This lease is for five years, and by the way, there is no guarantee that you will be offered another lease for another five years on similar terms or dissimilar terms," how does that enter your calculation of whether you want to go into that set-up?

MR SCHULTZ (PGA): It certainly affects your consideration. You would normally go back and attempt to debate for a longer lease, either an option or in fact seek a 10-year lease. In some cases that is granted, but that would be what I would have thought an astute person might well seek, particularly there is a certain imbalance. I don't have an answer for it, but there is a requirement to present your tenancy in a way that suits the owner of the shopping centre. So you're given a five-year lease, you propose a particular fit-out, they reject that and say, "No, you need to lower the ceiling, change this, change that," and they might increase the value of that fit-out by a substantial amount. It might be as much as 40, 50 per cent.

Over the five-year term now we have, you have this short period of time in which you need to recover your fit-out and everything else, and at the end to make a profit. You are encouraged to believe that, provided that you are a good trader, you comply with all of these things, that there would of course be the opportunity to have a further lease at the end of the five-year period. With a pharmacy and the opportunity to buy them at the moment it would not be possible under normal circumstances to repay principal and interest fit-out in a five-year span. You do need 10 years.

DR BYRON: But surely this is where something has to give.

MR SCHULTZ (PGA): Agreed.

DR BYRON: Because if you look at this proposition that's put to you and you say, "If I have to pay that much to buy into the business, if I've got to pay that much for a fit-out, and I have to pay this much in rent, there's absolutely no way I can do that in

five years."

MR SCHULTZ (PGA): Correct.

DR BYRON: So either the term has to be longer, the rent has to be lower, the fit-out has to be less expensive or whatever - - -

MR SCHULTZ (PGA): Or I don't go in there.

DR BYRON: If enough people do that calculation and say, "That is simply not viable. I'm sticking my head in a noose if I do that," eventually the shopping centre owners are going to have to come back and say, "Okay, we'll either do one or all of those three things."

MR SCHULTZ (PGA): Yes.

DR BYRON: Otherwise, as you say, there won't be pharmacies in shopping centres. They'll be somewhere else.

MR SCHULTZ (PGA): Yes.

DR BYRON: The question is will this equilibrium eventually be reached simply through normal commercial practices and negotiation or does it require the state government to come in and say the minimum lease term for a pharmacy shall be 10 years or 12 years or something, because even if that was done, if it doesn't control how much the fit-out costs or how much the rent is during the life of that lease, you can still end up with numbers that just don't stack.

MR SCHULTZ (PGA): What you say is very logical, and as you would be aware, for small tenancies, there are figures - and I just can't remember them - within the act at the moment in South Australia where you would in fact be offered a new lease if your turnover is at that level. I believe that a partial solution to what you've just outlined would be to raise it to the level that would cover most small businesses. At this stage, turnover and inflation has taken the turnover figures up to here, and the act substantially has not changed.

I think there would be a great benefit in including it to cover most of where our state governments define as a small business, and it might be a \$5 million turnover and, as I say, I can't remember - I'm not sure whether it's two or in that ilk at the moment, but if it were raised at that level, that would cover a portion of what you've said.

May I go back to the point that you made. The Pharmacy Guild is trying very

hard to sit down with and have discussions with shopping centre owners with a view to doing exactly what you've just said. To get a form of parameter that all parties understand where they're coming from, and saying to the shopping centre owners, "If you would like to have pharmacies ongoing in your centres, these are the issues that we have. We can give you sets of figures so that you can expand your knowledge," and they will be exact figures rather than coming through some other way in getting the answers, but they'll be exact figures, "if you'll share with us where you plan to go, can we get a broad brush plan that will give the opportunity for negotiation, but at the end of the day, give some sort of comfort as to where you should go within negotiating stance, whether you should consider or reject a five-year plan," and so that we can in fact go to pharmacy members and say, "If it only fits into that area, please understand it, and if it doesn't fit where you're at, you will need to get expert advice before you go ahead," because we do have members that are going in.

At this stage the numbers of pharmacies that are going into bankruptcy has multiplied - I believe it's five times in the last 10 years. So our pharmacists are not good enough businesspeople. They are making errors, and the net result is some very sad outcomes.

DR BYRON: I'm sort of wondering why associations don't put out a big health warning to their members to say, "If you're being asked to spend 500,000 on a fit-out and you're only being offered a lease of five years and you're expected to pay the rent in the order of" blah blah blah "warning, warning", alarm bells going off, and if enough alarm bells go off and enough pharmacists heed them, presumably the other side has to come back with an offer that is acceptable, viable.

I don't want to make it sound like I'm preaching that the market will fix everything, but there does seem to be a role for people to very carefully do their due diligence and to understand that going into a shopping centre with your pharmacy is actually quite a different environment than operating a pharmacy in the high street. The comments you made about goodwill I think are an interesting contrast to hopefully the person who's going to speak next, who said in his submission to us that every week - if you got a fixed-term lease, every week that goes by is one week closer to the day that your business isn't worth anything, the day your lease expires. If you got a lease and a franchise, if they both expire, then the whole thing evaporates.

MR SCHULTZ (PGA): Yes.

DR BYRON: I understand that people in small retail business believe that because they've been working so hard and drawing so little money out of the business, obviously its value must be going up and up and up all the time. But there's a counter-argument that says, well, no, actually every week, you're getting closer to the

day that it disappears. If you think that you're building up a business that you can sell for a couple of million bucks and go and retire to the Gold Coast, you might actually be mistaken.

MR SCHULTZ (PGA): That's correct.

DR BYRON: If you're on the high street, you probably could do that.

MR SCHULTZ (PGA): That is correct.

DR BYRON: But if you're in a centre, you may not be able to do that. If you're trying to sell a business and it's got, say, two years to go on the lease, it's not worth anything like the amount it would be if it had 10 years to go on the lease.

MR SCHULTZ (PGA): Ms Chapman.

DR BYRON: What if the landlord says, "Okay, yes, we'll cancel your lease and we'll start a new five-year, seven-year lease with the prospective buyer, but by the way, there's going to be a big rent increase," instead of your business being worth a million dollars to the prospective buyer, if there's going to be a big rent increase, it might only be worth a hundred thousand.

MR SCHULTZ (PGA): Ms Chapman.

DR BYRON: I understand this is when retailers say, "I've just been robbed of the value of my goodwill," but according to that line of argument, they were actually mistaken when they thought they had a business worth a million bucks, because in fact it never was really worth that. So I understand why people feel very angry, but when these sorts of cases go to the court, judges typically say, "Well, you knew that five years means five years. You knew that there was no guarantee that anything would come after that. If you were deluding yourself that your business was worth a million when it was actually only worth 20,000, it's your problem, not the court's or the state government's."

MR SCHULTZ (PGA): Yes.

DR BYRON: Sorry, I'm not trying to defend that argument.

MR SCHULTZ (PGA): No.

DR BYRON: I'm simply saying that's - - -

MR SCHULTZ (PGA): I absolutely understand, and I agree with you, and I'd like

to point out that if you're a retailer in a shopping centre, you are an eternal optimist, because if you weren't, you wouldn't be there. You continue to believe you have the skill to negotiate a new lease or somebody to help you, you believe because you've been a good retailer, you've paid your rent regularly, you've done all the right things that you will be offered another lease. You are encouraged to believe that. I don't say that you're misled, because the document is the document, but you're encouraged to believe that there will be another lease.

You are aware of all of the things that you've said. I believe it's the responsibility of the Guild - there is a committee set up to do exactly what you've outline - to meet with all parties and see whether or not there can be a better understanding developed, and then a set of guidelines that says, "Watch these things if you're going to go into the high street or into a shopping centre. These are the issues that you need to have an understanding." It's not yet completed, but we've got many of, shall we say, our best retailers that are involved in pharmacy on that committee, and I hope that something of value will come out of it.

DR BYRON: Because some of the retailers that appear to have been very successful when we say to them about this, "Is it true that five years means five years means five years," and they say, "Yes, of course. So we've organised ourselves in a way that the day the lease expires, if we do have to walk out, it's not going to kill us," and that alone gives them better negotiating power than if they've still - they're still paying off the money they borrowed to get into the business. They still haven't written off their fit-out for tax purposes et cetera, in which case they're in a profoundly weaker negotiating position.

MR SCHULTZ (PGA): Yes.

DR BYRON: I guess my point is that there are things that the retailer can do to make themselves less vulnerable at the times of the lease negotiation, and that some people seem to be doing that already.

MR SCHULTZ (PGA): Yes.

DR BYRON: The challenge now is to get that across to everybody else.

MR SCHULTZ (PGA): Yes. I was hoping that this Commission may develop and understanding and, because of the network of information that you're able to glean, might have some of our brightest brains have a look at some of the things we haven't yet thought of whereby there may be some further solutions. Some very brilliant people have been trying to work with it for a long period of time, and we are going forward.

DR BYRON: That's quite a challenge. When we read through all the second reading speeches and so on at the time when all the state and territory retail tenancy legislation was first introduced and when it's all been revised over the last 20, 30 years, virtually all of it has been about the particular situation of the small retail tenant in the large shopping centre. That seems to be the sticking point since large shopping centres sort of came in in the 60s. Yet even though there's been all sorts of additions to the legislation over the years, from what we're hearing as we go around the country, the problems still haven't been fixed or the problems, which I think in many cases weren't terribly well-defined or diagnosed.

So we can actually look at the different legislation, different systems in different states and see that, you know, everybody has brought in five-year minimum lease terms except Queensland, but in Queensland, life goes on without it. Queensland and the ACT brought in a requirement to get legal and commercial advice before the lease. Has that led to a huge improvement either before and after or between those that have it and enjoining jurisdictions that don't have it. When you look at the evidence, it's hard to see that that's actually made much difference.

Lease registration is very widespread in New South Wales, Queensland, the ACT. It's almost unheard of in Victoria, and yet if you compare New South Wales and Victoria, doesn't seem to make any difference. So it's hard for me to conclude this is the answer.

MR SCHULTZ (PGA): Yes.

DR BYRON: South Australia and the ACT have the right of first refusal on the expiry of the lease, and nobody else has it, but when you do the with and without comparison, it's not obvious that that's actually making a great deal - - -

MR SCHULTZ (PGA): Solution.

DR BYRON: - - - of difference on the ground. Because we've had non-uniform legislation, we've had all these sorts of, in effect, policy experiments going on, and we can now sit back and look at them to see what's worked and what hasn't, and I don't know that there's evidence that any of them have actually worked. Alternative dispute resolution seems to have made a big difference compared to where we were 20 years ago.

MR SCHULTZ (PGA): I certainly agree with that. I think that the dispute resolution gives an opportunity there that perhaps wasn't there earlier. I wonder whether or not with all of the differing examples that you've had in the various states whether just a different combination of all of them might work. We don't know yet.

DR BYRON: Yes. The counter-example is that Tasmania doesn't have any retail tenancy legislation, it just has a code. New Zealand has no retail tenancy legislation at all, and yet many of the same Australian retail businesses and the same Australian landlords operate there and the sky hasn't fallen in yet. So again when you ask the question of how much has been achieved through the last 14 or 15 reviews or whatever, it's still very hard to put your finger on and say that has been really successful, except for the disclosure statements and the alternative dispute resolution, which both seem to have been helpful, but not necessarily a magic silver bullet.

Yes, we're still trying to think of the fabulously brilliant ideas that nobody has ever thought of, but we're also looking for suggestions from people who are at the coalface like you.

MR SCHULTZ (PGA): Commissioner, I appreciate the fact of all of the time that's being put in to try and find some solutions, because we would benefit from them. The only minor one that I've been able to put to you this morning is the exposure of the rate per square metre right across the centre. I have no guarantees that that will do more than just be another tiny stepping stone that may or may not help. I certainly have a belief that it would help, and I certainly believe that some of our organisations for retailers certainly need to do more and more homework, and work with the shopping centre owners to see what solutions we can develop ourselves. We shouldn't necessarily just rely on the Commission and the government to do it. We should be putting lots of effort in ourselves, and then reporting back.

DR BYRON: One of the ideas that we floated in the draft report was of some sort of code of conduct, and we suggested one that had been sort of sorted out by the industry themselves, not necessarily written by a committee of bureaucrats, about what is reasonable behaviour with regard to large shopping centre and small retail tenants, and whether having something like that would be a bit of a circuit-breaker and restore confidence and trust, rather like the franchising code of conduct has apparently done in the franchising area.

We've had very mixed reactions to that idea, but other suggestions that may overlap with that is to have some sort of an ombudsman who could resolve disputes who might actually be responsible for enforcing the code or writing his own code but as a way of taking some of the unnecessary and counter-productive friction out of this relationship.

Another idea that was suggested in a number of the hearings was the leases are actually written by the landlord's lawyers, and therefore do a very good job of protecting the interests of the landlord, but not necessarily of the tenant. So if there was a standard lease that was written by some neutral third party rather like the way the Real Estate Institute prepares a residential tenancy lease - - -

MR SCHULTZ (PGA): Yes.

DR BYRON: Not that everybody has to follow exactly that one, but if all the standard terms and conditions are in there, and then for a particular landlord-tenant combination you agree to cross out certain clauses and write in other clauses, everybody could pick up that document and immediately see which ones have been crossed out and what else has been added. If nothing has been crossed out or added, you know it's the plain vanilla standard lease.

MR SCHULTZ (PGA): Yes, and just have an addendum which is the variations.

DR BYRON: And everybody know what's different and why it's different.

MR SCHULTZ (PGA): That would be very logical and helpful.

DR BYRON: Then the question is if that was developed through some sort of industry working parties, would the large shopping centres agree to use that rather than having their own proprietary lease that their lawyers have put together to make sure that their interests are very well protected. I don't know.

MR SCHULTZ (PGA): I don't think so, not unless they were encouraged to do so if there was some pressure brought to bear.

DR BYRON: Yes. I guess the only other comment I was going to make in response to your initial comments was about tenants having access to data and preferably to get the data freely available and not have to pay for it. I think most people have said that good information, accurate information is worth paying for, and if you don't pay anything for advice, that might be how much its worth. The technical point is that there are information asymmetries. One party knows something the other party doesn't.

MR SCHULTZ (PGA): Yes.

DR BYRON: Actually that's very common. When I deal with a bank, a telephone company, an insurance company, they know things that I don't. The reason I pay a car mechanic to fix my car is that he knows things that I don't. To say that simply because there's different information on both sides of the table, therefore governments have to fix it, that's not the way it works. It seems to us that there's quite an industry emerging in terms of advisory services.

The point you raise about getting the incentives right so that they're accountable for what they do, and the quality of advice that they give retail tenants is

worth what they're charging. That's another question. But there are now people who are mining the titles office lease information and selling information to people willing to ask for it.

MR SCHULTZ (PGA): Yes.

DR BYRON: The comment has been frequently made that people will pay a couple of hundred bucks to get an automobile association inspection on a used car, but they won't pay to get advice that could save them half a million dollars on a lease.

MR SCHULTZ (PGA): Yes. There's no logic about that.

DR BYRON: Anyway I think your basic point is correct, that if it's possible to provide the marketplace with more accurate information at relatively low cost, we certainly should be exploring those things.

MR SCHULTZ (PGA): I think it would help all parties. I think it would also help the shopping centre owners as well. There must be a significant amount of time, effort and money put into these negotiations. If there was a simpler answer and it saved them time and money, one would have thought there was some incentive for them to be a party to that. At this stage, it seems that they get such significant benefits, because some parties through fear accept the rental request, and put themselves into a difficult situation going forward.

DR BYRON: There's probably a lot of other things that we could talk about, but I think we might have to draw it to a close.

MR SCHULTZ (PGA): Thank you.

DR BYRON: Would you like to make any concluding wrap-up comments or sentences?

MR SCHULTZ (PGA): The only thing I'd like to do was just to say that on my behalf personally and perhaps from the Guild, thank you very much for listening and giving us the opportunity for at least exploring the possibilities, and also for the way that you've conducted the hearing and sharing with us some of the things that you've heard and found. I've certainly appreciated listening to it and have found it particularly interesting, and I'm hopeful that with the people that you'll be working with, we might find some answers. Thank you.

DR BYRON: Thanks very much. Thanks, Angelo.

MR SOMMARIVA (PGA): Thank you, Commissioner.

DR BYRON: Graeme, if you could just introduce yourself and your business for the transcript, and then take us through the comments, the criticism that you want to give to us on the draft report. I do thank you very much for the written submission that you've already sent in. I found it very useful and helpful, and thanks for coming today.

MR SMITH (MC): Thank you. My name is Graeme Smith. I'm the director and owner of Manna Confectionery. We own two manufacturing businesses, but connected to that, too, we operate one confectionery shop and two nut shops or retail. Two of the businesses are in what the Commissioner has referred to as high streets. I'd consider them more as retail precincts, if you like, and the third one is in a shopping centre. It's not a Westfield shopping centre, so it would be considered a second-tier shopping centre, but nevertheless, we'd still be applicable I think. Also in addition, my brother and sister are each in separate businesses, and I've been involved with negotiating leases with them as well.

The Commissioner referred previously to passion. He's seen a lot of passion in the previous submissions and around Australia. I can only echo that. The number of sleepless nights I've had over leases is more than I would have had over any other issue within the business I would say. In summation, my feeling with negotiating leases is a complete feeling of powerlessness. We're not connected with groups like the Pharmacy Guild or with a franchise operation or anything like that. We're sort of on our own. So we basically don't have any leverage or the feeling is we don't have any leverage whatsoever.

So when it comes to trying to put our point across, the overwhelming reaction I've had is a polite and courteous attention to the points that were raised, but a very firm and direct take it or leave it. In one case, we own - my sister actually owns this side of our company. It's a retail operation in Central Market. It's the oldest tenant in there. It's been operating for over a hundred years, and last year at our most recent renewal period, we were negotiating the lease quite hard - we went in quite hard - and the final comment was, "If you don't like it, you can just pack it up and leave," and this is after 100-plus years of goodwill in an historical shopping precinct of Adelaide.

So I feel that the outcome of this review in some way needs to shift the balance of power so that the smaller retails can at least have some power at the bargaining table. Obviously the power to landlords has been exacerbated by the rise of Westfield taking over the Centro group, the almost monopolistic control they have over main shopping centres. That's certainly my feeling about it. When I was negotiating to purchase the business that I purchased last year in the shopping centre, the requirements that were put to me for the refit were just the Westfield guidelines. So this is a family in Adelaide that owns the shopping centre, and they've just taken

the Westfield guidelines and applied to their shopping centre. So it would seem to me the feeling is that Westfield and their demands are driving where the market is going.

In particular I will address the points that I raise in my submission, although some of them have been raised already, and I'm heartened to hear that other people are having the same issues as me, and one in particular the Commissioner raised during the previous submission. Market rent - the main example is the Central Market when we were negotiating the rent last year. There was a large rent increase, and I asked the agent of the landlord - the landlord happens to be the Adelaide City Council, who are hard to argue with, but the agent who was a very nice man, very good at listening, and I asked him how to justify the increased rent, and he said, "The guy two stores away from you is paying that rent. He's just agreed to it," and it's well-known in the market that he only agreed to that increased rent because he needed to sell his business and needed a lease in order to sell it, so he agreed to an increased rent.

But what that did then is set a market rent, and so he said, "Yes, that guy's paying it." We raised the point, "The guy in the next stall over isn't paying it. He's paying considerably less." "Yes, but in his next rent review which is coming up next year, he'll be paying that as well." So what is market rent? If the landlord is setting market rent? It's not a fair rent any longer. That's my feeling about it. He was unable to justify the rent increase apart from saying that another stall two stalls down is paying the same amount.

I would wonder if we can introduce some sort of independent person who can actually say what the market rent is in different situations. I'm not sure in practice how that would happen. Making comparisons with other shopping centres is problematic, and that's one of the things that this negotiator said to us. "Other places around town are paying the same amount." Our point was we're operating in a market environment where there's no airconditioning, there's no designated parking, there's no store fit-outs, there's no ceilings, there's no shopfronts per se. There's just basically a square metreage of dirt that we have to invest in putting some sort of shopfront in. Again all those objections fell on deaf ears, and I feel again the powerlessness of negotiating. I felt what's the point in negotiating if we have no power to actually achieve a change in the proposal.

Rent increases is my second point. In recent times, all the leases I've been offered have been for a 4 per cent flat increase or CPI, whichever is greater, which is kind of like having your cake and eating it, too, I think. I think that in the past, leases have often been CPI which I would say is a fair indication of what the increase should be. I think anything greater than CPI is the driver of inflation, and of course we have to recover the extra cost of the rent which puts pressure on our prices, and

that just flows through to the general economy.

Renewal periods have been dealt with already, and I'd like to add my voice to that. In days gone past, it used to be standard practice that you got a three-plus-three-plus-three or a five-plus-five-plus-five, and you had some surety on your business. A five-year lease gives you nothing, and in a retail sense, a lease is your lifeblood. If you don't have a lease, you don't have a business, and I'll get on to the point of shop refits and the requirement to pour money into the business, but I think that it needs to be legislated that a right of renewal is offered as a standard.

I think the Commissioner raised in the previous submission the fact that landlords made it five years so that they could jack up the rents in five years' time; gave them flexibility to control or to gain more bargaining power by saying, "Well, you don't have a lease after five years. So if you don't like it, you can leave," whereas if there was a right of renewal, even if at the end of that five-year term there was a market review, at least the tenant has some bargaining power to say, "You just can't automatically kick me out without going through all the processes of developing and exploring what the market rent is using an independent valuer."

Coupled with that is the requirement from the landlord to undergo shop refits, and more than just the standard refit, but to the exacting standards of the landlord which, in the most recent case I had in the shopping centre, just was a regurgitation of a Westfield requirement, and no thought was given at all to what that might cost to a small retailer. It was like, "Here's our exacting standard. By the way, we've just changed our standard on lighting. So you have to spend another four to five thousand dollars per sign just to make your store look brighter." There's no consideration given to that for a small retailer.

It's my view that it has an increased negative effect on the tenant, because the more money we spend on the shop refit, obviously the brighter the shop is, the brighter the shopping centre, the increased business you would expect generally in a shopping centre, the increased appearance of the shopping centre et cetera. It would seem to me that we as the tenants are lining the pockets of the landlords. The more we spend on our business, the more we increase our business, the more we pour into advertising, promoting our business, the greater our businesses become, the greater the shopping centre becomes, the greater value the shopping centre then becomes, the greater the lease rentals become, and it has this continuing effect.

This is how I feel. I'm speaking from the heart. I could be incorrect in some of my perceptions because I'm of course very biased towards the position that I'm in. I'm not in a landlord's position, and I refuse in this submission to see it from a landlord's position, because I'm not a landlord, I'm a tenant, and I give my view of it.

The sale thing you alluded to in the last submission as well. When I bought the business in the shopping centre, I valued it on the basis of what could make from it to the end of the current lease term. The guy that was selling had a completely different view of it, and he had advice from a business broker advising the business is worth far more than I eventually paid for it, but I argued with him that I could only pay the value to the end of the current lease, because after that lease, the business could potentially be worth nothing. In fact it could potentially be a liability to me, because under the lease I'm required to deficit it, which is a large cost.

So I took the risk and I think Barry Schultz said that retailers in shopping centres were eternal optimists, and I think you have to be, or crazy, to do it. I took the point that we'd break even, at least get our money back at the end of the lease term, and then be able to negotiate another lease, and if I couldn't do that, at least I wasn't out of pocket, better than having spent four to five years of my life for nothing. But I think without that right of renewal, it makes selling your business very difficult also. The guy I bought the business from just renegotiated his lease, so he's at the beginning of his lease term which made it the most valuable to me, because I valued it based on the amount of months left on the term of the lease. But it would seem to me that if you don't offer right of renewal, the liquidity of businesses is reduced. So the ability of business owners to get in and out of businesses is reduced, which I think is detrimental to a free marketplace.

I'll get on to that a bit more in a second. Just on the turnover disclosure, in the case of a shopping centre, the initial proposal we were offered was 4 per cent of turnover or our rent negotiated, whichever was greater. We agreed to that. When we got the final lease document back, they'd slipped in 8 per cent of rent. So fortunately we read through the 100 pages of detail and found the change. I'm jumping around a bit, but I'll get to that lease documentation that you mentioned.

I was presented with this massive document, and the devil is in the detail. I went to my lawyer, and he charged me a couple of thousand bucks and wrote pages of, "Are you aware of this? Are you aware of that?" et cetera. "This is what this means. This is what that means." I said to him, "Thanks very much," went back to the landlord, "That's the lease. We're not changing it. Take it or leave it," again that take it or leave it attitude. I think it's a great idea to have an independent person draft a lease, because having one side who holds all the power anyway getting his lawyers to develop a lease that is so skewed in his favour is ridiculous is completely unfair.

You mentioned market forces before. I agree with the market and I agree with the free marketplace, but I think that in this case it's not a free marketplace in the true sense, because there's one dominant player who seems to be dictating terms in all the major shopping centres, and having a flow-on effect through some of the minor shopping centres also. So I don't think it's a fair marketplace. I think in some way,

the outcome of this review needs to bring the balance of power somewhat back in favour of the small tenant.

Let's not forget that small business is the largest employer in Australia, and if the end result of this is that the eternal optimist will die and there won't be people taking risks to buy businesses in shopping centres and, yes, that will shift the balance of power back because there'll be empty shops around the place, but it will also cause unemployment and negative economic effects also, which is detrimental to everyone.

The turnover disclosure - I can't see any possible justification for the landlord wanting to know my turnover except that it gives him more power when it comes to renegotiating my lease. In short, it is none of his business how I'm doing in the shopping centre in my view. If I happen to spend more money or I'm a cleverer retailer than the guy next door or my product is more in demand because I've made it so or because of other factors or because I've sensed the growing demand and I've taken advantage of it, why should the shopping centre owner share in that. I can't see any reason that the value of his investment should increase because I've done the hard work in increasing mine.

In our case in the shopping centre, we pay a premium to the promotions provider of our shopping centre in order to create activities to draw people to the shopping centre. So I feel that it's our money that's causing more people to come to the shopping centre which the landlord is then using to say, "Our shopping centre is creating business for you. Therefore we need to share in the increased business that you're experiencing," I think the argument is ridiculous. It also flows on to him justifying increased rents "because that guy over there is paying that much more and that guy over there is paying that much more, and they're doing really well. That's the market rent in this centre. Therefore I'll use that as a justification for increasing your rent next time I review it." It's a ridiculous argument.

The sale of business, I've already covered that, and it is a concern for me and it would be a concern for any small business, because you do pour your life and soul into it, and you do live in the hope that one day you can get out and retire from it, and you'd like to think that all the hard work you put into it is a saleable asset, but where it sits at the moment, it seems to me that the landlords can have a negative effect anyway on what you get for your business. They can certainly bring the price down. More than that - and this is the experience I had in particular with getting into the shopping centre last year, the landlord under our act has the power to refuse the sale of the business if they deem that the person buying the business is unsuitable.

A very public case, in our newspapers two years ago, one of our seafood restaurants in Glenelg - a well-known one - had negotiated the sale of his business. The landlord, a prominent developer in Adelaide, was able to stop that sale because

he considered that the guy buying it was an inferior restaurateur to the guy that was selling it. I just think that giving the landlord that ability to stop a sale also reduces the liquidity of businesses being able to be bought and sold.

The process I went through, I was given the requirement to provide a three-month unconditional rent guarantee which is appropriate I think. I offered to give him three months' rent in advance. He said, "No, I'd rather have a rent guarantee." The requirement I was given was, "I want it undated," which means it never ends unless he hands me the piece of paper that. I considered that unreasonable. He didn't. Under the act, I need to provide him with that document in the form that he considers reasonable, not what an independent person would consider reasonable.

I said to him, "My lease ends in five years. Why can't it expire in five years' time?" "No. We want it to be a date that doesn't expire into the future, because that's what we consider is reasonable." Again his example is to give you examples of how powerless we felt in the negotiations, but also how much power that a landlord wields. We were required to provide very detailed financial information as well as that rent guarantee. My argument to them was, "You have a rent guarantee, you have my personal guarantee, and you have the guarantee of my company." "No," they said, "we want more. We want your wife to provide a personal guarantee over your home." My argument was, "If you're considering that your property is so valuable and if I don't like it, then you'll get someone else to lease it. I the market for leases are that liquid, then you'll have no problem finding another tenant within three months. Why do I need to provide this level of information." Again, "Take it or leave it."

I had to provide profit and loss balance sheets for all of my entities, my holding company, my manufacturing businesses. I was put through more demands almost than I was put through by my bank when I took out my borrowings; again ridiculous requirement, but at each point, they had the power to say, "We can stop this sale if we want to, using the provisions that we've got under the act. We can just disallow you. We can just say we don't consider you to be a suitable purchaser," and I couldn't have bought the business.

I think that really covers all the points that I raise in my submission, and I think I've made my point. Thank you for the opportunity to make it.

DR BYRON: Don't rush away, Graeme. I guess many of the points that you've raised, as you say, have been raised everywhere we go, but the one question I guess that sticks in my mind is do you really want to be in a centre given all the rules, given what the lease is like, given that it's take it or leave it, given that you want your turnover data, given that they also are basically going to take a share in your

business, whether you want them to or not, given that you'll never accumulate much goodwill, because if you've got a fixed term lease and they have the ability to change the rent if they give a subsequent lease. Given all those things, maybe for your particular business proposition, you might say, "I'm better off outside than inside." Nobody is holding a gun at your head and saying, "You've got to go into the centre."

MR SMITH (MC): I agree with you. We actually opened up a nut shop almost the same in the high street as we bought in the shopping centre, and the shopping centre is far more successful. It seems to me the way that people are going in a retail sense is that they're gravitating to a shopping centre. That is the way that retail shopping seems to be going. It's moving away from high street or retail precincts. So it's like if you want to be in retail, that's where the customers are going. My argument is I don't mind paying a fair rent, but when you go to a negotiating position and you have no power, it's not a true negotiation. It's also not a free market.

DR BYRON: The one power that you have is to say, "No, I refuse to abide by those rules, and therefore I'm going to stay out on the strip where I may not make as much money."

MR SMITH (MC): Or may make a loss as we are in our business in the high street, but if every small business took that view, there wouldn't be a small business. Do we want small business or not, and I think we do. We need the variety. We need the employer for one. We need people like myself and members of the Pharmacy Guild to actually take a risk and operate in a shopping centre.

DR BYRON: Sure, but the counter-argument that's put to us is that if you don't like the terms and conditions that the landlord stipulates, that's fine, and is it reasonable to say we want to take all the up side, all the good things that we like about the proposition they put in front of us, like the fantastic foot traffic and the high turnover, but we don't like X, Y and Z. So we want the government to change the rules so that we can take all the positive features of this package and knock out all the bits that we don't like. Is that cherry picking?

MR SMITH (MC): No. I don't think it is, but I think that all the bits we don't like have been too distasteful, let's say. In any negotiation there's things you give and take on, but I think it's - let me use the example again of the market rent. When the guy on the other side of the negotiating table is the market or he's setting the market rent, it's not an independent market rent. It's not a fair market rent. So the playing field isn't fair, but once again you say, "Just don't do it then."

DR BYRON: No. My understanding is that many of the centres say, "Market rent, shmarket rent," whatever. "We think that you can pay a million a year, and if you don't want to pay a million a year, go away," and it's got nothing to do with what Joe

Blow next door or down the street or whatever is paying. If they're business model is to work out how much can each retailer afford to pay and then negotiate a separate deal, there is no such thing as a flat X dollars per square metre that everybody pays. It's a special individual price that's calculated for each individual business, and that seems to me to be what the business model of a shopping centre is, to know how much each of your retail tenants is earning, and how much they can afford to pay, and then go for that, not just to fix some flat price.

MR SMITH (MC): I think how much can they afford to pay really depends on the information the shopping centre doesn't have, what are the cost of my goods, what are my invariable costs that they're not aware of, the promotion that I do, the staff cost et cetera, the other costs. They don't know what I'm making bottom line. They only know the turnover, and they don't even know my gross margins. So it would be hard for them to judge.

In our case, the reason I bought this business, even going into all those situations, the gun to my head et cetera, the feeling powerlessness for negotiation, the reason I signed it is because it's in a damned good location. It's right next door to Woolworths. It's the best location in the shopping centre. I'm not totally stupid. I mean, I took a bit of a risk on it, but I still think that the power has shifted too far, and I think that the concept of market rent has disappeared out of the window. I don't think it's a free market. I don't think there's enough players in the market for it to be a free market.

DR BYRON: It's a concept that has its origins in the strip or the high street. We had a solicitor at the Sydney hearings who specialises in representing retail tenants, and his argument was that the standard retail lease that sort of evolved over the last 200 years of common law et cetera, it works pretty well in that context, but when you apply to a large managed shopping centre, it just doesn't quite do the job, because it's actually a fundamentally different beast.

MR SMITH (MC): It is.

DR BYRON: You're not just paying for square metres of space, you're actually paying to be managed, to have a centre that buzzes and hums and sings and dances and brings in customers and puts them in the right frame of mind to open their wallets et cetera. Yet because you're just paying on a square metre basis, there isn't the accountability of centre management if they get it wrong. If everything goes fantastically well and turnover is up, they will share in the up side, but if they mismanage the centre or let it run down and get daggy and people start to stay away - - -

MR SMITH (MC): They'd have to pay for that.

DR BYRON: They don't pay for it until all the leases start coming up for renewal, but I guess - which brings me back to the point, you know, when you're talking about the cost of fit-outs and centre management wanting you to do all sorts of more expensive things, the counter-argument that's been put to us is if the centre starts to look tired or run down or daggy, that's actually in nobody's best interests either.

MR SMITH (MC): I agree. This is a very good point. In our case, we were asked to change the fit-out that in our view and in the view of everyone we asked looked fine, but they wanted a change. "It's been like that for five years. We just want it changed." "We'll put new lighting in. We'll make it brighter." "No. We want you to replace all the glass, all the counters, the tops of the counters, the frontages of them. We want it all changed." "But it's only going to look different. It's not going to look better necessarily, it's just going to look changed." "Yes, that's right. We just want it changed."

DR BYRON: Again some of the solicitors that we've had at hearings I guess - I forget where it was, it's a bit of a blur, that's why we have transcripts - was saying that the lease document is actually an incompletely specified contract. At the time you sign it, you may not know whole things that might happen that you - you were going to have to pay for it. The landlord can require the tenant to do X, Y and Z and you sign it but you don't know when X, Y and Z might occur, and you don't know how much it's going to cost and you don't know what the consequences will be.

What they said to us is that's basically equivalent to writing a whole book of blank signed cheques, and again I don't want to harp on this, but I wonder why people sign a whole book of blank signed cheques, and then get surprised when the people they're given to actually start to fill them in and cash them.

MR SMITH (MC): Again it's the optimism thing. I think anyone in business is an optimist. I think you just want to get in there and do it. You've got this passion there to provide this service or this product. You really enjoy what you do, for lots of different reasons. You like the independence, and you just want to get in there and do it, and you're like, "Just be fair to me. I'll sign it, but just be fair. Let me have some sort of negotiation power. Let's talk about it. Let me bring my concerns to the table, and let's work together if we can, and let me achieve my goal, and maybe you can achieve your goal, too," but that's not the feeling I get.

DR BYRON: You're not at all alone in that observation. Going forward, what do we do about it? Let's take as given that that is the situation. What do you think the state government or the Commonwealth government can or should do about that? What is it that would put some balance back into the relationship between the large centre, which has got the best accountants and lawyers and so on that money can

buy, and Graeme and his family.

MR SMITH (MC): My little nut shop. Yes, that's it. I think a lease prepared by an independent person is a good idea. That was raised previously. At least it isn't prepared by their lawyer firstly. It means that it won't be skewed in their favour. It should be fair. I think guaranteed renewal terms should be there as well.

DR BYRON: Just on the guaranteed renewal terms, my understanding is that that would fundamentally change hundreds of years of the law of contract and property, you know, the landlord has the right to decide whether or not he'll lease his property and, if so, to whom and on what terms. If governments were going to change the law that says, "I have to agree to sign this contract simply because you really, really, really want me to," that's actually changing the law of contract. Traditionally it's been between two parties both willing, both reasonably well-informed. So it would be a pretty big step, I think.

MR SMITH (MC): Let's take it. I don't see any other way. They used to offer it as a standard, and it used to be back then because the landlord wanted security or tenure on his property.

DR BYRON: Yes.

MR SMITH (MC): Now it's like, "We've got so many people lining up, and we want the option to jack your rent up and to get rid of you so we can get someone else in."

DR BYRON: Yes, which reminds me, in my earlier comment, I think I said to recalibrate your rent. I didn't say to jack the rent up, because what happens if - I mean, there's a time element in this. For the last 15, 20 years or something, the Australian economy has basically been doing really well, and turnover has been going up, business is doing well, stock market et cetera. Just hypothetically - and we hope this doesn't happen, but what if we had another recession we had to have, and there was no longer queues of people lining up desperate to get some retail space in a shopping centre. It's not inevitable forever that there's always going to be a huge negotiating power on one side and not the other.

The thing could turn around if the economy went backwards, and you'd get landlords coming to you, pleading with you, offering you 50 per cent discount if you'll stay there for another 10 years. I'm stretching the truth here.

MR SMITH (MC): You are, because the high strips will go first. Shopping centres will go last. I'm only 42 years old, but I still remember the high streets being where you shop. It seems to be this growth of this massive shopping centre is a risk

development, and you go around the world, and obviously they're putting theme parks in centres and stuff now. They're just taking the model to the next level. So it's a new beast. I don't know what would happen if there is a recession, but I think they'd be the last to give in on any - - -

DR BYRON: That's because perhaps they've managed to create a micro environment here shoppers love to come and shop, they enjoy the ambience, the safety, the atmosphere.

MR SMITH (MC): All in one place, yes.

DR BYRON: The service, the fact that there's different retailers to choose from all under the one roof et cetera. If they've managed to create something that really pulls in consumers, and you and lots of other people would really like to have a business in there, it's not surprising that at the moment, you know, they're holding a lot of aces and you've got a pair of sevens.

MR SMITH (MC): But it would only be bricks and mortar if there wasn't individual retailers in there for people to visit and shop at. My argument is all they have is bricks and mortar and a bit of dirt and a carpark. If we didn't put our shop-fit in there, spend our hundreds of thousands of dollars and staff it and put our blood, sweat and tears into it, they don't have anything. We provide the bells and the whistles, the thing that the customer comes to buy.

But they don't see it like that in my view. They see it like - I have shareholders, the Westfield group obviously. If I put all my money that I've put in my business into Westfield shares 20 years ago, I'd be making more money now than I would if I had my retailing businesses for sure, and then when Westfield get big enough and they buy Centro and they sort of control this bigger, there's just - the power has shifted too far. I refuse to argue on behalf of it anyway, because I'm the little retailer, and that's where I'm coming from. I don't care about them, to be honest.

DR BYRON: But I guess the way I put it at the Perth hearings on Monday is if I chose to get into a boxing ring with the world heavyweight boxing champion, nobody should be surprised that it's a bloodbath and it's my blood.

MR SMITH (MC): Yes.

DR BYRON: If you choose to go in - - -

MR SMITH (MC): Yes, but what if you - - -

DR BYRON: Nobody is forcing you to go into a centre. I'm not trying to justify or condone their behaviour or anything else. I'm just trying to say you know in advance the rules of the game that they play are a lot harder than the rules of the game out on the street, and you do have a choice. What they're actually dangling there in front of you is a really big juicy carrot that says, "Come in here, and you're going to make a lot of money, but maybe only for the first five years."

MR SMITH (MC): Can I take it from the point of view that I'm already there. Let's forget the point that I've just bought a business in a shopping centre. Let's say I'm in there and I'm coming up for my five-year renewal. Let's use your boxing ring analogy. What if I have to get in that boxing ring, because if I don't, my wife and my children don't eat, my house repayments don't get made, everything collapses and I go bankrupt. I have to get in that ring and take on the heavyweight and take my chances with him, and that's where you're at. You've got so much invested in it that if you don't get in there and fight like a dog, you don't meet your commitments.

DR BYRON: I probably shouldn't push this analogy too far, but what you're saying is that knowing in advance there's going to be a bloodbath, the state should step in and either stop the fight or change the rules to even it up a bit.

MR SMITH (MC): What do you do? Do you walk away from all the goodwill you built up? Do you walk away from the hundreds of thousands of dollars you've put in the business? Do you walk away from your staff like the Pharmacy Guild have indicated? Do you walk away from something that you put your heart into in the case of my sister's business, 100 years of trading? Do you walk away from it because you're afraid to take on or suffer the consequences I guess of getting a beating. Look, Neil, that's what you do, and you go in there and you say, "Okay, that's the new rent." I go to all my loyal customers and say, "Everything's going up 10 per cent. I'm sorry about that," et cetera.

You take it on the chin and just do it, but you don't have to be happy about it, and I'd like to think that I had some power on behalf of my staff, my business, myself and my customers to say, "I went in there and fought pretty hard against the 10, 20 per cent rent increases, but I couldn't do anything about it. I just think the power shifted. There's no power for us.

DR BYRON: I'm really glad that you brought up the issue of the Central Market and the city council, because we were also talking about Victoria markets in Melbourne and how does that work, and whether the retailers in the markets feel as disempowered, as powerless, as retailers do in one of the big publicly listed shopping centres, and not all of them, but to a certain extent, there is that same level of (indistinct) that even in the council-owned markets, people who have been there for a hundred years don't necessarily get an automatic right to renewal. Just because you

paid the rent every month for a hundred years doesn't mean you own the place.

MR SMITH (MC): That's right.

DR BYRON: But can you just elaborate a little bit - - -

MR SMITH (MC): But don't you think it should be to the market?

DR BYRON: No, but can you elaborate a little bit more on the way having a city council as a landlord is like or is different from having somebody else as a centre landlord.

MR SMITH (MC): I think when they place an organisation like Jones Lang as an intermediary, they remove themselves from the process, and I'm not even confident that my objections got through the Jones Lang guy and actually got to the council, because he said to me at the beginning, "They're pretty firm on these things. It's definitely going to be 4 per cent increase a year. It's going to be five-year term fixed. This is going to be your rent per square metre," all the points that I really wanted to negotiate, he just said, "They're firm on these things."

Is it different dealing with the council? I threatened to him, I said, "If you really want us to pack up and leave, you're talking about a company that's been in South Australia since 1906. Every newspaper is going to hear about it. Every politician is going to get a letter. Every person on the council is going to" - "Fine, yes, great No problem." It completely fell on deaf ears. I'm not sure that even if I'd done that, it would have been a victory for them anyway. So, what, everyone would have said, "Poor guy. He's been mistreated by the council," but I still don't have a business. I've still got to pack up my stall and see you later. So dealing with the council, is it different? I haven't found it so.

DR BYRON: Thanks very much for that elaboration. I think that's exhausted my questions. Is there anything else you wanted to say in the way of wrapping up?

MR SMITH (MC): No. Just as Barry did, I'd just like to thank you for the opportunity. It's very rare that you get the opportunity to vent and to - my wife hears it, and she's going, "I know. What can we do about it?"

DR BYRON: As my wife says, "There's no point complaining to me. Go and talk to someone who can do something about it."

MR SMITH (MC): That's it. I appreciate that.

DR BYRON: Again there's no guarantee that our recommendation to governments

will be what you would have wanted or that they would accept what we say regardless, but all I can say is we understand what you and other retail tenants have been saying, and we're looking for ways to go forward. I guess if it was easy, somebody would have fixed it 20 years ago.

MR SMITH (MC): We're dealing with a new animal. The rise of these shopping complexes is a newer sort of animal, and I think it needs to be dealt with in a new way. I don't know if you can use hundred-year-old laws to deal with what's happening. It will only get worse. It's getting worse. I've owned the business 11 and a half years. I've only seen it get worse. So where will it end? It will end with us walking away from our retail leases and just saying it's too hard. It is too hard. So does small retail business end and does it become a franchise operation, and then where does that leave the consumer?

DR BYRON: Or do the small family retailers basically disappear from the centres and they might still exist on the strips, but the centres would basically consist only of national chains and national franchises, and they all start to look the same.

MR SMITH (MC): Exactly.

DR BYRON: But if that happened, maybe customers would start to go back on the strip to see - - -

MR SMITH (MC): Maybe. I hope I'm around long enough. It might take a few years to do that.

DR BYRON: Okay. We're speculating now, but thank you very much for the time and effort you've put in to preparing the submissions and for coming here today.

MR SMITH (MC): Thank you.

DR BYRON: We now have I think nobody else on the schedule until 2 o'clock, but I know I said that I'd give people an opportunity to come forward this afternoon, but we can have an extra opportunity now if anybody feels the spirit move them, but otherwise we'll just have to go and have morning tea and resume at 2 o'clock. Okay. Thanks very much, Paul. We'll resume at 2.00.

(Luncheon adjournment)

DR BYRON: Thank you very much for coming, gentlemen. If you could just introduce yourselves in your own voice for the transcript, and then take us through the main comments, feedback, criticism that you've got for us on the draft report. I think you get the last word in this round of inquiries.

MR BALDOCK (SRASA): Just like my wife.

DR BYRON: We look forward to hearing everything you've got to tell us, and sharing your experience and insights with us. Thanks for coming to day.

MR BALDOCK (SRASA): Thank you very much. I'm Max Baldock. I'm president of the State Retailers Association of South Australia. I'm also a practising retailer and have been for the past 20 years. My business is located in a major shopping centre. So I've had some I guess first-hand experience of some of the issues, problems, that are faced not only by myself, but other retailers. I've also done quite a degree of consulting work for those retailers in the system generally that are in some form of despair to try and help them with their problems; some successfully, some not. So that's my background. David?

MR GIERSCHE (SRASA): My name is David Giersch. I've been a retailer for 35 years. I've about 10 months ago sold my last shop - well, we think it's my last shop anyway. There's a lot of work obviously to do with Max and John, but I felt that at this stage of my life, I'd like to give something back to the industry because here seems to be a fair few problems out there that do need solving or at least do need talking about to see if we can all reach some consensus. That's about all I think.

DR BYRON: Thanks, David.

MR BALDOCK (SRASA): I'd firstly like to start and thank you for the opportunity to be here today and to respond to your draft report, and I do understand it's a draft report. It's not an easy task you face, and I guess whatever transpires from it, it won't please everyone, and we understand that. The views I express in here are often fairly direct, and I don't mean them to be personal, but they certainly are a strong feeling, and I guess it comes from two parts, as I said before, one being president of an association that represents all retailers, and the other part of me which is the emotive side which comes from those experiences that I've faced over those 20 years.

I'd like to also say a preface that any changes that do occur will not impact on me at all because I would say that I'm very close to the twilight years of being a retailer. So my desire to bring about change is more for the betterment of the industry, and those that are still in the industry and have a future in the industry.

The Commission was asked to make the recommendations, and I felt that the proposals fell into three: to reduce unwarranted constraints on the retail market, improve its efficiency and provide a pathway to lowering compliance costs, and the association would agree strongly with these. The third of these three points appears, however, to have received the most attention as is evident in the draft key findings. However, disappointingly, the Commission has not been able to supply quantifiable data to support their findings which causes some difficulty in judging the validity of several of their proposals.

The Commission's assessment appears to be that overall the retail tenancy market is operating reasonably efficiently at the moment. The association believes that given the plight of the smaller retailers and franchisees, and the huge disparity in profits between retailers in general and their landlords, and the management, the disparity that is growing by the year, there is an overwhelming evidence that this is not so. The Commission has not provided a definition of market failure that I could see in there. The Commission seems to have considered that if a lease is freely negotiated and that the conditions of the lease are transparent and the retailer is disappointed in trade or subsequently fails, it is not necessarily a case of economic market failure.

In principle, the association agrees with this statement. However, the problem for retailers is so widespread it begs the question can so many retailers be so naive or so stupid as to be making the same mistake and entering into contracts that are to their disadvantage, and that's what I thought was missing from this draft report. There doesn't seem to be a flavour coming through that there are widespread problems and widespread issues, and major widespread issues at the retail level.

Hitherto very successful franchisors who, one would imagine, have all the resources available to them and who in the past have made sound business decisions and are now finding that their returns have diminished to the extent of business closures, are they making the same naive business decisions as everyone else, because in actual fact that's happening at the moment as we speak. In major shopping centre, there are five major franchisors that have traded very successfully in situations that are either closed, about to be closed, being run by the franchisor because the franchisee has virtually gone bust, or are suffering major difficulties. In my 20 years, I've never seen such a quantity in one centre, and this is reasonably widespread at the moment. So something is happening out there that is not good for the retail system.

Do we wait until the whole retail system is in jeopardy before we decide to look at the grassroots where there is a systemic disease? We would have anticipated that the Commission would have gone and spoken to more retailers in the field so that they could have gained a clearer picture of the situation and reported on these

issues in more detail. It's often said that retailers had the opportunity to respond to various reporting mechanisms, but what's got to be understood is that the retailers, particularly at the moment, are so tied up by their business, they just do not get time to get their head above their own business to even respond to such things, if indeed they know this is actually happening.

If an economic model such as the Pareto optimality is used as an indicator of the health of the market, then a benchmark could be determined. Thus in conditions of perfect competition and in the absence of market failures, the Pareto optimality outcome should be the natural result of market operations. Well-functioning markets would allow gains from trade to occur so that resources are put to their highest value use. In simple terms, in an ideal market, all participants in that market should benefit from their efforts and investments within that market. If there is a significant imbalance, market failure should be indicated, and appropriate action should be taken to address the market failure.

However, the association believes consideration should have been given to those situations where the conditions in the centre have been materially changed by the landlord or management after the signing of the lease agreement and those changes to the benefit of the landlord and management. Such of these instances include tenancy mix. There are statements and disclosure about tenancy mix. Leases can be signed on the basis of the information given only to find that those tenancy mix balances have changed markedly.

Redevelopment issues, often they are not available or the information is not available at the signing of a lease, and retail usage changes that. By that I mean that each retailer in a centre is only allowed to trade in what the landlord will allow them to trade in, except when a new retailer enters the market where they can then be given trading rights in various areas, because no exclusivity is guaranteed. We understand that, but worse, when a retailer is going very poor, often what happens is the first thing that usually happens is that operator is then given the opportunity to trade in those areas of a retailer that is doing reasonably well. Hence, to help one retailer, they often bring about the demise of another, and that's something you cannot focus on or know that it's going to happen when you're signing the lease, and mall usage changes.

We've seen over the years, and over a 20-year period I've seen the change of mall usage from an area where existing retailers could overflow and sell their goods and communities could come in and make a vibrant centre, better for both retailers and landlords, to the extent where it is actually just now extra retail space, the costs of which are paid for by the retailers through their outgoings, and the retailer than can put in either island retail outlets or casual mall usage areas. Often they are in competition with those retailers that have signed leases some time before.

From the information in the report, it is indicated that the environment of a shopping centre is a monopolistic market controlled by the landlord or the management, and I've got a quote down there from page 89 which supports that statement. It virtually says overall success of the centre is largely the responsibility of the centre landlord. This statement places a large obligation on the landlord or management for which they are adequately rewarded by the retailers, hence why a management structure is an important and necessary part of retail centre structure, and is paid for by the retailer.

What I'm getting at there is we pay a management structure to manage the system so it will be successful for all, and often the case is that that is not the case, but there is no redress on management or landlord if the manager strays from what largely is his responsibility. When poor tenancy mix, redevelopment issues, retail usage changes, mall usages change decisions are made, retail tenants often lose turnover which negatively changes rental percentages and profit. The gross income from the centre does not necessarily increase or change or the income of the tenant increases. A state of Pareto optimal might no longer exist.

Should not the landlord via management be held responsible for not fulfilling their obligations to the retailer? If you went to anyone else and paid money for their advice and for their management and then found that they were using that money to their own advantage, I'm sure the government would look at that issue strongly. That actually happens in centres almost as a norm at the moment, and what if the landlord does materially benefit by these decisions to the detriment of the retailers?

Examples: in a tenancy mix over a 20-year period, in that 20-year period, a retailer has found that his turnover compared to 20 years ago is approximately at the moment 40 per cent higher after a 20-year period. The rent at the same time is 300 per cent higher, yet he still survives. There have been peaks and troughs in that time when the retailer has achieved well over 150 per cent, almost 200 per cent of what he was doing 20 years ago, only to find that what was introduced into the centre were more retailers in that sector. How did this occur? The centre manager is able to get the figures from that retailer and use them not to the advantage of the centre, but to the advantage of the retailer.

How do you survive in that situation over that 20-year period, and there are other people that have lost in this over that 20-year period, the amount of money allocated percentage-wise to staffing has dropped by 50 per cent. So certainly the people in the employment situation have had a decrease in income. Capacity to employ people is not there, but it's also the consumers that have suffered from this as well, and that is through the fact that 20 years ago, people operated on 33 per cent gross profit or a 50 per cent mark-up. Now the average mark-up certainly for this

retailer is 110 per cent which gives a gross profit of around about 55 per cent, and that's the only way that they're able to survive.

So it shows that over this period of time that the market has been controlled and managed quite differently to what would be happening outside in the normal market structure. At the same time, the over thing that's helped this retailer survive is he's diversified and traded outside the centre, and interestingly enough, in the area where he's traded in - and it's in food; so it's in catering - his income has increased each year by at least 10 per cent. Where it's a real genuine market and they're competing with a whole wider set of people, there is still the capacity to improve. So the efforts of the centre is being returned to the person that's actually putting the effort in.

How many benefit from the decisions of the landlord and management in these instances? I would say to you that that's only been one, and that's landlord and management structures. Management structure almost guarantees that these situations will occur, because if you look at the relationship between the management and landlords in shopping centres, you'll see that most of their income comes from a percentage of extra revenue that's generated from the centre itself. That's not a bad incentive I suppose to have somebody working strongly for you, but that's how it's generated.

That's one of the reasons why you will see that Westfield have, certainly in Australia, limited ownership of centres now, but they have a very strong presence in the area of management because that's where the money is. So there is an absolute incentive for the management that's being paid for by the retailers to manage a successful centre, as is the responsibility, seeing that they're managing it basically for themselves and getting no benefit themselves from it.

Many of these decisions are often no more than proposals to wealth from one group to another. It is the association's belief that there is sufficient evidence in the market for the Commission to address the market failure that is occurring in many of these shopping centres. On the one hand the Commission considers the case for greater prescriptiveness in tenancy legislation is weak. Much of the existing disclosure statements have had little impact on improving the decision-making process of retailers as they have been so general as to be of almost little value; things like there may or may not be changes in tenancy mix, there may or may not be a charge on electricity and energy usage, things that are so general that they have no value or they're meaningless.

So that's a general overview. I've just then gone quickly through the draft recommendations one by one. The first draft recommendation which is basically about enhancing the use of simple language in all tenancy agreements, the response

to that is we agree to both of your responses. However, over the years, leases have used simple language, but many retailers are still confused by the lease documents. So just by making the language simple won't necessarily solve the problem. Although the language might be simpler, the documents are still far from transparent and are far too long; for example, in areas like rent clauses which are not clearly understood, percentage rent formulas that are definitely not understood by the majority of retailers the I've spoken with, and rent obligations just to name three.

The second part, the better definition of a unconscionable conduct needs to be generated, and you mention that in your findings, and we support that, but my question is where is there evidence that by doing this, it will lead to significantly lower compliance and administration costs? I just would be interested in seeing what evidence you have to show that there will be significantly lower compliance and administration costs through that.

Draft 2, again it's similar to the first one, but it's to encourage nationally consistent models for retail tenancy leases for tenants and landlord disclosure statements. Until you have a nationally agreed legislation, I suspect the first part will be hard to implement, and the second part is institute nationally consistent reporting by administering authorities on the incidence of tenancy inquiries, complaints and dispute resolutions.

Our response is there's not much difference in the second as to the first, and we agree with part 1 of it. Part 2 will add little to the economic efficiencies of the market in our opinion. I don't think certainly retailers will get much direct benefit from it or access it at all. Questions I have are how many dispute resolutions have occurred in this state during the last five years, because the - - -

DR BYRON: Do you know the answer?

MR BALDOCK (SRASA): Yes.

DR BYRON: Can you tell us?

MR BALDOCK (SRASA): I think there's been one. It's been an absolute failure, because people haven't accessed it, and there's got to be a willingness on both parties to actually solve the dispute. That's been an absolutely failed situation. We put that in when I was part of the Retail Leases Advisory Committee that actually put that into the legislation, which proves one thing I guess, that sometimes you put stuff in and it's of no value. We felt that might be a useful way to get low resolution of issues.

DR BYRON: I don't want to interrupt you, but - - -

MR BALDOCK (SRASA): No, you do.

DR BYRON: No - can you come back to that later on, because that suggests that the situation in South Australia is quite different from the situation in most of the other jurisdictions, and I'd like to understand more about why that's different.

MR BALDOCK (SRASA): Certainly.

DR BYRON: Let's keep moving for now.

MR BALDOCK (SRASA): The TPA encourages small business to bargain collectively. Landlords and management will only meet with individuals. So how can they ever utilise the ability to bargain collectively. You have in your care a letter from a previous meeting showing exactly that point where there was certainly no willingness at all to meet with a group of retailers on an issue, and that wasn't on a rent issue.

I put a comment on the feasibility and benefits of lease registration which was in your document. This is available in this state at present, and is recommended by us to all retailers of leases over three years in duration to have their leases registered. As landlords threaten legal action if retailers discuss rent or other conditions of their lease - and you've got evidence of that given to you - with other retailers, this enables retailers to compare the economic advantages that retailers might have been given by the landlord and management. By that I mean if they are registered, at least you could access that information.

What I'd like to see is a fund put aside here someone actually puts and collates that information together as a tool for retailers when they go in and actually bargain with the landlord, because certainly at the moment, we work very blind and are told lots of stories that can't be substantiated about rent levels, and I've got there the service where this is made available to the market would be very useful in the aid of good decision-making. That would be something that would be of benefit to retailers.

Draft recommendation 3 which virtually says to relax key restrictions in retail tenancies to better rely on the regulation of the retail tenancy market for the broader market for commercial tenancies, we strongly agree with that. Terms of reference - - -

DR BYRON: Disagree?

MR BALDOCK (SRASA): Strongly disagree with that. Did I say agree?

Strongly disagree with that. The terms of reference and the Commission's approach do not quite align. Sorry, now, we strongly disagree with that. Your terms of reference and your approach to me didn't seem to quite align. On the one hand, the terms of reference - and this might be just being pedantic - seemed to indicate that they want to know the relationship between the broader market for commercial tenancies and the retail tenancy market from the terms of reference, but your report seems to infer that straightaway it's just a broader set of the landlord of the Commercial Tenancy Act. Retail tenancy is just a subset of it, and I don't think the two are quite the same. So whether that's a conclusion you've drawn or whether that's a stance you've taken, I'm not too sure. It's not too clear from my reading of your report.

The questions I have here are what are the broad set of landlord-tenant relationships that occur in commercial tenancies that are discussed above where it says retail tenancies extend to a much broader set of landlord-tenants relations. I'd like to know what they were. I don't think it's explained in that document. Much of the evidence put forward by the Commission appears to be contradictory. For example there's something that says the Commission has taken the position that the difference in size on negotiating -

It is not really evident that difference in size or negotiating power constrain the efficient operation of the retail tenancy market, because it needs to be recognised that considerable differences in negotiating power are not a unique feature of the retail tenancy market."

Then it says a little bit later:

Where there is a single landlord and many retailers in the retail concentration as in shopping centres, the overall success of the centre is largely the responsibility of the centre landlord. In less concentrated retail spaces, these are not as significant, with leases between individual landlords and tenants formed via negotiation, as for any business contract, where neither the landlord nor tenant has a controlling influence on the surroundings.

Two things seem to be contradictory here. On one hand they say they're no different to other areas, and in this instance, it says that there is a difference between the two areas. So I felt there was a conflict that you could look at between the two.

The question I have is, is this not a very strong argument that the situation and market forces are significantly different to any other form of commercial leasing that should be treated accordingly? Does the responsibility of the overall success of the centre include all participants, that is, customers, retailers, management and

landlords or does it only include the latter two? This is stating that the most significant influence in the success or otherwise of a shopping centre is determined by the behaviour of a landlord or their management. What redress would you suggest when the landlord/management get it totally wrong?

For example there are two centres at the moment that have both had huge problems in the centres because of poor redevelopment plans. They're not very far away from one another, and they're not the Westfield ones, and the issue was materially wrong right from the start. They made a fundamental mistake and they have absolutely ruined the trade of most of the retailers in that centre. When the redevelopment opened, most of the existing retailers had their figures dropped by between 30 and 50 per cent overnight, and those figures have improved marginally, but not very much.

People that were put in the new area are all struggling. Several have already walked out. So obviously the mistake was made that the whole set-up was totally wrong, and I talked about the turnover figures for a 20-year period, and the impact of tenancy mix on percentage rent. We often talk about rents being very high, but they're often made high by decisions made in tenancy mixes rather than by decisions that are made at the point of signing a lease. The draft finding:

Concentration of ownership and management is not especially high at a state or territory level, although regional dominance of a particular owner and manager may be more apparent.

The question I would have following that draft finding is where has the Commission pursued the significance and the impact of regional dominance of particular owners and manager? If it was found to be significant, where did they endeavour to quantify the likely benefits and costs to all participants as per their terms of reference, and is it more prevalent in all commercial tenancies or retail strips or shopping centres? Does it have an impact on negotiating power in the retail market?

The Commission believes that changes in legislation would involve governments relaxing key restrictions on commercial decision-making in retail tenancy legislation. Before you could really respond to that, you'd really want to know what those key restrictions are so that we can respond to those things. I'm just wondering, has the Commission any idea on what these key restrictions that they refer to are in the legislation.

Landlords, in particular those who own larger shopping centres, do not operate in perfectly competitive market for the provision of retail space. Owners of retail concentration, such as shopping centres et cetera,

compete in an oligopolistic fashion with other landlords. This type of competition suggests that some positive economic rents are extracted -

et cetera. My question to that statement is, is this stating that it is the retailer or consumer that suffers the net loss and economic surplus due to artificially high market rents, and that can be viewed as a market failure. It's not quite clear. Then you've got another statement similar:

However, this does not mean the landlords act as monopolists to retail tenants ... landlords have an incentive to lease all available space to tenants who can, in aggregate, achieve the greatest return. Thus, there is no loss in economic surplus within this more narrowly defined market.

If this is not monopolistic within a particular centre where they have total control of decision-making pertaining to tenancy mix, limitations of usage and products sold by individual retailers, decide on management structure and costs, occupancy costs, airconditioning outlets et cetera, mall leasing, what is? They can also demand turnover figures of all businesses in the centre, and I don't know what other businesses have that in possession. Is this significantly importantly different to retail strips and most other commercial leases? I would suggest it's very different.

In this more narrowly defined market, a greater aggregate is no guarantee that all or any will be achieving a greater return. Surely there are two assumptions; that there is a surplus and that has a widespread impact. In fact could not there conceivably be a market failure in that situation? So to suggest that it goes back into the commercial tenancies thing I think is a retrograde step because there is so great a difference between commercial tenancies and their issues and retail tenancies, particularly those in a shopping centre.

Some years back, the government here formed the Retail Tenancy Lease Advisory Committee, and it was representative of all those participants in the market. All week they probably had something like 12 or 14 participants, and we sat around the table and discussed issues to get the fairer more equitable and more workable legislation in place to what had been there before, which was the Commercial Tenancies Act.

It took a lot of toing and froing, but the one thing that came from it, whether it was good or bad - and I think there was agreement around the whole table that there had to be a marked difference between the two. In fact even when the retail leases section was taken from the commercial tenancies, we found that we had to implant within that a sector for just retail shopping centres, because even the broader Retail Leases Act did not cover the specifics of retail tenancies, and that was many, many hours of toing and froing and, as I say, it was a very representative group of people,

and to go back now and say that one act could cover all I think would be a disastrous way of going. The draft recommendations 4 says:

As unnecessarily prescriptive elements of retail tenancy legislation are removed, state and territory governments should seek, where practicable, to establish nationally consistent template legislation for retail and commercial tenancies available to be drawn down to each jurisdiction.

Our response to that is we agree in principle. However, the final draft would need to be agreed to by a wide representation of the retail industry similar to what I've just explained to you in the Retail Leases Act, and annexure attached for those differences that occur in each state, just different dynamics or different marketing, which may well come through a code of conduct, but I think we would still need an annexure there.

Special consideration for shopping centres similar to that in the South Australian Retail Leases Act would need to be supported, and your idea of a voluntary code of conduct, we support it partially in the sense that we would want an introduction of a mandatory code, national code of conduct enforceable by the ACCC for the operation and management of shopping centres. A voluntary franchise code of behaviour which was in place failed dismally, and the franchise code has been changed and I think made mandatory as from recent times, and it's still in the process of being announced. Draft recommendation 5:

While recognising the merits of planning and zoning controls in preserving public amenity, states and territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

We strongly disagree with this. I suppose the understanding is that if there is more space available for retailing, that will put more pressure on retail shopping centres to reduce rents, which is one of the issues and problems because tenants will have more choice, but in actual fact, what we believe would happen would be the failure of shopping centres, and that's something we don't want to see. We certainly want shopping centres to succeed. So we think this is a very dangerous notion to promote more planning and zoning areas.

As this is one of your five draft recommendations, did you quantify the growth of retail floor space over recent periods? You did have information in there about the number I think where it had increased from 92 to 2006 by approximately 40 per cent, but that was only the numbers. I don't think it was the floor space, and you would need to know what growth is occurring at the moment before you made any decisions of that kind.

The ratio of floor space per capita and how this compares with similar countries, I believe some years ago we, particularly in South Australia, were one of the highest in the world for retail floor space per capita; the trends and returns per square metre of floor space to retailers both large and small and to management and to landlords, and the level of replanning and rezoning that should occur to address your competition concerns.

Did you consider other impacts of additional floor space being provided on the environment, things such as traffic flow? The environment is a hot-to-trot thing, and we know that shopping centres are not small users of energy, and if we had more and more of them, it certainly wouldn't help the situation; traffic flow; the economy in general; ownership - would it encourage the oligopoly of landlords to either buy these sites or develop them to stop progress as has happened with the supermarkets. Both the two major chains are very adept at buying smaller supermarkets so that they maintain their presence in an area and restrict any competition coming into it. So if it's on the basis of competition, it certainly may well fail.

Would it have an impact on small landlords, retailers who have already signed leases. Retailers are in licences for five to seven years. What happens to them when a new area is rezoned for shopping centres and a new shopping centre is built; the impact on existing centres' aggregate that the Commission identified as critical in creating economic surplus.

We have had in an area down the south a new shopping centre that's been redeveloped, but basically it's almost been a new centre because it's over doubled its size - more than one and a half times its size I think. The impact that's had on the surrounding shopping precincts has been fairly major. It certainly hasn't helped competition. People in the existing precincts haven't noticed their rents dropping, in fact it's almost quite the reverse. People in the centre that's built haven't had any advantage with lower rents. So actually all it has done is just flooded the market with extra retail space to the detriment of all the players, including, I suspect, the landlords in the region. So it's certainly had a non-competitive impact on the market. It certainly hasn't helped employment, because there's been so many jobs lost from one that haven't been picked up by the others.

In summary, the arguments in the Commission document appear to be rather academic rather than practical, and they rely heavily on improving efficiency and effectiveness of regulations affecting the market, and dispute resolution procedures and the ensuring savings and benefits that should directly benefit small landlords and tenants. How this benefit will be derived is unclear as there is no quantifiable data to support the argument. The association is very disappointed in most of the outcomes as we believe there is clear evidence of market failure in the industry at the moment,

much of which is not directly related to the signing of a lease by a retailer.

Many of these issues appear not to be investigated by the Commission as are many of the practices that occur in shopping centres to the detriment of retailers. The association believes that recommendation 5 if implemented would be disastrous for the industry as a whole and for the community in general, and that recommendation 3 would be a major retrograde step. We'll wait for the final report, but left in its present form, we will be giving it limited support at this stage.

DR BYRON: Thank you very much for all that, Max.

MR BALDOCK (SRASA): Thank you for listening.

DR BYRON: No. That's been extremely helpful, and I do appreciate the amount of time and effort that you've put into that. Have you got a bit more time?

MR BALDOCK (SRASA): Certainly. My word.

DR BYRON: The first question that I've put to a lot of people is are we right in saying that there's huge fundamental differences between retailing out in the high street or on the strip as opposed to being in one of the large major managed shopping centres; what you pay for, what you get, the rules of the game, if I can put it that way, are actually vastly different.

MR BALDOCK (SRASA): Yes, definitely very definitely, and I think your document supports that. You've got enough evidence and you've taken enough information out - and I've quoted some of it - that shows exactly that point.

DR BYRON: Because - sorry, go on, please.

MR GIERSCHE (SRASA): Just in general, a strip would probably be run by a person who owns perhaps one with three or four shops, whereas your big centre is anywhere between three or four up to - - -

DR BYRON: Hundreds.

MR GIERSCHE (SRASA): - - - hundreds.

DR BYRON: But the fundamental difference as I see it is that if you can't reach an agreement on your lease out on the street, there are dozens of other landlords with similar space within the vicinity, and if necessary you can move across the road three doors down and your customers will follow you, they'll find you, and life goes on.

MR GIER SCH (SRASA): It probably depends what sort of business you're in.

MR BALDOCK (SRASA): It still does.

DR BYRON: But on the street, you're much likely to get a longer term lease, and with multiple options and those sorts of things.

MR GIER SCH (SRASA): Generally.

DR BYRON: Just going back to our reading through all the second reading speeches and soon when the legislation for retail tenancy was introduced all round Australia, it always seems to come back to focusing on the context of the small speciality retailer in the large managed centre. That only represents a small part of the whole big picture of retailing, but it's where much of the aggro seems to occur. Sorry, I'll correct that. There's a lot of argy-bargy out in the street between Mr and Mrs Smith who own a single shop and Mr and Mrs Jones who are their tenant. She won't pay the rent, he won't fix the hole in the roof blah blah blah. But there's all that sort of friction and tension which many people would say is normal in business.

But the legislation isn't really about dealing with that. The legislation is about the phenomenon of the emergence of the big managed shopping centres with lots of carparking, climate control airconditioning, all sorts of places under one roof and a manager, and the fact that they control basically everything that happens within this fortress. We've had so many people, including solicitors, say the old type of lease document that evolved over hundreds of years to deal with retailing on the street doesn't seem to fit very well in this new sort of post-1960 concept of the big managed centre where, when you sign up for a lease on the street, you're basically getting space, and that's all. But if you go into a shopping centre, not only are you getting space, but you're actually paying them to manage the whole fortress, the whole complex. You're paying them to put foot traffic past your door. You're paying them for promotion and all sorts of things. It's actually a quite different sort of a business model.

MR BALDOCK (SRASA): Totally different, yes, but we still rely on the same things that go back to the 14th or 15th century of lease law, don't we?

DR BYRON: The reason I'm sort of flogging this point is that it seems to me that an enormous amount of the problems, the tensions, the conflicts that arise between small tenants who understand how retailing is practised out on the street go into a large centre thinking that the rules of the game are the same, and then actually find out the rules of the game are actually very, very different, and they might have thought that just because outside on the street, you know, you might get 10 years plus five plus five plus five, but if you go into the centre, you get five years, bang.

MR BALDOCK (SRASA): That's right.

DR BYRON: Out on the street there's nobody giving you a two-inch thick fit-out guidelines document. You basically do what you think is necessary. The lawyers have said to us that a lease is really an incomplete form of contract in that the landlord is empowered by the lease to require the tenant to do virtually whatever, but when it has to be done and how much it's going to cost the tenant to do it and what the consequence of that will be are not known to anybody at the time when they sign it.

MR BALDOCK (SRASA): That's right.

DR BYRON: They have said to us it's equivalent to handing over a whole book of blank cheques that you've signed because when you sign that lease, you're actually giving the landlord the power to come back and say, "No, we don't want to lay carpet any more. We want parquetry," and come back a year later and say, "No, we don't want parquetry, we want mosaics," or whatever.

MR BALDOCK (SRASA): That's right.

DR BYRON: People who go into a centre thinking along traditional street retailing lines suddenly find out that what they've signed up to is actually something very profoundly different. There's pluses in that. The turnover and the foot traffic in the shopping centre might be double or treble what you get out in the street. However, there's other strings attached. Does that sound plausible?

MR BALDOCK (SRASA): It sounds plausible, but it's taking a snapshot of now and what was. I stretch over 20 years now and came from a totally different background to retailing. So I didn't know much about the street either. When we went in, we made an economic decision based on information given to us from a lot of experts, and from everything we could glean - we read the document, we had all the support, we looked at all the figures, and we made a decision based on a business proposition that was in front of us, and we understood all the ins and outs, and for the first six or seven years, I would say apart from some small ups and downs, we were in a very viable business.

Over that time our business has evolved several times because we think we're, particularly in our centre, one of the market leaders. The fact that we've been able to survive for 20 years is probably one evidence, and the fact that we were more than encouraged to have a much longer lease by the landlord - I've got good relations with our landlord - than the average indicates that it's very much a wanted creature.

DR BYRON: Yes.

MR BALDOCK (SRASA): Over the last few years, circumstances have changed to make it very much more difficult, and those circumstances seem to be that the demands on us or on the tenant are far greater than they ever were before. They're not disclosed all that well, and they're disclosed in such a manner that they're open to interpretation, and that the practices that actually occur in the shopping centre have changed markedly from what they were before, and the management structure has changed as well markedly to what it was before in the sense that we get more demands from management, but the demands placed back on management are not listened to or not accepted as they were five or 10 years ago. So things have changed.

You could say that's part of evolution of things, and I accept that, but it's not just that these people come in with a different mentality. I think what's changed is it's the notion of leasing a space that I suppose hasn't basically changed all that much from, as I say, the 14th and 15th century or when the law was first established when there certainly wasn't a creature such as shopping centres and management structures. That hasn't changed, and I suspect that that is the real issue. It's the fact that we have something that is very different to what was considered before as leasing of their space. There are certainly a lot more obligations, and maybe if we looked the other way and said is it that we are dealing with something that is substantially different to the average way that we saw leasing and maybe that's the part that should change to keep in pace with what's actually happening.

DR BYRON: I think that's exactly the direction that we're trying to head. I don't think we've ever said or implied that retailers were stupid or lazy, but what we have I guess, the thought that some of them are not as well-informed as they could be about what they're getting into, and particularly those who think they know what the rules of being a retail tenant are based on - - -

MR BALDOCK (SRASA): Prior knowledge, yes.

DR BYRON: Yes, the conventional wisdom, and then they go into a centre. To explore the difference a little bit - if you're out in the street basically a square metre of space along a strip, there is a going rate, the price and all the rest of it. My understanding now of - - -

MR BALDOCK (SRASA): It's market rate. That's what you're saying.

DR BYRON: It's market rate, yes, and if you can't reach an agreement with A, you go to B, C or D.

MR BALDOCK (SRASA): That's right.

DR BYRON: My understanding of the way it works in the large managed centres is that there isn't just a market rate. They can say, "I think that you can afford to pay 50,000, but you can afford to pay a hundred thousand." So if you come to me and say, "But he's only paying 50," I can say, "I really don't care what he's paying. This is between me and you."

MR BALDOCK (SRASA): That's right.

DR BYRON: "And I think that you can afford that." So what that means is that if you're a tenant in a large managed shopping centre, the landlord has actually got his hand out for a share of the net proceeds of your business. If you're still thinking of street, that's outrageous, but if somebody had explained to you that if you go into a centre and the landlord can see that you're trading very profitably, next time your lease comes up for renewal, yours might go up more than your next-door neighbour's.

MR BALDOCK (SRASA): Which we've had legislation in place for many years to say it's illegal.

DR BYRON: In South Australia only?

MR BALDOCK (SRASA): What's it called latchkey or something like that. Something like latchkey.

DR BYRON: Key money, is it?

MR BALDOCK (SRASA): Key money, yes. In a sense it is that, isn't it. If you're saying, "We will do that at a premium," the premium is actually the key money.

DR BYRON: The premium is the rent increase compared to what somebody else is paying. A lot of people have come to us in hearings and said, "So-and-so's rent has gone up by 50 per cent. Therefore there's a problem." The courts could equally say, "No, you were getting a generous rent before, and the market has changed. Maybe it should have gone up by double instead of just up by 60 per cent." The fact that somebody's rent has gone up by 60 per cent doesn't actually prove anything except that the landlord is trying to get a bigger share of the surplus that's being generated by the act of retail trading.

There's a range presumably between the minimum that they're prepared to accept and the maximum that the retailer can afford to pay, and where the actual falls in that range depends on negotiations, and what I think we're all saying is that at the

moment, the landlords hold a lot of the aces when it comes to negotiation. So it ends up being at the top of the range. That is still legal.

MR BALDOCK (SRASA): Yes. Obviously what I said was legal. Key money wasn't, but this is. That's what I'm saying. The thing is we didn't mention at all in our submission there high rents to do with negotiating, because we believe, too, that a rent when you negotiate is a rent negotiated between two willing parties, and you won't see anywhere the mention of high rent except in areas where it says rents have become high because of things such as tenancy mix or redevelopments that are not as they should be or closure of doors et cetera where the rent has become high because of a phenomenon that's been incurred by those who are managing the centre, and that impact has come back on a retailer, and they have no redress.

For example if you introduce - you know what figures are of a particular rent because I have to give you my turnover figures, and you say to yourself, well, there's certainly room for more of these retailers in here, and you place four more in, and my rent suddenly diminishes markedly.

DR BYRON: The turnover.

MR BALDOCK (SRASA): Turnover - rent won't; turnover will diminish markedly, effectively my rent percentage - and that's what's important.

DR BYRON: Exactly.

MR BALDOCK (SRASA): I'd pay half a million dollars rent tomorrow if I knew I had the turnover to justify it. So it's not really high rents. It's a percentage thing, and that's the only thing we talked about in there because we agree with you on some of the points that you made.

DR BYRON: But what you're calling a market failure is that you think the distribution of who gets how much of the surplus is wrong or unfair or unequitable.

MR BALDOCK (SRASA): Unequitable.

DR BYRON: The point is that I guess that - who's pocket the profits end up in, whether it's the landlord's or the tenant's, is a quite different question to is the marketplace operating efficiently, and it's very hard for governments or even Productivity Commissions to say what's the ideal distribution of the proceeds.

MR BALDOCK (SRASA): Yes.

DR BYRON: And you say people with blue eyes should get more than people with

brown eyes or whatever, or that people who have worked harder should get the biggest share of the proceeds, but a lot of the debate is about there's a certain amount of profits to be made out of selling goods to the public, and the question is how much of that does the retailer get to keep and how much of it does the landlord get to keep, particularly when landlords have the power to extract a very large percentage of it, and, the data suggests, have been getting better at doing that, whereas before they might have been happy to take 50 per cent of the profits, they might be getting much, much higher.

MR GIERSCHE (SRASA): They would have several levels of expertise I guess to work continuously at doing that, too.

DR BYRON: They would say that's their job. Their job is to maximise the returns to their shareholders.

MR BALDOCK (SRASA): I was dealing more with the mechanism that allows that to happen. If that mechanism that allows this to happen is in place, for example if there was a mechanism that said there are some obligations, as you say in here, the obligation is it's the responsibility of the landlord. It falls very much on their part for this centre to succeed and be a success. What if it's not?

DR BYRON: Yes.

MR BALDOCK (SRASA): Where is that coming from?

DR BYRON: That's the very next point that I was going to come to, and I think if you get a chance to look at the transcripts from Sydney, Melbourne and Brisbane especially, you'll see that. As you say, the conditions in the centre have been materially changed by the landlord or management after the signing of a lease agreement and to the benefit of the landlord, and on the one hand, the tenant can clearly say, "That's not the deal that I signed up to. You've changed the competition in a way that severely hurts me," but when these cases go to courts, the judges say the leases actually give him the right to do all those things, to vary the tenancy mix or to require you to relocate and all the rest of it.

What we've been thinking about is given that the landlords are quite happy to take a share when the thing works successfully, what about taking some of the risk of down side. What if they change the tenancy mix. What if they change - do a new addition or redesign the carpark and everybody suffers. Where's the accountability and the responsibility for that.

MR BALDOCK (SRASA): That's right.

DR BYRON: People in Sydney said to us given this difference between out in the street, you're just renting some space, full stop. In the street, you're renting some space, but you're also in a way paying for a management package, and that's all right to pay for that provided they do the management and do it well, but to pay for a management package when they screw up and hurt the people who are paying for it, hello, where's the accountability mechanism? Where's the key performance indicators?

MR BALDOCK (SRASA): That's right.

DR BYRON: "We're not just paying a flat rate for rent here. We're paying double the rent or whatever because we want this skilled expertise management package." If the landlord fails to deliver that, where's your comeback. I think that's a pretty good point, and we've been trying to think of how do you put the incentive back on them to require them to get it right or to make good if they don't. If they want to redesign the centre or shuffle everybody around or whatever, they will take the up side if it works but where their share of the down side if it doesn't.

I think you've raised the point of what happens if the centre is sold. You suddenly found yourself in a new centre management who may be better or they may be awful. You didn't get any say in that. If you were, say, strata title owners in that centre, you as the owners might decide who you want to be your manager, and that manager would report to you.

MR BALDOCK (SRASA): That's right.

DR BYRON: But that's not the game we're playing at the moment.

MR BALDOCK (SRASA): No.

DR BYRON: You're just tenants, and landlord A can sell the building to landlord B, and suddenly you get a whole new management structure which could be good or could not be good. Any ideas on what to do about that?

MR BALDOCK (SRASA): Me personally?

DR BYRON: Yes, or the association.

MR BALDOCK (SRASA): Support it strongly. In fact many years ago, we actually looked at it cost-wise and it would have been very viable to do just that, to strata title something, but that's interesting because strata titles weren't around in the 16th century either, but they came into effect because they moved with what was actually happening in society. Whether it's strata title or something similar, I can

understand that what a strata title gives you is the benefits that we really need and should be entitled to and should have some say into the management structure. We should have some say into their performance, and if it is not performing well because we're paying for it, something should happen.

DR BYRON: I've heard of a large strata title shopping centre in New Zealand which didn't seem to be performing very well and none of the incumbents seemed particularly happy with it, but nobody has told me about one in Australia, and you would have thought that if it was such a great idea, somebody would have done it.

MR BALDOCK (SRASA): Yes.

DR BYRON: I can think of many reasons why people would rather have their money, you know, tied up in the business rather than in the real estate or whatever, but it's one way of giving yourself (a) security of tenure because you own the box, and (b) you get a vote on who the manager agency is that you appoint and is accountable to you, not working for somebody else.

MR BALDOCK (SRASA): One of the problems you'd have to face is there'd be lots of obligations not only on the management, but on the strata title owners, too, because you have got there something that's a conglomeration, and the success of the centre is also a part of the retail tenancy mix, which if done well is effective, but if not done well, as I say, can make a huge problem in the quality of that tenure. I'm not suggesting that it would be easy and it would have to be restrictions on both sides. I'm sure something like that can be done.

DR BYRON: But the counter-argument is that the shopping centre model as we all know it now just seems to have become so much the standard that you hardly see any others. You say, "Well, gee, they must be doing something right."

MR BALDOCK (SRASA): And they certainly are. Have a look in the stock exchange, and look at the returns to the shareholders. They're certainly doing something right. Don't look at the shareholders for the small retailers though or their return. The thing is, the reason why it's got that way is there's really no return obligations, and that's what I said before, it's one-way traffic.

DR BYRON: Where's the responsibility.

MR BALDOCK (SRASA): The responsibility is there. There's no obligations on them though if they don't fulfil that responsibility.

DR BYRON: When you were making your comments before, you said should not the landlord via management be held responsible for not fulfilling their obligations to

the retailer.

MR BALDOCK (SRASA): Yes.

DR BYRON: To me that's pretty self-evident, and the question is how do you do that? Is it changes in legislation, changes in lease? Is it through a code of conduct? Is it through having some ombudsman? Is it through - I don't know.

MR BALDOCK (SRASA): But until somebody sits down and assesses those things, it won't be done. All those things you said are probably - you could say yes, yes, yes, yes, but when you put them down, you'll find the best medium to do that. But surely it can be done, and that's why I was hoping perhaps it might come from this report, that something like that might appear as - for instance, this is the way it could be done.

MR GIERSCH (SRASA): I believe one state at least does have a Commissioner, doesn't it?

DR BYRON: Victoria has a Small Business Commissioner, yes.

MR GIERSCH (SRASA): With those sorts of powers I guess.

DR BYRON: Not quite.

MR GIERSCH (SRASA): Not quite, but perhaps should have.

DR BYRON: We can perhaps explore that a bit more. I was intrigued by your comment that the existing disclosure statements have had little impact on improving decision-making in the process of retailers. That again is a bit different to what we've been told in other states. In the report we basically say out of all the things that state governments have tried in the last 20, 30 years to address what seems to be this whole suite of problems about small tenants in big centres, the two things that seem to have worked well were the disclosure statements and dispute resolution, and those are the two things you've bagged.

MR BALDOCK (SRASA): Yes.

DR BYRON: In contrast, all the other things that state governments have tried in the last 20 or 30 years, we can't find any evidence that they actually do any work, and some evidence that they just get in the way. We're still looking for it, but if you say South Australia has got the right of first refusal, ACT has, none of the others have, we should be able to see a difference. Every other state has got minimum lease terms, Queensland hasn't. Can we see what difference it would make. Queensland

and the ACT require a lawyer and an accountant to sign off. You should be able to see a difference before and after - - -

MR BALDOCK (SRASA): Yes.

DR BYRON: - - - and between those that have it and the adjoining states that don't have it. But you look at it - - -

MR BALDOCK (SRASA): Same problems.

DR BYRON: - - - no difference. So all these things which seem like a really good idea at the time and were brought in with the best of intentions by the state governments to help address the problem as it was understood, you know, when we look at them 10 years later and say, "That doesn't seem to have made much difference either."

We're looking around to say out of all these different things that have been tried in the last 25 years, where are the things that seem to have really worked well that all the other jurisdictions might want to follow, we thought the two that we could be very positive an enthusiastic about was alternative dispute resolution and the disclosure statements, and yet those are the two things that you've bagged.

MR BALDOCK (SRASA): Yes, and you yourself have said that in all these different provinces, there's still the same issues, even if these two are good.

DR BYRON: Yes.

MR BALDOCK (SRASA): Whether they're good or not, they might be comfort, but whether they actually are effective is a different matter. The problem with our disclosure statements is they disclose quite a deal of information, much of which you could find anyway, but the thing that I object to is statements in disclosure statements like, "We may or may not" do something, because to me - and I suppose that's what rankles more than anything with disclosure statements, what does that disclose?

DR BYRON: Nothing, and that's why the lawyers in a number of the hearings have said to us, "Look, the disclosure statement should disclose facts." It's a waste of ink saying, "Are your intentions with my daughter honourable?" What's he going to say.

MR BALDOCK (SRASA): Yes, of course it is.

DR BYRON: Do you have any intentions to mess these people around? Of course not. So asking hypothetical what if questions is really - - -

MR BALDOCK (SRASA): That's not disclosure.

DR BYRON: It just doesn't help. It may not do any harm, but it doesn't help much.

MR BALDOCK (SRASA): I'm looking at it as a practising retailer that's gone through the system and looked at disclosure statements over a period of time for myself and for others and gone through them with them, and that is my very firm opinion, that they're as good as the information in there, and often that information is not very useful.

The dispute resolution is very different, and maybe it's the way we do it, but we felt that it would bring about cheap and easy disputes between landlords and tenants. It would be worth your while talking to the Office of Consumer and Business Affairs, particularly - - -

DR BYRON: We have.

MR BALDOCK (SRASA): And you got the same sort of response, that there have been very few - - -

DR BYRON: Yes. Why are we doing this inquiry, because there aren't any problems.

MR BALDOCK (SRASA): That's right, and that's always been our concern as an association. It's giving a false image of the issues and problems that are out there. The question has to be why has there not been any? Is it because everyone is so happy and working so well or is it something else?

DR BYRON: But registration of leases so that people can get access to information, in a lot of states we're repeatedly told that this is the bee's knees. It's going to fix or at least help a great deal, but if you look at New South Wales, Queensland and the ACT where they've had registration, they still have almost the same problems as everybody else who doesn't. So where's the basis for me to say, "Look this is a great idea. It obviously works. Let's make it national," because we can't see any evidence that - you know.

MR BALDOCK (SRASA): Has any of that information been done in such a way that people can readily access it? For example if I wanted to go to shopping centre A, I could go to maybe a government or an office, and it shows me clearly this is the situation at the moment with regard to rents and conditions. Has that been done in any of the jurisdictions?

DR BYRON: Yes. Well, at the moment it's a private company or a number of

private companies that go to the trouble of scanning all the leases off the titles offices and searching, but for a couple of hundred dollars, they'll give you a printout of what the terms and conditions are for 10 other retailers in the centre you're interested in or in your retail category.

MR BALDOCK (SRASA): Okay.

DR BYRON: We've had a very wide-ranging discussion. Victorians thought that registration of retail leases was absolutely stupid, outrageous, and they daren't even think about that because it's completely incompatible with their property and titles. However, a solicitor in Brisbane said you could get a one-page epitome of lease which comes out the same time as the lease itself, both parties sign it. It's got all the key relevant details on one page. It's got nothing to do with the Titles Act and property law. It's purely for generating information. It's on a web site that's easily accessible and searchable within a matter of days, and basically anybody can get in there.

There's still some questions to be answered about what information goes on that page, whether it's only face rents or it also includes incentives or whether it also includes information about outgoings, and there are questions about whether this should be done by a state government agency or by a trader's organisation or by Joe Blow Pty Ltd or by one of the big three accounting companies or whoever, and at this stage I don't really care who does it. But if you think that having these one-page summaries of every retail lease in Australia would inform the marketplace, it might be worth doing, especially if it's really cheap.

MR BALDOCK (SRASA): Yes, it certainly would be. It certainly would be helpful, and again if I could do that, at least I'd understand. What's not understood often, if I'm dealing with somebody that's got a substantially lower rent, they have a market advantage over me for a start, a substantial market advantage.

DR BYRON: He might say, "I'm a really good negotiator. Why should I be penalised because I've been a good negotiator." There are also confidentiality issues at the moment that - - -

MR BALDOCK (SRASA): That's where it comes in again. We've got confidentiality issues, but once we register a lease, that confidential document is open to the public anyway, even in South Australia. So there you are.

DR BYRON: So the question for the politicians is whether the public benefit of having the marketplace fully informed is more important than the private right to two parties to a contract to keep the terms and conditions of that contract confidential. That might be an interesting call for the politicians to make. But the people who

have come to our hearings have actually done a great job of devising or spelling out very quick, cheap, easy system that would generate an enormous amount of information that almost anybody could tap in over the web for very, very little cost. It may not solve all the world's problem, but it may well be - - -

MR BALDOCK (SRASA): It certainly solves the problem that you've identified of people not being well-informed. It's certainly got to make them better informed, doesn't it?

DR BYRON: I really think a great deal of the aggravation comes because people are not well-informed or they have one conception about how it's going to work in the centre, and then they find out actually the rules are a bit different to that. So if they're fully informed about what they're getting into and eyes wide open, then that's a different story.

MR BALDOCK (SRASA): Given all those things, I mention in there that franchising, which has boomed over the last few years, we're finding in many of the centres, and particularly one centre, where they're falling over left, right and centre as well. They're people you would suspect are well-informed, understand the market et cetera, and have had a track record of success, and suddenly they're finding difficulties which are no different to all those that are occurring in the small retailers.

DR BYRON: One of the things that I've learnt in the course of this inquiry is that retailing is extremely complex, very difficult.

MR BALDOCK (SRASA): It is. There's no question of that.

DR BYRON: There are serious risks involved, and not just for tenants. I think if the landlords get it wrong, they can get burnt, too, but the question of where the pain stops. But just moving on slightly, your comments about our - I guess it was our first recommendation, where's the evidence that this really is going to lower compliance and administrative costs, our aim with that recommendation was not about lowering compliance administrative costs. It was actually greatly enhancing the understanding of the tenants and what they were getting into. It's much more about making sure people are fully informed of what they're getting into and what the consequences are. It's not just about bean-counting and saving costs.

Because, as I say, this imbalance of negotiating power that we talked about a great deal everywhere we've been, you know, one side have got expert lawyers and accountants and people who have been doing it every day of their life for the last 35 years. I come into a shopping centre as a small retailer. I may or may not have negotiated one or two, maybe three leases before in my life, but I'm certainly not as au fait with all this as the guy I'm sitting opposite. What are my chances of driving a

hard bargain with him when he's - but exactly the same if I go to a used car dealer. He's doing it every day of his life, I do it once every 10 years.

MR BALDOCK (SRASA): Yes.

DR BYRON: Not to suggest that shopping centre executives are like used car dealers. That's a very poor choice on my part, but there are often situations where if I go to a bank or insurance company, they know an awful lot of stuff that I don't.

MR BALDOCK (SRASA): That's right.

DR BYRON: Because they're the professionals. They do it every day. I don't. But it doesn't mean that I'm going to get burnt every time I deal with a bank or insurance company.

MR BALDOCK (SRASA): The language has been made simpler over the years. Over that 20-year period, it certainly has improved in that, but the result isn't improving. So there's still something wrong, isn't there.

DR BYRON: Which would be what? What we're really drilling down to is to diagnose exactly what's going on so that we can then come up with something that will actually deal with it, because I think that a lot of the things we've been trying in the past, you know, we were putting bandaids on the symptoms without actually understanding the nature of the beast.

MR BALDOCK (SRASA): I think that's part of it. Maybe the structure is still - it's a simpler document, but it's still in a similar format to what it was 20 years ago, but it's only simpler now, and perhaps it's the format of the document that's the problem. If it was put that the obligations - for example, the three I picked out are the three that I most commonly talk to people about that had no idea what it really meant or what the obligation was. Perhaps it's needed. Very clearly these are your obligations and this is when they happen, and they tend to be in those areas identified.

One is refit, and understand the level or extent that the refit would actually take and who was going to be doing what and the likely costs of it, and that often gets people into huge problems. The other problem is the percentage rent formula. I had somebody that had been in the industry for as long as I have. He suddenly was hit with arrears in rent that were put down to percentage rent, and he swears that he looked at it three, four times, and he'd interpreted it totally differently to what it was, because it wasn't clear. It took us to sit down - and my background has been probably allied more to mathematics than retailing in the past life, and for me it was a rather complex issue to explain to him what it actually meant.

The other one is the deficit obligations. They don't understand what actually is the liabilities for them if the lease is not renewed or they tend to walk away from it, what the costs are and what the whole issue means, and yet it's in fairly simple language, but the understanding isn't there. Perhaps it's because it's not put in the right format, that, "These are your obligations at the beginning of the lease, and this is what it means."

DR BYRON: Coming back to this difference in knowledge and therefore power, if I'm going into retail, I'm thinking about brand, logo, product, supply, staffing, OH and S and about a thousand other things, and the lease.

MR BALDOCK (SRASA): That's it.

DR BYRON: The guy I'm sitting opposite thinks only about the lease.

MR BALDOCK (SRASA): Yes.

DR BYRON: He knows all that inside out, and for me it's one of 20 things I've got to get right. Of course I'm in deep trouble if I don't get it right. If I thought about that for a while, I personally wouldn't go into a room to negotiate something like that without having a very experienced person with me to hold my hand, and I understand that small retailers now are turning to lawyers, consultants, advisers and whatever.

MR BALDOCK (SRASA): Lease negotiators.

DR BYRON: But going into a negotiation like that, you'd think you'd get the best hired gun you could find I would have thought.

MR BALDOCK (SRASA): You would think so. The problem initially is cost, that they've underestimated what the liability or obligations will be financially, and that often causes problems with people that are not familiar with the area. For those that are already in the system, their problem is financial, because they're still trying to pay off the last refit and now they're facing another one, and again they're trying to cut costs because they've been in the system and they believe they understand what it is. You can't legislate for that.

DR BYRON: No, but there's an old saying that good advice doesn't cost, it pays.

MR BALDOCK (SRASA): That's right. We understand that, you understand that, I understand that.

DR BYRON: We've had a number of other retail tenants, groups and advisers and

associations say that, "The problem with our members, they don't want to spend a few hundred or a few thousand dollars on something that could save them half a million."

MR BALDOCK (SRASA): Perhaps we do similar to the system. If you can't afford it, which many might not, you get the prescribed person for the time, just like you do in the legal system.

DR BYRON: Legal Aid.

MR GIERSCH (SRASA): Lease Aid.

MR BALDOCK (SRASA): Bandaid.

DR BYRON: The other variant on that is you have the equivalent of a health warning that says - actually this Look Before you Lease sign put out by the Department of Workplace Relations and Small Business a couple of years ago, but I've got armfuls of these documents from the ACCC, from all of state agencies, "Do not sign this lease without getting legal advice. You might lose your house," this sort of stuff in big red letters on just about every second page, and yet people still sign things that they don't read or don't understand or whatever, and get caught, and then find that because they've signed a contract, they don't have much redress.

It's one thing for me to say what we need to do is put more information out there so that prospective retail tenants in the centres are much better informed, but I guess, as I say, they've got lots of other things to do apart from reading brochures about retail tenancies saying, "Go and get some expensive legal advice." We actually had a lawyer say to us that if you go to a lawyer who only does suburban conveyancing and ask him about retail tenancy leases, you might end up paying \$10,000 and not getting much advice anyway, or if you only go to an accountant who does tax returns and you ask him to check out your business model and is this rent affordable, it's not just a question of going and getting advice, it's got to be expert advice, and that's not going to be cheap.

MR BALDOCK (SRASA): Yes, and it's difficult to find. There are experts and there are experts. When I deal with my clients, what I start with is virtually a balance sheet, a blank balance sheet, and we put in all the relevant details, and as we put in all the relevant details, we discuss what those details are, and what it actually does is it tells them exactly what sort of turnover they have to generate, and then it breaks it down into a weekly and then a daily turnover figure so they can get an understanding in real terms of what it means to them, and that rent, when the rent goes in, that impacts on the amount of staff they'll need or it impacts on the amount of turnover they're going to require. They can feed in things such as their refit if they put refit in,

and the amortised cost of that refit back to them, and so it goes on.

That I've found has been the most successful of commencing people either to go on with a business or not to go on with a business. I suppose I've started with something that is in their terms of interest and terms of understanding, and that's dollar figures. I don't know how you do it generally, but that model is just an Excel model that I developed that helps people. But that has been more successful, and the questions that are generated there are then relevant to all these things. They can make a decision that is based on not just the first year, but then we work it on the second, third, fourth and fifth year.

DR BYRON: If it's not a rude question, how often do you get the reaction where you go through the sums and the person says, "I should walk away?"

MR BALDOCK (SRASA): 10 per cent if we're lucky. The ones that I do get are the ones I redirect away from shopping centres, and I can think of a classic one that was adamant that he wanted to be a shopping centre. We put the rent in, and then we put alongside it a space that he could also get in a strip actually - it was more of a stand-alone, but near the shopping centre, and he had a product that could be either in or out. It was more destination. We put the two alongside one another, models, and guess which one he chose? The right one.

DR BYRON: I'd like to see more people do that.

MR BALDOCK (SRASA): Yes. It's a matter really of getting people down, and I suppose the point I'm trying to make from it is not that I'm a terribly clever bugger, because if I was, I'd be doing more of that and less of what I do, but it's getting down to something that is relevant and understanding, and within the realms of understanding of that particular person, and I think that is why they are successful. I actually did the same when I got offered a centre within a centre that nobody would take, and it was a substantial financial reward. A lot of my refit was being paid et cetera et cetera.

So I did the same thing for the Australian manager of the centres, and I took it through him and explained why I wouldn't be taken it, even given the generous offer, and I put down the exact same figures to him, and he clearly understood. He said, "I can understand that." He said, "I wish you would do this with all my centre managers so they understood a little bit more about what they're doing. I suppose that to me meant this really does hit a note on people when they can actually see right away that you can set up a model which will prophesise your daily, weekly, yearly terms, not just now, but in five years' time, and you could put in all the things that's in your heart, "I want to make 50,000. I want to make 30,000. What does that mean you'll have to do."

You can play around with the model. So really something of that nature I think - again something that's within the realms of understanding is the one that I've had the most success in. It was rather interesting for him to say, "Could I have that model for my managers."

DR BYRON: You should be selling software.

MR BALDOCK (SRASA): I should be, shouldn't I. The trouble is I can do it for other purposes, but not for making money.

DR BYRON: I mean, that seems to me the most fundamental thing, that if the landlord is offering a lease where the fit-out is going to cost X amount, the term is only for five years, say, and they rent of this amount, and you just look at it and say, "That doesn't add up. If I do that, I get done. One or all of those three things have to change. So if you want the gold-plated fit-out, I have to have at least 15 years. If you want the basic fit-out, yes, I can do it in five years, but only at that rent."

MR BALDOCK (SRASA): Yes.

DR BYRON: What bothers me is if people don't do that sort of homework and due diligence, it's hard for governments to devise a set of rules that are going to protect people if they haven't made that.

MR BALDOCK (SRASA): Yes.

DR BYRON: That's quite different from somebody who's actually just - you know, fraudulent behaviour, but I would hope that most of the time, somebody who's done those sorts of sums, looked at a spreadsheet like yours, would be able to go in with their eyes wide open and - there's still the problem of what happens if there's a disruption or if the centre management decides to radically refurbish it.

MR BALDOCK (SRASA): But at least you know your margin of error.

DR BYRON: Yes.

MR BALDOCK (SRASA): That's really important to have a margin of error there.

DR BYRON: It's sensitivity analysis, yes.

MR BALDOCK (SRASA): Actually that has been done again by some of the people within my centre. Because I can't represent them because the legislation says a tenant can't represent tenants within his own centre, I've had to give them these

details and then teach them how to actually use them and go in and negotiate in this way, and it's remarkable how even the managers acknowledge that this person has done something and knows a little bit more about the situation than the average one, and the results are quite staggering from that.

Where it breaks down is most people can afford my services because I do it for nothing or next to nothing for them, because my desire is not to make money from it, but to help people, otherwise I wouldn't be doing what I do now. Where it breaks down is - and it's back in the system where the experts really do want a lot of money, and many of the experts also say - and I've had issues with them where they'll say, "I want a percentage of your perceived savings, and there are perceived savings, but I want it over a five-year period as well," and when people start to look at this, they say, "We can't afford it," and that's where it breaks down. People look and they make a decision. So again I suppose the answer is it's got to be cheap and readily available, and in terms that people understand, whether it be spreadsheet or words, but it's got to be something that they can identify with and understand.

DR BYRON: Coming back to the point you made about the redevelopment debacles, and when we said responsibility for the overall success of the centre, yes, we did mean all participants, including customers and retailers.

MR BALDOCK (SRASA): Yes.

DR BYRON: We've seen enough examples of where centres with either greenfields developments or with major redevelopments have got it wrong, and I think in a few cases they've admitted that and tried to work with the lessees to sort out the mess. I think there are a couple of very celebrated cases where they stubbornly refuse to admit that they've stuffed up, and in many cases, the consequences are still going or will be going through the courts for years.

MR BALDOCK (SRASA): Again that sends signals to retailers. Why go through all that misery if it's going to be in the courts for years, as you say, and that's actually what happens.

DR BYRON: I think the worst examples that we've come across, it's probably fair to say, are tenants where there has been either a major expansion of an existing centre or they were the first tenants into a new greenfields centre, and everybody had really good expectations of what they hoped the traffic would be, but for whatever reason, it just never eventuated. Three months after being into a new centre and it has become painfully clear to the retailer that they're yet to see a customer sort of thing, and you've got four years and nine months to go on his lease. I guess people can make mistakes in business whether you're inside a centre or outside.

MR BALDOCK (SRASA): Absolutely, and I can your Honour that. I think those sorts of things would be good models to see - that is a first mistake, I can understand it, but what happens with all the subsequent mistakes. As those people move out of the centre, how are others coerced or whatever to come into a centre that's failing, but they don't know it's failing. That's where the real issue comes. In the issue I was talking about, they doubled the size of the centre and doubled the size of many of the tenancy mix categories, which inferred that they were expecting a hundred per cent increase in the figures.

The homework that they did - I talked to them about the homework that they did, and the homework was absolutely obsolete. I don't know where they got it from, and even the expectations of getting a hundred per cent more people was unrealistic. They finished up getting 20 per cent more people which has dwindled to about 10 per cent more people, and yet it's doubled in size. Both the chemists and the newsagents have never had it so good because now they've got more people. Why are those two different? Because chemists are licensed and it's very difficult for them to be duplicated easily.

DR BYRON: One per hundred shops.

MR BALDOCK (SRASA): And newsagents, same thing. They're controlled by an association so they're hard to get into. Those have succeeded, but where people like optometrists, jewellers, fashion shops and food of course have been absolutely decimated.

DR BYRON: In my local centre in Melbourne last year, they doubled the area space, and the number of jewellers went from two to eight. I used to walk through there and I don't recall ever having seen a customer in there.

MR BALDOCK (SRASA): No.

DR BYRON: I wondered every day how do these people afford to pay the rent.

MR BALDOCK (SRASA): One jeweller took \$4 in one day. I think it was a clean or something that they did. That happens in the market and we understand that, but there's no redress. That money is still going in at the same level - that's what I'm saying - to management and to landlord structures. It's not being changed. It's the same amount although the mistake has been made, and we don't know whether it was a genuine mistake or just a way of generating money. But we've talked about that, haven't we.

DR BYRON: I'm still trying to think of ways of sheeting the responsibility, the accountability back to the people who make the decisions. I don't mind them getting

the rewards if they get it right.

MR BALDOCK (SRASA): Exactly, more than happy.

DR BYRON: But they shouldn't be able to stuff people up with impunity.

MR BALDOCK (SRASA): No.

DR BYRON: What's the answer to that to say that if you make changes to the centre, either physical layout or mix or whatever, and there's a substantial reduction - I don't know how that's defined - then the tenant who's affected basically has some redress to either renegotiate the lease, cancel the lease, seek rebates or - - -

MR BALDOCK (SRASA): Yes.

DR BYRON: If they want to do some change in the centre that's going to benefit everybody else in the centre except me and I'm going to be a hundred thousand worse off, then it may be worthwhile for them to do all this change as long as - if they know they're going to have to restore me to a situation no worse than what I was before and they still want to do it, that's fine. But can they make all these changes, right or wrong, and ignore the fact that one of the tenants will be substantially worse off. I don't actually know how or if you can build those accountability measures.

MR BALDOCK (SRASA): I suppose it would start with a disclosure statement disclosing what they expect, what the basis of it was, how many of each category that are going to be put into the centre.

DR BYRON: Yes, but that's still hypothetical.

MR BALDOCK (SRASA): It's hypothetical.

DR BYRON: They could say, "We weren't going to put in another six jewellers, but they insisted, so we let them in."

MR BALDOCK (SRASA): Yes, I understand.

DR BYRON: Should people have some sort of statutory or right under the code to go and say, "You've made all these changes. As a result, more traffic flows through the whole centre, but in the corridor that I'm in, it's suddenly gone dead. Here's my figures. The turnover's down 50 per cent for each of the last three months. What are you going to do about it?" and I guess at the moment, they could say, "Nothing," which I think is probably not - it may be a legal answer, but it's not perhaps an ethical answer.

MR BALDOCK (SRASA): There's fundamental things, like the centre, for example, airconditioned the new wing and has left the other wing unconditioned and the only airconditioning in the centre - - -

DR BYRON: You can see which way people are going to flock.

MR BALDOCK (SRASA): - - - comes out of the shops, and the difference is so dramatic that particularly older people don't want to shop in the older wing in summer because it's just too hot. There's things of that kind that are in there that have a serious impact, and to not think it wasn't going to have a serious impact is gross negligence. But we've got no come-back.

DR BYRON: My question is still how do you build in the come-back, the accountability mechanism? I'm sure I'm not the only person to have been thinking about this, but - - -

MR BALDOCK (SRASA): I've thought of that substantially. It is difficult, but somebody must be able to come up with the right words. You know what you want, or have we still got the wrong structure for these things, that there are certain rights that you've got when you go into a shopping centre for a start, one of which is to expect if there is something like that that happens, there will be consequences if a certain thing happens.

DR BYRON: I guess the related question is if you want to look for those sort of rights of redress, should we try and put them in all the state legislations or should we go for something like the franchising code and say if this happens with that effect, then here's a mechanism for dealing with it.

MR BALDOCK (SRASA): It's closer to a code of conduct, isn't it, really in a sense than it is into legislation.

DR BYRON: If you did have a code of conduct, that might well be one of the things that's in there.

MR BALDOCK (SRASA): Why may I ask did you make it voluntary, not mandatory?

DR BYRON: Voluntary in the sense of - I don't have to answer that question, but I will. Voluntary - - -

MR BALDOCK (SRASA): Don't if you don't want to.

DR BYRON: - - - in the sense of whether you sign on or not, because if you say it's mandatory for all shopping centres, then you have to say every shopping centre, more than five shops or more than X square metres or anything else, because where are the boundaries. If you say any shopping centre owners that want to sign on to the code of good behaviour can do so whether you've got - you know, whether you're Westfield or whether you've just got a little suburban block of five shops.

MR BALDOCK (SRASA): Yes.

DR BYRON: If you want to say, "We promise to be upright and ethical and do the right thing and get a gold star," then it's voluntary whether you're locked in. Once you're in, everything in that code is binding on you and enforceable by the ACCC. You can't pick and choose that, "Clause 42 is not convenient today or I'll pretend that one's not there."

MR BALDOCK (SRASA): No. I understand that.

DR BYRON: The code is binding. The only thing that's voluntary is whether you're locked into it or not.

MR BALDOCK (SRASA): I understand.

DR BYRON: A lot of people have said the real cowboys, the bandits out there, the ones who need to be into it will be the very ones who don't, but what that's actually signalling to the marketplace is that you've got so many retailers who promise to abide by the code of good behaviour, and you've got some others out here who reserve the right to make out like bandits. If I want to go to one of the bandit guys, sure, it might be a bit cheaper, but if he's not willing to sign the code of good behaviour, do I really want to go there.

So the idea was that this would actually give people a signal that certain companies are binding themselves to be straight up and down according to the agreed rules of good behaviour. That's not to say that they won't occasionally get one of their staff who does something outrageous, but then it's on them to enforce that because the CEO has signed off to this code.

MR BALDOCK (SRASA): It's no different to the responsibility of me with my staff.

DR BYRON: Yes.

MR BALDOCK (SRASA): Same thing with their behaviour.

DR BYRON: We're not absolutely wedded to this idea at all, but what we were told by Franchise Council was that once the code was brought in, it really cleaned up the industry. There was a whole lot of nasty things that shouldn't have been happening, but were, and people talk about it as a sort of a circuit-breaker, a way of getting some mutual trust and respect and confidence back in there. But other ideas like having an ombudsman who can actually sort of - you pick up the phone, you ring the ombudsman who comes around in a couple of days and sorts it out and makes a binding ruling. I would imagine the ombudsman, pretty soon after he or she is appointed, would sit down and say, "Where would I draw the line between what's acceptable and what's not?" You've just reinvented the code.

He would have to write something like that anyway. Maybe you bring in the code and the ombudsman or maybe you work out what the rules of good behaviour are and put them in the legislation. I don't really care how it's done, but you'd like to see something like that that puts pressure on people to clean up their act.

MR BALDOCK (SRASA): We certainly support that notion. In our retail leases in South Australia, they do define what a shopping centre is. So it does take out those very small ones. If it was made mandatory, there'd be no reason why you couldn't have that mandatory to a certain level, and after that voluntary. Mandatory means that everyone knows with certainty when they go into the market that there is code of conduct.

DR BYRON: The code applies, yes.

MR BALDOCK (SRASA): Whereas the other way you're still relying on that information getting to people, and we've found with all this other, that isn't necessarily so.

DR BYRON: I think probably the most important criticism is that the people that the code is most aimed at would be the very ones who would try and avoid it.

MR BALDOCK (SRASA): Yes.

DR BYRON: They're not necessarily the biggest.

MR BALDOCK (SRASA): No, they're not necessarily the biggest. I agree entirely.

DR BYRON: A lot of people have told us that the second and third-tier people have been the - - -

MR BALDOCK (SRASA): A lot of our problems and the real problems in the

association are not with the major ones. It's certainly with very much smaller.

DR BYRON: Anyway, we are thinking about it. It has been brought to your attention before and we're still grappling with it. I realise I'm taking up a lot of your time, but I think we've actually talked through a lot of the other things I wanted to come back to. The planning and zoning controls. I don't think we ever intended to say, "Gee, there's a shortage of retail space in Australia. We have to build a lot more shops." Rather the argument was along the lines of if the planning and zoning laws mean that there's only going to be one centre in a district or a cluster of five, six suburbs, people have been complaining to us that that centre's owners/managers have a local monopoly power.

MR BALDOCK (SRASA): Yes.

DR BYRON: All we're saying is when the council decides that there's only going to be one shopping centre, you're actually conferring a mini monopoly. I think the reason they do that is because somebody is willing to pay a hell of a lot more for the ground if it's going to give them a mini monopoly than if they're just going to be one of a dozen different property developers in that area.

So the question about planning and zoning controls - we realise there's very good reasons for them clearly in all the ones that you've put there, but maybe the people who are doing that aren't conscious of the fact they're actually creating the situation that so many retail tenants have complained about; that if you want to operate in this new area, the five new suburbs that have been put out there, there is one shopping centre which is owned by one company, and you either deal with them or else you're not there. We're not saying repeal all the zoning laws. That would be a really stupid thing to say.

But we're saying when you do that, think about the implications of only having - imagine if there was only one shopping centre that owned all the retail space for the area around Elizabeth or something, that would give them a huge catchment, and basically people in that area would have very little choice but to come to that big centre. If there's retailers that want to be in there, there's only one person who owns it. You can easily predict what the negotiations will be like.

MR BALDOCK (SRASA): It's true that when one shopping centre sets up in a region, it not only has a monopoly within the centre, but it has close to a monopoly of the region, and I'm thinking again down the south it's exactly what's occurred, and that's certainly just made it strip shopping because of it, and it's the very reason why they expand so that the bigger they are, the chance of anybody else coming in where there's planning laws are minimal. So once you get big enough, by the very size of it, you're not going to come in there.

Woolworths are classics with setting up a major supermarket somewhere, but to cover their bases they make sure they have all the little mini ones around, too. So you still wouldn't stop under that circumstance. You wouldn't stop that sort of thing happening, buying up the mini ones and controlling them anyway, nor would it probably help just by sheer market size that anyone would want to try and challenge them in that area.

DR BYRON: If you think of the famous Chadstone in Victoria, it's like a castle surrounded by a big moat that's called the carpark. So if you're not inside the castle - - -

MR BALDOCK (SRASA): That's right.

DR BYRON: Outside the moat is kilometres of dormitory suburb, of houses.

MR BALDOCK (SRASA): Yes.

DR BYRON: So you either pay the premium to be inside Chadstone castle or you're five kilometres down road at the nearest tram stop or something. That doesn't give any retailer the right to be able to say, "If I can't reach a mutually acceptable deal with my landlord here and just going to move across the road or a hundred yards away" or whatever, you've got to move five K away and be separated by all those houses and all that carpark.

MR BALDOCK (SRASA): Many of the small retailers in shopping centres are not sustainable outside anyway. There's a few that are more destination ones, so they really haven't got that opportunity. I think it's more of a size one. Once they become such a size, they become monopolistic and I don't know how planning laws will make any more space. If somebody put a similar one which gave people the option and you were over-spaced, that's why I asked the question have you looked at the amount of retail floor space we have per capita, and how does it compare with elsewhere, because if you're going to increase floor space to that extent, you're going to finish up with a lot of empty space which is not going to be good for the industry, retailers or landlords.

DR BYRON: Exactly. That's why I make the point we're not suggesting for a moment that Australia or any state or area is seriously deprived of retail space. It's much more I think about how it's dispersed and where I lived in Melbourne, I could be in three or four fairly large shopping centres that were all within a couple of kilometres away and I was sort of in the middle. So we could choose where we did our shopping each week. That's fine. But if I'd lived in a different part of Melbourne, there would have been only one within a much bigger range. So they

had a certain amount of local monopoly, and presumably that's why many of the retailers wanted to be in there, because everybody in that catchment came there.

MR BALDOCK (SRASA): We're sort of doing the same. I think they've got something about 390 tenancies and they're going to expand to 600 at Marion, which means they're trying to do the same thing. The point I was going to make is do you think the horse has bolted with this.

DR BYRON: Probably.

MR BALDOCK (SRASA): You can't make it mandatory that they reduce size, and I agree with you. It's a mistake that's been made by how they run these big corporations to become monopolies in their own area. The one at Marion is interesting. On the original planning process of South Australia, that was seen to be a small centre and not a regional centre as it's become. It was just to be a small centre that complemented the Adelaide CBD. What actually happened was that the - because the right of approvals were in the hands of the Marion Council, they were more than happy for it to be redeveloped because again they've got a vested interest in it being bigger as well. So the whole system broke down again in that planning. Looking at it how it is, I don't know how it would be practically done.

DR BYRON: We've also looked at, in the USA, places like Houston are famous for not having any planning and zoning controls. So you imagine four of your biggest shopping complexes that you've ever seen basically adjoining each other or even continuous blocks, they also have a lot of vacant space. Rents are arguably a bit lower than in Australia, but that's because it's like there's an over-supply of shopping centre space. That doesn't mean that a retailer is any better off going in there than you would be in a place where there wasn't an over-supply of shopping space.

I'm not suggesting for a moment that we want to go like Houston, and I don't think the - I mean, the UK data is particularly helpful, too. We've got more shopping space per capita in most of the UK that patterns of shopping there are totally unlike what we do here. People walk down to the supermarket every day and come back with two shopping bags. It's just a completely different pattern of retailing in many senses.

MR BALDOCK (SRASA): And many of their centres have gone to greenfield sites outside of villages.

MR GIERSCH (SRASA): Further to what Max said about Marion, too, all the shopping centres around within a five to 10-kilometre radius, they've all put in for another 40 or 50 shops themselves. So they're all trying to grow because of that Marion experiment.

DR BYRON: But that's sort of mutually assured destruction, too, isn't it?

MR GIERSCHE (SRASA): Exactly. So there'll be an over-supply, if ever it gets going.

MR BALDOCK (SRASA): Destruction for all.

DR BYRON: But coming back to the point about why are shopping centres able to offer leases that contain so many terms and conditions at the tenants' expense and tenants are still signing them, one explanation is that, well, there's a relatively small supply of high quality retail space, and there's an awful lot of tenants who would like to be in it. So what we're repeatedly told is that the leasing agents can say, "Here's the lease. If you don't like it, there's 20 other people outside my door who will take it. There you go."

My response to that is if there's a limited supply and there's a large queue of people, one thing you might look at is, sure, we increase the supply of high quality retail space. The other thing is can we inform some of those people waiting outside the door, saying, "Hey, maybe you don't want to be here, because the terms and conditions, it ain't going to be no paradise." The very fundamental - when is their market power, their ability to drive such a hard bargain or to get people to agree to terms that otherwise people would think were incredible unfair. There's very few people offering leases and there's lots of retailers or at least over the last 10 or 15 years, there are a lot of retailers who wanted to get that space in the centres.

MR BALDOCK (SRASA): Many years ago there were dozens of people making a very good living out of selling just shopping centre businesses. Now there's I don't think anyone in the market that is making a living just out of those shopping centre businesses for sale. You would expect if there's a demand such as you've mentioned to get into these shopping centres, there should be a demand for those businesses that are actually in the shopping centres, but it's quite the reverse. There is minimal demand for them.

So what has driven in the last few years this demand, I suspect part of it has been franchises. You go into any shopping centre now, you'll see that a major proportion will be franchises whose business obviously they don't have a franchise outlet unless they're in there. So they will get in. I suspect they've driven up the market somewhat as well. So although there seems to be a huge demand, it certainly doesn't flow through to existing businesses otherwise there should be a line-up for my business and every other business that's there, and there certainly isn't.

DR BYRON: That's a good point. It's also quite possible that the leasing agent is

grossly exaggerating when he's saying that there's all these people waiting outside who will take this package if you don't want it.

MR BALDOCK (SRASA): Yes.

DR BYRON: In which case it might be time for a few people to call their bluff.

MR BALDOCK (SRASA): As I said, you can see what's happened now. The franchises are now - initially they were fine, but in their second and third terms, they're having the same problems as what the small retailer has been facing for some time. Honestly in our centre itself, these major names are just falling over left, right and centre because they can't sustain people in there with not only the rents that have been established and the conditions that have been established, but also the franchise fees as well, and that's causing a lot of heartache.

It's a semi-separate thing, but it's also part of the dynamics that occurred, and I suspect they have kept the shopping centres more viable and created this impression of demand rather much more than what has happened. I've been predicting for some time that there's going to be this major turnaround, and I keep on falling on my face, because it's not.

DR BYRON: It hasn't happened yet.

MR BALDOCK (SRASA): It hasn't happened yet. It has to happen, and I'm starting to see firstly the franchises, and then maybe others will start falling over. It's just an interesting observation.

DR BYRON: That's a good point, Max. I think we probably should draw this to a close, but I genuinely do value the opportunity to bounce ideas and to pick your brains given that you both have so much experience in this. All I can say is we'll go back and we'll carefully consider all the points you've raised and digest it along with all the other points that other people have raised in these hearings, but you've given us a lot to chew on there. So thanks very much.

MR BALDOCK (SRASA): I truly appreciate this dialogue that we've had and the time you've spent with us. It's been two-way, hasn't it? You've invested a lot of time with us as well, and probably now, what you should do in future is have people come in and talk with you first, and then say, "Right, your response now." There might be actually a different response, very different, because it's like everything. You interpret, don't you; you interpret the word. Interpret intent and all that sort of thing, and sometimes you just get slightly skewed.

DR BYRON: A few places where I've been amazed - not you, but other people -

have thought we were saying the exact opposite of what I thought we were saying. So clearly we hadn't expressed ourselves very well. But people were reading in things that I'd never even dreamt of, let alone said. So I think we have to be much more careful with the way we express ourselves. It's one thing for people to know what we're saying and legitimately disagree with it, but it's not really helpful if people have picked up the wrong end of the stick and are disagreeing with that when actually we're in agreement.

MR BALDOCK (SRASA): Little bit like leases, isn't it, you read the document and you misread it.

DR BYRON: Touche. On that note, I think we can draw the public hearings to a close, and we don't have to reconvene anywhere.

MR BALDOCK (SRASA): It's been good.

DR BYRON: Thank you very much. It's been a very nice note to finish on.

MR BALDOCK (SRASA): Thank you.

DR BYRON: Hearings are finished. Thanks.

AT 4.01 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY

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