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PRODUCTIVITY COMMISSION

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

DR N. BYRON, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON WEDNESDAY, 13 FEBRUARY 2008, AT 9.03 AM

Continued from 11/2/08

DR BYRON: Good morning, ladies and gentlemen. Welcome to the public hearings of the Productivity Commission's inquiry into the market for retail tenancy leases in Australia following the release of our draft report last December. My name is Neil Byron and I have been appointed the presiding commissioner for this inquiry. The inquiry began with terms of reference from the Australian government on 21 June last year and examined the operation of the retail tenancy market in Australia. I would like to put on record how grateful we are to the many organisations and individuals who have already participated in this inquiry and shared their years of experience and insights with us.

The purpose of these hearings is to facilitate public scrutiny of the commission's work and to get feedback and comment on that draft report. I do understand that the topics that we're covering in this report are very important for very small businesses, a great deal can be at stake and that passions can sometimes be raised. But we're trying to analyse the evidence objectively to see what's been tried in various places, what's worked, what hasn't, what more Australian and state and territory governments should do or should not do. So the hearings began in Canberra on 1 February, we spent four days in Sydney, then on Monday we took evidence in Brisbane and after today and Friday here we'll be in Perth next Monday and then Adelaide next Wednesday.

Then we'll have approximately six weeks to synthesise all that additional information that we've received, revise the draft report and get it to the Treasurer and the Australian Government no later than 31 March, having considered all the evidence and hearing submissions and all other relevant sources. All the participants in the inquiry will receive a copy of the final report once it's been released by the Government - not the Commission, the Government. That is usually within 25 parliamentary sitting days of when we hand over the final report to the Government.

We always try and conduct our public hearings in the most informal way that we can. The Productivity Commission Act no longer requires people to take an oath when they give evidence, but it does say they should "be truthful in their remarks". As we're taking a full transcript for the record, interjections from the floor aren't helpful but we always give anyone in the room who want to come forward and say their piece on the public record an opportunity to do that before the end of each day's proceedings. The transcript will be available on our web site as soon as it has been checked for accuracy and transcription errors and so on, usually within four or five days of each hearing and a hard copy is also available and there are request forms outside.

To comply with the Commonwealth Government's OH and S legislation I have to tell you that in the extremely unlikely event of a fire we'd all have to take the fire escape down 28 floors. The toilet facilities are just past the elevator the way we came in and to the left and we should all turn off our mobile phones at this point,

including myself.

I think we can now, having dispensed with the housekeeping, get straight down to business. First on today's program we have the Australian Property Institute. Thank you for coming, gentlemen, and for your two written submissions. If you could take us through the main critique that you want to make of our draft report, if you can do that in about 15, 20 minutes, then we can discuss that and thanks very much for your input.

MR SIMPSON (API): I will lead off. My name is Steve Simpson. I am currently the Victorian Vice-president of the Australian Property Institute Victorian division and with me today is Grant Warner, the National Executive Director of our Institute. Our Institute represents 8000 or thereabouts property practitioners around Australia. Most of those are probably valuers by qualification and practice, but we also have asset managers and other people as part of our organisation. Our key issues today are that we first and foremost certainly propose that uniform or harmonised retail tenancy legislation should be introduced in Australia. We are a little bit disappointed to be honest with the initial draft report that our views and comments et cetera perhaps didn't receive the weight we would have liked, given parties with a greater commercial interest and the way they presented themselves, such as the Australian Shopping Centre Council and so forth.

Our reason for that is simple. We are generally an unbiased group. We are fairly balanced in our representation of landlords and tenants throughout Australia in the retail market. The institute is actively involved in all aspects of the market ranging from strip retail centres through to the super regionals. We have involvement in anti-dispute resolution procedures and mechanisms. Our members determine the majority, not all but certainly the majority of any retail under retail shop leases throughout Australia where the parties are in disagreement and our members also meet the criteria of existing state legislation in those states that have it in relation to the specialist retail valuer's definition et cetera.

We consider the market currently in Australia is highly regulated and we're not saying it's a bad thing. It's been brought about after many years of perhaps not terribly good practices in certain areas of the industry. In some jurisdictions we think that the legislation is weighted in favour of the tenant and that's probably understandable because they're the ones who seem to be misled, picked on, call it whatever you like.

Our general comments on the Productivity Commission report are summarised in dot point form in our submission. I won't go through all of them, perhaps I will just pick up a few of the important ones. We felt that the Commission paid too much consideration to parties with vested interest or where those interests are not across the entire retail market and therefore only address a specific sector. To that end

we're alluding to and we do state in some detail further in the report that we felt that it was probably skewed heavily towards the shopping centre industry and to that end the upper end of the industry.

We don't think the Commission has taken into account that the state governments are largely responsible for much of the current inefficiencies as they have focused on existing legislation in major centre owners. If one looks at the history of retail tenancy legislation throughout and in particular Victoria, certainly the original 1986 act was borne out of practices that were undertaken by owners in that period of time. We think that the Commission overlooked the fact that the commercial office market is operating efficiently and we were a little bit surprised at the degree of emphasis that was given to the commercial office market insofar as if one, shall I say, reads between the lines there is perhaps a view that filtered through that the office market should also come under regulation and/or legislation. We don't believe that's necessary. We think the office market generally throughout the whole of Australia operates very efficiently.

DR BYRON: I must say I am stunned that you came to that conclusion. I can't imagine anything that we could have said that possibly gave your idea. Go on.

MR SIMPSON (API): I won't go into specifics now, but that's certainly the view of the committee that the API has formulated that there was a view that the office market - you refer to commercial - - -

DR BYRON: We express ourselves rather badly if you could draw the exact opposite conclusion to what we meant.

MR SIMPSON (API): I'm not speaking on my own so - - -

DR BYRON: Carry on.

MR SIMPSON (API): In fairness you did use the words "commercial market" and we interpret commercial as meaning office, so maybe we've misinterpreted that one word.

DR BYRON: We'll come back to that.

MR SIMPSON (API): There are issues that specifically affect our members which we think do need to be given a lot more consideration. Firstly, there is a requirement - and I will come back to this in a little bit more detail in a moment - but there is a requirement, we believe, for the indemnity for specialist retail valuers when they undertake retail rental determinations. We very much advocate the establishment of a national database of information available to valuers and parties with vested interests, that's landlords and tenants alike. There needs to be a very, very open

market. Currently in Australia only Queensland and New South Wales have registration of leases. That provides a fairly good database for those that have got the time to actually go and search or search leases.

We think it needs to go a few steps beyond that and not only registration of leases as a document, but also other side agreements that do exist in certain sectors of the market, eg, major shopping centres where, for example, any fit-out contributions or other form of incentives are provided to tenants. These are often documented by way of a side agreement which does not come into the registration process. So in Queensland where their legislation is quite specific that valuers are to determine in a rental dispute, the effective market rental value, which means one must take into any concessions, incentives, fit-out contributes, rent-free periods of anything else into account in working through their analyses of their comparable rental data to arrive at a rental value, they are often not able to in fact find out about those side agreements and that information so it makes it very difficult.

In Victoria we don't have any form of registration whatsoever and our members in Victoria are particularly disadvantaged in the fact that this information is not readily available. That's not to say you can't get it, but the time taken and the cost in terms of time spent in obtaining the information, particularly with the privacy legislation and the requirements of the Retail Leases Act in Victoria that information provided by certain parties is confidential and so forth and so on. It is a daunting task in certain circumstances to get that information.

Just moving on to the recommendations in the Commission's report. In terms of the actual recommendations, I won't bother reading those again, we'll just give you our comments and some of this might be slightly repetitive. Firstly, the API agrees that all retail tenancy documentation should be written in simple language. There's enough landlords around now that use what I refer to as plain English leases and they are by far and away the most simple and easiest to deal with in a whole raft of areas and I commend those landlords that have done that. In recommendation number 2 we agree that the state and territory governments should seek to improve the consistency and access to lease information across all jurisdictions. I have said before what that needs, what that requires.

In terms of the pros and cons out of that, we believe it will greatly assist in dispute resolution mechanisms, it will enable the availability and transparency of information. It will inform the market of lease information, will introduce efficiencies, will provide protection for all the parties involved and quite frankly, just sets up - I don't necessarily like the expression, but it will actually create we think a more level playing field than currently exists at the moment.

I touched on before that we thought that the Commission had focused on perhaps one end of the market and that is to say the major shopping centre area and

that, to a degree, is understandable. But we've done some research, at least one member of our committee has done some research and he's from Queensland. He came out with some interesting statistics about disputes and where they emanate from in particular. I will just give you a couple of examples, and they're what we call the super regional end of the marketplace. So for those who are in Melbourne, that's your Chadstone, Highpoint; in Queensland in Chermside, Pacific Fair, just to name a couple of shopping centres; Parramatta in Sydney perhaps. At that end of the marketplace, which represents about 5 per cent of the marketplace in Queensland, only .31 per cent of the disputes emanate at that end of the marketplace.

Conversely, at the neighbourhood shopping centre level, and that's typically a supermarket and perhaps 10, 15, 20 shops at max. That represents about 22 per cent of the retail space and a bit over 11 per cent of disputes from that area. Then you get into the others are everything but shopping centres, so you talk about your strip locations and the like. We have somewhere in the order of just under 40 per cent disputes emanate from that part of the marketplace. I haven't got any hard numbers for Victoria, but my relationship with the Small Business Commissioners Office in particular - I'm fairly broadly across those sorts things and I was present last year when Mark Brennan, the Victorian Small Business Commissioner, presented his findings. The statistic I have just quoted, notwithstanding it's not all of them, but similar trends exist in Victoria and what I was about to say is in what we call the other centres and that's, as I said, the high street-type locations, just under 40 per cent of any of the disputes emanate from that area.

What that tells us is that the legislation that's there at the moment and indeed the focus of the Commission, we believe, is more at the upper end of the market when in fact the legislation is serving that end of the market which probably needs attention most of all, that is that lower end of the market where we have landlords and tenants who are perhaps not across the understanding of legislation as it currently exists and so forth and so on. So we ask the Commission to perhaps review the direction of the report that they've done thus far to perhaps concentrate a bit more in those other areas.

Indemnity for specialist retail valuers. Our institute, as I said, has about 8000 members, many of who are qualified and make up panels of valuers in each state and they invariably pick up the title through legislation of specialist retail valuer. There is certain criteria that one must have to do that, not least of which is five years' experience in the marketplace in which they're being asked to undertake their work. It's a highly litigious area at the moment. We have situations that have occurred in New South Wales, for example, where, until recently, our members were extremely reluctant - and Grant may want to speak about this a little bit later - to actually take on determinations when appointed. The reason being that landlords and/or tenants were, in some cases, lodging what I will call spurious claims, that is, claims just to have a go after the event because they weren't happy.

At the end of the day in the determination I have done enough in my own right as a practitioner to know that very rarely are both parties happy and quite frankly, and in very simplistic terms, if you don't get a phone call after the event you've either got two parties that are so cheased off they just say, "It's not worth an argument" - which I think is probably unlikely, you've actually got it right, in the sense of their perspective, not necessarily right from mine because that's obviously what I do. As I said, in New South Wales you have a situation where virtually no-one would take it on and emanated primarily from the fact that the president of the New South Wales division, some years ago now, was actually sued on the basis of his appointment of the valuer. So out of that in the New South Wales legislation which was reviewed I think about 18 months ago, 12 months ago. If the valuer is appointed in New South Wales by the Administrative Decisions Tribunal, under their legislation currently that valuer has immunity once he's completed his task; that is to say, the parties go back and have a go at him.

I know for a fact that the Office of the Victorian Small Business Commission is concerned about the possibility that somebody might have a go at the Small Business Commissioner and I know that there has been some investigations in Victoria looking into to how we might introduce some legislation that will in fact protect the valuers. In New South Wales that protection does not extend to appointments made by the Real Estate Institute of New South Wales of indeed the Australian Property Institute and there are moves afoot to amend that anomaly to ensure that these valuers get the protection they rightly deserve. So we think that is a very important aspect. If you've got to appoint someone to do this sort of work, to do this job, to be part of dispute resolution, the person who undertakes that role, particularly when their decision under various leases and/or indeed letters of appointment or the basis on which you're appointed, the decisions are quite clearly stated as being final and binding, that should be it, and that's a major concern for us.

The report touched on a national shopping centre voluntary code of conduct. We don't think that has great merit as a blanket statement. As I said before, if you look at where the most numbers of disputes are emanating from, they are emanating from what I will call the bottom end of the market, that is the high street, in which case you haven't got owners who really know what they're doing and in some cases - not the majority of cases - you have a lot of tenants that really do not know what they're doing when it comes to legislation and how it all works. So we would suggest that that code of conduct probably has limited merit.

In summary, in no particular order, the data information available to valuers and other persons involved in this industry in leasing in particular with vested interests there should be a database of information available to them. Time frames to conduct rental determinations are all over the place when it comes to legislation around Australia. In Victoria we have 45 days or some other time frame as maybe

mutually agreed. That is probably at the moment the one that works best around the country because it's very difficult to in fact do them in 45 days mainly because there is some uncertainty as to when an appointment occurs, is it when, in my case, the president of the API in Victoria writes to me and notifies me that I have been appointed to do a determination? If that's the case, then a lot of that 45 days is eaten up by corresponding with the parties, working out the fee basis for the particular role, and indeed providing sufficient time for the parties to make submissions as to what they think the market rental value of those premises may be at the relevant date. I've had situations where for no reason apart from bureaucracy within the organisation that exists - and I'm doing one at the moment at Melbourne Airport which has been on my desk since July of last year and Qantas, which is the sublessor in this instance, has only in the last week confirmed my appointment. That 45-day rule has just gone out the door and it's just nonsense. So we need to look at a way of making the work better for all the parties concerned.

Consistency between jurisdictions, there would be plenty of retailers, I'm sure, that have talked to this and we don't need to say a lot except to say that there are what we believe are obvious economies of scale to have consistent legislation across Australia. Whether that's a federal act, which I believe is highly unlikely, or at least bringing to the fore the requirement for the existing states to have harmonised legislation I think is the absolute minimum. The bureaucracy and the red tape and the various leases that exist is an absolute nightmare for a lot of major retailers who have national representation.

The last thing, and I'll touch on this briefly, is the security of tenure for retailers. This is an area where a lot of retailers - because that's why, I must admit, I work in the retail area specifically, I work with and for a number of different retailers both within Victoria and around Australia, and the biggest single issue for them is when they come to lease renewals. I've got a model which - I'm actually coming back later this afternoon, I'll talk more in detail about it then, but I have what I think is a pretty simple model, that if a landlord instigates a lease renewal process and it gets to the point they've made a written offer and if the parties can't agree on the rent - because that's usually the biggest bone of contention when they renew a lease - then if after a certain period of time, 45, 60 days or whatever is appropriate then there needs to be the ability to have a dispute mechanism apply to that dispute because obviously a landlord wants a tenant there and the tenant wants to be there, then in my view and it's a view of the API that perhaps the most simple mechanism there would be a rental determination that binds both parties.

Landlords, I know, won't like that but the fact is I don't know what else to do because it's too easy for a landlord to say, "Well, if you don't like it, walk away," and tenants have got a lot of money invested in shops particularly in the major shopping centres where the fit-outs can run into several hundreds of thousands of dollars and that's not the answer - it really isn't the answer. Grant, have you got anything else

that you'd like to add?

MR WARNER (API): No, but I'd just like to reinforce a couple of things Steve has said, especially in relation to uniform legislation and issues surrounding rental determinations. As you're aware, a lot of leases have clauses which require in relation to disputes that parties can nominate for the president of the API - in this case our various state presidents - to appoint a determining valuer. We don't technically make an appointment. We make a nomination for a valuer to get in contact with the parties and it's up to the parties to accept that valuer's terms and conditions. As Steve said, the biggest problem we have is in relation to potential litigation after the determination. The fees for personal indemnity insurance and for potential legal fees if the party then disputes the determined value afterwards in some cases are just making it extremely difficult to get a determining valuer. So I think having that indemnity process in place - and that's not to indemnify against negligence because obviously you can't contract out of negligence or anything like that, but where you've had a specialist retail valuer appointed, someone who knows their job and does a professional job in accordance with international standards and the institute's own valuation standards, I think it's only reasonable to expect that that valuer and to that regard the institute is indemnified against the outcomes purely on the basis that one or either party may not necessarily like what the end result is.

The only way around it is have a mechanism in place such as the Family Court has or a number of courts where the court actually - what they do is they appoint a determining valuer, so instead of having either party appoint their own valuer and come up with different results and then go into dispute, have both agree on a single valuer to do the determination in the first instance. That was probably the main issue, and the other one was in relation to uniform legislation would obviously help all sides of the whole retail tenancy, landlord, lessee, and also the determining valuer as far as retail legislation goes.

DR BYRON: Thank you very much. There are quite a few points that you've raised there that I'd like to elaborate on a bit further with you, but I think we need to start with some clarification. Would you agree that the large managed shopping centre segment of the retail market operates according to substantially different rules the strips that we were previously accustomed to prior to the 60s and 70s?

MR SIMPSON (API): I guess it depends to a degree what you mean by rules. Personally I do work across all those sectors and it's certainly different dealing with the major landlords. Generally speaking, they are professional at what they do and there's no question, what we're talking about here is not about beating up landlords, please don't think that for one minute. I think if it had to be a black and white answer, yes, I think the answer is yes.

DR BYRON: Maybe in your personal submission it was that I read that in the large

shopping centres where most leases are for five years and options are as scarce as hen's teeth and there are very, very rarely mid-term market reviews, the sort of market reviews that valuers are typically called upon to do very rarely occurs in those big managed centres.

MR SIMPSON (API): Correct.

DR BYRON: So the sort of work that the API members routinely do is more likely in the strips or the smaller neighbourhood type of centres.

MR SIMPSON (API): Yes.

DR BYRON: I think that explains why the line that we've taken in the report and the way you've reacted to it has developed. It seems to us, having read all the legislation and the second-reading speeches about why legislation was introduced and the various 13, 14 other inquiries into this, that the reason that we have retail tenancy legislation is not specifically about the normal argy-bargy that occurs in the strips between Mr and Mrs Smith the tenant and Mr and Mrs Jones who own the building, it's allegations of systematic abuse of market power by the large landlords who own the big shopping centres. That is the public policy problem and that is the area that we have been asked to address. Some people refer to this as the shopping centre inquiry and I keep saying no it's not, it's about all retail but if you ask where are the allegations of systematic abuse of market power, it all comes back to the very small tenant in the very big centre.

When I spoke to Mark Brennan, he said that 90 per cent of the disputes in Victoria are between Mr and Mrs Smith and Mr and Mrs Jones. But that's not something that this inquiry was set up to be concerned about. There's a system that deals with that. The ADR seems to do that very, very well. What we were asked to look at is the issue about abuse of market power, monopoly power by particularly vis-a-vis small tenants by large landlords. It seems that getting into that involves a quite different set of issues compared to what happens in the normal hurly-burly on the high street. Is that - - -

MR SIMPSON (API): Yes.

DR BYRON: But I think that will also explain why the segment of retail that we've been asked to focus on is not the segment of retailing where most of your members do most of their work, in the strips and the ADR and market valuations. Does that - - -

MR SIMPSON (API): I understand where you're coming from and I don't disagree with, if you like, the terms of reference in relation to the small retailer in the large shopping centre and the usual words, the abuse of power that may exist in those circumstances. We've taken I guess the inquiry's heading or name as the retail tenancy market, so we're not showing you direction necessarily but saying, "Hey,

don't forget what's going down at the bottom end of the market as well," that's all. That's primarily where we're driving.

But can I just say though that the retail leasing market is not just about market revenues either and you're quite right about what goes on in shopping centres because the major landlords some years ago now - probably, I don't know, 10 or more years ago - for their own good reasons, and I'm not saying they're necessarily wrong, decided they would not have options, they would not have mid-term market reviews because they wanted to run their businesses differently. But when you get to the point of - and I touched on it earlier - lease renewals and so forth, and this is where I think the majority of power abuse may currently exist from my experience in any event - and I might just use Victoria as an example, without naming any particular landlord - but under our current legislation in Victoria, not more than 12 months and not less than six months before a lease expires, a landlord is obligated under the act to advise a tenant whether or not the lease will be renewed.

The majority of the major landlords currently, and I've got to say I understand what they're doing because at the end of the day, it's their decision - they will issue a letter about six months out, saying, "We advise we're not renewing your lease and our tenancy coordinating person will be in contact with you to discuss the deficit of your shop." I've got copies of letters like that. Now, to the Just Group or to Sussan or the bigger chain stores, okay, they've got professional people running their property areas and they just take that with a grain of salt. They know full well that come six weeks out, seven weeks out or whatever the case may be, somebody from Colonial or somebody from Westfield or GPT or whoever pick up the phone, ring them up and say, "Listen, we're going to talk to you about a new lease." It's the small parties, as you said, that gets worried about it. I do a reasonable amount of work for the smaller parties as well as a couple of the major retailers around Victoria and Australia and where we're coming from though is that what we're doing is not just talking about what happens in retail determinations sort of in a blinkered sense but what we're saying is, "Hey, there's other things going on out there which need to be looked at," and in terms of ADRs, maybe there's a dispute mechanism required for those lease renewal scenarios.

It may not make one iota of difference to the Just Group or those other ones that I mentioned before, but I can assure you in food courts, to name an example, you do find a reasonable proportion of what I'll loosely refer to as mum and dad operations. I think that is really important. I could cite you examples of what's gone on in some where landlords have turned around - they'll be a year out - and said, "Look, we're not sure if we're going to renew your lease but if you want to do it now and pay an increase," and I don't like using percentages but I will and I'll give you the hard numbers as well, "of circa 80 per cent from 120 to 180 thousand dollars a year, we'll do a new lease now and you'll be sure of going forward." I mean, that's just wrong. These people have got lots of things on the line, not least of which might

be their house or more than one house, for example, and all we're suggesting is that those situations, if a tenant can't reach agreement, then what's wrong with having an independent person come in and decide what that rent should be? That's really where we're coming from, in those circumstances.

DR BYRON: During the hearings over the last 10 days or so, a number of people suggested to us that it's a bit misleading to talk about renewal, that basically it's whether the sitting tenant is often offered a new lease because apart from the two parties to it, basically all the other terms and conditions can be different. I don't want to get bogged into semantics but renewal sort of implies that it's pretty much the same old lease, sort of touched up a bit or updated a bit, but in fact - - -

MR SIMPSON (API): Maybe.

DR BYRON: - - - my understanding of what happens in the big shopping centres is that they're fixed-term leases and some of them now actually say in the disclosure statement, "There is no guarantee that another lease will be offered after this one expires."

MR SIMPSON (API): Yes. Could I say just quickly - - -

DR BYRON: Is that honest?

MR SIMPSON (API): Yes. But I'll say it openly - I've said it in many different forums - there is no God-given right for an existing tenant to be given a new lease, call it a lease renewal or whatever you want to call it, I don't care. I mean, to me, it's a rose by any other name. All we're saying is that if the landlord starts that procedure, then they will think it's reasonable to infer, assume or whatever you like to call it that the landlord has a desire to in fact enter into a new lease with that tenant as a sitting tenant. Look, I've been on the receiving end with some of the people I've represented where a landlord said, "Look, if you don't like it, don't worry about it, we'll move on." That's all very well and good but it's not necessarily that easy. If you've got that much money invested in these shops in terms of the fit-out, amongst other things and other things along the line as well, then from the tenant's perspective, you're possibly in arguably a no-win situation and all we're saying is that if you start the process of a lease renewal as a sitting tenant, then in some cases, there needs to be, we believe - and I believe particularly - some form of dispute resolution there available to the parties because you've started the process, both parties want to be there, let's get the thing resolved.

DR BYRON: Yes.

MR SIMPSON (API): I know I'm labouring on the one point here but - - -

DR BYRON: There's no doubt that at the time of the expiry of the lease and the negotiations about a subsequent one, the small incumbent tenant often is in an extremely vulnerable, fragile situation. As you say, they may have an undepreciated fit-out; in some cases, people have borrowed money over 10 years to start up a business that has a lease for only five.

MR SIMPSON (API): Correct.

DR BYRON: Now, it seems to me that somebody who gets themselves into that situation is basically looking for trouble and shouldn't be surprised when it happens. The retailers that we've spoken to in the course of these hearings have said, "Yes, we know that fixed term means fixed term and so we have to run our business so that at midnight at the end of year 5, we can walk away in no pain." That means that you've got to write off your fit-out or your set-up costs and everything else, you've got to be able to earn a profit and get yourself in a position where you could walk if you had to.

As somebody said to us in Brisbane on Monday, if you look at the lease term, the initial fit-out - and landlords, particularly large centre landlords seem to be requiring more and more expensive fit-outs all the time - and the rent during the term of this lease, let's say five years, somebody coming in will look at that and say, "Look, it just doesn't add up. There's no way, if to get started is that expensive and the monthly rent is going to be X, that I can get my money back in five years." So either the term has to be longer, the fit-out has to be cheaper or the rent has to be lower or all three of those things. But if somebody is very optimistic and says, "Well, I'll sign it anyway," and then they find that at the end of five years, half their assets are undepreciated for tax purposes, they're still paying off the loan to set up the business in the first place, of course they're in an extraordinarily vulnerable situation. I guess what we're talking about is how can small retailers be better informed to not get themselves into those extremely vulnerable situations.

MR SIMPSON (API): I couldn't agree with you more, okay, and to a degree, those people, that type of person should be encouraged through, in the case of Victoria, the Small Business Commissioner's Office or whatever to seek out appropriate advice so that they in fact at the very least understand what they're getting themselves into, absolutely not an issue.

At the risk of being somewhat pedantic, I come back to the point that I'm trying to make here, that irrespective of whether it's a big tenant or a small tenant, most landlords through the course of a lease would know whether or not that tenant is performing reasonably well, has a viable business. I mean, landlords get their retail sales. Most of the big landlords can probably produce, I'd suggest to you within about 90 per cent accuracy, a P and L for that individual shop, no matter who it is or what it is because they've got the data and they have the information to do it. So they

know the various tenants at risk. I mean, I get phone calls from various shopping centre leasing executives from time to time saying, "Look, we've identified this particular shop. We think they're at risk." They're the words they use. "Would you have anybody you're working for at the moment" - they know who I represent from time to time - "who would be interested?" That's fine. It's all fair in war, because you can't help people help themselves necessarily and if they don't choose to do their appropriate homework and get the right advice and everything else, they've got no-one to blame but themselves.

Where I'm coming from - and I keep making the point and I think it's pretty simple - is that if a landlord starts - and he's the only one who can start this, by and large - "it", I should say, not "he" - the lease renewal process, the point I'm making is that if that lease renewal process commences and you receive an invitation to lease or a lease offer or whatever words the various landlords use, once they start that process I believe there is an indication on the part of the landlord they wish to keep that tenant, no matter who it is or what it is and all the rest of it. I take your point that tenant might be under pressure, for whatever reason, financially or otherwise. I understand all that. But what I'm saying is they start the process and if the parties can't agree on the rent - and I'm not talking about the fundamental lease terms in terms of rental increases or promotion fund contribution or whatever else you care to throw up - if the parties can't agree what is considered to be the most important commercial element of the lease, that is the amount of rent they pay, all we're saying, and as I said in particular with my own views, is that there needs to be some dispute mechanism to resolve that impasse.

It is too easy to say, "You've got yourself the problem, you should have known about this. See you later." The landlord started that process and there should be a dispute mechanism and what we're suggesting is that the most obvious one to us, as the API, is that the rent is determined, whether it be by a specialist retail valuer or a qualified accountant, at the end of the day that's up to the legislators to determine. We suggest to you very seriously that the specialist retail valuer is the right person and in that decision - there are one of two ways of doing this and this is up to the legislators, either it binds both parties, and they are stuck with it, or the tenant has - pick time frame - 10 days to accept that determination or walk away.

I don't see how in real terms the landlord is necessarily disadvantaged by that process. What I think it might stop is some of the ambit claims that do emerge from time to time in certain retail use - and you know what I mean by that - where the expectations of the landlord in terms of the rent do not marry up with where the market is at, and I am talking about the retail market in terms of business activity and annual sales, as the case be. We're entering into an uncertain period of time moving forward in the next 12, 18 months. There have already been reports out of Europe about the Christmas sales in Europe were down in the region of 40-something per cent over the previous year. If that filters through to Australia, and we have been

well buffeted in Australia by our own economic prosperities and Western Australia and Queensland and the like, if we start to see that downturn, and I've been through three or four of these scenarios over the last 20 years, I can back it in that landlords are still going to want their increases to get whatever they want because they've got obligations to the trusts that they form part of.

Indeed, probably most of the people in this room have superannuation funds invested in various areas, some of which will be property trusts and the like, they are still going to want to push these things along. I just think there are going to be more disputes in that area than ever before and I make the point again, I just think there needs to be - and I am sorry I keep saying "I", I should say "we" - some dispute mechanism in place to help sort out a problem that can't be resolved by open bargaining between the two parties.

To me it is no different than when you have a market rent review mid-term or exercise an option, the landlord in those situations puts the rent to the tenant, the tenant accepts or doesn't accept it and automatically if you can't agree it goes off to a specialist retail valuer to determine the rent. The procedure at the rent review lease renewal situation, to my mind, is no different except you don't have that dispute mechanism there.

DR BYRON: Can we move on to the code idea that we floated in the draft report. Part of the reason for that was that we thought that there was a need some sort of a circuit breaker to restore some confidence, trust, good faith et cetera particularly in the large shopping centres and the relationships with their small specialty tenants. One of the other reasons for thinking about the code is that although we can see the advantages of uniform national legislation, I think it's extremely likely that we're going to get that and keep it. We did briefly, about eight or nine years ago, have almost identical legislation across all the eight jurisdictions and since then it's diverged and continued to diverge. Every time one state has another review they'll add a few more clauses and so not only are they different, but they're continuing to diverge and under our federation the states have the sovereign right to do that.

However, if there was an agreement, if the most egregious area coming from claims of systematic abuse of market power by the big landlords, if that could be dealt with by a single national code, that would take a great deal of the heat out of this issue and would leave the state retail tenancy units to deal with the normal, day-to-day argy-bargy of business on the strips in the neighbourhood centres and although it looks like being extremely difficult to have uniform national legislation, you could have a code and if it turned out to be not working, if it needed a bit of fine tuning, that could be done by the parties to the code or by an administrator like the ACCC without having to get legislation through nine parliaments and that seemed to be another practicality.

We're not wedded to the idea at all, but the idea of a circuit breaker seems like a good one. Other people have talked about an ombudsman-type role. If there was going to be an ombudsman, whether it was at a state level or at a national level, one of the first things that such a person might do is to say, "Well, what do I think would be a reasonable code of behaviour for the large landlords and for their tenants in the shopping centres?" You might end up with a very similar outcome by a different route. Maybe the retail tenancy unions of each state get an arbitration role as well as a mediation role, that may be another way of doing it.

But just the idea that some sort of code of behaviour that might restore it - some of the lawyers we spoke to in Sydney were talking about a statutory duty to negotiate in good faith which they thought - with that applying to all business, not just retail tenancy - that might do the same sort of thing. So we're casting around for a whole lot of mechanisms that basically fix where this apparent problem is that the landlords in the big centres are much better resourced, much better equipped, much better informed than their small tenants and it seems to be a pretty-one sided negotiation process. Coming back to all the parliamentary speeches, that seemed to be the primary concern when all this retail tenancy legislation was brought in.

We notice that retail leasing went on for ages, probably 200 years before retail tenancy legislation was thought up. In New Zealand they still have retail tenancy and there is no retail tenancy legislation, it all happens basically under common law. When we say, "Why do eight jurisdictions in Australia have special retail tenancy legislation?" the answer always seem to come back, "When these big centres came in then they seemed to have a great deal of market power." So again, I'm not trying to explain why we have - I guess I am trying to explain why we've been led to focus on that part of the whole retail, but keeping in mind that we have to look at the whole retailing sector.

MR SIMPSON (API): Can I just make one comment on that. I guess in very simplistic terms our issue/problem, call it what you like, with what the Commission put down was the fact that they were talking about a voluntary code of conduct and we have a problem with the word "voluntary" in the sense of, "What if you choose not to volunteer?"

DR BYRON: If you choose not to volunteer to be a member of the code of good behaviour, it's like putting up a big neon sign that says, "I reserve the right to act like a total cowboy and ban it and you come and deal with me on a business at your own peril." I suspect that - - -

MR SIMPSON (API): Can I be hypothetical? What if that was Colonial and it involved Chadstone? Do you think it's going to diminish Chadstone's position in the marketplace? You don't think it will weaken the inquiry and so-called - I say so-called but they would say at any point in time you've got a list of people who want

to get into Chadstone. I don't think it would make one iota of difference.

DR BYRON: It may not, but the point is that it signals to the public and to prospective tenants whether or not the landlord has agreed to abide by an industry code of acceptable behaviour. If somebody says, "We are not prepared to sign the code of good behaviour," then that's actually giving a very loud signal and I suspect that most of the big boys would sign it immediately, but the ones who are probably worst behaving, maybe third and fourth tier, are the ones who wouldn't. But at least then anybody who went into that centre said, "I know in the beginning the rent might be cheap, but I'm going to be dealing with an absolute cowboy or bandit because the guy refuses to sign the code of good behaviour." That might be a circuit breaker, that might not be. Coming back to the - changing the subject completely - indemnity for specialist retail valuers. If somebody is doing a commercial valuation, does the same sort of issue arise there? Sorry, not a retail - - -

MR WARNER (API): Office valuation, yes, we do have circumstances where the same outcome where obviously the landlord and the tenant may not agree and there is circumstances do arise where one or other party would seek some recompense. Even at the end of the day, outside of negligence there's very little chance of it happening. It just creates a huge financial burden and legal fees and professional indemnity insurance issues for the specialist valuer.

MR SIMPSON (API): Can I just add to that, that I don't have any hard statistics apart from what I know in Melbourne, so I certainly can't speak with authority nationally, but certainly in Melbourne the lion's share of rental determinations that emanate from the API's offices in Port Melbourne are retail. It seems to be the area where there is more determinations than anywhere else. I can't tell you why, other than the fact that you've probably got a lot more small shopkeepers or whatever that can't deal with the issues as and when they present themselves, and I think it's probably fair to say that from a landlord perspective the majority of what I'll loosely call aggrieved landlords seem to come from the same area of retail and particularly the smaller strip areas, and that's where you end up with people who feel they've been duded, or call it whatever you like, and want to do something about it.

I get phone calls from time to time from both sides of the fence asking me if I'll give an appraisal of a determination, in other words my views as to how that has been done, presented, the logic and everything else that goes behind it, not necessarily whether the figures are right, but that's also part of it from time to time as well. I've had landlords not very happy with me. I've had some tenants that haven't been very happy with me, and one of whom last year decided he'd go to mediation about the result as a first step. Nothing has happened since but he's upset because the rent was reduced and the market evidence at the time demonstrated that's what in fact should happen. There were other mitigating circumstances in the background of all this as well which I won't bore the commission with, but it's a real problem because,

you know, if you've got a fair - and as I said, in New South Wales, earlier on when the president got sued, and Grant probably knows more about that than I do, that put the fear of God into practising valuers - not necessarily specialist retail valuers, but practising valuers generally where there was a period of time when no-one in New South Wales, I'm told, would accept an appointment to determine a rental, whether it was retail or not didn't matter.

DR BYRON: I fully understand the importance of the specialist valuers to dispute resolution process and how indemnity insurance and so on can actually derail that. I guess it's because we have been directed to focus on the area where these claims of abuse of market power - which has led us towards the shopping centres and away from looking so much at the strips, as we said before. But just on the relevance of the valuations, and I said before that it seems to me that the strip retailing and centre retailing are actually quite conceptually different. When I think of a strip, somebody can find out what's the going space per square metre for a whole series of similar boxes along the street and say, "Look, the going rate there is X and if you want to take a business in the middle of this row you should particularly approximately X." If your business makes millions, the owner of that business gets to keep all the difference between what the business earns and what he has to pay out in rent. But the shopping centre model, as I understand it, is that the shopping centre management can work out how much gross profit you're going to make in that spot in your particular line of work and "We want a big chunk of that." So it's possible that I might have the greengrocer here paying X, dress shop there paying 3X, and they're asking me for 8X because I'm a jeweller.

MR SIMPSON (API): That's right.

DR BYRON: So it's got nothing to do with how much per square metre is this concrete worth. It's a question of how much is my business in this space going to earn and how much of that can the landlord get. We've talked a lot about registration of lease and all the rest of it, a way of finding out how much everybody else is paying in the centre or in similar centres, but at the end of the day even if I can say, "Look, every other coffee shop in this centre is paying X. Across 10 coffee shops in Melbourne the rents are approximately X," the landlord can still say, "Yes, but I want 3X from you because I happen to know you make the best coffee, you've got the best waitresses, you've got nice colour scheme or whatever, and I'm not just going to charge you X because that's what everybody else pays." It's actually trying to extract a lot of the value that the business generates, not just go for the benchmark there.

MR SIMPSON (API): Yet when were appointed as determining valuers - and this is across all legislation around the country and indeed within our own valuation ideology and so forth - two things we're always told and in Victoria's legislation it says quite clearly, the determining valuer is to not take into account the goodwill of the business, which in fact can be extrapolated to include the sales and gross profits and all the other

bits and pieces that go with it, and the fixtures and fittings. We are to assume the shop is vacant, empty, available for leasing for the same use or similar use permitted under the lease.

DR BYRON: That seems to me to make perfect sense if we're talking about a strip. But if you go one further, apparently in the US there are a lot of places where the landlord is not actually renting space by the square metre he's, in effect, offering a concession that says, "Okay, Chanel Perfume, you can have a space over there. I don't care if it's 10, 20, 50 or whatever, and I will take X per cent of your turnover for five years. At the end of five years you're out and somebody else will be in there." So the landlord is, in effect, offering the opportunity for someone to run their business in this space and I will take a share of the profits. That is a fundamentally different sort of mindset to me to say, "Here's a cube of concrete and we're only talking about how much you're willing to pay for the space per square metre." My original question about whether the whole business model of being a shopping centre landlord or a retailer in a shopping centre is actually quite different from the one that we've known and loved over the last 200 years of the strip.

MR SIMPSON (API): I'm going to say and not so much you're wrong. The problem with taking on board that sort of view, where it falls down is that if you go in to see Colonial, or Westfield, or Lend Lease, or GPT, and they're leasing a shopping centre, they're going to say, "We want \$1250 a square metre for this shop." The person doing the negotiations on behalf of the tenant, whether it's themselves, or their property person, or someone like me, it doesn't matter, they go away and they throw everything into an upside down cone, if you like, and gurgitate it and everything else and what drops out is a rent that they arguably can afford to pay based on the landlord's requirement, or something close to it. When you come to do determinations in the strips, you are right, no problem.

When you actually do a determination in a shopping centre you need to take into account - this is my view anyway as a practitioner, and I've done a few in some of the big centres where there have been market rent reviews, there's not many of them as you rightly point out, but there are some - one of the things you've got to take into account right at the outset is the level of value in that shopping centre. So for example, if you take Chadstone where the level of value might be two and a half, maybe three thousand dollars a square metre, say, or if you look at Northcote Plaza the level of value in there might be \$600 a square metre, so there are some benchmarks within which you've got to operate. You're required in determining rents to take into account the lease terms and conditions. In Victoria you have an act of parliament that says it goes further and actually prescribes its use argument and everything else, and in some cases you as a valuer can find out information about the sales of some retailers and as the case may be. You'll never find out the profit of a tenant and I think it would be unreasonable on the part of any property person to try and get to that level of information because it's none of their business as far as I'm concerned. But you do take into account the turnovers of this

business and you do take into account the location. There's a whole raft of things that go into determining what that rental value is. It's not just brought down to, as I think you're suggesting, just simply the landlord's view that they can afford X, therefore they should pay X, where in fact there might be recent leaseings that have been undertaken or indeed lease renewals of the same type of use in a shopping centre - and coffee shops are a good example because I was involved in the Starbucks rent review in the middle of last year which still hasn't been resolved because GPT will not provide the determining valuer with the information that he needs to undertake his job because Starbucks doesn't come under the state legislation as a public company. I mean, it's bizarre. They want the thing done - "Okay, give me the information I want." He doesn't want a full schedule, he just wants information about those types of uses and shops, so he can establish what I referred to you earlier, the level of value of shops between X square metres and Y square metres and GPT are saying no, absolutely no way.

The point I'm getting to is it's a whole raft of things. I don't think it's as black and white as simply saying, "Well, the landlord wants to do it this way," or, "The landlord wants to do it that way." The landlord does it the way they want to do it in the circumstances they are confronting at the time.

DR BYRON: Okay. We had a solicitor who specialises in small retail tenancies in Sydney who said to us in the hearings that it seemed to him that the traditional lease which has evolved over the last 200 years and so on, which seems to work pretty well for the strips and the neighbourhood centres, it doesn't quite do it when you come to the big managed centres. He was suggesting that it was almost like you needed something additional. When we talked about that further, he said the reason that you pay perhaps twice as much to have a shop in a centre as you would to have a shop outside on a strip is because the centre management is going to bring in a lot more foot traffic and that's going to generate a lot more turnover.

MR SIMPSON (API): Correct.

DR BYRON: But if you said, "Well, rather than saying that I'm paying \$2000 a square metre for the space," you say, "I'm actually paying 1000 for the space and 1000 for them to actually manage it and make the place buzz and have all these people with their wallets open coming past my door," and then you could say, "Okay, the better they do that job of managing the centre, the more they get paid, but if they stuff up and people stop coming through the door - - -"

MR SIMPSON (API): Of the shop or the centre?

DR BYRON: Of the centre.

MR SIMPSON (API): Right, yes.

DR BYRON: Then the management should be accountable. One of the reasons we started talking along those lines is that the centre management claim to have the expertise of managing the centre and making it all a success, but they take no responsibility if it doesn't work. So the idea came up in the Sydney hearings that if thinking about the rent that you pay in a centre is having this other element that you don't pay for in a strip because you don't get it on a strip, you don't get anybody deliberately trying to manipulate the thing to get you more traffic and more turnover - - -

MR SIMPSON (API): You do in some cases but it's minuscule comparatively speaking, yes.

DR BYRON: Yes, very exceptional.

MR SIMPSON (API): Yes.

DR BYRON: I just wanted to float the idea because it came up in the Sydney hearings and I'm still trying to digest it.

MR SIMPSON (API): I believe that's a good comment. Just a couple of quick things: firstly, what I originally referred to as well-informed retail tenants, I'm talking about specialty shops now and again I'm talking about what I'll loosely refer to as the big boys of that genre, I think almost without exception if they can do deals, which is basically a percentage rent deal or a turnover rent deal and not have a minimum base rent or anything of that nature and it's gross, I think they'd accept it tomorrow, no problem at all because then it addresses some of those problems that you just alluded to. In other words, if a landlord's marketing or whatever doesn't work quite as well, maybe they don't do as much business, therefore they pay less rent. So you've got what I would arguably call a sustainable rent and that's fine, if it happens. But the landlords will never operate in that environment because they've got other responsibilities out of simply running the shopping centre, which I think it's fair to say most of the big boys manage them pretty damn well - you know, Chadstone, Highpoint, Melbourne Central, they're really very efficient units, all things being equal.

I've had debates with various people over the years about this sort of logic, about the landlord doing its bit to get people into the centre, which the tenant does pay for through its promotion levy fund contribution which is over and above their rent, and I've had it put to me on many occasions that, "We're doing our bit, we get the people in the centre, we're getting 15, 16, 17 million people," whatever it is, "through the shopping centre. If they don't walk through your front door, it's not our fault, therefore don't come to us and whinge about the rent if the rent is now proving to be too expensive." In other words, "Look in the mirror. You're not doing the right

job as a retailer." That can be difficult to deal with as well, so for every discussion you bring up in this area, I think there's always a counter one and I don't know what the right answer is at the end of the day, apart from everybody should do the best job they can.

DR BYRON: I guess the specific case is that if the centre management decides to redesign the carpark or something and the number of people going down this corridor in the centre drops by 50 per cent and every retailer in that corridor has their turnover drop by 50 per cent, do those people have a case for going back to the centre management and say, "Look, you did this"?

MR SIMPSON (API): Under current legislation in Victoria, they do have a right; whether they're going to win the argument is a separate issue again, okay?

DR BYRON: Yes.

MR SIMPSON (API): Let me say this - and this is really I think very important from shopping centre management practices, and I won't say who the landlord is, I think it's inappropriate - but there's a certain landlord that issues offers to lease on pink paper which, if you read the so-called special conditions, the current one that's shall I say flavour of the month at the moment is that the tenant, when signing that offer, actually acknowledges, because of the example you just used about things going on in the carpark or alterations coming forward, redevelopments, whatever you like, the current wording goes something like this: that the tenant acknowledges that the rent they've agreed to is less than the rent they otherwise might have agreed to had the renovations, extensions or alterations not have taken place and accordingly forgo their rights they may have for any future compensation. I've paraphrased that.

Now, if you're in the know and you're sitting there with a leasing executive, as I've done on more than one occasion, there's no way in Hades that my client is going to sign that with that in there. Nine and a half times out of 10, I'll get it out, but I'll back it in that most people would read that - and I'm talking about the smaller people now - they wouldn't have a clue. It's not illegal, it doesn't breach the current legislation in Victoria, but it's so far removed from the intended legislation, it scares the hell out of me.

DR BYRON: That's one of the things that would be not part of an agreed code of acceptable behaviour.

MR SIMPSON (API): Absolutely. I've been waiting for my time to say that one.

DR BYRON: Yes, okay. I think in view of the time, we're going to have to wrap up. I thought that we had explicitly acknowledged the very important role that the API members play in the whole retail tenancy market and I thought we'd actually

made quite a lot of use of your first submission, so I apologise if you thought it wasn't enough, but I think we've been over that. I do thank you and the committee who drafted the submissions and all your members for contributing so much to the inquiry.

MR SIMPSON (API): Thank you very much for your time.

MR WARNER (API): Thank you very much for the opportunity to make submissions and to appear at the hearing.

DR BYRON: Thank you very much. I probably should have explained that we've got a couple of our Canberra staff watching over the video but they don't have a microphone at their end, so they're not going to interrupt us and they're not taping it up here, we've just got the transcript.

DR BYRON: Can we move straight on now to the representatives from LeaseWise. When you're comfortable and got your papers sorted out, if you can just introduce yourself and the business for the transcript and then take us through the comments you wanted to make to us. Thank you very much for both your submissions and for sharing all your experiences and insights with us.

MR MACAULAY (LWG): Thank you very much, Neil. Just for the record, Peter Macaulay is my name. I'm the founder and director of Lease Police Pty Ltd and the LeaseWise Group. We are a firm of retail tenants advocates and we've been in operation for nine years. We're obviously grateful for the opportunity to appear before this public hearing. I sat and listened with great interest to Mr Simpson from the API and we have dealings almost on a daily basis with the API in regards to market reviews. I don't think I'm going to take up as much time as those guys did because it was a very wide-ranging and very interesting discussion that covered a lot of areas that I've brought up in my second submission.

Clearly, we hold the view that the current market is unfairly weighted in favour of landlords and there seems to be three key areas whereby we would like to see the Commission make recommendations to change and on a national basis I don't know whether Mr Simpson was here when I just was very grateful to hear what you said and there was a number of points that I'd agree on. I'm not so reluctant to name some of the landlords that we find dealing with particularly difficult. As a group certainly the majors we'd sort of list Westfield, GPT, QIC, Colonial, Lend Lease, AMP as having a similar if not identical view on the area of information that they gather, and that's the first area I'd like to flesh out in regards to the collecting of what's called confidential information under the Act and under the terms of most leases.

We hold the view that confidential information almost specifically relates to sales figures and we would say that the information that's gathered under the term of the lease is often used against retailers, and I'm going to use a specific example by way of illustrating this. Mr Simpson in his submission said that it was uncommon for market rent reviews to be held in shopping centres and I would certainly agree with that, although as the cycle of negotiation comes to an end and regulated usages such as pharmacy, post office, and various Tattsлото agencies and newsagents come up for renewal, certainly our advice has been to include a market rent review clause in the lease and we are using the Office of the Australian Property Institute that directs the traffic, I think in this regard, to conduct the market reviews.

We say that the information held by the major retail lessors that is not made available to the lessees continues to give them an unfair negotiating advantage. We'd like to specifically draw the Commission's attention to the ongoing misuse of data provided to lessees, in particular sales figures which I've mentioned before. Almost on a weekly basis our firm continues to see these confidential sales figures used by lessors

and their agents against sitting tenants to back up assumptions that they may have, or budgets that they might need to achieve on what the tenant can, in the landlord's opinion, afford to pay. Basically, the story goes that a leasing agent would say to a prospective tenant, "I shouldn't tell you this, but shop X turns over \$1 million and based on that the rent will be \$200,000 a year." When we try as we always do to elevate this verbal representation to a written representation to be included in the disclosure statement, 100 per cent of the time the leasing agent or the agent acting on behalf of the landlord will withdraw that representation. So it's not something that can be relied upon as a representation and obviously our advice to our various clients would be to walk away from the deal.

Further to that, the use of sales figures - and we've just undertaken a market review at a GPT centre, it's Parkmore, in Melbourne - and the lessor had requested an increase of rent from \$302,000 a year to \$450,000 a year. There was happily a clause in the lease that allowed for a market review. Some particularly hardheaded negotiations took place and there were a couple of instances where we felt compelled to mention GPT's conduct to the Office of the Small Business Commission and particularly in regards to the information that they were willing to provide and the time frame for which that information was supposed to be provided to the valuer. I would certainly concur with Mr Simpson's submission that 45 days is not long enough. This particular market review from the period of the acceptance of the brief from the valuer and the landlord and the lessee accepting the valuer and his fee structure took a total of 107 days. This was after a value that had originally been appointed by the API had refused the brief because, in his words, he said it was just too hard to deal with the major landlord.

In any event, we provided our submission within the time frame that was required, yet GPT and CB Richard Ellis, to extraordinarily highly evolved organisations, continued to duck and weave in regards to the provision of simple items that the valuer would require, specifically the provision of traffic figures. Every time we do a market review the traffic counters break down. We find this either an extraordinary coincidence or something that is inherently unconscionable by the landlords. The tenants pay for the maintenance of these counters via their outgoings contribution and are entitled to know what the traffic is doing. Again, we find that if the centre's traffic is actually up then it will be included in their little monthly newsletters. When that particular figure stops appearing in the monthly newsletters we know that the traffic is down. In any event the valuation was subsequently undertaken in a thorough manner. Further to the use of sales figures, the legislation in regards to market reviews is pretty clear in regards to goodwill. CB Richard Ellis made part of their submission:

It is appropriate to consider the rent review position which required all tenant goodwill to be ignored. In our opinion there is little to indicate that any tenant goodwill exists. Instead, the trading performance of the tenant is a reflection of the premises location, the recent extension and upgrade of the Parkmore shopping centre, its external frontage and direct

access to the carpark.

Long story short: it's got nothing to do with the fact that you're a regulated usage, pharmacy, you attract customers, you're branded, you've got good staff, you stock well, it's all because our shopping centre is wonderful. Then further into their submission they said:

CB provides sales turnover for the past 12 months to 31 July of 4.5 million.

The turnover in our view is the goodwill, whatever the turnover can generate from the particular tenancy. So what they're saying on one hand is because no goodwill exists, we don't want the valuer to consider the goodwill, but they didn't want the valuer to forget that the \$4.5 million turnover should form part of his ultimate valuation. They then go on to quote the sustainable occupancy cost percentage across the industry. All this information because they have a large portfolio that relates to all categories of retail is at their fingertips. This information is not at the retailer's fingertips. What the landlords are increasingly made aware of - certainly we're shouting it from the rooftops - is that 80 to 90 per cent of the retailers in their shopping centres do not report accurate sales figures anyway. As a bit of a policy for new leases we just say we're removing the turnover information and if it's a regulated usage that is required by the centre - such as a newsagent, or a Tattsлото, or a pharmacy - which is increasingly part of our business, then the landlord has nowhere else to go other than to continue to deal with us and which they are mostly happy to do.

The landlords often to say that they need to gauge the turnover of the centre, it's part of the effective running of the centre, and that may well be true. But what is uppermost in their mind is - I would think, Neil, you're correct in saying that it's, "We want a portion of your turnover, so therefore we need to know what that turnover is," and if that information was to be truly confidential then perhaps we wouldn't need to be so concerned about it as far as this Productivity Commission hearing is concerned. They use it against sitting tenants to say, "Well, are you going to walk away from \$3 million worth of turnover?" and the short answer to that and our advice is always to say, "Yes, we will." The only time you have real power in a negotiation is when the lease is being negotiated, or when the lease is about to end. Our sort of modus operandi, if you like, is to use the same tactics on the lessor that the lessor uses on the tenants. When six months before the lease comes up, if we're not really that interested in staying we just write a letter saying, "We seek an early exit of the centre," and you'd be amazed at the reaction that you get when the leasing executives from the majors say, "No, you can't go, we need you." It's all about the knowledge and knowing how to negotiate I suppose an outcome.

Having said that, leases in their current state are absolutely unsignable, which moves me on to the next point which probably makes it the major reason why they're

unsignable, which is the tenure situation. Again Mr Simpson spoke in my view very well on it. The lessee requires tenure to establish, build up, potentially sell and ultimately sell the business. A five-year term is just simply not long enough. We marvel at the Westfield fit-out guide when it comes across our desk which is now actually officially thicker than their lease document. In discussions with high-level Westfield executives, they say that that is the price of doing business and hanging your shingle in a Westfield centre; well, fine, that's fantastic.

As we deal with regulated usages and franchisors and branded outlets who have spent a lot of money investing in their own livery and how they want to present to the centre, a lot of them are particularly successful at that, find it very vexing to go in and sit down with a Westfield person who is intent on completely redesigning their business to fit a perception of a demographic that the centre is being developed in, no more evident than what's going on at Doncaster. You can see what a billion dollars will buy when they cut the ribbon at Doncaster in a few months' time. For those interstate, you can have a look at Bondi.

Westfield design their centres particularly well but they seem to want to insist on throwing out the efforts of franchisors and their branding and their own way of running things and presenting in favour of their way of doing it. Now, that would be fine if Westfield or any major landlord was prepared to significantly contribute to the cost of the alteration of the fit-out and in some cases, depending on how much the tenant is required, they will do that. But in a minimum fit-out for a Westfield centre at \$300,000, they are now working on an occupancy cost of 20 per cent of turnover as a general rule. If you trot yourself down to the bank manager and say, "I've only got five years to pay this back," the bank manager is going to say "no", which in effect suits us down to the ground because the word "no" is extremely important when you're dealing with landlords.

But as far as recommendations to make the market a little bit more buoyant and sustainable, certainly a minimum term of seven years would be required. We look to the ACT for guidance in regards to security of tenure and Westfield have - all the major owners have - a similar onerous clause not dissimilar to the one that Mr Simpson mentioned on the pink slip, that says that the lease won't be executed unless the party agrees to contract out of that particular agreement. What's required by the major landlords in Canberra is a letter from the lessee's solicitor or someone acting on their behalf that by consent between the parties they remove that security of tenure clause.

Lease term flows into security of tenure. I don't think you can have both. I think the landlords would be reasonable to say that, "We own the centres, it's our train set, we want to play with it the way we want to play with it." That's okay too, as long as the retailers who are in that centre are allowed to hopefully make some money, although that's never guaranteed, but also be able to fulfil their obligations

that are imposed on them if they choose to agree to the conditions that the landlord imposes.

Why wouldn't a landlord want to renew a lease on a tenant that has fulfilled their obligation under the lease? I fondly recall working for Pacific Shopping Centres whose owner, [personal/confidential details withheld] once told me that a lot of people are self-employed because no other bastard will have them; now, that may well be true. But there are also a lot of people who are self-employed in the retail centre who are successful at what they do, who honour their obligations under the lease and who are assets to whatever particular shopping centre they are tenanted in.

I'm still trying to find out why a landlord wouldn't want to continue to be in business with them, knowing that seven out of each 10 retailers who sign leases in new centres will not make it to the end of the lease term. They've already sorted out the wheat from the chaff if someone does make it through the lease term. Now, the landlord, it would be reasonable to impose certain conditions; certainly the payment of rent and any other sort of activity that the landlord would impose to guarantee a renewal of lease, I would think that that would certainly benefit both parties as far as the ongoing business relationship was concerned. So automatic lease renewal is something we've been sort of baying at the moon at for the past five years, but we continue to bay. We'll see if we can get over that.

If the landlord had legitimate reasons for the lessor not to renew the lease but they can't give good cause, then we would like to see that elevated from the verbal to the written. Again, I agree with Mr Simpson's experiences that it's a procedural thing for major shopping centre landlords, no matter who you are, to write to a tenant and say that, "At the end of this lease term, we're not going to give you a new lease." That is something that is trained by leasing executives, having been one myself, that they rely on a certain percentage of people to sort of panic, particularly the less highly evolved retailers, and to think that they have so much business and emotional energy invested in this particular enterprise that they will think that the sun won't come up unless they renew their lease. Now, that gives the landlord an advantage in the negotiations. We keep saying to people who call on us that, "You will negotiate a lease once every five years; the landlord will do it daily," so you have to assume that they have an advantage.

If the information that is provided at the get-go of a loose negotiation, particularly other rents which can be searched in some states but not in others, the turnover of the previous tenancy, information that landlords are particularly reluctant to share are critical to making a pretty important business decision. Now, most of our work, certainly in the Lease Police side of it, of which I control and direct, is in the area of dispute resolution. 80 per cent of my work is negotiating exit strategies for retailers who find themselves in strife. Without getting into specifics, they are so happy to be relieved of the burden of the shopping centre lease that they often have

to take a pretty substantial financial haircut to get out of it, and based on the lack of equity of information when they sign this lease, a lot of them say, "We wish we could go back in time," have a time machine.

So how to approach it? I think that concludes my points in regards to the second submission that I've put in which was a brief submission but I was interested again to hear the idea of a voluntary code of conduct. In the 370 mediations I've attended over the last eight years at the Retail Tenancy Unit, Queensland Dispute Resolution, VCAT, the Office of the Small Business Commissioner, 95 per cent of them have been against major landlords who have a system of dealing with dispute resolution and the issue of a code of conduct, be it voluntary or otherwise, I don't think I'd agree with your view that they would consider it something that they would need to be involved in. The Shopping Centre Council of Australia had a voluntary code of conduct that we would print out and read at all these mediations and cite specifically where an agent, acting on behalf of the shopping centre, had deviated from that code of conduct and consequently, that code of conduct was removed from the web site. I think it's a lofty ideal and I think that a code of conduct per se is a good thing but I would agree with Mr Simpson's submission that it would have to have a little bit more teeth than being voluntary. AMP and Colonial and Westfield and QIC are not so much worried with the public perception of them but are completely driven by the return to their trusts and their share price.

What needs to be done of course is to get the landlords to shift their view away from the fact that it is completely driven by the market forces. QIC, GPT and Chadstone is always set up as an example of how to run a shopping centre because they have waiting lists and all that. That's fine, but they are convinced that 97 per cent or 98 per cent occupancy means that they can charge what they like and if people are dumb enough to pay it, then, "Tough, read the lease and get on with it." But the lease is predicated on information that is not shared, so therefore it's a totally disadvantageous document which is why we are so busy and my phone will have rung three times in the hour and a half that we've been open for business this morning with people with a problem in a major shopping centre.

We don't display a lot of finesse or politeness when it comes to dealing with the major landlords because that's the language and the activity that they respond best to. We are very grateful that the various states have the dispute resolution thing set up which have been invaluable in elevating the problems and attempting then to quite effectively solving the problems that come up. But we don't want to be seen to be saying that the landlord has to guarantee the sales or the rents or the performance of the centre; quite correctly, there is a certain amount of risk and reward that comes into these things but when the landlords use occupancy cost percentages in a very laissez-faire way and use sales figures that are compulsory and then do not return the favour by telling you how the centre is tracking as far as traffic generation, then I think that's a little bit wrong. I think that's about all I'd like to say.

DR BYRON: Thanks, Peter. Let's go through those three areas because I think you're spot on, that those are the three things that have come up with just about every tenant we've spoken to at all the hearings. We've given a lot of thought about the requirement in most of the shopping centre leases to disclose turnover information which, when I first heard about it, frankly amazed me. I thought why would anybody voluntarily hand it over; it's like letting somebody else read your diary or your tax return or something. You said here that the lessors and their agents use it to back up their assumptions, so let's just do a hypothetical thing. Let's assume that we recommended that the requirement to disclose sales figures was removed, all the states and territories agreed with it and they changed the legislation. Then what happens? Have we fixed the most outrageous problem or is it possible that the centre management get out of their offices and they walk around the centre and say, "Look, he's trading well, lots of people queuing up at the counter, people coming out with their arms full and their wallets empty. This guy hasn't seen a customer in there for six days. This guy's stock hasn't moved in the last three days?" - if the centre management are as professional and expert as I think they probably are, they would have a pretty good idea of who's doing how much business.

Sure, I understand why they like to have the actual numbers straight off the cash register printout or whatever, but as I say, it's backing up their assumptions. Now, even if you outlawed that disclosure, they would then basically do the same thing but use their assumptions rather than use the actual numbers. They say, "You just bought a new Benz, you can obviously afford to pay us a lot more in rent. This guy hasn't seen a customer for two weeks. If we squeeze him any harder, he'll fall over." The whole concept behind these shopping centres is to work out how well each person is doing and then try and extract as much of that for the centre as you can. They're not just about renting space. They haven't got a hundred cubes of concrete which they're going to sell at X dollars a cubic metre. That doesn't seem to me to be what the shopping centres are about.

MR MACAULAY (LWG): I don't agree with that. I think that's exactly what they're about. They are there to rent space and to get a return on their investment for the building that they're doing. When the issue of sales figures comes up and we're talking to a centre manager, the first thing we ask is, "You tell me what you earn and I'll tell you if you're worth it as far as our perception of you doing your role is concerned." They always say, "It's none of your business," and we say, "Well, of course it isn't." So therefore you have a budgeted rental figure for that particular hundred square metres and you have a target figure. The budgeted rental figure is the figure that you're not prepared to go below. The target figure is what you will probably get paid your bonus on. Somewhere in the middle of those two figures is a number that both parties will either agree on or, "We'll walk away and you can go fishing somewhere else." The provision of the sales figures would not be a problem if it was treated confidentially which it isn't. If you report too low in the landlord's

opinion, then, "You've only got your five years so we're not going to renew you." If you report too high in the landlord's opinion, therefore your occupancy cost is too low, therefore, "It's all because we've done a wonderful job with the centre and the carparking, so therefore you have to pay more rent."

It's, you know, Little Red Riding Hood, you've got to do it just right or not do it at all, and if you are a required tenant or critical to the mix or an exciting new franchise concept that the landlord wants to put in their centre to be on the cutting edge - do you think Krispy Kreme, when they signed their first leases had a turnover clause? I don't know the answer to that but my strong feeling would be that they didn't because when they selected their first site at Fountain Gate, the red carpet was rolled out for them, probably correctly, because that was going to be a big deal and this was a new thing and the landlords were prepared to say, "We're going to fill the carparks and we're going to get our heads in the paper and the cars are going to be wrapped around for the first six months and that's worth something to us, so therefore what you turn over is your good luck and none of our business."

DR BYRON: But that's also consistent with the idea that the centre management expertise, their main task, is to discriminate, to look and say, "This is an exciting new business, it's going to have the crowds queuing up." They would offer a very generous option to get somebody like that into their centre if they think it's part of the desired mix.

MR SIMPSON (API): Sure.

DR BYRON: If there's something else that's not performing very well or it's a bit tired, they're delighted to see it go. Their whole modus operandi is all about trying to figure out who's doing well, who can afford a rent increase or, "Which category should we have more shops in because the fact that we've only got two of them and they're making a monza means that we should perhaps have four of them," not from the retailers' point of view but from the centre manager's point of view.

MR MACAULAY (LWG): My view on that is that the cycle, which is probably the reason for the Productivity Commission being interested in this section of the legislation, is at an end and has been at an end for some time. The complaints relating to perceived or real unconscionability or the unfair market power that the major landlords wield has reached such a crescendo that Costello, when he was the treasurer, did something about it.

In regards to the operation of a centre, again they know what it's going to take to operate the centre and it doesn't cost the landlord anything to operate the centre. It costs them to build it. The management fees and the cost of operating the centre are paid for by the tenants, as it should be, because they are getting the advantage of the landlord's foresight and business experience, but how much can they continue to

pay? On an average, a Westfield renewal letter that will go out 100 per cent of the time to specialty retailers will have a 70 per cent increase on it. I hadn't thought of it in the terms that Mr Simpson mentioned which I thought was very interesting, but he'd said that once that letter goes out, then that should be very hard to reverse out of. In the process of negotiation, sure, they will go high and we'll go low and somewhere in the middle, we'll do a deal or not; that's fine. But is it unconscionable for a landlord to say 100 per cent of the time, no matter how good you're doing, "You are going to be moved on"? Quite often, it's a very happy day when a tenant leaves a shopping centre, believe me. I've got people naming their kids after me because I got them out of shopping centres, and I'm not being flippant or glib about it.

It goes back to my original point: if landlords want to rent space, and that's the only reason they get out of bed in the morning, anything to do with the marketing of the centre or the presentation of the centre or anything like is significantly diminished which is why leasing executives get paid a ton more money than centre managers. Centre managers are there to keep to the ties on and to protect the security guards and to make sure that everything is okay and protect the landlord from the tenant complaints. The leasing executive is there to generate the revenue. Having lengthy experience in it we continue to be - some of the stuff that comes out of these guys is completely jaw dropping.

DR BYRON: That leads nicely into your second point when you say that a lot of the leases currently being proposed are simply unsignable. I'm sure you were here this morning when I said if you've got a high cost to start up the business and you've got a certain monthly rental to pay and it's only for five years, if the sums don't add up obviously a person should walk away and say, "If it's only going to be five years, either the rent has to be lower or the start-up is less or the fit-out is less expensive, no more gold taps," or alternatively, "If you want that standard of fit-out, either the rent is going to have to be lower or the term will be longer." But these three things are all - - -

MR MACAULAY (LWG): That's fine and the criteria of negotiating a sustainable lease, there is a certain amount of finesse involved, but you're quite right in saying that those things are the key ones. If it's the cost of doing business in a five-star centre like Chadstone or when Doncaster is finished or Bondi or any of these centres - but often the reason they have tenant banks and tenant lists and we don't hear any complaints about Chadstone and we don't, I'd agree with Mr Simpson's submission that the majors don't complain or the retailers don't really complain in these big centres or these prestige centres because they daren't, because they have got it in their head that if they're in the business of retailing they have to be seen to be in these iconic centres. Well done to Gandel, Colonial and Westfield for elevating perhaps three or four centres, in my view, in the country to that status. Good luck to them.

Quite often their tenure in those centres is predicated on them taking less

premises at an inflated rent in centres that aren't so good that the Westfield or Colonial also own. That happens a lot. That if you want to stay in your A-side on the main drag in Chadstone, we're happy for you, but you've got to solve a problem for us at Altona Gate and they do it because they like being in Chadstone because that's what retailing in a shopping centre - if you're in it, you've got to be in Chadstone and that's part of the sizzle rather than the steak in my view.

DR BYRON: Yes, but presumably people can make a well-informed decision knowing what the rules are, "This is the package you're going to be offered."

MR MACAULAY (LWG): Yes.

DR BYRON: You made the comment before that you've got high occupancy rates and long queues to get into some of these centres and you seem to be saying that's not supply and demand.

MR MACAULAY (LWG): People make decisions based on the information that's put in front of them and if they make a decision to go ahead and take a risk and the landlord has acted in a way that's disclosed everything under the terms of the lease - I mean, we don't seek out problems just for the sake of it. I would agree with you, it's better than it used to be as far as disclosure and that is concerned. Having said that when unrepresented parties enter leases and the leasing guy pours honey in their ear, it can be catastrophic. I have seen suicide attempts and marriage break-ups and terrible things.

DR BYRON: We're heard a lot about that in this inquiry. But when the person sitting on the other side of the table has been doing, negotiating retail leases every day for the last 30 years and you've never done it before or you've done it once or twice, it's a bit naive to think you're going to be able to drive a hard bargain, isn't it? Yet it amazes me that people would go in there without having someone as consultant, adviser or whatever, whether it's your company or someone similar.

MR MACAULAY (LWG): There are a number of companies that do what we do.

DR BYRON: In all states and territories there are people who will advise and yet it still surprises me that people go and sign a lease which has consequences of a million bucks and they could lose their house and yet they don't bother to seek expert professional help.

MR MACAULAY (LWG): The analogy I use - and I've just bought a car for my daughter who turned 18 recently and it cost me four grand and I spent \$200 getting the RACV to have a look at it to make sure it was sound. Yet people continue to sign these leases which are contracts often to pay a landlord millions of dollars in turnover because the leasing agent is a nice guy. We're trying to avoid all of that.

DR BYRON: He said, "Don't worry, mate, it will be all right."

MR MACAULAY (LWG): 100 per cent of the time again when the leasing executive, who is a project leasing executive, they are not there when the project ends. They are procedurally moved on to the next project, quite often interstate. So when the fertiliser hits the airconditioning, "No, he's gone." That happens a lot.

DR BYRON: Yes, we had a guy in Sydney last week who said by the time the lease expired there had been executives from the one who said, "Don't worry, mate, she'll be right. We'll look after you."

MR MACAULAY (LWG): We put our dictaphone on and we go and have a listen; we put our dictaphone on the table and we says, "We're going to record everything you say," and they say, "It's not admissible, please turn it of," we just know we're going to get a load of rubbish.

DR BYRON: That leads on to security of tenure. One of the comments that have come up is that when we talk about this in other places is that it tends to favour the incumbent against other people who are waiting to get into the centre who have some great new concept or some enthusiastic young couple who have got a great idea. So if you in some way give an advantage to the people who happen to be there first, does it disadvantage people who want to get in, does it contribute to the centre eventually being old and tired and occupied by a whole lot of people who should be enjoying their retirement somewhere else.

MR MACAULAY (LWG): It's interesting idea that you've raised and one thing that the Shopping Centre Council in general and Westfield in particular - from the very highest levels of Westfield they always say it's a dynamic, ever-changing environment and we reserve the right to be on the cutting edge. But I live in these shopping centres and it's very often difficult to tell the difference between Southland and Fountain Gate and Bondi and Hornsby. They have a system that they work to and a tenancy mix criteria that they work to that is almost like a cookie cutter approach in my view. They look so similar and the same shops are in the same location and the food court has the same tenants that whilst not preventing a major landlord from running the centre the way they want to run it, they obviously know what system works best.

The question that you raise is what's more important to the fair and balance operation of this legislation and the market? Is it more fair to have someone who has put the hard yards in, run the risk, stumped up the money first up, made it, turned it around, is making some money and wants to stay or is better for the community and the market to have someone with access to those premises because they've got a new and exciting idea. I don't think someone with a new and exciting idea would be as

likely to be seeking premises in a shopping centre if they knew from the outset that come five years they're out on their ear no matter what happens.

DR BYRON: But as you said earlier, it's the landlord's train set and they can actually - historically over hundreds of years of contract law the landlord has the right to decide who, if anybody he rents his place to.

MR MACAULAY (LWG): That's right, we don't want to change that. If I had perhaps gone down a different path I would be a property developer and I wish I'd bought Westfield shares in 1961. We don't want Westfield not to make money. We don't want Westfield and the major owners not to deliver a return to the superannuates who invest via their superannuation in a property trust. But what we don't want is to see the building on shifting sands and the downside completely fall on the retailer and there seems to be still a view, certainly in my view, that if it does go awry it is never the landlord's fault. The landlord is expert in all areas of retail except on how to fix the problem and there does seem to be a tree, a lemon tree if you like, that they just pick, "One lemon has gone and we'll get another one." What will change that perception is if the demand for this marketplace, these premises in the shopping centre is diminished. It's certainly my role to see that it is.

DR BYRON: When I ask myself what gives one party - not necessarily in a retail tenancy negotiation - but what gives one party market power is if you've got something the other side want and there's a whole queue of them lining up to get it, you've got market power whether you're selling used cars, or plane tickets, or whatever.

MR MACAULAY (LWG): No, I've been to auctions and you stand outside the auction and your market reserve is 420 and it will go for 650 and that's the market - it's worth what someone is prepared to pay for it. I suppose I come back to my original point, the information that needs to be shared to allow a cogent business decision to be made from the outset, there's very little transparency. Disclosure statements as they're currently drafted quite often make a point of not disclosing anything.

DR BYRON: But if you start from the observation that one side of the table has been doing this for years, has got access to the best lawyers, accountants, advisers, et cetera, the other party may know a great deal about dresses, or coffee, or being a pharmacist, or magazines if they're a newsagent, whatever, but they've only ever negotiated one or two leases before in their life. At first glance it would look a little bit one-sided. The way the legislation I think in the states and territories has dealt with this is to try and control what the better resourced, more informed, more influential, bigger parties do. But the other way of evening it up is to really bolster the people who are poorly informed, poorly advised, who haven't got access to top professionals, or to consumer education in a sense warn them. But I've got armfuls

of these brochures that say, "Don't sign this lease. You could lose your house," and yet people are still signing leases that seem to be - - -

MR MACAULAY (LWG): Putting their house at risk and again, there's Westfield are developing Bay City in Geelong and we've just got a DVD. It's the most fantastic thing. You can virtually go into the new centre and beautiful stock paper and polished and Westfield and happy smiling everything - terrific - and then you turn it over and there's a disclaimer which effectively says, "Don't believe anything that we've just told you. Undertake your own investigations." It would seem to be that a way of regulating it would be to install an onerous condition much like the ACT security of tenure legislation that allows to be contract out, that forces a party to a lease to get someone who is acting for them to take them through it and to read what it says, because you can't contract out of that section of legislation without a letter from your solicitor adviser. That's the only condition that you can do it. Is it ideal? I don't think so. Is it more paperwork? Yes, it is. Is it better than losing your house and your livelihood? I think it is too. If the landlords are compelled to put traffic figures, or feel like they want to disclose traffic figures when times are good, but they don't like telling them when times are bad, then I think that's a bit naughty.

DR BYRON: Okay, I think we're going to have to leave it there, Peter.

MR MACAULAY (LWG): Thank you very much.

DR BYRON: Thank you. Is there anything else you wanted to say?

MR MACAULAY (LWG): No, I'm all talked out, but I am very grateful for the opportunity and we look forward to the findings with great interest.

DR BYRON: Yes, we're still learning a great deal as we go around the traps talking to people and getting comments like we've had this morning on our draft report and there will be changes. Good, thank you very much. Can we resume in about 10 minutes after a cup of tea, and we've got NewsXpress, say, at 10 past 11 thanks, ladies and gentleman.

DR BYRON: Thank you very much, ladies and gentleman, if we can resume with Mr Mark Fletcher from NewsXpress Pty Ltd. Thank you for coming. If you'd like to take us through the main points you want to make. We've read your submissions.

MR FLETCHER (NPL): First off, my name is Mark Fletcher. I have been a newsagent now since February 1996. My newsagency is at Forest Hill Chase here in Victoria. I also own a newsagency down in Frankston which I purchased in October last year, and I'm a significant shareholder in another newsagency that we started in a fresh location out at Watergardens in Taylors Lakes. I also own three card and gift shops which are also located in shopping centres. NewsXpress is a marketing group. We've got 150 members now. The majority of those are in shopping centres as well, so really I'm here today on behalf of NewsXpress. I wanted to speak to the further submission that we provided yesterday as opposed to the initial submission, and just focus on our response to the draft report.

The first area we wanted to cover was to talk about market power. We feel that the current shopping centre tenancy marketplace is grossly unfair for independent retailers like newsagents and we're disappointed that the draft recommendations don't appear to address that situation. The resources and power of landlords sees many issues go unreported, and many of those that are reported fail because of inequality in resources. What I wanted to speak to for a moment was a very specific situation and this situation is a situation that I found myself in last year. It explores how landlords deal with conflict, and it speaks to the situation that we have here in Victoria, for example, with the Small Business Commissioner and how that office might be used to resolve disputes.

Just very, very briefly, in March 2007 there was major construction commenced at Forest Hill Chase. We were told about the construction up-front. We were told that it was going to affect our business and we were offered some compensation in advance of that work commencing. What we found as March unfolded was that the interruption to our business was far more than what we expected. We got to a point on 1 April where we had to take it to the landlord and provide them with sound files of noise in the store that was so debilitating that customers were walking out. We had a jackhammer jackhammering effectively inside our business on our busiest trading days of the week and we couldn't trade. From a health and safety point of view it was unsafe and just from a sheer customer enjoyment point of view it was unsafe. We took that to the landlord and the landlord did nothing about it.

So through the course of April we continued to go to the landlord about the impact the construction was having on our business, jackhammering continued, dust was a significant problem which in a newsagency is not helpful. Then as we went in to May we experienced major flooding. In this construction that they were doing, they took the roof off directly above our shop. So on 17 May we had major flooding in the business.

We had about \$2000 worth of stock damage and \$10,000 worth of fixtures damage including computer damage. We wrote to the landlord and we achieved no response. On 1 June we were flooded again. \$20,000 stock damage on the 1 June flooding, significant loss of sales on both of those flooding days, and around two days or three days after the 1 June flooding the landlord removed over \$20,000 worth of flood damaged stock. So they became engaged and said they would take this away and resolve compensation for us in terms of an insurance claim.

Through June, July, August and September there was significant correspondence between ourselves and the landlord. They wanted to meet and talk about it. I would only deal with it in writing because I didn't trust what they were saying to us. But in June we became so frustrated we took the matter formally to the Office of the Small Business Commissioner here in Victoria. I don't want to take you through all of the detail because there's no point. I'd observe this: the landlord on two occasions told the Small Business Commissioner that the issue was resolved, and that statement on each of those occasions was untrue. To this date we've not had a hearing with the Small Business Commissioner. The landlord agreed in July to pay us for the damaged stock through their insurance policy. To today we've not been paid for that damaged stock. So we're out of pocket \$20,000 worth of damaged stock.

I share that story to explain that the Small Business Commissioner's office in Victoria, despite their best efforts, believed the landlord when the landlord said that the issue was resolved and decided not to take the matter further even though we'd lodged a formal complaint. So we've had no hearing, the landlord was not compelled to attend a hearing. I'm fortunate in the sense that I have substantial other business interests behind me but if I was an individual newsagent out of pocket here, as I was, to the tune of about \$80,000 in one calendar year my business would have gone under, and there was no process to support what I was going through. The landlord would be shocked to sit here and listen to what I'm saying because they would have all sorts of reasons why things happened the way they happened. The reality is I'm out of pocket \$80,000 and there was no process that could help me even though I tried to engage that process.

So that goes to the point that we would make about how market power is abused and how landlords don't pay reasonable attention to the impact on small businesses of things that they do in their centres, and how the processes that are referred to the draft report, such as the Small Business Commissioner's office in Victoria don't really help small businesses.

In terms of unconscionable conduct, we support the Commission's view that a national approach is needed in areas of transparency and accountability. We'd note that unconscionable conduct is unlikely to cease because of a change in language. We would much rather see a very simple, rapid response tribunal established nationally which can quickly deal with, as a first step, complaints of unconscionable

conduct and issues such as what I've just described to the commission. We'd like to see that small businesses have somewhere else they can go to see those matters resolved quickly.

In terms of lease registration, we support the introduction of lease registration but would note that it can't be something which a landlord can (indistinct) independent retailers must have the opportunity of comparing leases, thereby achieving greater equity in the negotiation of said leases. It is in the area of marketing and other levies where we would anticipate considerable differences be disclosed between tenancies.

In terms of the voluntary code of conduct, the consideration of a voluntary code of conduct offers no certainty to independent retailers. In states where participation in landlord dispute resolution is voluntary at present there is evidence that it fails for the example that I've given earlier.

In terms of the lease term, the draft recommendation calling on state and territory governments is not, with respect, a fair outcome for small business. With a small business newsagent costing between three and four times net annual earnings to purchase it is only once the business is in year four or five that the owner is achieving a return. Depending on where the business is in the lease cycle the owner could be without a business. This offers no certainty to the new owner, nor to the owner seeking to sell the business.

I want to share two brief case studies. The first one relates to starting up a newsagency in a shopping centre, and I'm happy to provide the numbers if you would like to see them. If you look at the costs of starting up a newsagency in a shopping centre you're going to have around \$10,000 costs associated with the lease, and getting design papers done and things like that. A shop fit is around \$375,000 for a 200 square metre store. You're going to launch the business for around \$15,000 and you're going to spend \$135,000 on initial stock. Given that this is a start-up business in a greenfield location we would anticipate that in the first year your sales are going to be \$700,000. That would provide a gross profit of \$180,000, out of which you have to fund occupancy costs of \$135,000, labour costs of \$115,000, operating expenses of \$68,000, meaning that in the first year you've lost \$138,000. That's allowing for paying for the lease of the shop fit, which you haven't stumped up the cash for.

Year two and beyond you're going to annual sales of 1.3 million, a gross profit of \$405,000, based on industry averages, occupancy costs of \$145,000, labour costs of \$135,000 and expenses of \$75,000. So year two, three, four and five the business is established and you have a net return of \$50,000. So accumulated over five years you're talking about a \$62,000 return. If there's no lease extension offered the owners would walk away from that scenario owing about \$100,000 on the shop fit

and \$20,000 in equipment in the business. So they'd make a loss over the five-year period.

While the numbers improve as turnover grows, the fixed margin that newsagents must live with in newspapers, magazines, greeting cards, transport tickets and lottery products cap the money that they can make. Certainly the counterargument would be that they can increase sales, but we're dealing with a highly regulated and highly competitive marketplace. Magazine publishers and newspaper publishers are busy pushing sales of their product outside the newsagency channel. So it becomes a real challenge within that five-year period to actually make that business pay for itself. So those numbers represent a start-up situation.

If you have a look at the alternative, of purchasing a newsagency in a shopping centre, the average goodwill paid to purchase a newsagency is three and a half times net earnings. That varies from state to state but it's around three and a half times net earnings. One of the problems is that net earnings in newsagency land is actual net earnings plus a whole bunch of add-backs, including owner's drawings and various other costs. This creates an unreal net earnings figure, making the actual multiple in excess of four times "net earnings". If the business performs well and achieves growth of say 5 per cent year on year, above average for a newsagency, the purchaser can expect to have recovered the purchased price sometime in year four if they're lucky. This leaves one year to achieve a real net return for the purchaser.

The average gross profit for a newsagency in a shopping centre is 30 per cent. 75 per cent of this is spent on occupancy and labour costs, if you're lucky. This leaves 25 per cent of gross profit to fund business expenses, shrinkage or theft, and return for owners. Most shopping centre newsagencies are break-even propositions with owners working between 60 and 80 hours a week to keep labour costs in check. While the purchaser becomes a seller at some point the sale price is really a recovery situation, less so if there is little time left on the lease. The lease term is crucial to determining the value of a newsagency at the time of sale. When we purchased the newsagency in Frankston it had one year left to run on its lease. It was a distress sale by the vendor. We refused to negotiate the purchase of the business until we had agreement from the landlord that we would get a new five year lease. Once we had that we proceeded with the sale.

The information is present to support the case for automatic lease extensions, particularly for newsagencies that are in such regulated and tightly controlled gross profit businesses. Assuming that the business is purchased with a new lease the incoming newsagent could find that at the end of the lease they don't have any business to be sold and thereby effectively lose hundreds of thousands of dollars that they've paid in goodwill. Such a business often cannot relocate outside the centre because of restrictions that are imposed by Tattersalls and other lottery agencies, newspaper publishers, magazine publishers and magazine distributors. These

suppliers put restrictions on where newsagencies can be located. So if a lease can't be negotiated in the centre the newsagent has nowhere else to go, contrary to what was in the draft report.

We'd also like to comment on occupancy costs. We'd like to see greater transparency on occupancy costs. While tenants pay the fees, few if any have any say in how the money is spent. Too often the money is spent on services which serve larger businesses and not independent retail, shopping trolley collection for example. Newsagents don't care about that yet we fund it. In terms of marketing levels, we'd like to see greater transparency of the marketing levy collected and its application. Sure, there are marketing committees but rarely is there a democratic process to determine how the marketing levy should be spent. While I enjoy a good Welsh choir like anybody, I don't think a Welsh choir is going to help my business when it's paid to come and perform in the centre. But too often we see those sorts of things done within centres which draw people away from independent retail rather than drawing them to independent retail.

We would also like to see that small business members and proactive marketing groups, such as NewsXpress, are treated as major tenants. NewsXpress spends money on electronic media and print media advertising. We bring people to shopping centres, yet when we talk to landlords that's not taken into account when they're negotiating the marketing levy. In terms of planning notices, we believe that landlords ought to be required to put proposed changes to a centre through a stringent approval process where the full impact of changes are advised to tenants in advance. Too often the changes are made which result in a negative impact on tenants without an opportunity for tenants to challenge the proposed changes.

What happening to me at Forest Hill is a very good example of that. We had a two-hour meeting with the landlord, we discussed the changes, they did not disclose everything to us about what they were planning to do inside our store. If they had told us they were going to be jackhammering inside our lease space the day before Mother's Day, we would have suggested that's not a good idea. In terms of national tenant behaviour, independent retailers in many centres rely on a government-owned Australia Post outlet to draw traffic, yet we suffer when Australia Post closes on Saturday afternoon, Sundays and in the evenings. Independent small retailers are not afforded the opportunity of closing at these times, we're forced to stay open. We're forced to stay open when, in our case at Forest Hill, the government-owned post office which draws people to our end of the centre is closed. So our end of the centre becomes like a ghost town because the government chooses to close Australia Post, and we feel that that places them with an unfair advantage and us at a disadvantage.

In terms of capital investment, where a landlord requires that a new shop fit be undertaken we'd like to see that at that time a new lease on existing terms is offered. We think it's unfair for a tenant, such as a newsagent, to spend 300 to 400 thousand

dollars on a shop fit and to not have security of tenure beyond the existing lease period. In terms of the draft report they're the comments we would make and we'd be happy to discuss any points that you might have.

DR BYRON: Thank you very much, Mark. Most of the points you've covered are becoming pretty familiar to us, pretty central to this whole inquiry. One lawyer that came to the Sydney hearing said that basically the problem is that the lease is a contract which in legal terms is incomplete in the sense that one party can require the other party to do certain things but when and how much it would cost isn't known in advance, such as fit-outs and so on, or one party is allowed to make changes if they want to, to the building, but what it means for the other party and what to do about it isn't actually covered in the document. So in those two senses we've got a contract which is incomplete.

MR FLETCHER (NPL): A good example of that is the business I purchased in Frankston. We negotiated a new lease, we took that business over in October, and one of the conditions in the lease was that we created a new shopfront, and we wanted to have written into the lease the budget amount for the shopfront, and the landlord didn't want that, they wanted just that a new shopfront had to be created and we said, "Well, that's unfair because we need to know going in what our capital investment is going to be in this business," and they said, "No, you need to come in knowing that you've got to create a new shopfront," but a shopfront could be anything from 50 to 200 thousand dollars depending on what we're required to do. That cost us a couple of weeks of negotiating time trying to resolve that. There's an example where the landlord knew that the vendor of the business was distressed financially and the landlord didn't facilitate their exit from the business and didn't facilitate us coming in to create what, based on our track record, would be a professional business, they just wanted this open-ended agreement which, as you say, was an incomplete legal agreement.

DR BYRON: Yes. I shouldn't speculate about motive but if you end up paying for a very expensive fit-out that might greatly reduce your ability to walk away at the end of those five years if you've got substantial undepreciating assets there; whereas if the fit-out was at the bottom of that price range you might not be so vulnerable at the end of the lease term.

MR FLETCHER (NPL): That's one way to look at it. I think if you undertook research of newsagents and what they do at the end of their lease period, the vast majority of them don't walk away. Certainly I've owned my newsagency at Forest Hill for 12 years this month, so I don't have a track record for walking away. The landlord would have known that. I think they play these games because it's their way of trying to control the tenant.

DR BYRON: I wasn't suggesting that you need to actually walk but to be in a

position where you could if you had to, might actually change the balance of negotiations.

MR FLETCHER (NPL): Certainly, I agree.

DR BYRON: You're talking about you'd prefer to see a rapid response tribunal established nationally which can quickly deal with complaints. When I read that the other day it wasn't clear to me why you wanted a national one because I guess what we have been told by a number of people was that the state Retail Tenancy Units or Small Business Commissioner here in Victoria were actually doing that sort of thing. From your personal situation there would it be fair to say that there is a system in place that ought to deal with these issues but in your particular case it hasn't worked very well?

MR FLETCHER (NPL): No, I'd go beyond that. I also own a software company that supplies software to newsagents and I've operated that for 26 years. We have 1450 newsagents who are customers. Outside of the software side of the business I provide a lot of assistance and advice to newsagents and almost on a daily basis I have conversations with newsagents who are in distress. I know from what various newsagents have said to me that they have their own stories of the various state government instrumentalities letting them down in terms of that process. If I have a problem today in my shop with flooding or with jackhammer excessive noise, or in the case of a newsagent currently on the central coast of New South Wales where their shop has been closed because of construction which they say they weren't aware of - I haven't verified that for myself - I need a place where I can go where that's quickly dealt with.

If you look at the Small Business Commissioner office in Victoria process, while it's an easy access process it's slow. If I'm having a problem today in small business I need to be able to let the landlord know that I've got someone else on my side very quickly, like literally within 24 hours. I know that there are checks and balances in current processes because you don't want vexatious or frivolous actions commenced but by the same token where there is real distress we need to be able to deal with that quite quickly.

DR BYRON: Do you think an ombudsman type of role would be helpful?

MR FLETCHER (NPL): Yes, I think it would make a lot of sense.

DR BYRON: Would that have to be a national ombudsman or could you have one in each state?

MR FLETCHER (NPL): I think it could be state based. If you look, for example, at the telecommunications ombudsman approach, I've had reason to engage with that

office and found that to be a very straightforward process that's usually brought the other side to the table and has resolved issues. That's really what this is about, it's not about actually having someone sitting in judgment, it's just about a body that's going to be strong and stand with the tenant and say, "Look, we'll facilitate this process through to resolution," and a lot of landlords would say, "Okay, this person knows what they're doing, let's try and resolve this."

DR BYRON: Yes. We've had long discussions about lease registration and the pros and cons of it, and I guess there will be more of it here on Friday when the Law Institute of Victoria comes. The suggestion that was put to us by a lawyer in Brisbane on Monday was that at the time of signing a lease you also do a one-page epitome of lease which has all the pertinent details of the parties, the area, the term, the rent. We've had very lengthy discussions about whether it should be the face rent or the effective rent or the gross rent. One argument is that if you just take the face rent off the lease and it doesn't include any incentives, lease-free periods, contribution to fit-out, that actually gives a biased figure of what the true rental figure is. The counter-argument is that it's fairly easy to estimate what those incentives were and we were told in Sydney it's typically 4 per cent or 5 per cent. If you took the apparent figure, the face rents, off the lease documents and then if the actual is 96 per cent of that you'd be pretty close, as long as it's consistently biased.

You've actually also raised the point about outgoings. In terms of really informing a market you'd want to know the face rent, any incentive payments and some sort of summary figure of outgoings.

MR FLETCHER (NPL): I'd like to see outgoings broken down by the marketing levy specifically, so separating that out, because that's a contentious issue with a lot of small businesses.

DR BYRON: But it's a relatively small amount, isn't it, compared to the others?

MR FLETCHER (NPL): A small amount but it could be, you know, \$25,000 a year, depending on the centre you're in; it could be more. You also mentioned about fit-out contributions and things like that. I think it's appropriate if you're documenting fit-out contributions to document any conditions that might apply to those. Fit-out contributions can be smoke and mirrors.

DR BYRON: Good point, yes.

MR FLETCHER (NPL): We're in a situation in one location right now where almost a six-figure sum is not available because of a smoke and mirrors situation. We're having some interesting discussions about what was offered versus what's been delivered.

DR BYRON: We spoke with the API and with Leasewise this morning about the situation where given the cost of setting up the businesses, acquiring stock and so on, given the rent they're being asked to pay, if the term of five years is simply too short to get your money back, it's obvious to me that nobody should sign such a document. What I guess I'm still grappling with, what happens when you say to the landlord you're negotiating with, "This just doesn't stack up. If I sign that I'm committing financial suicide. You either have to give me eight years or 10 years or something, or, "The fit-out is going to have to be 50,000 rather than 250,000," or, "If you want that standard of fit-out and you only give me five years, then the amount of rent I can accord to pay is no more than X." Otherwise it doesn't add up.

MR FLETCHER (NPL): I think a certain number of small business retailers are like addicts and they just want their business open because that's where they feel their enjoyment, and even if it's a bad deal they will say yes. Uncommercial as that is, that happens often. We're in a situation with Watgardens, we were offered I think it was four years or something, we said we wanted eight, we ended up settling on six. We looked at that and said, you know, "It's not what we want but we'll accept it because we'll prove to them" - and this is where self-belief comes in - "that we're so good at what we're doing, we'll get a new lease at the end of the period." That was the situation. We'd created a concept store for other reasons beyond the four walls of that business. But for a lot of individual operators they don't look at it in quite the cold light of day way that you're suggesting.

DR BYRON: Did you get a guarantee that you would get a second lease after that?

MR FLETCHER (NPL): No.

DR BYRON: I mean, it comes back to the security of tenure and what does it mean if it says, "This is a fixed term lease"? On one reading it says, "Fixed term means fixed term. It doesn't mean fixed term plus an option or you'll be here indefinitely and as long as you pay the rent you'll be right to stay there as long as you want to." If fixed term means fixed term, every week that goes past is a week closer to the day when you haven't got a place to run your business from.

MR FLETCHER (NPL): Fixed term is relatively new though.

DR BYRON: Yes, and only in the shopping centres.

MR FLETCHER (NPL): Yes. My Forest Hill situation - we've had either five plus five or five plus five and an initial period, but our current lease expires in 2011. That's an old lease that had extensions and it's only when we were negotiating for the other two stores that we saw these fixed terms for ourselves. I don't think a lot of small retailers - certainly a lot of newsagents I talked to - have come to grips with what fixed term means and what the implications of fixed term leases will have on

the goodwill component. Three and a half times net earnings is not sustainable in a fixed term environment. I think if fixed term five year leases, six year leases survive, then the three and a half times net earnings will drop significantly.

DR BYRON: Yes, because people will find out that you simply can't afford to pay that much for a business and still - - -

MR FLETCHER (NPL): That's right. Let's for a moment contemplate what that means. That means potentially that all families that own newsagencies in shopping centres today, if fixed terms stays they have to face the reality that they're not going to sell the businesses for what they used to sell them for.

DR BYRON: They will make a large capital loss.

MR FLETCHER (NPL): Yes. We're talking of hundreds if not thousands of families losing, what, 10, 15, 20, 30 per cent of what they have invested in their business. If we got to a point where a business like a newsagency that is quite a regulated business with fixed retail prices for a lot of what we sell, if we got to a point where they were considered some sort of essential service and therefore guaranteed an extension based on certain conditions, then we'd protect the capital investment that those families have. I see a newsagent as being a very different scenario to a shoe shop, to a pharmacy or any other more general retailer, if you like.

DR BYRON: Okay. I think there's probably a lot more that we would need to look into on that one but I guess I was particularly taken by your argument about the terms of contract with the suppliers specify that the agent has to operate in a particular centre where the centre is the designated territory and your landlord knows that. Now, talk about being over a barrel, if the only place in the world where you could operate your business is in a particular centre and the landlord of that centre knows it, I would have thought you're putting your head in a noose and tightening it there, aren't you?

MR FLETCHER (NPL): It depends on how much you believe in yourself. This is another reason why newsagents are broadening their focus as well. I mean, you would have struggled five years ago to find newsagents trying to sell gifts, and a lot of newsagents are now trying to sell gifts because it's a part of our business where we can control the prices, we control what we buy; whereas with newspapers and magazines we can't control that. So newsagents are certainly broadening the number of categories that they sell within their businesses.

Also tied to that issue of your neck being in a noose in terms of what the landlord knows, the landlord also knows the economic viability or otherwise of the business. If you look at the magazine category, for example, we know from the research we've done through my software company that 65 per cent of all titles sold

through a newsagency are cash flow negative. 65 per cent of the titles I lose money on over the course of a year. I don't control what I receive, I don't control how long they stay on the shelf and I pay for it within 30 days or receiving it. So with half of all stock I receive not selling - so I get 100 magazines, I only sell 50 but I pay for those and then at the end of the next month I return them and then at the end of the next month I get a credit back for the half that didn't sell. So there's a cash flow imperative there for newsagents as well and landlords know that, yet they still try and impose traditional retail rules and guidelines if you like on these very regulated businesses.

DR BYRON: If you're operating a newsagency in the centre and you can't reach a mutually satisfactory agreement with the landlord when the lease expires, presumably there's dozens of other landlords on the strip and if necessary you put a little sign on the front door that says, "We've moved across the road and down the street three doors," and all your loyal customers would follow you there. But if you're in a shopping centre it's fundamentally different to that.

MR FLETCHER (NPL): That's right, you don't have that choice. It depends on the geographic territory as assessed by the publishers and distributors. You may have that choice. For example, at Forest Hill I wouldn't because the landlord actually controls the strip which is just outside the centre. There might be another centre where you could do that, but more often than not you're not able to do that.

DR BYRON: We've got a couple of pages of discussion in there about the nature of goodwill in the draft report and I think we might need to expand on that a bit more. But it seems to me that there's a fundamental difference between being in a strip where you can relocate your business across the road and down the street and your customers come with you because they're loyal to you and you know their kids names or whatever and in a situation where you're just the pharmacist on the second floor of the mall and if you go away and somebody else comes in he'll be the pharmacist on the second floor of the mall or the newsagent or whatever and people don't know or care, there's no particular loyalty to the individual business people, it's just the convenience of being on the second floor of the mall. Am I wildly mistaken on that or is there that fundamental difference between being in a strip and being in a centre?

MR FLETCHER (NPL): The difference is as you've described, but even more so. In a shopping strip situation I have to navigate the council, depending on what I want to do out the front of the shop. What I do in the shop is really my business. In a shopping centre situation I'm a lot more regulated.

DR BYRON: They micromanage.

MR FLETCHER (NPL): Micromanage absolutely and the interference in the

business is significant.

DR BYRON: They claim their specialised expertise is to micromanage your business.

MR FLETCHER (NPL): That's right and that's why they have jackhammers on the day before Mother's Day. As Peter mentioned earlier, there are many situations where the landlords interfere in businesses in a way that's unhelpful for the business and it becomes extremely, extremely difficult and not only the landlord, but also some suppliers. If you look at Tattersall's, for example, Tattersall's controls which outlets go where and there is a major shopping centre in Melbourne today where the landlord eased out the newsagent, didn't give them an extension of their lease and that centre today doesn't have a newsagency because Tattersall's and the landlord can't agree on there being a second Tattersall's outlet in the centre.

The community suffers as a result because they're not well served with a newsagency and the outgoing newsagent has lost the goodwill that they had built up in their business.

DR BYRON: I'm just wondering, the point that you raised about when Australia Post is closed that has implications for the turnover of other businesses in the neighbourhood. Where do we go with that? Are you basically suggesting that Australia Post or any other business should be required to stay open because its neighbours would rather it stayed open?

MR FLETCHER (NPL): No. I'm probably unfairly trying to sneak something in that is outside the scope of the inquiry but I would observe this: Australia Post has put a lot of effort in over the last 10 years making itself look and feel like a newsagency. 10 years ago they didn't sell stationery that they sell today or greeting cards or phone recharge and all of the things that newsagents have done for decades. So I have government owned post office directly opposite my newsagency at Forest Hill. They compete with us on stationery, ink for printers, greeting cards, all those sorts of things. On a Sunday when we're paying double time and a half to be open Australia Post can close. The pressure on us to be open on a Sunday is extraordinary. I suspect the pressure is not the same on Australia Post.

So on the one hand they see themselves as being this newsagency-type business, but when it suits them, they don't operate in the same world in which we operate. So I would like to see, I guess, a general comment that national tenants operating in the same space as small business tenants ought to be operating on the same rules according to landlords, if I could put it in those terms.

DR BYRON: Many of the post office agencies are basically franchised, aren't they?

MR FLETCHER (NPL): 865 post office outlets are government owned and they're the only ones that concern me. I see a licensed post office as being another small business operator. It's the government-owned outlets that are the concern.

DR BYRON: It seems to me that there's a lot of, shall we say, structural change going on in the newsagency area compared to, say, 10 years ago when you've got the supermarkets that are supermarkets that are selling magazines and cards and newspapers and gifts and lollies and whatever. You've got newsagencies and so on who are getting into a lot of those. Is there pressure quite apart from the nature of the retail tenancy lease on the whole business model of being the local suburban newsagency? Is it going the way of the butcher and the candlestick maker?

MR FLETCHER (NPL): There's extraordinary pressure on the model, not only in the areas that you describe, but also obviously newspapers sales are flat, people are moving online; magazine sales are flat, people are moving online.

DR BYRON: Card sales are down, people are sending emails.

MR FLETCHER (NPL): Card sales are okay actually. Lotteries, moving online. So lotteries, newspapers and magazines are certainly challenged. So the model itself is challenged. Groups like NewsXpress and Nextra and Newspower are in there trying to help newsagents reinvent themselves. It doesn't help that we have a government retail channel that's competing aggressively with us and it also doesn't help that we're dealing with landlords who make it extremely difficult. I think the newsagency channel, if I can put it this way: we're a channel that was created by a publisher, initially here in Victoria, to distributed The Bulletin in the 1800s. We were authorised under the Trade Practices Act for so long and the government facilitated deregulation in 1999 and so, if you like, protection that existed up until that time was taken away for no compensation. That's last decade's battle.

The channel is still coming to grips with the implications of that and we have suppliers who still treat newsagents as the businesses they were a hundred years ago. We have landlords who treat newsagents as irrelevant small businesses and we also have a channel of newsagents who are still coming to grips with all of the structural changes occurring. So it's a very, very significant and challenging problem that the channel is facing. A lot of people are putting a lot of effort into addressing it. The tenancy arrangements in shopping centres are one of a range of problems that we're facing.

DR BYRON: But not the only one.

MR FLETCHER (NPL): Not the only one.

DR BYRON: I'm afraid I'm going to have to leave it there. But I thank you very

much, Mark, for all your insight and experience and particularly your personal experiences in this and for the written submissions.

MR FLETCHER (NPL): Thank you very much.

DR BYRON: Thank you. We've got next Mr Geoff Hechtman and Mr Graeme Woods. Thanks for coming, gentlemen. If you'd just like to take a seat and make yourselves comfortable.

MR HECHTMAN: My submission is going to be pretty short, and it will give you a chance to catch up. I think the previous speakers have virtually covered most of my grievances but I'll bring up just a few of my major problems that have occurred in my some 25 years' association with - sorry?

DR BYRON: Could you just - - -

MR HECHTMAN: Speak up.

DR BYRON: And introduce yourself for the transcript.

MR HECHTMAN: Sorry. I'm Geoff Hechtman. We bought a business in 1980 at Westfield in Doncaster and that was quite a good business. We were doing quite well. Just some of the problems the tenants have with landlords, these multinational landlords who spend hundreds of millions of dollars building these centres and in the first three years, the ceiling caved in on three occasions, where the roof collapsed and we were totally flooded out and all the landlord would say is, "I'm sorry, but you're covered by insurance," et cetera. As I said, it took them more than three years to redo the roof and yet they spend these hundreds of millions of dollars on extensions.

We also had a shop in Chadstone shopping centre; this is going back to 1985. We were there for 22 years and the first lease was a six-year lease. At the end of that lease, we were given another six-year lease. When that ended, we got a letter from the landlord:

In accordance with the Victorian Retail Tenancy legislation, the landlord hereby informs the tenant that the landlord does not propose to offer the tenant a renewal of the above lease which is due to expire on 7 June 2004. Our tenancy coordinator will be in contact with you shortly to confirm and make good requirements. Should you wish to discuss, please do not hesitate to contact the retail management.

What it means, as the previous person in the submission mentioned, at the end of your lease, you have no options. You've got to move out. At the time, they gave me a choice. This actually happened in 1998, sorry. They said that when the lease

ended, we'd given notice to quit by the end of March. We spoke to the leasing department re another location, was offered Suzanne Grae's shop but then was told "unavailable" because the Suzanne Grae shop happened to be owned by [personal/confidential details withheld], who happened to be the brother-in-law of [personal/confidential details withheld] and it was pretty obvious at the time that they were using me as a bargaining chip. They obviously wanted to increase his rent and then they said, "Here you are, he's a guy who's prepared to go in. He's prepared to pay the additional rent." So at any rate, to cut a long story short, that didn't eventuate.

We were then offered another shop but that shop would not be ready until mid-June. We had already bought all our winter stock which had to be taken home and stored in the garage. The season was totally destroyed. We had to reopen with a 50 per cent off clearance on brand new stock which hadn't even hit the floor.

Other problems that occurred during that time was whenever there were renovations, the mall, for instance, there were constant disruptions in trading which went on for about four months. Our store was full of dust. Even when shut, was masked, dust still got in. We constantly wiped off dust from clothes and furniture from a hole in the wall from next door when they were doing renovations. It took three months for the hole to be fixed. When you complained to the leasing department, they never even called you back.

At the time, at the back of our shop was an electricity junction room which they wanted to close down and relocate to another location and that went on - for two months, we had workers come in and out through the store in their grubby overalls, going through where the ladies were undressing and no compensation at all. In fact it was suggested at the time that, "If you do that, we'll bear it in mind. It'll be a goodwill gesture by you to allow us to" - and the little room was taken away from us and we weren't compensated for that. The same shop was flooded by a sprinkler malfunction which happened at a different location. Once again, "Sorry, that's the way it is."

These are just a few points which I'd like to make: the leases, as mentioned before, are totally tilted in favour of the landlords. Tenants have no options after the lease ends. Verbal agreements are broken or denied. During construction, extensions, disruptions are caused but no compensation to tenants. If there is a dispute with a customer in a retail shop - for instance, a customer might bring back goods, they've changed their mind and they want their money back which they're not entitled to - it's become common where the customer will go to centre management and complain, the centre management calls you and this is briefly what they say: that we are to settle the dispute with the customer in the customer's favour regardless of whose fault it is and this is to protect the centre's image.

The centre's opening and closing times are controlled by the major stores. They do not abide by the centre times. In Chadstone, for instance, David Jones will open at 10 o'clock but all other tenants have to open at 9.00. They have VIP nights which are more in favour of the majors but we have to open. Another little point which we find is especially small tenants like myself are forced to mark up on our goods in order to cover our rental costs and of course that makes us less competitive. I think that's briefly my submission. I could go on for a week.

DR BYRON: I get the gist of it though. It sounds like you've had some pretty horrific experiences. I guess it's no consolation to say that we've heard - - -

MR HECHTMAN: You've heard it before.

DR BYRON: - - - similar stories, not only in this state but in other states too. I guess the question is what can we recommend to governments that they do about this. What's been done over the last 20 years, I guess, particularly with regard to the large shopping centres, is that the legislation has got longer and longer and more and more complicated and detailed about what must be done and what things cannot be done, and yet when we look at the evidence, it's not obvious that that's fixed the situation. I guess we were saying in the draft report that it's not clear to us that going further and further down that route is going to fix it either. I want to know what you think needs to be done. What's the answer?

MR HECHTMAN: Can I make one more point? Early in 2000-2001 we were approached by a fairly large ladies upmarket shoe retailer who offered me for my store in Chadstone \$250,000, just walk in and walk out, which I almost fell over, I was so thrilled, and I raced up to the leasing department and of course they said, "No, we can't have that because we want to retain it as ladies clothing," even though this was going to be upmarket ladies' shoes. At the same time there was a children's wear shop in a corner position and next to it was a children's shoes shop. The children's wear shop did a deal with a mobile telephone company and that went through just like that. They can put a mobile telephone company in a position where there was a children's wear shop and that's supposed to be okay, that's supposed to be a proper mix. But putting a ladies' shoes shop to where there was a ladies' clothing shop doesn't fit the mix. I can't understand that.

DR BYRON: Yes. Well, I can't understand that either but, you know, what's the answer?

MR HECHTMAN: If I was to put in a fish and chip shop where there was a ladies' wear shop, I could understand it, it doesn't quite fit in. But ladies' shoes and ladies' clothing, there's nothing incompatible about that.

DR BYRON: But basically what you're saying is that if you're in a large shopping

centre, the centre management can write the rules. When you go in there you're

basically giving them carte blanche to - - -

MR HECHTMAN: Yes, I understand that.

DR BYRON: If I accept all the stories like yours, and believe me there are a lot of them - - -

MR HECHTMAN: They're not stories, they're facts.

DR BYRON: Well, sorry - all the factual descriptions of real world experiences that we've got, you have to wonder why do people still queue up to get retail space in shopping centres unless they've got some sort of fantasy that they think - - -

MR WOODS: Can I just make a comment - Graeme Woods. I'm a retail property consultant. I've been in the industry for about 40 years now. It's been a great industry, an enormous amount of change. Just coming to the point that you're making about people queuing up in shopping centres, there is enormous change happening at the moment and has been evident over the last few years and heading towards the future, and that is, just by example, if you go back 10, 15 years ago in, for instance, food courts, they were the latest and the greatest and you had the Italian family, the Greek family, the Lebanese family, the Chinese family, the Vietnamese family et cetera. Very few Australians were in there apart from those who could make a sandwich. Today there are very few Greeks, Italians, Lebanese, Australians in shopping centre food courts, the reason being they can't afford to be there.

The industry has been taken over by - and I've got no problems about nationalities or racism at all - by the Asian industry. The Asian industry is primarily bringing people in from overseas that will pay anything to get a job or to get a business so they can settle in this country. That's fine, that's all part of a process, part of change. But when the Asians start to wake up, as they're starting to do now - because many of them through foolishness are buying businesses with maybe one year's lease and suddenly you get a phone call, "Look, my rent has gone up 300 per cent and I've just bought the business for half a million 12 months ago," then you think, "Hello, how stupid are you?" and I'm being very, very factual. That happens. You can't protect idiots against themselves. No legislation is ever going to do that.

DR BYRON: But Mr Hechtman is certainly not an idiot.

MR WOODS: Absolutely. But coming back into that situation where you've got - Mr Hechtman has been around for 25 years and run a very successful business until he was moved out of the centre because what's happening is you're either a big boy, a little boy or nobody. The little boy is just about on the way out. There's no question about that. The little boy has no power against the major shopping centres because

they slough off - I mean, I've been involved on the other side, I've been an Australian leasing manager for 10, 15 years, whatever. There's always the slough off, there's always the delay. It will fix itself, it will run away. The guy is either going to go broke or he will forget about it and get on with his business and that is an absolute fact. I'm sure there would be people in this room that would agree with that.

It's hard enough in the current industry for the big boys to handle what is now a change in the philosophy of centres - and I'm not going to give a big lecture. What's happening now is the businesses are run by major companies, very successful, very professional, who have one thing in mind, that's building assets for the benefit of the shareholders. That comes by way of cash at the end of the day in the till. Everybody dreams about having a centre that's got the right mix, the right number of ladies' fashion or the right number of souvlaki bars or whatever, but when push comes to shove and you've got five vacancies they will fill it with anything that will produce the cash on the day, and that's just a fact of life. That's just part of what's transpiring at the moment. Down the track you're going to see - I think it's changing now, as I mentioned before - the landlords will be starting to look - and there are some major developments happening right here in Victoria at the moment, and they're major companies, where incentives are being offered to people to go in, cash incentives.

When times are good and your property is good, you don't get a cash incentive. The higher the cash incentive, the worse the property or the higher the risk. A lot of people fall for that and it just happens. Again it goes on and on and on. But coming back, with somebody like Geoff - and as I've said I've known him for 20, 25 years, and I also represent some major international companies and national companies - when you come to your lease renewals - this is under the percentage rent banner - percentage rents are probably the worst thing that's happening in this industry at the moment. The landlord claims, "Look, we need that to see how our centre is going against whatever." Well, that's a load of rubbish. What they use it for specifically is to value the affordability of the retailer at the time to pay the new rent. When the lease comes up and you might be doing, say, \$4 million sales and the formula is something like 6 or 7 per cent in a particular industry, or if it's fashion it's probably up to 20 per cent, there's your new rent.

You say, "Well, how did you work that out?" "Well, you can afford it." Next door you've got an identical shop where you're battling with the landlord on your renewal to save your business - because you've got the option to walk but that's not what you go into business for - the next guy comes along, he says, "By the way, Graham, I've just got an offer from the shop next door to you." I say, "How did you go?" He says, "Well, for instance, \$200,000 they're asking from me, they're asking for 120,000 from the other guy because he's new." So how does all that work? Very simply it's affordability and that's wrong. You share in success by a base rent, plus outgoings, a gross rent, plus percentage rent. That's fine. The more sales you make, the more percentage rent you pay and everybody is happy because they know the

formula. If you do do four or five million dollars and your percentage rent is 100,000 you say, "Whoopee, isn't that fantastic."

The landlord is very happy, you're happy because you're making a fortune, and then you go back the next year and suddenly because you've got the wrong colour or the season, there's been no rain and it's 92 degrees and you've got a shop full of fur or woven fabric or winter stock, you can't get rid of it, so you bale it, very little margin, your sales are down 40 per cent and you say, "Guys, here's the base rent that we agreed but this year the percentage rent is almost zero," because they can't afford it. So it's a two-way street. When you come back on the good times you share it, when you come back on the bad times and if you're a bad trader, for sure, but there are times when what happens if you have a situation, once you're locked into the new rent based on your expertise, your professionalism, your ability to generate sales, you're locked in, the rent never goes down. They'll talk about it for years and years until people - like certain people I know - walk out of the business. That happens not just to the little guys, it happens to the big guys as well. That's all I want to say about percentage rent, it should be outlawed because I can't understand why any - as I said, the landlord will tell you they want percentage rent to see how the centre is performing. As you mentioned earlier a professional can walk around, he can look at the sandwich bar and he say, "Look, there are 15 people serving and making sandwiches between 12.00 and 2.00," and that's fine, high cost of labour et cetera but they'll say, "He's doing pretty well." They can have a guess, but it's irrelevant. When the leases come up, they still look at the sales and they put the form - and that can be a 50 or 60 or 70 per cent increase. I've seen it happen. It does happen and the poor little guy sits there and goes, "What am I going to do? I owe \$300,000. I can't walk away. I've got my mother working here, I've got my father working with me, and when the next lease comes on hopefully I'm going to pay off my 300,000, then they can have a lease back." How you protect people against that, I don't know.

DR BYRON: But the reality is that if they do sign the next lease at the end of that one it will probably be even worse, they'll have an even bigger debt - - -

MR WOODS: It can be worse.

DR BYRON: - - - and be facing an even bigger rent increase.

MR WOODS: But that's when they can walk. They can walk at any time basically. But the point is also if you come back to percentage rent, the landlord should not - the landlord doesn't tell you what the guy next door is paying but you've got to tell him what your business is. He knows everything about your business. Now, that is not fair. If he says to me, "Look, mate, the bloke next door is paying 120 grand and I want 200 from you," well, hello, it doesn't happen.

DR BYRON: So would this national lease registration system that's been talked

about - - -

MR WOODS: Yes, absolutely essential.

DR BYRON: What's your view on - let's go through a number of things there. Do you actually need the lease itself, which could be 70 pages or 100 or 150 pages or do you need the one-page summary?

MR WOODS: The one page. The rest of it is irrelevant.

DR BYRON: The rest of it is padding.

MR WOODS: Yes.

DR BYRON: Do we want just the face rent or do we want to know about incentives and do we also want to know the main parts of outgoings?

MR WOODS: We want the gross rent which includes outgoings et cetera. How that is broken up I think is irrelevant. At the end of the day you want the cheque that's written out at the end of each month to pay your rent.

DR BYRON: There's different ways of skinning a cat.

MR WOODS: There are. But if you come back to what the outgoings are what is the gross rent and then you can work that back, no problems at all. As far as incentives, that's a little difficult, but it should be included. If it can be included that would be terrific. But it's got to be done quickly. It's got to be done within seven days to 14 days of the lessee signing the document so it doesn't sit in somebody's office for four months, five months going backwards and forwards, saying, "We'll hold that back because we've got a serious of negotiations going on here." So once you've signed the lease it should be registered, 14 days, done.

DR BYRON: We've heard lots of discussion from lawyers about why it takes three months and six months and so on and that's why when one of them came up with this idea of you have your lease that can be that thick or whatever, but there's also this one-page summary. Maybe it takes six months to get - in Queensland you've got to get a surveyor to survey the shop, you might have to get the consent of the mortgagee or mortgagor or whatever, there's all sorts of reasons. But if you say, "Okay, this is the stuff that is going to the Titles Office," you've got a one-page summary on the web site within 24 hours.

MR WOODS: The essential terms and area is approx; the word "approx". It doesn't have to be 109.25.

DR BYRON: .24 is okay.

MR WOODS: Approximately 110. We don't need to know the exact detail, we need to have rough guide, 100 square metres is about 95 to 105.

DR BYRON: So this one-page summary is purely for the point of informing the marketplace.

MR WOODS: Correct.

DR BYRON: It's not about property title.

MR WOODS: Nothing to do with it. The property title you assume is correct. Westfield don't run around giving bad titles. If you've got an existing lease, you should not have to pay a survey fee which with a lot of leases you have to. You're already existing, you're already in the business, you're already in the tenancy. You don't need a survey because you're there. You've been there for five years. The quicker that role is out, the better it is. Coming back to Geoff.

MR HECHTMAN: No, that's all right. I'm out of it now. If my grievances help achieve something, I'll be happy for the existing tenants. But I'm out of it now.

DR BYRON: Given that all these things have happened, the question is what can governments do? What should they do or what should they not do? We've had 25 years of state and territory governments trying to make regulations about retail tenancy most of which is supposed to be about protecting small tenants from the market power of the large landlords and it seems to us that some things have improved over the last 20-odd years, but there are some things that still haven't.

MR WOODS: Geoff, I think you should mention without names what was said to you when you were negotiating the closure of your store in a certain centre. This just an example of what does happen. This is the sort of thing that I don't know how you protect people against this, but it's the sort of conduct or behaviour that goes on. Generally you have to accept the fact that your Westfields and your Colonials are very professional people and they usually hire pretty professional people and they've got an image to uphold and they have certain standard. They have training programs and all of that, but you know that's all fine, but there's also pressure on these professionals to perform and get so many deals and that's when they may go off the rails a little bit, but overall they're professional public companies.

DR BYRON: One said to me, "If you just look at the straight lease document it's amazing how much power it gives to the landlord, but you have to assume that 90 per cent or the time 90 per cent of the landlords will do the right thing." The question is where's the safety net for the occasion incompetence or something else.

But the whole business basically goes forward on a good faith that most of the time the guy won't shut me down - - -

MR WOODS: It has to.

DR BYRON: - - - even though theoretically he has the power to. Geoff, have you found the letter?

MR HECHTMAN: This is a letter that I wrote to the ex-leasing manager from Chadstone shopping centre -this was before Colonial took over - and she actually got herself a job with [personal/confidential details withheld] who have still got offices in the centre, but are divorced from the management. Is that right?

MR WOODS: Yes, that's fine. Just go on with the body of the letter.

MR HECHTMAN: I have addressed this to her and in this letter I'm saying - what's transpired before is that the business was going terribly and I just could not meet my commitments. I had a store 96 metres for which I was paying \$5500 a week just rent and on top of that there was outgoings and wages and whatever, so we were losing a hell of a lot of money. I addressed this letter to her:

I am writing this letter to you in sheer desperation. You have known me for over 22 years as a tenant of Chadstone shopping centre. For the past 12 to 18 months sales have dropped dramatically to the point where I cannot meet my commitments. I have had to borrow money to pay the rent. In late 2006 I met [personal/confidential details withheld] -

and I can't remember his name -

from Colonial Leasing to discuss my plight. I pleaded for a rent reduction. He advised me to move out. He said that he had a long list of tenants who were eager to get into Chadstone and were happy to pay the rent. On 8 May 07 I had a meeting with [personal/confidential details withheld]. They refused to lower the rent, but if I wished I could vacate. On 3 July 07 I had a meeting with [personal/confidential details withheld] who said things had changed and they would not release me from my lease which had three years to go.

At this point I want to make it clear that I became aware a few weeks later that the mall where my shop was located was going to be completely demolished, the whole mall was going to be demolished, so in other words I was out anyway, they would have had to relocate me. I just wanted to bring that point up before I go on.

On 3 July I had a meeting with [personal/confidential details withheld]

who said things had changed and they would not release me from my lease which had three years to go. He stated that even if I was to lose my home, which is my only asset and which has a large mortgage, Colonial would pursue me for their rent and costs. I spoke to another lady by the name of [personal/confidential details withheld], also from Colonial Leasing. She rang me on the 5 July and invited me for a further meeting and I met her at 10.30 am that same day. She said she would try to get another tenant but that this may be difficult as the mall where my shop is located was due for demolition and reconstruction in six to eight months. [confidential/personal details withheld] phoned me at 1.30 pm that day to inform me that she was to meet with a prospective tenant the next day and would be in touch.

[Personal/confidential details withheld] rang on 12 July to tell me that she had found a tenant and would be meeting with him at my shop to discuss details. On 12 July at 5 pm she arrived with the tenant, made good of premises was discussed and a handover date of 1 September was agreed. [Personal/confidential details withheld] said that the tenant would need one week for a fit-out and that we would have to pay Colonial one week's rent as compensation. We also would have to sign an unconditional surrender of lease document undated but it was agreed verbally that the shop would be vacated by 31 August. The documents were signed and delivered on 17 July. [Personal/confidential details withheld] rang approximately 2 pm to state that Colonial now required an additional two days and that the surrender date would now be 2 September. [Personal/confidential details withheld] rang approximately 4 pm to say that she had been instructed by [personal/confidential details withheld] from Colonial that they now wanted one month's rent as compensation.

[Personal/confidential details withheld], I - I know I'm repeating myself but I cannot begin to tell you of my own and my wife's desperation. Please, [personal/confidential details withheld], would you convey our plight to the [personal/confidential details withheld] Group and we will be ever so grateful.

Right, that's it. Now, that would go down as probably a tad unconscionable, perhaps?

DR BYRON: Yes, well - - -

MR HECHTMAN: Why one month's rent compensation when the tenant was going to occupy the store within a week of my leaving and he needed - he was only going to do a superficial fit-out with hardly anything?

DR BYRON: Yes.

MR HECHTMAN: I also want to mention that certain fittings I had to remove at my cost et cetera. This is what is so unreasonable, is that when a tenant signs a lease for say five, six years and spends say 100 or 120 or even more, after the lease expires he has no guarantee of a renewal of the lease. He can be told to go and then has to go and remove all the fittings and bring the premises back to its original state at his cost. I mean, you know, you pay and you pay and you pay.

DR BYRON: It does make me wonder why people continue to - - -

MR WOODS: People go into it.

MR HECHTMAN: You know - - -

MR WOODS: The list is shortening.

MR HECHTMAN: Restoration of the shop to its original empty four walls can cost today 6, 8 thousand dollars. I mean there are businesses now operating as bringing stores back to its original state. It's a good business.

DR BYRON: Okay, well, all I can say I guess at this stage is thank you very much for bringing that to our attention and putting it on the record.

MR HECHTMAN: I just hope it will help some poor bugger - - -

DR BYRON: Yes. Well, we all hope that.

MR HECHTMAN: - - - against these giants.

DR BYRON: Yes. Thank you very much.

MR HECHTMAN: Thank you.

DR BYRON: I think on that note we can adjourn for lunch and resume at 2.00 with Tauren Pty Ltd. Thank you.

(Luncheon adjournment)

DR BYRON: Let's resume the public hearings. The representative from Tauren Pty Ltd. Rad, if you would just introduce yourself for the transcript - - -

MR WILLIAMS (TPL): Yes.

DR BYRON: Then if - say 20 minutes or so take us through the main points that you wanted to make about the inquiry and draft report. Then we can talk about that for another half an hour or so after that.

MR WILLIAMS (TPL): Not sure it will take me that long but okay, yes.

DR BYRON: Well, thank you for coming.

MR WILLIAMS (TPL): Okay, so my name is Rad Williams. I'm a director of Tauren Pty Ltd. What else do you need to know about me? Is that enough?

DR BYRON: I guess you're going to tell us about Tauren's experience with regard to retail tenants?

MR WILLIAMS (TPL): Okay.

DR BYRON: Yes.

MR WILLIAMS (TPL): Well, my experience with regard to retail tenancies as a tenant - well, actually I was not a tenant, I was occupying a shop under a licence agreement whereby my franchisor had taken a lease. My franchisor was a national company and they had taken a lease in a suburban shopping centre which was managed by again, another national company, and was later - their management rights and the centre were sold during our tenancy or our time there to another national large company. So we took occupation of the premises in September of 2005. We spent money getting licences with a franchisor with a provider of - not sure how much I can say on this if it's on the public record.

DR BYRON: Yes, well, don't - don't go too far into the details because yes, it is public.

MR WILLIAMS (TPL): Okay. So we were required to pay some accreditation fees and do some training, which all costs time and money, in order to operate the shop we operated, both with the franchisor and with other parties. We were also required to pay for the shop fit in the centre, which was several hundred thousand dollars, and the stock and the bond. All up it was about \$600,000 to get into the business.

We were given projections by the franchisor as to what we could expect in terms of turnover and profit, assuming some - you know, general figures on what they expected the break-up of the trade to be amongst the different product categories and what they were told by the shopping centre developer - it was a new centre, the shopping centre developer would be - the likely foot traffic. So they worked out their numbers and they said, "Well, we would expect this store to turn over this much and this breakdown of product sales, this many employees, this much work by yourselves, you should end up with a profit of X."

So we took all that information, did some sensitivity analysis on it, looked at their other stores - and they were running about - I think it was 15 stores at the time and had been in this particular industry for nearly 30 years. So we thought, "Okay, they - you know, they kind of know what they're doing, we hope." Being a first time entrant into a retail shopping centre we knew that we were in a not terribly strong position if we were just a tenant and that's why we decided to go with a franchise system. So that's, I guess, the background to why we got into it and what it cost us.

When we moved into the centre there were problems with the development of the centre which delayed the people coming to shop there. That took some months to play out before they finished the whole centre. When that was finally finished we were expecting the traffic to be somewhere near what they had predicted. That didn't happen. The traffic was hard to determine. We don't know what the traffic was but we know that our sales were about 30 to 40 per cent of what was predicted. It took some time for us to learn the ropes and this industry and to understand where we could make efficiencies but there was nothing we could do about getting people to the centre, that was in the hands of the centre manager.

So reasonably early on we started negotiating or talking to the franchisor to say, "We've got a problem. How can we fix this?" The franchisor attempted to work with the landlord to, firstly, get some more people through the centre and also to get some sort of rent relief. They were successful to a minor degree. They did get a little bit of rent relief for a little while but nothing commensurate with the sort of downturn in trade versus projections that we would have needed to make the thing viable.

So there was a lot of toing and froing going on, trying to resolve it, how we're going to do it. How are we going to make this thing profitable? Do we make the shop smaller? Do we sell other products? None of that was ever going to work because basically there just weren't enough people coming through the centre.

We felt that we were continually put off by the relationship between the franchisor and the centre manager in that the franchisor would tell us, "Look, we've got influence with these people and we've got other shops in other centres with these people and we're planning to lease with these people. With this particular national

management company, we're going to be opening other stores, so we've got some influence in what they're going to do. So we were hanging on, hanging on, hoping that some of that would come to us, but really, it never did. Eventually we got to the point where we said, "Look, we've just got to get out of this," so we started negotiating for them to buy the business back from us - that's the franchisor to buy the business back from us. That did eventually happen about a year and a half after we entered the business but not before we got into dispute with them, refused to pay rent because we couldn't pay rent, and eventually they kicked us out of the store. The franchisor was working with the centre manager to get us out of the store. That happened in December 2006, just before Christmas or the day before Christmas.

So since that time, after we were kicked out of the store, they basically shut the shop on us, they kept the money in the tills, they kept all the stock, they wouldn't let us back in to reclaim belongings. It was quite a fight to get anything back out of the shop. Eventually they reopened the shop and we were in the process of taking them to court to try and recover something. Concurrently, we had applied to the office of the mediation adviser to go to mediation to resolve the issue of them buying the business back. At that mediation, we did agree with them that they would buy it back. We signed a contract. They paid part of that money to us and the balance of the money is due at the end of this month.

I think the important thing about that is that just to get to the mediation and present our facts with any sort of strength, we had to spend about \$40,000 with lawyers and various places, trying to get information, so that we could with confidence at least argue our position. It was clear though that if they couldn't resolve it at mediation, we had to go to court. It was going to cost a lot of money and it was uncertain whether we'd win. People were telling us that the result we had was actually a very good result in the industry and they didn't really have to do anything and they could have just let us sit there, which may be true; I'm not sure. So we took the business decision and sold out. The costs to us at the end of the day were something like \$250,000 in cash costs and we've estimated we lost about another \$150,000 in lost opportunity or having to fire sell other assets to get to the position where we could even fight and stay alive because of the losses in the business at the time.

So that's I guess a snapshot of the history we've had. We felt in that mediation that we were really behind a barrel and that we didn't have many ways to go and we felt at the time that even if we were successful in pursuing the franchisor and winning the case, we weren't sure they had the money to give us our money back anyway, so that was in our minds. Then the next thing was that if we could ever prove blame to the shopping centre manager for putting out misleading foot traffic numbers in the first place, we just felt that was going to be an impossible battle to win because of the resources they have and they're expert at fighting those battles and to my knowledge, they have not lost one yet, so that's my story.

DR BYRON: I guess it's no consolation at all, given your losses, but there are worse stories out there. The challenge for us is what, if anything, can governments do that will prevent those sorts of situations arising, and in dealing with both a landlord who you're renting the physical space from and the franchisor who you're in effect renting the intellectual property assistance from, I guess it's at least twice as complicated as dealing with just one of those two.

MR WILLIAMS (TPL): Yes.

DR BYRON: Did you have any interaction with the Franchise Code? Did that help you in any way?

MR WILLIAMS (TPL): A little, only later on in the piece. The franchisor complied with all the requirements under the code. They signed all the documents, they presented all the documents, but their numbers were just not close to anything real.

DR BYRON: Yes. If we go back to a post-mortem on this very unpleasant and unprofitable experience for you, what exactly went wrong was basically that the projections for the new centre were overly optimistic.

MR WILLIAMS (TPL): Yes.

DR BYRON: That's one of saying it; the other way is to say that the centre management didn't deliver on what they were hoping, claiming, expecting to deliver.

MR WILLIAMS (TPL): I think either is correct. They said that the foot traffic in the other side of the centre - this was an extension - is a particular number. I've no way of knowing how they got to that number, whether there's a standard or anything like that. The other part of it that I haven't talked about is that this particular franchisor has presented these things to us and has presented the same sort of claims to many other franchisees and four franchisees, of which I was one, went to the ACCC and said, "Look, these numbers that this franchise is putting to potential investors are not achievable. They're not achievable in terms of the foot traffic but also in terms of returns available to the operator of the franchise." Sorry, I've gone back here, but we did put that to the ACCC and they started to investigate that and then they decided that it was too hard to investigate and they didn't pursue it.

Having said that, a fifth franchisee is currently in a very similar position to the one I was in, where he's been locked out of his shop, he's had to spend about \$40,000 with barristers preparing a case and now he's taking the franchisor to I think the Federal Court, I'm not sure, and he's been asked to put up \$100,000 court costs in case he loses. We're talking about a mum and dad type person here and that's what

they're faced with. The franchisor did do everything according to the letter of the franchise code. We just didn't put the right numbers in there.

DR BYRON: It seems that many of the most tragic cases that we've heard about involve either a major expansion of a centre or a greenfields centre and a lot of it comes back to the foot traffic that persuaded the retailers to go in there didn't eventuate.

MR WILLIAMS (TPL): Okay.

DR BYRON: Now, whether that's deliberately misleading or whether that's just overly optimistic it's a pretty fine call that I guess a court or a mediator would make. If you've gone in there and the foot traffic had been double what they had told you, you probably would have done all right.

MR WILLIAMS (TPL): Yes, but they have got explanation clauses that say if you get over a certain trade then they get more rent.

DR BYRON: So there is base rent plus a percentage of turnover. Okay. Coming back to the question of what should governments - Commonwealth or state - do when situations like this arise. We've got the history, what do you do about it?

MR WILLIAMS (TPL): Well, I think it would have been helpful to us had we known the process earlier. We were in a complicated position because there was a franchise and a lease arrangement, so it was never quite clear to us who we were having to deal with. It became clear after we spent a lot of time and energy learning about it, because we had to. You go into these things hoping things are going to be all right, you don't go into them expecting the worst. It took us quite some months to figure out just what we needed to do. I would think an improvement in the legislation would be to make education of the process and what you do, put it onto the people who have got the power to force it onto the people who are in the weaker position.

DR BYRON: In Queensland the law, as of a couple of years ago, says that before a lease can become effective the tenant has to get both a solicitor, a legal sign-off, that they had been through it and explained it to you, and usually an accountant or some other commercial adviser sign off that the business model is sound, that the figures seem plausible and all those sorts of things. A number of people have said, "Well, yes, that's a great idea. We should have that in every other state too." But when we look and ask, "What difference has it made in Queensland compared to before and after?" you can't actually see anything. Some people are saying, "Why should we have to pay \$10,000 to get a lawyer to tell us that the lease is okay?"

MR WILLIAMS (TPL): Yes, it's a tough one. We had the same thing here, we

had to get sign-off by accountants and solicitors. They looked it and they said, "It looks all right to us," but when it goes wrong and you go back to the accountants and the solicitors who say, "We don't know what to do," or, "You've got to spend all this money," which is what happened to us. I guess my thought there is if it could be more promoted on an ongoing basis, as opposed to just at the front when you do it and you say, "All right, I've ticked that box," I think it would be better to have it in regular communications from the landlord to the tenant, particularly where there's an imbalance of power, that says, "If you've got a problem, if things aren't working out, this is what you do. This is the process," much like they do with the cigarette packets where they tell you there's a problem with smoking cigarettes. If the stronger partner had that onus on them then people would at least know where to go. What we found is when we went and spoke to a solicitor, we'd speak to three or four and we'd get kind of different answers from everybody. It wasn't clear what you had to do.

DR BYRON: Well, unless there are specialists in retail tenancy or franchise - - -

MR WILLIAMS (TPL): In this case that would be both, yes.

DR BYRON: - - - it may be new territory for them too.

MR WILLIAMS (TPL): Yes. Anyway that's one thought if they could just proactively push, "This is how you resolve a problem." The other thing that I thought would be a very useful thing to do would be to have, as much as the tenant puts up a bond against their performance against paying rent, I think the landlord should have to put up some sort of performance that could guarantee against what they're saying they're going to provide, such as foot traffic, and there should be a code or a standard against how you measure foot traffic and how it's reported because the whole business is around foot traffic.

DR BYRON: Yes. We were talking about that in the Sydney hearings. Given that foot traffic is so important to both the business model of the retailer but also to the landlord, maybe those figures need to be publicly available and can be audited.

MR WILLIAMS (TPL): Yes.

DR BYRON: We were talking about being able to audit outgoings but if foot traffic figures are so important to both sides, maybe they need to be more readily available and absolutely squeaky clean.

MR WILLIAMS (TPL): I think so. I think that would be a major improvement and I think within the lease there should be room for the tenant to tie the rent to the foot traffic because in our case we went in there with a particular scenario presented to us and told, "That's conservative, that's the minimum," and it wasn't. Had rent

been adjusted according to a predetermined foot traffic formula we might not have been in this situation.

DR BYRON: Yes. A few people have said to us that the reason you pay more in rent for space in major shopping centre is because the management will actually generate more foot traffic for you than you'd get out on the street and if you're a good retailer you can convert that foot traffic into turnover into profit.

MR WILLIAMS (TPL): That sounds reasonable.

DR BYRON: Yes. But what we're looking at is, where's the accountability and responsibility if the landlord doesn't deliver on that function of managing the centre well so that it does generate lots of traffic?

MR WILLIAMS (TPL): Yes, that will be a major step forward, I think.

DR BYRON: I guess the two parts of rent are the base rent and then the percentage of turnover if you get above the threshold. Turnover depends on more than just the foot traffic, it depends on how good a retailer you are, and product mix and all sorts of other things.

MR WILLIAMS (TPL): It does, but if there's a line like that it's plus or minus 5 or 10 per cent above the line that is the foot traffic line.

DR BYRON: Yes, but maybe it would be better to go back to the foot traffic. When you sign a lease in the centre there's a base line of, "This is what the expected foot traffic down that corridor is going to be," and if it's 50 per cent more than that then you'd probably pay higher rent and be happy about it, but if it's 20 per cent less than that then the rent comes down accordingly.

MR WILLIAMS (TPL): Yes.

DR BYRON: It's different from just paying rent on the basis of turnover because this is purely on the basis of traffic which is what the centre is supposedly managing and responsible for.

MR WILLIAMS (TPL): Yes, but their counter to that would be, "Well, it depends on how good the retailer is because they're going to draw the traffic," but mostly it's the centre that's promoting them as a destination and the retailer is just part of that.

DR BYRON: Yes. Well, if you could draw your own traffic you wouldn't need to be in the centre.

MR WILLIAMS (TPL): True.

DR BYRON: We talked this morning about some sort of ombudsman role - whether it was state or Commonwealth doesn't really matter - but somebody who you can ring up when a problem arises and they can basically come in and sort something out fairly quickly. Could you imagine that would work in your case?

MR WILLIAMS (TPL): It would have helped us to have a place to go to sort it out. We went to the Small Business Commission thinking that was the place to go to sort it out and it wasn't because we were in a franchise agreement. So if the ombudsman could cover all bases that would help, but if it was just tenancies or just franchising then I imagine there's going to be a lot of people caught in the sort of trap we were caught in.

DR BYRON: We've been told that increasingly out of all the small specialty businesses in the large shopping centres, they tend to be franchises anyway rather than purely independent mum and dad businesses there. They're becoming pretty rare in the larger centres. Most of the specialty tenants in the centres either seem to be national chains or franchisees.

MR WILLIAMS (TPL): Yes, and you can see why the landlords want that, because they're just dealing with a large player. In our case, how it played out for us is that the franchisor at the end of the day got his foot on some real estate in a shopping centre, had us pay for it all - he would argue that he paid some, but most of it was ours - we've taken the loss on the first year and a half of operation and nobody knows what the ongoing losses are going to be, but he's got that shop back at a discount with the opportunity to now move on, and had the hard times paid by somebody else. So one of the conclusions we came to after going through all this with the ACCC was we're thinking, "Gee, we should just be a franchisor. This is a good place to be. If we really wanted to make money we'd just go and be a franchisor and do this ourselves," because they're not able to be touched and they can ride these bumps on other people's money.

DR BYRON: We've been told of other circumstances where like you the franchisor is actually the tenant and the operator of the business is simply a licensee. We're trying to think through what the incentive structure is like there. Does it mean that the franchisor has less accountability to negotiate the best possible rent deal because he's not going to pay it, you are?

MR WILLIAMS (TPL): I think that's what's actually happening. In our case the franchisor is on the lease, so the ultimate buck stops with him. In some cases the franchisor is not on the lease. The franchisor just licenses his business system, in which case they're completely out of the picture.

DR BYRON: We've seen all sorts of different varieties of how this is done. I was just wondering if you had any thoughts on what you thought was the best one, whether it's better for the operator of the business to negotiate his own lease that he has to pay for,

or whether it's better to have a national franchisor negotiate the lease on their behalf, given that they may be able to get better terms and conditions because of their higher profile of their other franchises in other centres and all that sort of thing.

MR WILLIAMS (TPL): That's certainly what we thought when we went into the deal, that we'd be getting a better deal on that basis. I don't know the solution to it, but what's actually happening is that the franchisors are just more interested in getting real estate, which is leasehold real estate effectively, and in some cases we know of, they'll go and pay for a lease than the landlord is asking just because they want the real estate. So they'll take less advantageous terms than the current tenant, non-franchised just existing tenant, to basically take on that business. The sitting tenant has lost his shop. The new franchisor comes in and says, "Yes, we'll pay that more rent," because they know that their franchisee will have to take the pain.

DR BYRON: Yes, but if the rent is basically a higher level than is sustainable then the franchisee is going to be dragged under and that's not good for the franchisor either, is it?

MR WILLIAMS (TPL): That's what we're seeing happen and no, it's not and the franchisor would argue, "But we've got better business systems, therefore we can afford to pay more rent and we can get better deals with suppliers," et cetera, et cetera. Again, that's not what's happened in this case.

DR BYRON: Is there anything with regard to information provision? We've talked a lot in this inquiry about being able - for people going into a small specialty business, are people being able to get access to information on what other people are paying in that centre or in similar centres? It sounds like you did your homework and none of the alarm bells went off.

MR WILLIAMS (TPL): No, we did do our research and we compared other centres. We thought the rate per metre looks about right on this foot traffic. The one that caught us was we believed the foot traffic. I think there's enough information out there already about what a particular type of shop can afford to pay in rent, if you're prepared to look for it. Having more would help, but I don't think that's the thing that was missing in our case.

DR BYRON: But knowing that ultimately the viability of the business came down to the foot traffic, is there any way you could have vaccinated yourself? I guess I can't immediately think of one and it's probably only after the fact that you've realised that that was the weak link in the whole model.

MR WILLIAMS (TPL): Yes, if we were to go and do another one we'd certainly look for that, but this was our first go and we went with a franchisor who was supposed to know about this stuff, 30 years' experience, lots of shops.

DR BYRON: I suppose a cynic might say, in business stuff happens. I guess what governments are concerned about with regard to regulation and so on is whether there's something that's just intrinsically biased or systematically - that nobody who goes into small business is guaranteed that they're going to make money, but what governments are looking for is to see if there's anything that's systematically abusive. Is the answer to make the centre management in some way accountable for the amount of foot traffic?

MR WILLIAMS (TPL): My view is yes.

DR BYRON: We'll put that question to a few other people as we go around. Is there anything else you wanted to say?

MR WILLIAMS (TPL): No, I think I've covered my point, so thank you very much for hearing me.

DR BYRON: It's certainly a salutary lesson that even doing the research in the sense you did the analysis, you can still get burned.

MR WILLIAMS (TPL): That's the way it goes.

DR BYRON: Thanks very much for coming and sharing that with us, Rad.

MR WILLIAMS (TPL): Thank you.

DR BYRON: Next up we've got the representatives from Todd Trevaks Retail Consultant. If you could just introduce yourself and your background and then take us through the main points that you wanted to make. Thank you for coming.

MR TREVAKS (TTRC): My background is that for about 20 years I was the property manager and company secretary of the Sportsgirl/Sportscraft group of companies. When I left that company in 1994, I became a consultant to the Australian Retailers Association on tenancy matters and also consultant to a number of national retailers and shopping centres. Since 2003, I've been a consultant to the Small Business Commissioner of Victoria. I am a member of his ADR panel of mediators. I'm also a member of the panel of the Franchise Mediators in Sydney. I have a law degree. I have a qualification as an estate agent's representative. I have qualified for advanced mediation with Bond University and I'm an active mediator and consultant. I think that sums it up.

DR BYRON: Yes, it does indeed, so thank you even more for coming.

MR TREVAKS (TTRC): I thought because, as I understand it, there's only limited opportunity to make a number of points, I'd picked out the things I'm most passionate about. I believe that it's quite critical that there be national legislation which is

uniform. I identify with all the recommendations that are in the draft report on that. I have consulted to a number of national retailers and it's very irksome to have to find out what the legislation says in each state. I support the draft recommendation at page 211.

In relation to market information, transparency and disclosure, I think I might be at variance with the draft report. My own experience is that the more detail there has been in disclosure statements, the more helpful that has been to me as a consultant to retailers. In fact one of the problems that I find is that there may be not enough information in the disclosure statement. One of the things that always worries me is the generalised statement which you get in a disclosure statement from a shopping centre that there will be changes in the tenancy mix and the tenant should take that into account. I always ask the landlords, "How can you take into account something that you don't know?" Of course what does happen is that competitors are introduced into shopping centres when they're extended and it starts to cannibalise some of the existing businesses.

So I have often felt that it would be of considerable assistance to both landlords and retailers, particularly in the shopping centre environment, if there was to be a statement of what the risks are in entering into a retail tenancy lease. When I advise tenants, I always try to point out to them what the risks are because when you're entering into a retail lease, say, for five years, you're agreeing to pay the rent for five years, you have to find the money for fit-out, you have to find the money for stock and what usually happens with a lot of the smaller tenants is that they have to borrow considerable sums of money to set up, and if the business doesn't go according to plan or budget, they run out of money.

I have now mediated some hundreds of retail tenancy disputes and my anecdotal feeling is that around 80 per cent of them should never have been entered into because they weren't viable. But one of the problems, if I can make the point, is that I have advised people not to enter into leases but nevertheless they have entered into the lease because they say to you, "I have to have that shop." I've had that experience even with national retailers who ought to know better. When I was working for the company that I worked for, it was almost impossible to get them to close a shop that wasn't making money. So there's this feeling amongst retailers that they have to preserve sales and they're not so concerned about profit, it seems to me.

Anyway, I think that if landlords had to point out what the risks were, it might deter some people from entering into leases that they shouldn't enter into, so I'd be very keen to see that happening. I don't think anybody has mentioned that.

DR BYRON: No.

MR TREVAKS (TTRC): As I say in the little note I've given, the main reasons

why retailers don't succeed I think is that they either lack experience or they're undercapitalised, and if the risks were pointed out to them before they entered into the lease, it may get some of them to think about it a bit more profoundly than they do.

On the voluntary code of conduct, I support the concept as suggested at pages 212 and 213 but I'd just like to say that I was representing the Retailers Association in discussions with the Property Council some years ago and we talked about drafting a voluntary code and we in fact did draft one but none of the major landlords was prepared to agree to comply with it, so it was a somewhat useless exercise. So unless major retailers and landlords agree to abide by the code, it wouldn't really help.

One of the reasons that it's stated why there is retail tenancy legislation is to protect the small businessman. I've always been of the view that any legislation should apply not only to the retail leases but to all commercial leases and it should be to spell out best practice in leasing because some of the major tenants and landlords also need some sort of protection from time to time.

Perhaps I should relate an anecdote by experience which illustrates some of the difficulties that we have in this business. I was advising a retailer in one of the shopping centres who had the front of his shop covered up by a kiosk so you could no longer see it and whenever I advise tenants to enter into leases, I always try to get a clause in that there will be no obstruction to the line of sight. So I asked to see the lease, which he showed me and it didn't have such a clause, so I said, "Did you have a lawyer look at this lease?" He said, "Yes, but I sacked him." I said, "What did you do that for?" He said, "Because he told me not to sign it."

DR BYRON: I shouldn't laugh, but that's really sad.

MR TREVAKS (TTRC): That's what you're up against. I've had that experience several times. I've had people tell me that they didn't agree to things, where they've signed a lease that says they have. I say, "Is that your signature?" "Yes." "Well, you agreed." "No, my lawyer told me to sign it, so I signed it." "So what are you saying to me, you've signed a document you didn't understand?" "I suppose that's right." So the need to educate both landlords and retailers - and if I may say, lawyers and accountants as well - on the reality of business and retail business in particular, has still got some way to go. This applies equally particularly to mum and dad landlords in strip shops. One of the things that I've noted is that tend to let landlords who are struggling owe them too much money and then when they get around to trying to claim it the retailers has gone broke and everybody has lost. So educating the - I don't know how you do it because there are all sorts of opportunities to be educated. They are available but even when people go to them they don't necessarily take any notice of what they are told.

The other matter that I'm wanting to talk about is alternative dispute resolution. I've been involved with the Small Business Commissioner right from the opening of that office. In fact, I was the one who devised all of the ADR procedures for that office as well as being one of the mediators. It works very well. It's low cost. The Small Business Commissioner subsidises the fees of the mediators; who aren't, I might say, overpaid. The success rate in terms of settlement is around 80 per cent. I don't regard a mediation that fails to reach a settlement as a failure because at least it brought the parties together, they've communicated, they understand where everyone is coming from. Even that is a step forward, in my view. So that's a model that I really highly commend. The Small Business Commissioner of Victoria also mediates disputes other than retail tenancy disputes also on a low-cost basis. It's very helpful, particularly to small business and small employers. So they were the major points that I wanted to make.

DR BYRON: Okay. Thank you very much. There's a few things there that I'd like to pick up and elaborate a little bit more. When you were talking about a risk statement it seemed so obvious but I don't recall anybody mentioning that to us before.

MR TREVAKS (TTRC): No.

DR BYRON: Well, I guess people won't necessarily take a lot of notice of it if they're already, you know, paying for legal advice but ignoring it and sacking the lawyer. But at least, you know, some people might - it might focus their minds a bit. I guess for people just starting out in small retailing, you know, there are some who don't know how to get advice or that advice is available; there are some that don't bother to ask for it; and there are some that ask for it and get it and then still don't take any notice of it.

MR TREVAKS (TTRC): Correct.

DR BYRON: You know, you have to wonder how much more governments can do to educate and inform people who actually pay good money for advice and then ignore it.

MR TREVAKS (TTRC): Not a great deal, I don't think. I don't think governments can do much except make sure that the facts that landlords have to give to tenants are - or pertinent facts are available. One of the things that is a problem, I think, is trying to find out what rents are being paid in shopping centres. It's not publicly available so you have to go and ask all the other retailers how much they're paying, and that's pretty irksome.

DR BYRON: Yes, well, we've had all sorts of proposals about whether the leases

themselves should be on a searchable national database; or a suggestion that was given to us by a law firm in Brisbane on Monday was that you have a one-page epitome of lease which is signed by both parties simultaneously with signing the lease proper. Then that one-page summary goes up as readily available and searchable. It would be a very, very low cost, very easy system that would at least make information available to people. Whether they used it is another question but it would be there.

MR TREVAKS (TTTC): Well, that's a step forward but it wouldn't be conclusive because there are a lot of incentives given out and they don't appear.

DR BYRON: Yes, well, that's right. We've also talked about what information would actually be on that page, whether it's gross or effective after incentives, whether - you know, some people are concerned about the level of outgoings as well as the effective rent.

MR TREVAKS (TTTC): Yes.

DR BYRON: But the idea of having some simple information so that you could see, you know, what every other coffee shop or dress shop or whatever category you're interested in was paying in that centre and similar centres would certainly give - appear to give some more information to the tenant who is probably pretty deprived of information at the moment.

MR TREVAKS (TTTC): Yes, well, I would find that very helpful as a consultant. What I try to do when I'm talking to people about entering into a lease is to try and get them to tell me how much sales and gross profit they think they're going to make. I try to help them work that out. Then, when you look at the occupancy costs, you would say to them, "Well, are you going to make enough sales and gross profit to be able to pay that," because that's the way you've got to look at that.

DR BYRON: Yes.

MR TREVAKS (TTTC): One of the things that I find difficult is knowing what rents are being paid for that category in a particular centre.

DR BYRON: Just coming back to your comments about the disclosure. You say, you know, there will be changes in the tenancy mix. Now, what are you supposed to do with that? Somebody else has said to us in submission that disclosure statements should actually be confined to fact rather than to conjecture about what might happen. Or to ask somebody, "Do you have any intentions to do such-and-such over the next five years," will probably invite the answer of no. It's very hard to prove that that was a knowingly wilfully false statement. But rather than ask people to speculate about what their intentions might be or what they might do if something

happened and then dah dah dah - if the disclosure statement stuck to objectively proven fact would that help?

MR TREVAKS (TTRC): Well, one of the reasons why you have to have some conjecture is the existence of relocation clauses and demolition clauses, because if they are included in a lease then the prospective tenant needs to know that they are going to be relocated and if so, on what terms and on what basis are they going to be demolished.

DR BYRON: Yes.

MR TREVAKS (TTRC): So I always get them to ask is there any current intention to do any of that and then I make that into a representation, the answer, so that if they say, "No, we don't expect to do anything in the next five years," then I'll regard that as a representation.

DR BYRON: Okay, yes. In Queensland, at least - I think perhaps in some of the other jurisdictions there's a requirement that for the lease be effective that there must be both a sign-off from a lawyer and from some commercial adviser, consultant. But we were told there on Monday that if the retailer goes to a suburban solicitor who is mainly doing conveyancing and isn't really on top of retail tenancy they might end up paying, you know, five or 10 thousand dollars for not very much useful advice. If they go to an accountant who basically has been doing tax returns and doesn't specialise in the analysis of business models for small retail, again, they could be charged a lot of money for advice that's not actually worth that much.

MR TREVAKS (TTRC): I agree with that.

DR BYRON: You agree with that?

MR TREVAKS (TTRC): In fact, I would go as far as to say that the number of lawyers in Melbourne that really understand retail tenancy you could count on two hands.

DR BYRON: Okay. Yes, well, that has got some pretty interesting implications. Moving on to your comments about a code of conduct, I understand that there's a casual mall tenancy code of conduct - - -

MR TREVAKS (TTRC): Yes.

DR BYRON: - - - that has now been agreed after about five or six years. There was a draft of a code of conduct on outgoings - - -

MR TREVAKS (TTRC): Yes.

DR BYRON: The reason we floated the idea in the draft report was to see if there was some sort of circuit-breaker or a way of getting a bit more mutual confidence and trust, good faith, those sorts of things or having an agreed statement of what's reasonable behaviour. But if the parties don't think it's worthwhile to sit down and agree on a code of what's reasonable then I guess it's not going to happen, but I guess we also thought that that would be one way of getting something that was national in this application.

MR TREVAKS (TTTC): Yes, I'd agree with that. I think since the advent of retail tenancy legislation there has been a much better atmosphere between landlords and tenants, better communication, better understanding of each other's position. I think a voluntary code of conduct that everybody agreed to could further enhance that.

DR BYRON: You said the idea of spelling out what's best practice in leasing and how it should inform and apply to all landlords and all tenants big and small right across the spectrum. I think it probably would have both that sort of educational component about where the line is on what's reasonable behaviour and what's not, but it seems like there's probably half a dozen different ways of getting a similar outcome, whether the various parties in the industry sit down by themselves and work it out, if an ombudsman was appointed or something like they had under the franchising code where he has powers to adjudicate, I guess if you were appointed as ombudsman the first thing you'd do is sit down and say, "What do I think would be reasonable as a benchmark for the cases that are going to come before me," or alternatively, state governments will sit down and write in legislation what they think is reasonable or unreasonable behaviour. There are many different paths that basically lead to laying out what the rules of the road are.

MR TREVAKS (TTTC): Yes.

DR BYRON: I don't really care which path you take but I think people need to know pretty clearly what the rules of the road are - - -

MR TREVAKS (TTTC): They do, yes.

DR BYRON: - - - and they don't all at the moment.

MR TREVAKS (TTTC): I've seen some very sad cases when I've been mediating where nobody comes out of it positively. It can all have been prevented right at the beginning if only people would have sat down and done what they had to do.

DR BYRON: There has been some discussion at the hearings, a lot of people were very unimpressed by our comment about the increasing divergence between

legislation relating to retail tenancies and legislation relating to other business tenancies. Yes, we appreciate that they're different markets and there are differences but I guess what were questioning was the extent to which they need to be getting further apart. If there are protections to prevent a small retailer from abuse of market power by his landlord, shouldn't similar protections apply to a small workshop or an industrial thing?

MR TREVAKS (TTRC): Yes, an SME - small business or medium enterprise. I couldn't agree more. I've seen some terrible things in my retail research, and you try and get them changed and they won't move, some people. You say, "I think that's unfair, I think that's unreasonable," but it's, "Take it or leave it."

DR BYRON: Yes. The alternative dispute resolution mechanisms, we would have made the provisional assessment in the draft report that on average, in general, across Australia these things were working pretty well and certainly a big improvement compared to the days before they existed which is not to say that they're now perfect or can't be further improved, but we did have a few people complaining about the way the ADR works because in their particular case that didn't give an outcome. So I was pleased to hear your comment that the system in Victoria seems to work very well because it's consistent with our assessment. I just bring to your attention the fact that a few people have disagreed with that.

MR TREVAKS (TTRC): Well, if they can't get a settlement they might be dissatisfied but you can't help it. I mean, sometimes you just can't get people together.

DR BYRON: The alternative is worse.

MR TREVAKS (TTRC): One of the difficulties in retail tenancy disputes is that the mediator has to try and get one or both of the parties to agree to modify their perceived rights and that's not necessarily easy. What's really difficult is once the relationship has been fractured by the tenant leaving the premises and we're arguing about money, that's really hard.

DR BYRON: One lawyer in Sydney last week described a tenancy agreement as an incomplete contract in that party A can require party B to do certain things but at what time and at what cost and with what consequences is not specified or that party A reserves the right to do things at some point during the fixed term agreement without necessarily having to be responsible for the consequences for the other side. So would you agree that it's sort of - - -

MR TREVAKS (TTRC): It does happen but we try to overcome that by spelling it out in the lease.

DR BYRON: But that makes leases a much longer document, doesn't it, in terms of having to cover a whole lot of, "What if this happens? What if that happens? What if something else happens?" and hopefully nine times out of 10 none of those horrible things will happen.

MR TREVAKS (TTRC): That's true. The advent of the word processor has made leases abominable. They can go on for 60 and 70 pages, some of them.

DR BYRON: Yes. Do you think it is possible to distil a lease document down to a handful of half a dozen things?

MR TREVAKS (TTRC): Well, the way it's done in real estate transactions is that you've got a thing called table A which has got all the conditions of a contract, so you refer to that in your contract without having to spell them all out. They're standard conditions that everybody agrees upon. I think you could do the same in retail tenancy legislation so that you've got standard conditions that are implied or expressly incorporated without having to repeat them all the time.

DR BYRON: If the parties agreed to depart from the default of the standard conditions - - -

MR TREVAKS (TTRC): They can.

DR BYRON: - - - they can, but there would be a big line through something and a few signatures beside it and everybody would know that clause X doesn't apply to this particular contract. Barring that all the standard rules apply.

MR TREVAKS (TTRC): I was going to say in my day at Sportsgirl I had agreed on standard leases with a couple of the shopping centre developers and if there was a variation we'd put them in at the end as a special condition.

DR BYRON: You know what all the other clauses say and you just look for the variation?

MR TREVAKS (TTRC): Yes.

DR BYRON: Apart from that it's stock standard vanilla?

MR TREVAKS (TTRC): Yes.

DR BYRON: We were talking about that in the draft report but again a few people have given reasons why they don't think it's possible but I think it would enable variations to occur but they would automatically flag themselves.

MR TREVAKS (TTRC): Yes. They would be pointed out, wouldn't they?

DR BYRON: Yes, because the way the process has been described to us, you get the offer to lease, the agreement to lease, and then the lease itself, and you're continuously going through to see whether the fine print that you debated over last month has actually been incorporated into the next version when it comes. There's an enormous amount of time in reading line by line, word by word.

MR TREVAKS (TTRC): Indeed there is. What happens now a lot is that the tenant gets an offer to lease, which could be a five or six-page letter; gets an agreement for lease subsequently; and a pro forma lease. You've got to make sure that the terms are the same as in the offer, and sometimes they're not.

DR BYRON: Other people have told us about that too, but that all increases the transaction cost.

MR TREVAKS (TTRC): It does, but what can you do?

DR BYRON: Okay, that's been extremely helpful, thank you. Is there any other in conclusion comments that you'd like to make?

MR TREVAKS (TTRC): No, I thought the report was really great.

DR BYRON: I always love to hear that. I don't hear it often enough.

MR TREVAKS (TTRC): I learnt a lot about things I didn't know, to be honest.

DR BYRON: I find it hard to believe that there's much about retail tenancy that you didn't know before.

MR TREVAKS (TTRC): No, statistics were there that I didn't know, but I thought it was very good and I don't divert from it much, but I'm quite happy to still be involved if you think I can help.

DR BYRON: Thank you very much, Mr Trevaks.

MR TREVAKS (TTRC): Thank you for having me.

DR BYRON: Thank you for coming and for your written submissions, it's been most informative. Thanks very much for coming back, Steve.

MR SIMPSON (SF): That's fine.

DR BYRON: If you could introduce yourself again for the transcript.

MR SIMPSON (SF): Yes, wearing a slightly different hat for those people who were here this morning. Steve Simpson is my name. I'm a director of a retail valuation practice, consultancy practice known as Simpson Forsyth. A bit like Todd, I've got over 30 years' experience in the retail property industry under various guises, not quite 10 years with the old G.J. Coles for those that are old enough in the room to remember that name, more recently known as Coles Myer. For the last 22-odd years or thereabouts I've had in various guises my own business in the area of retail property consultancy, valuation, and working for a variety of different retailers. I'm a certified practising valuer and I will state up-front that I do meet the criteria under the current Victorian legislation as a specialist retail valuer. I did give the commission a paper which I'll sort of come back to towards the end. Having heard most of today, there's a number of issues I'd like just to perhaps touch on and hopefully fill in some of the gaps that might have been missed by some of the other speakers today if I can.

DR BYRON: Thank you.

MR SIMPSON (SF): Lease terms: generally speaking, as we've heard from a number of people today and probably right around this country, lease terms particularly in shopping centres are for fixed terms and they more often than not tend to be five years, in some cases, six, seven, or even eight depending on the nature of the use. So for example, chemists tend to get eight years and it's to do with the regulation of their industry and indeed today the size of the shops in most cases they're probably in excess of 200 metres and more often than not are actually touching on, say, 400 square metres. Consequently, their cost of fitting out their premises and so forth need a far greater time to amortise than it would do for a traditional 100 square metre fashion shop or something similar. Most retailers accept the fact in shopping centres these are fixed-term leases and I'll come back to that a little bit further in terms of pragmatic views on that.

With lease renewals, notwithstanding that lessors send out letters as one of the earlier speakers read out this morning that, "We're giving you notice that we're not going to renew the lease," and so forth, there is a pragmatic view that suggests that most retailers, as I said before, are aware that they're five-year leases or similar, but there's a reasonable expectation at the end of that lease that they will in fact be given a lease renewal, or a new lease, an offer of a new lease. I think that expectation be it founded on good or bad principles, but more often than not just simply on many years' experience in most cases, is one that's not totally unrealistic. I think we've moved on from the days - and I can remember when Eastland shopping centre in Melbourne opened in the mid-60s, albeit I was probably still at high school at the time, and those original leases in those sort of centres such as Eastland, the early days of Chadstone, Northland, and possibly even Southland, they actually went in on 15-year leases which today is just unheard of for specialty shops.

I think what's happened over the years is that there's been a growth in the shopping

centre industry, the understanding of retailing generally. I tend to think that retailing is pretty dynamic both from the property perspective - which we see with the likes of Chadstone constantly being extended and evolved and refurbished and all that sort of thing - but equally with the retailers themselves, that they've got to move along with the times as well and I think that the landlords probably have taken a view that they have an expectation that if a tenant doesn't work - and there are tenancies that don't work from time to time for a whole raft of reasons not necessarily the retailer's fault or anything else - that there needs to be the ability to change that tenancy mix over, rejuvenate the tenancy mix, get the tenants to refit their premises on a not ridiculous time frame - and some would argue five years is arguably too short. I might add that the retailers that I represent - and it's a fairly broad spectrum of people from mums and dads through to national retailers in the jewellery industry, for example - that I don't think in the last 10 years I've had a retailer that would have had to do a complete refit after five years. There will be things that need to be done and more often than not those things that need to be done are negotiated. It's amazing how many times if you approach it the right way you can in fact reduce what is a fairly arduous requirement back to something that's quite palatable and at the end of the day is probably right for the retailer to do because inevitably when I see these works undertaken - whether it's from a coat of paint through to a complete refit - one of the things that tends to happen time after time is that retailer's sales do improve, not always but in my experiences that's generally the case in degrees.

We touched on options. We know through this inquiry to date and indeed in the marketplace generally that the in the major shopping centres options simply for specialty shop retailers in the main do not exist. I think the only ones that are likely to get them these days are possibly pharmacies, despite what our newsagent representative said before, I am aware that some newsagents are able to by virtue of who their landlord is and perhaps the length of time they've been there, and indeed it may just come down to their negotiating skills. They can sometimes get a longer term or an option as well.

I think the important thing though for the Commission to recognise is that notwithstanding they're not in shopping centres, in quite a number of strip locations now - and I'm speaking purely from Melbourne - we're seeing options disappear in the strips as well. I think that's a really important factor for this Commission to take on board when it comes to lease renewals and perhaps what might be introduced as a way of helping those procedural matters work satisfactorily. I'll cite an example in Bridge Road. I know for a fact there's one agent that is recommending to every landlord - and Bridge Road is one of those strip centres which is a real cross-section of ethnicity in terms of its ownership et cetera et cetera - and this one agent I know and there's probably at least one other that may be doing the same thing is encouraging in their landlords to not offer an option. The reason being is quite simple, it's the same as the shopping centres, if you've got a dud tenant who is not really doing the right thing by the shop, need to get them out. They need to have some control over the use of the premises and that is to say there are plenty of retailers in the strips who from time to time if they've got a lease that's, say, a five-year lease with two or three five-year options, I know for a fact there's plenty of key

money changing hands between retailers which is not illegal as distinct from between landlord and tenant which is illegal where people are paying premiums to actually get the key to that shop.

Under the current legislation we have a situation where the lessors cannot unreasonably withhold their consent to an assignment and that invariably involves the change of use in the circumstances I'm alluding to, and the agents who are trying to look after their landlords' interests are saying, "Hang on a second. We don't want Joe Bloggs' tenant getting 50, 60, 80 thousand dollars - whatever it happens to be - off an incoming person because the only reason that person is paying it generally speaking is because there's some advantage under the terms of that lease to make that worthwhile." For example, it may not have any market reviews under that lease even at the option period, it's a fixed increase so there's a premium or there's a profit rent to the sitting tenant. So I think the commission needs to take on board that the options and the market reviews and everything else which in my opinion as a valuer, I think the market reviews are very important because I think it's the one aspect of this industry which provides the checks and balance in relation to rent, because without a market review it can just keep going as it is in most of the regional shopping centres, 5 per cent per annum, year after year after year, notwithstanding what the landlords want when the leases come up. That's a problem when you have a retail sales environment which might be lucky to be achieving CPI increases in sales. The gap just gets wider and wider, notwithstanding anything else that goes on in relation to - and I will use the example for jewellers. We have a situation now where if you look at the gold prices, we get it on the radio every morning, \$US900 an ounce. There comes a point in those, what I call discretionary retail businesses, you cannot afford to pass on those increases any longer because if you do, you're not going to selling anything.

If people get nervous, the pockets get very deep and the arms get very short. If it's discretionary and jewellery is probably one of the most discretionary uses you can have in a shopping centre, their sales just pull right back to the fold, really they do. They come back so quick it's scary. Even though the landlords know about these things - you've got pressure on petrol prices at the pump and all these other cost factors going up and the landlords still think the jewellers are making the biggest gross profit or net profit of everybody and that's not right. Let me tell you it is absolutely totally wrong and it's very, very difficult to convince some of the people about those elements.

The next thing I touch on is incentives. Without doubt incentives in shopping centres at the upper end of the market is an integral part of the industry. There is hardly a deal that I get involved with with my consulting hat on when I'm acting for my clients where an incentive is not part of that deal. Generally speaking we're talking about cash incentives towards the fit-out of the business. Graeme Woods spoke earlier and he talked about the downturn, when there is a downturn in the industry, and we may be heading into one of those at the moment- who knows - but

the incentives increase and they do increase, no question. Graeme was absolutely right. But the Commission needs to be aware there is no such thing as a free lunch, if you understand what I mean by that. That is to say that the incentives are provided more often than not to simply underpin the rental that is being sought by the landlord. I have said to many of clients over many, many years now that if I had a choice on the all things being equal basis I would do what I call real rent any day of the week rather than take an incentive. Having said that, I've got clients who would go absolutely gang busters to get that incentive.

I don't get it because I think at the end of the day if the business fails, and let's be frank and honest, a lot of them do and as somebody said earlier on, I'm not sure who, in that first five years some of them only last two or three years after a brand new business opens. They've got \$100,000 fit-out and if it fails after two years ask the question, "What's that incentive worth?" I'll tell you it's worth three-fifths of five-eighths of nothing. That's why I would rather do a real rent and I think it's important that we have effected - in the legislation we have existing and Queensland is the best example, at market reviews you must take into account incentives and determine effective market rent, rather than just the market rent. Only yesterday I was at a meeting out at Doncaster - and you can work out who that was with - trying to finalise a deal for a small kiosk in the Doncaster development and I said, "Have you got any money for fit-outs?" and he said, "Depends on the rent," and that just underpins, I think, what I've just used by way of examples.

Lease renewal practices. For those again who weren't here this morning, I spoke this morning on behalf of the Australian Property Institute and talked about lease renewal procedures and a model that I'd like to see come into force in some manner or form. I just want to give an example of lease renewal practices and how they can go off the rails, whether it be a small retailer or a big one, and this involved a fairly large retail client of mine. Three shops all in different centres, but all owned by the one national shopping centre company. It took 14 months to resolve those lease renewals and at the end of the day the whole thing came down to rent. I really want to stress that that in any lease renewal in the shopping centres all the issues are important, the lease term and all those other things and everything else.

But at the end of the day that one thing that causes the most angst and is probably upper most in the retailer's mind when they go into start that process is how much rent they're going to have to pay, particularly, as we've heard from a variety of people today, letters arrive with increases that the landlord wants of 50, 60, even 80 per cent in some cases. I don't get hung up personally on the percentage increase argument because if you go from a dollar to \$2 it's 100 per cent increase. I'm more interested in what the rent is as compared to other rental for similar types of uses within that particular shopping centre which reflects the level of value in that centre.

This thing got down to the wire - and I won't go through the whole story

because it will take too long - when my client said, "Look, we can't get there. You do what you've got to do," at least that was the message that I passed on to the landlord. They said, "Well, we're going to have to give you notice to move," and I said, "That's fine." I said, "If you want to lose up to \$12 million worth of sales from these three shopping centres, that's your call." That's a bit of an emotive argument on my part and I make no apologies for it. I had great delight in sending the notices back telling them that they had done them incorrectly when they arrived, but still they did do that at the end and we had made a decision, as distasteful as it was, to swallow the medicine and that we were actually going to go, that we would and we were prepared to do so.

We immediately put up "closing down sale" stickers on the windows, which is probably in breach of the lease at the time, but still we did it, and we also put ads in the daily paper, one-third of page in the Herald Sun, these three stores, closing down, up to 70 per cent off. That was on a Friday morning, by lunchtime that Friday the national general manager of leasing contacted my client direct, meeting at 11 o'clock Monday at their offices, after having God knows how many meetings where the rents during this 12-month period bounced up, down, sideways and everything else. They could not put themselves down to a rent and they kept asking, "What's your walk-away rent?" and we just said, "What we put on the table is what we're prepared to pay. We're not even going to respond to this walk-away rent argument." 10 past 11 that meeting was over and the deals were done at the rents that we had originally put on the table 12 months earlier.

The point of putting this on the table is it just demonstrates that the practices that some of the landlords will - and it doesn't apply in every case. Some of these things can be fairly straightforward, but in this case it was just absolutely absurd the way it all unfolded. To have gone through what we went through for over 12 months to in fact get the result which we should have got within a matter of weeks is just ridiculous and I personally wouldn't want to go through that again.

Entering leases generally. The question has been asked of nearly every speaker this morning with all the issues surrounding entering into a retail lease such as rent, such as lease terms, such as fit-outs, such as commitment to this and everything else and unfair lease clauses and the like, why do people do it. I think there are a lot of people out there who think that retailing is easy. I am here to say it's not. I have never been a retailer myself but I have worked over a long period of time with enough retails to see the good and the bad and to understand it is not an easy business to be in but people think that quite frankly they walk in, open the shop up, they sit back and people put money in the till. As I said, not that easy.

The sad part about it is a lot of the people that go into businesses, particularly the franchisees - and I would like to talk to the gentleman that spoke earlier - they tend to be superannuates, people that have retired early from whatever career they

have been in, they have got a big super payout and they want to have go at their own business for the last whatever number of years they think they can work and retailing seems to be a good option. Franchise look fantastic, it's all laid out for you, it's all systemised, lay down misere. Well, again, it's not easy doing that at all. So at the end of the day with any retailer, be they first timers or they've got 50 shops, there will always be mistakes and it's not necessarily down to bad planning.

I think the chap from - I don't know what business that franchise was, I suspect it was a food based business - it was fairly obvious to me sitting over there that he had done a lot of homework and he came unstuck because of figures that were provided to him by the lessor/franchisor in relation to traffic flow. If the circumstances had been different I could ask the question, I would have loved to have known whether it was a brand new centre, which I suspect it wasn't but if it was, who would know what the traffic flow is going to be anyway, and I don't know that the franchisor or the lessor necessarily has quoted figures that were incorrect. Unfortunately or otherwise, you alter a shopping centre, and it's not hard to do it, and you can change the dynamics of it and all of a sudden what was the worst entry in the centre suddenly becomes the best entry. Maybe as simple as putting in disabled carparking spaces - not that I'm against disabled people - or parents with prams parking spaces or something like that which just shifts a quantum number of cars to another entry and people find, "Oh, this is a bit more convenient for me," and then they tell their friends and then all of a sudden the whole thing is turned around. That is probably a silly example in one sense, but they are very fickle things.

My view is unfortunately, to quote the old saying, "You can lead the horse to water, but you can't always make it drink." You've asked a couple a times, "What do we do about it?" There is no real easy solution. It's not necessarily legislation, it's not necessarily code of conduct. It's probably all of the above in one form or another and I think that Todd made a good point when he was here about the statement of risks. The Small Business Commissioner in Victoria when a lease goes out, an information booklet has to go out with the lease. Probably the information booklet should be out there before that to give people an idea what's going on and include other things. In Canberra you've got to get a statement signed by your solicitor to say that you've in fact taken legal advice about the lease document itself. Certain landlords - I'm not sure how it works, it hasn't happened to me - but certain landlords I know try and sort of contract out of that in some manner or form. I'm not sure that's the right thing to do in any way, shape or form, but I think there needs to be probably more education, which is going to be an encumbrance on somebody - whether in the case of Victoria, it's the Small Business Commissioner's Office or what, I don't know - but there needs to be journals and articles and warnings.

I think the example was given like the warning on cigarette packets, there needs to be something out there which is just literally rammed down people's throats. Maybe the landlords have got to do this. When people come in and talk to you about

leasing a shop, irrespective of whether you're a first timer or a 110 times retailer, maybe as you leave, you must be given something that says, "Be aware of the risks of retailing," or something. I don't know, because it's hard to know where or how they get this information. If they don't get it from the source when they start talking to people about the opportunity of leasing that space, it's probably the practical point to get that information. How you enforce the landlord giving it, I don't know. There's regulations and all that sort of thing. As I said, I don't know that legislation is the only answer; it's certainly part of it.

Personally, I'd like to see harmonised legislation throughout Australia. I understand, listening to a lot of people this morning, that there are intrinsic issues associated with trying to put that in place, not least of which we have individual states and the right to create their own legislation. So it's probably not the only answer. An ombudsman, yes, a good idea; whether there's one or there's six or seven around the country, it remains to be seen, but if you have six or seven, I think you're going to just have the same problem you've got now. No doubt in my mind that in leasing activities generally, the big boys - and I'm talking about the Just Group, Sussan and other multi-store specialty shop retailers, they can look after themselves. They usually have professional people working for them. They have leasing departments or property departments. I have no doubt - no doubt whatsoever - that these bigger guys can do a better deal across the board in virtually every aspect of doing a retail tenancy agreement than a mum and dad, no doubt about that at all. I'd like to think that because of what I do when I'm acting for people, be they medium size or small, that I can do a better deal than the mums and dads. If I don't, I'm doing something probably horribly wrong.

I know for a fact that a number of leasing executives in shopping centres and particularly the guys that have grown up in the industry as I have over the last 30-odd years, they don't really like dealing with people like me. The reason they don't is because we've got at least some knowledge base which we can draw on and use and not so much work against them or try to beat them up but we cut to the chase really well and there's just no nonsense between us. They can't - hopefully they can't - pull the wool over my eyes and I don't try and pull it over theirs. I just want to do a proper deal, at the end of the day get a good deal that's good for both sides. If it's not a good deal that's good for both sides, it's not a good deal, a very, very fundamental philosophy that I've worked on forever.

Just a couple more points: sales figures, personally, I sit on the fence on this one. I can understand why the landlords want sales figures, because it is a benchmark they can use or a tool they can use to benchmark their shopping centres against other shopping centres, and whether it's expressed on an annual dollar basis or dollars per square metre or whatever basis they choose to do it, it's still information they use. Having said that, it's definitely used by landlords in working out the level of rentals that they want retailers to pay in the various use categories, no

doubt about that whatsoever. I've been in situations where I know the retailer I've come in to talk to the leasing executive about is probably not trading as well as he or she could and they're probably below the category average for that particular shopping centre. The leasing executive will say, "What we're asking for is market value." Conversely, if my retailer client is doing really well, they'll say, "You can afford it," so they've got both sides of the bread buttered, so to speak, and that really always has quite frankly irritated me.

As Graeme Woods said before and the question was asked of me this morning about percentage rent, whether retailers would like to be simply paying rent that's based on a percentage of their turnover, the answer from the retailer's perspective in my view is unequivocally yes; if they could do it that way, it would be great. If your sales go up, you pay more and you're happy; if your sales go down, you pay less and you're happy.

Having said that, I do want to make the point with what Graeme Woods said earlier on, that if you are paying percentage rent under the current base rent and percentage rent alternatives, there's no doubt if you're paying percentage rent, you're doing well. So why anybody would grumble about that, I don't know. As a corollary to that though, I have had situations where leases have come up for renewal and it's not necessarily a market rent review on each occasion. There have been a couple though where a tenant has been actually paying percentage rent during the term of that lease, particularly in the last couple of years, and the landlord's attitude is, "Well, if the base rent prior to review or lease expiry was 100,000 and they're paying \$20,000 in percentage rent, therefore the new base rent or market rent for the purpose of the market review should be \$120,000 a year." That's absolute nonsense. The reason being is very simple: if, after the next 12 months, they introduce two other competitors in that same category without necessarily increasing the size of the centre or the drawing power of that centre, the sales of that tenant drops, what's happened to the so-called market rent? I mean, the guy is going to be getting burnt big time. There would need to be quite a careful distinction between percentage rent and the capacity to pay and so forth.

Lease registration and information: I don't personally care whether it's lease registration or the one pager. I think the one pager makes a lot more sense. Having searched in New South Wales on a couple of occasions doing work up there, to search leases is laborious at best because you've got to search the whole document and it just takes time to do it. I'm not worried about the cost so much in terms of physically paying for it, but I think the idea or concept of having a one-page summary document, provided it encompasses all the things we've talked about and in particular the shop area and incentives, I think is really important. I don't personally care about the outgoings because the outgoings will vary from year to year in any case. I don't know that that's absolutely critical because one phone call and you can find out the outgoings of the shopping centre in any case on a rate per square metre

basis, so I don't think that's really that important.

In Victoria, we currently have a certain amount of data that's collected by the Small Business Commissioner's Office which is done for every lease that's entered into for all retailers that come under the act. It would not be difficult in Victoria to actually take that one-page document and enhance it to pick up the other information - we actually would start the database in Victoria. I don't really know what our Small Business Commissioner, Mark Brennan, does with the information he gets at the moment but I know it's not used for anything which I think is a real travesty because we've got 80 per cent of it sitting there and we can't access anything and no-one knows what to do with it. I have had discussions with the Small Business Commissioner's Office about this and obviously it's an argument that's got to be sold to government to make that happen. Like a lot of governments, be it federal or state, they're always concerned about the cost but I think it's not too difficult to make it revenue neutral.

If I could use myself exclusively as an example, if that information was there, would I be happy to pay for it? The answer is absolutely, because the cost of doing it on that basis rather than knocking on doors, which is the expression I use, are just poles apart and when you get into some of the inner suburban areas - and I didn't actually do this particular job but I talked to somebody about it at the end of last year of doing a determination by mutual appointment in Lygon Street, North Carlton. I've got nothing against Lygon Street, North Carlton, but the reality is you're talking about mum and dad operators in those shops, you're talking about an ownership structure along that street which would be as diverse as you could possibly imagine. The nature of the owners, I know, is such that they don't always use managing agents, ie real estate agents. To find out information about those shops as a determining valuer is near on impossible. It is absolutely near on impossible and it makes the job of the valuers in Victoria very, very difficult. Even in shopping centres, I might just reiterate an example I used this morning, if that's okay with you.

DR BYRON: Yes.

MR SIMPSON (SF): There's a determination happening out at Highpoint shopping centre at the moment involving Starbucks, the coffee shop, and the determining valuer has had this job on his desk, and the reason I know about it is that myself and our office, we did the submission on behalf of Starbucks. I went out of my way, drawing on all the contacts I had to make sure I got as much information about rental levels at the coffee shops and other shops in the general vicinity of that shop to try and draw some conclusion about what, if you like, the market rental value on an unencumbered basis was and then dovetailed into that the performance of the store to bring to account the affordability or sustainability argument. Was I acting as an advocate for Starbucks? Yes, to a point I am and I don't make any apologies for doing that. But the guy that's got the actual determination has been trying for nearly

six months now to get information out of GPT, the now owner of Highpoint, who are point blank refusing to give him the information he wants, primarily because they say they don't have to, and why they don't have to is because Starbucks is a subsidiary of a public company in America, consequently don't come under the act, therefore the provisions of section 37 of the act can't be enforced upon GPT to make them give the information. It's just crazy. If we had a system of some database where you could actually get that information, this job would have been done in a matter of weeks, and it's not right. It's just simply not right.

I might just add that some time ago, now probably a bit over a year ago, I was at a little mini afternoon seminar and I have a reasonably good relationship with the Australian Retailers Association, in fact before Todd took on the role he alluded to earlier, I used to do that for about three years as their sort of in-house consultant and I come across two guys from Sydney, one represents the ARA, the Australian Retailers Association, the other one was the Shopping Centre Council, and they made it pretty clear to me - as I said, just over a year ago - that they would be quite supportive of a national database of information.

Now, I must say I was taken aback by that because I didn't think the Shopping Centre Council, knowing who their primary members are, wouldn't want to do anything like that, and somehow or another we've got to make that happen. I don't know whether it's by legislation or regulation or what but we've just got to get there. I think the parties, who are the main people that want it, have already agreed in principle that's what probably should happen.

Lease documents: you asked Todd an interesting question about the length of leases, 70 pages and so forth. I just want to give you a very quick story of Lend Lease, they're a much bigger shopping centre player now because they invested a lot of their properties with GPT when that all happened a couple of years ago. About 10 years ago or more, Lend Lease had a meeting in Melbourne where they invited a raft of retailers to it, and the purpose of that meeting was to in fact launch their new plain English lease. They gave by way of some background the rationale behind what they were doing, and it goes something like this: Lend Lease went to their solicitors, and they said, "We're sick of these 70-page leases," because at the end of the day probably, let's say 60 of those 70 pages are all about what ifs. That's why leases have got to where they are now. It's all about what if - "What if this happens or what if that happens," and, "What do we do about it if it does happen," type of thing

They challenged their solicitors to come up with a lease that would address about four or five basic principles of a lease; that is lease term or tenure, commitment on the part of the tenant to pay rent; commitment on the part of the tenant to look after the premises; commitment on the part of the landlord to give them quiet enjoyment, and I think there was one more which I can't think of what it was at the

moment. What came out of that was a 10-page lease which Lend Lease still use and I think GPT certainly at Highpoint use in Victoria. I thought that was a terrific thing, yet a lot of other landlords haven't got it. I mean, why they don't it, I don't know. In terms of the commission's discussion and recommendation about lease documentation, we do have to get them simpler and it's not that hard to do in my personal opinion.

Rents: rentals in shopping centres - different uses pay different rents. There's no question about that whatsoever. If you're a jeweller you're going to pay more rent than a fruit and veg or a butcher or a deli or a shoe shop or something like that. Those who pay those higher rents - and I keep coming back to jewellers which is the one I'm probably most familiar with. They do acknowledge on the one hand that, yes, there's going to be a premium paid and that agreement about the premium is probably based on historical reasons rather than good business sense. It's all okay to a point but it's very difficult when you've got an in-line shop - and that is a shop that's not on a corner - of say 150 square metres, and next store to you is a home wares shop of 150 square metres, same frontage, same everything, and yet Mr Jeweller is paying \$250,000 for the privilege of being there, but the home wares shop next door is paying \$150,000.

When you get those differentials I can understand the retailer saying, "Hang on a sec, why am I paying so much more than the guy next door?" I don't know the answer to the problem, I've got to say, I just pose it as a question. I'm certainly not looking for the Commission to start thinking about regulating rentals or anything like that, but these are the issues you've got to keep in the back of your mind when you're dealing with all these other matters. I said before about the margins and so forth in jewellery and I just wonder sometimes despite all the remonstrations by landlords that they're really good in retail, they understand the whole thing, I do wonder sometimes how much they actually understand about running a retail business.

You talk about occupancy costs, the different percentages for different businesses, and I think the industry as a whole has probably - particularly I'm talking from the landlords' side - gone a bit overboard with the way in which those figures are used. I don't question the mathematical accuracy of those numbers but it doesn't mean they're right. Their average is only so they can get skewed up or skewed down depending on how broad the base is or the sample they're surveying. Secondly, I think they would be far better off using the median number which would be the most common number rather than the average which would give a much truer reflection of what's going on.

The only other thing I want to do, if I may, is just recover one of the important elements of the couple of pages submission I did which is to do with lease renewals. I really would like the commission to at least take on board and maybe consider some way - be it through a code of conduct or whatever, I don't know - of trying to

deal with this issue of lease renewal and the agreement of rentals, at least renewals and indeed the dispute resolution that could prevail when the parties can't agree, given that both parties want that new lease to happen. I won't go through the whole detail again except to say that I probably sound like I'm pushing the barrow for valuers and advocating to work for valuers, but I'm not doing it for that reason at all as such, but I think the real issue here is that if there is a determination of rental that binds both parties or at least gives the tenant to accept or reject the determined rental after the parties can't agree, that to me is the most practical way of resolving what I think is the single biggest issue in lease renewals.

I put it to the Commission that if you had to pick five really important items out of the current tenancy market at the moment, lease renewals is in that top five, along with security of tenure and other things. But I think lease renewal is in there in the top five and arguably in the first or second position in that hierarchy. That will do. I've rattled on for long enough.

DR BYRON: Thank you very much. You have covered a lot of territory there; very useful too. Could I just pick up on a couple of points. That was all very helpful but can I just go back to the comments you made about the incentives and, you know, real rent is a much better incentive than any effective market rent et cetera.

MR SIMPSON (SF): Yes.

DR BYRON: From your experience would you say there's a built-in bias to try and talk up the face rent because it affects the capital value of the whole shopping centre complex and so leasing executives are likely to offer reasonably generous incentives as long as it maintains the face rent which makes them and the value of the whole centre look good?

MR SIMPSON (SF): Yes, I do.

DR BYRON: My point is that it's a consistent bias.

MR SIMPSON (SF): Bias isn't the word that I would be using necessarily. I think it's a consistent practice. As I say there's no doubt that the level of incentive you're able to negotiate in a lease negotiation or transaction is a function of the rent or vice-versa. It doesn't matter which way you look at it, the lower the rent the less incentive you're going to get, if you're going to get any at all. If I just give you an example of where this really hit home. This is some years ago when Greensborough Plaza was first extended. A major valuation firm in Melbourne was given the job of valuing the shopping centre. I think it was for the trust or something like that that owned the property, one of their biannual valuations. The valuers who undertook that job, dare I say, had the temerity to walk around the shopping centre and in doing so spoke to a number of retailers, with a tenancy schedule in hand, just talking about their rents

and just doing what valuers do, and they just started asking questions about some of the incentives. When they did their report they actually brought all that to account. They never got that job again because they worked out that the rents that were face rents were not necessarily market rents and they capitalised the market rental values and consequently brought the value of the shopping centre down below a level that the then owner was happy with. That's a consequence of where this ends up.

When shopping centres are doing major extensions or they're greenfield sites, such as Plenty Valley out Epping way, there are budgets set up for these things. The money for incentives comes out of a budget which doesn't necessarily correlate through to the development costs of the shopping centre, so they keep the costs down, keep the rents up and on paper it looks all very honky-dory, everything is happy campers, but as I said my issue with the incentives is twofold: one is the bringing to account in terms of what the real rent of the shop is; secondly, the value of that incentive if the thing doesn't work.

DR BYRON: Yes, sure. In addition to those two elements there's the problem of whether it leads to a sort of bubble of the kind of the office rental market in Sydney in the early 90s when there were very, very generous rent-free periods and so on. The buildings were being valued on the basis that everybody was paying the face rent, when in fact only half the people were paying half the face rent half the time, sort of thing.

MR SIMPSON (SF): That's right.

DR BYRON: The true value of the business was a fraction. That bubble burst with fairly spectacular consequences.

MR SIMPSON (SF): Yes, did down here too. Look, Southland Shopping Centre, when that was extended - must have been what, mid-90s, 95? That went through the hoops. I took some years for that to settle down after it first opened. There were huge incentives given in that shopping centre, huge incentives. Dare I say, the chickens came home to roost when people started to fail. People just weren't trading. It cost untold aggravation. We saw the rents drop considerably from the so-called rents they had been leased at - pick a number, \$1500 a square metre. Inside two years some of those \$1500 a metre rent were back to eight, nine hundred dollars a metre.

DR BYRON: Which is what they should have been all along.

MR SIMPSON (SF): Correct. That's the point.

DR BYRON: See, that raises the point that, you know, if we've got cycles in the economy, I can understand people who have been coming up for a new lease say in

the last 18 months, two years, when things have been sailing - consumer confidence was very high, people were spending a lot of money and landlords were asking for very substantial rent increases. Now, if we had been doing this in well, the early 90s or something when consumer confidence was sort of the opposite direction, where there were empty shops, then landlords presumably wouldn't be asking and wouldn't be getting those same sort of increases. So that am I right in thinking that there are cycles in this?

MR SIMPSON (SF): There are cycles but also there are lags.

DR BYRON: If we've had 10 years of prosperity - - -

MR SIMPSON (SF): There are lags, though, that's the problem. It takes time to catch up. I haven't really got anything new this year in terms of a lease renewal to take on - well, hang on, I've got one out at Northland. I'm concerned at the moment in getting those instructions. Valuers are the best example. Valuers don't create the market at all. Valuers are forever looking over their shoulder because they can only rely on what has happened. We actually get criticised for - sometimes, for not actually just looking a little bit further ahead to say, you know, "What if - you know, what's going on down the track? Where are we heading economically," or whatever the case may be. So there's a lag in all of that sort of stuff as well.

Now, I think we're heading - personally at the moment I think there's a bit of a watershed starting to come up. I can honestly say - in the middle of last year doing things out at Doncaster, and we're talking about incentives still - incentives, you've got no hope, not a hope in Hades. I was at a meeting yesterday, got one like that where I didn't - that wouldn't have happened six months ago. I think that despite all the rhetoric that's coming out from the leasing guys out at wherever - Doncaster, about how good it is and they're this and they're that and it's all happening and rah rah rah there's an undertone creeping through even just - so far this year, whether it's what's happened at Centro has caused a bit of a re-think about how they're doing it or whatever I don't really know but it's going to be a very interesting time.

But as I said, everybody looks backwards. Sales supposedly for January I got out of - very senior guy last night at Westfield - sales for January across their centres have been absolutely abysmal. I'm talking about retail sales in the shopping centres. That's a stark contrast to where they were last year. It'll be interesting to see when the ABS figures come out for the - you know, as they do on a regular basis about retail sales - whether they're up or down. But the word I got from Scott last night, they're down substantially. So that's going to have an impact. Now, whether that means the leasing guys get a little softer in the way they deal with these things or aren't as hard or they don't start putting through the increases that they have been doing in the past I don't know. But what about the people who renewed leases in the last six, nine months of last year?

DR BYRON: Yes, they could be paying through the noses for the next five years - the next four years.

MR SIMPSON (SF): They could be up that creek without a paddle, because it's very - yes, it's very difficult to go back after the horse has bolted, knock on the door and say, "I need some help."

DR BYRON: Yes, okay. Talking about renewals and serious negotiations in good faith - serious professional negotiations that deal with good for both sides.

MR SIMPSON (SF): Yes.

DR BYRON: We had some lawyers from Sydney who were talking about a statutory duty to negotiate in good faith. I'm not sure where you can go with that.

MR SIMPSON (SF): I'm not sure what that means, in practical terms.

DR BYRON: Yes, exactly, and how you test for it or - - -

MR SIMPSON (SF): Yes.

DR BYRON: - - - how you prove that somebody has violated that. But as somebody else said you've got to assume that the other people on the other side of the negotiating table are reasonable most of the time. If something really outrageous happened, well, that's where the courts and the unconscionable conduct and all that sort of stuff is there to catch the really outrageous stuff. But hopefully most of the time people will just get on with making money.

MR SIMPSON (SF): Look, I think it's fair to say in negotiations I do for my clients I always go in with the view that - I don't go in with the view that I'm going to have a punch-up or a huge argument or anything else. I go with the intendant - if not good faith, that we've got to get there - be sensible about everything and get a result. Now, that doesn't always transpire. The people I sometimes feel a bit sorry for are those that have got perhaps one or two shops and choose for whatever reason to do it themselves. They've had experiences through the term of the lease and mention unconscionable conduct and maybe getting ACCC involved and everything else but I can tell you, there's a lot of retailers out there who will not go down that path. They wouldn't even go to mediation for fear of "retribution" - - -

DR BYRON: Yes.

MR SIMPSON (SF): - - - from landlords about, you know, "You took us to mediation therefore" - well, you know, "Look, we've got long memories," type of

thing, "we're not going to renew the lease," whether it be for that particular shop or in another centre under the same ownership. People think like that and it's probably human nature to do so.

DR BYRON: Well, I mean we had a lot of debate putting the draft report together about you can see how many - you can get figures on how many people have registered complaints or how many phone calls have been made to the retail tenancy unit or whatever. But what you can't see is whether that's only the tip of the iceberg. You can't - there is no data on how many people are out there not just grumbling but with a serious problem but unwilling or unable to stick their hand up in case of the consequences. All I can say is, well, you know, we can't measure what can't be seen. If nobody is willing to put their hand up we can't count hands. But, you know, we accept that there may well be a lot of people out there who have grievance. But again, maybe it's a commercial decision to just say, "Well, I don't like it but I've got to get on with it."

MR SIMPSON (SF): I think that's - - -

DR BYRON: You may not like your next-door neighbour but there's no point in picking a fight with him. You've got to live with him.

MR SIMPSON (SF): That's right. No, I agree with that and I think that rightly or wrongly people would argue that commonsense often comes to the fore and you take a commercial view and say, "Look, I'm not happy about it but I'll live with it. I'll move on. I'll worry about it later on. My relationship with John Smith, the leasing guy at such-and-such a place is far more important than the fact they've blocked the entry near my shop for two days," or something like that, you know what I mean? You've just got to be a bit sensible about it.

DR BYRON: Yes. All the what-ifs that take up so much space in the lease documents, I was wondering what happens if you've got a 10-page lease that doesn't - you know, you get bogged down with all these - and then one of those things happen. Do you have some other - - -

MR SIMPSON (SF): Yes.

DR BYRON: See, if you - not that I want to flog the idea of a code but if you had some standard terms or something else that says, "In the event of" - dah da dah da - "then this is how we'll behave". In the event of something else, "the standard procedure is" - dah da dah da. Everybody knows what those sort of defaults were. Then you easily can write a very short lease. But if you've got to go through and work out for yourself every conceivable thing that could possibly happen over the next X years and how it would be dealt with and get the other side to agree with it, well, that's going to take a lot of lawyer time.

MR SIMPSON (SF): I agree. Look, I think - just sort of go back to the business about the 70-page lease and my expression about - it's about the what-ifs, it's a bit like how long is a piece of string. Where do you draw the line? If you're going to start drawing a list of standard conditions, for the sake of a description, be it through a code of conduct or whatever, where does the draftsman for that draw the line, because you could end up with a 100-page document; hypothetically, I mean it may not happen and probably wouldn't, but you could end up with it. I think, to use that Land Lease example, what they tried to do - and I think in actual fact the view they also took was that - look, this is just my personal view. I've got not statistical evidence to support this. But I would say to you probably 95 per cent of the time the retail tenant in a shopping centre signs a lease, it goes in the drawer and never comes out.

DR BYRON: Doesn't need to come out?

MR SIMPSON (SF): Doesn't need to come out. I can cite you an example of a major retailer with something like six, seven hundred shops around this country who made a decision some years ago not to employ their lawyers to go through their leases. They had their own property people check off four or five terms of the lease. If they were right and complied with legislation of the day, they signed the lease, put it in a cupboard and it never came out. They paid their rent on time, they gave them their sales figures, they did all the basic things that needed to be done and they got on with life. They saved a million dollars a year as a consequence. I'm not saying that money should be the sole arbiter of whether or not you go to lawyers necessarily, but I think we've got to be mindful of the fact that the landlord prepares the lease. It's the landlord's lease. Rather than having a list of standard conditions, maybe we could have a document that says, "A lease shall embrace as a minimum the following," and those minimum things might be the four or five things that I've alluded to and not much more, because really and truly, I don't pull leases out for any of my clients - I can't remember we pulled out a lease, to say, "Hang on, we've got a problem here. Does the lease deal with it?"

DR BYRON: I guess what I was leading to is: is there any downside from having a short lease?

MR SIMPSON (SF): I'm not aware of any; seriously, I'm not.

DR BYRON: Okay, you don't have to convince me. I don't think I've got anything else. All your suggestions about registration and turnover and incentives and so on - - -

MR SIMPSON (SF): Yes, they've all been done to death.

DR BYRON: Yes.

MR SIMPSON (SF): The only thing I'd like to say, and I apologise in advance for sounding like a broken record, I really would like the Commission to take on board the concept of having some dispute resolution for lease renewals, in terms of how you determine a rent if you can't agree; whether it's the model I've suggested or not, I don't really mind, but there needs to be something done with that. I think it's a real issue.

DR BYRON: Okay. Just one last question on that: I'm trying to anticipate what criticism other people might make about that and I confess to not being a lawyer, but does it fundamentally change something about a contract being made between two willing parties, in that even if you and I are negotiating and I said, "I'm willing to offer you a lease provided that the rent is acceptable," and then a third party comes into the number and I say, "That's not acceptable to me," yet it's going to be imposed and I'm going to have to have a contract with you, even though the most fundamental term is not something that would have been acceptable, is it violating that sort of contract law?

MR SIMPSON (SF): Potentially it might, but I think sometimes - I'll put it a different way. I'd like to think that if the potential of a third party deciding, determining - whatever word you want to use - what the rent should be if you can't agree, might reduce the level of what I loosely refer to as the ambit claim by both sides for that matter, not just - there's unreasonable expectation I think on both sides in some cases. It brings the parties much closer together before they start because if they don't want to go down that path, that procedure, then what I'm suggesting works, as far as I'm concerned. As I said, I draw the distinction of recommending this as a model as much to avoid disputes as to actually resolve them.

DR BYRON: Yes, and there's that method of saying, "I will take whichever of the two bids I think is actually the most reasonable," and that actually encourages convergence rather than ambit claims.

MR SIMPSON (SF): Can I give you an example? I think I know what you're referring to. I'll give you an example: only this week, I was asked by a public company that specialise in fashion. They have a number of very large freestanding stores around Australia, a couple in Melbourne, and this particular lease has an expiry later this year. They've asked for some advice on what the market rental value of it is and if this was to go to determination, each party would appoint its own valuer to try and negotiate a settlement and if those two valuers can't agree, then it goes to a third valuer on the basis that each of those valuers prepares a written submission that is submitted, and the words are "in a sealed envelope simultaneously to the independent valuer who shall pick one of the two figures as a result". I would think and suggest to you that (a) it is not in breach of any legislation; more

importantly though, I think it automatically stops the parties putting in ridiculous ambit figures to try and push the value up or down as the case may be and that's what happens in determinations.

I've received enough submissions over my time to know that people gild the lily a bit and add it up and pad it up and all that sort of gear or strip it down, and hopefully that would bring the parties together from the point of view that the two valuers wouldn't want that to happen, I don't think. Certainly if I was acting for my client in that situation, I wouldn't want that to go to determination, I really wouldn't. Hopefully it would stop that, but if it did, I'd make sure that what I gave that valuer was absolutely what I really believed the rent to be, not what I think it should be, and hopefully the party on the other side would do the same. So that would stop it; maybe that's a way of ending it, if you have the determination process in the shopping centres when they can't agree at lease renewal. Maybe it's that type of process, that model, that would actually work.

DR BYRON: And they come so close together that the difference doesn't even matter.

MR SIMPSON (SF): It should be resolved before it gets that far.

DR BYRON: Yes. So what you're saying is that there are ways.

MR SIMPSON (SF): I think there are, yes.

DR BYRON: Good, okay. Thank you very much for sharing all that with us this afternoon.

MR SIMPSON (SF): You're welcome. Thank you very much for having me.

DR BYRON: It's extremely helpful.

DR BYRON: The gentlemen from the Australian Retailers Association are here. I hope you're ready. Thanks very much for coming. Just take a seat anywhere in front of the mike. Whenever you're settled and comfortable, if you could each introduce yourselves for the transcript.

MR EVANS (ARA): Richard Evans, executive director, Australian Retailers Association.

MR GILLESPIE (ARA): Roger Gillespie, president of the Australian Retailers Association and I'm also attending as executive chairman of Bakers Delight Holdings Ltd.

DR BYRON: Thank you both very much for coming. If you'd like to take us through the main points, the comments, feedback or criticism that you want to give us on the draft report and then - - -

MR EVANS (ARA): I've got an opening statement I'd like to read and then go to questions, if you don't mind, Commissioner. Thank you for the opportunity of appearing before you today and providing further contribution to your inquiry. Roger Gillespie is the founder of Bakers Delight and a significant retailer in Australia who is successfully establishing his brand, not only in Australia but also internationally. Mr Gillespie appears as president of the ARA, but he's also here as a tenant and will be able to provide you with more perspective in terms of his own perspective and practical solutions for you to consider.

For your own interest, my own background is one of a former shopping centre manager and I have had other experience within the retail market as a supplier. I have also served as a federal member of parliament and I chaired the Fair Trading Inquiry for a period during the landmark Finding A Balance report, so I'm able to provide you with a perspective from many sides of the current retail leasing debate. I would like to complete this statement and then move to questions.

Australians generally, Commissioner, want two things, they want to own their own home and they want to be their own boss. Home ownership in Australia is significant and the route to being a boss for many Australians is within the retail sector. For many new retailers, opening a shop and waiting for folks to come and buy off them is an easy way to financial independence. They consider business to be easy and they seem to think that they have certain rights available to them.

The stark reality is that business is very, very hard and the rights are very, very limited. We cannot and should not legislate for business success and the anticipation of small business operators for the Commission to resolve their current market angst is perhaps misplaced. This inquiry is significant as it finally raises the importance of

the challenges within the retail leasing sector to be an economic position and it is our view that unless we have substantial practical solutions from your final report, then the issue will die for many years and the market will ultimately suffer.

An initial question to ask then when considering this matter is have things changed? Well, since the retail market began changing in the 1960s with the emergence of the regional shopping centres and indeed sub-regional shopping centres, the market has changed. Clearly, strip shopping has not, in our opinion. There are many landlords in strip shopping and there remain many opportunities for retailers to change locations if they find their current lease arrangements unsuitable. Whilst competition is strong, there is more opportunity for retailers to build a business, perhaps even buy their own shop, to create a goodwill for themselves and indeed to prosper. On the other hand, the original shopping centre market which includes the sub-regional shopping centre market is very different and therefore should be treated differently from the non shopping centre market. The regional shopping centre market is, in our view, an oligopoly. However, when a shopping centre market location - within one location it is clearly a monopoly with an imbalance of power directly in the hands of the landlord or indeed their agents. The landlord has complete power over retailer who perhaps is an economic captive within the market of a particular shopping centre.

The Australian Retailers Association respects that landlords have an investment and they are responding to the demands of shareholders to maximise their investment. We respect that landlords need to manage their property to the benefit of the consumer market for that centre and they have the ability to create a vibrant tenancy mix. The ARA recognises that there is a need to harmonise state legislations and that the constant need of state governments to review their legislation and the constant comparisons between their jurisdictions can create uncertainty for landlords and makes it harder for tenants, in particular those tenants that trade in many states.

However, we strongly submit that the regional shopping centre market - which include subregional, as I say - should not be a master-servant environment as perhaps many tenants feel it is when moving into a negotiation with their landlords or their agents, for it seems there is no negotiation and it is a take it or leave it approach which is contrary to the needs of the fair market to operate. There is a suggestion from the landlords sector that if a tenant does not like the conditions of the lease they can walk away and relocate. For many reasons, not least of all economic, the practical application of that idea is not reasonable.

The bottom line is that the market needs good landlords and landlords require good tenants, in fact, we need each other. That's an important point. Yet the tenants are saying that they are being mistreated in terms of their investment with the landlord. It is this message from tenants that has been ringing within the ears of legislators for more than 15 years yet although solutions have been suggested from

many inquiries and recommendations have been made, little action has been taken and the problems remain. When I say little action what I mean by that is that the legislations have been changed but there doesn't seem to be any change in the application of the law.

If one operates a monopoly then one can do whatever one likes in that market. In retail leasing it is possibly fair to say that the state legislation is reasonable and on reading each state's law it is not unreasonable to suggest that the market should operate adequately. But it is not the law but the application of the law that is of concern. I think this is the core of your draft report. The current laws on face value seem okay. But if that is the case why then do you have so many submissions and examples of why your view is not supported?

It is the ARA's view that we can zero down into the following issues of contention. They are: one, uniform retail tenancy legislation across all jurisdictions; a code of conduct for the application of the law; a prescriptive low-cost mediation system; a full disclosure from the landlord; ceasing of retail trade figures disclosure; and end-of-term negotiation. There are many others but let's just focus on these issues.

In terms of the uniform tenancy legislation, this is the most practical and positive move for all parties within the retail leasing market and we strongly recommend that we move to uniformity. This means that we need the state governments to agree. As the current Prime Minister has stated, let us end the mess of intransigence from federalism and have a consensus on all issues. This is one such issue that needs to be resolved.

The second point is a code of conduct. There has been a suggestion that a code will resolve the first point of state legislation. But it really isn't the law but the behaviour and application of the law by the landlords and in particular their employees or agents that is of concern and requiring a code. The at time intimidatory behaviour and strong-arm negotiation tactics put business ethics out the window when it comes to some retail lease negotiations. I can go on further about some practices during questions. Suffice to say behaviour needs to change and the master-servant culture that exists within some agents needs to change. This behaviour change will not happen under a voluntary code but can and may happen under a mandatory code as evidenced by the franchising code of conduct.

The next point is mediation. Without question the mediation process is the way to resolve disputes in retail leasing but both parties have to mediate in good faith. Currently, I don't think that's the case. Across Australia this varies. I again point to the franchising code of conduct as a model and recommend the model of the Victorian government with the Small Business Commissioner as a suitable model to implement when dealing with the recalcitrant parties.

The next point is full disclosure by the landlord. Landlords are able to circumvent the many reporting processes associated with the retail leasing market and therefore could be accused of perhaps manipulating the market through non-disclosure. This non-disclosure of rent rebates, marketing rebates, shopfront rebates and any other incentives are perhaps hidden when determining proper market value and therefore affect the negotiation of a new-entry retailer. We need a solution to prescribe full disclosure to allow full and proper market valuation. This full disclosure should also extend to future development plans so that a retail tenant knows if and when their trade may be affected. It is not good enough to have a six months notice of disruption. Landlords know their future plans for buildings and investments in advance. Therefore, withholding this information is an imbalance in power.

The next point is ceasing of retail trade figures. There has been a lot spoken about the disclosure of trading figures. It is the view of the ARA that there is not one reason why a landlord should know the trading performance of a tenant. We re-emphasise that: not one reason. Landlords claim spurious needs such as a tenancy mix and traffic, but these arguments are weak as market information on consumer spends and foot traffic can be determined by other means. Research into retail methods and consumer needs is available through many methods. To claim trade figures as the major source of this research is, in our opinion, rubbish. There is only one reason why landlords want the figures, and that is to claim rent and therefore push the market up within their own market.

If landlords want to know about trade they would base their rent on trade and therefore share the risk. When trade goes down so too does their rent. But no, landlords don't want that. Landlords use trade figures to manipulate the market through their rent negotiations. Let us be of no doubt, landlords manipulate rents to their advantage. The ARA does not disagree that - their right to do so per se although there could be an argument against a monopoly manipulating markets. What retailers want is negotiation balance. Having disclosed trade figures does not allow this balance to happen.

The last point is end-of-term negotiation. The ARA agrees the issues of goodwill within a shopping centre are contentious. Perhaps greater education for the new retail tenant entering is required prior to entry. Perhaps new entries need to sign off that they have received advice and that they understand the end-of-lease issues before entry as prescribed such as within the franchising code. For instance, if they knew that 80 per cent of leases weren't renewed would they in fact undertake, at least in the first place? Now, the question is that they probably don't even realise that. Not that that happens but if they knew that that's what the chance was, well then perhaps they wouldn't go into it.

The bottom line on this though is that many small business operators are so keen to have their own business that they ignore this very important point. At the end of a lease, unless there is a prescribed option there is nothing. Given a retail tenant may be an economic captive to their business this provides a strong negotiation point for the landlord and their agents. An economic captive will agree to anything if they can continue to maintain their income. We invoke Maslow's theories to understand these needs of a tenant. If their income is under threat they will do anything to make it continue.

The landlord knows this. The landlord knows what the tenant can afford. The landlord probably knows what the tenant owes. The landlord probably knows the financial circumstances of the tenant. The landlord, under this current feudal-like lease system, can determine if the tenant goes or stays. Such is the enormous power of a landlord or indeed their agent. The landlord can determine what the tenant will pay because they have the power to know what they can in fact afford. So the tenant is at the will of the landlord. A landlord, or more particular, their agent, can determine who stays and who goes based upon what? They have enormous power and no doubt with such absolute power they can determine anything that suits them at any time.

The question to ask is this: what protection does the retail tenant have of abuse of this enormous power the landlord has within negotiation? What protections are there under current law? What rights do they have? The answer is none. Hence this inquiry and indeed other inquiries over the years. More needs to be done at the end of the lease. Perhaps it simply comes down to an ideal of negotiating in good faith. The challenge before the commission is one of resolution. This inquiry can resolve the issues we have before the market as it has the unique power to persuade the legislators and the regulators. The Commission can resolve many of the issues which have been consuming the market for many, many years. Commissioner, we wish you well in your enormous challenge and your deliberations and we are happy to move to questions.

DR BYRON: Mr Gillespie, was there anything you wanted to say by way of opening comments?

MR GILLESPIE (ARA): There's a couple of comments, yes. I think from an overview of Australian retail compared with North America where we also conduct business, the town planning restrictions on where regional shopping centres can go and where any shopping centre can go needs to be considered. The oligopoly that Richard referred to is alive and well in the major centres and they meet under the Property Council of Australia and conduct their discussions. That's one issue. Zooming into the more specific, smaller issues, I have had a case brought to my attention this morning where in a regional centre we came to the end of our lease - we operate over 600 locations in Australia and the landlord wanted to put the rent up

from \$110,000 to around \$140,000 and we said, "No, we don't want to stay there," and we're about to move out. They have come back a few weeks ago and said, "We can offer you another location just 50 metres across the arcade," and we said, "No, we're not interested, it's a second-rate location." They then come back again and said, "Well, you can have it for \$65,000," less than half of what they were asking for the first one, same size space, "No, we're not interested." "Well, we'll give you \$100,000 towards the cost you relocating." "No, we're not interested." "We'll give you \$150,000 towards the cost of relocation." We've gone back and said, "If it's 250 and you drop the rent a bit more we might consider it."

So it's that sort of thing happening. When you're a sitting tenant the risk is you get screwed; if you're not a sitting tenant and you can have the full ability to negotiate you can get a better deal by and large. That happens in many of our cases, but the sitting tenant is at a strong disadvantage. The good faith negotiation at the end of term I think is one which is spoken about. The legislation about having to relocate halfway through a lease, I think it's in many of the state legislations, in my view needs to be reviewed because it doesn't give a tenant security of tenure.

Another point I'd like to mention is at the end of the lease there's no reference as a mechanism that could be included to cap the rent increases as to the percentage increase in sales per square metre for a whole centre. So five years ago if the average sales were, say, 10,000 a metre and at the end of five years they're only 11,000 per square metre, and inflation through that period would indicate they should be 12,000 per square metre, there should be no increase. But if the sales per square metre has gone up to 15,000 per square metre, well, the rent should be able to go up at least 50 per cent, being the difference between 10,000 and 15,000. It's a very good measure on a total. So if you're an underperforming tenant and you haven't gone up 50 per cent you've got a decision to either lift your game or move out, but it does cap the rental increases.

The sales increases across Australia per square metre are not moving up anywhere near in line with inflation, yet rents are exceeding inflation increases. Most leases that we're involved in have fixed increases of between 3 and 5 per cent. Our sales fluctuate; in some years they go up and in some they don't. Right now we're running a little bit ahead of that but the information we get from some of the major landlords we're at the top of the heap in terms of sales growth, but many retailers aren't growing at all. The information we get from one of the largest retailers shows sales across all specialty stores at 8100 a metre and they've been that for two years, yet they've got continual increases, so there's an imbalance. If you're a sitting tenant you haven't got a mechanism to fight it. That's one mechanism that could be introduced to look at sales per square metre in a given shopping centre and whether they've gone up or down as a mechanism to cap it.

DR BYRON: That automatic rent escalation clause basically means a wealth

transfer from the owners of the business to the owners of the centres.

MR GILLESPIE (ARA): Exactly, yes. It's been going on, very aggressively, for the last 10 years.

DR BYRON: Okay. Thank you very much for the comments. I must say there's very little in them that I can disagree with.

MR EVANS (ARA): That's good.

DR BYRON: Coming back to a couple of points that you raise there, you said that strip shopping hasn't really changed that much since the advent of big centres under one roof with climate control airconditioning. Our reading of all the legislation - the second reading speeches and so on that's come in since, I guess, 1980 in Queensland - has been about the problems of systematic abuse of market power by large landlords with small specialty tenants. Even though there's a whole lot of argy-bargy that goes on out in the strips that's not a public policy issue in terms of abuse of market power.

MR EVANS (ARA): I think it's fair to say it's still dynamic, the market is dynamic out in the strip, and, for instance, if Roger has an issue with a landlord in a strip it's easy for him to resolve it by moving. He can move down the road into another location that's available down the road.

DR BYRON: So your customers follow you very easily.

MR GILLESPIE (ARA): Yes, we've done that.

MR EVANS (ARA): So the mechanics of the market in strip shopping really hasn't changed that much. There might be some changes in terms of landlords owning bigger strips et cetera, but you've got that ability to be able to move within the region and take virtually your goodwill with you. Shopping centres, be it major regional or subregional, if the market is very different and the market becomes a monopoly, basically, and whether or not you've got a retail lease or in fact a trading licence is a debatable point, the question becomes, "Okay, you've got a licence for five years. Do the best you can." The trouble is though that the landlord says, "Okay. If you come in we want a nice shopfront," so therefore you've got to invest in the shopfront and you've got to do this and you've got to do that. Therefore the return on your investment may not necessarily be achieved in five years, whereas a good businessman would want a return on investment in five years and therefore have the ability to walk away.

The problem is that a lot of small retailers do not have that ability to walk away. They're an economic captive basically. They're requiring renewal of their

lease. Now, whether that's a right term or just a new lease to be taken up, they don't understand that initially when they first go in - and maybe there's an argument for greater education for pre-entry - but the point being is that with the use of trading figures, with the use of perhaps having a person you're negotiating with who's an economic captive, the power is strongly in the hands of the landlord.

Now, we don't argue the fact that the landlords need to maximise their return on investment, no question about that. There's no question about getting a tenancy vibrancy mix, and these are the spurious things they bring into the debate. The one issue here that they've got is that they've got knowledge of trade figures and so they know what they can ask for. They know what they can push a trader for. With a trader being an economic captive, perhaps, in Roger's case where he walked away and said, "No, we're moving," that changed the whole dynamics of the negotiation. Most small traders don't have the ability to do that, so they're an economic captive.

I'll be ridiculous by saying if an agent says, "Well, I don't like your uniforms within your shop. Change your uniforms in your shop and we'll be happy," the tenant has no choice, they have to. "I don't like the way you comb your hair. I'll renew your lease if you comb your hair differently." They'll have to do that. There's that master-servant sort of approach to negotiations and when all the power is at this side of the table, it doesn't matter how much negotiation ability you've got on the other side, the power is here.

DR BYRON: Yes. The full disclosure by the landlord, we've had a lot of discussion as we've been in Canberra, Sydney, Brisbane and even today about disclosure of the rents, having a national database on retail tenancies. In Queensland, New South Wales and ACT, a lot of people register the leases, that generates information that's publicly searchable et cetera. The Law Institute of Victoria has given a submission to us strongly opposing that. People in Brisbane on Monday came up with the idea of what we need is a one-page summary or epitome of a lease which has got nothing to do with property law, it's purely about generating information for the marketplace, and with no six-month, 12-month delays like the leases might have before they get registered, this one-page summary signed by both parties simultaneously when signing the lease but it goes off, you know, within a couple of days it's on the database, publicly available information, all landlords, all tenants, everybody can find out and so on. It may not solve the problem, but it would certainly put a great deal more information out there on what other people are paying. So would you see that as being a breakthrough? There's the second question of what information it actually contains, whether it's face rent, or effective rent.

MR EVANS (ARA): I think there will be two parts of our response, and I'll respond and then Roger can respond. I can understand the Law Institute being a bit nervous about that because - look, does the market need to know everyone's rent roll, and do your competitors - landlords - need to know what your rent roll is across the

road? I can understand why they would be nervous about that. The question is though: what are they disclosing? When Roger gave the example before of \$65,000 annual a year, would they put in there the \$250,000 rebate they're getting for their shopfront? Will they be disclosing their book value or their real value of the lease, and that's where the problems come. Having been a former shopping centre manager, you do provide incentives for people, so long as you get the value of the rent - and I don't know whether it's ethical or not, I'm not longer a shopping centre manager, but this is the practice we used to do years ago and that was that you got a book value and that was what you disclosed to valuers and others, "Here's the book value. We're getting \$1000 a metre for that particular tenancy."

With rebates it might only be 600, or 750, or whatever the figure might be. So the question that becomes, commissioner, is what is the information and how accurate is that information and how quickly is that information has come forward. What helps, I guess, is for starters tenants in a shopping centre are required not to disclose what their rental is to their colleagues in the next shop. In competitive disadvantages/advantages there's reasons for that. But if there was a proper true market indicator as to what the market might be paying in that particular market in that particular shopping centre, not comparing shopping centres down the road, but that particular shopping centre, then I think it would be an advantage for the tenancies.

DR BYRON: Somebody said it's a trade-off which is up to the legislatures, I guess, whether the right for people to have an informed market is more or less important than the right of people to make contracts and keep them private. I think that's a very tough call.

MR EVANS (ARA): The market has to be able to freely operate and if I can negotiate a higher rent from a better trader here, why would I want to disclose that negotiation with the next tenant? I understand that principle, but what I think should happen is averages or whatever it might be for that market, so people can go in and negotiate what those tenancies are actually doing within that particular shopping centre, not specific, but generally an understanding of that would be helpful in terms of negotiation, I think. But I understand the sensitivity in terms of landlords wanting to keep that information back. Roger might like to comment on the current regime in New South Wales.

MR GILLESPIE (ARA): Yes, I'm more in line with Richard in that respect. I haven't thought a lot about it because it just seems to be an issue that's so far away from being a reality. But if on one hand you go to the model Richard just described where there's a central database with someone managing it to say, "Well, the average rate per square metre is X amongst shops under a certain size," or whatever the definition might be - - -

DR BYRON: By category.

MR GILLESPIE (ARA): Yes, by category, that could work well. If it's everything

out there, I don't know whether I'd necessarily want my competitors for my space to know what I'm paying, because they go and approach the landlord and say, "Well, I'll give you 10 grand a year more," and we still might lose the location. So there's a small disadvantage, but on the other hand if you look at the food markets, you go to Victoria Market or South Melbourne Market and you want to buy a kilo of apples, you can walk up and down and check the quality and one is \$1 a kilo and one is \$2 a kilo "Well, I like that one, I'll go and buy it," so it's odd when I think about it a bit more.

DR BYRON: Okay.

MR EVANS (ARA): And in New South Wales the registration of leases?

MR GILLESPIE (ARA): Yes, I think that's a furphy along the same reasons that you said, that there's a delay for a start. They don't lodge them until the last possible minute and then there's things that aren't in there, whether there's rebates, or incentives, or the building comes fully fitted, and there's ways of beating whatever legislation can be created I would have thought, because right now a site from a major landlord, it's getting to the point where it's just dirt, you know, you've got to pour the slab and build the walls and do everything. Where does it stop and start? So if it gets to the point where we can walk into a fully-fledged bakery and still pay rent that's sort of somewhere between is the reality, but that wouldn't go on the lease.

DR BYRON: Can we move on to the disclosure of turnover figures, and I think it would be fair to say that just about everybody we've spoken to who wasn't a representative of a landlord has been highly critical of this as you have. Let me just try out a hypothetical. Let's say that all the state and territory legislatures decided to make it illegal to require the disclosure of turnover data, and so none of this is disclosed any more. The counter-argument is that if the staff of the centre, the leasing executives and so on, are really good at their jobs they can walk around and say, "Gee, they're trading well. They've got a lot of customers. People are walking out with their wallets empty and their arms full. This guy's stock hasn't moved. This guy hasn't seen a customer in there for three days," and they if they're any good can figure out how much you can afford to pay for rent and how much you can't afford to pay for rent. They may not have chapter and verse the exact figure to two decimal places, but if they're any good they'll guesstimate it pretty well and then they could still do the same sort of behaviour of saying, "We're going to charge you as much as we think you can afford to pay. We may not know exactly that, but we're going to come pretty close to it," in which case having abolished the disclosure of turnover information may not have actually fixed whatever the problem was.

MR GILLESPIE (ARA): I agree with the ability of the manager to go around and see the good, the bad and the ugly. Most people can detect whether someone has got a good operation or not, but whether any centre manager could go to one of our stores and guesstimate the sales within 20 per cent, I'd be very surprised. It's that top 20 per cent

that you're paying extra rent on. So they've got the ability to walk around and see that that shop number 45, haven't seen a customer in there for two months and their stock doesn't change and there's dust on the shelves, you know, they're just a bad retailer, they shouldn't be there. They would probably go broke anyway so the circumstances sort them out. I'm in favour of no disclosure. The other problem with disclosure is that it's a matter of who discloses what. The bigger retailers that have got automatic systems like ours and so on, we are fairly confident our figures are accurate. You've got other people who run chains and they don't have to worry about what their sales are because our business is based on a percentage of turnover, so we're very keen to make sure we count every dollar that goes through the till, but there's other people that believe it or not are not really honest.

DR BYRON: Really?

MR GILLESPIE (ARA): Yes.

DR BYRON: No.

MR GILLESPIE (ARA): Even though GST was supposed to fix all of that and eliminate the cash economy, my view is that I don't think it's had a dollar effect on it, and particularly in retail. You get penalised for being a good operator and paying more rent compared to you could have a next-door neighbour whose sales are the same per square metre but they only declare 80 per cent of their sales so they don't pay as much rent, so there's that discrimination between those who are honest and those who are dishonest.

MR EVANS (ARA): Certainly that is the case with retail franchises because the model means that you need to disclose figures to the franchisor and that's why there is a trend towards regional shopping centres, indeed subregionals to encourage franchise systems into the market. The issue really is why do they need the trade figures and the answer is, well, it's foot traffic, marketing, we need to know what the tenancy mix is - well, that means they're not doing their job. Get out and do your job and then we'll negotiate about what I can and can't afford. The fact is when you come into negotiation and you've got your lawyers there and you've got your market analysis and all that sort of stuff and we'll sit there and you can only negotiate with the landlord and they're sitting opposite, they know what you can afford. If they don't want you, they'll ask for something that you can't afford because you just can't afford it. They know what you can afford to pay. So it doesn't matter how much negotiation you do, "This is what we want. Sorry."

They're duty-bound to try and get that for their stakeholders as well and their shareholders and I respect their position that they're trying to best they can for their shareholders. But because they have that knowledge in the first place, it's one-sided and it's a power imbalance at the negotiation.

DR BYRON: That brings us back to the phrase that you used a couple of times of the master-servant relationship or the people under licences. At the other hearings small speciality tenants in the centres have been compared with pieceworkers, with sharecroppers, with subcontractors. Somebody was talking about a very large and well-known food court where basically it's the landlord's hamburger shop, the landlord's chicken shop, the landlord's sandwich shop and these people may think they're running their own independent business, but in effect it's the landlord's restaurant and they've just outsourced different factions of it, "You do the deserts and you do the coffee."

MR GILLESPIE (ARA): Modern day slavery. They're locked in there.

DR BYRON: I'm not saying this is true but - - -

MR GILLESPIE (ARA): It is true, you're dead right.

DR BYRON: - - - this has been put to us that you're basically outsourcing.

MR GILLESPIE (ARA): You're dead right. They've put their one, two or three hundred thousand into buying that location, "I'm not going to let it go because I mortgaged my house to get it," and so on so they'll work 12 hours a day until their marriage breaks up and they sick because they've got to adjust by abusing drugs or alcohol or whatever and the whole thing falls in a heap. Then the next sucker comes along and says, "Oh, that's a good idea, I'll go in there and I'll make a fortune," and everyone lives in hope.

DR BYRON: They can basically say, "Who wants to be our coffee shop, hamburger shop or dress shop, pharmacy and newsagent," or whatever, "you've got five years and we'll take whoever is offering the best deal. At the end of five years you may or may not get another turn." The real problem comes when that guy takes a 10-year loan and he's only got five years. Then he becomes an economic captive big time.

MR EVANS (ARA): That's true and they may not have borrowed against 10 years. But with respect and to Roger as well and to every other retailer, I've got a little bit of a different view about this and that is that if someone comes in investing their superannuation fund and not understanding it, not doing their due diligence, not understanding that they haven't got anything beyond five years into a regional shopping centre or in fact a subregional shopping centre, well, more fool you. There is a requirement, I think, on a landlord to ensure that tenants coming in are fully educated as to what the end of lease requirements are. Good ones do, good managers do. Good managers talk to new tenants coming in, "Look, it's not going to last at the end of the term, you may not be here."

A lot folks move into business because they get excited about it. They've asked the next door neighbour, "It's good idea if you open up a kebab shop not a problem," and they don't understand the implications associated with that, especially the financial implications. Where it becomes a little bit dark is when landlords use these types of tenants to manipulate the market. In other words, we had an abundance of fruit juice places wanting to get space recently in shopping centres from 2001-2002 coming into shopping centres, "I'll pay anything to get the space." Sure enough they came in and paid everything to get the space, but in that monopoly that then effects the market because, "If they're paying that over there, I want you now to pay this here." This operator may only last 18 months, the person you're talking about and the one Roger is talking about out they go, but the market has been affected by this novice coming in. That's the market and how much control do you want to have over the market? The point really comes back is the manipulation of rents and one of the reasons why they can manipulate rents is because they know turnovers.

DR BYRON: I have heard that some of the large centre owners are basically putting in big red letters on the lease document that, "This lease is for five years. There is no guarantee that you'll get another turn." But literally dozens, maybe hundreds, just about every small retailer that I've spoken to have basically said, "Look, I'm a good tenant. I pay the rent every week. I have done the right thing. I haven't caused any problems. Surely I'm entitled to another five years?" You can see where they get the expectation, but when that expectation doesn't come through, it's a mess. On the one hand you can say, "You should have read the fine print," or, "You should have understood that it was only for five years," but you can also understand how they thought, "I want a business that's going to go on for the next 20 years I either want my kids to inherit or I want to be able to sell it when I retire," or something and so people are coming in with expectations and then get shattered.

MR EVANS (ARA): My response to you is this: I may have painted the landlords as dark people that are out there to hurt the small retailer - people like Westfield are very pro in terms of trying to help their traders and indeed, providing new training programs called the "seeds program" which is about trying to maximise - and they're doing it through us as well and we're supporting Westfield in a lot of ways - their education. Where this whole system breaks down and the examples you were talking about is pre-entry education. It's pre-entry education, folks going in thinking that they're going to have the best - open up the shop, customers are going to come rolling in through the door and when they don't, they start blaming people. They blame the landlord, in franchising cases they blame people like Roger if they're not successful. That's what I said, we cannot legislate for success. We've got to let the market operate effectively and you're going to have winners and losers in a market like that.

It's when the landlords, and indeed their agents, use those folks to manipulate

the rental market that there becomes a problem and they manipulate it by perhaps not educating them when they first come in, that's (a), and (b) is knowing what their trade figures are.

DR BYRON: In terms of sorting out the issues that involve small speciality tenants in large shopping centres which have been on the horizon of governments since the 70s and 80s and there are still issues, there's still a great deal of dissatisfaction about this, suggest to me that all the legislative intervention that's happened over the last 30 years it may have improved parts of it, but it still hasn't basically fixed whatever the problem was. Your suggestion is that the key, the one thing that can actually take a great deal of heat out of that situation in the centres is the disclosure of turnover information, get rid of that.

MR EVANS (ARA): Three things.

DR BYRON: Okay, but that's the first one?

MR EVANS (ARA): That's one of them. Absolutely. As I said before in my opening statement, if you look at the legislation in each of the states, it's pretty hard to pick a hole in it because it's all pretty much not bad.

DR BYRON: Well intention.

MR EVANS (ARA): It's the application and that's why we say that there is a code of behaviour required because, let's face it, I've got here a file that says, "I've got a list of tenants ready to take over your property and prepared to pay \$150,000 a year for it." You're already paying 50, so you pay up 150." Do they ever show you those offers and the answer is, no, they don't. So really do they have the offers? We never know. Is that hard-ball business or ethically pretty bad where we need to have a code of behaviour.

DR BYRON: Good faith negotiations.

MR EVANS (ARA): That's what Roger was talking about, good faith negotiations at the end of the lease, but at the same time in terms of negotiation and behaviour associated with what you can and can't do for these agents, leasing agents in particular. I mean, a lot of these leasing agents are in fact incentive paid. So in other words, if I get you to pay \$20,000 more, I get a BMW. You think to yourself, "Is that good, ethical practice that we need to have?" and the answer to that, I think, is probably no, we don't. We need to have good faith negotiations where people can actually negotiate with a balance of power. Currently that doesn't happen.

MR GILLESPIE (ARA): I was about to - - -

DR BYRON: The three things were?

MR EVANS (ARA): It's a code.

DR BYRON: Yes.

MR EVANS (ARA): It's the - - -

MR GILLESPIE (ARA): Disclosure.

MR EVANS (ARA): - - - non-disclosure of - - -

DR BYRON: Turnover?

MR EVANS (ARA): - - - turnover and it's good faith negotiations at the end of the term.

DR BYRON: Thanks.

MR GILLESPIE (ARA): I was just going to say that the franchisees are at a bigger disadvantage than chain stores, because chain stores they can call a bluff of the landlord and say, "Well, all right, if you think your site is worth that much I'll go into hold-over." I know of some chains they've got a few hundred stores, they've got up to 40 stores on hold-over because they won't finalise their lease. A franchisee can't do that because they've got - that's all they've got. That's their business, their livelihood, their house is attached to it and everything is there. The landlords know that and so they can knock off under the time.

Where we are the tenant, as in we've signed all our leases - but the sub-tenant is a franchisee - but where we own the store ourselves we have the power to call their bluff a bit more. We get a much better outcome than we do where we tell them, "Well, we're ready to walk," like the one I was telling you about before. We've got a heap of cases like that; we've said, "No, we don't want to stay there". We had one a few years ago and they wanted us to move from one site to another. The rent was 80,000, it was going to go to 90 or something. We said, "No, we'll pull out." We moved out. Six months later - and they were going to give us an inferior location. They gave us - then they came back and said, "No, you can have this location," it was the best location that we could have wished for, 40,000 a year rent, and a contribution to fit-out. Like it's just criminal. Whereas if you were a sitting tenant you would just get screwed, if you're a franchisee. It just happens time and time again. I don't know whether the FCA has presented to you yet. You're up next, Dave?

MR EVANS (ARA): They will.

MR GILLESPIE (ARA): Right.

DR BYRON: Right.

MR GILLESPIE (ARA): You will hear all that again. It's such a disadvantage. The small retailer, the one store owner or the one or two or three - it's the same point. But if you're a chain, like the Just Group or any of the others, they've got much better bargaining power. But for the franchisee they're the same as a single store operator from the landlord's perspective.

MR EVANS (ARA): That's the point. I mean Roger has got a real estate department in his operation, signs all the leases himself. So he's got a huge negotiating power in that way. But the other side of that is that the landlords know what he's paying in every location and what they in fact can potentially pay. That's a great advantage for them as well.

Small retailers, you know, what do they focus on? They're focused on putting food on their family table, enjoying their customers, chat chat chat. They're not interested in industrial relations law and they're not interested in leasing law. Let's face it, they're only interested in selling dresses. So what I'm saying to you is they don't put a lot of focus into that. They have a sense of trust in a shark infested pond and there's a lot of Nemos out there.

DR BYRON: I think that's a caption for this report, isn't it?

MR EVANS (ARA): There's a lot of Nemos out there trying to get home.

DR BYRON: Yes.

MR EVANS (ARA): They can't because the power imbalance is significant.

MR GILLESPIE (ARA): Yes. I think the other thing is that the hope of - as human beings we live in hope. There are more stories where leases are renewed so people hang on. So this whole thing of saying - Richard's point earlier of saying, "Well, you have disclosure up front: it's only five years, there's no guarantee." "Oh yeah, but everyone else gets renewed. That's not my - and I'm going to be better than anyone else." You know, it's like the people who smoke, "No, cancer is not going to get me. No, no, no, it's only weak people that die from smoking," you know, get lung cancer. "No, no, it's not me. I'm better than that." So we're all in this - living in hope until the landlord comes along and slaps you with a 50 per cent increase. They know whether you can take 50 per cent, 45 per cent, 40.

I had a guy come to me recently. He's bragging about he wanted to help us.

He said, "I've got this landlord. He wanted 90 per cent increase and I got him down to only 40 per cent." He was bragging about it being a win. I said, "When you get a reduction come and tell me and then we'll tell about it, but not when your rent is still going up more than inflation on top of your annual adjustment. You've got rocks in your head." But it's all this conditioning. He thinks he is a hero and had a big win. It's nonsense.

MR EVANS (ARA): I think it's important though that landlords do have that right to negotiate and maximise their return. Look, there's no question about that, that if it's a quality property that they should have the right to be able to negotiate and negotiate hard. No question about that and we wouldn't argue that point. What we do argue is that there has got to be a balance in the negotiation and currently there is not.

DR BYRON: But in terms of dealing with that imbalance, my old school motto was, "knowledge is power". From the point of view of the small mum and dad tenant lack of knowledge is serious disempowerment. But most of the legislation seems to me to focus on trying to control the exercise of power by the more knowledgeable, more powerful side. But maybe there's a lot more that we could do to empower the little guy to make sure that they're well advised, they've got access to information, that they start off with L-plates with somebody sitting beside them; because there's no doubt that they can get into huge financial problems if they don't - even if they do some homework, actually. But particularly those who don't do the due diligence, you know, there's a lot of blood on the floor.

MR GILLESPIE (ARA): They don't read. I'll tell you a case I came across last week. There's a franchisee got one of our business for sale. The incoming franchisee said, "Yes, I'll agree to buy it." They went and sought the independent legal and accounting advice. We told them, "No, it's not a good deal because you've got two years to run on your lease. The landlord has already told us there's going to be relocation. It will cost you a couple of hundred thousand to do it and you're already paying full price so there's going to be no moves and no work needed to be done on the shop." "Oh no, we still think it's a good idea." It's just ridiculous. We have knocked the deal back because we will get shot if we approve it, by the ACCC or someone. It's just ridiculous. They have had advice from accountants and lawyers and they still want to do it. It's just going to end in tears in two years.

DR BYRON: You're probably the bad guy for having prevented this.

MR GILLESPIE (ARA): We have got another fight on our hands because we're preventing it, yes.

DR BYRON: But I mean somebody sitting right where you're sitting about an hour ago said, you know, this guy sacked his lawyer because the lawyer had told him not

to sign the lease.

MR GILLESPIE (ARA): Same sort of - it's absolutely - I rest my case.

MR EVANS (ARA): We shouldn't legislate for success. I mean there has to be a market where there are winners and losers. If they just ignore advice that's as much as we can probably help them, "Take the advice. But if you ignore all that well then don't come back and complain." The issue with Westfield and others is that they are moving to sort of occupancy costs of 15 per cent, and indeed probably pushing to 20 per cent, whereas strip shopping is probably about 8 to 10 per cent occupancy cost. That's okay on total sales, 15 per cent of total sales. But if, as Roger was saying, there's a downturn in sales do they reduce their rent down too? No. They don't still retain 15 per cent occupancy costs back down. They maintain it, whether they force that tenant out or they get a new tenant in, because they've maintained their rent, which is maintaining the value of the property, which we all know they have to because of their shareholders.

DR BYRON: They have to try to - - -

MR GILLESPIE (ARA): Yes - - -

DR BYRON: - - - but ultimately something has got to give.

MR GILLESPIE (ARA): Which is what is happening now.

MR EVANS (ARA): Correct, and that's the problem. The problem is if they know what occupancy costs are, you know, and that, they structure what - if they know what the turnover is they structure their whole system upon turnover.

DR BYRON: Yes.

MR EVANS (ARA): All we're asking for is a little bit more power balance, that's all.

DR BYRON: Yes, not arguing. Good, well, thank you very much. I don't think I've got anything else to raise.

MR GILLESPIE (ARA): Okay.

DR BYRON: But any closing comments?

MR EVANS (ARA): Well the only thing that we say is that this is a significant inquiry. There have been a lot of inquiries. I mean I think the last one was - federally it was Baird, prior to that was Fair Trading, prior to that was Bedel,

prior to that was Schott, prior to that I think was Swanson, or something like that. The point I'm trying to make is that this is really the most significant inquiry about this issue for some time and maybe the last for 15 or 20-odd years. So therefore the recommendations that you put forward - I don't want to put this on you but the recommendations you put forward are going to be significant. I think that you've got a lot of support from the sector if it's balanced recommendations.

I know the position of the Shopping Centre Council and the Property Council would be, you know, "Look, we've had all these inquiries and all that sort of thing and we have all this legislation" - rhubarb rhubarb. I understand their worries about that. They want some sense of certainty But so to do tenants as well. Really, look, hard bore negotiation, unconscionable conduct - fine line. We just want to have equality of negotiation. That's where the power imbalance, I think, with information at the moment. I'm not so sure whether if I was a candle shop owner in a major shopping centre whether I would want to know what the other tenants are paying. All I want to know is what my comparison is upon my sales, upon what my occupancy cost is. Suddenly my occupancy cost goes to 27 per cent well then it doesn't matter what the person next door is getting paid; if my occupancy cost has gone to 27 per cent, it's unsustainable, and it can only go that way if they indeed know what I'm doing and they're forcing me out or whatever it might be. So if I was a tenant, would I want more information or would I want less information? I'd be wanting less information back to them, which is my turnover figures. As Roger said, a lot of them are manipulated anyway.

DR BYRON: Yes, okay. Thank you both very much.

MR EVANS (ARA): Thank you.

MR GILLESPIE (ARA): Thank you.

DR BYRON: Is there anybody else in the room who wants to come forward and put something on the public record today or can we adjourn until Friday morning? Going once, going twice, are you all done? Okay, thank you very much, ladies and gentlemen, we will resume here at 9 o'clock Friday morning.

AT 4.57 PM THE INQUIRY WAS ADJOURNED UNTIL
FRIDAY, 15 FEBRUARY 2008

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