



SPARK AND CANNON

Telephone:

Adelaide	(08) 8110 8999
Hobart	(03) 6220 3000
Melbourne	(03) 9248 5678
Perth	(08) 6210 9999
Sydney	(02) 9217 0999

**TRANSCRIPT
OF PROCEEDINGS**

PRODUCTIVITY COMMISSION

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

DR N. BYRON, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON MONDAY, 18 FEBRUARY 2008, AT 9.14 AM

Continued from 15/2/08 in Melbourne

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 on our draft report that was released last year. My name is Neil Byron, and I'm the presiding Commissioner for this inquiry. The inquiry began with a reference from the Australia government on 21 June last year. We were asked to examine the operation of the retail tenancy market across Australia. I've been putting on record as we go around how grateful we are for the many organisations and individuals who have already participated in this inquiry and shared their knowledge and experience with us.

The purpose of this particular hearing is to facilitate public scrutiny of the Commission's work and to get feedback and comment on our draft report. We understand how important the matter of retail tenancy is to many small businesses. A great deal can be at stake and passions can be raised. But we're trying to analyse the evidence subjectively to see what has been tried in various places, what's worked, what hasn't and what more the Australian and state governments should do or not do.

We began the hearings in Canberra on 1 February. We spent four days in Sydney, Brisbane Monday last week, and Melbourne last Wednesday and Friday, and then in two days' time we'll be in Adelaide. Then the Commission will have about six weeks to prepare a final report that has to be with the Australian government by the end of March, having considered all evidence presented in the hearings and submissions.

All the participants in the inquiry will automatically receive a copy of the final report after it's been released by the government. The government usually releases the Commission's reports within 25 parliamentary sitting days from the completion of the inquiry. We always try to conduct our hearings in a reasonably informal manner. The Productivity Commission Act does say that participants should "be truthful in giving their evidence", and of course they always are. We are taking a full transcript for the record so interjections from the floor aren't helpful. But I always at the end of each day provide an opportunity for anyone in the room who wants to come forward and put their point of view on the public record to do so. The transcripts, after they have been checked for any transcription errors, will be available on the Commission's web site as soon as possible, usually within three or four days of the hearing. They're also available to be purchased in hard copy.

To comply with the Commonwealth's occupational health and safety legislation I have to draw your attention to the fire exit, which is just to the left of the elevators outside. The evacuation procedure is down there to the assembly point outside, in the extremely unlikely event of a fire. The toilet facilities are just to the left of the elevators also and the third piece of housekeeping is if you wouldn't mind turning your mobile off or to silent that would be helpful too.

So I'd now like to start today's formal proceedings even though our advertised first representatives from the Pharmacy Guild don't seem to have - maybe they're caught in traffic. Sir, if you'd like to come forward, take a seat, make yourself comfortable. When you're ready if you could just introduce yourself and just a little about your background for the transcript, then take us through the main comments, criticisms, observations that you want to make of the inquiry and the draft report. Thank you very much for coming today.

MR DILLON (P777): My name is Michael Dillon. I am a pharmacist, have been for about the last 45 years. I am currently chairman of a small group of pharmacies in Perth which trade under the name of Pharmacy 777 and Pharmacy Health, 26 in total. I have been involved in negotiating with landlords regarding rent probably going back some 30-odd years when my first experience in a shopping centre was in the Garden City development in Booragoon in Western Australia. So since then on many occasions I have been involved in negotiating rental agreements and new sites for that matter with various leasing agents representing landlords in Western Australia. Is that enough?

DR BYRON: Yes, thank you, excellent. So what would you like to tell us?

MR DILLON (P777): I guess as I come to the twilight of my career the difficulty I see is for young people particularly to become involved in our profession, our industry, in shopping centres. There seems to be a predisposition that we can afford, or pharmacy can afford, very high square metreage rentals.

I was recently looking at a shopping centre in the south of Perth developed by Stocklands in Settlers Hill. When I approached the landlord's representative I was told that the expectation in this very fairly ordinary minimal shopping centre to start with would be \$1000 a square metre for pharmacy. The space that they were - it was non-negotiable. It was, I think at the time, 285 or 325 square metres. They had an expectation that we would pay - pharmacy would pay 15 per cent of turnover. Well, being someone who has been in the profession, industry, for a long time I can assure you that 15 per cent turnover rentals is no longer - never been and never has been and never will be a viable rental proposition for pharmacy.

The pharmacy profession is undergoing its own changes, which are significant. Since I have been in the industry the margins on which we operate have been significantly eroded. GPs were in the high 30s, I guess, when I started, maybe even touching on 40 per cent, that's 40 years ago, whereas now they're down into the high 20s and maybe if you're very good you might get into the 30s. So 15 per cent rental and something like 15 per cent in salaries doesn't leave much for the proprietor for a wage, forgetting all the other expenses.

So my concern is that landlords and leasing agents seem to be operating from a historic perspective whereby we can afford to pay rentals which are off the planet. Their argument is, "Well, if you don't pay, someone else will." But I have seen a significant number of these pharmacies turnover in a fairly short space of time because operators have gone into them on the basis of thinking that they're going to make a reasonable living out of it or a profit. It hasn't happened and so there's been a sell-on and a change of size or things of that nature. I could give examples of those.

I guess that's really the most significant point that as pharmacists we were once seen as cash cows. We were seen that we could pay an extremely high rental. In fact, in the shopping centre I spoke of the landlord removed the newsagency and the pharmacy from the leasing arrangements on the basis that there would be so many people knocking on the door to get those two particular tenancies that they would do it themselves and save themselves paying a leasing fee. I believe that has happened.

So I guess, as I say, the counterargument is, "Well, there's someone out there prepared to pay. It's a free market so let it happen." I'm just saying that really these days it's very hard for anybody to have a career path and try and get into a retail pharmacy situation in a shopping centre. It's just becoming beyond the pale. I think the same thing is happening to us which I observed happened to banks some years ago. They just moved out of shopping centres because they were being charged too much. Then I guess the shopping centre owners decided that - and this is purely my take on it - that they really needed banks back in shopping centres because they were a convenience to the public. I suppose ATMs and the like have somewhat blunted that but I notice now that there must be some significant change in the rentals banks are paying because they are moving back into or around large shopping centre developments.

So apart from the fact that the leasing agents seem to charge rentals on what they believe you can afford to pay - as opposed to someone else we may be paying or being asked for \$1000 a square metre whereas someone else may be paying 3 or 4 hundred dollars a square metre. I have a little bit of difficulty with that because I think it's unreasonable that that should occur, that you are charged on the basis of what your business can afford to pay, disregarding the fact that your square metreage may be a lot larger than some of these other ones which you would imagine would be paying a lower dollar per square metre.

Even if you do get up into large sizes and say, "Well, we're now running" - and without boring you with where pharmacy is going these days you're either going down the discount line or you're going down the value-adding line. We choose to go down the value-adding line in our business but the discount operation is a big barn, 500 square metres with checkouts without any service whatsoever. That model, I guess, is starting to negotiate better rentals in perhaps - on the east coast anyway, perhaps in upstairs or less viable areas with high traffic. Maybe there is a little bit of

a shift starting to happen there. But unless you're prepared to take those large sizes and take a punt on the fact that you're going to have a 500 square metre pharmacy or 600 square metre pharmacy or 1000 square metre pharmacy and you hope you can fill it with whatever, your chances of survival, I believe, are becoming less and less.

The other restriction we have is that there is a restriction by landlords, or by leasing agents and landlords, on what lines we can carry. So if, for argument's sake, we wished to carry some electrical item, a hair dryer or something, well, it may be said that that no longer is part of our prerogative because it's not within our retail inventory that we're allowed to hold according to the description of our tenancy and what our tenancy represents. So we also see that as a bit of restrictive trade practice.

The other thing that is happening to pharmacy and the thing that perhaps kept us alive was the fact that we did pretty well out of prescriptions because we get a dispensing fee. Years ago we got a 50 per cent mark-up on drugs on prescriptions on the national health system. I would imagine - I haven't got the exact numbers - but about probably 90 or more per cent of our dispensing is now controlled by the pharmaceutical benefits scheme. So the return on those is now very strictly controlled. So our mark-up now is 10 per cent on most things and in fact is less than that on drugs, I think, which are over a certain amount, over \$200 or something of that nature. So there's a set amount of money you can make. Also, we're moving very much into generics, not that those that aren't interested would know but on 1 August this year the Health Department has reduced our remuneration on or our return on generic drugs by 12 and a half per cent just across the board. Just wham, that's it.

So from that I'm telling you that the future going forward is not all that hugely secure. I don't know. I honestly don't know how we're going to pan out with a 12 and a half per cent discount on generics which is, as I say, where the majority - that and over the counter medication, rather, patent medicines - is where most of our profit comes from. The other things really are sort of sprats to catch mackerels, such as the hair care and the cosmetics and those sort of things. It's very hard to make significant money out of those.

So traditionally we grew up stocking those sorts of things, but really and truly prescriptions and patent medicines are where we're at, and there's a well publicised case that Woolworths and Coles are very eager to get their hands on the fat cow, or the protected species that they see that we are. I don't believe that to be the case. I believe that pharmacy in this country does provide a good quality service to its patrons, to its patients. That might sound like a vested interest but I do truly believe that if we continue to go down the two retailer track and they start owning absolutely everything - they own the liquor outlets now, they own the petrol stations and they own grocery and sundry other things. I don't know whether we really want to put community pharmacy in the hands of the big two grocers.

There's another danger that we see, that we have a lot of competition with our front of shop goods other than those which are "protected", the ones where we have the sole rights to distribute, and I think there is merit in that because it's very, very easy, for instance, to overdose on paracetamol. So I think it's important that these over the counter medications are kept in the hands of qualified pharmacists. There is a counterargument that you go into a pharmacy and no-one asks you about what - you can buy just from the shop assistant. I think that is in a minority of cases these days. If it's a significant purchase the pharmacist becomes involved, and I think that's been shown by what's happened with pseudoephedrine and things of that ilk. Probably that's all I have to say in that area.

The other thing that has always irked me - and I hope, Mr Chairman, that it's relevant - is that when we're negotiating a site these days, and this is true of everybody I suppose, small retailers, we are given a shell. These days you're lucky if you get a ceiling. What you get is a couple of wires. You get an electrical feed and you might get the telephone feed, no shop front, no ceiling, no nothing. Then as soon as you've fitted it all out you sign it over to the landlord anyway, because if you go belly-up or at the end of your lease, he can claim it if he wants to or, particularly the shopfront, that is, he can tell you to go back to what it was.

DR BYRON: Remove it and make good. Can I just follow up a couple of the points?

MR DILLON (P777): Yes, sure.

DR BYRON: Firstly, and I'm sure it's no consolation, but what you're telling us is quite consistent with what we've been told at all the other hearings.

MR DILLON (P777): I'm pleased about that, Mr Chairman.

DR BYRON: One of the things that seems to be emerging is that the large shopping centres seem to be doing much more than just renting space, you know, a floor and three walls in that the shopping centres would claim that they're managing the whole centre environment and putting the sizzle in the sausage or whatever the cliché is, making the place vibrant and dynamic and the sort of place where consumers love to come and shop and spend their money. So it's a quite different sort of environment to retailing on the strip where literally you're just renting the space, you're not paying for any management. Would you agree with that; that the shopping centre is fundamentally different, and the corollary is that you're to pay a lot more per square metre to be in a centre than you would outside on the high street because of all the activities of the centre management that actually brings in more foot traffic which should increase turnover?

MR DILLON (P777): I think what you say is absolutely correct inasmuch as that's right. A shopping centre environment does create a space and an environment and an ambience which is where shoppers wish to go. So from a retailer's point of view or from a community pharmacy's point of view historically it's been a great place to be because you fish where the fish are, as the saying goes. But I might remind you, Mr Chairman, that you actually pay for that on top of the rent. You pay rental for the space which is purely just for the empty space which you fit out, you supply all the ambience, and you do that in strict control these days. You don't go in and put up a painted sign. I mean, once upon a time you might have hung a sign up which might have cost you a couple of thousand dollars, you can pay 20, 30, 40, \$50,000, maybe even more for just the signage. So that's one factor. Then the fit-out that you do has to be approved by the managing agent. I can understand the significance of that, you don't want the so-called mums and dads coming in and putting a packing case up as a counter and painting "Michael's Discount Chemist" on the front.

DR BYRON: Lowering the tone of the place.

MR DILLON (P777): They don't want that, but I think the pendulum has swung very much the other way. It's very much a fairly heavy-handed approach to how you will be, and what you can have and what you can't have. You really have absolutely no choice about where you can go in the shopping centre, they've predetermined where you'll go, and because you are a bit of a necessary item they will be trying to put you in a place where you'll draw traffic to that spot which mightn't be too good. Then over and above that you're paying the traders association levy, and on top of that of course you pay the variable outgoings, which are the expenses for the centre. So the ambience that's been created you've paid for.

DR BYRON: Exactly. But I often wonder why, given that you're likely to get a shorter term lease if you go into a centre than if you go onto the high street, you're likely to get a requirement for a much more expensive fit-out that's going to take longer to depreciate, that the centre management can basically move you around within the centre, they can require you to do all sorts of things as part of the lease, some of which haven't been specified in advance - I guess the quid pro quo is they're offering the lure of higher foot traffic, higher turnover and therefore higher profits. But I'm always interested when I speak to somebody who said, "Well, we tried going into the centre and when we did the sums we decided we were better off to go back outside again even though the traffic was lower." So I'm intrigued about how people do that calculation and whether it's really worth going into the centre, paying a lot more for the rent and having all these additional conditions imposed on you that you don't get if you're outside of a centre.

MR DILLON (P777): The last three, four, maybe five centres that have been put up to us - in this particular town we've got a reasonably good reputation and we trade seven days a week. They like putting you in a precinct where there is seven day

traffic. So we have reasonable sort of credentials and we get a good hearing, but at the end of the day they just want the money. So if you don't square up they will take someone else who's prepared to pay the money, and I guess that is a market force and I can't argue with that. But I do say that the last two or three that I'm aware of, Subi Centro was one, people have just gone belly-up. Gateway was another, and when a centre reaches - I mean, there is a restriction on the number of pharmacies you can have in a centre: up to 100 shops give you one pharmacy, over 100 gives you two. This is a federal government HIC restriction. You can have a pharmacy but you can't have an HIC approval number. So if you don't have an HIC approval number the pharmacy becomes definitely unviable.

The development south of Perth at Gateway, which is a significant centre, the second pharmacy went in without an HIC number just to get the spot, to hold the ground so that ultimately when it got to over 100 there would be two licences instead of one. When you get over 200 you have three. We are still in one shopping centre. We were virtually forced into the third - to take the third spot, even though it would be small, to protect ourselves because we would have had some difficulty if we had got another huge discounter in there or something of that nature.

DR BYRON: But I mean the other big difference between retailing on the high street and retailing in a large managed shopping centre is that the centres do, it seems to me, consistently try and rent not on the basis of a going rate but on the basis of, "How much we think you can pay". So there may well be a fruit and veggie shop over there that's paying 1000, dress shop here paying 2000, but they want 8000 from you because they think you can afford 8000. So it has got - it's quite different to out on the street where basically the going rate per square metre is basically the same all the way up and down, approximately.

MR DILLON (P777): We've chosen - I'm sorry, I probably didn't finish that. We've chosen not to go - well, not to - like here's the rent. The rent is say, I don't know, \$1200 a square metre, \$1000 a square metre. Unless you're prepared to pay that we're not even prepared to negotiate any more and they go away and someone will come along, whether it will be - who ultimately will pay the money. What I'm saying is that I think those days are starting to disappear, as the butcher disappeared, the individual butcher disappeared and the individual greengrocer disappeared.

I think the days of those individual pharmacies - you will find there will be group backings. The backing of - our backing comes, or the guarantee of finance comes from the three main distributors of - long line wholesalers, namely API, Sigma and Symbion - and because they want to retain market share they will guarantee someone into that position because they're not really that interested in how many dollars - whether you make a good or a bad living out of it or whether you just break even. What they're interested in doing is retaining that as part of their market share, who they can sell to, because what they don't control is the last person in the

food chain, which is us, which is retailer.

See, Symbion and API and these people manufacture, they distribute. But where they have got their hands tied is they can't say what we can sell. So we can sell your brand of cough and cold or we can sell some other brand of cough and cold. What they want to do is control that food chain. So if they control the - well, quietly they guaranteed you for \$1,000,000 to back you into a shopping centre they're not going to walk away from you. You're not going to walk away from them, rather, when it comes to where you buy your goods from.

DR BYRON: Yes, of course. I mean the sort of structural change that you were talking about from the old days when pharmacists, perhaps like newsagents, might have been seen as sort of a cash cow, there are significant changes afoot. But is it possible to argue that if the shopping centres keep making excessive demands in terms of rent or cost of fit-out that eventually pharmacists will just say, "Look, no can do. Numbers don't add up. If I go in on those terms and conditions I'll simply be losing money, so" - and, you know, eventually there must be some end to it, mustn't there?

MR DILLON (P777): I think we're in that transition now. The other thing that's sort of on the horizon is that we don't quite know what's going to happen with ownership. So I could paint the scenario where Symbion, who own the Terry White brand, say, which you've probably heard of?

DR BYRON: Yes.

MR DILLON (P777): I'm not suggesting you haven't heard of these people but there are quite a number of groups, there's Chemist Warehouse and things like that, who own a significant number of pharmacies. Pharmacy at the moment is restricted in its ownership, particularly in this state. I don't have an interest in those 26 pharmacies with - it's sort of more like a marketing group. So if in the next agreement, which we're locked into every five years, we negotiate - the federal Pharmacy Guild who will be coming soon, I'm sure, when they negotiate with the federal government they negotiate our pharmaceutical benefit - our return on the PBS for the next five years and the rules and regulations. They even control where we can go. We can't go within a kilometre of another pharmacy and all this sorts of things. We're very tightly controlled in what we can do there.

Now, I could think of a scenario where that ultimately I think if - and I'm not a Terry White or I'm not an Amcal Plus or whatever, which is one of the Sigma brands, but if they go into a shopping centre and they've got the managing director of a public company or their general manager sitting beside them negotiating a deal, say, "Well look, we're Terry White," you know, "we're Amcal". That's a little bit - a bit more persuading to the leasing agent and they say, "Well look, if you want us we're

going to pay something less," which they want to pay. So I'm not privy to what those negotiations are. So maybe I'm talking through my hat. I'm only talking through what happens to me, and we're a small group in Western Australia, when we go to the table to negotiate.

DR BYRON: But I mean - again, that has been said to us many times, that the guy that you're sitting opposite when you negotiate a lease basically negotiates leases every day of his career, and you might do it once every five years or something. That alone would suggest that he would have a few aces up his sleeve during those negotiations.

MR DILLON (P777): Well, we no longer use - you have to use somebody now. So we use somebody at our end who negotiates leases every day from the retailers point of view, generally ex-shopping centre managers who realise that pharmacists have been screwed for a long time. They try and go into bat for you, but you really don't - it's a hard - - -

DR BYRON: But presumably the bigger groups can basically say, "Well, we'll do a deal over 20 shopping centres, 20 locations, rather than doing them one by one."

MR DILLON (P777): I think that that power, that horsepower, comes from the fact that they are associated with one of the three major wholesalers, because it's very much in the interests of - if I own a pharmacy and my time is coming to a close and I wish to get out and go and play golf or whatever we do, well then, the person who I have been predominantly buying my drugs and patent medicines, my long line wholesaler, be it Sigma, API or Symbion, they will want the sale of that business to go to someone who is going to continue that association - - -

DR BYRON: Yes.

MR DILLON (P777): - - - even though they can't put it in writing. But if someone is your guarantor at the bank you're probably pretty hard pressed to go and go somewhere else.

DR BYRON: Yes, of course. Yes, the other point you mentioned about the restrictions on what you can sell. That has come up repeatedly not only in pharmacy, that - particularly in food courts where the shopping centre is basically telling each food court operator what they can have or not have on their menu. In some cases how much they should charge for it. Which to me makes it sound almost as if those small businesses are almost like sub-contractors or outsourced, that they're each supplying different parts of the menu but ultimately the centre management is controlling the whole food court, micro-managing, I guess. I gather that it's not uncommon then for the centre through the lease documentation to specify what you can and cannot stock and sell.

MR DILLON (P777): Absolutely. I mean we were told - I think it was just last year in one shopping centre. We have a fridge, one of these fridges that holds water and various other drinks that - because you're open seven days a week people impulse purchase. I mean it's not a - it's more a convenience than anything else. Well, in this particular shopping centre we put some - I don't know, Powerade or something, into it which was being sold by, I don't know, the delicatessen round the corner or something. They complained to centre management. They came along and said, "Well, you know, part of your - we don't class Powerade as being a pharmaceutical," you know, or, "being part of your inventory that we believe comes under the definition of a pharmaceutical chemist, so take it out, get rid of it."

DR BYRON: But if you were operating a pharmacy outside the centre on the street - - -

MR DILLON (P777): Do what you like.

DR BYRON: Exactly.

MR DILLON (P777): Which we do, and we're moving - I would suggest that our modus operandi is to look to strip shopping centres because there is a return by the public wanting to go small rather than big, and I think there is a niche being created again for the boutique high service pharmacy. That's the niche that we're eking out with a high level of service, extended hours and an inventory which is commensurate with what people perceive as to perhaps be the purveyors of, as opposed to what the landlord says we can or cannot sell. There is that happening and it's certainly happening in WA to the point where the state minister has highlighted that fact that there is a return back to the high street in a way.

DR BYRON: Presumably if the centres keep imposing increasingly onerous conditions or more expensive rents and fit-outs, that would only encourage people to stay away.

MR DILLON (P777): There are some that are a little bit more venomous than others, and once you're in there, of course - one business we've been in for 20 years in a shopping centre, probably really the only one we've got left; the others we've removed ourselves from. But it's hard to walk away from that goodwill and just let the lease go, you want to sell on. Certainly that is an option and when the shopping centre is coming up for redevelopment, which does happen, your whole leasing arrangements just get put on hold.

We're in one small shopping centre where we really haven't had a lease now for two years. We're just in no man's land. We can't really go anywhere, you can't borrow against your equity because you really have no equity because you don't have

a lease, but we keep getting told that, "Eventually there will be a lease because we can't get it sorted with the local authority at the moment as to how the redevelopment is going to happen, so therefore we can't tell you where you're going to be or what's going to happen but, trust me, we're going to give you a lease."

DR BYRON: That's a pretty unsatisfactory way to run a business.

MR DILLON (P777): It is, yes. That particular young guy is not feeling too flash at the moment and he hasn't done for a couple of years.

DR BYRON: Just coming back to the capacity to pay, somebody said to us that it's almost like the centres were offering licences or concessions of, "Who wants to operate the pharmacy on the second floor of the mall? Who wants to be the newsagent down there? Who wants to be in the fish shop," or whatever. "You've got five years or you've got eight years," or whatever. In effect they're basically selling "the business opportunity" to operate that business in that space for a fixed term and at the end of that term all bets are off and they will offer that opportunity to the next guy.

MR DILLON (P777): Absolutely. Nowadays they sometimes say, "What will you offer?" They don't even tell you what the rental is going to be. The ballpark is maybe a thousand dollars a square metre but that's the range. "What are you prepared to pay?" If someone is prepared to pay it, well, my argument goes down the gurgler because that's where it's at. I'm just saying I don't like it, it's not very satisfactory, it's very hard unless you're probably a national operator now to get into a major centre, I believe, or you've got the backing of one of the big three long line wholesalers that's going to back you in because they actually want to make sure they've got the business. On top of that, in my lifetime I've seen the emergence of look-alike pharmacies, like Priceline which you may or may not have heard of.

DR BYRON: There's one across the road.

MR DILLON (P777): No, that's a Priceline pharmacy, but before they had Priceline pharmacies they just had Priceline. Take the dispensary out, you've got everything that a pharmacy stocks other than the patent medicines and dispensary, and they put those up against you. In the shopping centre that we're in where there are three pharmacies, there's also a very, very large Priceline who would be paying, I would imagine, I don't know, a lot less per square metre than us, so there you go.

DR BYRON: Well, thank you very much, Michael, that's been extremely informative.

MR DILLON (P777): Thank you.

DR BYRON: Somehow we're going to have to digest all that information.

MR DILLON (P777): It was probably a bit garbled, I'm sorry.

DR BYRON: No, it was quite coherent.

MR DILLON (P777): I really appreciate the opportunity for you coming over and being prepared to listen.

DR BYRON: Thank you very much.

DR BYRON: Thanks for coming, gentlemen. If you would like to take a seat and introduce yourselves for the record. I think the record knows who you are now, Angelo.

MR SOMMARIVA (PGA): Thanks, Commissioner. I'm Angelo Sommariva, strategic planning officer, Pharmacy Guild of Australia.

MR WRAGG (PGA): I'm Steve Wragg and here to represent the Pharmacy Guild of Western Australia..

MR SOMMARIVA (PGA): Thank you again, Commissioner, for the opportunity to speak. Obviously, as you rightly pointed out, we've spoken before and I don't want to waste your time by going over the same points again, so this will probably be a little bit shorter in that I'll simply hand over to Mr Wragg and get him to highlight just some of the examples of what we have been discussing around the country basically of where we believe the market is not currently functioning properly.

DR BYRON: Thanks very much, Mr Wragg.

MR WRAGG (PGA): Thank you, Commissioner. One of the things that I believe is of importance and I'd like to bring up is that within pharmacy, most pharmacists that are leasing are looking to have business relationships with the landlords and the leasing agents and in doing so they're very, very much inclined not to want to create waves, not to be difficult tenants, and because the businesses are those that are actually their livelihood the intention is to try and get a relationship for life. Because of that I think you'll find that very few pharmacists actually enter into any sort of antagonistic dialogue with their landlords. There may be in fact, by evidence at the Pharmacy Guild and through my own experience, a lot of discontent, there is a lot of difficulty faced by pharmacists but very little of that is highlighted or brought to the attention, and almost never does it get any sort of tribunal or mediation stages.

We find that there are also other issues that are notable that in WA particularly you will notice if you look at a planning map of WA, because we're a late developing city, that during the 70s and through to the 90s there was a large amount of planning done by the state government and the local councils which made large residential areas and very, very small pockets of possible leasing areas, those that are zoned for shopping centres and for retail. The effect of those now some 20 to 30 years later is that we have very few choices in a lot of these areas for tenants that are in shopping centres to have alternative places where they can actually operate from.

To highlight that fact, within the company that I work for - and we assist pharmacies in their lease negotiations and their business operations, we have a variation in leasing rentals that are payable for a pharmacy between 2 per cent of their turnover

up to 12 per cent of their turnover, which is a very, very large variation of some 600 per cent. Certainly in my lifetime experience I have found that that variation can be actually higher. I've had some situations where a rental can be as low as 1 per cent of a person's turnover and in fact other situations which ultimately leads in a lot of financial difficulty, bankruptcy. That's when it goes above 10 and sometimes as high as 16 per cent of a pharmacy's turnover.

I think that that then highlights the fact that true market economic forces are not at play here and there are other factors. One of those factors is the one I referred to with planning. If you look at a planning map of say the city of Melville, you will notice there are only certain pockets of areas where a pharmacy can operate. Within those pockets - that means that they're nearly always held monolithically by a large company or managed by one of the large leasing agents. As such their rental ranges tend to be very, very much the high end. If in fact a person is not happy with paying that sort of rental there is no options at all for them to move in opposition or in competition to that particular site.

For example, if you're in a shopping centre if you were to try and move outside the shopping centre district and wanted to move across the road there is in fact no land available for trading. Now, in some cases that's not always the case and there are some smaller opportunities to go across the road. But in fact although it appears that you could operate a business in another precinct adjacent to a shopping centre, that particular precinct will have its own limitations and some new limitations that are not evident. For example, we currently operate a pharmacy that borders onto a shopping district. So on one side of the road we have the opportunity for a tenant to operate a pharmacy in a shopping district. They can have on the outside of that pharmacy some 80 square metres of advertising, whereas the pharmacy that operates on the other corner which is actually diagonally opposite, because it's not within the shopping district but is a special use, its size is limited to only 80 square metres compared to 250 for the opposition. At the same time its limitation on advertising externally is limited to one square metre.

So in fact what we have is not so much a situation whereby there is truly equal economics in the market but we've got a disparity between what is available to be operating on one side of the road, which is under a shopping district, and on the other side of the road which is in fact not. So the parties that actually control those sorts of shopping precincts or shopping areas have got the ability to charge much much higher rents because in fact there are no alternatives and there are no options.

I would like also to point out that within the market of leasing you will notice that particularly in WA the leasing agents - it is held by just a few very large leasing companies, the shopping centres. What we have tended to find in WA now is a set of brokers or negotiants will be party - will assist you on a lease negotiation in WA. In fact what appears to be happening is there seems to be a pseudo collusion. What

we've got here is because trying to lease in a very large shopping centre is such a complicated and sophisticated process because you're talking about a lease for five to 10 years, in some cases some of the leases will be over half a million dollars a year. It's quite a considerable amount of money.

So when entering into a lease it's always advisable, for that sort of money, to get somebody to help you, to advise and to get market information and then represent you. What we find, however, is that those parties that are representing the tenants are in fact a small group and it would appear are acting - maybe "collusion" is a bit too strong a word but certainly they're on speaking terms and they have got relationships. They tend to be that you get an averaged result rather than the fair and reasonable result coming forward. It puts a lot of power, once again, back into these negotiators' hands because they've got - they're privy now to large amounts of information through the shopping centres.

In fact, our experience is that if you are in a major shopping centre in Western Australia, that is, one of the top five, the chances of you actually making a profit are probably only about 20 per cent. Most of the other pharmacies that are in very, very large shopping centres in WA have either been in receivership, have had to sell after having not made a profit for quite a number of years or what is quite common is that they will have a secondary business in another market which is able to subsidise the shopping centre.

One may well ask why would you bother to run a business in a large shopping centre if it doesn't make a profit? The fact is all people go into business believing they will make a profit and that they can always do it better than someone else. Unfortunately that doesn't always seem to be the case. In fact, what tends to happen is that they will use the turnover, the large turnover that they can get from that shopping centre to help to increase their overall buying power, their ability to buy goods at a better price to offset. So in fact even if the very large shopping centre business doesn't make a profit it does have an economic advantage, although one that would not be commensurate with the leasing charged at the centre.

I would just like to maybe make a couple of case studies just to highlight a couple of other areas of interest. I note that just recently in the last three years I had a shopping centre lease with one of the very large shopping centre leasing companies. I found it very, very strange to be given a letter two and a half years before the end of my tenancy which had been for a 10-year period notifying me that my lease would not be renewed at the end of the period. It seems most unusual to be given that notification two and a half years before the end. While I do appreciate that they gave me notice I do wonder what their motive was in giving me that sort of warning out in advance if it was to be anything else other than just to protect themselves legally in not wanting to renegotiate and renew my lease.

I have another situation where a pharmacist had entered into a very large shopping centre lease and was struggling there for a couple of years. One of the practices that we're seeing. This is a very senior pharmacist in WA and he has had experience in shopping centres for around 20 years. It seems to be a practice, and one that seems to be common, that a pharmacist will enter into a contract to lease a shopping centre at a lease that seems to be above market and probably not sustainable. Usually what will tend to happen is they will go in for that lease for a period of two to three years of their five year term having not made any money. When they then have a set of accounting figures to show they have made a loss for the three years, they go to the shopping centre and try and negotiate a slightly lesser rent, one which will still see them not making a large profit but one which will at least see them start to turn around. The profit in fact they make is then only in the fourth and fifth year.

So what tends to happen is the shopping centres are able to push the rentals as high as they can without sending the business broke. Once there's actually proof that they've gone too far they're willing to ratchet it back a small amount. In fact then the pharmacy can make a small profit going forward. To put this in perspective we're talking about pharmacies therefore that can lose up to \$1,000,000 in the first two years only to find themselves then able to renegotiate the rents down by as much as \$100,000 a year, and then in the last two years try to make back the profit. In fact they make very little return economically out of the business but they have started to build a goodwill because they have a five year trading, and they try to renegotiate a new lease.

At the same time, what we're tending to notice in centres nowadays is also that rather than actually do a refit every 10 years a lot of the centres are now tending to ask for a refit within five years. Not only that, but the shopping centres redevelopments in Western Australia, which is a very fast growing state, are seeing our centres expanding and therefore being renovated at a much quicker rate. It's during these renovation processes or expansion processes that a lot of businesses actually lost. Historically, for most businesses they lost between 20 and 25 per cent of their business during that 12-month period, and sometimes in extreme cases the actual expansion can see them being boarded up and having no tenants next to them for as long as 18 months.

So I also make this point, most rents are negotiated and leases are being paid on the basis of getting fair and reasonable access to their tenancy for the full period of the lease, whereas in fact because the clauses within the lease allow it there can be a redevelopment and there's no compensation. I think at this point in time these are the main points I want to make today.

DR BYRON: Thank you very much, Mr Wragg. The details are different, but the same points are fairly familiar, have been made to us basically everywhere else we've

been. So there does seem to be a consistent pattern, not that that's any consolation for you. I was surprised by your statement about how few of the pharmacies operating in large shopping centres are making a reasonable profit. I'm just wondering how long it will be before more pharmacists realise that getting a space in a major centre doesn't seem to be a guaranteed ticket to paradise.

MR WRAGG (PGA): I think that's a fairly reasonable question, I think that's a good question. I think you'll find that certainly a large number of successful pharmacists do not have any pharmacies in the major shopping centres, and those that are able to run successful pharmacies, or I should say appear to run successful pharmacies in the shopping centres normally have another source of income to offset the very small profit they may be making, which is not commensurate with a normal business return.

DR BYRON: It hardly seems like an activity one would do just for recreation.

MR WRAGG (PGA): I think the point is anybody going into a business believes they can do it better and that the turning point is just around the corner. You seem to have a steady stream of people believing that they can always do it better. On paper you'll notice that if you were to break down, for example over a five year lease, two of those years they may in fact be making a reasonable profit. Unfortunately there will be factors why the other three years have not made a profit, and one of those that I pointed out is that unexpected redevelopment of the centre, unexpected competition, for example you may have a large shopping centre that has two pharmacies in it, they might expand it very marginally. Now, any expansion of the shopping centre won't bring any more pharmacy prescriptions because it's limited, the number of people getting scripts in that neighbourhood, in that area, will not go up. If you add a third pharmacy, by virtue of the fact of simple mathematics your business should drop by a third.

DR BYRON: We've raised that point in a number of the hearings because it seems to me that if I enter a lease based on looking around, seeing who's operating other businesses, who are my competitors, how many others there are and so on, and then a year into the lease all that changes do I have any comeback in the sense that this is not the deal that I went into. The shopping centre people have responded saying, "Well, that could happen out on the strip anyway. If you're business is very successful there's nothing to stop somebody else from emulating you and moving in a kilometre away." The difference is that in the centre it may well be deliberately manipulated rather than chance.

MR WRAGG (PGA): That may be true. I'd like to point out that there is a major difference between having a competitor inside a market where I'm paying for the privilege of having customers come past my door and therefore my rental is likely to be 8 and 10 per cent, as opposed to outside when I'm accepting that I may get

competition and my rental is closer to 3 per cent. I can have competition come next door to me on 3 per cent, still survive and lose half my turnover, but I can't do that if I'm paying a rent that takes the majority of my profit away.

DR BYRON: As we've been discussing in many of the hearings, if you're in a centre the reason that you're paying a much higher rent than you would outside is because of the expectation of much higher levels of foot traffic, therefore turnover, therefore profitability. But other people have said to us, maybe the turnover is 50 per cent higher, but if the rent is double you may be no better off.

MR WRAGG (PGA): There's no question that you aren't necessarily better off. I think from a pharmacist's point of view there are three options if you are to own a pharmacy. One is to be in a shopping centre, one is to be in a strip or a local neighbourhood, and the third is to be a medical centre. What you find is because there are roughly 5000 pharmacies around Australia the community requires them in all three positions, three totally different markets and consumers expect to be able to access pharmacists in all three of those. It's not possible that the shopping centres won't have pharmacies because in fact people expect them there and there will be business.

Whilst this may not help our argument you probably appreciate that pharmacists owning pharmacies in shopping centres is quite a nice prestigious thing to do. So people are prepared to take smaller returns when they believe that it's either close to where they live or it has some other prestige attached. So I think you'll find that that's another factor.

DR BYRON: If at the end of a tenure lease the centre management says, "We're not going to renew your lease," and they may well have decided that they're going to lease that space to somebody else to operate a pharmacy in the same spot, what are the prospects that the first pharmacist, the one who's been there for nine years and 11 months, actually being able to take very much of his business to some other location? Would most of the people patronising that shopping centre just observe that there's still another pharmacy in the same spot? If you'd moved on and I'd taken over the place and had my name on the front door instead of your name how much difference does this make? Would people know or care?

MR WRAGG (PGA): I think from a turnover point and from the power of the goodwill the transfer could be as high as 100 per cent. There's no expectation that there would be a large loss, assuming that the person leaving - in most cases in shopping centres in WA there are no alternatives to move to, so we'll assume that they've just closed down and left. The person coming in is likely to get all of the goodwill and all of the business instantaneously, and that's one of the carrots and the stick that really, really makes it difficult when you go into lease negotiations.

Even if I'm only making a small amount of profit I am making a profit and the leasing agents can in reality put the lease up to a point where the business can still make a profit, and because the incoming party doesn't have to buy the goodwill they really only then have to come up with the stock. In some cases, if the party leaves the store with its fixtures and fittings intact as a negotiating - I could walk in just for the cost of stock and keep some goodwill which I in fact didn't foster over the last five to 10 years.

DR BYRON: And get the fit-out at a discount.

MR WRAGG (PGA): Exactly.

DR BYRON: The landlord is actually capturing a lot of that through a higher rent than the previous person was paying.

MR WRAGG (PGA): In my experience over the last 30 years the landlords are very, very clear in understanding that they believe they own part of the goodwill of the business and that's why they charge the higher rental. So you could in fact look at it this way: the higher rentals are actually a profit sharing in the business because they have created the turnover for you. It's just like having a business partner. The fact is that they've got that ability to charge the higher rent and therefore become your pseudo business partner, purely and simply because they have been able to win a planning approval in an area where there's a monopoly, hence the differential between 2 and 12 per cent rentals occurring.

I suppose that's one of the factors we're a little bit concerned about. If it's only a five-year lease you can build up a business and you actually have no ownership after five years of that goodwill, and at the same time there are no alternatives to move to a competitive other position to keep your goodwill because there's nothing available by state law and planning approval law.

DR BYRON: So your silent partner can basically take a much larger share of the gross profits of the business it's generating.

MR WRAGG (PGA): Yes, I think that's probably a good analogy. If you could imagine two people in business, one person working the business and one person not working the business, and each year they say, "We'll start the business off and we'll share and I'll take a little bit, but you doing all the work, you can have a big bit," but after 12 months they say, "I can't live on that much because my shareholders want some more money," so they say, "How about I take a little bit more." Then the year after that they say, "I'll just take a little bit more because my shareholders, my wife and kids need some more and I need a bigger house and a bigger car." That goes on until finally the person working the business is getting 10 per cent of the profit and the other party is getting 90 per cent of the profit. Why would the person that's only

getting 10 per cent not walk away - because they don't have any real options. They can't say to that person, "I don't want to deal with you, I want to go into partnership with Joe across the road because he's more reasonable," because you can't go across the road, you can't work with Joe, and all of these factors that we've talked about come into play.

We have to be nice to these partners and we have to make out that we're not really at war with them because if they get any inkling that we're disgruntled or we might make a big scene or even tell somebody, they would basically just say, "Look, our agreement is terminated. We don't want to be in partnership with you, you're too much trouble," and bearing in mind that most of the young leasing managers are trying to prove that they are good leasing managers so they will try and be as aggressive as they can because that actually adds to their credibility as a good leasing manager within this large company and opportunities keep moving for them.

DR BYRON: Unless it gets to the point where they have alienated somebody who was actually a very successful business man and they can't get anybody as good to come in, and then it becomes clear that they have pushed too hard.

MR WRAGG (PGA): That's true. That's true indeed. I think we'd like to believe that's the case. Unfortunately in most businesses those differences in any industry are probably not great enough. If one jeweller was to leave and another one was to replace them you may have your own preferred jeweller but the difference is probably not going to be dramatic enough for the landlord to worry about it at this point in time. It's only if you change the usage completely.

There's just one other minor point and I'm sure you've had this raised numerous times. Within the shopping centres one of the things that historically has always made it more difficult is the cost per square metre that we'll pay for our usage compared to the cost per square metre to the large discount department stores and the supermarkets. In all respects for the parts where we have to compete are the same goods. So to have a ratio of rent that could be as much as 10 times more does seem to indicate there is another factor at play here with regards to the amount of money that's paid for a lease. To be honest, in my opinion that did seem in balance about 10 years ago, there was a reasonable balance, not between the supermarkets and the pharmacies but between the pharmacies and all other tenants we had a reasonable balance. There wasn't an overly large demand in shopping centres for all sorts of tenancies. It seemed to stay in balance for a while.

In WA in the last five years that balance has changed dramatically. You can appreciate because both the population has increased very quickly, our wealth has increased very quickly, particularly disposable income, what we're finding in shopping centres now is that the demand for leasing space by nationals or even new operators is so high, and some of the parties are listed companies and they're getting

such large amounts of wealth being injected to these new businesses that that's also forcing up the rentals, because the rentals are even higher than what pharmacies are prepared to pay which historically was the highest rent in the shopping centre.

To explain that, 10 years ago there was only one jeweller in the major shopping centre and they had been cutting back and back, and in most of the smaller shopping centres it was zero. Nowadays in some of the shopping centres it's not unusual to find as many as eight. These are small 50 to 100 square metre tenancies. One of the things that was put to me was, "Look, we really don't need you any more. If you're not prepared to pay the same rental as the people that are keen to be in the shopping centres this year, at the moment, then in fact you can leave and I'll find somebody else or you can take a non-preferred position right at the back of the centre but paying the same rental, because all the preferred positions now I want to give to, for example, the jewellers and the smaller stores," which their rentals are horrific. In fact I'm not sure that they're necessarily making large profits at the moment. I'd like to see where they will be in five years' time.

DR BYRON: Yes. Without wanting to sound too much like an economist, isn't that sort of supply and demand? As you've said there's a relatively limited supply of premium retail space, particularly because of the way the zoning has worked. In an economy that's booming there's very, very large demand for retailers who want to get into that high quality space. It's no surprise that they're bidding up the rents.

MR WRAGG (PGA): As a pharmacist and as a business man I accept that. I accept if the value of that square metre there is worth more then I should pay more. I have to compete for that space, that's not unreasonable. What I find unreasonable is that I'm competing with the jewellers and others for that space, whereas the supermarket is not competing for space. I can't take part of their space. In fact from an economic point of view we're not truly competing, we're only competing at the high end and we're not competing at the lower dollars end.

MR SOMMARIVA (PGA): If I could as well, not only that but it would be okay to call it a supply and demand issue if that shopping centre was also competing against another shopping centre across the street, but as you point out in your question, because of the zoning restrictions and the planning issues, whilst the businesses inside the shopping centre are competing, that particular shopping centre is not. In a local area monopoly like that I don't think that seeing it entirely from an economic point of view is the thing that we should be doing at this point.

DR BYRON: But if the shopping centre management found out that the only pharmacy in their centre was going to leave because the rents that were being demanded were simply impossible to pay, don't you think they might reconsider? They would have to ask themselves the question, "Do our customers come into the centre and expect to see a pharmacy here? If so, do we need to make the appropriate

adjustment to keep them here?" I don't know what the answer to that is.

MR WRAGG (PGA): If in fact the pharmacy is losing money then the shopping centre - if it can be shown to be sustainable that they have lost over two to three years then they will adjust because they understand the market rent they've gone to is just too high. If they bring it down slightly, which is probably disproportionate to what a lot of the other tenants are paying, then because there is a large competition within pharmacy itself for that space and because it is a specialist shopping centre and has been able to bring this extra business, there is tendency that because we don't have equal competition inside and outside that there is a demand for that at high rentals and at low profit, low percentage profit.

Maybe if it is of any help, just to give you an idea: on the outside of a large shopping centre in WA it's not unrealistic - we've got one tenancy that's paying \$200 a square metre; there are three pharmacies on the inside of that shopping centre and they pay \$1600 a square metre. That's an eight times differential and you're only 200 metres apart. This is the sort of mark-up, the power that's given to a shopping centre. On the outside it's 200 square metres and on the inside it's \$1600 per square metre.

DR BYRON: Yes. But I mean presumably nobody is forcing those people to operate inside the centre if they have the option of being outside. I mean surely if they're paying eight times as much they have done the sums and worked out that they can afford to, otherwise why are they there?

MR WRAGG (PGA): On that particular case that shopping centre only had two pharmacies so it was felt that that was a reasonable - they would get a reasonable return because they can get such a high turnover they would make a small amount of profit. In fact, only one of those two pharmacies was profitable. The second one started profitably and they were enticed - they were asked to renegotiate their lease and the rental was put up substantially.

Rather than lose the goodwill that they had built up while the business was profitable they didn't want to lose the goodwill at the lease renegotiation. So what they did is that they accepted the higher rental but they tried to change their business model to offset the higher rental. In doing so they bought a newsagency nearby, made it a slightly bigger tenancy, because as the tenancy got bigger the landlord was prepared to give them a rental reduction per square metre. Based on that model they could see that they would be able to make enough profit to meet both the landlord's objectives and their own objectives.

The first 12 months they seemed to be doing okay. After that, however, it went downhill very quickly. The landlord then opened a lotto kiosk just around the corner. Then the supermarket started selling all the things that the newsagency had

such as the books, the magazines, the stationery. They found themselves in a situation where their model of turnover had been eroded by the shopping centre. They weren't able to renegotiate their lease and they went into receivership and still are. So these were factors that they didn't expect when they made their decision on what would be economic. Just recently in that same shopping centre now a third pharmacy has been added, because they had a slight expansion. So once again, they had just got - feeling was they were just getting to a point where they were going to make - economically they were going to make a profit from the store and there was another change which maybe should have been foreseen but in this situation wasn't foreseen; and so, start again.

DR BYRON: Yes.

MR WRAGG (PGA): Out of interest, we personally keep away from the extra large shopping centres because we realise there's very little profit in the long term.

DR BYRON: Yes. Well, without wanting to appear overly cynical the centres' expertise seems to be in working out how much various businesses can afford to pay and then asking for that much. That seems to be what they do and do it pretty precisely.

MR WRAGG (PGA): They do it very, very well.

DR BYRON: Yes, okay. I don't think I have anything - any other questions. Is there any closing remarks that either of you would like to make?

MR SOMMARIVA (PGA): Just quickly, once again touching on the issue of accessibility. From an industry that seeks to be accessible to 100 per cent of the community then I think it would be a sad day if we did get to a point where pharmacies were not able to go into these particular zones. It's, from our point of view, important for every person in the community to have access to pharmacies. If it gets to a point where we can no longer go into shopping centres then I think the community will be the ultimate loser from that.

DR BYRON: Okay. Thank you very much, Angelo.

MR SOMMARIVA (PGA): Thanks once again, Commissioner.

DR BYRON: I think we'll take a very short break for a cup of tea, about 10 minutes, and then resume with the Retail Traders Association of WA. Thanks very much, gentlemen.

DR BYRON: Thank you very much ladies and gentlemen. We've now got the representative for Retail Traders Association. Sorry to keep you waiting, gentlemen. Thank you very much for coming today. Could each of you introduce yourselves for the transcript so that they'll be able to recognise the voices when they're doing the transcribing later. Thank you very much for the submissions, especially the last one which we just got last week. If you'd like to take us through the main comments and criticisms and suggestions for how to improve our draft report I'd be very grateful. It's good to see you again.

MR TIGHE (RTAWA): My name is Craig Tighe. I'm from the AFL Stores here in WA and a member of the Retail Traders Association.

MR SPENCER (RTAWA): Wayne Spencer, executive director of the Retail Traders Association.

MR HISCOX (RTAWA): Anthony Hiscox from Krazy Tees. I've got three stores in strip shops.

MR SPENCER (RTAWA): Mr Commissioner, thank you for having us. I guess our concern with the draft and looking specifically at Western Australia, the economic approach of the draft to basically say that there is or there will be a working out of the imbalance of power between the landlord and the small tenant I think is something that we're greatly concerned about. I guess things that concern us is that shopping centres have played a large part of the retail scene for a great number of years. I've personally been involved in building them and developing them and running them. Although they may only represent 20 per cent of the actual tenancies or leases in place they do represent over 40 per cent of the national turnover. I think that is something that the Commission should be very much aware of in the imbalance of - how can we say this? We're looking at the statistics on the one hand that to a certain degree are not correct on the other.

You have in Perth a metropolitan centres policy and a nodes policy which is currently under review, which is highly restrictive of the location and type of retail outlets that are allowable, and in fact even limits the total square metreage that is allowable in certain areas. You do have in a number of areas a monopolistic situation that the landlords can take advantage of. You also look at the strata of shopping centres, they being the full regional centre to a sub regional to a neighbourhood centre. Especially in the full regional centres there is a limited number of those in Perth, which when you look at it does have cross ownership and a very limited, restricted amount of ownership. We're fully aware that at the management level those people do talk to each other and communicate on various aspects of lease negotiations.

I think the other matter of concern too is that we've noticed a change in retail leases and whereas there used to be five years and most probably two or three years in you would cop a market review, now it's all done with CPI market review alternating. The thing that concerns us is that in the last 12 to 18 months especially we've been privy to looking at rent increases as much as 70 per cent, and I just can't quite fathom that one myself. Where a lease, as we see it, should be basically staying on top of current market rental, to then jump by 70 per cent is highly opportunistic and it doesn't give the small retailer much opportunity to negotiate downwards, and it basically is the landlord taking a bigger share of the partnership.

I think the other situation that should be looked at with the leasing is that shopping centres have the ability because of the lease to get turnover figures, and you don't have to be a rocket scientist to work out what a particular line of product can generate in gross profit. Therefore you can work out two things, one, what the rental in the market for that particular product or lease should be, but you can also work out what they can make out of that and as to how much of that you want. So it is an extremely imbalanced situation because the small tenant in Western Australia doesn't have access to full market information. Leases are not forced to be registered here, they're a voluntary situation and I think we can talk later about that, we have a possible solution.

We've also noted there's increasing demand in Western Australia for retail negotiation consultants. This to us is a signal that the small retailer doesn't have the wherewithal or the knowledge or the understanding to negotiate on his own behalf. The only problem is being a small community and a small state a lot of the people concerned should really be declaring their conflict of interest because they do negotiate for the landlords as well; to find tenants for them as well as negotiating for other people, small tenants et cetera in their hour of need.

I think the other area that needs to be looked at too is with the point of renewal. I understand that - I fear more so than - and agree with them - shopping centres need to be having a good mix that meets their demographics, the needs of their demographics especially in primary and secondary areas. But where you have a lease coming up for renewal and the landlord wishes to maintain that product or that range of product that the lessee has and they basically do not give any just reason then I just don't understand why it's allowable that they can turn from one tenant selling X product to another tenant or prospective tenant selling X product and basically play one against the other for the rental; or, in fact, the diminishing of the goodwill of what the previous tenant has built up.

I think there were some comments in your draft with regard to assignment of leases. I guess the one thing that we really were concerned about was the removal or the apparent want to remove restrictions back to the situation with commercial leases. One area that - I think that concerns us greatly. I think the assignment of

leases, the landlord has the ability to check out the assignee. They're in a unique position to be able to do that.

I think that the assignee - the lessee that's making the assignment really should be allowed to step out of the picture completely because the landlord can vary the dynamics within the dynamics within that shopping centre very easily. There may be extensions, there may be other things, there may be even a change of landlord and a diminution of the marketing et cetera. You also have a new lessee stepping up to the situation that the existing lessee has no control over, and therefore, as it exists under the current leasing now, should be allowed to basically to give up any chance of recourse against him with the assignment of the lease.

I think it should be stated up-front the RTA's perspective is to lessen red tape and to remove red tape from situations and indeed, look at the economic balance within a industry sector. The exception to that is where there is an un-level playing field. We do believe that the retail leasing, especially in small tenancies, is one of those areas that does need the continuance of regulation to maintain or try and move it to a level playing field.

I think the draft also refers to the unintended consequences of some of the current legislation. I just pick on a subject here of a five-year lease. The reality is that at least the small tenant has the ability to negotiate from that point, whereas previously what would be offered is mostly a one, two or three year lease. This comes into importance when you look at the depreciation of assets and fit-outs and also the ability to build a business. But a tenant at least has got five years to start with. He can negotiate seven, eight or 10 or he can negotiate downwards if he wishes to but at least he's got a starting point. I think that the Commission's comments in the draft, "unintended consequences", I think sometimes is perhaps a bit off the mark.

You've also recommended a pause in state legislation and understanding that the RTA would be in support of a national legislation alignment - if you wished to pause the state legislation then I think there has got to be a directive or at least a goal to get things in order. On the national basis it is specifically the disclosure statements I think are a key matter of concern, especially with a lot of tenants having multi-state representation. The only other scenario if you go to a national - I guess what is the lowest denominator that you can go to? From WA's perspective, most probably are the least regulated in its format. I would say that in certain cases there are elements that still need to be added to our legislation.

I think they're the - most of the other items are covered in our submission but I would just like to bring up again the point of lease registration. It's not compulsory in this state, it's a voluntary situation. To our mind it is not that well - given it's voluntary.

DR BYRON: Yes.

MR SPENCER (RTAWA): We would like to suggest that the simple fact of lease registration is not the answer. We're looking for a balance of understanding and a balance of information between landlord and tenant. It really requires the interpretation of that information to a basis or semblance that the small retailer can understand. Our suggestion is that a body like ourselves could be utilised to develop a process that would enable both parties to facilitate through for information and understanding of what is really happening in the market, be it in shopping centres or be it in strip scenario.

I think, just in conclusion, that if there was establishment of a national consistent approach - and we don't support the removal of existing legislation but at least a national consistent approach, even if those inconsistencies between states were noted and highlighted but especially with the disclosure statements I think you would achieve a great deal in the step forward of lessening costs and lessening misunderstandings at least in that basis. I'll stand back and let my compatriots say their words.

DR BYRON: Yes.

MR HISCOX (RTAWA): I've not much more to say than what has already been said. The main point that I conceive, just having strip shops, is that a lot of the red tape has been taken out of the strip shops which the shopping centres have got like percentage rents and so forth been taken out. The strip shops have been able to survive and they're going quite well without all that. So we need to probably take that away - take the powers away from the shopping centres in whatever way we possibly can to even up the balance.

MR TIGHE (RTAWA): Yes. I guess in a nutshell what any prospective new tenant going in, or an existing tenant goes into a shopping centre wants information, and there is an absolute lack of information provided. You know only anecdotal information from talking to co-tenants. Even if you hire a consultant to do the lease negotiation for you, you're generally relying on their knowledge of the industry and the information is somewhat lacking. To be able to have, for example, registered leases so that you were able to find out exactly what the market rent is, exactly what co-tenants are paying, as well as perhaps getting some better information about what the market is.

If you're a prospective tenant going into a shopping centre, instead of going in with blinkers on where you may be a franchisee, for example, coming in from a company that's telling you a wonderful story because they've got a vested interest of selling you the concept and how well it's done in other centres, you can come into

that centre with blinkers on believing and trusting that all the information you've got is correct. Of course once you get in there you realise - much the same as the pharmacy people were saying - there is only a certain market and you've just taken the market from being divided by four players into five and so on.

On rare occasions it actually grows a market or it fits the demand within the centre but I think generally small retailers and people taking on these leases - and myself one of them - you have to remain fairly optimistic. You do go in there with a genuine belief, as was said earlier, that you can do it better than the next person. I've been in centres now for 10 years and the large shopping centres and the nature of my business is that we have to be in those sort of centres for the traffic in the type of business we're in, but you are sat with a situation that you really have nowhere to go. I can't pack up and go to the high street across the road, even if I wanted to - and I have looked at that option on several occasions during those lease negotiations. But you really just don't have that option from a financial consideration because the investment you've got in goodwill, as well as stock, fittings, you may have mortgages and other personal debt that you've got to fund.

You end up in a situation where the person you're negotiating with knows exactly what your turnover is. They know from their retail experience and knowledge that your business model would be generating you this much gross profit roughly, so, "Therefore, under our parameters, you can pay this much percentage rent, or this much is a percent of your turnover to us." The mere fact that the neighbouring tenant may be paying \$50,000 a year less but maybe not trading as well or working on a different set of margins, they just know that your business can sustain 10, 12, 15, whatever it is that they feel can be done. Of course then you'll get thrown in the dreaded percentage rent factor that if you actually do have a successful year and circumstances go your way and you've traded well, you've done the right thing, bought the right products, you suddenly get lumbered with an additional rent bill because you've traded below that percentage.

Those sort of things, you either need to take the information away from the ability of the centre to get that sales information which most of the centres will tell you that you have to sign a waiver basically to provide the information, or you have to let that information be more widely used; not necessarily in detail but used by other tenants in the centre to say, "Well, if I'm in the gift category of that centre, if there's 10 gift retailers in the centre, the average turnover is this." The last five years it's gone down because we've gradually introduced things. It tells you information. You can then make a considered opinion and say, "Look, Craig, it might be time to pack up and go," or, "Yes, they're right. Even though I might feel that my turnover has gone down as a tenant, the reality is everybody else is going up, so maybe it is me." But you don't have any of that information to make those assessments.

In my opinion anyway that's one of the critical factors that's lacking. Listening

to the previous participants this morning all they have said about, for example, the pharmaceutical industry - pharmacies - is exactly the same for just about any other tenant in a major shopping centre. We run into all the same sort of problems.

DR BYRON: Can I ask a couple of questions on all those points. If we start from the point that in the shopping centre the whole, if you like, business model is different compared to outside on the strip, that rent isn't just based on what's the going rate per square metre. The asking rent is based on what they think you can afford.

MR TIGHE (RTAWA): Sorry, I would say that it's actually based on two things: what the previous tenant is, what they have to get per square metre, and what they think you can pay, and they try and hit somewhere ideally close to where they think you can pay and above what they need.

DR BYRON: We have spent a lot of time looking at lease information and systems of disclosure, a national, very low cost, reliable, readily accessible information so that you can get information on leases. I think from some of the other hearings we've had around the country, it seems like there's a very simple way of doing that; not necessarily through registering the lease itself but it's what the solicitor in Brisbane called "a one-page epitome of lease" that has all the key points pulled out of it, so rather than putting 70 pages, 100 pages of lease up on the Web that you have to plough through. This has got nothing to do with property law which is different from all eight jurisdictions. This would be a one-pager that was signed simultaneously with the lease that had all the key information on it and it was purely to inform the marketplace. I think we can do that.

Let's say we recommend it and let's say that all the states and territories picked it up and we've got a national database, but from what you're saying if you're in lease negotiations you can pull out figures off the Web now that would say, "He's paying X, she's paying 2 X and you want me to pay 6 X?" and they will say, "Yes, because we think you can afford it." So even if we have this national system of full information of how much every retailer in every shopping centre and strip everywhere in Australia is actually paying, and even if it's accurate information, not just base rent but includes all the incentives, it may not actually change the fundamentals. They're not just saying, "The going rent is X, we want X from you," they're saying, "Knowing your business and what you're turning over, this is what we think you can pay." My question is, are we going to set up a system that will provide what everybody is asking for and it still doesn't actually solve the problem?

MR TIGHE (RTAWA): It will go a long way towards it in the sense that you're giving both parties equal information about what the playing field is. If I then choose, because I know my business, to pay 6 X, that's either my stupidity or my knowledge of my business and they're right, and if I feel that I can do that. But at the

moment I go in there and I might be paying 6 X because I've gone in there with the best of intentions but no knowledge. Then once I'm in there, having a quiet chat to Anthony two tenancies up, and he says, "You paid what?"

DR BYRON: You're doing it with your eyes open.

MR TIGHE (RTAWA): You've got your eyes open.

DR BYRON: Okay. Now, likewise we've had discussions everywhere we've been about the leases requiring retail tenants to disclose their turnover figures to the shopping centre owners. I think there's probably nothing that irritates retailers more than that. Almost without exception people are saying, "Stop that." But just hypothetically let's say we recommended that every state and territory agreed to say, "It's no longer legal to force your retail tenants to disclose their turnover figures," the counter-argument might be something like this: if the centre executives are really competent and professional, they can walk through their shopping centre and say, "He's doing well. There's a lot of customers queuing up at the cash register, coming out with their arms full and their wallets empty. This guy over here, haven't seen a customer in there for a week, his stock hasn't moved," you know, blah blah blah. They can actually go through and they would probably make a pretty good stab at how well you're doing and therefore they'd still try to charge what they think you can afford to pay. So again, rather than actually knowing your turnover figures they'd be guessing. Sometimes they might be too high, sometimes they might be a bit low. But in terms of the shopping centre trying to get the most out of you they can, would it actually solve the problem?

MR TIGHE (RTAWA): Again, it goes a long way towards it because you're in a situation then where you are trying to do a deal and you've at least got some cards hidden. You know exactly what your situation is, and you may if your situation is dire and you do need rent assistance or you need to negotiate down, at your discretion you may want to show them, "Here's the figures, this is what's happening, and these are the reasons why and this is how I'm going to turn around, and this is why you need to keep me, and blah, blah, blah, or this is why I'd like to stay." These are all part of the negotiations. But when you have nowhere to go and the leasing agent is sitting on the other side of the table saying, "Gee, you had a good year. You did well, you know. Fantastic figures. Here's your new rent," where do you go?

MR SPENCER (RTAWA): I think there's two things. I'd turn round to landlords and say, "Well, why don't you charge a percent rent and be done with it."

MR TIGHE (RTAWA): And be done with it, yes.

DR BYRON: Well, I mean, this has come up.

MR SPENCER (RTAWA): Come on, watch their answer, "But, but, but - - -"

DR BYRON: Is there some way of separating and saying okay, I've had a good year, turnover has gone up. How much of it is because the centre management have done their job and really made the place buzz and sucked in customers, and how much is it because you're a brilliant retailer? Now, at the moment you can see what the turnover figures are but you can't really see who deserves the credit for that. Is there any way of unpacking that and saying, "Well, 80 per cent of this is because of me and only 20 per cent is because of what you've done"?

MR SPENCER (RTAWA): That's up to the individual to prove that. You can see that yourself. You can see what's happening in a shopping centre. You can see whether you've got a good or bad manager. You can see what the manager's KPIs really are, you can work it out. I think the unfortunate consequence, and maybe Western Australia is about to go through this cycle, is the fact that you've had a pretty outstanding rental increase factor going through the economy at the moment literary chasing the turnover up, and when turnover falls you're going to find delinquency and bankruptcies going all over the place because they're unsustainable.

DR BYRON: One would hope that that doesn't happen but you're right, it could.

MR TIGHE (RTAWA): It's a realistic cycle. It does happen.

DR BYRON: On the question of assignment, I appreciate the points that you've got in the written submission. I guess there seems to be a presumption that the recent changes to the legislation that allow the person selling the business to basically walk away with no more strings attached, is it possible though that now that the landlord can no longer have a claim, a comeback, against the guy who sells the business that they would be even stricter in vetting who the buyer of that business is? If they think the buyer is going to be an under performer they might say, "No, we're not going to approve the assignment," in which case the guy who's trying to sell his business is no better off.

Apparently a similar change to this happened in the UK recently and there the landlords have started requiring large bonds or insurance to cover them for the fact that - whereas before they had a guaranteed rent stream for five years, now they're going to let one guy walk away part-way through, new guy comes in, what if the new guy doesn't perform? Their income stream is going. So they start making demands, all of which has the effect of reducing the value that the guy gets when he's selling his business.

Alternatively, the landlord says, "If you want to sell your business part-way through the lease we'll negotiate a new lease with the person who wants to buy your business." They come in, have a chat, the rent is now going to be 2X, therefore how

much is that person willing to pay to buy the business? A lot less than they were before when the rent of X. So it's not at all clear to me that these changes in the legislation always work in the favour of the guy who's trying to sell the business. In some cases it might be the opposite. It depends very much on what the landlords do to protect their own interest under the new rules.

MR SPENCER (RTAWA): That's fair enough if they wish to research and put some demands on it, but then that at least can be discussed prior to talking to a prospective purchaser, so that you know exactly where you stand. The reality though is the fact that once you step out of that retail environment you lose total control of what's happening in that business, and therefore why should you be taken or dragged into court two or three years later for something that you really have no control over whatsoever?

DR BYRON: I can see that. As some of the lawyers have said to us, these lease contracts in a technical sense are incomplete contracts. There's terms in there where when you sign the lease you're agreeing to things but you don't actually know what you're agreeing to, and when it will happen, and how much it will cost, and what the consequences will be. The landlord can require the tenant to do such and such, and such and such, and such and such, like fit-out or move you around, but the tenant doesn't know when he signs it exactly what that will cost or what it'll mean. So it's a bit like signing a blank cheque.

MR SPENCER (RTAWA): Sure.

DR BYRON: Sorry, I'm not trying to put words in your mouth.

MR SPENCER (RTAWA): No, it's absurd.

MR TIGHE (RTAWA): It is.

MR SPENCER (RTAWA): When you move into the area of franchising it's even worse because you're basically - when you look at a franchisee coming into a position they literally are inexperienced, don't know what's going on, may not even have retail experience. It really is wood duck territory.

DR BYRON: Do you think we should quote you on that?

MR SPENCER (RTAWA): You can if you like. That's what it's referred to in the game. If you look at the leasing, for instance, from state to state, in Queensland, which I'm quite familiar with, there are three rental values on a particular shop: the idiot that walks in the door, the more astute business person, and the local person who really knows what he's talking about. That's in Queensland, there's three rentals on a site. If you want to ask me, I know exactly because I've been involved and

actually have been through the same area. It's quite a joke.

DR BYRON: With regard to your comments about what we said about five-year lease terms, I guess the idea we were floating were the terms of the lease should themselves be one of the things that are on the table for negotiation. You just mentioned Queensland where they initially had minimum five-year lease terms and then the retailers demanded the legislation be changed because they didn't want it. When we were actually trying to get evidence on this we can't see much difference in Queensland between before and after minimum lease terms. If New South Wales has got a five-year minimum and Queensland doesn't, let's do the side by side comparison, there doesn't seem to be any difference.

So when we ask ourselves where's the evidence that having a minimum five-year lease term has actually made a great difference you don't actually see very much either way. It's completely inconclusive. So it's very hard to then recommend that Queensland should be doing what everybody else does.

MR SPENCER (RTAWA): But if you look at it from the small tenants point of view at least he's got five years. If he wants to negotiate more he can, if he wants to negotiate less he can. But at least he's got five years to start from. If you take that away from him he's going to get pushed in 12 months, two year, three year leases in certain circumstances.

MR TIGHE (RTAWA): My understanding was that the leases in WA have to be a minimum of five years in a new lease.

MR SPENCER (RTAWA): They are, but they can be a two year lease with a three year option.

MR TIGHE (RTAWA): - - - in a new lease.

DR BYRON: Yes.

MR HISCOX (RTAWA): The problem with what actually happens is when you go into a lease you're very positive about the future of your shop and you pretty much know within probably three months, or definitely after your first Christmas, whether that location is going to work or not. If it doesn't work you really need help to get out of that lease as soon as you possibly can because you're just losing your house and you're losing all your money. That's definitely a problem, that people get involved in retail and get sucked into it and they just can't get out.

MR TIGHE (RTAWA): I guess the other issue is about the option. I mean, I don't know of any of the major shopping centres that offer an option. They would never offer an option.

DR BYRON: No.

MR TIGHE (RTAWA): I think they should. I think that should be something that's offered to a tenant, that after five years you know if you've paid your rent, you've done all the things that you should do you should have some sort of comfort or guarantee going forward to know that they're going to give you another lease, whereas exactly as we said earlier you can get to the end of a five year lease and they, "Look, you know, we've got another bloke here that will pay more for the site."

DR BYRON: That seems to be what routinely happens.

MR TIGHE (RTAWA): That's completely an unfair situation for the small tenant that has worked and built up, and I would say 90 per cent of small business people that I speak to and people that go into shopping centres are in the situation where the first three years, just as we've said in pharmacy, you probably don't make any money, maybe four years. Then in the last year you finally make a quid, and you've built that business up, you've got it to a point, you're then sitting there again in a very weak negotiating position with the new lease because you think, "I've done all this hard work, I need to move forward."

DR BYRON: That's why I was asking about the comparison between the strips and the centres, because if you're in a strip and you've worked your butt off for 80 hours a week, take minimum amount of money out of the business and you're building it up, if you get to the point where you can't renew your lease you can always move across the road and down the street, hang up the sign on the front door and all of your loyal customers will follow you to your new place.

MR TIGHE (RTAWA): Correct.

DR BYRON: You're actually building up an asset and at the end or whatever you can sell the business as a going concern and retire or whatever you want to do. But if you've got a fixed term lease in a shopping centre - and I understand that some of the leases now have in one-inch high red letters on the front "This lease is for five years. There is no guarantee you will get another term after that." Somebody said to us at the hearings in Sydney, "It's like every week that goes past is a week closer to the day when your lease expires," and if your lease expires and you can't get another one, and if you can't move your business across the road and down the street, poof, it's gone. It evaporates.

So we've had some very successful retailers who say to us, "Look, we know that five years means five years means five years. So we make sure that the amount of money we spend on the fit-out is something we can afford to pay back over five years. We write it off for tax as fast as we can, and so we get ourselves in a situation

where if they offer us a second lease which is just unacceptable we could walk if we had to." They haven't put their head in the noose and tightened it. But on the other hand we've also heard from people who've got a five year lease but they've borrowed money over 10 years to pay for it and they've got an eight year write-off period for the fit-out, and come four years and 11 months they're in an incredibly vulnerable, exposed situation. But the courts seem to say that, "Well, you should have known that five years means five years."

MR TIGHE (RTAWA): I mean, that works perfectly well for a lot of retail businesses but not all. There's many, mine included, that you end up - certainly from an accounting point of view I do exactly that, but from an operating my business point of view mine is one, as are many others, that you need to place orders nearly 12 months ahead in order to receive product in order to continue. So if you're in the last year of your lease and you fail to place orders because you think, "Well, there's no guarantee," suddenly you go into that next year with no stock. You're going out of business anyway, so what do you do? You basically have to go ahead with the belief that you're going to stay and hope that you get the right - you're in a no-win situation, and mine is not the only business like that. There are other businesses that rely on purely an indent-type basis for ordering and you've got to move forward on that basis.

It may be simpler for a food or a franchise where it's not that situation, or where the goods that they're buying a selling are always in stock, it's a stock service arrangement. But certainly not for a lot of businesses, it's very much done on an indent basis and some of those indents can be 12 months and longer. So going into that last year can be a very difficult situation for those businesses.

DR BYRON: Just to elaborate a bit further on that, some people have said to us in the hearings that the reasons landlords have been pushing to condense the lease term and the reason they've been pushing for more expensive fit-outs is it basically just tightens the screws and even further reduces - - -

MR TIGHE (RTAWA): Your ability to leave. Yes, absolutely.

MR SPENCER (RTAWA): As I said to you earlier, it just depends on who you're talking to and what his KPIs are. His performance measurement is what? Although the owner of a shopping centre may have a certain philosophy the KPI on his centre manager can really inflict a lot of punishment on a lot of people. It's not consistent. The other thing, just mentioning on that, why can't you have a situation where a lease renewal should be offered unless there is a good reason? If the shopping centre says, "Look, I've got to change the mix and you don't fit in it," give him adequate warning.

DR BYRON: One of the reasons that I've been told is that it basically goes back to common law and contracts, that a contract is supposed to be between two willing

parties both reasonably informed and if one side says, "We don't want to sign the lease," governments have been reluctant to force them to just because the other side really, really, really want it.

Presumably the landlords have been able to claim that if they don't want to sign a lease with party X they shouldn't be forced to, whether X has been there for five years or 10 years and paid the rent every month on time doesn't guarantee that they have to be offered another lease on similar terms and conditions. I can understand perfectly why the tenant would like that, and even in South Australia and the ACT where there's a right of first refusal there's a fair bit of debate within those two jurisdictions about how much real work that clause does or whether there are so many exceptions that it doesn't actually do very much.

MR SPENCER (RTAWA): It works perfectly well, though, in the commercial property area. If I was in a commercial business situation where I was leasing a factory unit or whatever it may be nine times out of 10 I'll get a five year, five year, five year lease put in front of me. So I think it's purely a negotiation tool from the point of view of the landlords that they don't want it in there. That's the bottom line. If we've done nothing as a tenant to say to them that we shouldn't continue on unless, as you say, they come to us and say, "Look, we're changing the focus of the centre to food only. We don't want any gift - you know," then there's got to be a clause within there that says, "Okay, here's adequate notice about that," and you get an opportunity to trade out and move on.

DR BYRON: But the way it's explained to us is that if you're talking about the high street where the owners of the space might be Mr and Mrs Smith or Mr and Mrs Jones or their DIY super fund or something, they'd be delighted to have a good tenant in there for 10, five, five, et cetera.

MR SPENCER (RTAWA): Correct, absolutely.

DR BYRON: But with the large shopping centres the reason they go for the minimum lease term is that every time there's a new lease there's another opportunity to recalculate what's the maximum amount that you can afford to pay.

MR TIGHE (RTAWA): Exactly my point. Where's the equity in that situation for the tenant?

DR BYRON: Well, one answer is that tenants should know that the rules of the game in a shopping centre are wildly different to the rules of the game on the strip, and that if you are in there for five years, don't be surprised if at the end of the five years the centre management comes back and says, "We now think you can afford to pay double that or five times that or 10 times that because we now know who you are and we've seen you perform."

MR TIGHE (RTAWA): Absolutely. I think we all know that going into shopping centres. We all know that, we're just saying it's not right, it's not correct. Having been in there for the time that I've been in there, it's not an equitable playing field and it's an anomaly in the system and it should be changed to give people the opportunity to stay there. I've seen - and this is again anecdotal - tenants that are perfectly good operators that have simply had that situation happen to them, as was mentioned earlier this morning, about a pharmacy being pushed straight out the door. I've seen that myself with other tenants, whether it be food or otherwise. It's just wrong on all kinds of levels.

DR BYRON: We were told last week in Melbourne that many centres routinely send out to everybody, six months before the expiry of the lease, a letter that says, "You will not be renewed." Then a couple of weeks later you might get another one, "We could be seen to talk about it perhaps." But I can imagine how incredibly sleepless the nights would be when you get one of those letters.

MR TIGHE (RTAWA): It's incredible. I've got one of my tenancies that again has been in this situation because of redevelopment for nearly two years now that we haven't had a lease. Every time we go around and around in circles when we talk about it because they don't know whether they're going to redevelop but they don't want you to leave. So we know that because of the type of tenant we are that we'll be retained, but I'm not here to talk about me, I'm here to talk about the general industry and the situation that we're at as small retailers in large shopping centres. You're in an unfair situation. My neighbour across the mall, he might not be desired so he'll be out.

DR BYRON: The other argument is that if you know in advance - I mean, it's like if I get into the ring to go 15 rounds with the world heavyweight boxing champion, believe me, it's going to be a bloodbath - my blood. We know that in advance and it's not going to be a surprise. The only question is, why would I be so stupid to do that when I know that I'm going to get massacred. Now, I'm not suggesting that it's a perfect comparison but if I'm a small retailer and I'm going to go in with a very, very large, very well informed multinational company with the best lawyers that money can buy and they're writing the rules and they can basically require me to do anything at any time for any reason, short of asking for my first-born child or something - -

MR TIGHE (RTAWA): They do that.

MR SPENCER (RTAWA): They do that as well.

DR BYRON: If I sign that why should I be surprised four or five years down the track if there's a lot of my blood on the floor. The thing that really amazes me is that there appear to be people queuing up to get retail space in large shopping centres.

Maybe one of the things that gives the centres the ability to ask for the sun, the moon, the stars and the sky is because there's a queue of people outside who will sign it if you won't. Maybe if the word got around, some of those people in the queue would decide to - - -

MR TIGHE (RTAWA): Jump off.

DR BYRON: - - - do something else with their superannuation funds, and then the centres would not be able to ask for the sun, the moon, the stars and the sky.

MR TIGHE (RTAWA): I think that gets back to the issue we're talking about and information - providing the information back to the prospective tenants and the existing tenants. Then if you want to go ahead - because the amount of times - and I'm sure this is shared by every single retailer in a large shopping centre that goes, "You're in this particular shopping centre, you must be making a fortune. Every time I go up there, there's people everywhere." Well, perception and reality, as we know, are always two different things and they're not there on a Monday when there's no-one around or any other day for that matter. They might only go on a Thursday night when it is packed. I think that's half the problem - perception and reality are completely two different things and there is a lot of misinformation out there.

Certainly when I went into the business myself I was under the same impression, "Gee, it must be great." I'd been in retail before so I did know some of it but until you've actually been in business for yourself you go, "There's a lot more to this than meets the eye and there's a lot more reality to the situation." It's not saying that you cannot make money, there's a lot of people that do make money in shopping centres, however, the playing field has to be one that is a lot more level and informed and equitable for both parties. That's what we're trying to achieve.

DR BYRON: I guess in this inquiry we're hearing all the bad news from all the people who have got burnt or who see their share of the profits being very rapidly eroded and so on. You've just said there's probably lots of people out there in shopping centres who are making money. We haven't heard a word from any of them. Not one person has come to the inquiry and put their hand up and said, "I'm in a shopping centre, a small retailer, I'm making a monza and I'm happy."

MR TIGHE (RTAWA): I'm making money, so there you go, otherwise I wouldn't be in business for 10 years.

DR BYRON: One - we've got one.

MR SPENCER (RTAWA): Remember that those people that are making money are going to keep under the horizon with the landlords. They don't want to have any kafuffle or any disturbance whatsoever.

MR TIGHE (RTAWA): That's true. Having said that, the first five or six years with my business I struggled as well, so I've been on both ends of the stick in a sense. My whole viewpoint on this is that I know and I see just a constant turnover. Once you've been in shopping centres for a while, five or 10 years, whatever it may be, you just see this continual turnover - - -

DR BYRON: The churn.

MR TIGHE (RTAWA): - - - of people, and some of them are excellent retailers, and they've signed the wrong lease or they've done something else that has caused their demise. They just put their head in for too much, as good a retailer as they may be, or business person.

DR BYRON: That comes back to the points you made about advisers and consultants and so on. I take the point about potential conflicts of interest, but barring that it doesn't actually bother me that there are more people coming up as advisers or consultants or lease negotiators or whatever. I think that if somebody has only ever negotiated one or two leases in their life and the person that's sitting opposite has been doing it every day of the week for the last 35 years, the guy with L-plates basically needs to have a very experienced adviser beside him.

In fact somebody has suggested to us that people should be prohibited from actually negotiating their own leases if they haven't done it before because they will almost certainly get burnt if they do that. The reason that I get a motor mechanic to repair my car is because there's an information asymmetry. I know some things but I don't know how to repair fuel injected engines, so I get somebody I does. If I'm a pharmacist and I know a great deal about pharmacy but I haven't been negotiating leases every day for the last 35 years, maybe I should get somebody who knows that. Some of the retailers associations in the eastern states said to us, "Our problem is that many of our members are too stingy to pay a thousand bucks for advice that could save them half a million."

MR TIGHE (RTAWA): Exactly right.

DR BYRON: These are the people who would pay a hundred bucks to get an Automobile Association inspection on a used car but are about to sit down and sign a \$1 million lease and they don't even think of asking for the equivalent of a car check.

MR SPENCER (RTAWA): I agree and I think you will find that retail is the worst serviced industry in Australia in the sense that it doesn't have an education program and it doesn't have education institutions that are teaching retail. It doesn't have any of that around it like you do with motor mechanics or whatever. They don't have that around it. It's a valid point you're bringing up and it's something which - I'll revert

back to Queensland again. If a tenant comes along he's got to get it signed off by his accountant, by his lawyer and his financier. There's three warnings.

DR BYRON: Yes, and we thought that that was a good idea, but what we were told last Monday in Brisbane is that a lot of small retailers are trying to opt out of that because they don't want to pay the five grand to the lawyer, or even worse as both lawyers and accountants said to us, if you go to your suburban lawyer who just does conveyancing and is not a specialist in retail tenancy law, you might be paying five or 10 grand for nothing. If you go to your suburban accountant who basically does tax returns and is not a specialist in retail business models, again you might pay 5000 for nothing. So it's not just a question of getting somebody to sign off, it really has to be high quality advice. So your prospective small retail tenant not only has to find somebody who is really professionally on top of all this complexity, but they also have to be prepared to pay for it. Then we had the case where a guy said, "Yes, my lawyer told me I should not under any circumstances sign this lease, so I fired the bastard." Then all the things that the lawyer had predicted would go wrong did go wrong. How does the law prevent that? I don't think we can.

MR TIGHE (RTAWA): But you're in a situation, you know, I've just signed a lease again for a new - you know, and you run to past your legal advice and I do use a firm that specialises in that area, and they say don't sign it, essentially. But what do you? What choice do you have? If you've got hundreds and hundreds of thousands of dollars tied up in that shop and business, the shopping centre knows you've really got very little choice but to sign it. Otherwise you walk away and you lose a fortune, or do you take the gamble, and it's just a gamble of resigning. At the end of the day it's a one-sided agreement. Every lease document I'm sure you've looked at is completely one-sided agreement. You really are faced with a situation of saying, well, my livelihood is there, I've got hundreds of thousands of dollars of stock and this and that and the other and advertising and forward commitments on orders and this. What do I do?

DR BYRON: I understand all that.

MR TIGHE (RTAWA): So I'm not saying that the advice is wrong. They're absolutely right. Don't sign it. But your choice is basically you've got both hands tied behind your back and you really have to try to find a way to sign it and move on and hope for the best, and that's the situation.

DR BYRON: How do you know, Craig, that five years from that you won't be in an even worse situation?

MR TIGHE (RTAWA): You don't, that's business.

DR BYRON: This is a good money after bad problem, isn't it?

MR TIGHE (RTAWA): It is, and that's business though. Most people go into business with the best of intentions and a strong belief and optimism, and if you go into business without any of that you won't succeed. On the flip side, you've got to try and get the right advice, do the best business planning you can, get the right buying, et cetera, et cetera, et cetera. If you can do all those things you've got a chance to make some money, and if you make some money, great. But it is very much a risk versus reward proposition and most people would have heard all the damning statistics about the success rate of new ventures and so on that start off. It is a terrible survival rate, but that's the nature of the business that we're in. The problem is, however, getting back to the issue that we're here to discuss is the fact that we need to make that playing field fair.

If I choose through my stupidity and against the advice of my lawyer to sign the document, that's my problem and I'll wear that consequence, as I have to. However, where the biggest risk for a retailer or for any business person is in that schedule, is in the detail of how much I've got to pay, when I've got to pay it, what the guarantees are, et cetera, et cetera, et cetera. The most important one is how much have I got to pay and how can I negotiate and be put in a better negotiating position, or in a more equitable position with that landlord with all their power and resources and money and lawyers. I'm signing onto a one-sided contract. How do I get a better informed situation that says, okay, this is a fair rent given that tenant A and tenant C are paying 2X, I'm happy to pay 2.1X, if that's the case, if I feel that strongly about the success in this particular location. That's still my responsibility. I don't think we're asking for this Commission to take any of that responsibility off business people. They will still succeed and fail on their own merits quite often, but what they ultimately need is the ability to get a more fair playing field, and that's what we're talking about.

DR BYRON: Anthony, we've been talking this morning almost exclusively about the large managed shopping centres. This inquiry is not just about shopping centres. It's also supposed to be about strips.

MR SPENCER (RTAWA): We're trying to get a balance for you.

DR BYRON: But I thought I should ask you while you're here: most of the evidence that we're getting all around the country is that the assertions about systematic abuse of market power is largely coming in the large shopping centres. There's a lot of commercial argy-bargy on the strip between small landlords and small tenants along the lines of, "She won't pay the rent. That's because he won't fix the hole in the roof," and that sort of stuff. Nobody is suggesting that there's any monopoly power in that, it's just business. So since you are the person on the strip, is there anything you wanted to say about whether the problems of retail on the strip are substantially different from shopping centres, or if there's something about the strips that we've overlooked so far.

MR HISCOX (RTAWA): Yes, I've also had shops in the Westfield shopping centres,

but I haven't got them any more. The differences looking at what we've discussed is really once the percentage rent thing comes into it, it really changes the whole dynamics of what the shop is all about. I would say a strip shop is more in line - listening to Craig - with a commercial tenancy agreement than a shopping centre. The shopping centres are more like a hotel. You're just there until someone is not making money and you're out. Where the strip shops are more dealing with owners. You might have an owner, you might even be able to be the owner, or it might be you're just dealing with an agent and you're actually dealing with people. I've been in Fremantle for 20 years and went to the same agent. He's gone for a few different companies but the same guy is looking after us. Everything is one phone call, it's as simple as that.

So the strip shop people just really need to have a smaller lease, they don't need all the stuff that gets put in there for a shopping centre, they just keep it nice and simple. So you can easily get out if you have a problem. One of the problems is having a temporary shop in strip shops which owners want because they don't know what they're doing with the tenancy. They can't do that because the five-year rule has come in so they can't give you a temporary shop so it sits there vacant. They're the main things that have come up. It's definitely different to what the shopping centres are doing.

DR BYRON: Thanks very much for that. We probably could go on all day but we'd better not. But honestly, I've found this incredibly useful, valuable, but we'll probably have to wind up. Any closing comments that any of you would like to make? I really do appreciate the effort and the thought that's gone into the submissions and the suggestions of how to improve things.

MR SPENCER (RTAWA): I guess there's some comments but I think that most of it is in that document. I just think that you do have a business model for shopping centres and a business model for retail that basically clash in a number of areas. The commonsense, of which there isn't much around unfortunately, is that they both have to work together. If we can just get that playing field level then they will be forced to work together.

DR BYRON: Sorry, you reminded me of the one other thing I did want to ask you just briefly about the idea we floated of some sort of code of conduct, code of behaviour, because a lot of people are saying, "We need some sort of circuit-breaker to get some mutual trust and respect back into this," and if it was possible, a bit like the Franchise Code which apparently has done a great deal to sort of clean that up - sorry, that sounds pejorative but it's greatly improved, the way the franchising business works in Australia because they have now got a code.

MR SPENCER (RTAWA): It's now being questioned again.

DR BYRON: Yes. I'd be interested in your further thoughts on ways of getting that sort of mutual respect or better understanding between the landlords and tenants.

Other ideas that have been put to us, instead of having a code through the ACCC was increasing the scope and the powers of the state Retail Tenancy Units or having some sort of ombudsman, whether it was state or federal, someone who the small tenant could go to who would have some powers to iron it out. Anything like that, any thoughts?

MR SPENCER (RTAWA): We support a code over regulation, to be quite honest, in this instance. If the shopping centres could have a code in place, where they behaved a certain way, I think that would be helpful to match in with a regulation because I guess in every area, there's those that are a little bit unscrupulous or exploit situations to the maximum and I just think that there are some shopping centre owners and managers out there that are very good too, so it's getting a balance that forces people to follow a path and to negotiate a path and to declare interests that are necessary. I've lived within retail for a number of years and I've seen shopping centre managers do some despicable things, yet I've seen other shopping centres back away from that type of ground and take the moral ground and do the right thing. I just think that if there was a code of practice in place for the shopping centres and how they operated, I think that would be a great step forward, but it still needs the regulations to bring other things to play.

DR BYRON: Yes, and of course sitting over the top of that for the really outrageous things, there's the unconscionable conduct; hopefully if it could be made to work a bit more.

MR SPENCER (RTAWA): Unconscionable conduct, what is it? It's not defined. What happens to unconscionable conduct after a lease has expired? By law, it doesn't exist.

DR BYRON: There is no relationship.

MR SPENCER (RTAWA): There's no relationship. Talk about franchising, we've just had a franchise that's had a franchise position in place for 30 years - literally be a slow creep against all his situations because the franchisor wants the goodwill for nothing, has offered him half the price its worth and is just slowly going to creep through his business until they change the law. This happened back with franchises in the petroleum industry back in 60s and 70s. They enacted an act to stop it and yet in retail leasing, franchising, go for your life. It's not fair. Thank you, Mr Commissioner. We appreciate your time.

DR BYRON: Thank you very much. I realise you've all got businesses to run, so thank you.

MR SPENCER (RTAWA): If there's anything else that we can help with, then please feel free - - -

DR BYRON: Thanks very much. We're going to adjourn and come back at 1.30 with the WA Retailers Association and the Newsagents Federation, WA Branch. Thanks, ladies and gentlemen.

(Luncheon Adjournment)

DR BYRON: Thank you very much, ladies and gentlemen, if we can now resume the hearings. We've got Mr Martin Dempsey from the WA Retailers Association, and Neville?

MR ROEDIGER (ANF): Yes.

DR BYRON: Neville Roediger from the Newsagents Federation. Thank you very much for coming, gentlemen, and thank you for the written submissions and all the time and effort that's gone into that.

MR DEMPSEY (WARA): Thank you.

DR BYRON: If you'd like to talk us through. Maybe introduce yourselves from the transcript first.

MR DEMPSEY (WARA): Yes, if you like. I've actually done some preparation for this but I'm perfectly willing to, in fact I'd appreciate if you could interject and ask things going along because there is a mix of some highly technical things and some things which it was actually quite difficult to write about. But yes, I'll take you up on the offer of introducing myself first. Martin Dempsey is my name. I'm the chief executive officer of the WA Retailers Association. The association I represent was established in 1979 and in short WARA, as we're often referred to, works with and teams up with organisations like the Pharmacy Guild, the Australian Newsagents Federation and at a peak level with groups including the Franchise Council of Australia, NARGA and COSBOA.

More informally, I actually do have a lot of qualifications, and those qualifications are in psychology, media and business administration. So in fact I actually have more letters after my name than in it. I say that even though the number and range of the qualifications is actually of very, very little significance to me. The reason for that is because I'll soon be up for 10 years as a chief executive and colloquially I'm referred to simply as "Martin the Mediator". So if you haven't already guessed, and apart from reviewing the material I've submitted I hope to make matters such as why I hope experiences could assist you to make a number of changes, if I can be so presumptuous, to your draft report.

DR BYRON: That's why we're here.

MR DEMPSEY (WARA): It's also to try to explain why we think those changes are appropriate. So to start off, really my experience tells me that most people think of mediators as very, very patient people who rarely have firm opinions and who certainly don't force their opinions on others. Mediators, in other words, are far more likely to encourage a sudden outbreak of commonsense, even though commonsense

is a remarkably uncommon phenomena. As a very well known mediator you've probably heard of a fellow called Sir Laurence Street, who's what I term a "rhino mediator". A lot of people think of him as a retired Supreme Court judge in New South Wales or if you're from the east you might have heard him referred to him more dramatically as the godfather of dispute resolution.

The thing is, like Laurie, there are certain things that mediators don't do, and one of those is to make confessions. I'm going to drop that convention right off because I'm going to confess that to write my first submission to you, which was the confidential one, I actually had to send my family away for over a week just so I could write it and, if you like, get it out of my system. I understand that there's been a lot of people who've got a lot of things out of their system in the hearings that you've done as well. So to prepare for this hearing I read over that first confidential submission and yes, it had it's venting of the horror stories and its recollections of all the things that - apart from the metaphor of all those that die how many were actually sick first, I noticed that in the transcripts. I note, of course, that you've heard a lot of this already.

So what could be referred to as the blood, sweat and tears and the bankruptcies, the administrations and forced liquidations, they are important. Unfortunately they have to be logged in so that basically the awareness that you're charged with, a task of getting in a short period of time, that you actually do know that there are some pretty horrible things that go behind these "lease negotiations", as they're often referred to. Yes, they're things like nervous breakdowns, strokes, broken marriages and, yes, suicides.

Again, I'm keen to actually make sure that - I think the last time Gary Banks was here in Perth and I was before the Commission on the deregulation of the dairy industry. We were on the way to lunch and he made a comment to the lady that was representing the dairy farmers, and Gary said something to the effect of, "Well, you've got break a few eggs to make an omelette." It didn't go down very well. So it's those sorts of things that I suppose are part of the context that we're trying to get a hold of and make sure that we don't waste the opportunity of the Commission.

Milton has also sent me a lot of material. I know Milton very well, and I notice that he's been very, very busy. He actually sent out one of his shop talk pieces where he actually quoted something out of the draft report where in the report it said, "The term 'war' is not representative of the balance of the evidence provided in this inquiry. A few skirmishes, some lingering resentment, hard bargaining and some disappointments, but not war. I repeat, not war." Well, that's pretty strong stuff. I think a word I heard you use earlier was the "need not to be pejorative", and that's certainly pouring gasoline on a fire that's well lit. It's already well lit.

DR BYRON: Can I just interrupt to clarify.

MR DEMPSEY (WARA): Sure, of course you can, sir.

DR BYRON: The point that we were trying to make there was that in 97 with the Reid committee, where they did describe it as "war", we were trying to make the point that the system now seems to be a bit better. Not perfect, but better than it was then. There has been some improvement in the last 10 years, particularly because of what the governments have done with regard to alternative dispute resolution and information, particularly the disclosure statements, which seem to us to have taken the worst of the heat out of the previous situation. So all we were trying to say with that comment was that the situation as it had been told to us over the last six months is that it's not as bad as it was 10 years before. Now, if that assessment is wrong, please tell us.

MR DEMPSEY (WARA): Yes, frankly it is.

DR BYRON: Okay.

MR DEMPSEY (WARA): There's reasons for why that's - it's not so much that it's wrong, it's just inappropriate. As you've correctly identified, the last time this was actually looked at was the Reid report which was in 1997. Now we've got this inquiry in 2007. What you say has been great advances is what's largely in contention now, as to whether the situation has got better or worse. In fact the balance of the evidence - and I think that's a term you use quite frequently in the report - suggests that people can lose a lot more money a lot quicker, so the balance of that evidence doesn't suggest in fact that there's been a lot of improvements in that 10-year period. Certainly legislatively - I think you had seven bullet points on page 3 of the call for submissions - a lot of people, myself included, found that very depressing, that in fact those bullet points, if they were to represent the progress made, made very poor reading, very poor and depressing reading if you're carrying my meaning. Do you know the points that I'm referring to?

DR BYRON: I can't immediately recall them, I'm afraid.

MR DEMPSEY (WARA): On page 3 of the call for submissions that the Commission put out, and basically they're just bullet points, starting off with the 97 Reid committee and basically looking at the upping of the dollar limit for matters alleging unconscionable conduct and I think there was the Trade Practices amendment that was put to the former Liberal government in December 2007 as well. That's the one.

DR BYRON: Yes.

MR DEMPSEY (WARA): Those are the seven points. So what you're referring to was progress and advancing. Looking at that page, that doesn't seem to suggest a

great deal of progress.

DR BYRON: At this point, that was purely a statement of historical fact. There's no opinion or assessment anywhere in there. It just says:

A number of important developments pertinent to the regulation of tenancies have occurred.

As far as I can recall, we didn't say that it was particularly good or particularly bad, it's just a factual statement that this is what has happened.

MR DEMPSEY (WARA): No, but my point is that if that's the progress in 10 years, you know, if we're going to have an inquiry every 10 years regarding retail leasing and that's the page to describe what's happened from the last one to this one, that's not particularly impressive. Anyway, I'll continue.

DR BYRON: Yes, please.

MR DEMPSEY (WARA): I've made mention about the "unconscionable conduct" phrase and I've got to say that my memory of this concept, apart from a lot of casework which is very intensive, I can remember sitting on a couple of committees here in WA. The first one saw a white paper produced and the other, a green bill. I mention these committees because the most regular cry from lessor representatives about unconscionable conduct was, "Where is the court-admissible evidence?" and I repeat again the word "evidence".

The problems with trying to address their cries were firstly because the judicial interpretation of the concept was very clearly and massively different to what the legislators had originally envisaged. Secondly, because of the sheer cost and time burdens of litigation, it meant that very, very few tenants could actually survive the legal process of countless requests for further and better particulars, the strike-out motions and appeals, all the way - in one particularly important case - from the then Commercial Tribunal of WA in 1996 to the mixed verdict of the Federal Court where leave was also granted to the highest court in the land, the High Court of Australia, such that the final determination was handed down in 2002. It's a very long way. I mean, in between there, the landlord in fact appealed the matter that was determined by the Commercial Tribunal, firstly, into the District Court. The District Court upheld the Commercial Tribunal, so he appealed it in the Supreme Court. The Supreme Court upheld both the District Court and the Commercial Tribunal and so it was taken to the Federal Court.

That case of course is called the Farrington Fair case. If you read that case at all, it's not an easy case to read, it's a long and complicated case, but you won't actually read that a number of the tenants actually died before the final verdict was

handed down. Business law text, for example, also don't mention that the ACCC picked up something like three-quarters of a million dollars of the tenant's legal fees in the Federal Court. I only mention the amount because the tenant's legal fees were in fact a great deal higher than what the ACCC's money accounted for. So it's a long hard road, unconscionable conduct. In fact I've got many lawyers and basically a lot of them now refer to the Farrington Fair case as the Clayton's precedent; it's the precedent you have when you're not having a precedent.

So it's somewhat easy to be very removed in an attempt to be impartial when people talk about how section 51AC was a great outcome after Farrington Fair because that avenue just wasn't available with Farrington Fair. It was section 51AA on special disability. The interpretation that was so narrow and shocked people so greatly was because "special disability" was interpreted as meaning that in order for someone to claim a special disability, they had to be blind and unable to read a contract, and that was in fact the example that was used - so incredibly narrow is the short form there.

You can go through that case yourselves if you want to of course, but believe it or not, you actually do have my respect because sitting on the fence and trying to be impartial, as mediators well know, is actually a very dangerous thing. It means you're going to get shot at from all angles and it's something, as I say, that mediators understand very well. But it's especially dangerous if you're going to be selective and even picky as to what constitutes the evidence as well and that's what I'm getting at with these committees that were brought together on this concept of unconscionable conduct.

I think now I'd really like to draw some attention to something that I think you've already led me to as well and that's the black letter law and the state-by-state regulation, preferably why there's been so many of these state based reviews. Here, I want to be very clear if I can, Commissioner: the reason why there's been so many reviews is because the intent of our legislators and regulators has routinely been swept aside by the big end of town. That's right, people with all of the lawyers to find the loopholes - and they're people in the corporate sector - that are basically looking to access more of what tends to be referred to as OPM or other people's money. I'll try and make this as clear and transparent as I possibly can and it does involve a little bit of history. Where I can, I'll just go back to try and explain how things came to where they are now because I frankly think it's very difficult to expect you guys in six months to understand just how technical and complex and sophisticated in fact this market is.

But the history here is that when I first learnt about leasing, I learnt about it as a spectrum, and at one end of the spectrum you had fully grossed-up leases, and the other, you had net leases. The actual number of the fully grossed-up leases was very small because that's where lessors actually used to take some of the risk. A fully

grossed-up lease included all of the things that are broken down into clear categories in a net lease, so a net lease is the net rent, plus the outgoings, plus the rates and taxes, plus any promotional and marketing levies. A gross lease is a single payment made once a month, so if the landlord or the landlord's advisers didn't estimate that council rates were going to go up 20 per cent, too bad. So the lessor actually took some risks with the fully grossed up leases.

What happened was that the legislators and the regulators focused on where most of the problems were, and with net leases that was with the outgoings. Now, outgoings had to be budgeted for usually a year ahead and then they had to be audited within three months of the end of the financial year, so by the end of September. That's what the legislators did. They actually passed laws in the 1985 act over here to see that basically the audit bundles of the outgoings budget could be unbundled in the commercial tribunal. They could be opened up and examined, line by line, item by item, if need be. There's certainly been some classic instances that I can recall. I think I made mention of one of them in my submission - both the confidential and the non-confidential submission - about a lessor representative that was most upset because I questioned the expenses relating to background music in a shopping centre. I said, "Look, I'm going to ask about these things," and he said, "Why? I take umbrage. I'm offended that you should have to know all these things about background music." I said, "Well, what's it for?" He said, "Well, it's background music for an escalator and it's perfectly normal." I said, "Well, actually this shopping centre has only got one level. There is no second floor." These are the sorts of things that would come out of unbundling audited outgoing statements.

Keeping in mind the legal principles of the freedom and sanctity of contract - and I'll come back to these as well - landlords and their representatives had to do something to take their attention off net leases. They could be got at, if you like - to look at it pejoratively - and basically the lessors and the representatives very quickly tired of all this unbundling business, so they started advising their lessor clients that a great deal more money could be made out of tenants if, and only if, they could incorporate some of their more controversial expenses into categories that came with very sticky labels - labels like legal fees; labels like management fees - so an invitation to treat type documents from lessors' lawyers' word processors, for example, straight off a word processor, and quickly started to break from three figures into four. From formerly costing 5 or 6 hundred dollars, they now cost 12 to 15 hundred dollars. They're just the same documents.

If you wanted to change one of these standard documents then very expensive hourly charges and disbursements would apply. I think we all know what a legal cost agreement looks like but I'll just make that point. Management fees, they also became a huge can of worms as, frankly, all manner of expenses - including a lot of very highly suspect ones - found themselves all bundled up into a single invoice and then charged back to tenants as outgoings. This is all about net leases and what

happened after net leases, if you like. Well, what they did then was they said, "Basically they should move to semi-gross leases," so that the new net rent included many of the old outgoings and the management fees and then things like rates and taxes and simply got referred to statutory outgoings. I can see some tenants nodding. They know exactly what I'm talking about.

That's pretty neat and tidy really because under semi-gross leases, lessors could sidestep any requirement to have to publish a budget for the year ahead obviously, but even more they didn't have to worry about those pesky audits any more. Management fees just didn't appear to exist any more even though it was very clear that these fees had simply been incorporated into the new semi-gross rent. The reason why I'm making a bit of a thing about this, Commissioner, is that in the 1998 amendments to the 1985 act, management fees were specifically prohibited. So I'm hoping to set up something of a pattern of behaviour here, if you like, that it's not just happenstance that these things have occurred, there's been a pattern to them essentially.

I think essentially I am a proponent of the lease registration proposal that I know you've heard quite a bit about going around the country. One of the reasons that I'm pretty sure you have heard in your public hearings, certainly as to why I like the idea of a lease register, is that questions such as how many net and fully grossed-up leases and how many semi-gross leases, that becomes very straightforward. In fact I think the expression is, "That's a doddle," in these sorts of things. I'm going to come back to this bit again too because this move to semi-gross leases, it needs to be looked at for what it has been. Essentially that's been an attempt to get away from the gaze and the intention of the legislators and the regulators basically. I must say in your draft report, as I went through, I noticed the number of times there was mention of perceived or potential imbalances, and yet even sitting here for just a brief time earlier today it's been very clear that these imbalances aren't perceived, you've heard them ad infinitum. You've actually heard almost to a tee that these things are real. They're not perceived, they in fact exist. In no way are they perceived or potential, they do exist.

DR BYRON: Perceived wasn't meant to imply that they were illusionary.

MR DEMPSEY (WARA): Fair enough.

DR BYRON: It was that they were noticed or believed to exist.

MR DEMPSEY (WARA): Sure. I take your point.

DR BYRON: Not that they were incorrectly believed to exist.

MR DEMPSEY (WARA): I guess you can tell already that I'm pretty keen on the

context of things, you know, hence the example about how semi-gross leases came about, for example. Where this is taking me, I noticed the comments in there about the need to show a net benefit for legislators and regulators to do more than tip their toe in the water, metaphorically speaking, to really immerse themselves back in this complicated field. So I got to actually asking myself, "If it's not our government's responsibility to provide what's referred to very broadly as dispute resolution, whose job is it if it's not government's?" I thought that was a primary role of government. It's not just courts. Obviously the access to justice issue has determined that people in civil jurisdictions in particular have major problems in going to court, and especially when the other side is so much larger and more powerful.

I ask again, if it's not governments that do this, whose job is it? Is it our state and country's tenants' and tenants' advocates' job? Well, no, I think that's why you've got people like me and you have them around the country who are actually saying no. Is it the landlords' and their representatives' job? Well, I don't think so there either. I'll just make that point again: when seeing lawyers and taking civil action in our court systems is not only so vastly time-consuming and hugely expensive, surely we can come to some better understanding as to what is effectively on and what is not on when it comes to dispute resolution. I don't think we can get away from the fact that it is a fundamental job of government to do that.

I had an example to put to you about just what does happen when there is the political will to act for changes on matters involving dispute resolution, and there's an example here in WA about six months ago now where the state government decided that real estate agencies shouldn't be able to charge tenants a letting fee, where a tenant put in an application to basically rent a residential property. The real estate industry huffed and puffed but the state government passed a bill saying that any agent charging a letting fee to a residential tenant would be fined and repeatedly fined if they kept doing it. Kapow, the residential property market over here in the west moved very, very quickly, let me tell you. So it's from there that I actually do take issue of your support in the draft report for what you termed voluntary codes.

Voluntary codes just don't work, and they certainly don't work when you've got a very powerful but clear minority trying to get away with a lot more and make a lot more money by using the power and information balances at their disposal. Even under antiquated legal principles like the freedom to contract and the sanctity of contract - you mentioned an example in the previous session, that if you were up against the champion of the world that there would be a bloodbath. If the talk is of voluntary codes I'd suggest it's like being in the vicinity of a pub brawl with security bouncers in and fists flying and then trying to be the person to announce that the Queensberry rules of boxing apply. Voluntary codes just don't work.

One of them in fact is a classic case now, and that's on casual mall leasing. Before I go into casual mall leasing if you like there's a bit more history. I always try

to back it up with how we got to where we've got to. In years gone by, tenants used to have what was called exclusivity. That's what they had, they were given exclusivity. As landlords realised that especially following redevelopments they could effectively multiply their profits many times over by introducing competitors to eat away or "cannibalise", that's the term that's used in the field, their formerly exclusive tenants' businesses.

So for example, food halls. Food halls are where consumers could sit and eat their meals, and crockery and cutlery could be cleared efficiently. Then came kiosks that were placed smack bang in the middle of walkways, called "common areas" in retail leasing speak, and old centre-stage areas. The thing is the walkways and the centre-stage areas were already paid for out of pre-existing specialty tenants' outgoings. So it's pure profit, if you get what I'm driving at here. If a coffee, tea and cake cafe in a food hall thought they had any right to be the ones that sold ice-cream and donuts, for example, they were promptly told and in no uncertain manner that they no longer had exclusivity and to basically stop whingeing and get on with it. Ditto for the sushi and the bottled juice providers, there's plenty of examples.

But why continue to have a food hall if foodstuffs can be purchased all throughout a shopping centre? Under semi-gross rents who's benefiting most from the so-called competition? I'm especially prickly, I must admit, if the argument is twisted to say that the biggest beneficiaries have been consumers. I mention the comments made back to people that commented as to why they couldn't sell certain goods any longer, and almost invariably it's centre management personnel that do that.

The thing about that now is that isn't it centre management personnel that are actually charging management back to the very people that in point of actual fact pay their wages such that effectively the tenants who formerly had exclusivity were now required to supply their monthly turnover figures to these same centre management personnel under their new semi-gross leases. So they've certainly had a lot happen to them with that transition, if you like. You could go as far as to say that tenants are milch cows, so that instead of the experience of being milked with their monthly rental payments they could then experience lower turnovers and smaller profits, and then in fact to be slaughtered, and they've gone from being milch cows to literally beef. At lease renewal time that's especially prevalent.

I also urge you to look at - that lease renewals - this is that technical material I mentioned I'd be bringing up. Lease renewals don't involve the valuers that by legislation are involved at market rent review time. They're literally take it or leave it scenarios. Lessors do not even vaguely attempt to go through the process to justify their figures their asset managers believe are appropriate. Can one walk if you paid, say, the industry bench mark of \$1000 for your initial fit-out and after some four and a bit years your accountant tells you that the ATO recommends that the retailer

writes off their fit-out over seven years. I'm saying this because there's a subsidiary matter here, and that's tenants actually have a lot of trouble actually getting valuers at market rent review time, a lot of trouble.

The two, lease renewal and market rent review, whilst separate they are related, especially if the tenant doesn't exercise their option correctly, as many don't. So what I'm trying to get at here, Commissioner, is if a tenant doesn't exercise their option between three and six months from the required anniversary of the commencement, that's the technical terms, the market rent review that accompanied the option becomes a lease renewal. That's the technical side of it. So what started as a market rent review, if you like, through the option process if the option is not exercised correctly becomes a lease renewal. So under lease renewal there's no reference to valuers.

DR BYRON: Sorry, the reason that I'm confused is I thought that options were now very rare in shopping centres.

MR DEMPSEY (WARA): In the smaller shopping centres, the numeric majority of the market, no. There's still quite a few of them. It's only the larger supercentres, the regionals and the subregionals that have gone flat fives and that's it.

DR BYRON: But the neighbour centres still have - - -

MR DEMPSEY (WARA): Absolutely, absolutely. I do a lot of options still, six and sixes, you get all sorts of things there. There's a little bit of parochialism here as well because I don't think - I know it's not a state secret, but WA like Queensland is having a boom. So essentially, with lease renewals, and I've unfortunately had a pretty amazing experience with this just recently, most of last calendar year I did market rent reviews. I refer to them as double digit increases, and when I say double digit I mean, 30, 40, 50, 60, 70 per cent increases were the proposed increases in the market rent. Basically, on Christmas Eve day I got three tenants that rang me up about three lease renewals and they were triple figure increases, and the range there was from 100 to 120 per cent increase. I can acknowledge that property values have gone up, but their big hit ups. They're very big hit ups. From a tenant's perspective what are you going to do? Who are you going to call, as they say?

What they actually experience, it always seems to be someone new from centre management that pops in and says that a new fit-out will be required because it's a new lease. We were talking about this outside a little bit as well. These people say that for the fit-out for the new tenancy that basically it's gone up from a benchmark of around \$1000 a square metre and that's tripled. That's tripled. You're talking about north of \$3000 per square metre for fitting out to the standards for which the tenant has got absolutely no control and is often, in fact, forced into using only the contractors that the lessor nominates. So when I say unilateral it's seriously

unilateral. Those sorts of increases, triple figure increases in rents and a tripling of the costs of fit-out, they are major expenses.

Of course the landlord's representatives, they only want to approve what makes their centre look the spiffiest, and they tend to insist that it makes their centre - as they often refer to it, "their centre" - to be as ritzy as they possibly can. Again historically here, refurbishments, as they used to be referred to, they used to be referred to as "a bit of a lick-up" or a lick of paint. When you've got increases from \$1000 to north of \$3000 a square metre, that's certainly a lot more than a bit of a lick-up.

You've sort of led me to the point about where the numbers are in the shopping centre industry. What actually happens here is that the vast bulk of the market numerically speaking, they just emulate the big end. I get to some actual numbers in a second, but there's another trend that happened here as well, because with the move from net leases to semi-gross leases a lot of the really large landlords - which I'll be fleshing out how the smaller ones emulate the larger ones - they also sacked their property managers and brought the centre management in house. So over here in the west there was a lot of shopping centres that used an operation called FPD Savills. They had a lot of shopping centres and all of a sudden the really big players, the Westfields and the Centros, simply sacked FPD Savills and put their own centre management people, employees basically. So there was a lot of these fees that now weren't being claimed through net leases under outgoings, or under semi-gross lease as a part of the semi-gross rental figure, but they also had the ability to charge new and increased management fees through their own in-house employees as well.

The amazing thing about that is that the new centre managements, the in-house ones, they're the ones that are employed, they actually don't have the authority to vary many things. They just don't have that authority. That's all over east, if you like. I have to say this because I've literally had thousands of tenants contact me over the last 10 years and so that they took this matter or that matter up with their centre management and surprise surprise, nothing happened. These days there's no secret about that. Centre managers actually say, "Look, we're not allowed to actually deal with you on that. We can't negotiate with you. That's been set. That's beyond our control," that's very, very common now. The other thing of course is that centre managements churn staff, including executives, and they churn them with what I'll term alarming regularity. So no-one is there for very long. It makes it again very, very difficult for tenants to actually make sense of what's going on, obviously to their disadvantage and very much to their cost and their expense as well.

If you like, those sort of things, I'll refer to them a bit later on as manipulations, but what do centre managements do these days? Essentially they chart turnovers, that's what they do. The reason they do that is because lessor advisers before them have actually got around the black letter law. Again, under the 1985 Commercial Tenancies Act the

taking of turnover figures was prohibited specifically. So it's only by going to these semi-gross leases - again I'll make that point about the pattern - and now in leases where there are percentage rent clauses there are also additional clauses that say that if the tenant understates the turnover and they're found to be understating the turnover that there's an additional fee of between, in my experience, normally 12 to 18 times the difference. So again, they've even got that one covered, if you know what I'm saying.

Trying to deal and conceptualise what this is like is I think part of the challenge for us all and by that I mean including yourself as well. Imagine if someone said to you, "We've got your new contract of employment but it's going to be a lot less than what it was before," a great deal less, you know, it meant taking a drop in your package of, say, somewhere north of 25 times the CPI rate, for example, and that's a big drop. But imagine now if it was proposed that the cost of one of your very vital business inputs - air, if you like, space, a metre of air this way by a metre of air this way, literally the space between the walls of a tenancy - went up by that same factor of 25 times the CPI for the last full three financial years. The last full financial years of CPI were 3 per cent and the increases, as I indicated before, are market rent reviews, before Christmas Eve for me, were getting up to 70 per cent and with Christmas Eve we're in fact triple figures for lease renewals.

So this argument that lessors apply sometimes that market rent reviews and lease renewals are a chance for the to catch up, it's very hard with increases of that magnitude and being so far in excess of CPI to say that that's a catch-up. That's not a catch-up. That's a grab. That's a gouge. Already they've got annual rent reviews of - it's very well known, Westfield, I think we've got someone from Westfield here, it's well known to be CPI plus 1 and a half. Centro's is CPI plus 2. These are compounding annual increases. I think you know this anyway. But again I ask you to try and conceptualise this. If you're a banker and your cost of funds went up by 100 per cent, what are the chances of you not passing that on to your consumers? In fact I did see a press article by the National Bank teeing up on retailers and saying they were adding to inflation. If the cost of air has gone up 100 per cent, that's got to be inflationary for sure and, yes, that is a war that our new prime minister has declared on inflation.

I'll get back to the centre managements because these days not only do they rotate them and churn them, but they just basically now clerical people. They just do these charts and they ship it off to the leasing teams over in the east. I think that in order for me to tell you a few more of the things that certainly I've come to in my experience of shopping centres is to turn to what they call the precinct system. This has also been something that has turned tenant on tenant, if you like, to make more competitors out of former compatriots, if you like. Simply put, it's putting as many women's fashion outlets in the same part of the shopping centre and with the hairdressing, hair accessories, and nail salon operations within close proximity to that. Ditto for the jewellery shops, they call it a jewellery precinct, and usually with the electronic doodah and collectible businesses not too far away from them.

The active preference in certainly the super centres is for franchised businesses, for franchises. The thing is there's nowhere near enough of these franchises. They're rare animals, if you like. So they have to fill the spaces not taken up by the franchises by basically mum and dad operations, and the churn on those is just mind-boggling. I know one of my peers in Queensland talks simply about the transfer of wealth from mums and dads and it's absolutely brutal. When it comes to what used to be known as prime tenancies, prime tenancies used to be your pharmacy and your newsagents. They too have come under a great deal of pressure because again, in times gone by they used to have much longer leases. Even in super-regionals not uncommon for them to have, say, a 10 plus 10. They were considered to be almost community services, if you like. Nowadays pharmacists and newsagencies have come under a lot of pressure. They have been pushed onto flat fives in these major centres. With the redevelopment of centres it was worked out that they could get actually two of each of these former prime tenancies into the same centre not in a precinct now - it does make a lot of sense to have a pharmacist next to a pharmacist - they put them at either end. With newsagencies they might just be able to squeeze in a couple of kiosks as well. So by gaining access to their turnover numbers, a lessor might offer the same newsagent the first crack at the new kiosk, might, no compulsion, but they might. But it was only a matter of a market rent review and a lease renewal before those formerly long leases, they basically just succumbed to the legislative minimum that became a maximum, if you know what I'm getting at, so a flat five with no option for an additional term.

When I was putting this together I was thinking you were probably going to wonder, "What's happening to all these centre management staff and leasing executives that get churned?" Well, essentially they got replaced usually by leasing executives that would come in to achieve very clear objectives. You could almost call them commandos, basically. These executives would often be on massive Commission payments if they could radically estimate the key tenancy rentals that they needed to move so that they became the reference point for the market rent reviews for the other tenants. Again it's that pattern.

The regular centre management - the clerical side, if you like - would then come in and mop up the remaining specialties because that new market rent had been established. So once the leasing commando had been transferred to their next assignment, in-house clerks would just drop off the offer to lease paperwork, and they would say things literally like this: "We could only have you accept our offer if it comes back to us on our paper and it has got to come back unchanged. It must be on our paper and it must come back unchanged." "Why couldn't they have it altered in any way?" Well, the response would typically be, "Because that's how head office needs it and that's what the policy is now." That would be the response. "Can the tenant see the policy?" "No, but as they've asked, if they do sign the offer to lease it will be binding on the tenant but still subject to the lessor's approval." That's true. I can show you those documents. When I say unilateral, I really do mean unilateral.

If you're wondering where the power and information balance and asymmetry kick in, if you think what I'm saying is bizarre, I'm prepared to show it to independent third parties to make sure that you actually sight these documents because it is that unilateral. That's how far the power imbalance and the information imbalance has gone. One of the other phenomena I have to relate to is that for years my wife has been on to me about what she calls my garbage bags of business cards. Basically they're business cards of me trying to track where the leasing executives have been transferred to over time. It's been important to me, of course, to know where the people are that actually have the authority to make these decisions because, as I said, tenants waste a lot of time with centre management that just don't have the power to vary these agreements, so they're in fact just wasting time. My wife got onto me about that over the weekend again, I must say.

I think if you're sensing any nervousness on my part, Commissioner, I have to say to you it's a very, very rare thing for a mediator to kiss and tell - very rare. You will notice I mentioned certain large shopping centre names but I've not mentioned any of those executives, for example, or those centre management and that's because mediators just don't do that. That in fact is confidential. The other thing here is - and I indicated it a little earlier to you as well - I don't think I'll get another opportunity to change things at this level. If it's going to be 10 years from the Reid report to this inquiry, this inquiry is pretty darned important. I don't know if I'll be around in another 10 years to actually do this again.

I don't think there's any chance I'll be getting Milton's job, I think that's pretty obvious, but there is another rationale for this and that involves the risk of me being called a greenie because I don't think this is sustainable going forward. I think that retail leasing is unsustainable. I'll sketch it out very quickly, if you like. I said I'd do this earlier. Here in the Perth metro area we have 240 shopping centres and less than a dozen of those are the super regional, regional or subregional centres - less than a dozen out of 240. That means on a purely numerical basis the biggies are .05 per cent of the total. It's the old level of statistical significance, if you like.

Yes, these large mega-centres have a disproportionate influence over how the vast majority - the remainder basically, 240 minus 12 - of those centres are run. These big centres, I don't think there's sufficient understanding of just what a money-making licence, getting any shopping centre for that matter zoned as retail, is. But to say that they can go out and treat people in this unilateral horrible fashion after they have been given this amazing thing called a zoning, I think that's stretching things way too far. I'm also concerned about some of the developments in shopping centres because certainly there have been clear instances here in Perth of gang activity, car thieving, vandalism, there are some security and even terrorism concerns with some of these centres.

The idea that Perth could benefit from fewer shopping centres which have tighter legislation and regulation, believe it or not does have some merit. We are over-shopped. I don't have a problem admitting that. But at the same time as saying over-shopped, I've got to say that Perth also suffers from an acute housing shortage, from labour shortages and skill shortages. So you can't look at just the number of shops per capita in isolation of these other phenomena.

Things brings to mind the opportunity - and certainly with the new federal government - to revisit Commonwealth and state relations in a way that hasn't been done a lot of in the previous 11 and a half years. As Milton has already confirmed to me, the chances of the states giving up their property rights are about the same as striking a match on jelly, was the way that Milton put it to me, and I agree with him. I agree that what's required is harmonisation, but it's harmonisation of a particular type and also for a lot of fresh and new ideas.

On the harmonisation front, things like talking COAG and then purely focusing on end of lease or end of franchise issues is nowhere near the whole story, and particularly for approaching each of the states with a package. As indicated earlier, Milton's centres, while they are huge and powerful, are technically significantly less than 1 per cent of the total number of the centres in WA. This is to say that end of lease is not the only area of possible reform. Here in Perth's eastern suburbs, for example, we still have numerous leases - yes, they are in those neighbourhood and suburban centres - where we have alternating CPI and market rent reviews. That's CPI one year and market rent review the next before it's CPI again and market rent review after that again. Is that an end of lease issue? No, it's not.

We also have problems that extend right up the line as well because even a tenant does locate a valuer for a market rent review, the chances of agreeing with the landlord's employee valuer are extremely unlikely. So who mediates? Well, legislatively a third valuer is supposed to be appointed from the valuer's professional body. It's called the Australian Property Institute. The problem is over here is that that body refuses to arbitrate on a dispute between two of its members - refuses. As a reason they do quote the 1998 amendment, section 11 of that, saying that they can't but that's a problem. When the dispute goes off to the tribunal, one of the suggestions is - the tribunal is very concerned about this over here - has access to the valuer-general's data. Why the valuer-general - because he has to do the GRV calculations for the local councils to work out the rates. That's one initiative that certainly I've been working on getting in and I think it's a good one. In fact, the thing about - and again it's despite the legislation, for example, that ratchet clauses be banned. I've actually got a matter on that's been going for nearly three years now where the tenant's lease fell between the cracks of the 85 act and the 98 amendments, so technically every single one of the annual rent reviews can be a market rent review because their rent review says "CPI or market, whichever is the greater", and lo and behold, with increasing property values, what's the landlord going to go for.

They go for the market; it's happened twice and it now looks set to happen a third time.

So I come with these fresh new ideas and specifically the doing away, for example, with guarantees for the tenants of lessors who reclaim or relocate tenancies in a redevelopment. How do they do that? They give a notice saying, "We're going to redevelop, you've got six months, get out." They're under a legislative requirement to relocate that tenant but lo and behold, when they relocate them, they put them on a semi-gross lease and they require their turnover numbers, so again, it's the rough end of the pineapple, if you know what I'm getting at.

How can a landlord continue to have all these guarantees, personal guarantees, directors' guarantees, if the security of the lease has all of a sudden been reduced to being from - let's take a dim view, say it's a regional centre and say it's five years; now it's six months and, hello, there's a lot of expense to do with fitting out a new substitute or alternative premises under a relocation.

I'm actually a fan of break clauses for tenants rather than options. They work. Break clauses, if we take the ATO's seven years, for example, it can be a three plus four, a two plus five, a five plus two, whatever, and essentially the tenant just indicates that they're willing to go on with the new term. The option and the way that it's been construed so that now, if a tenant doesn't exercise their option and they're up for a lease renewal, is just unbelievably harsh; you'll notice I used the word "harsh" there rather than "unconscionable". Basically, it's a mistake. If I was to sign you on to a five-year contract with a five plus five and the requirement was that three to six months from the fifth anniversary of the commencement, you were to write to me either with registered mail or on a fax machine with a fax report and you missed it because it's four and a half, four and three-quarter years away from when you first signed the contract, I'd say that's pretty close to an honest mistake, rather than - anyway, I digress.

I know the State Administrative Tribunal system. I was a big fan of the former Commercial Tribunal system frankly, because with the old Commercial Tribunal, you could sit down and informally get a lot more agreements than what is these days now quite a legalistic process in the tribunal again now, very much like a court in fact. But I've also looked at all the transcripts; I think Associate Prof Zumbo suggested mandatory sign-offs and that negotiations be in good faith is a great idea. Eileen, who couldn't be here this morning, she's been working very hard on what she terms "unfair contracts" and a check list for the tribunal just to check that the contract has been negotiated fairly. I think that's another great idea.

Regarding lease renewals, Canberra, ACT, has what I'm told is the best program for lease renewals. 90 per cent is the figure that I'm quoted of lease renewals in Canberra are done and happily so from the tenants' perspective. If that's

best practice, we've got to look at that.

DR BYRON: We know that they're done but we don't know how happily.

MR DEMPSEY (WARA): No. I take your point, I don't either, but it certainly looks good. It looks like it needs to be checked out.

DR BYRON: What we're still investigating is to what extent; is that because of the features of the ACT legislation or does that reflect the features of the ACT marketplace in terms of a much greater supply of retail space per capita and the relatively smaller number of people who want to go into small business in that space. So the landlords may not have the same sort of supply/demand imbalance that they do here, for example. Even if the legislation was exactly the same, you might get different results, simply because of that.

MR DEMPSEY (WARA): I'd like to have a lot closer look at that because that looks like it might have real potential, but yes, I take your point.

DR BYRON: It's interesting, because the wonderful nature of the ACT legislation has been talked up in Brisbane, Sydney and Melbourne, but at the ACT hearings, there were a number of retail tenants who were complaining and they didn't think that they were in retail tenant paradise.

MR DEMPSEY (WARA): I take your point there as well. Another one that I've heard that is on probably a greater scale and I think probably has federal importance is adopting the international valuation standards. These things have been taken on board by I think a dozen major capital cities, including places like London, New York, enormous parts of China, large Asian capital cities; why couldn't we have a look at those, adopting those?

I do actually have some very, very technical problems with the draft report and I'll try and go through them a bit quickly but they are technical and I do apologise if they're not the most exciting things, but they are important certainly to me. Starting at page 29 of the draft report, you note that around 16 per cent of all retail and service businesses leave the industry, and the ABS study was conducted in the financial years from June 2003 to June 2006, but I just can't see how that number, 16 per cent, has been arrived at from the table 2.4. I'm just going to list these off, if I can, sir. I've also got specific reservations about the interpretations drawn from figure 2.7 on page 30. Also on page 31 with figure 2.8, I notice the comment that:

The exit rates were substantially higher for retailers that had no employees.

That's a direct quote - and what are termed "small specialty shops operated by the

owner". Again, I just can't see that from the data and the figure provided. The citing of the Shopping Centre Council of Australia's 2003 submission and its use of "sample centres" and the mention of its listing of a 15 per cent exit rate as being -

in line with the annual average rate of exit across all retail and service establishments from the three-year ABS study quoted in table 2.4.

That's stretching things, frankly. It certainly wasn't under the italicised type saying that you were looking for comment on that; that's the first thing. I got to thinking about what an annual 15 or 16 per cent annual exit rate means in terms of what's been the overriding benchmark of the so-called flat five lease. For example, over any five-year period, depending on whether you take 15 per cent annual or 16 per cent annual, does it mean that between 75 and 80 per cent of all tenants leave in a five-year period? It doesn't sound too bad when you say 15 or 16 per cent, but if you say it's annual and it's over any five-year period, that's a lot more significant. It's a great deal more significant. It certainly flies in the face of the Shopping Centre Council's claim that three-quarters of all tenancies are renewed. I know this might sound like fairly basic stuff but which is it here? Could it be that there is a high renewal rate but it's just not the pre-existing tenants who are able to afford the massive increases and the extra conditions, and that yes, the lease was renewed, but just not to the tenant who had it before.

DR BYRON: I think we can assume that "renewal" means the same parties involved.

MR DEMPSEY (WARA): Well, I couldn't see it from that.

DR BYRON: Table 2.4 is the number of entry or exit or retail businesses each year as a percentage of the number of businesses operating at the start of that year, and the exit rate, before it was 16 per cent of the number of businesses there left in that year, the following year it was 17 per cent across all retailing, and then 05-06 again the exit rate was 16 per cent of the number of businesses that were there at the beginning of the year.

MR DEMPSEY (WARA): Do you believe those numbers, sir?

DR BYRON: I have no reason to question what the ABS has - - -

MR DEMPSEY (WARA): I've got great faith in the ABS, I'm just, you know - it would sort of verify it, if you like, with the shopping centre councils sample centres submission, I think was one.

DR BYRON: I would put a great deal more faith in the information that we've got from the ABS.

MR DEMPSEY (WARA): Fair enough, fair enough. I'll keep going on that if you like, because I'm looking at some amendment there because I think the other quote on that page is, "It is likely that only some of these exits represent business failure."

DR BYRON: Yes.

MR DEMPSEY (WARA): Then you go down to footnote number 2 at the bottom of the page.

DR BYRON: Yes, there's all sorts of reasons why people leave, not necessarily because the business is no longer viable.

MR DEMPSEY (WARA): Hang on, let's just - this is why I'm keen to actually - I know this is technical. But that footnote talks about a small business study. Everything else has been retail. That footnote mentions a significantly lower failure rate of 9 per cent. In fact from memory I think it mentions a range from 4 to 9 per cent, isn't it?

DR BYRON: Depending on which definition they use as to "failure".

MR DEMPSEY (WARA): Right, okay. That's a lot different to 15, 16 per cent, and in fact that small business study - not the retail figures that were quoted from the ABS and the SCCA - was 1996. So from the ABS study backwards to a different category, small business, 1996, I don't know, I just think that needs to be looked at, if I can put it that way, sir. I've got no problem with the ABS, please don't get me wrong. I think that they're the exact right people, along with the Reserve Bank, to monitor the inflationary aspects of these massive lease increases. I think both the ABS and the Reserve Bank are the exact right bodies to be conducting and overseeing the lease registration process in states across Australia as well. In fact on that Milton and I actually agree. Milton's own submission, on pages 32-34, indicate that he's actually in favour of that registration process occurring.

Are you still looking at that page? I can keep going there if you like, sir, because I also don't like the term "business survivor" in figure 2.8. If we're talking about harmonising things I think we'd better get the terms right. "Business survivor" in a retail sense, I don't know, that doesn't fill people with the sort of optimism and get up and go that was referred to in the submission just before us. These sorts of things, it's going to come down - also, look, vacancy rates, the same thing. The amount of manipulation of numbers, I mentioned earlier about the number of regional centres in percentage - things can get off the twist here. It's a very sophisticated market. It certainly shouldn't be overly simplified because otherwise people just get the wrong idea, frankly, and that's what we're on about, trying to prevent large numbers of small retail tenants from getting the wrong idea.

I'll stay with vacancy rates, if you like. These things are routinely manipulated in the market, routinely in the market place. I'll give you just a couple of examples. Things like the number of tenants that have gone broke in a particular shop within relatively short periods of time, you think that the vacancy rate might in fact reflect something like that, they don't - they just don't. The major reason is not so much that the tenants didn't have the necessary skills but rather that the new rent was the same rent that sent the previous couple of sets of people bankrupt as well. But no, it doesn't come up in the vacancy rates.

As a practitioner I can tell you it was very depressing for me to recall the fifth set of prospective tenants that asked me about the exact same shop in less than a one-year period - less than a one year period, five separate sets of people. The trouble is that I knew the former two tenants inside the previous three-year period and how long the shop had actually been vacant. Did any of the disclosure documents show what I'll term the true vacancy rate? No, no. Did the rent decrease to give any new punters a fair go, as they say? No, they did not. Is this uncommon? Again, no. Again, in my experience there are many tenants on much extended month to month holding over tenancies, basically because the new preferred franchise tenants, of which there's a shortage, can't be located and also, frankly, because lessors just don't want to reveal the real vacancy situation at their centres. They just don't want to do it. They'd rather boast how they don't wear the pain of subsidising rentals. Basically, you know, it's fairly - you know.

Arrears - arrears is another area that's shrouded in mystery. Empty glass, tenancies where the decision has been made to let the staff go and strip the shop but continue to pay the rent, because you go broke more slowly that way. They don't come up on the vacancy rates either. Ever notice those former shops with artworks or a lounge suite with a price tag on it, with non-leasing but paid advertising material on the front window? Very little dollar return but enough to continue reporting incredibly low vacancy rates. I think I'm painting a bit of a picture. So thinks like your section on market entry and exits, they certainly don't ring true with me as a practitioner.

Statistics even from bodies like ITPA, for example, official bankruptcies, they're just so low that I'd do more voluntary administrations than ITPA does for all of WA in a year. So I certainly can't say that lessors are the only ones that manipulate numbers, but there's a bit of a theme here if I'm communicating, sir.

I do think this is something for government. I suggested so earlier, I'll say it again, and all levels of government. It's not just the principal and fundamental requirements to provide dispute resolution facilities. Look at government, they rely on rates and taxes. To flesh it out in a practical sense, here in WA the GST on retails in WA last calendar year exceeded the entire state surplus by some 150 per cent, the

entire state surplus, and that includes mining royalties - just the GST. So called small retail businesses in WA employ between five and six times the number that all of the big end of town employs in total - in total. So that's right, the smallies account for a minimum of five times the total number of people employed by Coles, Woolworths, Target, Big W, Bunnings, Harvey Norman, the lot. The variation, that's up to six times if you include the number of self-employed small independent retailers as well.

I'm trying not to be too impassioned, but the rationality of these things is difficult to encapsulate. I mean, WA's largest combined landlord and agent is Centro. They've got over 20 centres here in Western Australia. Now, they dropped over 80 per cent of their value on the stock exchange in just two days last year. So that's a significant drop. You can't say that these things just - things can and do move quickly. Yes, they can be beyond even the best ministrations of the world's best economists. The drop in the value of the Australia Stock Exchange as a whole, from November last year the Australia Stock Exchange lost \$180 billion. It's a very large sum of money. How large is it? Well, President Bush pledged \$160 billion to try to kick start the entire American economy. We lost it in a bit over two months in the Australia Stock Exchange.

DR BYRON: Sorry, you've lost me on the relevance of that point to retail tenancy.

MR DEMPSEY (WARA): Well, things change. I'm concerned that basically things in retail leasing are unsustainable. We have got very high rents, so that if there are drops in retail trade the people that are on those large rents hit the ground very quickly. Is there parallels with this? Yes, on the stock exchange, basically. Even with retail shopping centre groups like Centro they can lose a lot of money very quickly. Not clear?

DR BYRON: The fact that stock market values change overnight doesn't surprise me at all. I'm still grappling with what the connection is to this inquiry.

MR DEMPSEY (WARA): Okay, I'll see if I can make that clearer as I go through. I'm quite close to completing here - - -

DR BYRON: Good.

MR DEMPSEY (WARA): - - - but I'll see if I can. I think if there are going to be movements, as there obviously have been on the stock exchange, the requirement by those same groups to have guarantees over other people's assets when their cash flows are so intimately tied into the valuation of those businesses on the stock exchange that by extension you've got tenants that are exposed to things that they have absolutely no control over whatsoever.

I take your point about the stock exchange, you know, being capable of dropping, and dropping significantly. But these groups hold personal and directors' guarantees on the leases of people in their shopping centres. The value of shopping centre business drops significantly, what the guarantees - I just find it ridiculous that tenants should have to guarantee the payment of their leases going forward. Most of the actions in bankruptcies relate to the payment of the balance of the term of the lease. Shopping centres can sell to one another and transfer ownership and the guarantees simply transfer. Shopping centres can redevelop and give six months' notice. The guarantees still hold. It just doesn't seem to be a terribly consistent fit, I guess.

DR BYRON: Yes, other people have made that point too.

MR DEMPSEY (WARA): I think the other thing - and I'll try and be very quick here. What happens when people go bankrupt - and to say that this is not a government responsibility I think would be incredibly bizarre. My experience is that if there's a couple involved there's normally health problems and one of the partners becomes - claims a carer's pension while the other one is on a disability allowance. Centrelink is very important. They normally cash in things like life insurance and superannuation, you pointed out earlier. Those things tend to go in just the running of the business. But, you know, things like Centrelink, they're government responsibilities and certainly they're federal ones.

I think I'll conclude on basically something that I noticed, this metaphor in some of the transcripts about people that die, you know, it would be helpful if we knew how many were sick before they died, I think was one of the references. Was it Steven Spring from COSBOA?

DR BYRON: Yes, I think he said that the statistics don't tell us how many are in intensive care on life support.

MR DEMPSEY (WARA): Well, it actually made me think of another metaphor again and it's about the team of doctors that announce that the surgery was a complete success, it's just that the patients keep dying.

DR BYRON: Yes.

MR DEMPSEY (WARA): I think it's on that note I'll wind up my comments to you.

DR BYRON: Okay.

MR DEMPSEY (WARA): Love to hear some questions from you though, if I may.

DR BYRON: Yes, thanks. But before we do that - Neville?

MR ROEDIGER (ANF): All right. Well, thanks for the opportunity. Now, I know you've had submissions from our organisation and also further representation from one of our people so I certainly don't propose to go over all of that. I want to be informal and as brief as I can and not to go into the detail that Martin's gone in.

There's just a couple of points that I would really like to emphasise. Through a lot of what I have sat through today and through a lot of what I have read the whole issue of fairness keeps coming up. I think if there are enough people saying that it's unfair then there must be something there. I guess the point I would make is - and I take your comment on board that fairness can be in the eye of the beholder. I think just to emphasise Martin's point is where do we go to seek fairness? End of the day both parties may feel that it's unfair but the question is more of a balance between landlords and tenants.

I guess to highlight one of the unfairnesses in the system is one that has been mulled over regularly, and that is the turnover reporting issue. Every time we have that discussion it seems to come back to the affordability of the business to pay a certain level of rent. Putting all the onus on the tenant there is never any question of what does it cost the landlord to provide that retail space. So it's always going back onto the tenant. So the point I would make is: where is the balance, how do we get to that balance? When we have one of our largest landlords say that, "Being a landlord is all about taking money out of a tenant's pocket and putting it in mine," I think that should ring alarm bells straightaway.

DR BYRON: Is that a public quote?

MR ROEDIGER (ANF): It was reported in the national press, yes. I think it was a Fairfax publication. So that's it from me.

DR BYRON: Well, working backwards can I just pick up the fairness thing. I don't know if you were here this morning when I said, you know, if I was to get into the ring to go 15 rounds with the world heavyweight boxing champion - - -

MR ROEDIGER (ANF): Did hear that.

DR BYRON: I think we could all agree that that would not be a fair confrontation, especially for me.

MR DEMPSEY (WARA): Actually, I don't know, sir.

DR BYRON: What government would do, I think, is say, "Listen, this is going to

be a slaughter. We'll just prohibit it," not allowed to do that. If legislatures were convinced that the imbalance of power between the large shopping centres, with some of the best lawyers and accountants and professional advisers in the world, versus the mum and dad retailers, especially if they are relatively new at retailing who don't have the access to the information and the resources and the deep pockets and all the rest of it - if the politicians thought that this is just going to be so unfair that any small retailer who goes into a centre is just going to be hung, drawn and quartered, butchered, fleeced and then severely hurt, they can say, "Okay, it's forbidden." Now, would that - some people would say, "Well, that would prevent small retailers from having the opportunity of actually getting in there and becoming big retailers and making - - -"

MR DEMPSEY (WARA): Well, Milton would say that, for show. Milton would say that for sure.

DR BYRON: Well, I think a lot of people - - -

MR DEMPSEY (WARA): Do you say that, sir?

DR BYRON: I don't know. A lot of people go into small business hoping it will become a big one, I guess.

MR ROEDIGER (ANF): A lot of people go into business of all sorts with the ambition of improving their lifestyle. It's often their single wealth creation strategy. While you can't protect people from making the wrong decision they do need to be fully informed.

DR BYRON: Yes.

MR ROEDIGER (ANF): I think the point Martin made in regard to disclosure of previous history of premises is a valid one. To me it's a bit like smoking. People are still going to smoke even though you put ghastly pictures on the packet and all sorts of warnings. Could we go down the pathway of saying, "You signed this death warrant of a lease. It's your own peril"?

MR DEMPSEY (WARA): I think there's a bit more to it than that too. I mean firstly, there's understanding exactly what the target market is for these small retailers. They tend to be - in my experience they tend to be too young, you know, basically - and I'll get this right if I can - people in their 40s and 50s, predominantly. They're far too young to retire but they're beyond working, you know, doing eight sales calls a day, for example. So if I can just paint that picture for a start. So most of them tend to actually say, "I haven't got enough money to retire, so I'll take a shop just to get me through. How could it be? I've got to stand in a shop and that might be a bit boring, but I'll give it a go." They don't expect to be put into a - what was

your metaphor again, sir - into a boxing ring. They certainly don't expect that, but they pretty quickly figure out what's actually occurred.

DR BYRON: On the plane coming over last night I was looking this "Look Before You Lease" put out by the Commonwealth Department of Employment Workplace Relations and Small Business last year, and just a couple of things that are highlighted, big colours and things are, "Never sign a lease unless you completely understand and agree with all the clauses. Look for information. You might avoid expensive misunderstandings that could cost you your business. Don't sign anything. Don't accept keys or pay bond money before you have professional advice." These are all big red letters, "If you're in doubt ask for help of a solicitor." Just about every page has got these sort of health warnings, "Remember, a 5 per cent annual rent increase means you'll be paying over 20 per cent more rent in five years' time. Is this in your business plan? Talk to a professional or association before you sign the lease. Once you're in a lease it's hard to get out of it. It could cost you a lot of money.

MR DEMPSEY (WARA): But from demonising tenants - and I know I've had this discussion with Milton Cockburn on many occasions - he talks in it and he says things like, "You can't prohibit stupidity. You can't legislate against ignorance."

DR BYRON: No, that's not my point. I've got armfuls of brochures that have been put out by Office of Fair Trading, ACCC, Office of Small Business, the Commonwealth government, "Note, you have no automatic right of renewal unless your lease or legislation gives it to you." There's so much information around, but it seems that a lot of people either don't read it or don't take any notice of it.

MR DEMPSEY (WARA): I think that's self-evident. But does it say in there that landlords are actually working against you? Does it say that they're actually going to change the type of lease and get very vital information about your business to guarantee that you not only don't succeed but you go bankrupt? Do they say that?

DR BYRON: No, I haven't read that.

MR DEMPSEY (WARA): No, it's funny. Or is it funny? I don't think it is.

DR BYRON: No, it's not funny at all. It's very sad. In fact it's quite tragic. Does your organisation make these same sorts of points? "The leasing executive that you're negotiating with is not there to do you a favour. This guy is on big retainers," or whatever. "He's working for the other side," if you like. If I who had never done retailing before went down to negotiate a lease with somebody who has been doing it every day for the last 35 years, how do I think I'm going to get a good deal out of him if I haven't got really good expert advisers to help me and take me through the ropes? It seems to me that all the retailer organisations should be just screaming out

these same sorts of messages, "Think very carefully before you sign. This guy is not there to do you a favour. Are you sure you really want to do this?"

MR DEMPSEY (WARA): I think you might have it arse-about, with respect, sir. You're talking about people that are actively working against other people's best interests. You're talking about - I think the terms are the transfer of wealth. I think Neville just talked about - what was it again - taking the money out of - - -

MR ROEDIGER (ANF): The tenant's pocket and putting it in the landlord's pocket.

DR BYRON: But that to me is precisely what the shopping centre model is about and that's what leasing executives get paid a lot of money to do. Everybody should know that. We should be screaming it from the rooftops.

MR DEMPSEY (WARA): So you say caveat emptor.

DR BYRON: No, it's a lot more than caveat emptor.

MR ROEDIGER (ANF): That's right, forearmed is forewarned.

DR BYRON: No, but the legislation - - -

MR DEMPSEY (WARA): This is where angels fear to tread.

DR BYRON: Yes, the legislation up till now has looked at this and said, "This is an extremely unfair relationship. One side has a lot of knowledge, information and power. The other side has very little," and so they're trying to limit what the large landlords can do in terms of misusing that power which everybody seems to agree they have. The problem is that every time you pass another law that says, "And by the way, you're not allowed to do X, Y and Z," they come up with 101 other ways of skinning the same cat. All I'm suggesting is maybe as well as trying to control the power of the better informed side, we should be providing a lot more information, advisory service, whatever, to inform and empower the little guys including telling them, "You've got to do your own homework and you can't expect the nice people in the state or Commonwealth government to look after you and make sure nothing goes wrong if you haven't done your homework."

MR DEMPSEY (WARA): That does occur and it hasn't changed. The model that you refer to has been refined and worked so that - what would it take for you to change your view that the problem is in fact more on the tenant's side when in fact the flagrant breaches, the getting around of the attempts to regulate is in fact on the other side?

DR BYRON: I'm amazed that you think that I have that view.

MR DEMPSEY (WARA): It's pretty close to a landlord's view if you don't mind me saying, sir.

DR BYRON: You can say whatever you like. You can be wrong, but you can say whatever you like.

MR DEMPSEY (WARA): I don't think I'm wrong on this one.

DR BYRON: Yes, you may well be. The point is that what the shopping centres are doing has been repeatedly found by courts to be perfectly legal. There have been recommendations for change which every legislature in this country have looked at and in many cases have decided not to make. Senator Murray has been taking me to task for not doing what was recommended by Reid in 97. In the last 11 years every government in Australia has had the chance to implement that. They've looked at, they've thought about it, they have decided not to. If I was to recommend exactly the same thing that Reid recommended, it would probably get the same result again for the next 11 years.

MR DEMPSEY (WARA): We've had a change of federal government for a start. I think you'd have to rate that as a fairly significant event, wouldn't you?

DR BYRON: Yes, but there's no guarantee that the answer would change.

MR DEMPSEY (WARA): Uniformity I agree with you has not curried a lot of favour, certainly with the last Liberal federal government, but certainly what's shaping up as being the new system for Commonwealth and state relationships, for example, I think that might offer considerably more scope for getting, as you say, a more consistent approach. I'm a bit concerned about Milton's use of the word "harmonised" because his idea of harmonised is certainly different from mine. Just taking the best of what's there instead of saying, as you've indicated consistently, there are a lot of horror stories, there are a lot of stories that are very upset. But at the same time sort of saying, "Look, we can improve," and all states might not take the same best practice things on board, but there might be a couple of headline things that they can take on board and there might be a number of other separate things that they can take on separately. Do you know what I'm getting at?

DR BYRON: Yes.

MR DEMPSEY (WARA): To say, you know, "Gee, you can go out there and lose a lot of money these days," that's true, no doubt, that you can lose it a lot quicker than you used to lose it, that's also true. But we're actually trying to make things better, not sort of report how some crafty people can get more money out of another group of people even more efficiently.

DR BYRON: I'm certainly not proposing that at all. I'm trying to think of ways of restoring the balance that will actually work, unlike all the things that have been done in the last 20 years which patently have not. I'm reminded that one definition of insanity is when you keep doing exactly the same thing and expect that the result will be different next time.

MR DEMPSEY (WARA): I agree.

DR BYRON: So we have been trying to look at the evidence of what has actually worked and made a difference, and what hasn't. Out of all the various innovations and bells and whistles that have been put on state legislation around Australia, there's very little evidence that any of them have actually done any real work and made for better outcomes. That's why we're looking around and saying let's try and find something that will work and will actually deliver better outcomes for small retailers with regard to redressing this imbalance of power. I don't want to get into the same situation as the Tax Act which is now 13 foot high or whatever, where every time one loophole is closed you've got a thousand lawyers and accountants out there who find a thousand new loopholes. I suspect that's a bit like what's happened to retail tenancy legislation. The reason we've got more and more legislation is that every time one loophole is closed, somebody finds a different way of skinning the cat, of taking money out of the small tenant's pocket.

We can go on prohibiting it one by one but the number of innovative new ways that haven't been thought of before is just likely to keep growing. We're going to be continuously chasing our tails, "No, no, you can't do that," and so they will come up with 10 new ways of doing it. "You can't do any of those," so they'll come up with a hundred other ways of doing it.

MR DEMPSEY (WARA): I'm concerned that it sounds like we're giving up before we're even getting onto it.

DR BYRON: No, no, we're not giving up, that's actually what's been happening over the last few years.

MR DEMPSEY (WARA): But can't we acknowledge, firstly, that rather than saying that none of these things have worked that various state acts or amendments to those acts haven't worked and as you say you'd like better outcomes? Certainly speaking on behalf of independents, well, we'd like different outcomes, that's agreed. But can't we actually acknowledge that in fact the movement and the breach and the other ways to skin a cat is a very significant part of the problem, very significant? I mean, the prohibition of these turnover numbers, you've been hearing it right around Australia, and how did it come about? Well, I know I've gone to a lot of trouble to explain exactly how it did.

DR BYRON: As I said this morning - - -

MR DEMPSEY (WARA): The acts that they got around to do it, I mean, it can be revisited very easily to say, "Right, well, it can't be done, and it can't be done because of this, this and this." The wording in the act - certainly in the WA act - is very clear.

DR BYRON: We could recommend it and might even persuade all the state and territory governments and the Commonwealth government to do it, but what I said this morning is, I have this horrible nagging doubt that even if we recommend it, that all the retail tenancy legislation be immediately changed to prohibit the requirement to disclose turnover information, it might not actually fix very much, because rather than having the actual turnover data they would will engage in the same practices using their guesstimates of it rather than the actual numbers.

MR DEMPSEY (WARA): The Rolls-Royce - - -

DR BYRON: No, if these leasing people are as competent as we've been told they are, they will be able to go through any centre and say, "They're doing well. They haven't had a customer for two weeks now. This guy's stock hasn't moved," dah dah dah. "We notice you've just bought a Benz," or, "You've got a Bentley parked out the front," or something, "We're obviously not charging you enough rent." If they walked around and used their eyes they would make a pretty good stab of who was still doing reasonably well and who wasn't. In fact I think I could almost do that and I don't claim to have any expertise in this area at all as a leasing executive.

So what I'm trying to satisfy myself of is if we advocated setting up a national lease so that everybody could find out how much other people were paying; if we proposed that the requirement to disclose turnover information be prohibited; if we proposed that the minimum lease should be seven years instead of five years - even if we did all those things and even if the government accepted our recommendation and all that, would it actually solve the problem? Would it seriously give better outcomes? That's where we're still looking for evidence.

MR DEMPSEY (WARA): Well, it would certainly give access and heretofore access that's been unavailable for tenants, things like this - the lease register, for example. That problem is not only tenants is valuers, it's the State Administrative Tribunal, it's right up and down.

DR BYRON: Yes, but as the valuers said, they don't become involved in what happens in the shopping centres anyway, not very often, because there are virtually no options or renewals that require an independent valuation because it's basically a second lease. If the centre owners basically are working on, "We're going to ask for a rent based on how much we think you can afford to pay," then knowing that the butcher, the baker, the candlestick-maker only pay a certain amount, isn't going to

stop them from asking me for twice that much if they think I can afford to pay.

MR DEMPSEY (WARA): With respect, it is a metre there this way and a metre there that way. Here in WA - and I will use real numbers - there's not a Woolworths store in Western Australia that pays more than \$200 per square metre per annum. The peak rent here in WA is in fact south of the river, it's a food hall tenancy, it's \$7000 per square metre per annum. It's the same commodity. It is not accounted for by Woolworths occupying that much more space than all of those specialty centres made together. The outcomes to which you refer - - -

DR BYRON: Tiger Woods plays golf, so do I; how come he gets paid more than I do? It's an irrelevant comparison. I can sing in the bath; how come Pavarotti got more than me.

MR DEMPSEY (WARA): It's the same commodity though, sir.

DR BYRON: Yes, I'm better than Pavarotti. The point is - - -

MR DEMPSEY (WARA): You might have trouble getting people to agree with you.

DR BYRON: Yes, and that's exactly my response to you. The fact that one party over here agrees to pay X and the party over there agrees to pay 10 times X - - -

MR DEMPSEY (WARA): Do you know what the difference is between 200 and 7000 is? There's a lot of water there, isn't there, especially for the same commodity. I take your point about Pavarotti but if you're talking about a business and the cost of inputs, this would be equivalent in your metaphor, for example, to say, "I don't play as well as Tiger Woods because I've managed to perfect the practice swing and the gimme putt." Am I making myself clear now? There are very big advantages afforded to some people, notably the larger tenants that are on below economic cost rents, and those that are smaller independent retailers that are on vastly inflated figures. The chances of the independent ones to make a go of their businesses - I'll put it another way. I notice you don't seem to be taking that on board.

DR BYRON: Why don't you tell them that, "This rent unaffordably high. Don't sign the lease"?

MR DEMPSEY (WARA): I often do. I often do.

DR BYRON: And? Do they take any notice?

MR DEMPSEY (WARA): Yes, sometimes they do and sometimes they don't.

DR BYRON: Sometimes they don't.

MR ROEDIGER (ANF): At great expense to themselves.

MR DEMPSEY (WARA): Yes, that's right.

MR ROEDIGER (ANF): Just going back to the question you posed about how do we solve the problem - - -

DR BYRON: I think that would be a good place to come back to.

MR ROEDIGER (ANF): Yes. The concept of a model lease where in legislation, "This is the lease that you give to a tenant and nothing shall be added to or taken away from," is that a stepping stone?

DR BYRON: No, I have a reservation about the second part. You say, "This is a model lease but if you want to add a special clause or to delete a clause you can do that," but if it's got a great big red line through it or if something has been written in by hand you can immediately see it. You don't have to read through a hundred pages of 10-font stuff to make sure everything is exactly what you think it is. If you knew what the standard lease and then you just had to look and say, "Is there anything with a red line through it?" or, "Is there anything else that's been written in at the bottom of the page?" "No, it's all clean, it's a standard lease, I know and understand what's in there." If it's got something added or taken out I can then look at that bit and say, "Will I wear that? Yes or no?" I think part of the problem that we have at the moment is that the leases have become so incredibly complicated that it's hard for anybody, even lawyers, to get their brains around them. Why have the leases become so complicated? Well, part of it - not the only explanation - is because the legislation governing leases has become so complicated.

MR DEMPSEY (WARA): That's a bit of a cop-out, frankly. I've got a member at the moment, he runs a car wrecking facility. He's not a traditional retailer, put it that way, but he's decided that he's going to rent out part of his yard to put a telecommunications tower in there and in fact he's had interest from one party and interest from another party. I don't think it's a state secret, one of those parties is Telstra. Telstra in this case is the lessee. They have provided to this fellow, my member, their contract. Whoever writes the contract, writes the contract in their favour. I think that's the problem that we're not addressing with a lot of leases. This particular contract says that, "The lessor" - my member, the car wrecking proprietor, warrants that there is no hazard or occupational health and safety matter on this property, and I've had to ring up Telstra and say, "It's a car wrecking yard," and they said, "We can't change that." Whoever writes the lease is the one that writes it in their own favour. I think that's the bit that with the large landlords and their complaints about, "There's so many different legislative things," take my word for it,

good lawyer or not so good lawyer, if it's been written by a landlord it's in the landlord's favour very clearly at every juncture, every possibility, every combination and permutation it is - it is, I promise you. That's why it's somewhat redundant for tenants to see lawyers now because the lawyers simply say, "Don't do it. Don't do it, it's a unilateral contract. It favours one side at your cost and expense." That's the problem, that's the problem.

DR BYRON: Maybe the problem is that people continue to do it even when they've been advised not to.

MR DEMPSEY (WARA): No, I think it's a bit more than that. We were sort of talking about it a little bit outside. Once large landlord groups have been given zoning all responsibility seems to end. They just go ballistic on tenants, churning and burning, so to speak. Once they've got that all important zoning: unilateral contracts, no problem; churning, burning, you know. I think the complaint that landlords have got to comply with so much legislation, given that they've got the opportunity to make so much money - they expense everything, sir - everything.

DR BYRON: Which comes back to my point. I'm still amazed that people sign these leases given, as you say, that they're unilateral and that they're queuing up to sign them. That's what I really don't understand.

MR DEMPSEY (WARA): That brings a new problem, and you're talking about outcomes. What happens in places - you're here in WA, we've got a boom. We've got the furthest to fall. We've got the furthest to fall. Our rents have gone up. Honestly, if you were in Sydney for example if the head office for a very large lessor was over here and you phoned up and said, "Look, what's my lease renewal? What rate is my lease renewal at?" and I said, "Things are a bit tough over here in Western Australia at the moment. You're in Sydney. I need you to even out my portfolio a bit. How about 100 per cent increase for you?" From the line you're taking you'd say, "No, I'll walk away," and you'd have every right to.

The reverse, however, doesn't seem to cut the same track, for example. If you've a landlord that's saying, "We must have the freedom to contract. There is a sanctity to the contract. But it will be my contract and no other contract. I will get my people to sign away rights," that's bizarre for a start, wouldn't you say? To sign away rights, things that people have, people can sign them away, can they? Yet you can still claim freedom of contract, you can still claim the sanctity. There surely is some contradiction here - surely. No? You can't see that?

DR BYRON: No, I'm not a contract lawyer, fortunately. I think we've given this quite a hiding, gentlemen. Thank you very much for all your energetic input and sharing your experience and hard-won lessons with us in an attempt to educate us fully. There's probably much more, but I don't know that we can achieve much more

this afternoon. We will certainly go through and follow up on all the points that you've raised there. So thanks very much, Martin.

MR DEMPSEY (WARA): Thanks.

DR BYRON: I think we've probably got - forget about the cup of tea. Ymal Uludong and Mary Uludong. Thank you very much for coming. We're running a little bit late, but I hope you don't mind.

MS ULUDONG (TBPL): Thanks for having us.

DR BYRON: Thank you both very much for coming. If you could just introduce yourselves briefly for the transcript and then tell us whatever you think we need to know, and thank you for making the effort to come here today.

MS ULUDONG (TBPL): Thank you for having us. My name is Mary Uludong and this is Ymal Uludong. We're "mum and dad". We owned a retail shop in a large shopping centre so we have come here to share our experience, and hopefully help address some of the issues that effected us so that other people don't have to go through that experience. I think there's an opportunity here for people to make a difference. That's one of the reasons why we're here. We're also here to put a face to these people that you're referring to, be available to you to answer any questions you may have, seeking clarification on any of the issues from the perspective of a small tenant in a shopping centre, and provide a perspective on these issues on behalf of the small business tenants who aren't here today. I wanted to also address some of the issues as to why they may not be here.

DR BYRON: Thanks.

MS ULUDONG (TBPL): So the main points that we have to cover - we want to be brief because I've read all the transcripts and there's been a lot of brilliant, intelligent people speaking before us who've covered a lot of the issues that we feel are relevant in addressing some of the things to do with the draft report. So we don't necessarily want to repeat ourselves there. They've eloquently been able to express how we feel about it.

So we just hope to cover a situation where a landlord has total control but doesn't accept any responsibility or accountability when they fail to deliver on their obligations and this failure results in losses to businesses. For example, Erina Fair, and due to circumstances I'm not going to name the shopping centre that we were in, but coincidentally it is managed and owned by the same company as Erina Fair. We also wanted to touch on low cost dispute resolutions available, and as part of that the notion of unconscionable conduct. Like I said, we also wanted to talk about why other tenants may have not come forward today, also perhaps address the question of are small business people stupid. I also wanted to talk about a fair go.

So by way of background, like I said, we owned a small business in a shopping centre. We're "mum and dad" but we've also had a lot of business experience. Me

personally, I've had over 15 years' worth of banking experience, with the last five years specialising in e-business and transactions solutions, dealing with a major client group of businesses in WA. Ymal, my business partner as well as my husband, he's had extensive experience in media and the other partner, who can't be here today, is my mother-in-law, Ymal's mother, who's had over 45 years' experience in running businesses, involved in media. So between the three of us - plus we had another partner who was an expert in retail, so the four of us cumulatively had over 75 years' worth of business experience.

MR ULUDONG (TBPL): This is not just general business experience. So far as both Michelle and myself our expertise is in the field of negotiation for very large clients, and both me and mother Michelle have worked on behalf of some of the largest corporations on the planet.

MS ULUDONG (TBPL): So certainly we don't know it all, and we've been educated severely in this industry. To be honest I don't consider running a small retail DVD shop in a shopping centre to be rocket science, and as far as all the things you mentioned about doing our homework, we can check off all the boxes, using all of our experience plus we went and sought legal advice, we got advice from accountants, colleagues that I knew of in the business industry. We certainly did not have rose-coloured glasses, did not expect to become millionaires or that money to start dropping from the heavens because we purchased this business. We realised that it would involve a lot of hard work, and we were prepared to take on a certain risk which was calculated. However, once we signed the lease the rug was pulled out from under us and the deal that we signed was not the deal that we received. So if you want to elaborate on that.

MR ULUDONG (TBPL): To give a general background, we started off where we took over a business, a very small, 80 square metre video, DVD retail rental shop in a shopping centre that was under renovations. During that 12-month period we negotiated the purchase of the business and the lease for the new tenancy which was being built and was being increased to 215 square, which we thought was only a good thing, and also negotiated the shop-fit. There was nothing in the lease that I thought was mystifying or confusing. I thought it was pretty straightforward, and at the time both me and our legal counsel agreed that we thought it was a pretty good lease. Everything in it seemed fair and I agreed with everything that was written.

During the process, once we had signed off we had been given approval for the shop-fit which was the only precursor other than the lease which was stopping us from purchasing the business. We then signed off on the shop-fit, signed off on the lease and purchased the business, basically all on the same day to make sure that we weren't exposed. Once our lease was signed, and this was in July 2002, basically the shopping centre redevelopment was extended in ways which still has never been made clear to us to the point where we actually ended up having a situation where

once our shop-fit was accepted we were told that the site manager had since lost our submission, and this in November, almost five months after the fact, to which we were told to resubmit.

I was totally surprised, and when queried upon it with the landlord to which in writing we had a very fair agreement I thought, to which I agreed to, I was told we simply had to do it otherwise they could simply not approve our shop-fit. So we chewed the extra cost of having it all done again in a very short period of time, because we were fighting the clock and it was in our best commercial interest to get this place built in and get in there and operate as soon as possible. During July to November of that year we were operating out of what I would refer to as a "donga" or a caravan. So it was very much in our best interests to do so and get this turned around.

Once this was done, after we had signed the lease, told the shop-fit was approved, purchased the business, we were told that basically our builders, once we tried to get onto site induction, were refused entry to the site. We went through three builders and after the third builder was refused access to our premises to build I then sat down and had a meeting with the landlord, the site manager and also the centre manager. In this meeting I was told in no uncertain terms we were simply not paying enough, despite the five quotes we got from various builders almost eight months prior - this is almost five months after signing all of the paperwork - and that we needed to use, and I quote from the site manager as saying, "people that he would approve of" and that I was threatened quite literally and told that if I did not use people he approved of I will simply have a business with no roof, and that if that was the case they would have good cause to sue for the fact that we had not qualified for the shop-fit and failed to meet the standards of the shop-fit and that we would be liable for the full term of the lease before we even get four walls around us.

This was the opening relationship with my landlord before I could even start trading. I was quite shocked. I'm not used to conducting business with this sort of mentality on any level, and I've conducted business internationally and on national level here in Australia. So we were basically forced to use - at that stage I simply said, "Rather than waste another builder coming in, wasting all that time, having another month of going through this see-saw effect and us losing money, why don't you recommend someone and save us all this time and running around." So they did, the end of result of which was an 800 per cent increase on our shop-fit. I actually said in the meeting said that surely this cannot be legal, to which the centre manager dropped her head, didn't look at me in the eye, and the site manager was literally banging his fist on the table getting all red eyed at me.

Basically from this point on we had to pay it. It incurred basically approximately about 50 to \$60,000 additional costs on top of our shop-fit, which after all the fist stamping and the sue pressure that we were under just to get this

place open we were basically forced into accepting it, to which the landlord as written in their correspondence to us "did us a favour" in loaning us the amount, which they added on top of our rental amount, or our lease figures. So the culmination of which a shop - for all intents and purposes, you assess your risks, I thought we would be opening in July of that year, we ended up opening Christmas Eve, 24 December, possibly the worst time I could think of for opening a store. It's a very difficult time when you need to be set up and prepared for the crucial retail period.

So we started off behind the eight ball. Pretty much most of our buying capital for opening the business and all our business plan were shot. It was literally a waste. During the overlays of delay of time, the delaying tactics and having to bow to threats I'm afraid that my business plan was about as far off track as humanly possible and was literally not appropriate. So we went ahead and opened the business and started to trade. We found that there was severe problems such that I had had members screaming at me, mums with kids coming after school saying, "It is not safe for my children." I wrote many times over a period of four years to my landlord saying that this is a problem, this is the case, and in this entire time to this date - last time we had a meeting with them was November of last year and they stated that there was no problem, they simply do not believe us.

With the luxury of having to incur long-term losses like we have in a situation to which I thought we would end up paying 5000 per month approximately for this business, which I thought was fair, over the last four years we've been paying closer to eight to nine, with added costs that we simply had no way of knowing of, were not prepared for. With further investigation I found out there was a royal Commission into the very shopping centre to which I'm referring to, and in that Commission the staff of the landlord were literally - the decision of the royal Commission was effectively that "lack of adherence to the rule of the law when it was contrary to their commercial interests", was the general statement. I've pointed this out to the landlord. They still don't believe that we have any real case and they really are only interested in recouping their money.

That's just a brief overview. I don't want to get into too much detail, but that's the kind of situation we discovered. Going through some of the previous hearings I've heard the statement of, "Why were these people in these situations when they're sitting down across the table to feel like they can possibly get a good deal when they're so outclassed in negotiation, and the expertise on the other side of the table is so much better?" I have not found any expertise in negotiations that I've been involved in. If beating someone over the head with a mallet is what's called expertise then my entire experience in the realm of media has been misconstrued.

DR BYRON: That's certainly not what I meant by expertise.

MR ULUDONG (TBPL): I would love to have seen some of the expertise that was referred to in the hearings. In my experience over the last four to five years I've yet to see it. I'm just suggesting that perhaps the situation isn't so straightforward as you would think for the average - there are small business retailers who do come from other industries who are familiar with the art of negotiation and they way of conducting business in a fair, or even as far as saying ethical fashion. I'm just suggesting that I personally can cite cases to which this is not going on. It's a bit more than a lack of expertise or imbalance.

DR BYRON: I don't doubt what you're saying for a second. As one of my colleagues, who is a commercial lawyer, said that when you read through any of these retail tenancy leases there's absolutely no doubt that they are extremely one-sided. He said the only reason in his view that people sign them is that you have to hope that most of the time the guy on the other side of the table will be reasonable, and perhaps most of the time they are. But if you come up with someone who is seriously incompetent or seriously malicious they can do great harm to you.

MRS ULUDONG (TBPL): We thought that the legislation was there to protect us in these circumstances, and you refer to, "Well, the tenant goes to these people and it's like, 'Help us,' or whatever," and reading legislation, that's what I thought some of that legislation refers to, to prevent this kind of thing from happening. Then when we did go to the ACCC - we went to the ACCC immediately when they wouldn't let our builders on site and our costs increased by 100 per cent - we got some inexperienced operator, it was almost like ringing a call centre or something and you're dealing with some person who answers the phone and you're trying to explain to them these complex issues, they don't really care, and we feel that at that point we didn't have to suffer the way that we have five years down the track and are continuing to suffer.

Even in the royal Commission, one of the questions was about the role of the ACCC in addressing the issues that came up at the Commission. The thing is that we didn't find out about the Commission until last year and that's involved us doing a lot of research to try and find out why did these problems happen.

MR ULUDONG (TBPL): Also just to clarify, the site manager I'm referring to - the judge or very powerful man who ran the Commission said about not adhering to the law. Those statements, those comments were taken in October prior to the November meeting to which we were threatened. To say that these people were acting with ignorance can't be said. I didn't find this out until last year.

MRS ULUDONG (TBPL): That's one of the reasons I feel he was able to say to us, "I can do whatever I want."

MR ULUDONG (TBPL): He truly believed it.

MRS ULUDONG (TBPL): Because he was in a royal Commission one month prior and nothing happened. I'm just wondering what kind of deterrents are there to prevent such cowboy thuggery or whatever you want to call it, because personally when I was working in financial services I was subject to potential fines if I did the wrong thing, if I didn't comply with a certain code of conduct. The company was liable - and these are large fines, because recently there was a case with Lend Lease where they went to the ACCC and they were fined \$100,000. When a company is reporting \$6 billion in revenue or whatever, \$100,000 isn't much on the radar. There were significant fines for my employer as well as potential criminal charges.

I feel like on some level the shopping centre council - or whoever represents the other side - and us should be united in the fact that we do not want this kind of behaviour in this industry. You talk about bringing back trust into this relationship. Something needs to be done and unfortunately I can't sit here and tell you what are the solutions. Hopefully we can help clarify any misunderstandings, or if you have any other questions that you need to ask us to be convinced that something needs to be done now.

MR ULUDONG (TBPL): Another way of saying it is, aren't test cases so horrible? We've got to cover most of the points that you'd be looking at. I hate to be blunt but - - -

MRS ULUDONG (TBPL): We feel like we've lived through a nuclear war, a shark attack and whatever other horror you want to chuck in there.

DR BYRON: On the dispute resolution, I guess we have said in the draft report that we've come to the conclusion that in most states, most of the time, the ADR system seems to work reasonably well, which is not to say that it's perfect.

MRS ULUDONG (TBPL): Can we talk a little bit - or do you want to finish your point?

DR BYRON: Yes, I know that was on your list. We can explore how it might be approved. From what you've said it sounds to me like the conduct of that centre leasing person - again it sounds pretty unconscionable to me - - -

MRS ULUDONG (TBPL): Yes, go to the ACCC and say "unconscionable".

MR ULUDONG (TBPL): I would also add that I've read the definition of "unconscionable" and I can tick off every point they've got but how am I going to prove it and how do I go about it? I can't litigate.

MRS ULUDONG (TBPL): We have contacted the ACCC perhaps 20 times over

the last four years. Now, the best that we got with the ACCC was just before they closed our doors. In July of 2006 there was an investigator that started looking into our case. They also went and interviewed other tenants at the shopping centre.

MR ULUDONG (TBPL): I checked. I have not had any of these tenants confirm that yet.

MRS ULUDONG (TBPL): But two weeks after that they shut our doors, so that sent a clear message to other tenants in the shopping centre, "You are on your own, ACCC can't help you. No-one can help you. Look what happened to these guys. These guys were trying to negotiate on these issues with the landlord and the doors were locked on them."

MR ULUDONG (TBPL): This type of strategy is not uncommon even amongst media.

MRS ULUDONG (TBPL): The reason why we couldn't pay the rent for the last few months is we had made a decision early on that they weren't going to fix the problem because we spent two years paying lawyers because we found substantial flaws in the shopping centre to the extent that it was affecting the commercial viability of every single tenant there. We went to the landlord and explained to them what that problem was, how it was affecting us, and their response was they do not believe us. They maintained that position for two years. We engaged a lawyer and all that happened was letters exchanged backwards and forwards it became a different ballgame with the lawyers and all that. Most of the time we actually wrote the letters for the lawyers ourselves.

MR ULUDONG (TBPL): But to be fair, this is not a negotiation. You cannot negotiate something to which the other party doesn't believe exists. It's like trying to negotiate with the Jewish priest about whether or not what Jesus Christ said was right when he doesn't believe he was the Messiah. Do you know what I'm saying?

MRS ULUDONG (TBPL): That's not fair.

DR BYRON: I get the point.

MRS ULUDONG (TBPL): The other thing is, we've talked about the nature of the retail game and how you have to act really fast. You can't afford to have a period of two years where you're operating under restricted access to your premises or customers can't get to your store or the centre isn't commercially viable and the landlord is doing nothing about it. Then we had to make the decision, "Look, no-one is going to help us. Our only option is to cash up and sell everything."

MR ULUDONG (TBPL): Also keep in mind that with our correspondence with

the landlord, I'm not a whingeing tenant, I'm a statistician by trade. I provided them with the errors of their calculations, their mathematics were poor, to say the least; I provided them with the fact that they have understated on their approval process. They stated retail figures to the retail square metreage to the tune of 15,400-odd. On their own prospectus for investment portfolios listed on their web site they stated 16,900. I don't believe they're ignorant, and I believe they're not admitting to the issue for a good reason, but in this situation I think if you're going to make amendments to the legislation that people like us, when we have literally got the facts and figures, and I can't understand why, other than the fact that they can. Who is there to stop them?

I can tell you that I get the impression from dealing with these people across the table, after the whole royal Commission they truly believed they can do whatever they want and they have said as much to me. What is it about the legislation - or if there is a governing body what is it they do? If there is law, how is it implemented, besides an individual having to legislate.

DR BYRON: Is there a Western Australia state body - - -

MRS ULUDONG (TBPL): As I was saying before we basically had to make the decision, "Okay, we're going to sell all our assets, we're going to get to the end of this lease and walk away with nothing." But then what happened was because the problems at the shopping centre were so severe, and due to the nature of the problems, our trade experienced a severe downturn in 2006 to the point where that plan wasn't going to work. We tried to negotiate a rent reductions, saying, "Look, these problems are affecting us so therefore" - you know, tried to highlight the fact that we were good tenants, we were bringing in all these people to the shopping centre. But they refused to negotiate and we were basically told, or I was basically threatened that I was playing a very dangerous game and I'd better be very careful. At the time I was experiencing some health problems. We told them not to contact with me any more and just to deal with my husband.

MR ULUDONG (TBPL): Because I was always at work because I couldn't afford staff. My wife was pretty much holding down everything she could to hold down the fort.

MS ULUDONG (TBPL): They kept on contacting me and insinuating various things at the time. The ACCC wasn't acting, you know, they were taking their time. It took until October, and this was one month after the business was shut before we even got a letter response. In that particular letter it says that they're still investigating the situation and they will get back to us, but no-one has got back to us. So then they commenced - I had a severe health crisis on the day that they shut our doors and we contacted them and told them. One week after we told them they commenced legal action against us in the district court for \$30,000 in rent arrears.

We went to get legal representation to find out that it would cost us \$25,000 to get someone to represent us in the district court defending a claim of \$30,000, which doesn't quite add up.

MR ULUDONG (TBPL): Judging from our landlord's experience I doubt that that was unknown to them.

MS ULUDONG (TBPL): We still want to pursue our rights, so over the last year we've been working on a State Administrative Tribunal application ourselves. In November we put that application forward to SAT. Actually, we have to deliver some documents to their lawyers today after this. We're progressing in the State Administrative Tribunal representing ourselves, trying to the best we can because we can't afford a lawyer.

MR ULUDONG (TBPL): But even then we were told we need legal representation. The chief judge, I believe him, he said we should - I believe that he knows what's best and he advised that we should get legal representation. So the only point of mediation we've got I automatically feel yet again I'm at an inherent disadvantage with someone who not only has obviously more financial power behind them and that can afford every ounce of expertise in the world, but as far as I can tell are amoral for the way they've been conducting themselves with me, and are far from being experts in anything to do with negotiation.

It concerns me that here we are, yes, we've just commenced mediation, but my faith in this process when I'm already at an inherent disadvantage as stated by the chief justice, how much faith am I now, after what we've been through, expected to hold in the State Administrative Tribunal when I've been told I need legal representation, and after the situation we've been in can barely afford to keep a roof over my wife and child. That's not a favourable outcome and I don't see many options as far as what we can do. I mean, we are going to progress with this, but no doubt my lack of knowledge in technical matters of law and the tribunal will see me at a certain risk to which I am not in the position to calculate, and I'm a statistician. I don't like that, it bothers me badly.

MS ULUDONG (TBPL): So you mentioned unconscionable conduct, and we thought that we had a good case for unconscionable conduct. We felt that was quite clear. But when you go the lawyers there's a lot of debate around that word, even. As soon as you mention the word there's this prejudice against you. Then they get into all this legal debate over the definition of a word. It's like they play semantics. I think "unconscionable", that word, is just totally being used to distract everybody from what that law was actually intended to do in the first place.

MR ULUDONG (TBPL): Well, it seems so to us, and we don't understand such things very well.

DR BYRON: I think you understand it pretty well.

MS ULUDONG (TBPL): So that's another gap that we found through our experience that we feel needs to be addressed and some of the suggestions that have come forward is to perhaps change that word to "unfair" or "unethical", or I'm not sure what word you want to use.

DR BYRON: There was a lot of debate about that and my understanding is that the governments that have looked at it, well, the commonwealth government at least, deliberately decided not to use "unfair" or "unethical", although some of the state governments do say "unconscionable or unfair". Then again, it's up to the courts to interpret that. Sorry, you also said that you wanted to explain why there are other tenants in a similar situation who are not coming forward, and I think I can see where that's going. You don't have to say very much there.

MR ULUDONG (TBPL): I can put it simply. There was a tenant who is of ethnic descent, very strong accent, and at the culmination of my discussion with him he was very hesitant because he's currently in the period to which he's having to renegotiate his lease, and his one statement which I think summarises everything, "What can I do? It's a mafioso," which if you talk to anyone from the old country, if man who is 60 plus, it means quite a bit to someone who was raised in Italy and around there.

MS ULUDONG (TBPL): No offence to the mafioso.

MR ULUDONG (TBPL): You know, from what I understand that's pretty dire stuff, and he honestly felt like he had no choice. The police won't help him, the law won't help him. He's on his own and there's nothing he can do. That's the way these people feel, and that's probably the underlying reason why a lot of people aren't here today.

DR BYRON: One of the things - I honestly don't know what we can do to help in your particular case. But you said you're trying to make sure that nobody else has to go through this. What sort of changes to the system now or in the near future could basically prevent this happening again?

MS ULUDONG (TBPL): If there were changes to be made, like you said, I think for the last 10, 20 years these things have been going round in circles. I think there needs to be some radical changes. So if we're going to make those changes I think we really need to commit to how do we want this industry to go forward. of course the nature of the industry is changing, where it's been suggested perhaps these smaller retailers won't exist in shopping centres any more. But for right now there are still people that are vulnerable and exposed. Some of the radical ideas I thought of, and I know they're not going to be appropriate, but for example: I would suggest

a rent freeze until such problems can be fixed; perhaps getting rid of the ability of the lawyers to intervene during these things altogether, to hopefully balance out any dispute resolution process, whereby everyone has to mediate. I don't know, these are just some radical ideas that I was thinking of at 2 am in the morning.

DR BYRON: I can understand you've got a lot of time at 2 o'clock in the morning to think about things like that when you're lying awake. One of the things we've been thinking about is, you know, we could recommend that there be some sort of ombudsman who could move very, very quickly to deal with things, like within days, not wait six months to get a letter or something, because as you and a number of other people have said to us if there's an immediate access dispute or if your customers can't get into the building or whatever you need someone to sort it out immediately, not in a few months time.

MS ULUDONG (TBPL): Yes.

DR BYRON: Somebody who actually had the power to force through corrective action. People suggested to us last week that rather than having a code of behaviour or a code of conduct that if there were ombudsmen in each state for retail or commercial tenancies that those people would themselves sit down and make a list of what sort of behaviour they thought was acceptable and what was unacceptable. I think the sorts of things you've talked about would all fall on the clearly unacceptable side of that ledger. But whether that's enough, well - - -

MS ULUDONG (TBPL): Yes, I think that's a good starting point. But certainly there are - if I use the analogy of a bucket there are holes in a lot of areas where the water is leaking. So we can't just say, "Well, we're going to do this one thing and that's going to fix all the problems." Just like what you said before.

DR BYRON: Yes, there's no magic silver bullet for this.

MS ULUDONG (TBPL): Yes.

DR BYRON: But maybe if the Western Australian commercial retail tenancy ombudsman had the power to say that, "The rent doesn't have to be paid until this problem is sorted out," that might focus the mind a bit and get people to sort it out fairly quickly.

MS ULUDONG (TBPL): Yes.

DR BYRON: Just hypothetically. But this person would need to have some power to kick a few goals and not be purely advisory.

MS ULUDONG (TBPL): Yes, I agree.

DR BYRON: Sorry, I'm not trying to put words in your mouth.

MS ULUDONG (TBPL): No, I think that's a great idea.

DR BYRON: Well, it's not mine. I can't take any credit for it.

MS ULUDONG (TBPL): Well, whoever's idea it is, it's a good idea.

MR ULUDONG (TBPL): Well, I was also thinking something similar to the triple A credit rating required for a major media agency to have authorisation to put media with any of the available media and be available to media discounts. So I guess in the real estate agent or the retail leasing agency I guess the only thing that would be pertinent would be like the guarantees. For any given business there are director guarantees that are to be held with a neutral third party. I think someone mentioned at one of the hearings whether that could be used - - -

MS ULUDONG (TBPL): The Reserve.

MR ULUDONG (TBPL): Or the Reserve Bank, and that could be used to fund a committee. But I was thinking something like the Australian Broadcast Association which has a nomination amongst all the major groups, so you could look at the same sort of committee-type system there to which would rule as to whether or not someone who was applying or a landlord who is taking on guarantees on behalf of - for rent tenants, that ability to do so can be controlled. So if someone is not behaving or conducting themselves in such a fashion similar to the major media groups, media buying groups here in Australia, "You're a naughty boy. You get credit rating revoked." You can no longer basically, by virtue of not being able to process a guarantee for your tenants, take on new tenants until they have similar fate, that you are in fact conducting yourself in an appropriate manner to whatever standard you want to hold them to. I don't know if that is possible but it was just something that I thought of - I believe I - I've been reading a lot of stuff so I really can't remember too well but I believe it was something from the Sydney day, the fourth in Sydney. I believe someone said it then.

DR BYRON: Yes, I think I remember that too.

MR ULUDONG (TBPL): But that's the only kind of - my experience isn't as strong in retail as it is in media and that's the only thing I can think of as far as what you have suggested.

MS ULUDONG (TBPL): So if we could just wrap it up, I guess, on the points of "small business people are stupid" I would like to suggest there that just because a landlord has this supposed 35 years' experience and can use the system to screw

people over doesn't mean that they're great negotiators and the tenants are stupid, if you get my point. It's like when Martin was up here and it's like I've noticed throughout the transcripts that sometimes they try and put the blame on the tenants in that, "Oh well, they didn't do their homework," and, "They didn't do this," and, "They're bad business people," and all of this. Yes, that may occur but due to the kind of problem that we're talking about I think it also shows that there's more to it than just that.

MR ULUDONG (TBPL): They're perhaps not in the majority.

MS ULUDONG (TBPL): Some people may be deliberately being misled or deceived or unfair tactics are being used. The problem is - I think a lot of the problems have been talked about once you sign the lease and - some people sign the lease where they have to amortise the cost over the five-year period and various other things. Then they've invested so much so then it's hard to walk away after a five-year lease. So there's all those other issues where I don't think that the tenant is necessarily stupid. However, I would advise any future tenant not to enter into this industry unless these problems are addressed and fixed in the future.

MR ULUDONG (TBPL): Or the power to litigate is at hand.

DR BYRON: Yes. Well, I mean that again reminds me of - the situation was, apparently, with franchisors some years ago where so many people were getting so badly burnt - that was when they came up with this franchise code which is enforceable by the ACCC. I don't expect that carries much weight with you but apparently it has really cleaned up what used to be a pretty sordid industry.

MS ULUDONG (TBPL): I support a code of conduct, possibly mandatory, rather than voluntary.

DR BYRON: Yes. Well, I think the franchising one is compulsory.

MS ULUDONG (TBPL): Compulsory, yes.

DR BYRON: But I mean that's another way of controlling the cowboys in the industry. The franchise people are now saying that it's actually - the industry is now held in good regard and respect - - -

MS ULUDONG (TBPL): Yes.

DR BYRON: - - - because they got all the cowboys out of it.

MS ULUDONG (TBPL): I think that's what both parties want at the end of the day. I think sometimes in this forum there seems to be these polarised views and

passions and people can be antagonistic towards to each other. But I think that at the end of the day it would benefit everybody involved if these types of things aren't allowed to happen in the future. On my final point I wanted to talk about a fair go. One of the things that I was a little bit concerned about is on the first day of the hearings I read that you made the statement that the Productivity Commission doesn't do fair very well.

DR BYRON: We're not set up to do fair.

MS ULUDONG (TBPL): Yes.

DR BYRON: But the politicians are.

MS ULUDONG (TBPL): Yes, but I think it's important that we consider fairness considering we say, "Oh well, Australia, one of the tenets of being an Australian is that you have a fair go," and everybody, you know, has equal rights. I have to say through this experience I feel like people have tried to take my rights away.

DR BYRON: I can understand that. Yes, I think you're right.

MS ULUDONG (TBPL): I'm not going to give my rights away.

MR ULUDONG (TBPL): It would be nice to know that when these very large companies come over to this part of the world and this little corner of Australia that they conduct themselves in ways that befit the Australian public and the ways to which the public deserve, that's all.

MS ULUDONG (TBPL): We're not - and you used the analogy also of a school child coming up to the teacher saying, "This isn't fair, this isn't fair," when really they're complaining about the fact that they didn't get the outcome that they wanted. Yes, the outcome was not what we wanted but what we wanted more so is the opportunity, a real opportunity, a genuine opportunity, to begin with. We feel that this situation highlights that the landlord set us up to fail and they knew that we were going to fail.

DR BYRON: They're not responsible for that.

MS ULUDONG (TBPL): They are responsible for that.

DR BYRON: Well, there's no way of holding them accountable, I think was one of your first points, that they can do these things with - - -

MS ULUDONG (TBPL): Currently. I mean we're going to do our best to try and hold them accountable because we've managed to accumulate some evidence now,

after five years where we can show they have made errors in calculations, they've made errors. But yes, do we have faith in the law that with all this truth and evidence that that will get us anywhere? I don't know, but we're going to give it a go.

MR ULUDONG (TBPL): Make no mistake, we're fighting it uphill. We mentioned to the local council. I've actually heard little comments from the politicians saying they hope this goes away. This is not something that isn't broadly known about. Just very little is done about it and I can't seem to find anyone who can do anything about it or is willing to do anything about it.

MS ULUDONG (TBPL): So what we're asking is that the good people who are in a position to do something about it do something about it, so like I said, other people will not have to go through this experience. That's all we have to say today, and thank you for your time.

DR BYRON: I thank you both very much for sharing that with us. I do apologise if things that I said in a different time and place, you thought were directly intended at you. I don't think I've ever said that I thought tenants were stupid.

MS ULUDONG (TBPL): I know, but - - -

DR BYRON: But I sometimes wonder about, you know, the guy who said, "The lawyer told me not to do it because all these things would happen and so I fired him."

MR ULUDONG (TBPL): I've seen some examples in the hearing that were shocking, yes.

DR BYRON: However, even if there are some cases where people didn't do their homework I know there are cases, including yours, where you did all the homework and you came up against someone who was apparently just completely ruthless and didn't negotiate. Banging their fist on the table is not negotiating.

MR ULUDONG (TBPL): I'm not holding my previous industry of media and advertising up in a high stature. I'm just surprised, and my eyes were opened even further, and I've come across it in the industry I'm in, you know, I found it rather impressive.

DR BYRON: Thank you very much for taking the trouble and being so open about your experience. I wish you every success.

MS ULUDONG (TBPL): Thank you. Thank you for your time today.

MR ULUDONG (TBPL): Thank you for your time.

DR BYRON: I did say this morning that if anybody else wanted to come forward and say their piece on the public record there would be an opportunity.

MS HAINES (SPL): My name is Michelle Haines. I work for Savills in Perth. I'm a retail property manager, and I'd just like to say on the record that I'm very compassionate to you poor people that you've suffered such a terrible experience, and that not all centre managers and property managers are like that, and we don't certainly exhibit - and I agree - unconscionable behaviour. That's it.

DR BYRON: Thank you very much, Michelle, for putting that on the record. There have been a few cases as we've gone around the traps, only a few, where people have been able to point out shopping centre management doing "the right thing" of seeing that a tenant was getting into trouble, giving them rent relief, having mentors and advisers, helping get their business back on track and they went on to have a very long and happy and mutually successful relationship. I just wish I'd heard a lot more stories like that. But at least it tells me it is possible, that not everybody has to be ruthless. Sir, if you'd again just take a seat, tell us your name.

MR NG (WSK): Excuse me, my English is not that good. I got a retail in - - -

DR BYRON: Sorry, name?

MR NG (WSK): Sorry, Ray Ng. Ray, R-a-y N-g. I've got a retail shops in Freemantle, and actually I've been there since 95, that's about 12 years. My first lease was I got assignment from the previous owner, then I got a renewal of 10 years lease which is supposed to end in 2010. So I think about four years ago I had a - the landlord came and said they wanted to do some renovations. But after waiting for nearly half a year they said they're not going to go ahead with that, with the renovation. Not only that, after six months they told me that when my lease ends they're not going to renew it. So I don't know where - what option have I got?

DR BYRON: I guess the - - -

MR NG (WSK): Which means I'm just counting the days, you see.

DR BYRON: Yes, I understand that.

MR NG (WSK): Because I paid quite a lot of goodwill when I bought the business, you see. So if at the end of the lease I've got to walk away, which means my goodwill will be divided by the - you know, like what I save is 10 years, which means if I pay - like if I pay 20,000 rent now I have to pay 40,000 for that period of rent, for the period of tenancy. So I don't know what options I've got, you see.

DR BYRON: Are you in the street or in a shopping centre?

MR NG (WSK): Actually we're in the train station, you see.

DR BYRON: Okay, train station.

MR NG (WSK): Yes, that's the - I don't know, is the government property.

DR BYRON: To be completely honest I don't know the detail of the system here, but I think maybe you should talk to the retail tenancy unit of the state government and they can tell you about what the options are that you have.

MR NG (WSK): But government property, is it considered commercial? Is it that you've got separate rules?

DR BYRON: I don't know. If you can leave some address, phone number, et cetera, we'll see if we can make some inquiries to find out what's happening. But at the moment I don't actually know what the answer would be.

MR NG (WSK): I see. So I just give my name and address.

DR BYRON: But thank you very much for raising that with us, and we'll see if we can do some homework and get back.

MR NG (WSK): The other point is that, you know, I tried to sell the business but I don't know whether because they've been telling me - we brought in a potential buyer but the agent has been telling them they're not going to, you know, extend the lease when the lease is finished. But the other things is I want to know whether - because at that time it was about three, four years, you see. Are they allowed to tell the tenant that, you know, the new people, that the lease is not going to renew?

DR BYRON: Again - - -

MR NG (WSK): Because there was a remainder of three or four years' tenure, at least there is some goodwill. But when the managing agent mentioned that they are not going to renew people walk away, you see.

DR BYRON: Yes, which is not really surprising.

MR NG (WSK): I don't know whether they have the right to do that.

DR BYRON: We'll inquire about that too. I'm not sure, but we'll try to find out for you.

MR NG (WSK): I mean if it is three months maybe they tell them, but it is three years so anything can happen. Why have they got to tell them, you see? It's up to the new people to make the decision. But straight away when they tell them then people will not - - -

DR BYRON: Yes, they walk away.

MR NG (WSK): All right, thank you.

DR BYRON: Thank you very much, and you'll hear from us later. I think we can now conclude the hearings and we'll resume on Wednesday morning in Adelaide. Thank you very much, ladies and gentlemen.

AT 4.19 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 20 FEBRUARY 2008

INDEX

	<u>Page</u>
PHARMACY 777: MICHAEL DILLON	666-676
PHARMACY GUILD OF AUSTRALIA: ANGELO SOMMARIVA STEVEN WRAGG	677-687
RETAIL TRADERS ASSOCIATION OF W.A.: WAYNE SPENCER ANTHONY HISCOX CRAIG TIGHE	688-708
W.A. RETAILERS ASSOCIATION INC: MARTIN DEMPSEY	709-741
AUSTRALIAN NEWSAGENTS FEDERATION: NEVILLE ROEDIGER	731-739
TIA BELAU PTY LTD: MARY ULUDONG YMAL ULUDONG	740-756
SAVILLS (W.A.) PTY LTD: MICHELLE HAINES	756
WHISTLE STOP KIOSK: RAY NG	756-759