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PRODUCTIVITY COMMISSION

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

DR N. BYRON, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON WEDNESDAY, 6 FEBRUARY 2008, AT 9.04 AM

Continued from 5/2/08

DR BYRON: Good morning, ladies and gentlemen. Welcome to the third day of the public hearings of the Productivity Commission's inquiry into the market for retail tenancy leases in Australia. My name is Neil Byron. I am the Presiding Commissioner for this inquiry, which began with a reference from the Australian government on 21 June last year. We have already had hearings here yesterday and the day before, and last Friday in Canberra. Next week we're in Brisbane and then Melbourne, and the following week in Adelaide and then Perth.

The purpose of these hearings is to facilitate public scrutiny on the Commission's draft report and to get feedback and comment on that draft. We fully understand the importance of the subject material that we're looking at and how for many individual traders there's a great deal at stake, and that a number of issues can raise passions. We're trying to analyse the evidence that we've received as objectively as we can, and we're trying to test that the evidence we've received in the past is both complete and correct. We're trying to look at what has worked and not worked in terms of previous government policies in this area, and to assess what the Australian and state and territory governments should or should not do with regard to these matters.

After we've finished these hearings, we have until 31 March to finalise the report and submit it to the treasurer and the Australian government. The report should then be released within 25 parliamentary sitting days in the House of Representatives, sometimes - not always - with the government's response to whatever recommendations we make. We always try and keep these hearings as informal as possible, although the Productivity Commission Act does require that people should "be truthful in giving their evidence".

Because we're taking a full transcript for the public record, it's not helpful to have comments or interjection from the floor; but if anybody has a point that they want to make, I always give the opportunity for anyone in the room to come forward at the end of the day and put forward their point of view on the record. Whether that's something you want to say in response to evidence that someone else has given or perhaps somebody who has already given evidence and thought of something else they wanted to say, but had forgotten, that's fine. There will be opportunities for anybody in the room to say their piece, but that will come sort of at the end of the day's advertised program.

We will make the transcript available to participants to check that they haven't been misquoted, and then after that checking it will be available on the Commission's web site as soon as possible. It depends how fast it's checked, but usually within about a week. Transcripts can also be purchased and there are order forms outside. Just for the record, the emergency procedures: the exit is straight out the way you came through the foyer, and across the road. The toilet facilities are just along the

hallway there. Anybody who has got a mobile phone with you, could you turn it off or into silent mode. I think that's enough housekeeping for this morning.

I'd like to start today's hearings by welcoming Mr Bruce Crowe; if you'd like to come and take a seat in front of any of those microphones. When you're comfortable and settled down - you know, any papers you've got sorted - then if you would sort of summarise the main points that you want to make in response to the draft report or the information that you want to give us and then we can talk about that. We've allowed, I guess, about 45 minutes for this. You don't have to talk for that long though. Thank you very much for coming.

MR CROWE: I have to be somewhere else at 10 o'clock.

DR BYRON: Okay, we won't keep you.

MR CROWE: What I prepared was a statement which I had intended to be an example of the effects of the present rules, laws and regulations as they affect a particular individual landlord in their relations with their tenants. It fits in with the draft report principles, but it's not a comment upon or an examination of those. It does ask at the end for particular things to be considered in whatever you recommend. I wanted to place before you some practical examples of the effects of the current rules that may help put a bit more meat around some of the things that you're looking at.

The purpose of my statement is to talk about what has happened in particular tenancies over the last 12 months or so that I feel is not conducive to healthy landlord and tenant relations under the present rules.

DR BYRON: Thanks. This is an elaboration on the first submission that you sent us in - - -

MR CROWE: The first submission was a direct response to the specific questions asked.

DR BYRON: Yes.

MR CROWE: And I did not elaborate at that time - I simply responded to the questions - but there was a lot of background and context to my comments then, so this would provide some of that context.

DR BYRON: Thanks.

MR CROWE: Mr Commissioner, I make this statement without prejudice and in

confidence to the inquiry. My name is Bruce Crowe. [Personal/confidential details withheld]. The statement is made from memory of events in 2007-08. My wife's family - - -

DR BYRON: Sorry, could I just check - the transcript is normally a public document.

MR CROWE: I mention one legal firm in this document. I probably would prefer, before it went public, that that be removed.

DR BYRON: We can do that.

MR CROWE: Otherwise, I've kept away from mentioning names, people, places and so on.

DR BYRON: I don't want you to disclose anything that would cause you or anybody else any particular problems - - -

MR CROWE: That's why I mention this.

DR BYRON: Okay.

MR CROWE: I've mentioned one legal firm, but that could be suppressed by your editing processes; or would you like me to re-submit? I've given you an electronic copy. I can email a revised electronic copy later today or tomorrow.

DR BYRON: Sorry, were you planning to read this whole statement into the transcript?

MR CROWE: That was my intent.

DR BYRON: I'm just wondering if that's the most efficient use of your time here or whether it would be more useful if we can sort of take this as given and we talk about the key points that arise out of it - - -

MR CROWE: Good, that's fine.

DR BYRON: - - - and what else to do about it.

MR CROWE: Yes, I understand.

DR BYRON: I've reread yesterday your initial statement, so I understand the general issues. I'm not sure that it's particularly helpful to go through all the very

specific details of this case. It's very important to have your evidence, because I think you're one of the few people who are raising issues of how the retail tenancy legislation affects a small landlord. We've heard a lot from small retailers and we've heard a lot from large shopping centre owners, but we haven't heard much from, you know, people from this point of view.

MR CROWE: Mm'hm.

DR BYRON: I think rather than getting too far into the details and the specifics of this one case, we might spend our time here more usefully talking about some of the - - -

MR CROWE: I can encapsulate it for you quite briefly and then we'll see where that goes.

DR BYRON: Thanks.

MR CROWE: Essentially what has happened is that particular tenants have used particular solicitors to delay and defer on payments. These payments relate to rents and they also relate to disbursements which, under the terms of the lease, were the responsibility of the tenant to meet. Various means have been used by these parties to delay the payments and to challenge the payments, such that they get very far behind and it becomes very difficult to try and recover the moneys and also to recover them in an orderly manner so that we know just where we stand financially.

The cost to the landlord is the foregone income, the cost of servicing his outgoings and his reputation, because he receives notices that things haven't been paid that he thought had been paid and that's adversely affecting his credit rating. It's the behaviour of people avoiding and using the present regulation, such as the 14-day grace period before interest is payable, and also using their interpretation of the mediation process. The court views that if the tenant is trying hard and showing signs of paying, then in fact it's very hard to lock a tenant out and to force them to produce the moneys. Our experience has been, over the last 12 months, that we've been up to six months behind in collecting moneys from particular tenants. At the moment one of those tenants has just moved on and there is a net of some \$12,000 owing at the end of that person's time, which is indicative of the scale of the matters.

Now, the impact in terms of small landlords. The small landlord - principal landlord - is an 85-year-old gentleman who in fact earned these properties by working greengroceries in them for over 40 years and who brought his family up in the upstairs rooms over these; so they are earned properties, they are not investment properties. He is relying upon them for his superannuation and, being at an advanced age, becomes very concerned when things aren't in an orderly manner. That has

ramifications through to the family who have to provide support, and I as a distant member of that family also get involved in some of the management issues and dealing with solicitors and so on.

The amount of inconvenience, work, cost, disruption, stress, caused by these behaviours, is quite considerable. In our understanding - simple understanding - and in accordance with one of the things that's already in your draft recommending that consideration be given to returning to straight contract arrangements rather than the special arrangements that are given for retail, I think we'd be moving in the right direction so that in fact the normal contract laws and rules would apply to these situations rather than special rules and special jurisdictions that appear on the face of it to be one-sided in the way in which they treat certain matters. That's the gist of the argument, sir.

DR BYRON: That's an excellent summary and we would probably need to have a bit more detail than that, but that might come out if we talk through some of those points that you've just raised.

MR CROWE: Certainly.

DR BYRON: I'm sorry, I didn't mean to cut you off. I'm just trying to get the maximum value out of the time we've got with you.

MR CROWE: No, I've paused, sir. I've made a reasonable summary.

DR BYRON: Yes, thanks. The reason that I think this case is of such interest to us is that a lot of the legislation introduced by the state governments all around Australia is basically about protecting small retail tenants from what is seen to be the excessive power of large landlords such as big shopping centres. If I can summarise your summary, that legislation has tipped the balance too far so that some small tenants can exploit that when they're actually dealing with another small landlord.

MR CROWE: That is correct.

DR BYRON: Yes, okay. There really is no argument for special protection for small tenants if they're in fact tenants of a very small landlord who has got no greater punch or power than the tenant has. In terms of the cost to the landlord and reputation, credit rating, et cetera, I can easily see how all that happens. Can you expand a little bit more on the tactics that the tenants have used to delay or, you know, avoid payment. You said before about the role of a particular legal - do you think that there is this legal firm or a number of firms who specialise in finding ways that tenants can avoid their obligations?

MR CROWE: Yes.

DR BYRON: Okay. I mean, we've heard stories about tenants who have complained about how they've been locked out by the landlord, et cetera, and yet we haven't heard - well, only two or three stories like this one where it is the small landlord who is the one who has been disadvantaged. I would just like you to elaborate a bit more on that.

MR CROWE: Yes.

DR BYRON: Why do they do it?

MR CROWE: They do it by not paying the rent on the due date and then the lease allows a 14-day grace period before interest is due on the overdue payment. What they will do to save paying the interest is to pay on the 14th day. If they do this systematically, then a landlord loses two weeks of interest on that rent consistently.

DR BYRON: Yes.

MR CROWE: Then they will sometimes pay part of the rent within the 14 days and not all of it. Our solicitor advises us that that is an indication of intent, of goodwill, to pay, and therefore if we were to take that before arbitration or use it as a case for lock-out and it was taken to a judge, we would be told that the tenant was trying and showing good faith, and trying to pay their rent and therefore we would fail.

DR BYRON: Does a tenant need to give reasons for why they couldn't make the full rent payment?

MR CROWE: There's no requirement. In our cases they don't offer the reasons or they offer different reasons. One tenant, for instance, offered the reason that he was refinancing. Another tenant offered the reason - no, didn't offer any particular reason, just got into a chronic state of paying late. One of the tenants, we found out subsequently, had become bankrupt and hadn't bothered to tell us, nor had his solicitor. That particular tenant's financial payment patterns changed around about the time the person was made bankrupt; but I found that out by doing a search with the people in King Street who keep a record of those things.

Another way is if the tenant is required to pay the outgoings, such as the council rates for instance, then they are passed on through the agent to the tenant for payment. If the tenant doesn't pay that and no-one is monitoring it, then we don't know that it's not being paid until such time as the council sends us a notice and in fact sends us a notice of compliance and a threat to take us to court if we don't pay

within a certain time. That was the first we knew about the fact that rates last year were well and truly overdue and hadn't been paid. There was no argument about them being an obligation of the tenant and no argument about the notice being given.

Another way in which that tenant and the solicitor have caused delays is to dispute that the amounts we advise them that are due for land tax, for instance, are correct. The land tax has to be computed as part of a larger amount of land tax. That is done by the accountant and that amount of money is asked of the tenant. The tenant and their solicitor challenge that and then we respond to that challenge with the detailed calculation and they come back and dispute it again. This can happen up to - in our case it has happened up to three times that they've done this, so that it gets up to six months behind in terms of the payments and the landlord is carrying that cost, and trying to deal with it in that time.

Another tenant had a habit of putting their cheque under the door of the agents - managing agents - on the 14th day after it was due, in the evening after hours, so that it could not be cleared until the following week. They'd do it on a Friday night or a Saturday night. It couldn't be cleared until the following week, so by about the Wednesday we'd find that the cheque was rubber; it bounced. Then we have to seek the issue of another cheque, so there we are, we're now three weeks behind; but because the person gave a cheque, again our solicitor advises us that the person is showing good faith and trying to pay it.

When these things happen time after time after time, they are part of a pattern of avoidance of payment, not a one-off bit of bad luck in one month - in which we could understand that and which in fact I assume that the 14-day grace in the Act is intended to provide for that situation and to accommodate that. With proper communication, that can always be done, but when it becomes chronic as it has done with two tenants in our case over this last 12 months, then it becomes quite a management issue. It's a management issue for us to trace the moneys and to track it back through the agent's statements as well as through bank deposits, and to be sure that we know that we're correct and then to persuade the tenant through their solicitor.

At one stage the solicitor put the tenant in touch with our solicitor and when our solicitor said to the other party's solicitor, "This fellow has approached me directly," the other party's solicitor said, "Oh, you can talk to him directly," as if to say, "I'm no longer representing him." Well, our solicitor did talk to the fellow directly; they did come to a verbal agreement. That was put into writing, that was sent to the tenant, but the response comes back from the other party's solicitor and denies that that's what was agreed, and asks for further information. So, it's this obfuscation and this avoidance pattern of behaviour going on continuously that puts it behind and causes the stress and the strain and the workload for the landlord, and

his family. It's not just him.

DR BYRON: Yes. Okay, I'm wondering to what extent there are things that are within the control of the landlord and his family representatives in terms of - I understand your point about the legislative system seems to give a lot more scope for delinquency, but in terms of the landlord's responsibility, in terms of checking out the credentials and the track record of these people before they took their leases, can I - well, I'll ask it rather than presume - - -

MR CROWE: You can ask it - - -

DR BYRON: You did those sorts of due diligence checks and - - -

MR CROWE: In one case the person was starting up their business. They were given a one-year lease to start with, on fairly generous terms, and when it came to the end of that year they wanted to convert that into a three-year lease, which was allowed for, on the same terms that were in the original one-year lease. The credentialling checks that were done before then were, as far as I'm aware, satisfactory. I didn't conduct them. I don't know the full details, but they were done by the agents as far as I know to the satisfaction of the parties; but I don't know what the details were.

In the case of the other party, which is the one that's most troublesome to us, they sort of took over the lease from some other parties. The previous tenants kind of sold on the business and those people moved into the lease at a time when the aged parents solely were looking after the properties with a long-term family solicitor, who was also aged whom we've since moved away from because of, shall we say, incompleteness in that person's work. We do suffer to some extent from that incompleteness filtering through still into the leases that we've got - - -

DR BYRON: So how long have those people been there?

MR CROWE: One screening check that I was involved with back in January or so this year, the tenant who was seeking a renewal simply offered a piece of paper which had their claimed assets on it and their claimed liabilities, and a sum. The assets were basically their house. Now, that was the same tenant who four months before had been made bankrupt but he didn't disclose his bankruptcy. We didn't check at that stage. I said to the solicitor, "Is there any way of checking this and getting more information?" I was told not to bother too much about it. If we could get a bank guarantee for the thing, which we tried to - we built into subsequent drafts of the lease, but we didn't have it at that time. Our advice from our solicitor was that the lease was sufficiently porous that in fact we would have difficulty enforcing it.

About April-May, I did the check of the person's credentials and found out that they had been made bankrupt, and that explained why the person had been trying to get a renewal in someone else's name in a trust and so on; so it couldn't be a renewal, it had to be a totally new lease. When we found that out, it changed the circumstances. Again. The answer to your question is a limited amount of financial checking was done beforehand and it was done under circumstances where we did not have an appropriate control over it.

DR BYRON: Okay, thanks. Those inadequate checks have been haunting you basically, since - - -

MR CROWE: Correct. They have stayed to haunt, because the solicitor we've been using for the last 12 months has pointed out these deficiencies and said that we really do have some difficulties until we get people onto new leases. That's what we've been trying to do.

DR BYRON: Okay, yes. The points that you made about the land tax and the rates payments, would those have been less of a problem if it was a different form of lease where rather than making the tenant directly responsible for those payments, those amounts were basically just added onto the rent payments and you would take care of those payments yourself?

MR CROWE: That is what our current lease that we are proposing for a new tenant, does. We decided some time earlier last year that we would have to move to that because it was too messy and too difficult doing it the other way. The challenge with that of course is to make realistic estimates of what's going to happen in light of the lease. For instance, the land tax estimates came in in January and they are up 7.6 per cent on the previous year. We had allowed for 5 per cent, so we had to go back and do our sums again to see whether what we had on offer for prospective tenants was going to work.

Probably the implication of that is that the review time for what is a marketable rent needs to be kept short to the three years and not out to five years, because it's too long. I think that's the implication of that but, yes, that would make it more reasonable. It would also make it more reasonable if in fact the payments were made as a result of a bank order. In other words, a periodic bank order so that it's transferred each month electronically; that it is for the total amount. That would be the ideal situation because immediately it would be flagged, if the payment wasn't made, that there was an overdue situation. It would have to be an intentional overdue situation because the order would have to be cancelled by the tenant and that may strengthen the hand of the landlord to recover the situation.

DR BYRON: Can we switch now to the topic of mediation, because we've made

the comment in our draft report that it seems on the whole even though the system may not be perfect, there does seem to be a fairly good system in each state for affordable, easy-accessible and pretty effective dispute resolution mechanisms. Have you tried mediation on this one?

MR CROWE: We were advised by both our solicitors at the time that mediation wouldn't work for us, particularly in view of the porousness of the leases that we had.

DR BYRON: Because, for example, the Small Business Commissioner in Victoria has told me that the great majority of the cases that go to mediation there are between the small landlord and the small tenant in this sort of situation.

MR CROWE: Yes.

DR BYRON: There's a certain amount of, sort of, "he says/she says". He has told us that, you know, the mediation system there seems to work fairly well. Yesterday we had a solicitor who is also on a mediation panel with the Retail Tenancy Unit, tell us that, you know, the New South Wales system seems to work pretty well.

MR CROWE: I personally don't have experience of it. We were advised by our solicitors at the time that it was biased, in favour of tenants, and therefore we would probably not succeed. I understand that the senior landlord gentleman once before went to a mediation or arbitration, some years ago - I don't know the details of the matter. I wasn't involved with it - and was disappointed with the outcome.

DR BYRON: Yes.

MR CROWE: I am a qualified mediator myself. I don't do this mediation, I do workplace mediation - so I do understand the mediation process. My observation and what I've been told is that the mediation process that actually happens is somewhere between mediation and arbitration. In other words, it goes a little bit further than conciliation sometimes and suggesting what might be done.

DR BYRON: Yes. You're basically relying on other people's advice to you about what's likely to happen, rather than personal experience.

MR CROWE: Correct. I haven't tested it myself, correct.

DR BYRON: Thanks for clearing that up. Can we go back to - you said you had some suggestions about the sorts of things that we might consider in terms of public policy. I mean, our job is not to deal with individual disputes, but to look at the system as a whole.

MR CROWE: I understand that. If you look at - - -

DR BYRON: How can the system be improved?

MR CROWE: If you look at paragraph 47 of my statement there, I've simply got two general requests: first, that small landlords not be saddled with any heavy-handed laws and regulations that might be suitable for dealing with larger landlords with significant market power, such as have been named in recent months on talkback radio. Such laws would probably increase the rights and options for tenants at the expense of landlords and that's a matter which you have already shown you recognise.

Second, I ask that small landlords be protected from predatory behaviour by delinquent tenants, and there I've used the word "conniving" in the Oxford Dictionary sense, of appearing to agree with their tenants. The present laws seem to permit a return to standard commercial contract laws for landlord and tenant agreements and would be a move in the right direction of having a level playing field for both parties, and those in the most general terms are my requests of you. I don't have more specific suggestions about specific things.

DR BYRON: Yes, I'm just wondering - the point about returning to normal commercial law - whether most other small landlords and small tenants would basically be of the same view as that.

MR CROWE: I haven't surveyed them, sir.

DR BYRON: No, of course, but I guess the thing that particularly differentiates this case is that there may well be delinquent tenants and derelict landlords and so on but you're suggesting that legislation provides loopholes for lawyers who want to advise their clients in a certain direction to milk the system to the maximum.

MR CROWE: What I mean by that is the allowance under the regulations for these days of grace and the case law interpretations I've been given by my legal advisers of the way in which matters would be interpreted that came before those jurisdictions.

DR BYRON: The signs of good faith and intent.

MR CROWE: Yes.

DR BYRON: Although somebody else may read signs of bad faith and a different intent - - -

MR CROWE: Exactly.

DR BYRON: - - - into the same evidence.

MR CROWE: Exactly.

DR BYRON: I think, yes, in this whole area there is sort of a presumption that the tenants are generally the less powerful and the victims of the tenants who have all the power and you're making a fairly strong case that it's not always thus.

MR CROWE: If you're relying upon your income from your tenancy to pay your own bills and maintenance and to service other matters and it doesn't happen, then you draw upon your reserves or you have to go and borrow and it really is not a satisfactory situation.

DR BYRON: Yes. In looking at the legislation, we've reviewed all the arguments that were put that led to the legislation - you know, the second reading speeches in the parliaments and so on - and, as far as we can see, the intent of most of this legislation was to protect very small tenants operating in very large shopping centres and yet that same legislation applies to everybody, including a very small landlord with his two old shops.

MR CROWE: Yes.

DR BYRON: I think we've got that point pretty clear. Thank you very much for making it.

MR CROWE: Thank you very much.

DR BYRON: I'm sorry for cutting you off there.

MR CROWE: No, that's fine. Do I need to do something about this statement that I've provided you with? Will the transcript be what we have been speaking here now - - -

DR BYRON: The transcript will go on the web site. I think it's probably better if we keep the full statement that you've given us as a confidential submission.

MR CROWE: That's what I'd prefer.

DR BYRON: Yes, that's what we'll do. Thank you very much for coming.

MR CROWE: Thank you for having me.

DR BYRON: Next we've got Mr Bruce York. Thanks for coming, Mr York; if you'd like to take a seat there. Mr York, if you'd just introduce yourself briefly for the transcript and then take us through the main points. Thanks for your written submissions which we have received and read carefully.

MR YORK: My name is Bruce York. I am retired. In July last year I retired as the national lease administration manager for Woolworths Limited. So I speak today on my own behalf, obviously gauged from my experience in the industry. I worked for Big W and Woolworths for about 14 years before I retired. I am a CPA and a fellow of the Chartered Institute of Company Secretaries.

One of the significant things that I did in working for Woolworths was that I was their representative on the Australian Retailers Association property subcommittee for a number of years and, in that role, I was appointed as being the chairman of a subcommittee which looked particularly into the management fees, but which was extended to cover the whole of outgoings. In that committee which I formed, which consisted of a representative from Coles Myer and David Jones, we came to a conclusion that there were some very serious common problems in the areas of outgoings and we wrote an outgoings code of conduct which was passed by the Australian Retail Association Committee and that recommended a number of substantial changes which were mostly outside the requirements of the varying state acts and which we saw as critical.

That was rejected by the property council at a meeting that we held with them as adding too much to their costs of accountability and so the matter languished a little bit and shortly after that, as you know, there was a breakup in the Australian Retail Association; both Coles Myer and Woolworths - I'm not too sure about David Jones - left that committee and subsequently formed their own retail association which did not have a property committee. So from that point of view, my personal involvement in that ceased, but during that involvement I was not only exposed to those other three major retailers, but to many specialty tenants who used to come and were members of the committee which I think probably I was on for about four years.

Having lobbied state governments fairly significantly over my time in Woolworths to listen to and read the outgoings code, probably the only success that I could see was in New South Wales; when they last changed the regulations they allowed the tenant to question the auditor, which wasn't the extent of the recommendations of the code. One of the most significant - there were two or three significant things and one of the most significant things, if I had to do one thing in Australia which was mentioned and covered by the code, was to introduce the ability of tenants to audit outgoings.

It is with that thrust that I make my thrust to the Productivity Commission and appeal for that transparency and justice which the retailers seek - would be well and truly satisfied by this. It would be satisfied not only because of the ability of a tenant to appoint an auditor and to have them do it - in the case of the code it required three tenants in a shopping centre to give some measure of the thing being a real need - but also the audit threat, if you like to use that word, would also bring to heel the landlords in terms of them making sure that they presented outgoing statements honestly.

By the nature of the fact that I worked for Woolworths, I dealt significantly with major landlords and I must say that most of the examples that I can present to you of the sorts of abuses that I believe are occurring, or the way people construct their affairs to maximise their recovery of outgoings - although I have done audits of smaller landlords and brought them to heel fairly substantially by going right into their records and advising them how we think the outgoings ought to be presented. So there has been a number of successes. I guess the major thing that I found out was that Woolworths had stores which they acquired from an American company called Safeway under which they trade in Victoria, and I discovered that most of the Safeway leases, were obviously guided by their American standards, had an audit requirement in it, and it gave me and Woolworths a powerful position to be able to negotiate with landlords on audit requirements.

One notable example of this, when I tried to enforce an audit requirement you realise that Woolworths is a little stronger than everybody but still has its hassles, was that I was trying to do an audit on a particular shopping centre in Victoria and I had a major landlord, no less than the managing director, ring me and abuse me and tell me that he wasn't going to permit his records to be audited. In the end I did find, and it was only a small amount through a change of ownership in that landlord and a change of the shopping centre, that they were actually not allocating and apportioning outgoings correctly, and the matter was corrected, but it was only a few thousand dollars, but still I was never allowed, and I never pursued legally that outgoings right. Woolworths is obviously a bit reluctant to take legal action unless it's a really big sum of money involved. It's not commercially viable to dig for small amounts of dollars.

I won't regurgitate my second paper which talked about the main thrust that I want to talk about today, but I would just like to perhaps give a few examples. First of all - no, I will just refer - my major input and concern, I guess, came from page 120, 121 of the report which is under the heading of Outgoings Payable, and I was very pleased to read the first few paragraphs but when it came to the last paragraph when a landlord was quoted and there was no conclusion reached at all from my observation on outgoings. Just a quote from the last paragraph there of Colonial First State Management said:

There is a perception that the retail property owners have little incentive to minimise outgoing costs. However the opposite is in fact correct. From an owner's perspective the returns required to justify their outgoing investment in a centre is dependent upon ensuring that rents preferably increase over time. Consequently it is in the owner's best interests to also ensure that outgoing costs are minimised as they are purely a recovery of actual costs, so that much of the tenants' occupancy cost is derived from rent resulting in real returns to owners.

As I said, there was no conclusion that you guys came to in that, so I was concerned that outgoing costs would become a conclusion because outgoing costs - of all the things that I was ever involved in in the property aspects of Woolworths, outgoing costs and possibly extended trading, but definitely to a lesser extent - where there is an arbitrariness in what is being charged and what can be charged because your leases just generally agree to pay outgoing costs and they specify the items to which you'll contribute, give a large degree of flexibility to a landlord into the dollar amounts that actually end up being charged to you.

There are rules for that to be charged but like everything, you've got to understand some of the background to the rules to see that those rules can, themselves, in fact be abused and that the tenant has little knowledge of that abuse and little opportunity to actually find out about what's going on, because I had lots of tenants tell me, in the Retail Association, "It's all right for you big boys, you can get answers, but we write to landlords and they just refuse to answer our questions." So unless landlords, outside of the Act - and I'm unaware of any legislation that requires the landlord to give strong answers, and unless you put the audit requirement in, he's not going to give a strong answer; he can give evasive answers and the person in the end, they just give up and don't bother pursuing the matter.

Outgoing costs represent about 1 to 2 per cent of a tenant's turnover, so they are not necessarily a substantial part of the rent. So you might be paying, as a speciality shop operator, \$500 to \$1000 a square metre as a speciality tenant, but your outgoing costs would be in the order of \$100 to \$150 a square metre. So as a percentage of the total they're not much. Just some specific examples that I would like to expand on that I put in my verbal submission. Firstly, I was aware from what several landlords said to me, that there was a bit of a philosophy amongst landlords, agents particularly, that they were really judged well if they recovered 120 per cent of their outgoing costs. That is just a concern in principle that people might seek ways around the system to be able to charge additional outgoing costs over to which is fair entitled to recover.

So that's just a perception from talking to people; they obviously wouldn't talk

on the records. The most substantial abuse of which I'm aware is the GLA of the Westfield Chatswood Sydney where the Myer department store is excluded from the GLA of the centre. Any normal average person going to the centre would get a little centre brochure plan and there clearly shown on the plan is the Myer department store. But what actually happened here is that in the late 90s Westfield owned one property surrounded by roads and Coles Myer owned the other property surrounded on the other side of the road. What they actually did, was that Coles Myer sold to Westfield half their land on the other side of the property and retained ownership of their land on which they withdrew the Myer store.

Then they set up a lease under their own ownership, just an internal lease which only required them to pay rates and taxes and insurances. Now, this is effectively almost a gross lease from the landlord's point of view. So when Coles Myer then decided to sell the property obviously the lease went with the property, and from the landlord's point of view it wasn't a very good idea to be able to buy a lease like this, where you have to actually fund all the outgoings attributable to that area, and let me say that that area is about one-third of the total shopping centre and the rest of it is about two-thirds of the gross lettable area of the shopping centre.

So what they did long term - and I've read articles in arrears, because I researched this quite significantly because Woolworths had a store there - was that there was speculation at the time because what actually happened is a subsidiary company of Babcock and Brown investment bankers actually bought the company, but if you do a company search on that you'll find that Westfield have a floating charge over the company assets. So that immediately put my antenna up to think that Westfield are involved in doing this arrangement with Babcock and Brown. So if I went to Westfield and I said, "Why isn't the GLA of the Myer store?" They said, "It's not owned by us and there are those that aware that under the retail list that is active in New South Wales one of the definitions of the shopping centre is that it has a common owner."

So they are maintaining that the GLA should not be included for outgoings for the rest of the shopping centres because it's a different owner and obviously Woolworths never pursued it legally but I think that that was a construction to avoid the truth that it was really effectively the one owner. In terms of dollars we had a Tandy store in that and I estimated that the outgoings payable by the Tandy store was about \$10,000 more per annum because of the exclusion of the Myer department store GLA, and the Food For Less which Woolworths had the lease on, was about \$30,000 per annum. So there was significant dollars, and if you actually analyse the outgoings costs and compared them to industry standards you found that they were substantially greater than the industry average because of the lower GLA being used as the divisor in working it out.

That is the most extreme example. There are other incidences where people fiddle with the GLA and obviously if you divide by a lower GLA you're going to get a different answer than if you divide by the full GLA. So that's a problem. That is an extreme example. So I leave that thought with you, that there is an ability - look, the tenants, particularly the smaller tenants, would have no idea what the GLA is. I mean, what we used as a standard was to go to - the Property Council themselves put out handbooks and they stated the GLA in there and if there was substantial deviation from the GLA we would question why and ask for explanations. There's an ability to cheat on the GLA which can impact the outgoings recoveries if you want to get 120 per cent recovery.

The other example I had was in Epping Plaza and, as far as I know, this may still be going on today. Certainly the Chatswood example is still happening today, as far as I'm aware. There was a huge area of vacant land alongside the shopping centre in the Epping Plaza and the land tax for that was just included in the total land tax charges for the centre, and being charged out to all the tenants. It's quite clear in the Retail Leases Act that that is not allowed, but most people wouldn't have even realised it. It was only that we applied fairly close criteria that I actually discovered that abuse going on there.

Another one, back to Westfield Parramatta, was that I was surprised - because I was in the Big W division for a number of years, so I was only in the supermarket division in the later four or five years of my employment - to discover that at Parramatta they had an excellent lease there. Just sort of going to that previous guy, he obviously got a lot of bad leases and he's seeking to correct that, and that is happening because Woolworths have got lots of landlord-friendly leases and lots of tenant-friendly leases and so, you know, it happens in the swings and the roundabouts.

But, at any rate, in this particular one they had a very good lease, from my point of view. I'd never seen it before in the wording in the lease - where the net revenue from the carpark was meant to be included in the outgoings. That amount came, staggeringly, to about \$1.5 million. It was a huge amount of income being earned and I feel almost certain that - and I haven't seen a specialty one so I can't absolutely say, but certainly if the Commission was able to get a tenant from that centre to show them their outgoing statement, my feeling would be that they would not be giving the revenue benefit of that carpark to the speciality tenants. It was just so unusual for me to see that in a lease, and I looked at - you know, Woolworths is involved in smaller sized stores as well as bigger ones, so across the gambit of leases, it's the only time I've ever seen that wording. So that's why I think that's so special.

Another example of where other landlords - and it may be happening in other shopping centres where they have carpark revenue - feel that that is the landlords,

that is not the tenants, even though the tenant might be expected to pay for a lot of the costs. I suppose the more honest ones would actually absorb the costs in the revenue, but they're still going to get a net revenue position. That's another example of a possible abuse. Another one, just to spread it around to other states, was in the Centro centre at Karingal Hub. I was challenging their management fees there and they were quite transparent in a number of ways, which is very unusual for them - to try and convince me that their management fees - which all of a sudden went up from about \$18 to \$33 a square metre in one year, and then I got quite uptight about it - noticed that their central IT section was being charged out to all their shopping centres through general administration, and then they were putting management fees on top of it.

If you really want to cheat your outgoings and over-recover your outgoings, you virtually charge people twice by charging them - by apportioning out your head office costs in the general administration costs, because it's being charged to the actual shopping centre - giving landlords lots of hints here, Mr Commissioner - but you also then charge management fees. I'll just divert a little bit on management fees. Management fees in the competitive end of the industry tend to be 1.5 to 3 per cent of gross rent turnover. In the large regional shopping centres, where you'd think that there was going to be fair competition, it's not because every regional shopping centre and above in Australia is owned by a major landlord and managed by a major landlord, so there's got to be something in it.

They tell you that they can only do the job properly; they're not going to put it to outside people. Well, why are their management fees between 5 and 7 per cent, where the small subregional and below type, down to neighbourhood shopping centres, tend to be in the 1.5 to 3 per cent area? It's unexplained, untransparent, can't get any honest answers out of anyone how it's done. I've suggested some of the things that could be going on, Mr Commissioner. It's enough of a worry to me to say if landlords don't get up and follow the American standard, where I don't think they have too much trouble in the outgoings area, and have that ability to audit outgoings, they're just going to continue to have people pulling the wool over their eyes. While the majors can perhaps uncover a lot of that, I believe there's still a lot more that could be uncovered if that audit right was given.

Just as an example of that, Woolworths recover in the order of something like \$4 million from general areas and overcharges each year in their outgoings. I couldn't believe it. In the first year I did it I thought, "Aren't I a clever boy?" You know, we made that much money. But then, when we kept on making it every year in these errors kept on appearing I felt that - you don't know whether people are making honest errors or dishonest errors, but it kept going for year on year and you realise that there are a lot of landlords out there who are trying to cheat you, and to get away with things. That's just through outgoings, I'm talking about there, not

through other things.

One major concern which I had was with Westfield particularly. Under the New South Wales guidelines for outgoings - outgoings are charged on a referable area basis and I took probably three years to be given an explanation of how that actually worked and then, all of a sudden, I realised what they were doing. They were using that New South Wales legislation in the way that they apportioned outgoings. They would have an apportionment for the general shopping centre, apportionment for the outside shops, apportionment for the freestanding shops, an apportionment for the cinemas, and I think there's another one I can't think of. But, at any rate, they used all different GLAs, depending on what they were doing.

Now, that is allowed under the New South Wales Retail Leases Act, but the problem is there's no accountability in doing it. When I actually tried to say, "Oh, I don't believe that that is the way you should apportion outgoings, that doesn't seem fair and reasonable," that was another fight which - I retired before that fight ever got to a conclusion. I believe that this happens with other landlords, where they do use those sorts of things, but it's not transparent and tenants can never find out what actually is going on.

While I see some big issues in management fees in Australia particularly, and realise from my background - before I worked for Woolworths I worked in the stevedoring industry particularly where the Prices Justification Tribunal made the company I worked for lower its prices by 10 per cent; I worked in the overnight road transport industry, where I was low enough down the management line not to really know, but suspected that TNT and IPEC had a bit of a deal on overnight freights; and then being exposed to - arguing for the stevedoring industry to the Prices Justification Tribunal, that fair prices did exist. Subsequent to that - and then they didn't pursue that second inquiry. I've sort of had a bit of a background of being involved - and I did a cost investigation for the removal industry some years before that and gained some extra dollars on the Department of Supply, as it was then called, contract for furniture storage.

I've had quite an experience in looking at costings as an accountant over my life and, therefore, I am well aware of what costs should include and shouldn't include. My role in one stevedoring company is that the company secretary, of course, led me to understand a lot about those sorts of things. I don't speak from a background of ignorance on costing and, therefore, I am seriously concerned that a major open-ended cost lacks any justice in terms of the true accountability. Anybody who has worked for a company and seen a young auditor come in, and answered his questions, and knowing that the auditors are paid by the actual company itself, we only have HIH and Enron, Arthur Andersen - what happened to them - to see some of the severe results of the lack of transparency and lack of disclosure. I feel that in

this particular cost in the industry, that the Commission ought to look at more details.

If you want those specific examples, I've given them to you. I can give you more details if needs be; that making the landlords more accountable, by bringing in a requirement in all the state legislation, that the tenants have an ability to audit outgoings - it's spelt out, the details, in the outgoings code. Why I see this as the major one - and I've got that management fee on the side - if you had an ability to audit the outgoings you could get in and find out what these management fees were and therefore maybe bring them to heel a little more in terms of what is fair, because there could well be other contracts in the industry - I haven't even mentioned this - where there are related parties involved. This could perhaps be even more so at the lower end of the market, where you can get your Uncle Sam's security business to do your security and a good way of funding Uncle Sam a little bit more because all the tenants are going to pay; the same with cleaning contracts and things like that. They can be open to abuse because there are no standards in governing the way that these charges are made.

I believe that the one single thing which would bring all those concerns to heel is the ability of tenants to ask for an audit of outgoings. They would obviously fund it. If there was a problem found in it, which involved a refund of outgoings, then you could make the landlord liable for the payment because he'd made an error. I would feel that this would be one single thing that the industry could do in outgoings to solve a lot of problems. With that, Mr Commissioner, I thank you for your time and leave that with you.

DR BYRON: Don't go away yet. There are a few things that I'd just like you to elaborate a little bit more. First of all, thank you very much for pointing out the deficiency in those couple of pages of our draft report. I don't think we intended to give the last word on that topic to one of the particular landlords. That wasn't meant to imply that we totally agreed with or endorsed that quote, but I see how it looks that way.

I guess what I found really alarming in your first submission and in the follow-up is the implication that, if Woolworths and David Jones and Coles Myer and so on have also told us they can't get answers on outgoings, God help the little guys, because the argument is generally put that the reason that retail tenancy legislation doesn't apply to the majors is the presumption that they're big enough and ugly enough to look after themselves and it's more the battle of two 800-pound gorillas rather than - et cetera, and yet, this seems to be an area where even the major retailers are complaining about serious lack of accountability and transparency.

I suspect we'd probably get a lot more complaints from the small tenants if they understood more about what they're being billed for. We have received quite a

number of complaints about the more petty thing, that "We're required to use a certain builder or a certain architect or certain cleaning," or security or something, and it turns out that there's some - it's either a subsidiary of the landlord or in a smaller case it's Uncle Same, et cetera.

The general idea is that we're looking to try and get the incentives right for the right sort of behaviour and it seems to me that if the outgoings situation is one where the tenant is basically giving the landlord a blank cheque - you know, "Go out and incur whatever you want and just send us the bill, and we can't even ask why it was incurred, did you receive three quotes, why did you take the highest quote rather than the lowest quote?" - I do find it amazing that that situation exists with regard to the outgoings that the tenant is just told, sort of, "Shut up and pay for it and don't ask questions."

Just to elaborate on the auditing, it's not only a question that the amount actually matches the invoice but it's also the sense of a performance audit - that you actually chose the best of the alternative suppliers, the one that offered best value for money; so that if the cleaning charges for the centre suddenly doubled, why don't the tenants have a right to ask, "Why did that happen?" It seems obvious to me that this responsibility transference in accountability should be part of the system. Did I hear you right when you said that the Property Council rejected the ARA's draft code on outgoings because it would impose additional costs and accountability?

MR YORK: Additional cost more than accountability. They wouldn't admit to that one, I don't think.

DR BYRON: Okay, additional cost. But it does seem to me that one of the things that is generally missing is that sort of accountability; and in a sense what most of the grievances that have been put to us from all sorts of tenants really come back to are lack of transparency and accountability. There's been a fair bit of grievance and discussion about the outgoings but even in terms of rental levels on subsequent lease or in terms of if there's a major change in the building that results in changes in traffic flows which results in loss of turnovers, the landlord doesn't seem to be accountable for the consequences of those changes. Is that - or am I reading too much into that?

MR YORK: No, that does happen. One would hope that a landlord is looking at the best interests of his total centre, realising that if his tenant doesn't perform he'll either lose his tenant or he'll suffer. But I've heard plenty of tenants complain that - particularly if they bring an extra competitor in, another jewellery shop or something like that: this fellow has got a good business and they can see that so they bring another one in and that halves his business, so tenants have grievances. And when they reorganise a centre and the fellow gets left up a bit of a dead end of the centre,

they don't go back to them and say, "We'll give you a lower rent because of that." Those sorts of things do happen and people do complain. It's not a problem for majors normally, because they get well and truly consulted.

DR BYRON: Sure. But an alternative point of view - on one hand I'm thinking that this long list of examples that you've given us suggests that there's very clearly some funny business, sharp practices, carelessness or whatever going on in the area of outgoings, and yet on the other hand I think, "There's more than one way of skinning a cat." Maybe the landlord is getting a bit of supplementary income by being creative on the outgoings. If all of that was cleaned up and made absolutely 100 per cent squeaky clean, wouldn't they just put the rents up by the same amount? At least then it would be transparent.

MR YORK: That's the bottom line, yes. It's transparent to the tenant and it's more competitive. I think one of the arguments that I had that I didn't want to pursue in the public inquiry was the fact that there is an oligopoly, almost, in shopping centres because you get an area of land and you've got an exclusive right on that. You fight tooth and nail to stop any further development. But there is to some extent a competitiveness between shopping centres. There are some limits on that, yet a tenant isn't forced to go there if he thinks the rent is going to be too high, so there is an element in there. It's not a substantial worry to me because I was aware, even in the Woolworths situation, where in the Big W division I was negotiating leases - if there's a Kmart and a Target already in town and you're coming in as Big W, you're going to get a much better rent deal. If there's nobody there and the whole three of you are all fighting, you're going to have to pay a little more, so that's the sort of market operating in its true sense. There's no doubt about that, and that would operate with specialty tenancies as well, but you know what you're paying in the face rent.

DR BYRON: If you're looking at alternative sites that you could go into with your business, to a certain extent you're looking at the face rent and you're basically assuming, "Outgoings are outgoings. It will be a reasonable recovery of legitimately incurred, fully accounted costs, so we won't look too closely at that." Or do you say, "Outgoings could actually be a significant proportion. Are there differences in what our outgoings expense would be depending if we went into centre A, B or C?" We've also heard examples like, "The lifts are deficient. If you replace them it's a capital cost, but if you just keep repairing it, it's an outgoing and you can bill that back to the tenants; so as a result, the lifts never get replaced, they just get repaired once a week.

MR YORK: That's right.

DR BYRON: Now, if you knew that the face rents of three different centres were

approximately comparable, would you actually go back and say, "Well, you know, number B is actually going to give us a better deal in outgoings because of the way that's structured or set up," or, you know, "Because the lists are new, they're not going to have a maintenance component like that."

MR YORK: Yes.

DR BYRON: How big a ticket item is it?

MR YORK: Okay. I tried to refer to that before when I said it was about 1 to 2 per cent of your turnover. It is not significant, obviously. You wouldn't pick a centre - you'd pick the one that you thought you were going to get the best sales result probably, because the outgoings wouldn't be substantial enough to unduly worry you. I suppose I might be talking generally, but you understand that sometimes in the negotiations you can negotiate out of paying certain outgoings, like management fees, for example. That was a traditional one where a lot of the major landlords - and I was aware a lot of the Coles Myer leases, from what I found out in looking at the leases, they didn't pay management fees.

I think that was more in the Coles Target area of business. Woolworths to some extent, they probably weren't as sharp in those long ago. They're 40-year leases you negotiate and they can go on for longer than that with options. They weren't perhaps as astute in some of those sorts of charges but if you were worried about a particular item of outgoing in a particular centre, you would endeavour to negotiate not to pay that, if you could.

One of the things that people do nowadays is - often the common practice amongst the majors is to have what they call semi-gross leases where you actually have all your first year's outgoings lumped in and you pay increases over the base year. You're never exactly sure what the base year is going to be until the base year has gone, but it tends to, you know, mitigate that because a lot of your outgoings are included in a known lump gross lease amount - - -

DR BYRON: Yes.

MR YORK: - - - and you're just paying increases. You'll also quite often cap those leases at CPI or CPI plus 1 or 2 per cent, to try and control the outgoings. That's how they try and control and mitigate outgoing costs in majors' leases. I don't believe that happens very much but, I mean, most specialty shop operators try and go for gross leases. What I'm not sure of in Australia is the percentage of gross leases, and it's the landlord's worry then. It's a matter of risk. Do you put the risk onto the tenant or the landlord in terms of outgoings?

That gives some measure of mitigation and the landlord being more responsible in his outgoings costs because he's wearing - and I've heard some landlords tell me that up to 67 per cent, two-thirds of their stores, would be gross leases. I mean, if the introduction of an audit requirement pushed landlords into gross leases, I don't think the retail industry would be weeping tears of blood. They would be glad of that because then they know up-front when they're getting into the deal what they're going to be up for; so that may be a consequence of that to avoid that requirement.

DR BYRON: In terms of what to do about this, you were talking about getting the audit requirement into the state retail tenancy legislation.

MR YORK: That's correct.

DR BYRON: The draft code on outgoings, is that a dead duck now or - - -

MR YORK: Probably, yes. It's an ARA document, even though I still have a copy of it. I did include a copy of it into your records.

DR BYRON: Yes. Do you see any point in pushing that or reviving it?

MR YORK: It's a difficult one. I often thought in 30 years' time they might say, "That bloke Bruce York had some great insights. You know, he designed this. We're just about to bring it in." The code that the Property Council have just agreed to was the casual mall leasing code, which was one of the other codes that we were pushing at the time. I think I gave the Commission a copy - - -

DR BYRON: Yes.

MR YORK: - - - and then all of a sudden read that it had been - it was coming in from 1 July last year. I'm encouraged by the fact that one code has got past the hurdles, but I tend to think that the landlords feel so threatened by that code - and I actually did a comparison between all the state retail leases at the time, back in 2002, and the code, and there were substantial additional things in the code; so there would have been a lot of additional compliance requirements over the state acts to take up the code. Unless there was actually pressure - and the ARA and the retailers, I think as I mentioned in my initial report, are so dysfunctional now. There are so many of them. There are about three or four different associations. They don't get together.

Unless they can get together and bring pressure on the Landlord Association - and it's every difficult to get them together. I honestly don't think that that code would get up at all. That's why I just thought I'm going to pick one item; I'm going to fight like a blinkin' dog in a corner to get one thing that I feel is the major reform

in Australia to bring justice to the retail tenants. Obviously the people that are outside like Coles, David Jones and other people, Woolworths, hopefully that culture then will just put into their leases - I've had the interesting situation where I'm negotiating a lease and the fellow says, "I want to be able to audit your sales." I say, "Okay, if that's the case, I want to be able to audit outgoings," and he said, "Oh, well, forget that. Next point." You know, there would be greater faith in the Woolworths' audit certificate on sales than there would be in the landlord's certificate, I'd suggest.

DR BYRON: Yes, but you say in your summing up it just seems fairly obvious that there should be that transparency of responsibility and accountability.

MR YORK: The landlords will fight you tooth and nail if you put it in, I can tell you. If there's any landlords' representatives listening here in the public part - - -

DR BYRON: I don't know that there are.

MR YORK: - - - they'll be noting it and getting it right back to their committee. They are very powerful, the Property Council. The Shopping Centre Council of Australia is a very powerful group when compared to the retailers, and they lobby state governments like mad not to have that in. I was very surprised actually that we got a little bit in the door, mainly through my lobbying to the people to get that in New South Wales, to get that ability to question the auditor.

DR BYRON: Okay, so that has implications for the other - what you've just said - area that we'd floated in our draft report about as a possible circuit breaker or way of restoring mutual trust and confidence and so on in the system to get the major retailers and the major landlord - sorry, the major retailers' representative bodies and the major landlord representative bodies to come up with some sort of a mutually agreed code of acceptable behaviour. From what you just said, you don't think that that would ever happen.

MR YORK: Not while they're not getting together. Again, as I say, they are picking their fights, and I would suggest to you that outgoings because of the nature or the relevancy of it, it's not probably a fight that they can see because it's spread out so widely amongst all the retailers in 1 or 2 per cent of their turnover and they've got bigger things that they want to fight about as tenants; but in the meantime all those little bits - I mean, for management fees in my assumption the landlords in the major regional shopping centres in Australia are making 20 to 30 dollars a square metre over about what I think is a reasonable amount of dollars. I mean, it's not much on 100 square metres - a couple of thousand; two or three thousand dollars. If you add all the retailers in Australia together, it's billions - millions probably, not billions. Millions.

DR BYRON: Yes.

MR YORK: And so it's not seen in one cost. They're more worried about other things. I don't see that this is a real major - - -

DR BYRON: It's not on the radar.

MR YORK: Yes, it's not on the radar. No, I wouldn't think so, so that's why I think that it's - you know, as you rightly said, the majors are concerned. They were concerned by the fact that they came together on that subcommittee which I chaired. I had no hidden agenda. We just came together and started to share all the problems and realised that we all had them. You've realised that through your questioning of other people, I would assume. I think something ought to be done about it; that's the bottom line. In terms of the equity, there are piles of other things to which I would agree and support and all that in the industry, but that just happens to be my one thing about which I would have a fair degree of expertise and the ability to speak on, so I speak on that. That's why I'm just pushing that barrow.

DR BYRON: Yes. Well, making sure that that area of the whole landlord-tenancy relationship in retailing was completely fair and square and aboveboard, would be a darn good start, wouldn't it?

MR YORK: Absolutely.

DR BYRON: It probably wouldn't solve all the issues.

MR YORK: No.

DR BYRON: It could actually be a bit of a prototype, if a few other issues could be resolved too. If the parties are willing. If the parties are not willing, then I guess the fall-back is some more legislation.

MR YORK: Let me say, the retailers would be willing but I think the landlords would not. That's why the government is there, to bring in those sorts of rules that bring about equity and fairness. I cannot see it being other than true justice. I mean, that's what governments are there for; they are there to bring about legislation. If there's something unfair in the community, they are there to be the judge and the umpire.

I throw it entirely into your lap and their lap to beat the argument. If they need me to make any further representation or comments on that, to it, I'm more than happy to stand up. I'd just like to see that come in.

DR BYRON: I guess the final questions I should ask is, if the landlord's representatives responded by saying there would be too much additional expense - let's get this right. If the retail tenancy legislation was changed to allow the right to demand an audit of outgoings, if three or more tenants ask for it - something like that.

MR YORK: Yes.

DR BYRON: It wouldn't even need to be done that often, would it? Your point was: it was the threat that they could be audited which would make them clean up their own act.

MR YORK: That's correct. Most laws are like that, aren't they?

DR BYRON: Yes.

MR YORK: You know where the standard is and therefore you comply.

DR BYRON: Yes. I assume there's the reputation risk, that none of them would want to be audited and then found to have had serious glitches in the system and have to reimburse, as well as paying for the audit.

MR YORK: Yes. I feel that would be the major thing. The other point that I mentioned, on management fees, is a worry. Let's say you do carry out that audit and you find that management fees are - because they're charging 7 per cent of their gross rent turnover, how far you could extend that audit to go beyond that to say that that was an unreasonable amount is a concern to me. I'm sort of not pursuing that at the moment. One step at a time. But this management fee - the discrepancy between both ends of the industry is a real worry. Where's the economy of scale in a large operation? Their costs should be lower per square metre than the small guy.

DR BYRON: And greater expertise.

MR YORK: Yes.

DR BYRON: Okay.

MR YORK: That's another big worry, but still.

DR BYRON: I can't think of anything else to ask you about at this stage. Were there any closing comments that you wanted to make that we haven't already covered?

MR YORK: I would only bore you with repeating what I've said already.

DR BYRON: In that case I think some of us have earned a tea break. Thank you very much. We'll resume at 11.00.

DR BYRON: Gentlemen, if we can resume the hearings with Mr Ken Roberts who has come all the way from Port Macquarie to tell us about his experience with retail tenancy. Thank you very much for the written submissions that you've sent us. I do appreciate the effort and expense of coming here today. As soon as you're ready, if you'd just like to take us through the main points that you wanted to make, and we can talk about that for a while.

MR ROBERTS: Basically we were in two centres, in a Westfield and a Lend Lease. We'd been in a Westfield centre for about seven years when we went into the second one. The second centre we went into didn't do what it was supposed to, what we were told it would do. We had a gourmet sandwich shop in the food court and we were told that we'd be the only one in there. As it happened, about a month before the food court opened a second gourmet sandwich shop was asked did they want to go in there because one of the other tenants had pulled out. We'd been chased by this particular centre - can I mention the centre?

DR BYRON: We know which one it is.

MR ROBERTS: Probably three years before that they'd approached us to go into the centre, before they did the extensions. We had a good look at it and thought it wasn't worthwhile. Then when they did the extensions we thought, the second time, that it would be worthwhile. With the figures that we had we thought we'd be okay, and supposedly the passing traffic and what have you. When we did eventually open it, the traffic was nowhere what we had expected it to be. We only stayed there about 10 months before we closed our shop and moved out.

We had had quite a few negotiations with the management. My accountant had been in attendance. The franchisor - because it was a franchise we had - had flown up from Melbourne to talk to them as well and they just said, "Sorry, but there's nothing we can do." We tried to get them to send the information to Sydney, to see what they do, but they said, "Well, they'll only tell you what we've told you, you know, that you're on your own, sort of thing, and we can't do anything."

When I did actually walk out of the centre, the manager rang me on the Saturday morning - it was Easter time when we moved out, on the Thursday night. Nobody even realised we were going. The shop was empty. Even the chap next door didn't realise that we'd cleared the place out - the manager rang me, just on the Saturday morning, demanded that I be back in the centre within 48 hours and then wanted to know why I hadn't been in touch with management. They could have spoken to me and "We could have arranged something to help you on your way, sort of thing, to keep you in the centre." Whether the manager was aware we had had these previous talks, I don't know. By his attitude, you'd have to wonder whether he did or not, but I would think so.

Unconscionable conduct was one of the things I had in mind when we were told by Lend Lease that there would not be any other gourmet sandwich shops in there. We emphasised that fact when we signed the lease that we wouldn't go in there if there was to be another sandwich shop. I've got a plan here, which was given to us by the chap doing the leases. They had itemised what shops were to go in the food court, and there was only one vacant one, which is the one that we ended up taking. The one that had the second shop, that went into it, was supposed to have been the seafood, but apparently they pulled out, unbeknownst to us, and centre management didn't bother to tell us that they'd pulled out and there would be another sandwich shop going in. And yes, we sort of got caught on the hop.

DR BYRON: Can I just interrupt, just for clarification?

MR ROBERTS: Yes, sure.

DR BYRON: Was there a disclosure statement with the lease that you signed?

MR ROBERTS: Not in writing, as such, no. I've actually been onto the franchisor in the last couple of days and he was supposed to ring me back some time today. He's going through all his paperwork to see if there was anything in writing, but he doesn't think so. He seemed to remember it pretty well. There was a small juice shop going in which would sell a limited number of sandwiches which we believed were to be pre-made, that they'd be packaged, and we were the only ones that were making fresh sandwiches. But there was nothing in writing to say that there wouldn't be another one in there. They assured us there would not be, but we had nothing in writing.

DR BYRON: But not in writing?

MR ROBERTS: No.

DR BYRON: Okay.

MR ROBERTS: As I say, we also had a shop in the second centre which we had been in for about - it finished up we were in there for 10 years. It was very good for the first few years, but then this started to go backwards, and mainly when they did an extension again. When they did an extension in the second one they closed down 500 carparks straightaway. Business dropped off. That particular one we had that for quite a while. When we walked out of the other one we thought, well, this other one we can keep it going and pay our debts and get out of trouble. But then they decided to do an extension. They closed 500 carparks straightaway, and the traffic just wasn't there for us to get out of trouble; it actually went backwards as well.

Yet when you spoke to centre management they maintained that in the previous 12 months they had had quite a large increase in the traffic flow, but you only had to stand at your counter and look down the passageways and there was nowhere near the people in there. Where they get their figures from, I've got no idea, but they maintained that the traffic flow was increasing.

The store next to us, they were down \$100,000 overnight - in that last 12 months we were there. The manager of that particular shop actually spoke to me one day and I happened to mention it to him. He said, "Oh, yeah, we've gone down 100,000 in the last 12 months," and he was happy for me to tell you that because he was on the verge of being sacked because his bosses - the company that he worked for - they thought he'd been tickling the till and that's why he was down \$100,000. When I told him I was as well, I think that saved his bacon. The centre was going down, yes. We were paying \$150,000 at the time in the first centre and that was due to go up to \$200,000, on renewal, but somebody else took over as we decided not to go into it.

With the management in the centre as well, they put a second sandwich shop in the first one we were in. In the first centre we were in, they put a second sandwich shop in there. It didn't do very well. We complained.

When that one went they put another one in there, and we sort of complained to management. The particular manager there at the time - he was only there about six months, he actually said to me he didn't care if he had sandwich shops in every store in the food court. He didn't care if they were all sandwich shops as long as he was getting his rent coming in, he was happy, and his exact words to me were, "If you move out I've got another idiot waiting to take your place" - were the exact words he used. Yes. I couldn't believe it. Had to keep myself under control a bit, but I thought, "Oh, well, you know." He was inferring I was an idiot for being there and there was another one waiting to come in.

DR BYRON: Very revealing.

MR ROBERTS: For six months we had been negotiating with the centre to try and do something about the lease. As far they would go, is say, "All right, you can pay fortnightly instead of monthly," but I mean, that didn't help anyway because the turnover just wasn't there.

DR BYRON: And after you moved out at the end of 10 months, you were still responsible for the lease?

MR ROBERTS: Yes, we had to pay - they kept the security deposit and they

wanted the balance of that by the following Friday after we moved out. It ended up they kept the security deposit and they said they would be in touch with us then for the balance of the six years end lease. I had been to my solicitor and they said, "It's most unlikely they could get the six years because - you know, six months, at the worst, but another tenant went in within a couple of weeks and to this - this was in 2004, and to this day I've never heard another word from the company, from the centre.

They've never written to me asking me for the balance of the lease and actually I've heard no more. Why, I don't know, but as I say another tenant went into that particular store, they probably last five or six months, went out of business. Apparently put up her house naturally and lost it all, and then there is another one in there now. But I've got no idea why they didn't approach me. I did get a letter to say they would be suing me for the balance of the six years' lease.

DR BYRON: But they didn't go through with that.

MR ROBERTS: No.

DR BYRON: Presumably when someone else is in there - - -

MR ROBERTS: Yes, I'd say the fact that they had somebody else in there, they decided to let it go. Yes. Otherwise, they are the main points I had to mention.

DR BYRON: Yes.

MR ROBERTS: The other thing too that they told us a few times with the franchisees in the centre itself, they sort of emphasised the fact that we weren't allowed to talk to each other. I mean, we always had a bit of a chat to find out how you're going and what's happening and that sort of thing, and centre management didn't like that.

DR BYRON: No.

MR ROBERTS: Another stage we approached them - my son-in-law was in the shop at the time and he approached centre management for all the food court tenants to get together with him and have a talk. He just point blank refused. He said I will talk to each of you individually, but he said, "If I talk to you as a whole you'll kill me," and he said, "I don't want to talk to you as a whole." He would only speak to us on an individual basis. And every time you talk to somebody, like one of the other tenants, they're the only ones that are doing bad and everybody else in the food court is doing well. I was told the same thing, "You're the only one having trouble. Why are you complaining? What's your problem? Everyone else is trading well," and you

talk to one of the others and they've been told exactly the same story, that he was the only one going bad and the rest of us were doing well.

We did have a bit of trouble too with one of the centres, we had a couple of break-ins and the centre management, sort of, didn't want to know about that; another one they had tradesmen, while they were still - the food court only just opened and they had tradesmen come in and they were working upstairs and they unplugged our lead for our refrigeration - the power point is upstairs, put their lead in for the day but then forgot to plug it back in. The girls came in the next morning and everything in the coolroom was at a very high temperature; had to throw out all the meat and that.

We got security with us to try and find out what the problem was and found that our lead had been unplugged which was a no-no in the centres. The lead that was in there had a tag on it, so we knew who had plugged it in and when that company was approached, they just said, "Oh, sorry, but somebody stole one of our leads. That must have been it." But my attitude is if I stole a lead the first thing I'd do is take the tag off it so you didn't know who owns it, who it belongs to. But they didn't want to know that as well. They just sort of said, "Tough." No compensation from Erina for it.

DR BYRON: The bottom line on each of the things that you've outlined is that the centre management basically takes no responsibility.

MR ROBERTS: No, not for anything. Basically you're on your own.

DR BYRON: We've been thinking about ways that they may be requires to take some responsibility for their actions or consequences of their actions. If we go back to the first thing about the projections of what the foot traffic might be in the new extension, presumably they had figures on what they would like it to be or what they hoped it would be, but there's no guarantee that that's what was going to happen, was there?

MR ROBERTS: No.

DR BYRON: So when the actual is only a fraction of what everybody was expecting or hoping for, the question is who's responsible for that and what happens.

MR ROBERTS: Yes. They maintained - I was to say to them - that the stuff, that they would bring the customers into the centre and we had to supply the product. But then there were times too, they said, "Oh, well, it's up to you to get people in here. You know, if you've got the right sort of thing," and went back on the story after you'd gone into the centre.

DR BYRON: If I think about the difference between being in a big managed centre and just being out on the high street, in a strip - if you're in a big managed centre there is supposed to be management there that is generating the traffic, and that's presumably what you're paying extra for compared to being out on the strip. If you're paying extra and they're not delivering - - -

MR ROBERTS: Yes, that's right, you're in trouble. The other thing too, the one that we ended up walking out of, they had the food court listed as an atrium; had a big sign up for the Atrium, but so many people came into there while we were there and they just said, "We didn't know where the food court was," and they didn't know what an atrium was and I actually got in touch with centre management at one stage and they said, "It will probably take them about three months to change the sign from "Atrium" to "Food Court" because an atrium doesn't mention anything about food, and that's why a lot of people might have seen the sign Atrium but didn't know that that was where the food court was, and in the 10 months that we were there that sign never ever went up and I have noticed now that it is there, but Atrium is quite a large sign and little words underneath it is "Food Court". They have added a bit to it so people know it's a food court, but the first 10 months we were there we had a lot of complaints because people couldn't find the food court. They actually said to us - - -

DR BYRON: Yes, but this is the management expertise that you're paying extra for.

MR ROBERTS: Yes. When I mentioned it to them at one of our meetings that's when they said to me, "Well, look, we can do something about that but it's going to take about three months," because they got to go through all the channels and, yes, but as I say in the 10 months I was there it never happened anyway.

DR BYRON: I can't imagine it was that hard to change a sign.

MR ROBERTS: Yes, I wouldn't have thought so.

DR BYRON: Yes. I understand the consequences for your family from what happened in the second centre particularly that you went into, have been very, very dramatic, but I guess we've also heard other people who have had horrible things happen to them that weren't entirely the fault of the management or landlord. We're aware that situations like yours happen. We're still trying to figure out how frequently things like this happen and then how can you revise the system so that it either doesn't happen or it's much less likely to happen or it won't be as serious next time it happens. That sort of thing.

MR ROBERTS: Yes.

DR BYRON: So I imagine that over the years, since you left that centre, you've given a fair bit of thought to what went wrong; "Is there anything different that we could have done or they could have done," and have you got any suggestions for us?

MR ROBERTS: It's hard to say. I mean, I don't know. I haven't given it a lot of thought in that respect; just once I got out of it I thought that's it, don't want to be involved in that sort of thing again. I'd never go back into another centre. And everybody else that's been in the centres I've spoken to that have gone out of them, have all said the same thing; the last time they will go into a major centre.

DR BYRON: It sounds like there's a particularly nasty situation there.

MR ROBERTS: Yes, if they talk to you and help, you know. The way I see it, all right, they mightn't make as big a profit but if they just say, "All right, we'll reduce your rent until you get on your feet, until the centre gets a few more people through it, naturally" - but they just don't want to help in that respect. That would be one way to do it. They might take it that they are going to make a little bit less, but as long as everybody is making money, it's a bit of a help to get it rolling until it's well under way.

DR BYRON: Presumably, it doesn't do them any good if they've got empty spaces.

MR ROBERTS: No, no.

DR BYRON: Or if they've got continual turnover of people walking out because they can't make a go of it.

MR ROBERTS: That's right, yes. After we moved out, it was only within a couple of weeks I had two or three different people ringing me up at home to just say, "What did you do to get out? We want to go but we're frightened to. We don't know how to go about it." I said, "Look, I just packed up all my gear and went. Just see what the consequences are for that." A few more did go and I believe within the next three years 84 stores have closed and moved out of there, including a Terry White Chemist. They moved out because they couldn't afford the rent. Franklins moved out. They actually bought land outside on the street and built their own complex. They moved out of the centre as well. A lot of other stores, shoe shops and that sort of thing, were all going. An ice-cream store on one corner - there's been three tenants.

DR BYRON: I would like to come back to the point that the landlords can do things, change things, rearrange the traffic flows or rearrange the composition of shops in the centre and not take responsibility if it doesn't work out. As I say, you're paying them because they're expert centre managers.

MR ROBERTS: Yes. I think the main thing - and quite a few have spoken about it - we seem to think that, in that particular centre, the food court - particularly those in the food court anyway - it was sort of an afterthought. It was just like a little bubble stuck on the side of the complex. Whether they'd forgotten in the plans to put it on - it was just out of the way. The previous food court in there, before the extension, was in the centre of the building and you basically had to pass through that to get to the car parks and things and it did quite well.

DR BYRON: And everybody saw it.

MR ROBERTS: Yes, everybody saw it and everybody - 50 per cent of the traffic would have had to go through it, virtually, to get to the car parks, to get the theatre and that sort of thing. When they did the extension it was sort of tucked away on the side and it was easy to walk past without knowing it was there, especially with the water atrium up - it had no indication whatsoever. That's specifically the food court side of it.

DR BYRON: Yes.

MR ROBERTS: There was another incident there. I was talking to the chap that had one of the other stores in there and he was going very slowly. It was a Western Australian franchise. I was talking to him one day and he had rung his boss in WA to have a talk to him about how the centre was going. Actually, this particular chap ended up selling his shop before we'd actually moved out. He had a talk to him and just said, "The business - the centre is going very badly. There's hardly anyone" - he had his mobile phone and could show him the photo on the phone. The chap over there - the boss over there said, "All right, I'll ring centre management now and have a talk to them." He rang and the centre management assured him that everything was going well and the food court was full. This was in the middle of lunchtime. The guy said to him, "Well, how come I'm sitting here looking at a photo of it now when it's only half-full and you're telling me it's full?" Apparently there was silence for 30 seconds and the manager didn't know what to say. He was maintaining the food court was full, but the guy that had the shop was showing him on his mobile that it was half-empty, you know.

DR BYRON: Yes.

MR ROBERTS: It's hard when you talk to them, too, because they - I suppose they've got to spin that spiel that it's going to be the best thing for you to do, "Get into our centre; we've got the traffic," and you're safe and all that sort of thing.

DR BYRON: Yes. You did say you had a six-year lease.

MR ROBERTS: Yes, it was a six-year lease that had been negotiated. The franchisor did all that.

DR BYRON: Okay. As you know, five seems - everybody feels that almost everyone gets five years. It's interesting that you got six.

MR ROBERTS: In the first centre we had five with an option to go the next five, which we did do. But in the other one, at one stage there they offered us a seven-year lease but did settle on the six year, which I thought was a bit strange because, as you say, generally they're five years. But, no, we had a six-year lease in there, but the franchisor did all the negotiating and all that sort of thing, and we were one of the lucky ones that had a franchisor that was - he was on your side, whereas most of them - I went to a meeting once where they seemed to think franchisors were there for their own gain. But we were lucky that our guy was pretty good.

DR BYRON: So you had no trouble with the franchisor.

MR ROBERTS: No trouble with the franchisor at all, yes.

DR BYRON: He was helpful and supportive?

MR ROBERTS: Yes, and when it came to the crunch and we were getting out of the shop, you know, and people wanted us to undersell the second one, he said that he was doing all right and he actually signed it over to me and just said, you know, "You get what you want for the other one, at the end of it." He said, "You take whatever you can get." Even when I rang him last night, you know, if we can do anything with the administrative case that we've got going now, he said, "Whatever you get is yours. I don't want anything."

DR BYRON: Okay.

MR ROBERTS: But he was one of the exceptions. Even when I went to this meeting the guy that was running the franchise meeting came to after and said, you know, "Why isn't everybody killing you to buy your shop?" He said, you know, "You're one in a million." Everything he said that was wrong I disagreed with at the meeting, because our guy was on our side.

DR BYRON: It's good to hear that there are some like that.

MR ROBERTS: Yes.

DR BYRON: That's terrific. I am not sure if there's anywhere further we can go

with this at the moment. I appreciate that there is a whole litany of things that are just one problem after another. I guess the other side would say, "Yes, occasionally we get it wrong," but it's not just a question of possibly poor design or poor traffic flows or whatever.

MR ROBERTS: No.

DR BYRON: There are also questions about the behaviour of the people and whether they are willing to - with regard to the break-ins and so on and willingness to negotiate.

MR ROBERTS: Yes, the franchisor - when one of the companies was opening new centres, they always rang him and gave him first option in the food court because of how well he did with his trading and that sort of thing. He set up the shop and they were always very well run and that sort of thing. He had a lot of good shops and he always had first option. That's why he had the premier position in a lot of the shopping centres. But then he learnt, probably just after we went out - probably within the next 12 months he started to sell off. When I rang him yesterday he's out of the food game altogether now, because he sold his last one just before Christmas, for the fact that - you know, he said the centres are sort of a thing of the past and not worth going into any more, and he sold off all his shops, got out of it altogether. Yet he'd been in it for, what, 25 years, and was well recognised as having one of the better shops, yes.

DR BYRON: Okay.

MR ROBERTS: He decided enough was enough and he sold out, sold everything.

DR BYRON: Yes. Is there anything else you wanted to say in the way of closing comments, to wrap it up?

MR ROBERTS: No, I think that's covered all the things that I've got.

DR BYRON: We're looking at all retailing tenancy across the whole country and we can't concentrate on the problems that went wrong in just one centre in one state, but it's very revealing to see how much can go wrong in one centre in one state and how many people can be affected by it.

MR ROBERTS: Yes. There have been a lot of closures up there. It's a big one, to a lot of small ones, yes.

DR BYRON: Okay, thank you very much for coming so far to share that with us.

MR ROBERTS: No problem.

DR BYRON: I wish you all the best.

MR ROBERTS: Thank you.

DR BYRON: Next we have Mr Michael Bradley coming back again. Thanks for coming back, Mr Bradley. When you're settle down and comfortable, if you'd like to take us through the main points - if you want to make any submission in terms of improving our draft report and making sure that our evidence is correct and complete that we've relied on - over to you.

MR BRADLEY: Good. My dealings with the share-driven monopoly landlord are as follows. Back in the nineties I spotted a business for sale in the local paper and, having looked at the business carefully and the location, I approached the centre management for a meeting. On meeting [Mr X] [personal/confidential details withheld], ... - he told me he used to be a plumber and his wife used to be a hairdresser. I said, "Oh yeah." We had a little chat. I asked [Mr X] [personal/confidential details withheld] if the trader who I was buying the goodwill from was paying their rent on time and was their record as a good tenant sound. [Mr X] [personal/confidential details withheld] said that information couldn't be discussed because it was private and nobody would want that information discussed with a possible person that was buying the goodwill off them.

I asked, if I bought the business and the goodwill, taking over the three years that were left on the lease, could I expect to renew the lease in the same position without refitting the shop. [Mr X] [personal/confidential details withheld] said, yes, I could expect to stay there with the refit as the management were happy with the tenant mix at this location. Another question I put to [Mr X] [personal/confidential details withheld] was if the centre had any plans to turn the area into a carpark or any other development in the future. He laughed and he said, "No, no. The area is working well and there are no plans for that remodelling." I asked could I have it in writing. Once again he said, "Well, we don't give that undertaking to any of our tenants in writing, but if you're a good tenant we'll look after you." I said, "Oh."

[Personal/confidential details withheld]. With all this information in hand, I purchased the goodwill lock, stock and barrel and all the rest of it, and the three years remaining on the lease, with 120,000 that I took out of the stock market in cash - tax-paid money - and I thought, "I'll increase the business by about 3 per cent" and, you know, "When I get the new lease - 18 months into the new lease - I'll sell it onto another lucky business owner and they can share in the success of this centre."

Two and a half years after trading I saw the business increase by 6 per cent. It was doing quite well. Then the Queensland Investment Corporation had a gala

dinner for all the traders and I was lucky enough to get an award from them for the best-run type business in their centres. A little plastic trophy in the shape of a triangle with this flame-looking thing - really great - and a \$500 cheque. Well, this was a little perplexing because at the very time I was negotiating to get another lease and this was turning into a very strange happening.

The newsagent next-door to me said that he was being moved into a kiosk, leaving an empty shop next-door to me. In fact, the other traders were all being moved, leaving my business on its lonesome. I was informed by management that Medicare was going to be moving into this old newsagency and the traffic flow would improve. It didn't happen. I asked about an empty location next to Hoyts Cinemas and I was told, "You couldn't afford that location. It's too expensive." Some months later on, after the shop had remained empty all that time, the same business that I was running moved into that very location.

I met several of the Queensland Investment Corporation managers and at one point came to the conclusion that I was missing something. I was advised by a friend of mine at a barbie to sound out the boss, get him on his own and offer him a \$10,000 bribe to see if it could get things jollied along, to get me a new lease. His advice is better doing the 120,000 cold, isn't it? I didn't get to see [Mr X] [personal/confidential details withheld] again and I felt that if I started down such a path in my business - which was never my practice, running any of my businesses since I was 20 - throwing good money after bad. Besides, there was a new manager every time I met one; never the same person.

They took me out and showed me the fire marshalling area at one point, where they stored the shopping trolleys, and the fellow told me that they could put a shop out there for me. The area had a low ceiling and related pipe-work; it would make an even lower ceiling if you put a false ceiling there. I thought at this point, "They're having me at it." He said they were going to put cash points out there, to draw the people out into that area. It was a lie, it never happened. As my obligation - after six months of this dance with management - the obligation of my lease terms had expired, I approached management about adjusting the rent down to meeting the falling traffic flow; in essence, going on a monthly rental. This was done by me in the form of a letter written, and an accompanying cheque each month, for several months.

A male manager, whose name I don't remember, came to see me and told me to go next-door and see the retailing leasing manager located in the old school building in Castle Hill Road - the school building that they bought off the council for my new lease - because leasing now wasn't done upstairs any more in the centre's boardroom and I had to go and see this other guy. I attended the office to yet another fellow and he offered me a lease with a \$600 a week increase, up to \$2400 a week, plus I was to

move to a new location and refit at my own cost; about 100,000 bucks. I said the

centre was well aware what the turnover was. They were in possession of the figures. They had the possession of the figures, as I did, and where was the extra money to come from to pay for this? We're trading seven days, where's the profit going to come from? The landlord would be taking all the profit. What's the point in trading?

He said, "You don't have faith in this centre, do you?" I said, "I have faith in the centre. I'm in the centre, but I can't take on something that I know is not feasible. I've got to pay this money every month." He said if I didn't want to take it, he had a queue of people waiting to take it, "So what do you want to do? Do you want it or not?" At this point I thought, "Shall I hit him?" I thought, "No, it's not done." I said I was in the centre and I knew what the trading figures in here were and I felt that I was being duped into this position, a position that I had taken on from [Mr X's] [personal/confidential details withheld] assurances at the time when I met him, when I was about to lay the \$120,000 egg to buy the goodwill. "Well, he's not here any more. You're dealing with me." I answered it would be a disaster to take on such a lease.

We traded for a few weeks and had a visit from management informing me that I could leave at the end of the month. Knowing that the staff I had, had all commitments - mortgages and whatnot - I thought it was not fair to pull the rug on them without notice so I told them the position. They were on the phone immediately for other job replacements. I had another visit from management two hours later, saying I could stay another three months. I informed him that the staff were told and they were on the move. In essence, the business was not feasible to pay the amounts we had agreed. The management said, "Are you prepared to make an offer to lease it?" I said, "Well, I'll give you 50 bucks a week." He declined and he said, "You can leave then in that case, you know, that's not really an offer."

I said, "Well, can I get my cash bond released from you, please? When do I get my money on that?" - bearing in mind I'm walking away from my 120,000 nest egg. "When you've left the centre," he says, "you'll get your money back." I went and took out the related things I wanted out of the shop and handed the keys in after we went down to inspect it.

Some weeks later I received a demand for non-payment of rent - 20,000-odd bucks or something. I arranged a meeting with the manager; yet another new manager met me. She had the file and she looked at it and she said, "We believe you owe us this money. You were supposed to pay us a certain amount of money on your lease and you had reduced it." I pointed out that she held in her hand my beige-coloured letters in the file, that were clearly visible - of the letters of offer each month with the accompanying cheques. "Yes," she said, "but there's no notes on this file and we believe we will look to recover this money." I thought, that's a threat. I

said, "Look, love, when you and I have such meetings as this here, it's my business

and QIC that are talking. What you say on their behalf I act on that. Your predecessor and I had such meetings and I acted on those arrangements. Now, if you don't want to keep to those arrangements, I'll tell you what I'll do. I will not be engaging a lawyer and get snowed by a roomful of lawyers you have on a retainer. But I will promise that I will hire a few good-looking girls and we'll stop every car entering the carparks into the centre and turn it into a circus, telling people how you rip off the small traders in here, and I'll do it for a long time, until they get fed up, and they don't get fed up by looking at good-looking girls."

I said, "Go away and phone your auntie or your mum and come back and tell me what you want to do, what action you're going to take." Fair play, she went out and she came back about four minutes later and she said, "We'll give you your bond back intact." I said to her, "For your information, what we're doing here today is not business, in case you don't know." As the new trader took on the lease in that position that was offered me I was interested to see what was going on. He lasted four months and went broke. I felt for him. In essence, it was an ambush. He was soccer punched. They knew what they were doing. In essence, he was paying for the goodwill that the centre wanted to keep as theirs, the extra 600 bucks a week, or \$156,000 over the five-year lease. That's a grand total of something like 624,000 over five years in rent, not including yearly increases - airconditioning and all that stuff.

The Commission feels that the property owner owns the goodwill - in your draft submission. Society doesn't ring true to that. Goodwill has been traded for years and years and years out on the strip. We are in a revolution in shopping centres, a revolution of poured concrete and climate control. You can akin it to the British in Ireland, where I'm from. Captain Boycott started a boycott where people were growing the food on the farm and delivering it all to the landlord, and were given a small patch to grow potatoes on. We know what happened in that - there was no meat left and half of them starved. This is what is happening in our retail centres in Australia at the moment. You are creaming, juicing, eating up your small traders.

The centre did not tell me - why didn't the centre tell me that; that I was buying something off the trader that they believed was theirs? A few weeks later I get another bill from the centre for \$1100 - \$11,000 it was, not \$1100 - from the management. No, 1100 it was, from the management for the airconditioning. I made another appointment with them and I was given an appointment at 6 o'clock in the morning for a meeting. I got down there and informed them I wouldn't pay 11 cents, because it wasn't what was agreed. This bill was also waived. My solicitor said, "Everybody else would have paid it." My solicitor said my mistake was buying the goodwill, as these centres view the goodwill as theirs. Why didn't [Mr X] [personal/confidential details withheld] tell me that when I first met him; that the goodwill I was buying was theirs? I wouldn't have paid \$11,000 for a three-year

lease - \$120,000 for a three-year lease. I wouldn't

have paid \$120,000 for the fit-out. I was buying a relationship.

I would have been out of there like a scalded cat if he had told me that. I wouldn't have invested the \$120,000 of my tax-paid money. It wasn't a get-rich quick. I didn't expect to become a millionaire. I didn't think it was going to be easy in the centre. I went in with a business idea and a business plan, into a business I had known from leaving school. If I had known the culture of these big players, wanting to juice the small trader, I would never have gone near it. I was led to believe that we were establishing a relationship of mutual trust, that I was buying an asset of goodwill, plus fixtures and stock, in order to have the opportunity of continuing to a new lease that would have the same continuity - not a freehold, not as I have heard here on Monday, one of these representatives from the big boys, the monopoly landlord, saying that I was buying a freehold. I'm not buying a freehold, but I expect, as a good tenant, with a good rental record, and keeping the shop in order, to be given a new lease at the end of that period.

My solicitor commented, "Well, maybe they felt the tenant you were replacing had run out of funds. Maybe it suited their plan. When the lease was up they could just replace you, too." Is this fair trading? Not by a long shot. Castle Towers now has bought outside the centre. They bought another small centre opposite them on the main drag. They are, in essence, grabbing the financial throat - the CB throat of Castle Hill. If you want to go shopping the only place to go is Castle Towers. It's a monopoly situation. This is repeated throughout Sydney. Chatswood we have two players; Hornsby - you can go on - Maroubra. They're building a big one in Ryde. The Commission will know what I'm talking about more than me giving them facts and figures. I just want to give you my experience as a small trader.

The same formula now is taking place where I have a business now in a major shopping centre. I've seen long-term tenants being pushed out, not because they don't know what they're doing, not because they went into it thinking they were going to be millionaires. They've been pushed out because management are looking that the goodwill is theirs and they know they can do this. They know they can put the knife in their back, kill them off and get someone to come in and pay for the goodwill and a higher rental. They have to, to keep the share price up. If the share price stays static, like Pacific Dunlop, the share price will drop. They've got to keep this onward, upward, onward, upward - and who is paying for it? The small trader.

In Russia the Communist Bolsheviks got rid of the kulak, the tightfists, as they were called, which was the entrepreneurial class - as they called them. They put them all into collectives. Is that what we're after in Australia? Are we going to turn around and find out that we've got one or two big landlords that own all of the retail space? Councils go hand in hand in this when you're trying to get a small business up. The CBDs are limited to certain areas. The shop I'm in at the moment, I had

centre management come down at the end of the lease - when I applied for a new lease - and the fellow looked outside the shop for about five minutes, maybe six, and he sent me a bill for a critique report. In that critique report he said that I should paint the ceiling and put in a couple of light boxes. The work cost less than his bill.

I objected to the charge and they said it was a standard charge. My lease arrived with the requirement for professionally-drawn plans for the critique report that he told me he wanted done, which could run into four or five thousand bucks - get someone to draw your plans like that. These costs are applied to the tenant as a take it or leave it stance. I crossed out the requirement for professionally-drawn plans, signed the lease and sent it back. It came back to me, "This wasn't negotiable" - although it was never discussed at the lease negotiation process.

So you pay the thousand bucks. Although I had been a tenant with a good rental payment for nearly 20 years, the bond was increased to \$10,000 in the form of my cash money in a bank guarantee. This cost me about 225 bucks a year to keep my money in the bank for the landlord to see that his rent for the four months was there. Why? Bank charges for the lease term to keep my own cash tied up? Hardball? Very hardball. At the end of the lease, in five years, there will be another critique report, more charges and a bigger bond. There will be, I fear, a refit requirement, although the refit is good but they have the power to come in and say, "This is looking a little dated. We think we'll do that." We're talking about 80,000. "It's looking a little dated. Re-do it. This is looking a little dated, yes. Re-do the whole thing."

Some areas need to be addressed by the Commission. Non-disclosure of takings. This thing of saying, "You tell us your turnover so we can advertise for you." The advertising they do is of no use to me at all; absolutely no use. You can say, "Well, we're advertising to deliver it in." Westfield has advertised they're the biggest retailer in New South Wales. I thought they were landlords. When did they become retailers?

They're telling you what it is. They're telling you what they're trying to do. And what they're trying to do is they're getting the small traders to work as piecework. "How cheap will you work?" You know, "Will you work to eat?" Don't try and make a profit; they're after it. We need to get security of position. If you're a good trader you need to be able to go along and say, "You want 25 per cent rental increase? You want 15 per cent? Go to arbitration and get it." We're not asking for a freehold. If they offered me the freehold, I'd buy it. Stop the landlord charging a fee in order to assess the condition of the premises at the end of your lease; to come in and look at this and say, "Yeah, well, brown is out now; make it pink."

Stop landlords moving tenants in order to refurbish the centres. This happens

every 10 to 15 years. You've seen it and I've seen it. Chatswood Chase did major, major, major work in Chatswood Chase, moving stuff around, if any of you know about that. You go down there, I wonder how they manage to do it. How did the traders survive with all that dust and muck and bollocks. Stop the landlord getting a marked levy from the lease for advertising, with no say in how it's spent. If they're going to get money off you for advertising, let them come back. If advertising for me doesn't work, I stop it. What they're doing doesn't work and I'm still paying for it.

The landlords argue they're reducing tenants to keep the centres vibrant, killing off the under-performers, weeding out the undesirable, putting in fresh new blood. How do they know? Ah, they've got all the figures. They know what everybody is doing. That's how they know. My negotiating was done with the centre manager saying, "Well, you've got a very good business down there, don't you, and this is the rent we want from you now." I ask, "Is there any point in asking for a lesser amount?" He says, "Not really, no. We've got heaps of people wanting to come in here." "Okay." In order to keep market forces at work, the law should require these market monopoly landlords to strata-title a percentage of the centres, a space to keep small businesses operating.

The landlord on the strip would have little chance of trying to pull off these unconscionable strokes that they're doing. Give the small traders some protection. The Retail Act needs reforming in order to protect the consumer and trader alike. Local governments allowed these monopoly landlords to grab control over our towns and cities, commercial and retail centres. You'd be blind not to see that; blind. One of the small places up in the markets there, in Parklea Markets, I think Westfield has bought them, didn't they? Somebody bought them. Some big trader was after buying them. All these people coming together to sell at the weekends, they're looking for ways of doing it. They're looking for ways to corner the market.

When the government talks of breaking monopolies, we want to see - you know, "We want to break monopolies." We see less petrol stations, more cars. Great competition - I think not. We see butchers disappearing from everywhere. Greengrocers are all disappearing. Small business is disappearing at a great rate of knots. Why? The main retail areas have been grabbed by these monopoly landlords, that's why: layer-cake parking. I had experience with Chatswood Council, with their carpark, charging more than Westfields for their carpark. I wrote to them and said, "Why are you underpinning Westfield's charges? Why don't you match their prices?" They did and the carpark was much fuller afterwards. They've since closed the carpark.

Anyway, when you see monopoly landlords getting the lion's share of space in Parramatta, Pitt Street in the city and in fact every retail area that I've been around,

Australia-wide probably - in the last month I see the actions of my landlord. They have let a new beauty shop in and asked the existing beauty shop for a refit and rent increase. They know what she can afford. They're privy to her takings, the figures for the last five years. They know it will be excessive, what they're asking for her business rent affordability. This businesswoman has been there for over 14 years. This businesswoman declined to take on the lease and chose to leave the centre. Management asked her for 11,000 bucks to strip out her fit-out of her unit. It's like a pizza slice. It's not a big unit.

Any value in the existing business is added on to the rent of the new introduced business, because landlords have got all the figures and he, in essence, steals her goodwill; not in the same spot, just around the corner. Alan Bond tried to do such when he bought a group of pubs and he was taken to court by the managers - the class action against him - for the goodwill. Does the Commission think that each business should fight that case again in the court on that merit of goodwill? Bond's people that had the pubs, managers, they bought the goodwill to run it, sell beer. If you're darting down the road and you come to the crossroads and the King's Head is there and you want to pop in to just have a beer, is that the landlord's money, his goodwill, because it's his position, he bought the building? No, there's a percentage which is, in the rent, not in the goodwill.

I sat here on Monday and listened to the Commission saying, "Oh, well, you know, when you go into your goodwill, they've created the goodwill," and all that type of stuff. They can put that in the lease. "When you're taking on this lease, mate, you ain't creating no goodwill in this centre. We look on it as ours and if you show us there's goodwill, we'll add it on to the next five years' lease." That's, in essence, what they're saying. The pubs had good positions, I'm sure; some better than others. It doesn't make it the landlord's preserve to get that goodwill. We've had centuries of this in small traders passing on goodwill. If Derby, in the Industrial Revolution, making wrought iron, finds out that he can smelt iron and get the iron to run, who does that belong to? That doesn't belong to the preserve of the fellow that he's renting the barn off that he did it in. It belongs to Derby.

The position; the position of it. You sort of say, "Well, the position of it was, you know, they called it pig-iron because he poured it into the pig trough and the only reason he could do it is because the iron was there and the coal was there and that's how it come about." It's not the landlord's thing. It belongs to the person that's working on it. The landlord is getting a handsome rent for his premises. To come in and give him the goodwill is wrong; very, very wrong. You're going to kill off a whole class of people in Australia. The Russians did it when they went after the tight-fisters, they were called, the kulak; the person that showed any entrepreneurial skill.

The British did it with the Irish in England with the absentee landlord. You can go on but there are examples from history. What you're doing here in this Commission, the problem I've come down with today to talk to you about, is not for me. I'm at the end of my working life. But when I'm an old dear walking around in a walking frame I don't want to find the only place I can go to shop is in these monopoly-controlled landlords - share-driven monopoly landlords. It isn't good for the consumer. It isn't good for productivity.

It's very good for the owners of these shopping centres. There is no lump sum to pay when they've got rid of the existing tenant. The new tenant will have the goodwill added onto their rent. It's not a question of fair trading; too fair for the landlord, not fair by a country mile for the trader. We're experiencing a revolution in all this and I feel that to raise a voice for fair trading is not to hear myself talk, but to give you people an idea of small business people like me that have made a career of small business, finding that we're being murdered out there.

There's no use us staggering into the room with knife sticking between our shoulderblades and falling on the floor, and having the Commission saying, "Well, you have to be careful of knives. They're dangerous." I wonder how it got like this. If he's shouting murder, you have to look in to see what's happening, and we're shouting murder. We've seen traders taking their own lives, risking ruin, to open up a business. It's not a question of their wanting to make a million overnight. It's a question that they're being let in. They're being let in to the lotus effect; brought into a shopping centre, sitting down with the likes of [Mr X] [personal/confidential details withheld] and being smoothed over and having oil poured on your head.

I'm waiting to hear the shocking news that Tom Trader will see the problems in the form of the centre management team and take some illegal or violent action against them, after losing their family and home. Violent action against innocent people who are only obeying orders from above; orders that are allowed by a retail Act that doesn't protect. It doesn't protect the small trader. We're not talking about penny-ante stuff here. We're talking about people using substantial amounts of money. Some years ago some chap blew his brains out outside the bank because he went under with high interest rates. This is what happens. Desperation. Desperation in these people.

Today brings me down here - not desperation because I'm lucky enough to be a good businessman, but when I've been financially raped, I know how it feels. I feel - to come here today to tell you how it is when you're dealing with these people. I was very interested to see these four people sitting here, ... [personal/confidential details withheld], so smoothly telling us all that all was well. "All was well and leave it as it is; let us deal with the traders as we know how and we will do it - we will self-govern."

We've seen the licensed casino cheating at cards; taking the 10s out of the decks at the blackjack table. Licensed. They got fined \$15,000 for that. That's like you guys getting fined 50 cents. If you come in and said, "I just got a speeding ticket. It cost me 50 cents," I'd say, "What are you bothering telling me about it for? It's irrelevant." The government has to play catch-up, but when you've got these big shopping centres giving millions of dollars to the political parties and they're all going around saying, "Oh, no, no, we don't want to do this. We don't want to change the Retail Leasing Act. You know, let's keep it as it is. It's all working very well. You know, we've got falling prices - we've got falling grocery prices and it's all hunky-dory," then you're not joining up the dots. You're not listening to us.

I've finished my working life in small businesses and if you offered me a shop in a shopping centre that's ready to go, had signed the lease, with nothing to pay, I wouldn't do it because I know how many beans make five. It's an old English saying, how many beans - if you don't know how many beans make five - and I know it well and truly. Dealing with the monopoly landlord, I found I was lied to, I was duped and it wasn't done because I was going in as a starry-eyed - an "I'm going to get rich quick" scheme. I went in looking to make a business, improve it and sell it on; to be an asset for them and for myself. What I found, I was gutted, filleted, stitched up and thrown out.

I'd like to thank the Commission for their time, ... [personal/confidential details withheld].

DR BYRON: Okay, thank you very much, Michael. I think you've discovered - and very, very forcefully reminded us - about rule 1; never take anybody's verbal assurances as gospel. You've learnt that the very hard and painful way.

MR BRADLEY: I knew that. I knew that, but when you're trying to establish a relationship, you have to have trust. There has to be an element of trust. When we come here for this meeting, you have to trust that I'm not going to get violent, that I'm not going to beat you up, because it's not done; there's an element of trust. There's an agreed perception of how things should be conducted. When you go in to deal with a landlord, you go into a business deal, you assume you're going to establish that ongoing relationship - not of five years. I didn't want to buy their lease. I didn't want to be put on the board and made assistant chairman. I was going in as a business and they know that. They're not stupid, I'm not stupid.

As I say, they know how many beans make five, and so do I, and when you go in to sit down with them and should say, "Is it safe?" and you[sic] say, "Yeah, it's

safe," then you assume that it's safe. "Can I have it in writing?" They say, "Well, no, you don't need it in writing. We don't give that to anybody in writing. It's safe. You'll all be safe" - but then when you find out that someone is going to come in and kick the financial crap out of you - - -

DR BYRON: Looking back at this now - don't go away. From your sort of closing comments, I was thinking you should have been in a strip all along rather than - - -

MR BRADLEY: I have been.

DR BYRON: - - - in a centre.

MR BRADLEY: I have been.

DR BYRON: Yes.

MR BRADLEY: I've been in a strip.

DR BYRON: Well, let's go back then. Would you agree that being a small trader in a strip is fundamentally different from being a small trader in a big managed centre simply because the big managed centre has got, as you say, more lawyers and accountants - and the other thing is that you're paying more in a centre because they - - -

MR BRADLEY: I know what you're going to say. When I go in to play blackjack at the casino and I pull up the chair, and I sit down and I say, "Hit me," I expect them to be playing with the right deck. Would you agree?

DR BYRON: Of course.

MR BRADLEY: When I go into a shopping centre to take on a business and I sit down and I talk to somebody one on one, I expect we're establishing something. Now, if they don't want to establish that, if they want to turn around and say, "Look, son, you know, when you come in here, this five-year lease you're getting, that's it, and any goodwill you create ain't gonna be yours; and if you show us you're a good trader, we'll eat that. We'll have that - - -"

DR BYRON: That's exactly where I was leading to; that there does seem to be a fundamental difference between retailing on the street and retailing in a big managed centre.

MR BRADLEY: It's a revolution.

DR BYRON: And my point is the rules of the game are fundamentally different, and anybody who has been working in that environment on the strip where you've got dozens of different landlords to choose from, there's no turnover figures being provided, there's no compulsory fit-out, there's no critique report, there's nah nah nah, and you go into a centre - the rules are basically different. You're actually going to pay them a premium because they're going to do the advertising, they're going to do the management, they're going to generate the foot traffic for you. That's why you're paying extra in the centre.

Now, if you don't want their advertising, why would you go over there and pay for it? If you're working on the strip the rules of the game are fundamentally different. You can't have two teams on the football field and one team is playing soccer and the other team is playing gridiron.

MR BRADLEY: Yes.

DR BYRON: That's not going to be fair. You've got to know what the same rules are.

MR BRADLEY: You have to look at the - "Why are you doing this? Why are you going into business here? What is the end product of your business here?" You say, "Well, I want to come in and I want to work in this nice shopping centre, because it looks nice. It's nice, and I want to become a millionaire. It's going to be nice. I'm going to be a millionaire." This is your words yesterday - or Monday. You say, "Oh, okay. Well, I'll tell you how it is. When you come in here, you have to work out if there's going to be any money left after your work, because we're looking at the business so hard because we've got all the figures from the businesses previous to you - and we're looking at them so hard and we know exactly what the depth of those businesses can be. We're going to take all of that" - because it's not higher maths - - -

DR BYRON: No, you've discovered what the rules are.

MR BRADLEY: It's not higher maths, but the - you're lied to. [personal/confidential details withheld] ... When I'm sitting there laying a 120,000-dollar egg and I'm asking him the pertinent questions, - he lied to me, and then when my solicitor explained to me my mistake was to buy the goodwill because they look on it as their's, and I said, "Well, why didn't he tell me that? Why didn't he tell me, what you're doing here, you know, it's bad news because you haven't got a hope in hell of getting your \$120,000 back mate." And I walked out. I walked out of the centre because it wasn't tenable.

And they lied to the guy coming in because he went broke. He probably wasn't inept. He probably wasn't an idiot. He probably knew how many beans made five,

but he's ambushed; he's sucker punch, and the Act doesn't safeguard - I can't, say, pull up stumps and go down to the trader down the corridor because they own them all, and it's getting more and more that way in New South Wales, but all these areas are owned by the one landlord, and the councils are keeping us corralled in areas where we can't get out. If you say, "You go in there or you go nowhere, or you go somewhere that is really, really second rate."

DR BYRON: Let's just hone in on the figure of the turnover data because everybody we've been talking to over the whole course of this inquiry - the small retailers in the big centres bring up the issue of having to disclose their monthly turnover figures. Let me put another proposition to you. Let's say the law made it illegal for them to ask or for you to give the figures. Okay. Let's just hypothetically say that. Another theory is that a competent centre manager could walk around the building and say, "That guy's doing well. He'd be pulling in about 200,000. This guy, hasn't seen a customer in there for the last two days. This guy's stock hasn't moved in the last three weeks. This guy's just bought a new Mercedes - we're obviously not charging him enough rent," you know. I reckon they could work out how much each business could afford to pay in rent whether you gave them the turnover data or not.

MR BRADLEY: I knew people who could play poker and do that. They didn't go around and look at everybody's cards. They just said, "You've got four of a kind. I ain't raising the money any more. I ain't going to do it any more. I ain't going to put any more in the pot because you're going to win," and this is what disclosure of takings do. When I went into the centres they would say, "We're going to have (indistinct)" and you knew that you were going to have a certain thing and they were looking after you, but these guys aren't looking after you like that. It's a new ball game. These guys are share-driven monopoly landlords and they've got to keep going up and up and up. Centro is a perfect example. Could you run a four and a half billion company and run it into the ground? I couldn't.

DR BYRON: I don't think I could, no.

MR BRADLEY: But it was done. It was done because these fellows are playing the high roller's game. They're playing winner takes all, and these little people that are sitting out here as small business people, they don't matter. They will crunch them. They will put you through the mixer.

DR BYRON: Mr Anthony Herro who is a solicitor who, I think, specialises in representing small tenants in Sydney. When he was sitting here yesterday morning he made what I thought was a very, very astute observation. He said, the sort of leases that we all know and understand, developed over the last few hundred years, in the sort of strip environment where you've got hundreds of retailers and hundreds

of small landlords, people who own one shop or perhaps two - he said, somehow that tool just doesn't seem to fit very well with our new big modern mega shopper mall, and he said we need something different because the lease that we've had for the last 100 years isn't sort of the right document for that. I think what you've told us here this morning reinforces that; that the rules have changed completely.

MR BRADLEY: Yes.

DR BYRON: And they haven't told you what the new rules are.

MR BRADLEY: No. Definitely not. And they lie to you about the new rules. You say, "We're playing cricket here, aren't we?" and he says, "Oh, yeah, we are," you know. "We're playing with machetes and you've got a cricket bat," and they're hacking each other to death. That's what it is. I told you on Monday I phoned a friend of mine and I was telling him I was going to buy in Castle Towers and he said - in the states - he said, "You be careful about going to those places. Those suckers juice them, mate. They juice you here." He said, "I wouldn't go in those centres here, those suckers juice you." He said, "The only things you get in there are franchises," and the franchises act hand-in-hand with the landlord to juice the fellow that comes in thinking he's going to make a quid, and they're telling him - they're showing the figures and they're saying, "These figures that we have here, we're \$500,000 turnover and you're going to do this and you're going to do that. It's going to be rosy," and they're led into it by the hand to do franchises.

When they find the reality when they get in, they find that the equations have been done and there isn't any profit. A friend of mine worked at Michel's Patisserie for two years, him and the wife, for no money; seven days a week trading. Got his franchise money back, and I said, "You're lucky to get it back. I didn't get mine back," and he says, "Two years" - the money, he earned nothing for two years. We both worked for no money for two years. The new franchisee, 180,000 to buy the franchise, 30 per cent rent increase. He went in and told them who he was. The fellow's accountant, he's going, "They're saying it's us. They've told us it's us. We don't know how to do it. My wife and I put our super in here."

That's the reality of what you're doing, and these monkeys can sit here and say, "It's all fine. We've got people waiting to come in. They're queuing up to come in." They've got them queuing up to go in the casino too but they expect it to be fair. They're running around to put money on the roulette tables at the Star Casino but they expect it to be fair. They don't expect to have a magnet underneath the roulette wheel.

DR BYRON: Yes.

MR BRADLEY: That's what these people are doing - they've got magnets under the businesses to pull out all the assets out of them, and when you're finished, when he's finished here, you walk away. I admire someone like him - he comes down here today, wasting his time to come down to sit here, no-one's paying him, no-one's paying me; they say it's too late for me and too late for him. But we're coming down and say, "Yeah," but there's a minion of people behind us that it's been done to, and you think, "Why aren't they here?" and they sort of thing, "Oh, it's a nightmare. Why revisit it."

DR BYRON: I don't suppose it is any consolation but - - -

MR BRADLEY: I'm not looking after a consolation. I want the Retail Leasing Act changed, so when I go out with my pension thing I can think we've got a bit of competition going here; a bit of market force is in play.

DR BYRON: What I was going to say is that what will change the situation where the shopping centres can basically put any terms and conditions that they feel like in, including your critique report and airconditioning bills and advertising you don't want, et cetera - what will change the situation, and one of the things is when there is no longer a queue of people lining up outside who want to come in, in your terms, to be juiced.

MR BRADLEY: You have a business migration program where it's easy to get into the country you get a half a million bucks or a million bucks to come on in to Australia, and you're walking into this lotus land where you - you're walking in and saying, "Oh my God, they almost look like they're making a quid" - like the last speaker, my predecessor, said that they're all losing money. He thought they were all doing all right. And it's a sucker-punch ambush, and I can sit with a manager like you and I'm going to go out and do it, I'm going to look for businesses for sale, whatever businesses they are in shopping centres and I'm going to go in and I'm going to see centre managers and I'm going to sit down, and I'm going to say, ask them all the relevant questions here, and then I'll write to you and tell them. I'll tell you what they've been telling me. Of course, the fellow you're buying off doesn't want to tell you that he's - "Was I lucky to get you."

DR BYRON: Because if the buyer knew what the vendor had been going through he wouldn't be a buyer.

MR BRADLEY: He wouldn't buy. I wouldn't have laid \$120,000 if [Mr X] [personal/confidential details withheld] had said to me - - -

DR BYRON: "You've got three years to get your money back and then you're out." You wouldn't have paid \$120,000 for a three-year business.

MR BRADLEY: No. I thought I was establishing a relationship and I asked him, "Do you want me in the centre or would you prefer a big boy to come in?" "No, we're quite happy with you," and my solicitor said, "Well, maybe the last bloke was right out of money," and he thought, "Well, you'll be a good stopgap. We'll juice you and then get somebody else," and they did, and they juiced him. And I'm surprised there are all these empty seats here; there should be hundreds of people in here, sitting and saying, "This happened to me," because it has. But as I said, when you get a good hiding financially, you don't want to go around telling people. You know, "How's business?" It's like asking how's your health. "How's your health? How's your chemo going? Not too bad." No-one's going to turn around and sort of saying, "Business - let me tell you how bad business is," you know, and I'm trying to sell it. Word gets around like wildfire.

As an old boss of mine said, "If you want to sell the place, paint it up and make it look good. Go and get a few of your relatives to come in and make the place look busy." You know, it's a bit underhanded, but these people are running it very, very keenly and the reason we're here isn't to hear myself talk, because I'm not that good a speaker, but it's to tell you people the need to change the Act and it depends when you make your submission and go up and they look at me, they remember, and I'll think, "Well, that was really good that they did that; non-disclosure of takings" - make them say, "Give us 50 per cent of your turnover in rent.

We don't want to know what your takings are, or we want to know what your takings are. You just tell us what your takings are. Give us 40 per cent of your turnover in rent, or give us 35 per cent of your turnover in rent, or give us 14 per cent of your turnover in rent." You know, don't bother about the rent, we'll just go for a straight percentage. If they want to know what your turnover is, let them do that. Let them take 2 per cent for advertising and 25 per cent out for rent. Then you could sit down and you can say, "He wants 25 per cent of your rent. Let me think now. That's 10 grand a week. That's two and a half grand a week. I suppose you could do that." Let them do that, but don't let them ask what the trading figures are and then keep escalating. It's inflationary.

They're talking about keeping the banks down and inflation, and Rudd scratches his head and doesn't know what to do about it. This is what he should do about it. This is where you eat. These people, it's not an investment for them. It's their eating money. Small business people, it's their eating money. Your shopping centre owners, your Mr Smith who runs Centro, he gets three million bucks. He's out of there. He walks away and leaves devastation and ruin in his wake, and sort of says, "Oh, well, that was all right, wasn't it?"

DR BYRON: It's very interesting but the bottom line is: what can governments do,

through changing legislation, to reduce the probability of - what actually - - -

MR BRADLEY: I think what they should do, if the government wants to create a level playing field with it, they want to stop them asking for turnover figures for a start, in the small business. If they want turnover figures, ask them for a straight percentage of those turnover figures for rent. That's plain.

DR BYRON: You don't accept my proposition that maybe they could guesstimate what all those figures were anyway, even if they weren't provided?

MR BRADLEY: They can do one or the other: they can guesstimate or they can ask for your turnover and ask for a percentage in rent. Give them a little bit of leeway on it. When you hear people turning around and sort of saying, "Well, the last bloke was paying 50 per cent as his rent, and he had a huge turnover. Do you want to pay that?" You say, "Oh, yeah, I can pay 50 per cent rent because the turnover is so huge. Yeah, we can do that." If the turnover drops because they've chopped the carpark or filled it with car-washing facilities, then you say, "Look, we're giving you 50 per cent of nothing because you've created nothing." Do that.

Stop them doing fit-outs every five years. I remember businesses, in England and Ireland, where they would be there for 30 or 40 years - Forbes and so on, established in 1890. They don't own the building they rent it off the landlord. There's a revolution going on. There's a revolution been happening here since 1970, with poured concrete and climate control, and you have to stand in and say, "Well, because you've got poured concrete and climate control, you have to allow these big players to kick the living gruel out of all the small business people." That's an acceptable part of having a nice environment.

DR BYRON: The final question I was going to ask you, your comment about "Where are the butchers and the greengrocers and the candlestick makers and so on?" A lot of people have said to us as we've been travelling around that you go into a big shopping centre and they're all the same. You say, "Gee, am I in Adelaide or Brisbane," because they've all got the national chains and the national franchises and so on. One argument is that the small business, the one-shop butcher or the one-shop greengrocer, is sort of disappearing from the whole retail world and certainly disappearing from the big centres.

MR BRADLEY: It's just cost because these centres are sitting down and they're saying, "We've got so many square feet of retail space to lease and we want \$2000 per square metre per annum, for all of them." You say, "The woman who sells the haberdashery stuff, where you go in and you buy six buttons, you want her to pay two and a half thousand dollars?" That's why you ain't got none, because there's no choice. The choice has gone, disappeared, because it's maximus. Everybody is to

pay maximus. You sort of say, "Oh, what's maximus?" They say, "\$2000 a week." He'll say, "You know, we're repairing shoes here or, you know, we're selling this or we're selling that." You sort of say, "Well, that's your problem."

Of course, what they're doing is seizing control. The government has to have control of these things where you get people on this piecework, where you turn around and say, "Well, you work really hard on piecework and anything you do over 40 hours we can give you some of that, if there's anything left." That's piecework. The government had to step in, in the Industrial Revolution, and do that, and stop factory owners from saying, "How little will you work for? Will you work for bread?" or going down to the docks and throwing out the tickets to the fellows, to grab a ticket to come into work. This is what's happening in your retail centres, your big glamodes, and it's because it's a revolution.

The reason they've set the Commission up is they know there's some smoke, and there's a raging fire down there. When it's finished, I want to see that they've at least thrown a good bucket of water on the raging fire and given some protection to the tenants. Then you'll see the franchises disappearing. What you're seeing now is you're seeing the greenhouse effect and your growing franchises. Look at all these franchises growing. What happened to Giuseppe's Coffee Lounge and Freddie's Butchers and so on? You see, Freddie can't afford it. He's just priced out of the market.

I've looked for a small shop, and I've been looking since about 95. A friend of mine bought one in Wahroonga. And I've been looking around. At the time when I was looking it was 780,000, they are now 1.4 million to buy a small shop. You are corralled by the planning orders. If you haven't got 1.4 million you can't get a small business. When you're giving over these retail areas to these big players, you have to have some control on it. It has changed. There's a sea change going on. If you haven't felt the chill, become a small business person and go into one of them. You'll soon find out how cold it is in there.

DR BYRON: It has been extremely interesting and helpful to us. I mean, whether you're trying to be helpful or not, you are. The issues that you're raising, we know they're real issues. In terms of the best way to deal with them, we are all still grappling with that.

MR BRADLEY: My last business that I'm in now, my lease will be up in three years' time and I bet you a hundred bucks that I'll be leaving. I know that I won't get another lease that I can accept, and I've been there 20 years, because I've seen what's happening. I've seen what's happening with all the other traders. They are all being pushed out. I've had a word with them. We pass in the corridor and I say, "Why are you leaving, Nat?" He says, "We were just pushed out." That's the way it is.

DR BYRON: 20 years? I haven't heard of anybody who has had more than a five-year lease before.

MR BRADLEY: Yes, but it's changing now. They've got this idea the goodwill is theirs and they've been going for it. You only hear of this problem every five years because it only hiccups every five years. You find people like Ken and me who are getting their bums kicked, and we're walking away thing, "Oh, what happened? I thought I was a good tenant." They're sort of saying, "We can get another one of you. Sod off." That's what's happening.

DR BYRON: Okay. I think we'd better draw it to a close there.

MR BRADLEY: Good on you. Thank you very much.

DR BYRON: Thank you very much. We'll resume at 2 o'clock with Council of Small Business of Australia. Thanks very much, ladies and gentlemen.

(Luncheon adjournment)

DR BYRON: Good afternoon, ladies and gentlemen, welcome back. If we can continue with the public hearings of the Commission's inquiry into the market for retail tenancy leases in Australia. We are resuming with the representative from the Council of Small Business of Australia. Our standard procedure, Stephen, is that we ask people if they can basically take us through the main points that they want to cover in terms of comment or criticism or additions about the draft report. I've got some questions I'd like to put to you and I'm sure there will be things that we'll want to discuss, arising from what you say here today. Can you spare at least an hour for us, or it might be longer than that?

MR SPRING (COSBOA): Yes, I've got probably 20 pages or so of stuff that I'd actually like to talk about, if I can, which basically raises all the points that have been raised in your report, which is basically our submission.

DR BYRON: Yes. Okay, well, in that case we might be here a bit longer. Without further ado, if you could, just briefly introduce yourself and your organisation for the transcript purposes.

MR SPRING (COSBOA): Yes, my name is Stephen Spring, from Australian Retail Lease Management. I'm retail policy adviser for COSBOA, which is the Council of Small Business of Australia and I'm here representing them in the capacity of retail policy adviser.

DR BYRON: All right, take it away.

MR SPRING (COSBOA): The background is, I have over 20 years' experience in retail property industry. My former business partner owned and built shopping centres and, like me, was also a retailer. I've worked on both sides of the landlord and tenant relationship and I've seen at first hand virtually every facet of the retail property industry, both inside and outside shopping centres. I've had the pleasure of being able to have some influence on retail leasing law because I'm a member of the working group that reviews the Retail Lease Act of New South Wales.

On behalf of clients, I regularly represent tenants in the Administrative Decisions Tribunal of New South Wales. I've litigated retail leases in the Supreme Court of New South Wales and even in the Industrial Relations Commission under the contracts provision of section 106 of the Industrial Relations Act. So, having been a retailer, I do speak from experience. In my capacity as COSBOA's retail policy adviser - I do so as a service to the retail industry, because what we see are some of the wrongs perpetrated on the hardworking families and we see that we wish to leave a legacy that we've in some way contributed to the betterment of Australian society.

I do not believe that retailers should stand idly by and let landlords dominate the debate. I thank the Commission for its impartiality. I'm pleased the Commission is taking this approach in a field where many tenants do not accept that, in business, some people are the losers and some people are the winners, and in a commercial battle that is the way it must be in a free market. However, what lessees would like to see as an outcome of the public hearings, I suspect, is the Productivity Commission to alter some of its views and reshape its findings, because COSBOA submits that some of them may have been, with respect, made in a vacuum.

COSBOA would like to say that the Commission needs to challenge its own thoughts and rigorously apply a deeper understanding from the public hearings and from the submissions such as COSBOA's today. It would be a shame that, having gone this far, retailers say that the Commission has made its findings on the basis that in some cases it has misdirected itself; and we would like to explore some of those issues if we can.

Unlike the retail industry, the Shopping Centre Council lobbyists are paid professionals whose constituent members were, in New South Wales at least, vehemently opposed to any regulation of their market. In 1994, when New South Wales introduced its own regulations because voluntary regulations had failed, landlords and their lawyers - and I know this because at that stage I was in the landlords' camp - were finding new and creative ways to get around the Retail Leases Act. One reason why retail leasing legislation has grown is simply because landlords have, at virtually every opportunity, taken every advantage of stretching the law to suit their own purposes. So we submit that the legislation has grown to be more prescriptive mainly because of landlords, not of tenants.

We submit that efficiency versus transparency is a major issue here with the Productivity Commission. My submission is that the Productivity Commission is not to confuse an efficient retail marketplace with a clear marketplace. A clear marketplace means one where both parties have equal amounts of information from which to make a considered judgment as to their risks and rewards. Regretfully, the Productivity Commission has not defined what an efficient marketplace is in the context of retail leasing. We find that a shame because it would help us.

Is an efficient marketplace one that quickly leases premises or one that has insignificant defaults under a lease or a small number of disputes perhaps, or one where there is equal footing for both lessee and lessor? What is an efficient marketplace in the context of retail leasing? It is disappointing the Productivity Commission has not set this out in detail, because pure economic theory that has been applied to people's livelihoods, after all, may be a perverse outcome and that's not what everybody is after.

COSBOA asserts that the Australian retail lease market is not such a market which allows for lessees to have access to information to allow them to make fully considered judgments. For example, at page 84, the Productivity Commission refers to a Canadian document called Winning Retail. That document shows, at page 7, a similar requirement to here in Australia: that Canadian retailers require tenants to report monthly sales figures to their landlord. Page 8 of that document shows a table entitled, Canadian Mall Sales Per Square Foot, which is a table for mall sales by region, broken down by category. It's been taken from the monthly Canadian Mall Sales Report published by the International Council of Shopping Centres; if I can just show you a copy of that.

The difference between the Canadian and Australian market is that no such detailed reports are available here in Australia to the level of detail by region or mall. It's a different culture. Here in Australia, our culture is one of secrecy. Therefore, it is impossible for a retailer without anything more to estimate what their sales would be upon entering a lease in any particular mall. On the other hand, this information is clearly collected by the landlord. This information is assimilated amongst landlords and sometimes shared through cross-ownership, so that the profile of the retailer's sales performance is built up over time. This is one example where the retail leasing market is inefficient, simply because the information available to one party is not available to another.

It is inefficient because one party cannot assess risk in the way that another party can. This is despite advisers and retail professionals operating in the marketplace, because the advisers themselves do not have access to that critical information that's needed to assist the retailer. The information would be available if they were a Canadian retail adviser but it simply doesn't exist here in a form that is readily available. By contrast, Australian sales information that comes close is in a format that does not differentiate by region.

If I could show the Commissioner an example of a JHD report, these cost nearly \$5000 per set per annum. These are averages. These are the JHD averages that the industry uses. These are copyrighted so they can't be published willy-nilly. They use average grossed -up figures across all states. They're separated by CBD centres, centres that have supermarkets, major regionals, leading regionals and double discount supermarket centres. They give averages. But really, there's nothing in the way of publications of specific areas as the International Council of Shopping Centre reports do in Canada and in America. On the other hand, landlords have very detailed data because they collect it from their tenants.

In New South Wales, the government and the industry recognised this information asymmetry in its 2006 review and it went some of the way at closing the gap. At points 30 and 31 of the disclosure statement - if I could show them to the

Commissioner - in New South Wales, it mandated for a breakdown which went some of the way to addressing the information imbalance so that a prospective lessee could compare annual turnovers per square metre within the shopping centre and for food, non-food and services, to allow them to make a more informed decision on a particular shopping centre. In other words, a well-informed adviser could also do more. If the Productivity Commission was to view this innovation as a prescriptive and restrictive practice on the efficiency of the retail leasing market, in COSBOA's view it would be a restrictive practice that would be a retrograde step and would further increase the information asymmetry between a lessee and a lessor.

The information asymmetry - when you know a retailer's turnover, you also know their rent-paying threshold. COSBOA recommended in its submission that the information asymmetry could be partly alleviated by the Australian Bureau of Statistics collecting retailers' sales information on a quarterly basis and aggregating those sales data so that both landlords and tenants have access to the sales but no individual retailer could be identified. This would mean that lessors would still be able to view the retail performance of the shopping centre, and their assets, and lessees would not live in fear that their individual retail sales would be used against them in retail lease negotiations, especially at least renewal time.

I noticed a couple of days ago that the Commission has picked up on an important point during these hearings: that lease renewal time is not really that at all. It's a new lease. This, as an aside, has been picked up by Westfield in Victoria, and I commend Westfield for doing this, where lessees are fully informed in writing that if a new lease is offered at the expiration of the current lease on offer, it may well be a completely new lease on completely new terms and lessees should not assume that the lease will be renewed.

DR BYRON: Sorry, that's only done in Victoria?

MR SPRING (COSBOA): It's Westfield's standard Victorian blurb that goes out to lessees.

DR BYRON: But similar clauses don't appear in other states?

MR SPRING (COSBOA): They appear in different formats, but Victoria seems to have got its very, very clear.

DR BYRON: Yes, good.

MR SPRING (COSBOA): However, in our view, the Productivity Commission has not fully appreciated that full control of a lessee's business at lease renewal time truly comes from having access to their turnover figures. I've seen this, in my

experience, time and time again. This was highlighted in the COSBOA submission where evidence was offered that showed landlords used turnover figures for negotiating rents. COSBOA's submission wasn't the only one to highlight this. COSBOA is concerned that this wasn't seen as a crucial point by the Productivity Commission.

COSBOA's submission highlighted that secrecy surrounding collection of turnover figures fuels the information symmetry to the lessee's detriment. The argument that landlords need to know their customers' sales so they can manage their assets every day on a daily basis is a furphy. Every day landlords make millions of dollars of investments in greenfield sites and extensions without knowing retailers' turnover. They don't know what their sales are. These extensions of centres are made without having a clue. They make considered judgments themselves. Knowing turnover figures, amassing that information and keeping it for use at lease renewal times makes an inefficient market and is one that eventually distorts. COSBOA submits that only a clear market can be an efficient market.

As Boydell found out in his emperor's new clothes submitted to the Productivity Commission in COSBOA's submission, in Australia there's a large amount of secrecy surrounding rentals, turnovers and hidden incentives. It seems to be peculiar to Australia. Landlords are in the business of selling retail space, not selling goods and services like retailers are. Why do they need access to retailers' turnover figures? There is a reason. We have in this industry what is called a liar lease. That's not something that's often talked about.

A liar lease is where a leasing agent leases a retail shop to a retailer on the basis that the landlord clearly knows, through experience of previous failed retailers and the collection of sales information, that the new incoming retailer could not possibly ever make any money, or even pay the contracted rent out of the gross margin. The landlord, armed with that information that the retailer does not have access to, is on one view irresponsibly using his position to get a signature on a page and is, in effect, a predator business, having no regard to the capacity for the business to generate enough funds for that least to be paid, for the purpose the lease was entered into.

Now, of course, the liar lease is part and parcel of the leasing game. I'm not suggesting that every landlord plays the liar lease game and, on another view, at law it doesn't really matter if the business cannot generate sufficient funds for the contracted rent to be paid out of trading profits anyway. The rent under the liar lease has to be paid whether the money comes from borrowings, selling the family home. In a clear market COSBOA suggests that the liar lease would be less prevalent.

The Commission recently heard about a discount retailer that was the third

operator in the space of as many years. They were totally unaware of the previous problems and now he is in trouble. That's a liar lease. COSBOA submits that you cannot have an efficient market unless it is a clear market. A clear market protects lessees. To use the old adage, "What you see is what you get." What you don't see gets you.

I want to move on to lease registration. In its submission COSBOA has offered that a national registration of retail lessees would provide, if implemented, a clear market when it comes to assessing information for rentals for retail leases. A national retail leases register would list details of location, use of premises, commencement and termination dates, area, use of equipment, rent, rent escalation, all incentives, outgoings, rent-free periods, and all assignment details and other information, all in one place.

The Australian experience is a complete contrast to that of the UK. Once again, COSBOA asserts that it has been in the best interests of landlords to ensure that rents, incentives and other market information has been kept out of the public domain. As Crosby said in his report, after researching the Australian retail leasing market:

In Australia there is no systematic lease information available, therefore one-off studies of lease terms, lease expiry dates and other ad hoc information dominate the discussions. Importantly, the Australian debate is undertaken in relative ignorance of data such as lease renewal rates and reasons for non-renewal and renewal, and the actual lease terms for small, micro, medium and large enterprises.

Importantly, what data there appears to be is mainly in the hands of the landlords and their lobby groups. In some respects, the discussion regarding leases has been undertaken in a vacuum of information. I'm suggesting that that is precisely what has happened here.

Now, it is a shame the Productivity Commission did not look closer at the United Kingdom's property database of leases and report more thoroughly. With respect, one reason why the UK may be slower to introduce prescriptive legislation is that High Street retail dominates. Shopping centres and their systems do not dominate. UK tenants are more likely to use property professionals negotiating their property deals and, importantly, data on lease deals is freely available. Knowledge is king and, therefore, it is democratically applied.

We further submit that a national retail lease register would ensure that the vacuum of information becomes information rich and the lessees are not information poor. This would mean the market is more efficient. An efficient market is one

where lessees can assess risk. The key area of assessing sales potential and assessing rental rates is currently akin to pin the tail on the donkey. The market will become more efficient simply because retailers are better informed. Currently the market is inefficient because retailers are not well informed. This information of symmetry goes to valuations, when a third party is called to do an independent assessment of rent.

Another argument is that retail leasing data is available in those states that may lead to lower disputes - unfortunately, it will be very hard to quantify this. However, I would like to inform the Commission of one recent anecdote. My client is a retailer of outdoor sportswear. It operates in Kent Street in Sydney, famous for its outdoor sportswear and outdoor equipment. Along with others, it competes in a healthy market and draws from the entire Sydney region. A rent review was contemplated by the lease. The landlord and my client - which have a very well established relationship - could not agree on a market rent. It was decided that, instead of invoking the market rent review dispute clause formally, each party would present each other with a list of leases of comparable properties which showed the going rate and they would, over a cup of coffee, work out a new market rent. This approach is often taken by my clients, under my instructions, simply because in a spirit of cooperation and transparency it's a hell of a lot cheaper.

Needless to say, the unsupported advice of the landlord received from his own advisory property adviser, was at odds with the evidence that was presented to him by way of showing the lease. In other words, his property adviser said it was worth a hell of a lot more than what it really was. The two parties were able to work out their differences for a cup of coffee and a few downloads. Now, in a state without easy access to retail lease information, you could never do that. In a state without retail lease registration it's virtually impossible to provide proper retail lease evaluations because the information is unavailable. Picking up scraps of information, keeping one's ear to the ground and buying a beer or a coffee to ooze a rent out of a friendly retailer is not a viable substitute for hard lease data.

In New South Wales and in states where registration is commonplace, landlords have purposely distorted the market by purposely withholding side deals information from the market, and that has had a material effect on rental rates, by ensuring that lease incentives and fit-out allowances are not disclosed to the market. This is not done to protect confidentiality; quite frankly, it is tantamount in some cases to a fraud. It is done to distort capital values. It is designed, in some cases, to fall the value when the rent roll is higher than what it actually is.

Let me give you an example: just around the corner here is a small newsagency that's going through a current market rent review. A submission went in to the valuer and the valuer said to the landlord, "Please put in your submission," and

the tenant, "Please put in your submission." Now, Advantage Real Estate are the predominant strip shop lessor's representative of most of the strip shops around here in Kings Cross. In some ways it has a monopoly on the area for retail lessors.

Now, as part of its submission to the valuer, to establish a current market rental, it put in all the sales of the property and, therefore, said, "Because of the sales of those properties, the rental income from those shops should be X and, therefore, the rental income for this particular shop under current market revue should be X." Now, needless to say, if that was challenged in a court, that would be thrown out. However, it does distort the market when side deals and effective rents are not shown. This is exactly what happens in shopping centres, because the landlord holds all the information.

Now, why else would a landlord do it? Without a clear market, COSBOA states that it's not possible for the retail leasing market to operate efficiently. On a much larger scale, retail landlords have manipulated the result - and, boy, what a result they've achieved. Just so it wasn't buried in our submission, I think it's important to reiterate that property returns from retail have outstripped every other section of the property sector. I think it's important to show that in its true light.

There are benefits to government in a national retail leases register. The Reserve Bank is deeply concerned when banks raise or alter their costs of funds. They do this because they know businesses will eventually pass on the cost of funds to their customers. In reality, some costs and increases are absorbed and businesses eventually pass it on to consumers and they're not fully absorbed. This includes rent increases. A half of one per cent increase in the cost of funds, by way of increases in the interest rate, to the average specialty retailer is less in dollar terms than a 5 per cent increase in rent of a much larger, say, 20 or 25 per cent rent increase every five years. But when banks increase rates it's national news. When it is large increases in rents it's not national news.

COSBOA submits the Productivity Commission should not assume that these increases are all absorbed, or they are benign. Ultimately, the retailer is forced out of business or costs are absorbed and profits are eroded. The effect should not be lost on the Productivity Commission, considering the size of the national rent roll. The national rent roll, with many thousands of specialty retailers, is regularly increasing prices to meet the demands of a retail property industry and its voracious appetite for rental increases. A national retail leases register may - and I say "may" - show government a further underlying inflationary pressure in the form of increase in rents on a national basis. Why not? Transportation and fuel costs are traded assiduously. Why not retail rents?

Now I'd like to turn to occupancy costs. Within shopping centres, at least,

COSBOA submits that an inefficient market has led to the distortion where occupancy costs have risen to the point where many retailers are not making any money - not all, but some. Many retailers are not prepared to crystallise their loss-making enterprises and walk away. Part of the problem is that they hang on when their shop is well past its profitability use-by date. If retailers are more inclined to throw in the keys to landlords, landlords would be more inclined to run after them. However, it's easy for us to say when we, ourselves, do not have our livelihoods on the line. However, the seed of the problem is often sewn before they enter the lease.

The Productivity Commission has made a point that because vacancy rates within shopping centres are low, retailers are therefore able to pay the going rate. However, we believe that this is an over-simplification of the market. Vacancy rates are a blunt instrument in assessing what is a very sophisticated market. The analogy of that is that a patient doesn't have to be dead for it to be sick. Death rates within populations do not necessarily show a healthy population. All they do is show that people are dying; they do not necessarily show that people are sick. In general, most small businesses fronting up to the Productivity Commission would have had a personal, emotionally invested view, much more so than, say, the retail associations or the lobby groups. It's their money, it's their blood, and it's their sweat and it's their tears.

But in pure mathematical terms, and retail math is not that hard to work out - let me give you an example: in the Australian Financial Review, Kingsley Varr - who I think has fronted up to the Commission - wrote that the returns of the owner of a retail business are not that great. He wrote on Monday, 7 January:

As a general rule, stock cost 50 per cent, rent 15 per cent, wages 23 per cent, other expenses 5 per cent. It does not leave much to repay capital borrowings and make a profit. Once the landlord starts demanding 19 to 20 per cent of turnover, the equation no longer works.

He went on to say:

Small traders have two choices: lose the business quickly by not signing any lease, or suffering a slow economic death by signing and operating unprofitably.

It is interesting that not once the Productivity Commission has mentioned the words "gross profit" in its report. Any first-year accountancy student will tell you that a business can only afford a certain amount of expenses, which is dependent upon its gross profit. In the same Canadian report referred to by the Productivity Commission at page 10, it reads:

How much rent can you afford to pay?

It says:

Please note that rent payments should be directly related to expected gross margins. Occupancy costs are expressed as a percentage of total sales.

And there it lists a table with store types and average gross margins: for fashion and footwear it has an upper limit of 14 per cent; for appliances it has an upper limit of rent of 7 per cent; for hardware it has an upper limit of rent of 7 per cent, and so on. By contrast, when you go to page 125 of the Productivity Commission's report, it is quite clear that occupancy costs in Australia are way above those recommended as the highest by the Canadian experience. In fact, the average for Australia's regionals, for example, for fast food is 3.5 per cent higher in Australia at regional shopping centres. In metro shopping centres it's 2.5 per cent more than the upper limit recommended. In non-metro supermarket centres it is 1 per cent more than the recommended upper limit.

In that same category of fast food, the target occupancy costs should be 10 or 12 per cent. On the Productivity Commission's own case, citing its own figures from its own report, using its own recommended occupancy costs out of the Canadian experience, the Australian experience, on average, is 3 per cent higher than Canada. No wonder retailers say that they are hurting. There was a time when 15 per cent net was an average return for a retailer. When I first started out if you got 15 per cent net you were having a great time. In other words, 15 cents out of every dollar. Now it's more the case to be two or three, occasionally four cents. That comes from my own experience on the accounts I get to see from many of my members - sorry, of COSBOA's members and my clients.

But the reasons for this are simple: the market in Australia is not a clear market. Australian lessees do not have the same information as their Canadian counterparts. It has been also COSBOA's experience that boom states, as opposed to recessionary states, experience rent increases over and above an average. The only possible way that property industry specialists manipulating a market can do this is by looking at the states of retailers in certain categories, from certain regions and from certain shopping centres, and apply across the board rent increases for those boom states. In a clear market, arbitrary rent increases based on sales information would not be able to occur.

Page 31 of the Productivity Commission does not show the losses, accrued losses and accumulated losses for businesses that exit the shopping centre system.

COSBOA submits that the Productivity Commission cannot really draw conclusions without detailing those and without the correct and specific data if, indeed, it ever exists. Unfortunately, collecting data to draw these conclusions is, at best, haphazard. At page 149 the businesses operating at a loss are not separated by shops in shopping centres and, therefore, we cannot blame just entirely shopping centres. However, in COSBOA's view, they do not provide a truly useful indicator to make the kind of assumptions that have been made in the Productivity Commission's report.

So, with respect, in this regard the Productivity Commission's report lacks an internal consistency and a robust internal logic in this regard. It is based on the idea that state governments have continually tried to address the problems and that the problems have only been perceived, and those problems remain - therefore, state governments have failed to stop it. So the problem is perceived, but we say, and COSBOA says, it's not. We say it is still a war; it's not just a few skirmishes.

Put simply, COSBOA asserts that state governments have gone far but not far enough. We require, for a full and balanced market, full and frank disclosure under the lease registration system, nondisclosure of turnover figures to lessees, or disclosure of turnover figures aggregative of a lessee's turnover on an individual basis is not disclosed. Also some states to have a properly locked-in independent market review assessment when parties cannot agree at lease renewal time - and I'll get to that later.

Other than that, I think it's generally agreed that many states - and I say this from experience of New South Wales - has retail lease legislation that has gone far enough, depending on which side of the landlord and tenant divide you care to talk to.

DR BYRON: Before you go on - I'm a bit slow in taking my notes here - three things.

MR SPRING (COSBOA): Yes.

DR BYRON: You just mentioned three major things that the government had done.

MR SPRING (COSBOA): No, that they haven't done.

DR BYRON: Sorry, are yet to do. They were - if you can just - - -

MR SPRING (COSBOA): Full and frank disclosure under the lease registration system.

DR BYRON: Yes.

MR SPRING (COSBOA): Nondisclosure of turnover figures to lessees or disclosure of turnover figures aggregated when lessees are not disclosed on an individual basis. A proper independent market review assessment where parties cannot agree on the rent at lease renewal time.

DR BYRON: Thanks.

MR SPRING (COSBOA): I'd like to talk about security of tenure. The Productivity Commission has taken a somewhat benign view of security of tenure, and not surprisingly. There was a time when many leases had relocation and demolition clauses; many still do. However, state legislation gives rights of compensation in those circumstances and, by and large, this has done away with the element of the problem, except for end of lease. But for many, security of tenure still rests on arbitrary decisions by landlords. For example, one landlord's trick is to spring a surprise lockout on public holidays under false claims of asbestos contamination.

The courts say damages are therefore an adequate remedy. Courts are reluctant to allow the retailers back into the premises because of the potential danger, so the net effect is that the retailer has been suddenly evicted and now is just simply left with a court battle. In my own experience, I owned a shop in the Queen Victoria Building for 16 years; it was one of the highest grossing shops per square metre in the building. The shop was fully renovated every four years. I had, by and large, a great relationship with the owners of the building. They employed some of my companies to do some marketing for the building on a number of occasions.

The Singapore government bought the building and management changed hands. Without so much as a discussion as to why, I received a letter from a man who I'd never met and he booted the shop out of the building. At first they offered compensation, and then a lawyer got involved. When I asked for meetings and mediation and wrote some letters, the lawyers then sought a Supreme Court injunction, banning me from the building and trying to prevent me from speaking to anyone about it. It was comical. It was Keystone Cops stuff.

Of course the injunction was thrown out of court; the judge said some scathing words against the lawyer and against the landlord. But it illustrates the kind of capitalist strong-armed behaviour that many landlords are prepared to engage in. The shop was simply replaced with rights of assembly usage to my old shop. Being sued by a large company, or by the Singapore government, would probably frighten the wits out of most traders and scare them off by so many large companies, and that's the reason why they get away with it. I invited the QVB to comment on the

matter in open discussion here but they declined.

You see, despite the rhetoric, if the retailer banks on their lease being renewed, even on favourable terms, or renewed at all, when shopping centres hold all the trump cards, I believe a retailer is being pretty naive. Whilst many shopping centre managers say - they say - "If you pay your rent on time, if you are a good trader, if you treat the customers well" - and all the other platitudes - "your lease will be likely renewed, " the legal right of the landlord is that there are no rights of renewal. So despite all the surveys and comforting words, showing the probabilities of lease renewal, landlords are unlikely to ever shift their legal position.

COSBOA's comment in this regard suggests that it would like to see done some degree of expansion of property rights. Not so. In its submission COSBOA asserted that a seven-year lease should be the minimum term. Landlords suggested they need full control over their shopping centres to allow them to control the tenancy mix, and this is true. A tenancy mix of a shopping centre is critical, to allow it to change with the marketplace. What has not been said is that it doesn't change and evolve that fast.

The time of a retail life cycle is shortening. However, seven years gives retailers ample time in which to set up, depreciate and close down, and enough time for landlords to plan properly. COSBOA would not be in favour of preferential property rights to expand a lessee's interest in anything more, but the Commission should not assume that change in tenancy mixes and retailers is a rapid process because it's not. There are only so many retailers willing to take space, and truly new concepts in retail are relatively far and few between. Retail architecture and planning is often decades in the pipeline. However, COSBOA supports the current leasehold system.

Vacancy rates. Much seems to be made of vacancy rates. It seems as if the Productivity Commission has taken the view that because vacancy rates in shopping centres are low the market is therefore working efficiently. We believe that's an oversimplification. The metaphor is that in a sophisticated market the patient may be sick and on life support, however, it is not dead. But vacancy rates do not count for everything. For example, many shopping centres operate with distressed tenants, where tenants are not paying the face rent; ie, the rent that they should be paying under the leases they are not and are in fact paying less, so therefore they are being subsidised by the landlord.

In many shopping centres many tenants are unable to pay the contracted rent or are behind in their rent and they're in breach of the lease, but if the landlords were to enforce their rights under the lease they would have half-empty centres. Some landlords have rent rolls with embarrassingly large debt; their debtor tenants are 60

or 90 days in arrears, yet they have full occupancy. Care must be taken when this simplification is trotted out. There are other shopping centres where tenants are continually churned, and many tenants never get to even see a fraction of the time allocated on their leases. In a clear market, much of that distress would be avoided. A lease registration system would show these problems. But the truth is, landlords don't want a clear market because information and secrecy is power. Vacancy rates, COSBOA suggests, do not show the true picture; they only show a small part of one picture.

Unfortunately the Productivity Commission does not have data and information that is able to differentiate loss-making stores in shopping centres as opposed to loss-making stores external to shopping centres, and that's a shame. However, with occupancy costs at an average - and this is an average - of 17.5 per cent in regional shopping centres, there are very few retailers who are able to make reasonable profits. It's obvious why retailers want reforms. Retailers must either integrate and manufacture products themselves, which will explain why some of them have, or input directly from low-cost producing countries like China, which many do or many cannot.

It is COSBOA's experience that this is exactly what has happened, especially in say the apparel industry. Retailers who have been able to manufacture products overseas to designs of their own choosing have been able to survive in shopping centres by increasing their gross margin and pay the far higher rents than would have ordinarily been able to be the case. The net effect is of course that Australian jobs have been exported to pay for the higher rents. COSBOA is not saying that this is the case in every case. However, if you speak to many apparel retailers and ask about their strategies for tackling the increase in rents, this is exactly what they do: they manufacture overseas to pay for the higher rents.

COSBOA asserts that occupancy cost ratios supplied in figure 7.1 on page 125 of the draft report, which averages, many retailers will be supplying their goods and services to the market at a cost that is higher than would ordinarily be the case if the market was a clear market. In other words, many are running at a loss. The net public detriment is that those businesses that are running at a loss are obtaining their capital from somewhere. That capital is eventually being transferred to the landlord.

COSBOA submits that in a clear market that capital would not be transferred to the landlord because that capital would have been preserved. Why else would a retailer sign up to a loss maker? He would not. In a clear market he would know. COSBOA is of the view that a regulated retail leasing market is a good thing for the Australian economy. It prevents landlords acting capriciously and keeps disputes down to a minimum. However, the three problem areas of distorted markets versus clear markets now need to be addressed.

The Productivity Commission talks about retail lease and advocates in an industry that is set up to assist retailers and their retail leasing negotiations. In reality - and this may come as a surprise - many landlords refuse to deal with leasing advocates. Many landlords are intimidated by retail leasing advocates because information and knowledge is power and when a lessee is on equal footing with a landlord, the landlord's power disappears. This is not the case with some of the majors - and the majors, I'm more talking about the ones from the Shopping Centre Council, because they are used to dealing at a professional level. But not every shopping centre is a member of the Shopping Centre Council and many refuse to deal with retail leasing advocates.

It is not uncommon for a landlord to punish a retailer for using a retail advocate, even one from a retailer association. One thing that I would like to highlight is that the Productivity Commission, we don't think, fully understands that retail leases in shopping centres are not simply leases governing property rights. In truth, retail leases in shopping centres can virtually be a stranglehold on the lessee's business and it does it in many ways. Taken as a whole, an agreement for lease, complete with fit-out manual, lease and all of its terms and conditions, dictates the key performance indicators of the business except for sales and because, all things being equal, a shop generally takes on the characteristics of the shopping centre, landlords' actions can strongly dictate its sales positively and negatively as well.

However, sales data are the one key performance indicator that the landlord knows. The lease and agreement for lease dictates the capital costs of the fit-out, virtually all of the operating costs except labour - and this would include electricity, gas usage and others - and the usage clause dictates the gross margin and therefore, when taken as a whole apart from labour, the landlord has enormous control, of micro-control over the expenses of the business. COSBOA asserts that the Productivity Commission should not confuse simple property leases, often found on the strips, with detailed retail management leases which have evolved over the last 20 or so years in the shopping centre industry. I have to talk now a bit about the voluntary code.

The Productivity Commission should be alive to the fact that whilst many of the Shopping Centre Council members do operate with constraints, and many do have an ethical mindset, there are many shopping centre owners that do not. There are many who are not part of the Shopping Centre Council membership and slowly that has changed over the years but the Productivity Commission should not be fooled by representations that all property managers engage in fair play, because they do not. That is why COSBOA strongly opposes any movement for a voluntary code.

Experience shows that unless it is defined in clear black and white, landlords

and their lawyers will take every opportunity to push the boundaries as far as they can. COSBOA submits that it's naïve to think that a voluntary code, enforceable by the ACCC, will in fact solve problems. It is optimistic to think a voluntary code will solve problems of misconduct. Voluntary codes have been tried within the context of retail leasing and have failed. Why would a landlord sign up to constraints, compliance costs?

A reading of the Commission's draft report would perhaps give the reader an idea that the cost of compliance is so overwhelmingly prohibitive that some lessees would not be entering into a lease because of those costs and I think this should be kept in perspective. With capital costs in the hundreds of thousands and the lease commitments in hundreds of millions of dollars perhaps - perhaps millions of dollars - costs of compliance which range from a few hundred dollars to a few thousand dollars are a paltry amount of money relative to the protection that a lessee would be obtaining if it were otherwise the case. Any argument that stripping away these compliance costs or reducing or eliminating them would somehow increase efficiency or stimulate the retail leasing market for more activity is, in COSBOA's view, not made out.

Perhaps the most contentious of the issues is the supply and demand and the lease renewal or, as COSBOA would submit, standover tactics. COSBOA suggests that it's a furphy that negotiations for renewal of a lease in a sitting tenant are undertaken in the context of supply and demand for retail space. It must be seen in reality. COSBOA submits that in truth, at a micro level, it has very little to do with supply and demand. It has all to do with what the landlord can get away with and I've seen it too many times to know otherwise. If the landlord can increase the rent, knowing what they know about the lessee's position, it will. "Can the lessee stay in the same spot and continue to operate? How much rent pain can they bear? Will I lose them? Will they walk away if I push them too hard? Can I push harder? They won't walk away from a relatively new fit-out, will they?" Rent increases are all part of a landlord's game.

It has been COSBOA's experience that many renewals are an ambit claim that many retailers fall for. The draft report shows this to be true at page 105. Many retailers are too scared to bargain and believe wholeheartedly the type of information that landlords tell them. They believe that the rent is a market rent and they believe the stories that are regularly used to try to coerce lessees to pay increased rents when in actual fact the truth is there's no justification for any increases in rents at all. Justifying rents of 100, 150 per cent, regularly, is extremely difficult for most landlords and when challenged they have a great deal of difficulty.

Taking into account the performance of the centre and most centres that are, in actual fact, struggling to keep up, in many ways it's a game of hope by the landlord.

Basing an increased rent on cajoling - and, in some cases, lies - has nothing to do with supply and demand. It has everything to do with the poor conduct of the landlord and the landlord's gain. When Westfield reported that 75 per cent of its five-year leases for specialty shops were renewed, the statistic does not mean that those retailers were happy to renew them; it just meant that they were just renewed. It does not mean that they would make profits or losses for their shops, it just means that they were renewed. Those statistics do not show anything more than that.

It's a sad fact that there is no independent or accurate data that shows clearly the reasons why lessees renewed. COSBOA submits that the Productivity Commission cannot draw simplistic conclusions that renewals are a clear market at work. Faced with the prospect of losing their entire investment, the option of renewal is a bitter but slightly more palatable pill to swallow. It does not necessarily follow that non-renewal and vacancy rates are the only indicator of a market status and that the shop is therefore at a market rent. COSBOA would suggest that renewals of 25 and 30 per cent and sometimes 100 per cent increases are not at the market rent. It has nothing to do with supply and demand and those leases are renewed under duress. So therefore, if they're renewed under duress, they would not be renewed at a current market rent.

Section 1 of the Retail Leases Act in New South Wales defines current market rent. The definition of current market rent - and this is a standard definition of current market that has been applied quite liberally across the board - is, "The renter will be reasonably expected to be paid for a shop between a willing lessor and a willing lessee, an arm's length transaction where the parties are acting knowledgeably, prudently and without compulsion, determined on an effective rent basis having regard to the provisions of the lease and the rent that would be reasonably expected to be paid for the shop if it was unoccupied and offered for renting for a substantially similar use. So in other words two parties operating, knowing all the full facts, if it was unoccupied for the usage that the shop was being offered for.

Reasonable rent, willingness to pay, arm's length transaction, knowledge, prudence, compulsion. Seen in the light of a legal definition, the current market and supply and demand against a background of knowing the tenant's sales figures is quite meaningless. Firstly, knowledge: is the tenant cognisant of all the facts and the truth which can be proved, firmly, or inferred from the facts of the circumstances? Is he acting without compulsion? "Compulsion" is defined as coercion, extortion, exaction or use of force, and "under contract" is to compel a person to agree to something involuntary. A payment made under compulsion is prima facie recoverable as "unjust enrichment".

Is it really an arm's length transaction in which it is presumed that each party

has made the best possible bargain in the circumstances? Is it really a reasonable rent? Because the courts will have to determine what a reasonable rent is in the relevant circumstances if the parties can't agree. Is it really a willingness to pay, because a willingness to pay is what is to be expected to pay for a free market rather than do without them, and a variety of techniques have been developed for the assessment of what willingness to pay really is. So seeing it against the legal definition, supply and demand really is meaningless.

DR BYRON: Sorry, you've completely lost me there. That legal definition is precisely what we've used and supply and demand is entirely consistent with it. I just cannot see how you're saying that they're different concepts or they're incompatible.

MR SPRING (COSBOA): That landlord at the end of the lease knows all; the landlord at the end knows the rent pain of which the tenant can suffer. He knows when he knows his sales figures what his threshold of pain is.

DR BYRON: As I said an earlier witness this morning, let's assume that the disclosure of monthly turnover figures had been banned hypothetically.

MR SPRING (COSBOA): Yes.

DR BYRON: I would predict that an experience and competent person, yourself for example, could walk through any large shopping centre and say, "He's trading very well."

MR SPRING (COSBOA): Yes.

DR BYRON: "This guy hasn't had a customer for three days. This guy's stock hasn't moved. This guy - I see he's just bought a new Benz, he's doing all right. We're obviously not charging him as much as he can afford to pay." The landlords if they're negotiating a second lease - let's not call it a renewable, because it's a new lease.

MR SPRING (COSBOA): New lease, yes.

DR BYRON: New Lease a la Westfield Victoria. The site is up for occupancy again. The landlord's representatives, if they are competent, have got a fairly good idea of who's trading well, what segments are doing well in this space, what's fashionable at the moment, you know, whether mobile phones and juice bars and hot or cold and so on, and I would think that they would still do a pretty good job of figuring out how much they could tighten the screws on any particular individual even barring the turnover data.

MR SPRING (COSBOA): If they don't have the turnover figures.

DR BYRON: They have to guesstimate it rather than knowing it, but with a couple of decimal places. But if you think that they could guesstimate it pretty well, they would probably still do pretty much the same job through guesstimating.

MR SPRING (COSBOA): No.

DR BYRON: You see, what I'm getting at is we're focusing on the disclosure of turnover data as one of the key factors, and if you fix that you fix a whole lot of other things, and what I'm wondering is that maybe it's a furphy because if the centre management are as expert as they claim to be, even without the exact turnover figures, they would guess pretty darn close and they would still be able to say, "Who is paying as much as we can possibly get out of them, and where is there still possibility to ratchet it up a bit further?" So what I'm suggesting is even if we did ban revealing turnover figures or asking for turnover figures, nothing might actually change, because they would - they would have to approximate it but they'd approximate it pretty closely.

MR SPRING (COSBOA): Okay. Let's turn it around the other way, and let's not use a shopping centre example. Let's use a strip shop. When the lease comes up for renewal in the strip shop and the landlord comes in and says, "We want to offer you a renewal," and the offer comes in and the argument goes like this, "We don't know what your sales figures are. We don't care, but we believe on the open market we can get X amount of rent. We believe that the rental for that particular shop is X amount of dollars. Take it or leave it." Right. And you're then faced with the dilemma - the retailer faces the dilemma of saying, "What is the open market for that shop?" because the landlord says often, "We're happy with you as a trader and we believe that the rent is X. You were paying in the past of rent of say \$100,000 and we believe that there's growth in this area, so you should be paying at least \$15,000 more." So let's say we should be paying \$115,000. We believe we should be getting 15 per cent growth.

Then you flip that to a shopping centre. What a shopping centre does is, "We know what your sales are. We know that you can afford more. We know you can afford more so therefore pay us more." They don't say, most of the time, "This is what we believe the market is." They say, "This is a supply and demand issue," but it's not really.

DR BYRON: It's still the same thing.

MR SPRING (COSBOA): No.

DR BYRON: They're saying that, "We think, or we would like to get, or we're making an ambit claim that it's now X and if you don't think you want to pay that" - as somebody said to us this morning - "there's a queue of other people outside who will be willing to come in and pay that." So there is always a gap between one side would like to - I'd like to pay as low as possible, you'd like to get as much as possible, and we usually negotiate somewhere in that range.

MR SPRING (COSBOA): Okay.

DR BYRON: What I think we're in vigorous agreement is increasingly it's coming at the top of the range, that the lowest price that the landlord is willing to accept and the highest price that the tenant could possibly pay without falling over, but if it's still within that range, supply and demand determines - if we went into a recession and there were a lot of empty shops and there weren't people queuing up to start their small businesses, we'd be at the bottom of that range because of supply and demand.

MR SPRING (COSBOA): Yes, but let me give you a classic example of where that anomaly appears. I'm running a case at the moment in the ADT. It was a new lease, right. The landlord has said that the rental, in his experience, should have been \$105,000. We said it should be \$80,000. The landlord said, "Unless you pay that you're out." Now, there was a pre-existing agreement that the rent of the new lease was going to be at a current market rent. So the issue before the tribunal is what is the current market rent.

DR BYRON: This is actually a renewal, isn't it?

MR SPRING (COSBOA): No. It's not a renewal. It's a new lease. He actually changed his position. So there is a pre-existing agreement for a new lease, but it's not a renewal. Right. So the issue before the tribunal is what is the current market rent for the premises. The problem for the landlord is, how did he define what a current market rent is. It's fascinating going through the evidence of how he defined what the current market rent is, because what he did was he basically took a figure out the air, right. Now, there is no scientific basis as far as this guy was concerned, and there are some scientific bases of how market rent is defined, but for many landlords that have turnover figures, the scientific basis is, "We believe that you can pay more because we've seen your sales."

Very few come along where people say, "Look, your sales have gone down, so therefore we're going to offer you less rent." It's very, very few. So comparing shopping centres that have access to sales figures compared to strip shops that have no - the negotiating power of landlords or people with strip shops - sorry, of people with access to sales figures, is often chalk and cheese. I've also seen this where some landlords and strip shops have got clued in and they've actually got sales figures out

to tenants.

DR BYRON: So you don't accept the possibility that someone could come to the same conclusion that you could afford to pay more rent even without - we were given the example of the guy who was running a toy shop in a high street, and a few other people noticed that there were lots of customers in there and noticed his new Rolls Royce parked out the front, and sure enough, before very long there were three or four other toy shops in the same high street.

MR SPRING (COSBOA): Yes.

DR BYRON: Now, it had nothing to do with anybody disclosing turnover data.

MR SPRING (COSBOA): Yes.

DR BYRON: It was people who could actually read the signs. They could see the people coming out of the shop with armfuls of stuff. They could hear the cash register clinking.

MR SPRING (COSBOA): Yes.

DR BYRON: And thought, "Mm, there's a quid to be made there."

MR SPRING (COSBOA): Yes.

DR BYRON: So competitors came in. The landlord says, "It seems to me you're making a lot of money and I'd like some of it if you want to have your lease renewed."

MR SPRING (COSBOA): Yes.

DR BYRON: So again that's suggesting to me that there are ways where people can read the signs and will do the same thing even if we stop the disclosure of turnover information.

MR SPRING (COSBOA): Yes, but it's not based on any hard empirical evidence and you can very easily, with a little bit of calculator, sit down - once you've got tenant's turnover figures you can sit down and work out what their pain threshold is; it's reasonably easy.

DR BYRON: There's no doubt it makes it much easier.

MR SPRING (COSBOA): It makes it far, far easier. It's the back of an envelope

stuff. But the risk for the landlord, if you pitch the rent too high, is that the tenant is going to turn around and say, "See you later." They've got empty shops, mortgages to service. Therefore, they are much softer in their negotiations. They don't go in and say, "We've got 100 per cent rent increase." They'll say, "This is what we believe it's worth. Can you come back to us?" Whereas, when people have got hard empirical data that they're working from, with the turnover figures in the back of their mind, they're going to turn around and say, "Look, we know you can afford this because we've got your sales figures." And that's a big difference, because the risk for the landlord has been ratcheted up when there are no sales figures to work from. That's the big difference.

DR BYRON: I completely understand why they like to have it.

MR SPRING (COSBOA): Sure.

DR BYRON: But I'm just questioning whether stopping it would actually stop all of the consequences. We may be getting ourselves into a situation where we're imagining that - you know, this is the magic silver bullet and if we fix this we've fixed a whole lot of other things, and we may be disappointed. But it seems to me that it may not be such a panacea.

MR SPRING (COSBOA): In my experience, we're dealing with shops that disclose turnover figures, dealing with shops that don't disclose turnover figures, dealing with centres that do disclose turnover figures and dealing with centres that have not disclosed turnover figures and management have created new leases where they do disclose turnover figures - where, say, a shopping centre has been sold - it follows the same pattern. As soon as turnover figures are disclosed management use those as a robust way of maximising the rental values - right - in my experience.

In my experience it's very rare that landlords are able to turn around to tenants where they don't get sales figures and say, "We know you can afford this because you've bought yourself a shiny new car, or you're wearing a new suit." Right - but they may turn around and say, "Look, you're making lots of money. We know you're making lots of money." But what they will say is, "This is what we believe the market is." Most of the time the landlords don't know what the market is; it's on a "We hope that he'll pay this." It does come down to the negotiation, but seen in the cold, hard light of the legal definition, when the landlord knows the sales figures, it kind of makes the whole thing a bit of a joke. That's what I'm saying.

DR BYRON: Okay, good. Let's keep going.

MR SPRING (COSBOA): The next thing I'd like to talk about is legislative inconsistency. As a concept, it's plainly desirable for national consistency. For most

small businesses with one location it is, however, irrelevant. It is not desirable to go for the lowest common denominator at the expense of best practice, and national consistency would mostly benefit cross-border businesses and landlords. So lowest common denominator, if it were to be implemented in a national scheme, would be a retrograde step. But there are reasons why there is inconsistent legislation between jurisdictions. What, perhaps, has not come to light is that during the various rounds of legislative reform at a state level, both parties, including the Shopping Centre Council and the associations, have had the opportunity to harmonise legislation and the state governments have given the Shopping Centre Council and the associations the ability to align legislation between the states - but they have refused to do so.

What the Shopping Centre Council may not have told the Productivity Commission is, for example, in New South Wales, that during the New South Wales review in 2006, the government spent a large amount of time suggesting clauses to align legislation with Queensland and Victoria, something which the Shopping Centre Council opposed. It did not like the cherry-picking approach. So, therefore, COSBOA suggested it can hardly be right to complain that the various states and territories have different legislation when the Shopping Centre Council itself is, in part, the very reason for the particular problem. Other than those comments, any other harmonised legislation can only be a good thing.

Overly prescriptive legislation - and the first thing I'd like to talk about is assignment. At page 197 of the Productivity Commission's report, the Productivity Commission has suggested that lease assignments are an example of overly-prescriptive legislation. This is where, except in Tasmania, legislation has overruled the privity of contract rule and prevents a landlord from suing an assignor if an assignee defaults under a lease. State governments have seen that there is good sense in protecting a lessee when he or she assigns a lease to an incoming tenant, he or she is free from any further obligation under the lease.

COSBOA suggests that there is more to it than this. This does not operate in isolation. This only operates by the granting of certification which protects the rights of landlords. Landlords have to, under most circumstances, approve the incoming tenant and, therefore, they have an almost right of veto whether the incoming tenant has the financial resources and the equivalent retail skills as the person who wishes to assign the lease. So, therefore, COSBOA cannot accept that when a business is sold and sold again, and perhaps even sold again, with the same lease on foot, that the first person should still be responsible for the lease and its payments under it - perhaps for many years after the business has been sold - which is what the Productivity Commission is describing as overly-prescriptive legislation and one that creates an inefficient market.

Commonsense shows, and the reason why state governments have legislated

for the amendments to the common law position, that in a free market where the landlord has control over his property by way of veto of assignment, no further right should accrue that after that assignment - if the incoming lessee has been approved by the lessor and the outgoing lessee has certified with the incoming lessee that the information has been provided - does not prejudice the landlord in any way. An example of this is section 41A of the Retail Leases Act. So lessees should not be permanently on the hook, which would be the case where a landlord perpetually varies a lease term, instead of granting a new lease.

Another example that has been described as overly-prescriptive legislation, is in outgoing. COSBOA has difficulty accepting that transparency in outgoing has been prescriptive with the outgoing somehow - is an inefficiency in the retail leasing market. The reason why state governments have included this prescriptive legislation was to stop instances and, in some cases, tantamount to fraud, that allowed landlords to perpetrate against lessees in circumstances where lessees had very little ability to clarify, qualify and quantify the outgoing they needed to pay under the terms of their lease. It is COSBOA's experience that by making these outgoing as prescriptive as possible, and with the ability for lessees to have access to audit reports, including now withholding payment, a transparent mechanism has been created that minimises any ability for landlords to fraudulently gain any advantage over the lessees - something that was relatively common prior to the enactment of these sections.

DR BYRON: Sorry, when was that - the enactment?

MR SPRING (COSBOA): When was the enactment?

DR BYRON: Yes.

MR SPRING (COSBOA): The withholding penalty was enacted in 2006. Prior to that it was in the 1994 legislation that - - -

DR BYRON: We'll come back to that.

MR SPRING (COSBOA): Okay, we'll come back to that. That's not to say that all shopping centres have been engaged in this activity but it does reduce the ability of landlords to contemplate such an activity to start with. It goes deeper than that. Let's say a public company ignores the rules and uses its market promotion funds collected as income and puts it to his rental account. Let's say it refuses to account this to the lessees, but instead tells the stock market that its properties are more profitable than they really are because they've increased the capital value of the asset by charging all of its marketing promotions accounts to its rental accounts. After all, its accounts marketing and promotions accounts are now being used as income. Isn't that fraud?

Don't you think the enactments were brought in, in the first place, to stop that kind of behaviour? That is exactly the reason why they were, because that has happened.

COSBOA also submits that the Productivity Commission is not correct when making assumptions that the retail and the ordinary commercial market should be treated as the same. COSBOA believes that the Productivity Commission - - -

DR BYRON: I don't think we said that.

MR SPRING (COSBOA): COSBOA believes that the Productivity Commission's view is not to treat retail as a special subcategory of commercial market.

DR BYRON: Yes.

MR SPRING (COSBOA): Yes, I withdraw the first sentence.

DR BYRON: Sorry, didn't mean to interrupt, go on.

MR SPRING (COSBOA): COSBOA believes that the Productivity Commission's view not to treat retail as a special subcategory of commercial leasing is completely at odds with the way the market has operated for the last 30 years. A quick scan amongst the property trusts will clearly see that shopping centres, offices and factories are all seen as quite distinct and separate markets. While property groups per se operate across industry sectors, COSBOA submits that they themselves quite clearly differentiate between retail property and other property types. COSBOA is concerned that retail property, if it was lumped in with other forms of property, the practices and conventions built up around retail property that take into account that particular subspecies, and special needs of retailers such as demographics, tenancy mix, product mix, shopping centre design, ethnicity, traffic flow and a whole host of other retail, consumer and market behaviour specialties, would create havoc within the retail leasing community if those concerned with factories and offices were to become involved without the necessary skill sets and experience that retail property specialists demand - and all of these rests on the lease. Commercial leasing for offices and factories do not have the same leases. Their terms and conditions are quite different. Market reviews are the norm, not the exception. Incentives are usually public knowledge and options are not part and parcel of the deal. These norms are stripped out in most shopping centre leases.

I'd like to say something about unconscionability. Unless the word is placed with "unfair", it's COSBOA's view that the courts and tribunals will continue to be perplexed by the moving target and personal prejudice of the case. Unless the definition of "unconscionability" is clarified by legislation, the bar will be set so high that the legislation is virtually meaningless for all but the most battle-hardened

retailers with very deep pockets and lots at stake. Other than that, unconscionable conduct provisions have proved to be a slight annoyance and a mild deterrent to landlords, but in practice cost decisions are showing that unconscionability is a concept best left for academia. Application in the real world has proved to be limited.

Going back to my example of my sweet shop, when New South Wales enacted its unconscionable conduct in 1998, it is not widely known but it was also meant to solve the end-of-lease problem. In the second reading speech on 1 December in 1998 when introducing unconscionable conduct provisions, it was specifically said - this is the second reading speech:

One of the most crucial issues and the most difficult to deal with raised during consultations with merchants and property owners, was the situation at end of lease. On the one hand, the merchants felt vulnerable, having invested their time and money in their business having no certainty that the lease would be renewed. They may have invested tens of thousands of dollars in fitting out the store. There may be no suitable location in a town or city and their goodwill may be tied up with that location.

On the other hand, the property owners wanted to apply their property rights, and rightly so, if the property owner wanted to change the store mix of the centre to attract more customers, or a merchant was performing poorly which reflected on the centre and its other merchants, or the property owners thought they could achieve a better return for the shop which the current owner was not prepared to meet.

So, on the one view the New South Wales parliament intended there to be three broad grounds that lessors envisaged providing a complete bar to unconscionability. Is the lessor changing the store mix of the centre to attract more customers? Is the lessee performing poorly, which reflected on the centre? Can the property owner achieve a better return for the shop? Other than that, it may be unconscionable that the landlord was not renewing the lease. Now, this unfortunately has never been tested by the courts or the tribunals, but it was one of those things that was enacted to solve it.

DR BYRON: Sorry, just to clarify, it was in the second reading speech but it's not expressed anything like that in the legislation itself.

MR SPRING (COSBOA): No, correct. I think that's the way they got around it all. So, in summary I'd like to finish with a few other points I'd like to mention. Now, for many years shopping centres have denied that use of sales figures are used

in retail lease negotiations and rent-setting arrangements. As it's time for honesty in these things, it was refreshing here to hear Milton Cockburn saying that shopping centres do micro-manage their shopping centres by using the sales figures to deal with tenants.

He pointed out that tenants in distress often use sales figures disclosed to tenants as a reason for rent reduction. What he did not say is that many landlords see the lease as a contract that's not conditional upon turnover of their business, and if they do entertain any rent reduction they're more interested in profit and loss figures than sales figures. Those working in this industry regularly see businesses done over. They shrug their shoulders and they say, "Well, that's just part of the system. They should have done this or they should have done that." There are lots of "shoulds".

COSBOA suggests, is that the kind of future we want our Australians to live in? Do we want the ugly side of retail leasing to be buried behind closed doors with secret mediation agreements and hush-hush settlements? Do we want them in documents piling up, littering the road of our consciousness, in a place where big business can trample on small business simply because it can and where big business can see inquiries like this as a public relations exercise?

In the past we heard the same type of mantra from the cigarette industry, the fast food industry and the oil industry; that we live in a free market and the market decides our fate, and that we don't need change. At first we believed them, but then we learned. Is that the fate that we want our society to endure, because eventually as a society we come to realise that there is a cost. It costs our collective health, our families and they'll be poorer because of it, until we say - for instance, we banned smoking because we were warned about its dangers and we now spend millions on public education.

We've legislated to make our cars safer and cleaner, because we realised that over time they were killing us. We forced people to wear seat belts and we changed public behaviour, and we shouted down the folk that called it government intervention. We lowered and we stopped the drink-and-driving, and we changed the public behaviour so that our kids and loved ones weren't killed in such large numbers, and our heads weren't impaled by poor designed steering wheels and dashboards. All these things imposed burdens on industry and restrictions, and created intrusion, but we gave road deaths meaning so the makers of dangerous cars and the drivers of dangerous ways don't think us fools. The same thinking is now swarming the fast food industry and the parallels to the retail leasing industry are clear.

All these things make us aware and give us information to stop us thinking

about our actions. That can impact upon our personal lives and those of our society around us. COSBOA is saying that by opening up the industry for freedom of information, it gives us choices. It's a clear market as to the goods and service we wish to consume or not. It's an efficient market where we choose, with all parties having the facts. Government intervention in this industry in this context is a small price to pay. It's a tiny, insignificant burden knowing that we're all safer because of it and we are not just protecting a few.

COSBOA submits that renting retail space should be no different. Mums and dads are consumers of retail space. The ATO classifies most small retailers as micro-businesses, according to turnover. Now, these are not well-resourced people. They're not experts in retail property and neither are their lawyers. They need transparency. I'm suggesting to the Commission that your ear should be fertile to those organisations that see the damage reaped upon working families when big business teams with big-end lawyers push decency out of the window.

Without egging the pudding, you've heard that families do break apart. Lives are ruined. Bankruptcies are real. Suicides and attempted suicides do happen, I'm afraid. Words like "disappointment" and "perceived problems" are of little use to those thousands of businesses and occupancy cost ratios that give them less than award wage. Those on this side of the fence have to unfortunately deal with those things and COSBOA submits that it's better to have a clear market to minimise those things in the first place so retailers' eyes are open wider. That's it.

DR BYRON: Thank you. I should have started at the end of your comments, but if I left you thinking that we were totally opposed to any form of government involvement or regulation in the market, that's certainly not a correct impression. What we're trying to ensure is that when governments do regulate in this area, it's on a solid rational basis and that the regulations do actually work and make a difference. What concerns us is that there does seem to be a great deal - particularly that's been added in some states but not others over the last 10 or 20 years - that doesn't actually seem to be doing any work and just getting in the way. Anyway, we'll come back to that.

We're trying to make sure that the legislation we have actually does really address real problems rather than just create, you know, more picnics for lawyers - with no offence to any lawyers present. Can we start at the absolute fundamentals, where I think we've already agreed that the situation in strip shopping is worlds apart from the situation in the large managed shopping centres.

MR SPRING (COSBOA): Yes.

DR BYRON: I don't know if you're aware of Mr Anthony Herro, who is a solicitor - - -

MR SPRING (COSBOA): Yes.

DR BYRON: - - - who was sitting in that same seat there yesterday morning.

MR SPRING (COSBOA): Yes.

DR BYRON: He made what I thought was a very, very pertinent observation that the leases we all know and love that evolved over the last 200 years in a sort of a High Street strip-shopping sort of format - he said, "They don't seem to be quite the right instrument for this new concept of the large managed shopping malls. We need something else, but I don't know what it is."

MR SPRING (COSBOA): Yes.

DR BYRON: Now, does that ring any bells at all with you?

MR SPRING (COSBOA): Absolutely, because a shopping centre now - I mean, I was lucky enough to be able to live through this transition where at one stage you go to a shopping centre and it was a supermarket with a few specialty shops hanging off and they got bigger and bigger and bigger, and then shopping centre managers decided that all retailers should wear uniforms; and all shopping centres should have specialty shopfronts; and all shops have to have special lighting; and all shops have to have certain opening hours and closing hours to give it uniformity, to attract more customers to the shopping centre.

More customers coming to the shopping centre required better parking and then they had to work out that we didn't want all of the shop staff filling up the parking, so rules were created for shopping centres, and so shopping centres ceased to become simple property leases, as we pointed out. They became management leases and they became a mixture of franchise agreements that managed the property and they became - at law, they still remained property leases because you were renting a box, but they became so much more.

DR BYRON: Yes, okay. This is starting to ring bells with things that we've been told over the last couple of days. Can we just explore that a little bit more, just off the top of my head. If you enter into a lease on the high street, you're basically renting physical space and there's no attempt by the landlord to micro-manage you or tell you want colour uniforms or hours.

MR SPRING (COSBOA): Rarely.

DR BYRON: Yes. But if you go into a centre, you'll probably end up paying

substantially more rent but you're also getting additional service. It's almost like a management contract that, "If you come in here you not only get the space, but we will do advertising, we will do promotion, we will dah dah dah, and we will put a certain amount of foot traffic past your door," and that's what you're paying the premium for, for that sort of - - -

MR SPRING (COSBOA): That's the theory.

DR BYRON: It's like an implied add-on contract, but you just said a few minutes ago you're not just paying for the space, you're paying for all this other stuff which you may or may not get.

MR SPRING (COSBOA): Yes.

DR BYRON: That's what I'm concerned about: if you're paying for something and yet there's no accountability to actually deliver that.

MR SPRING (COSBOA): There isn't.

DR BYRON: If I'm paying you twice the rent because I expect twice the foot traffic to come past my door and I'm only getting 10 per cent more than I would have got if I'd stayed in the high street, it's not working.

MR SPRING (COSBOA): Correct. What happens with that, the theory is, of course, that all the retailers doing all the right things under their management leases are going to create a complementary team of retailers that's going to attract more people to the centre, which is going to benefit their business.

DR BYRON: They'll bounce off each other.

MR SPRING (COSBOA): Yes, so it's not done in isolation. So when these management leases have evolved and they've said, "We want to be able to enforce rights for you to clean shopfronts and for you to wear uniforms and for you to change your signage every three years," and all the rest of it, they're all done for a specific reason. However, each one has a thousand shades of grey and each one has a thousand shades of grey to have another dispute over. This is where part of the problem has evolved, as the registration has evolved: that each one of these things has become far more complicated. Rarely you get that on the strip.

Most of the problems on the strip are landlords saying to the tenant, "We're not going to spend any money on our building, because every dollar that we give you to put into our building is going to be money that we're never going to get back." So most of the problems in the strips are things like leaking roofs, crappy floorboards

and this kind of stuff.

DR BYRON: But they're not trying to micro-manage you and tell you what shade of grey your walls should be painted.

MR SPRING (COSBOA): They're not micro-managing, absolutely not.

DR BYRON: So if you're in a business where you're something of a destination, you can generate your own foot traffic and you don't want to be micro-managed, you don't need the centre management to put a lot of punters past your door, then you'd be crazy to pay extra for that micro-management that you don't want or need.

MR SPRING (COSBOA): Yes and no. That's only if you have the type of business that can survive in the strip, because a lot of businesses can't survive in the strip now. There are only certain businesses - - -

DR BYRON: For example?

MR SPRING (COSBOA): For example a newsagent can survive in the strip, a chemist can survive in the strip but you wouldn't be able to have high impulse - like a doughnut bar, for instance - surviving in the strip, because you have to have a lot of people past the front door to be able to generate enough money to be able to pay the rent because you need high impulse sales, which is generally under \$5. Right? So you might be able to find it in places like Bondi Beach where you have high turnover at certain times of the year. You may be able to find those kinds of places in Prahran or Oxford Street, but you just don't get the sheer volume of people.

DR BYRON: Okay, good. Thanks.

MR SPRING (COSBOA): So there are only certain types of businesses that work in the strips. Strips are a different animal when it comes to retailing from shopping centres. In many ways, shopping centres are the line of least resistance when it comes to setting up your locations. You know that you can go into a shopping centre and you're more likely, even though you're going to pay higher rent, to get more customers than working for it on the strip.

DR BYRON: Some of the comparison that we've seen is that your turnover might be 50 per cent more but your rent might be doubled, which makes me wonder, where's the attraction in that?

MR SPRING (COSBOA): My experience has been that for some businesses, staying in a shopping centre and flogging a dead horse in terms of profit - after a while, there are only so many dead horses you can flog, and when you pull out of

shopping centres - for instance, hairdressers are a classic example - your customers follow you. So if you go out onto the strip, your rent is peanuts, all customers follow you, the shopping centre loses the custom but if you're working for rent all the time, all of a sudden, your profitability goes through the roof because all the customers follow you. But you couldn't do that if you were a doughnut bar or a juice bar. There are only certain businesses you can do that with.

DR BYRON: Funnily enough, we were talking about this over lunch, since you've raised the subject of hairdressers. If you were some sort of very famous hairdresser to the movie stars or something, you could move back into back alley somewhere. You'd have two weeks' worth of appointments booked up in advance. People would come anyway.

MR SPRING (COSBOA): Yes.

DR BYRON: If you were one of these new style, no appointment necessary, maybe they do belong in the shopping centre for the passing trade, where somebody is on their way between the supermarket and the carpark: "I'll just pop in for 10 minutes and have a quick haircut."

MR SPRING (COSBOA): Sure.

DR BYRON: So even within the hairdressing sector, there might actually be different models.

MR SPRING (COSBOA): Absolutely.

DR BYRON: So we're on the right track there?

MR SPRING (COSBOA): That's absolutely correct, yes.

DR BYRON: I do have some serious questions to ask you, too. Let's start with coming back to the information asymmetry. I think many of the things that you're saying all the way through relate to information asymmetry, whether it's about turnover data or about rental figures. And I think we have said fairly explicitly that there is a very substantial information asymmetry between the small specialty tenant and the very large shopping centre landlord. We don't think there's that sort of information asymmetry between the small landlord and the small tenant on the strip, so we look at ways of resolving those. There are three particular types of information: sales data, which is the Canadian example which we'll do some more with and there's, "What is a typical rent for a certain segment in a certain area in a certain type of centre?"

The third one that we haven't actually looked at yet is the information asymmetry when it comes to assessing risks. Just intuitively, it seems to me that the staff of the large shopping centre owners, whose perhaps entire professional career has been in shopping centre management, probably have a much more highly developed ability to assess risks than somebody who's going into their first or second short-term lease in small business or particularly, what seems to be a common case now, people retiring at 40 from the military or 55 from the public service - - -

MR SPRING (COSBOA): Taking their super out.

DR BYRON: Taking out their super and deciding to go and buy themselves a small business - people who have basically never committed retailing before - and their capacity to fully understand and assess the risks of what they're going into just seems to be totally poles apart from the experts and the professionals that are sitting opposite at the table.

MR SPRING (COSBOA): There are a number of points. First of all, retailing risk is often seen - you've got your property risk but you've also got your location risk and you've got your legal risk. The way that the industry has grown up is that people go along, they look at a location and they go, "Okay, there are lots of people here," and a lot of them, that's as far as they go, whereas location risk is a lot more involved than that.

There are demographic studies, there is location over time, there are ethnicities. Is your target market within 15 minutes' drive? Is it within walking distance? Are there transportation modes that are around you? You know, it's a study of itself and in many ways it's a bit of a black art. Franchisors do it and they do it professionally now, whereas many of them don't. The smaller retailers never do it at all.

DR BYRON: We've spoken to a consultancy whose business is to provide this sort of analytical information. What amazes and perhaps horrifies me is that so many people - small tenants - not only don't use it, they don't even know it's possible to use it.

MR SPRING (COSBOA): Part of my business is supplying that. They've heard the word "location" but don't know what it means. So everybody says, "Oh, yes, location, location, location," but what it really means in the terms of context of retailing is often the case of: "Well, it happens to be 15 minutes from where I live." A classic example would be shops that appear to kids, where they locate in shopping centres where all you get is 75-year-old retirees. Now, unless they're selling to the grandchildren of those retirees, the kids are not going to be buying anything. So you've got location risk.

Then in terms of the legal risk, people go along to their lawyers, which are often the family lawyers, and they're not specialist property lawyers, they're not specialist retail property lawyers, because they are far and few between. The large shopping centre industry has people like Minter Ellison and Mallesons Stephen Jaques and Lander and Co and the large property firms that have their own specialist divisions and front up to these Commissions and prepare reports and all the rest of it, and sit on boards and do the equivalent of what I do. They have an understanding of the subtleties of the law. Whereas the average suburban lawyer, when he's asked to read through a 50 or 60-page agreement for lease and then a 50 or 60-page lease and then a rules book and then a fit-out manual and then advise a client, and he says, "Well, it's going to cost you five or six thousand dollars," the tenant turns around and says, "I'm not paying that."

They're not going to take a punt on a location for \$5000 to decide whether it's good insurance for them or not, or whether it's a good or bad location. They're not going to pay four or five thousand dollars to see whether their legal risk is manageable or not. Often, what they don't understand because they don't understand because they don't have access to it is their benchmarking, and their benchmarking and their business plan is often wildly inaccurate and incredibly optimistic and they'll go along and make some incredibly optimistic plans. But when you put them up against the benchmarks they're assuming that they're going to be doing better than 40 or 50 per cent or 80 per cent of every other retailer that's in his category in the country. And you're saying to them, "What's so better about your product in that location that's going to make you better than the best in other parts of the country?" and they can't tell you.

So it's the risk management in all of those categories, and every single one of those, if they fail, puts them in a problem and gives them a legal problem with the landlord, because the landlord just simply wants the rent.

DR BYRON: Which I guess leads into the next topic I was going to ask you to elaborate on, which is the liar lease.

MR SPRING (COSBOA): Yes.

DR BYRON: I hadn't heard the phrase before but - - -

MR SPRING (COSBOA): You can understand it.

DR BYRON: - - - I'd come up with exactly the same context. I knew exactly what you meant. I guess perhaps connected to that - I don't know that you connected them, but if we talk about assignment, we've had a few people in here in the last few days who have this story that they are brought into a business partway through the

lease and have two or three years to go. They either were orally advised that: "Don't worry. It will be right. We'll look after you," wink, wink, or "Oh, yeah, of course," but nothing in writing. The famous case of the 20-year-old who paid 200,000 to buy a juice bar that had 18 months to go on the lease, with no renewal. Anybody can tell that this is not a recipe for success.

Is it the leasing agent or the centre management's responsibility to tell the purchaser of that business, "You know, that business that was worth \$200,000, mate, is not even worth \$20," because then the vendor - you know, all his dreams of happy retirement off somewhere else are shot. If the buyer and the seller of the business have reached agreement, whether it's fully informed or not - that may be another unequal situation - what's the responsibility of the centre to warn off the buyer?

MR SPRING (COSBOA): The only circumstance where I believe that a landlord is entitled to view sales figures is in assignments. Right? I don't believe they should be allowed to collect them but I do believe they should be entitled - and section 41A of the Retail Leases Act is exactly designed for this, where somebody comes in to buy a business, and the landlord has to approve that person. For the assignee to be basically let off the hook he has to provide a certificate and that certificate basically gives the turnover and the figures. So everything is transparent. There is a triangle of transparency that runs through the entire transaction.

I do believe it's the responsibility - it's always going to have to be "Buyer be aware". There's a responsibility on all parties. There's a responsibility on the person that's buying the business, to make sure that his homework is done. You do not buy a business with two and a half years left on the lease, and if you get a nudge, nudge, wink, wink you just don't buy it.

In past inquiries people have said that it's common practice that if you're going to go and buy a business you say that you want a brand new lease, otherwise you won't buy the business. The truth of the matter is, though, that when people do go to buy businesses halfway through leases - especially in shopping centres - the shopping centres require brand new fit-outs and they require increases in rental, because if they're going to give a new lease, it's a brand new lease. If they cancel the old one they give you a brand new one, so therefore that diminishes the value of the business.

Shopping centre managers do have a responsibility to say, "Look, yes, the lease is only for a short period of time and there is no right of renewal." That's the way that, if I was a shopping centre manager, I would be handling it: there is no right of renewal. All of this nudge, nudge, wink, wink, "Yes, if you pay your rent on time we will pay," and then turn around, at the end of the lease, and say, "Well, we have a legal right and there is no right of renewal. Yes, I know what I said before, but we

have a legal right," that's where the problem lies.

DR BYRON: Yes. I was asking some people, in the last few days, about whether we should even been talking about the word "renewal" in shopping centres. If it's a fixed term - five years or six years - - -

MR SPRING (COSBOA): It's a new lease.

DR BYRON: Full stop, yes. That's one finished and the new one starts again. I'd just like to explore it with you, because of your experience. Nearly everybody I know in small business, including a lot of friends and family, believe that as they work their butts off the value of their business is going up all the time. It has just occurred to me over the last couple of days that if you, say at midnight at the end of year 5, haven't got something of your business that you can relocate - across the road, down the street - and your customers come with you - like a hairdresser - the day your lease expires your business is basically worth nothing.

MR SPRING (COSBOA): Correct.

DR BYRON: So what that means is that every month that goes by, I'm actually getting a week or a month closer to the day my business is actually worth nothing.

MR SPRING (COSBOA): Correct.

DR BYRON: Yet I'm telling myself, every week and every month, "I've worked so hard. My business must be worth more."

MR SPRING (COSBOA): Correct.

DR BYRON: I'm just doing this off the top of my head, but it seems to me that we're deluding ourselves.

MR SPRING (COSBOA): We're fooling ourselves.

DR BYRON: Yes, we're deluding ourselves. You know, "Because I've been working so hard and building it up, I don't realise that actually it's slowly converging on the day it's worth nothing."

MR SPRING (COSBOA): And it depends on the type of business that you have in retail. The hairdressers have an inherent value in their business if people are prepared to follow them, if they relocate across the road, simply because all their customers are going to follow. But if you've got the juice bar or the doughnut bar, that if they moved across the road the customers are not going to walk across the

road to go and get a doughnut for \$3.50, and a cup of coffee. It's going to have to be a bloody good doughnut and a bloody good cup of coffee for people to walk across a main road.

So therefore the truth of the matter is that there's hundreds and thousands of businesses out there that think they have inherent goodwill and they're entitled to inherent goodwill but unless those leases are renewed at a rent that they can afford there is no goodwill, and their goodwill is in actual fact falling month-by-month from the day that they bought the business.

DR BYRON: But that's again quite different from the situation of, if I own a strip, where I can put the sign on the front door that says, "We've moved down the road," and all the people who know your name and you know their kids' names, they'll follow you two doors down the road.

MR SPRING (COSBOA): Correct.

DR BYRON: But if you're in the centre and you move out and some other guy moves in but everything else stays the same, most of the customers wouldn't even know that the ownership has changed.

MR SPRING (COSBOA): In actual fact, it's worse than that, because what happens in shopping centres is that - one of the things that happens in shopping centres is when one person moves out or one person's lease is not renewed, often the usage stays the same - not all the time. Often the usage stays the same so you might have an optometrist, for instance, that's been there for 20 years. They can't agree on a rental so the landlord has obviously pitched his rent too high so the optometrist then moves out, a new optometrist comes in and pinches all the customers that go with it and basically he has, in effect - maybe not from a legal point of view but certainly from a commercial point of view - has robbed the goodwill of that previous person because whilst many people would refuse to deal with the new incoming - the new tenant - a lot of them would say, "Okay, you're the new person. You're my new optometrist," you know. So therefore the new guy might be prepared to pay a higher rental because of that.

DR BYRON: Because he doesn't have to buy his goodwill.

MR SPRING (COSBOA): And also that - - -

DR BYRON: He may not even have to buy the fit-out.

MR SPRING (COSBOA): Exactly, but also in the strip shops, as opposed to shopping centres - in shopping centres they do say - many leases say, "You're not

allowed to put any closing down sale signs up. You're not allowed to put any bankruptcy sale signs up. You're not allowed to put any relocation signs up. You're not allowed to tell your prospective customers what you're doing." I mean, one of the battles that I had with the QVB in the Supreme Court was when I was wanting to put up "closing down sale" and one of the battles was that. There was nothing in the lease that sort of prevented me and they said, "Well, it is company policy," and I said, "Well, where is it in the lease?" It wasn't in the lease and they said, "Well, it's our company policy," and they said, "Well, where's it written in the lease?"

So one of the arguments that we had is that - so the shopping centres are very specific on what they like their end-of-lease conditions to be and, you're exactly right, all of a sudden your shop is there one day and the next day it's gone, whereas on the strip shops they can relocate at will providing they can find the right location along the strips, and that's what often you find. You do often find that strips move up and - retailers - strip shops move up and down the strip according to the market conditions, whether they want to expand or whether they want to be close by, but most of the time they try to stay within that general area, whereas in shopping centres that doesn't always happen.

DR BYRON: Would it be too cynical - one interpretation that has been given to us with the compression of lease terms and so on is that the centre management is basically saying, "We're auctioning the right to operate a pharmacy, a newsagent, a coffee shop, a dress shop, a shoe shop for the next five years and you know, if you're selected as the person to do it, at the end of that we're going to open it up to all bidders again. You can put in a bid but, you know, don't be surprised if the price is twice what you were paying," or whatever, and so at the end of five years - some people have said to us, "Look, if we know it's five years, you've got five years to recoup your costs and make a profit and get out," and the really big grief is people who thought that they were going to get 10 years when they only had a five-year lease. But if you know it's going to be five years and you make that decision in the full light of day then you know where you stand and it's back to your point about transparency.

MR SPRING (COSBOA): Yes, and I - there's two points there. I think it is a bit cynical to say that landlords are auctioning off little boxes every five years, but essentially that's exactly what they are doing in a roundabout sort of way. That's precisely what they are doing, seeing as there is no right to renewal. It's only in New South Wales where there is no right - automatic right of renewal. They are allowed to go and test the market if they want a renewal and it is in the landlord's interest to renew as many leases as possible at the highest possible rent for stability of the tenancy meetings. So it's in the landlord's interest to keep as many tenants as possible.

But if retailers were to do their numbers properly where they factored in their depreciation of goodwill, their depreciation of the fit-out, their cost of making good and their rental and occupancy costs during the term and their proper turnover that they're likely to achieve, they would find that the vast majority of them would not be entering those leases.

DR BYRON: Yes, fine.

MR SPRING (COSBOA): If there was full transparency up-front they would be saying, "This business model makes no sense." So the fact that they are able to rationalise in their mind of, "Oh, we'll get a new lease. We'll work through the first lease and that's when we'll pay everything off and we might have to do a bit of a wash and brush-up or we'll get a new lease," when they're faced with a new lease with higher rent and a new fit-out and a few other little bits and pieces, it's "Oh, my God, we were robbed." They probably weren't really.

DR BYRON: What do they say? The triumph of hope over experience.

MR SPRING (COSBOA): Yes.

DR BYRON: But it has been suggested to us that the concept of building up goodwill in business as an asset - something that you can sell and retire to live up the Gold Coast or whatever you want to do - is a concept that makes a lot of sense if you're on the strip and if you have got a 10 plus five plus five. There is that customer loyalty that people who have known the shop since your grandparents owned it or whatever. That concept is very sound in that context but when you transfer it into a five-year fixed-term micro-managed centre.

MR SPRING (COSBOA): It no longer applies.

DR BYRON: Yes.

MR SPRING (COSBOA): That's right. I mean, we do a lot of stuff with newsagencies and you often get to see the newsagencies in strip shops and newsagencies in shopping centres and they are really two different business models. The newsagencies in strip shops (a) they have territories for deliveries of newspapers where they have got or, say, three plus three plus three or five plus five plus five. If the landlord insists that they pay a higher rent, or we can get an option out of them, I say it's better for you to pay a couple of thousand dollars a year in rent and get another five years option and trade the option for higher rent because it means you have got a good, wealthy business that you can trade on. Instead of just going for the lowest rent you get in shopping centres, you have got to go for the lowest rent because you know your shop is not going to be renewed after five - sometimes seven

years, you get out of, in a newsagency, because it is seen as more of a prime tenancy than just an ordinary, say, fashion trader for instance, right?

However, there is - you're exactly right - the business model for a shopping centre is really quite different than a business model in a strip shop. Having said that though, Commissioner, there is not that many strip shops around that you can go along and you can do all this. Strip shops are limited too, you know. There's only a limited number of strip shops as well.

DR BYRON: You have got to allow for the fact that until last November I lived in Melbourne where there's a lot more strip shopping than Sydney.

MR SPRING (COSBOA): Yes. Love Melbourne because of it!

DR BYRON: But on the subject of the newsagencies, since we've raised it, we were given the example last Friday of somebody who has got a newsagency in a centre and their contract with the newspaper supplier basically says their territory is within that centre.

MR SPRING (COSBOA): Yes.

DR BYRON: And that seems to me to be an extraordinary proposition where one contract says, "I have to deal with a certain landlord. I can't take my business to any other landlord in the world," and the landlord knows it.

MR SPRING (COSBOA): That's correct.

DR BYRON: I wouldn't expect him to be overly generous in terms of rent negotiations.

MR SPRING (COSBOA): That's correct.

DR BYRON: The phrase "short and curlies" comes to mind.

MR SPRING (COSBOA): That's correct.

DR BYRON: Okay. I just wanted to check that that - - -

MR SPRING (COSBOA): And it's actually worse in New South Wales because in New South Wales newsagencies have to have a lease if they want to have Lotto. Under the Lotto arrangements you have to have a lease. You can just be on a month-to-month arrangement if you want to be able to have Lotto. So can you imagine what happens when you are negotiating leases at the end of the term? You

have to get the transaction done quickly because Lotto has its ability to step in and say, "Where's your lease? We're going to pull away Lotto," and if you pull away Lotto the business is ruined.

DR BYRON: Okay. The reason I raise that is that so many people have said to us, "Look, you know, particularly when it comes to the expiry of the lease and the start of a second one" - we're not going to use the word "renewal" any more - we are in a very, very vulnerable situation.

MR SPRING (COSBOA): Very vulnerable.

DR BYRON: They are very vulnerable, but I'm asking (a) how did they get to the situation where they're so vulnerable, and what is the public policy consequences; what can or should governments do to either prevent, discourage, dissuade people from getting into that situation where they suddenly find themselves incredibly exposed and vulnerable.

MR SPRING (COSBOA): I've wrestled with this for many years and the only thing that I can - the thing that I've always pushed whenever this question has been put to me is open disclosure and transparency, and it's open disclosure and transparency prior to them entering the lease; having access to the information to allow them to build a proper business model so they're not making simple assumptions, and they should not be assuming that the lease is going to be renewed. They should not be assuming that the sales are going to be some pie in the sky stuff. It should all be based on hard evidence, and they should not be assuming that - there should be no assumptions in the equation.

DR BYRON: Yes, transparency - exactly the phrase we were talking about here yesterday. I was going to move on to the issue that you raised about outgoings. We had a gentleman here who was involved with the preparation of the draft code on outgoings, who gave us some stories that would make your hair stand on end about what happens, and his argument was that a simple change in the retail tenancy legislation that would permit a group of tenants in a centre to demand an audit, not only that the amount they were billed for is the right amount but in terms of performance or an efficiency audit that if the cost of the cleaning the centre have suddenly doubled overnight, "How do we know that you actually chose the cheapest quote rather the quote that came from your brother-in-law's company." Is that the sort of thing that you think would add a great deal of transparency to the marketplace?

MR SPRING (COSBOA): The trouble is then you get down to who's actually controlling the shopping centre. I mean, the tenants should never control the shopping centre, and while there has to be transparency in terms of what the landlord

should disclose, I do believe that there should always be the ability for tenants to be able to access the books and do its own inquiry and have access to the audits, and if they're not getting those reports, withhold the payment. Right. But then you get into the question of who's controlling the shopping centre and it's not the asset of the tenant, it's the asset of the - - -

DR BYRON: No, there's no doubt at all that the owners of the centre have the right to manage it and decide who does what within it, et cetera, but there is also the question of transparency and accountability.

MR SPRING (COSBOA): Sure.

DR BYRON: And as we said this morning, these audits may not have to happen very, very often; that simply the fact that if things get wildly out of hand tenants can demand an audit, gives people the right incentive to do the right thing. Nobody would want to be exposed as having either made errors or deliberately defrauded people.

MR SPRING (COSBOA): So here in New South Wales the landlord gives an audit and then if the tenant is unhappy with it they can question the auditor. They have the ability to question the auditor. If they don't get the audited statement they can withhold the payment.

DR BYRON: They can.

MR SPRING (COSBOA): Yes.

DR BYRON: Already?

MR SPRING (COSBOA): Yes. That's already here on the SDT books.

DR BYRON: I guess before I move off outgoings, how big a ticket item is that in the grand scheme of things?

MR SPRING (COSBOA): It started off to be a small - years ago it was small. It was a small percentage of your total occupancy cost. It's got larger and larger and larger over the years by the imposition of management fees that the larger owners are imposing upon the centres which is funnelled back to the operating companies, and most shopping centre managers do their best to keep those costs down, but it can often be 10, sometimes 15 per cent of the total rent roll; sometimes it's less, sometimes it's more. I mean, it really does depend. The trouble with outgoings is some outgoings are disproportionately larger because of the scale of the size of the shopping centre. You know you get economies of scale when the size of the

shopping centres are of a certain size. So tenants in smaller shopping centres where it's not spread out amongst a number of tenants, do have disproportionately large outgoings.

DR BYRON: Are the management fees audited?

MR SPRING (COSBOA): They're part - it's just an invoice as far as I would know. It's just part of the audited statement.

DR BYRON: The reason that outgoings as a category would be increasing, I guess, is that more and more things have been included in outgoings that can be, sort of, invoiced back to the tenants.

MR SPRING (COSBOA): I think there are a number of things. The quality of shopping centres over the years has grown. Looking after a shopping centre is an expensive business, and people expect to have quality fittings. People expect the shopping centres to be constantly clean. If you seriously start to degrade the outgoings to save money you seriously start to degrade the quality of the shopping centres, and you can often tell - if you take two shopping centres, and both things being equal, the quality of the management of the shopping centre is often how much they spend on outgoings, and from my experience of retailing I would much more prefer for the landlord to be spending more money on outgoings and having a quality shopping centre, because that's going to attract the customers, than having a filthy dirty toilets and that kind of stuff.

DR BYRON: I was just going to say, when the toilets start to get dirty it won't be long before the turnover figures start to plummet.

MR SPRING (COSBOA): The customer will simply walk away.

DR BYRON: Go away somewhere else.

MR SPRING (COSBOA): So it's a very fine balance.

DR BYRON: Thanks. The idea of the voluntary code that we floated for discussion in the draft report wasn't in the sense of the previous New South Wales one where you can pick and choose which bits of it you would go along with at various times, but the idea that there would be a mutually negotiated code between the major landlord and the retailer groups on what was considered acceptable, ethical, reasonable, normal commercial code of behaviour, and once centres signed on to that every item on that would be binding and enforceable by the ACCC.

We talked about that not as a way of adding another level of bureaucracy and

legislation and red tape to this whole thing, but it did seem to us that there was a bit of a need for a circuit breaker, and that although there's a lot of commercial argy-bargy in all retail tenancy, it seemed to me that the area of the small specialty tenant in the large shopping centre is the area where a great deal of the heat is going coming from, and if we could find a way of cutting through that and beginning to restore some mutual confidence and, dare I say, trust, then there is a chance that we could get things back onto a straight and level situation without going through another 1000 pages of black letter law.

The reaction to it so far has been far from positive. That's fine. I mean, I'm not in any way wedded to a code of conduct, voluntary or mandatory, as a magic silver bullet that would fix all the problems. It was just one suggestion of a possible circuit breaker. Have you got any other suggestions of how do we start to get things back onto a more even keel?

MR SPRING (COSBOA): I think the trouble with the market is it's fractured amongst the major players who, in my experience - and dealing with them on a day-to-day basis at the level that I deal with them - I'm mainly overall - mainly reasonably professional but drive a hard bargain because they're hard-nosed business people. But if you don't have that level of ability to bargain hard and negotiate of which most small business people don't, they see them as the big bad guys and therefore they seem themselves as wanting protection, and the small guys - and following on from that, that not every shopping centre owner is a member of the Shopping Centre Council. Many of them see the Shopping Centre Council as a little exclusive club which they want to have nothing to do with. What you may end up having is you're strata-ing another section of retailing where you have one set of behaviour for one section and another section of behaviour for another. I think that having another section of behaviour will, by default, end up having another layer of bureaucracy, by default, simply because people are going to have to make considered judgments. How are they going to be dealing with this person and where do they sit in the overall scheme of things?

I think that's going to be very difficult for the shopping centre managers to be able to decide on how they react and how they deal with one person, as opposed to another business, because is that person a small business or are they a large business and how are they going to deal with them?

DR BYRON: Yes, and all those definitional boundaries always create shades - - -

MR SPRING (COSBOA): Yes, so I think what may end up happening is I think you just may end up creating a bigger can of worms than what it's designed to solve.

DR BYRON: Okay, thanks. Coming back to the information asymmetry, in your

first submission you had quite a nice discussion of the case for the National Register of Retail Leases and one thought that occurred to me- you know, the way you set that out I thought was very neat and very well-structured - and you made the case that if it was done through the ABS, for example, information appropriately sanitised would come back and would be useful for both the centre management for what they legitimately need to do in terms of maintaining the dynamism of the centre, and also for the tenants.

Just hypothetically, imagine that the shopping centre owners were to say, "Look, we don't really need all this turnover information anyway, in order to keep the centre vibrant and dynamic." Would it be still worthwhile to go with an option like the one that you laid out, let's say it's through the ABS, just because the information that comes back would actually be valuable for the tenants?

MR SPRING (COSBOA): Absolutely.

DR BYRON: Who cares whether the landlords need it or not?

MR SPRING (COSBOA): Absolutely, because it's all part of that - you would have discovered, when speaking with some smaller tenants when you said, "Oh, but there's tenant advocates that can assist you. There's specialist retail advisers that can assist you," and they've gone, "Oh, is there?" I strike exactly the same thing when I turn around and I say, "Well, show me your business plan. If you want to enter this market show me your business plan and I will put it up against a set of benchmarks just to see whether your business plans are realistic," and they go, "What's a benchmark?" I said, "Well, this is going to show me whether your business plan is realistic in terms of sales, expenses and the net profit you believe that you're going to make and we can say then that you're going to be within a band of sales, expenses, targets for you to be able to genuinely say that you're going to be able to make it or whether you're going to fail and what we have to do to be able to make sure that you're within those ranges."

The trouble with ABS is that it doesn't really - the trouble with the current ABS, it doesn't really do that in the way that's in a format that's properly set out. This is another arm that could be set out for proper benchmarking and so in terms of the information that would be available to a retailer, it would be fantastic because it will allow them to make proper considered decisions and if they are going - it's all about their having everything up-front.

DR BYRON: As I say, most of the problems that we see at the end start at the beginning.

MR SPRING (COSBOA): They nearly all start at the beginning.

DR BYRON: And they start from lack of full information and full disclosure, the basic information and transparency. We've had a lot of conversations here in the last few days about the registration of leases and we were wondering whether some - rather than having the whole lease, which would be 60 pages or more downloadable as a pdf file off a web site, is it possible if there was a one-page summary of the lease, the key terms thing, and you could just have a publicly accessible database of all those one pages that - well, I was thinking about whether you'd have a system where people could sort of type in the details on the web and that.

But that would have a serious defect in that you couldn't guarantee that the information on it was absolutely kosher, so whereas if you take a front page off the lease document that comes with the lease statement and it has some sort of a stamp or certification or it has gone through a government department, you actually know that everything on that page is official. The idea of having the publicly accessible database which could be used as a basis for official valuations by members of the API and so on - you know, all sorts of discussions about whether the database needs to be run by a state government or by ABS or whatever - KPMG or Ernst and Young or somebody else would do it.

I don't care so much about who does it but the idea that there would be a system that actually provides certified accurate information that either small retailers or people who are going to advise them can get access to it and then manipulate and aggregate or whatever they want to do with it.

MR SPRING (COSBOA): Okay. You see, the way the system works at the moment, if I have a retailer that comes along and says to me, "I'm thinking about going into a particular shopping centre," or even some of my larger clients who have got hundreds of shops, part of our due diligence is to download a selection of leases that we think give us an idea of what the comparable rents are in that shopping centre and then we go out and do our locational due diligence and we do exit surveys and a whole bunch of other things, right?

Part of that is to actually read those leases. After a while you get to build up a very good idea of specific locations and specific shopping centres, but if it's something that you don't know about you've just got to download more leases, basically, and read more leases. Afterwards you put up a spreadsheet. It's simply a spreadsheet: "Shop number 17, area is such and such, they've got this incentive, you've got this, this, this. These are the peculiar things about the lease." So eventually what you end up with is an overall summary so we know what our parameters of our lease negotiation should be.

So if a landlord tells us - turns around and says, "Look, we don't give options

and we've got 15 leases down there that he's given options," we know he's telling a porky, right?

DR BYRON: Yes.

MR SPRING (COSBOA): What we do is a long-winded version of what we should be able to do; is say, "Return to us all of the leases in that area that have got all that data and information in one summary format by collecting all of those summary pages in one go." That's the kind of thing that you might have in your head and that could all be simply by taking off one single form where they're filling out the lease details and all the information on one page which is simply inputted onto a web page. To me, that is the essence of the National Register of Retail Leases. It gives the ability to access that. Whilst it does have the potential for people to put on fraudulent information, I think there's many things from government that we write when we certify forms.

When go and fill out a form that we're driving a car, we say that we don't have diabetes and we don't have all the things and we sign these things to say that they're true and it says, "You're liable for \$1000 fine for not telling the truth," you know. There's many ways that you can get people to act honestly. There might be a few that are going to be dishonest but overall - and a lot of people do things through lawyers anyway and the lawyers are not going to fill out the wrong form.

DR BYRON: We had a discussion with Craig Kelly, who you may know, about whether the - because of the existence of incentives, the information that's on the leases would actually provide disinformation in that it would be consistently biased upwards. Then we had Simon Fonteyn here yesterday, who you may also know, saying, "Well, that actually wasn't a problem because it's very easy to work out that, on the average at the moment for certain types of centres, the incentives are usually 4 per cent or 6 per cent," so you just take all the face rents and knock off the 4 per cent or the 6 per cent, whatever the correction factor is, and you've still got a viable - I think Simon was making the point that this isn't a killer argument against having a national register of leases; the fact that the leases themselves don't show the side deals. Where do you stand on that?

MR SPRING (COSBOA): Where I stand on that is that they're both right. The reason why they're both right is that - nothing is ever simple in retail. Let's say, for instance, you've got a shopping centre and the shopping centre is difficult to lease. Most early shopping centres, when they're brand new, say a greenfield site, is difficult to lease. You've got to go out there and entice retailers to come in so, therefore, your level of incentives - incentivisation is going to be a lot, lot higher. You can't simply build that in because one retailer may be getting \$300,000 worth of fit-out contribution and another retailer may get nothing. Then, a couple of years

later, it may radically change.

In some areas of Sydney where we were having - here at the Cross, for instance, when they were doing all of the works up in the Cross a few years ago, it radically altered the leasing pattern around here. They were doing works for the roadways and for the pathways, to beautify it all, and it decimated the leasing market for a while and people were having to be given large incentives to stay in their property because they were bailing out because they were going broke. Now, all of that is one area where incentivisation is an important method of keeping tenants in there, and should be disclosed.

But, overall, Simon is also right because if there is an overall level of incentivisation in one market - for instance, like bulky goods - in bulky goods at the moment the average level of rent incentive is three and a half to four months, and they just build it in, without even having to read through all the leases you know that they're going to get a three or four-month rent-free period. Right. So they're both right.

DR BYRON: Yes, okay.

MR SPRING (COSBOA): But what I would suggest is that the level of incentive should be on there to start with and then it's up to the valuer to do whatever he wants to do with those incentives. More information in a clean clinical form is much better than less.

DR BYRON: Or is the alternative just to put on the effective rent and forget all about the - - -

MR SPRING (COSBOA): The trouble with putting on an effective rent is then it becomes - an effective rent becomes a matter of interpretation, and the interpretation comes down to who is actually putting it on the form, and then it becomes a lawyerfest.

DR BYRON: Okay. I take your point about vacancy rates, that they only indicate that the death rate is not that all is - or the patients are not dead yet, they're still sick or on life support. We were trying very hard to get information on whether there were more or less loss-making retailers inside or outside of centres, but as you say that is very difficult. It's been very difficult for us to get a handle on it, but if you can help us in any way - - -

MR SPRING (COSBOA): I believe that Michael Lonie from the Australian Retail Association is conducting a very large survey.

DR BYRON: Okay, we'll talk more to Michael about that then. You mentioned, almost in passing, that certain landlords may punish small retailers for using advocates.

MR SPRING (COSBOA): Yes.

DR BYRON: Could you elaborate a little bit more on how. I guess I can understand why. What, if any, protections can be built in? The counterargument I've heard from a few of the landlords is that, "We're actually very happy. We would prefer to have a professional advocate come and negotiate with us rather than having somebody who is a wild-eyed optimist or who is going to burst into tears if we don't give them the right number." So I guess it's different types of landlords who have different types of reactions to different types of advocates.

MR SPRING (COSBOA): Precisely right. Some landlords love dealing with the professionals simply because we all know what we're there for.

DR BYRON: Yes, neat and clean and professional.

MR SPRING (COSBOA): It's neat and clean and professional and we can sit back and we can say, "Let's cut the crap," basically and we can get right down to business and what you can achieve in two hours, you can normally achieve in 15 or 20 minutes, right. And you also know that you're all on the same page when it comes to what you're trying to achieve in terms of the number for the tenant, because the overall vast majority of landlords do not want their tenants to run away, go broke or badmouth the landlord. They do want to sit there and make some money and give some money to the landlord, otherwise they wouldn't be there.

However, not every shopping centre is set up for that type of negotiation. When you've got a family-owned shopping centre that may own one shopping centre, or two, or perhaps three in a consortium or a little syndication, and you've got one centre manager that might happen to be a friend of a friend, he's used to dealing with the individual proprietors on a daily basis and he's used to doing it his way. When somebody gets brought in that may start to second-guess and question everything that he says, and starts to want things specifically in writing and the reasons why, that's when things can start to get very difficult.

You know, there are a lot of stories around where landlords have set out to make life difficult for tenants after they have employed professional negotiators or what they do is they say, "My lawyer deals with all of that; I'm only after the raw number and all the other details the lawyers can deal with." In one way that's okay but, in another way, it's not so good because it removes the - tenants are the best when they are their own advocates. But you've got to give them the power to be their

own advocates. The service that we offer is like a lease coaching service where tenants have the ability to be coached in what they're doing. When you take that power away from them, you also take their ability away to make their own proper commercial decisions.

If you just give it to a bunch of lawyers to decide it costs them more money and it's more expensive and it takes longer for the transaction to be crystallised. So, instead of it taking weeks, it often takes months and months and months. When your tenant advocate comes along he is often seen as a threat by the landlord, so it really does depend on what type of landlord you've got. In the UK it's very common that retailers use property agents to act as their go-between. It's a very common thing. If you're a retailer in the UK and you want to go and rent a property, you don't just knock on the door and front up and say, "Can I rent this property." What often happens is you go along and get the local real estate agent and say, "Can you please contact the agent of that property?" They will say either, "That's me," or, "Okay, I'll go down the corner," and they negotiate themselves. You instruct the agent who is dealing with somebody that is instructed by the landlord. That's how it works.

Whereas, in here, traditionally agents have dealt directly with the proprietors, especially the small business people - directly. Then, when the deal is consummated, it gets passed on to the legal team.

DR BYRON: Yes. I'm just wondering, given particularly people who are - as I said before - taking their superannuation payouts and deciding that they will go into retailing for five years before they really retire, somebody said - and I'm not sure if they were joking or not - that those people should be banned from negotiating their own leases, or give them big L-plates, or make sure that there's an experienced driver beside them when you let them loose on the road. So that if there was an experienced advocate or professional whatever who at least held their hands while they went into the negotiation. But, you know, it seems almost self-evident that somebody who has never done it before, sitting opposite someone whose entire professional career has been negotiating leases in retail - I mean, the chances of them being done over like a dinner are pretty high, I would have thought.

MR SPRING (COSBOA): Yes, it's like playing a round of golf with a golf professional for the first time. You know, it's chalk and cheese. Will they spend a few thousand dollars with a professional or even just take their lawyer along - often they say, "No, I can spend that on merchandising or I can spend it on stock" and that sort of stuff. Often they don't see the importance of getting that fundamental lease in place.

DR BYRON: No, if we were to say, "Look, excuse me, friend, but you're talking about signing a \$500,000 contract here. Your house is at stake, the rest of your super

funds is at stake - - -"

MR SPRING (COSBOA): They often don't see that.

DR BYRON: These are the same people who would pay the 100 bucks to get an NRMA inspection before they bought a second-hand car, but they wouldn't do the equivalent before they sign a half-million dollar - - -

MR SPRING (COSBOA): A lot of them don't understand that when you have a lease it's for a fixed term and that once you sign the lease, you're liable for that rent right to the very end. When you say to them, "What's the rent?" "It's \$100,000." "How long is the lease?" "Five years." "So you're liable for half a million dollars." "Am I?" "Yes." They don't understand that. "But I don't just close down?" "No." "Can't I just get rid of the lease?" "No." Under certain circumstances yes, but only if the landlord approves it under limited circumstances." "What happens if I sell the shop?" "You can sell the shop but only under certain circumstances." "Oh." The conversation is as basic as that.

DR BYRON: Yes, it's a bit frightening really.

MR SPRING (COSBOA): And that's the reason why I believe that what we should be doing is putting as much information out there as possible in all its forms and then it's up to state governments to educate the people, and if they don't educate them that's as far as you can do.

DR BYRON: But we've been to the Retail Tenancy Unit and all their equivalents in all the other states.

MR SPRING (COSBOA): And they do a great job.

DR BYRON: You've got handfuls of brochures and the ACCC puts out brochures and there's web sites and things, and I mean, I picked up armfuls of information on this, and yet it seems that there are people who either didn't know there were brochures or didn't pick up the brochures or didn't bother reading them, or if they did read them didn't take much notice of them.

MR SPRING (COSBOA): Correct. Yes.

DR BYRON: And then it's a government policy to make sure that they never get into trouble.

MR SPRING (COSBOA): I have heard in Germany you have to do a small business course before you sign a lease.

DR BYRON: Yes, there are lots of things like that in Germany.

MR SPRING (COSBOA): I'm not suggesting we go this far but what I am suggesting is that where we lack the transparency is if somebody came to me and wanted some specifics there are still a number of grey areas, and if we had more transparency in the way suggested by the COSBOA submission some of those grey areas would diminish and there's always going to be people that are always going to make the wrong business decision because they were either hasty or they took no advice.

DR BYRON: Yes.

MR SPRING (COSBOA): Or they took the advice of a well-meaning friend.

DR BYRON: But as you say there's a great deal we can do to try and put a lot more information out there and also to put the bright spotlight of transparency and accountability in a few dark corners.

MR SPRING (COSBOA): I believe so.

DR BYRON: There's a few cockroaches in the dark corners.

MR SPRING (COSBOA): I believe so, yes.

DR BYRON: It's a minor point but you commented on our observation about retail vis-à-vis all other types of business leases, my recollection of what we said is that we weren't saying that they were all the same and it was just one big market. But we were questioning the extent to which the way state legislation deals with them is different; not only that the differences exist in the way the markets are regulated, but those regulations seems to be diverging further and further apart, and they're saying, "Okay, yes, we do realise that retail in many ways is quite different from all sorts of other business leases because of the importance of location and who your neighbours are and so on," although there are some protections that a small retail lease get, that say a small industrial lease doesn't get.

MR SPRING (COSBOA): Doesn't get.

DR BYRON: You know, somebody who's poured a lot of concrete to set lathes in a warehouse - his cost to get up and move if he doesn't like the second lease are very high too, and he's also in a very vulnerable situation once he's poured all that concrete. So the question was how different does the regulation of retail vis-à-vis all the other types of business leases have to be, and should they be getting further and

further apart all the time, or at least could they sort of go along in parallel rather than to keep diverging.

MR SPRING (COSBOA): I think the answer to the question is basically in the fact that the shopping centres have developed a system because I think mainly some of the - shopping centres, they're a system.

DR BYRON: Yes. It's a new system.

MR SPRING (COSBOA): It's a system. It's a new system that's developed in the last 25 or 30 years, and within that system are people that will go from one shopping centre to another shopping centre and the system is the same. Yet nearly all the other - the office market there is a system but it's nowhere near as intricate and complicated and factory - you've not got factory units, and that property market is its own specialist market, but they don't have the churning system in the way that the shopping centre system is designed. It's consumer driven, so therefore everything is focused on the customer, so therefore much of the legislation and the leases are all focused on doing things for the customer.

I mean, that's the reason why you have uniforms and rules and all the rest of it, whereas you just don't have that in ordinary commercial leases, and whilst I take your point that somebody that's set concrete and put lathes on - yes, it's quite likely that they would have got a five plus a five plus a five, and is able to amortise out that capital expenditure over that 15 years. That's not likely to be the case in a shopping centre where the guy may have spent \$300,000 on a five year lease on the full expectation, naively perhaps, that he's going to get his lease renewed.

DR BYRON: Yes.

MR SPRING (COSBOA): So my answer to the question is that shopping centres are a system whereas it's far more individualised and customised out there in the ordinary property marketplace.

DR BYRON: Sure. Coming back, one of the key features of the system is that the centre management, in effect, is undertaking to manage the whole enterprise in a way that will give the businesses in it a lot more turnover, a lot more foot traffic than they would have got, and the centre's expertise is in making the whole place so vibrant, dynamic, enjoyable for the customer's, et cetera, that the traffic continues to grow and hence the turnover. One of my concerns is, okay, where is the accountability and the transparency on that? Should I be able to audit the foot count?

MR SPRING (COSBOA): You can.

DR BYRON: If they say that turnover has been running - - -

MR SPRING (COSBOA): Under the Retail Leases Act if you're paying for that in your outgoings you have - I don't have the Retail Lease Act here with me, but if you're paying for that under the promotions account, you're paying for that; you have the ability to request those lessee sales figures, and a good lessor - and most of the good lessors will say, "Come into the room and you can sit there and watch the computer sit there, tick over the numbers." Good lessors are pretty transparent. Good lessors are pretty transparent. It's the second tier and the third tier ones that are not so transparent, mainly because if they've got things to hide or maybe they just don't know how to handle themselves.

DR BYRON: Okay.

MR SPRING (COSBOA): But whilst they provide a system I don't know how you'd actually go about auditing the quality of their system. It comes with experience and there are - the reason why Westfield is successful is they run good shopping centres. You never see a filthy shopping centre, you never see a filthy Westfield shopping centre. If you go into a Lend Lease shopping centre it's very rare that you'll see it filthy. It's very rare that you'll see doors falling off or you won't walk into a Westfield shopping centre and see things falling apart. The centre manager would have his guts for garters if that ever happened. There is a cost for that and the tenants do pay for that, in contrast to many shopping centres out there that are second or third tier shopping centres where there is struggle to keep customers coming through.

You've only go to look at a shopping centre like Burwood for instance. It's Burwood Plaza which is a second-tier shopping centre that's deteriorating and you've got Westfield Burwood which is a beautiful shopping centre. You know which one is going to get all the customers.

DR BYRON: Yes, and things like security and especially mums with young kids and all the rest of it.

MR SPRING (COSBOA): Security, all the rest of it.

DR BYRON: I'm just having a look at the clock here, and thank you so much for your time already, but there is one last thing I wanted to ask. You said in the lease that COSBOA thinks that the minimum term should be seven years rather than five.

MR SPRING (COSBOA): Yes.

DR BYRON: We've asked the question in the draft report - Queensland doesn't

have any minimum lease term at all and civilisation didn't collapse; life goes on - how can we do the with and without; before and after sort of comparison that says that having a minimum lease term, whatever the number is, has actually done anything, good or bad? My problem is how do I know whether it should be five years, six years, seven years or any other number? Should we even be thinking about telling the governments that whatever the number is, you should set a minimum lease term - perhaps overly idealistic, but isn't that - the term of the lease itself - one of the fundamental things that the two parties to the lease need to agree on?

MR SPRING (COSBOA): Yes, the minimum five-year term came out of the COAG meeting, and then Queensland decided to go their own way. The average tenancy term, in New South Wales at least, used to be three years and tenants were not able to depreciate their fittings over the three years, so there was this residual amount of money which they had. They were increasingly exposed to end of term because they got this brand new fit-out, virtually.

DR BYRON: But they may have had options though.

MR SPRING (COSBOA): That was just at the stage when options were being phased out. The reason why options were phased out was simply because the landlord really doesn't control his rent roll; market value is running around all over the place. Plus there are delays and all the rest of it. So you end up with a situation where the minimum five-year term was set as a compromise. COSBOA is saying the minimum five-year term should be moved to seven, simply because the cost of fit-outs are now horrendously expensive and they're far more expensive than what they were when that minimum five-year term was first in.

There is unfortunately no way of recognising whether the Queensland experience has led to longer or shorter terms. I regularly negotiate five, six, seven-year terms, depending on the tenant, and sometimes the tenant does want to take a three-year lease, simply because his business model is more akin to a three-year lease than anything else.

Sometimes a landlord will say, "We want to be able to give you a five-year but we're only going to give you a three-year. We can't give you anything more because we're redeveloping the centre." And the tenant and the landlord agree to a three-year, and it's quite clear and open and transparent, and they'll sign one of the section 16 certificates. Or you might have a tenant that says, "We're doing a pilot store." I often do rollouts of chains. "We're doing a pilot store. We don't know our market here. We want to do a one-year lease. We'd like to have a one-year plus four-year option, or maybe a five-year option." The landlord says, "We don't give an option." We'll say, "Look, we'll take a one-year lease. If after one year we work, we'll come back and we'll negotiate a new one. If not, we'll walk away. Is that okay?" And

they say, "Yes, that's fine."

So yes, it is part of that overall cut and thrust. However, I do believe that you have to have a base. You do have to have a minimum term. Otherwise you'll go back to the old ways, where landlords are squeezing down the minimum-amount terms possible, which will be three or four years. I don't think tenants are sophisticated enough to know that they need three or four or five, or sometimes six or seven, or sometimes 10 years.

We've already discussed how naive some tenants can be, and many of them don't quite understand that there is a correlation between set-up, write-off, depreciation, all wrapped up in the term, and unless they're able to write off the cost of their fittings over the term - and that term is something that has to be negotiated right at the very beginning - they're in trouble before they even start.

DR BYRON: We've heard from people who have a five-year lease, it's going to take them seven years to write off the fit-out, and they borrowed money to set up the business over 10 years. So five years after the business is - when the lease is expired - - -

MR SPRING (COSBOA): Their business model is all wrong.

DR BYRON: Again, you look at people and say, "They're vulnerable. How did they get into that situation?" You know when the five years is up and they're looking at a second lease and they've still got a lot of money to pay off the first one, if they have made any profits - if they've paid tax on profits they probably shouldn't have. If you've accounted for it all properly, they haven't made profits.

MR SPRING (COSBOA): The other thing that's important as well is that the Tax Office doesn't allow accelerated depreciation rates on a lot of fixtures or fittings.

DR BYRON: Yes, we're aware of that. I also understand your point that if it was seven years that shouldn't present insurmountable problems for the centres in terms of the - it seems anyway that, whatever the term of the lease, the cycle for the centre, for renovations, is probably more like seven or eight years anyway.

MR SPRING (COSBOA): Yes. When five years came out there was: "Oh, well, the sky is going to fall in. We're going to be locking our tenants in for these long-term leases," which is all rubbish. Shopping centres take years to plan. It takes a year and a half for the architects to decide what they're going to do, then it takes six months or so for the leasing people to decide where the tenants are going to go, then it takes a year and a half or so for it to go through DA, then it takes them six months to let all the contracts, it takes another year and a half for the base building works to

start. I mean, we're up to five years already. These things are years in the planning, and by the time they actually start leasing them, they're leasing them three or four years out, which is ample time.

There was a major ruckus when they introduced the preferential right of lease renewal down in South Australia.

DR BYRON: That's right.

MR SPRING (COSBOA): The landlords were saying, "The investment in South Australia is going to stop." It hasn't stopped. They were saying, "It's all going to dry up because we're not going to be able to manage our centres." The life cycle of these shopping centres, whilst they have to invest large amounts of capital back into them, in 10-year cycles, the lease profile of these things come up on a regular basis. You don't have to compress them down to three years, five years has proven to be adequate.

By the time landlords and tenants agree on a new lease, another couple of years - I mean, the truth of the matter is that by the time the landlord and the tenant agree on a new lease and get a new lease in place, and get a new fit-out ready and planned, it's seven years down the track anyway. The life cycle of these things should be seven years. Having a minimum seven-year term does not mean that they cannot contract out of their rights and agree on a new lease at a shorter period of time for a specific reason, or agree on a longer lease if they wanted to.

DR BYRON: Just on the subject of South Australia and the ACT, with the right of renewal, there seems to be so many "however"s or "accepts" attached to that that it doesn't seem to be doing much heavy lifting either. It may give comfort to people who believe that there's a right of first refusal, but it's hard to see whether it's actually doing much real work in terms of changing what happens on the ground.

MR SPRING (COSBOA): In terms of shopping centres, I don't think it's having the effect that people would like, simply because shopping centres are clued into the fact that it's an impediment to their business process. In terms of the strip shops, it's just another thing that landlords have to deal with. If landlords can get out of their obligations in shopping centres, they've got lawyers on top of it that make sure they can.

DR BYRON: Again, if this was seen as a remedy for a problem that arises with the small tenant in the big centre, why do you then impose the remedy on people over here somewhere who were never part of that problem?

MR SPRING (COSBOA): Because I don't think that it's fair to say that those

people were never part of the problem because they may also be part of the problem. Whilst there is a general perception that large shopping centres are the only problem, they're not the only problem because there is a strata of shopping centres that are not large shopping centres that are a problem. There are problems in the strip shops as well.

DR BYRON: If the fundamental issue is that all this is about is abuse of market power, I don't anybody is suggesting that the small landlord in the strip has market power and therefore why are the remedies to prevent abuse of market power being imposed somewhere where nobody has even suggested that the problem existed? Why didn't you just say, "If we think there's a problem with abuse of market power in the shopping centres, and this is a remedy for it, we'll apply it there"? Why you need to smear it over all the rest of the landscape I don't quite understand.

MR SPRING (COSBOA): I take your point. That's a matter for the governments of South Australia and for the ACT. In the 2006 review it was put up to the government that we should have an end-of-year market. If landlord and tenant can't agree on a new rent when a new lease comes up, but the landlord wants the tenant to stay and the tenant wants to stay, and they've agree in principle to stay but they can't agree on a new rent, it should go off to an independent market reviewer. This was going to be the circuit-breaker for all of these problems. The New South Wales government decided against it.

That was one of the methods that the associations thought was going to be a terrific circuit-breaker. That would have been another variation on a theme, so we would have had ACT, New South Wales and South Australia all having variations on the theme, and I don't envy your task in having to come up with something which might be another variation on a theme or ignoring it altogether.

DR BYRON: I think in view of the time we probably should draw that to a close. Thank you very much for being so generous with your time and especially all your experience and for the written submissions too. There's a great deal there that we need to chew over, but thank you very much for being so open and helping with my brainstorming.

MR SPRING (COSBOA): My pleasure.

DR BYRON: Thanks.

MR SPRING (COSBOA): No, thank you.

DR BYRON: And is there anybody else in the room who'd like to come and say something? If not today, then we'll resume tomorrow morning at 9.30. Thank you

very much, ladies and gentlemen.

AT 4.48 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 7 FEBRUARY 2008

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