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TRANSCRIPT
OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO THE MARKET FOR RETAIL TENANCY IN AUSTRALIA

DR N. BYRON, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON MONDAY, 4 FEBRUARY 2008, AT 9.12 AM

Continued from 1/2/08 in Canberra

DR BYRON: Welcome to the public hearings of the Productivity Commission's inquiry into the market for retail tenancy leases in Australia, following the release of our draft report in December last year. My name is Neil Byron and I'm the presiding Commissioner for this inquiry. The inquiry began with a reference from the Australian government on 21 June last year and examines the operation of the retail tenancy market in Australia. I would like to put on record how grateful we are to the many organisations and individuals who have already participated in this inquiry. The purpose of this hearing today is to facilitate public scrutiny of the Commission's work and to get feedback and comment on the draft report.

I understand that the issues that we're covering in this report are very large for many small businesses, a great deal is at stake and that passions can be raised. But we're trying to analyse the evidence objectively, to see what's been tried in various places, what's worked, what hasn't, and what more the Australian and state governments should do or not do. Following these hearings here today, we will be in Sydney until Thursday. We started in Canberra last Friday. Next week we will be in Brisbane and then Melbourne, the following week in Perth and finishing in Adelaide on 20 February.

The Commission then will prepare a final report that has to be with the Australian government by 31 March, having considered all of the evidence that has been presented in the hearings, submissions and whatever other relevant information we can find. All the participants in this inquiry will automatically receive a copy of the final report once it has been released by the government, which is usually within 25 parliamentary sitting days after the completion of the inquiry. We always like to conduct our hearings in a reasonably informal manner, although the Productivity Commission Act requires that participants should "be truthful in giving their evidence". Because we're taking a full transcript for the record, comments from the floor are rarely helpful. At the end of proceedings each day we always provide an opportunity for anybody in the room who wants to come forward and put their point of view on the record to do so.

If anyone wants to respond to something that someone else has said during the day, or people who have earlier given evidence and want to come back to say something or to add something that they might have forgotten, there will be opportunities for people to participate later. The transcript will be made available to participants to check and then it will be on the Commission's web site as soon as possible, usually within a week or so of each hearing. Transcripts can also be purchased in hard copy and the order forms are out the front. All the submissions that we've received are available on the Commission's web site or by order form, and we try and get them up on the web site within a day or two of receipt.

To comply with the Commonwealth's occupational health and safety

legislation, I have to draw your attention to the fire exits, evacuation procedures and assembly points. In the extremely unlikely event of a fire, head straight out the way you came in through the foyer, out the front doors and across the road. Second housekeeping, the toilets you just walked past on the way into this room and, finally, if anyone has got a mobile phone they might like to turn it off or into silent mode.

Now I would like to start today's formal proceedings by welcoming Mr Michael Lonie from the Australian Retailers Association. Thank you very much for your submission. As soon as you're ready, Michael, if you could briefly introduce yourself for the transcript and then if you can take us through the main points that you want to make in response to our draft report. If you could do that within about 15 to 20 minutes, that would leave us with probably three-quarters of an hour to discuss those matters that you've raised. I've got a couple of questions for clarification that I'd like to put to you later. So whenever you're ready.

MR LONIE (ARA): Thank you. My name is Michael Lonie. I'm a director of the Australian Retailers Association, basically responsible for tenancy matters associated with retail leasing. We welcome your draft report. I guess there are a number of matters that we don't see eye to eye with you in that regard, and I think that's not to be unexpected. However, there are aspects that clearly we do basically agree with, bearing in mind that we are national and we operate on a national basis. Quite clearly, we do support the aspect of endeavouring to have some harmonised legislation throughout the various states and territory governments, whereby the key aspects of the various tenancy laws are similar. We do acknowledge, however, in respect of that, that there are some difficulties.

We've been around as an organisation long enough to look at some other areas where harmonisation has been attempted. I suppose the credit card is a very good example, which took some 13 years, I think, to finally get to almost harmonised legislation. Clearly then each state did take a slightly different view on a range of matters, and we would suggest to you that, whilst you might be attempting to go down the same road, you may not be able to reach agreement on all matters across all states and territories.

The second matter that we would like to put is that, whilst you acknowledged the dispute resolution procedures as being successful, in terms of mediation, I don't believe that the Commission drew sufficiently on the fact that over 50 per cent of those mediations, especially in the states of Queensland, New South Wales and Victoria, related to strip shops. That tended to be almost glossed over, and I think it's an area that we would like to redirect you to have another look at. It has been very successful in terms of those mediation processes, but to try and put the whole report in context of saying that it relates purely to shopping centres, we would challenge that because there is a much broader aspect. The majority of the report in many

ways, in terms of retail listing disputes, related to, in our view, the shopping centre industry. Sure, it's a significant part, and I will come to that later.

I guess the most contentious point that we find in your draft report is the establishment of the broader market in linking commercial tenancies with retail tenancies. We would put to you that they are two distinct areas. Even the investment market realises and recognises the fact that most property trusts quite clearly are divided into basically commercial and into retail. I understand your desire to try and achieve some commonality. However, there are aspects within the commercial side that do not apply to the retail. Retail is a lot more confined in respect to where you can go. I notice that the Productivity Commission and the ACCC recently moved offices in Canberra, quite easily and quite readily, to another building, and I guess everybody that deals with you will be quite easily able to access you. No different to Westpac Bank in Sydney here and KPMG, who clearly picked up and left significant buildings in the centre of the district, the CBD, and moved to the outskirts.

Retail, especially relating to shopping centres, is not able to go down that road. Quite clearly, part of that is to do with zoning, and I think you've possibly recognised that in your last recommendation 5, but that perhaps does need to be explored. We also would like to put that we have over the years looked at voluntary codes, and in terms of New South Wales we originally started with a voluntary code. Unfortunately, it didn't quite work to the extent that parties would have liked it to do. Parts were cherry-picked to suit the purpose and large parts were ignored, especially some of those that were key parts.

I think we have seen some codes introduced. The code relating to casual mall leasing had a very, very long gestation period. It now, I would admit, has been agreed to and has been recognised by the ACCC. I could be cynical enough to say that some of the pressures that existed six and seven years ago with respect of casual mall leasing have now passed us by, because those spaces within the shopping centres now are largely occupied by permanent kiosks on leases. So for a number of the major landlords, casual mall leasing is not as important as it used to be. We did endeavour, over a period, to attempt to get a code relating to outgoings, to try and eliminate some of the difficulties that were being experienced between landlord and tenants, but that failed. I'm going to leave that, I think, to Mr Bruce York that you've got later, in that area, coming in, because I think that's the one area that he does wish to speak to. By the way, just going back to commercial and retail leases similarities and the fact of a template legislation - a template lease document that is being proposed - the concept is one that I guess we would all like.

However, the reality of it is that each of the landlords have their own varying styles, especially the major ones that relate to shopping centres, and I would suggest

that the annexures that would be attached to that would be still as difficult for those to read who are unfamiliar with them as it is today in the actual lease document. However, one possibly could take some of the aspects that come out of the schedules that are often attached to the retail leases that clearly define those matters I think you are attempting, as a Commission, to address, and that that be the basic terms of the lease and the terms and the conditions. We would acknowledge, if that could be achieved across Australia as a template, it would do a lot, especially up-front, not buried at the back of the lease documentation.

There is still an inconsistency in respect of information relating to retail leases throughout Australia. We acknowledge that you have indicated that there should be greater disclosure in respect of the registration of leases. However, I would suggest that perhaps you may look at the market information in the UK, where clearly an organisation like Shopfront or one or two others, borough by borough, I can basically pick up all of the retail lease information for just about every retail lease in the United Kingdom - that is not something that I can do in Australia - and it is current. However, I will admit that leases over there are much longer term. They're often 10 years. The increases are usually based on a mid-term market review, but the information is there and is available.

I could be cheeky enough to say that, in respect of the commercial and the retail lease being the same and the same information, are we going to ask for the income from the various commercial tenants to offset the sales figures? I think you'll get my point in respect of that: clearly not. So we have not given up on the sales figures. I think that basically, Commissioner, sort of covers an introductory statement for you.

DR BYRON: Thank you very much. You've raised the major points that we were expecting or looking for. To come back to a point that arose from your second comment about much of the mediation dealing with issues in strip shops, is it your view that the issues surrounding retail tenancy in the large shopping centres is really quite a different set of issues as opposed to retail tenancy in a small strip shop where you've got an individual landlord with one or two premises?

MR LONIE (ARA): Yes, there are some differences. However, there are some similarities as well. Outgoings, for example, is often an area that clearly is debated within both. I think in terms of the shopping centre versus the strip shop, the strip shop where there is reasonable strip and good strip - and I think I will need to put to you that, in terms of strip shops, it's quite obvious that some cities have a very, very strong strip - for example, Melbourne far exceeds the strip capacity that we have in Sydney and it's a totally different market, and there's a different market in terms of strips in Melbourne and Sydney. The shopping centre market does tend to be the same and uniform throughout Australia.

DR BYRON: I guess what that's leading to is that when we look at the form of the legislation that's been introduced over the last 20 years and go through second reading speeches and so on, the legislation I think in almost all cases has referred to issues of abuse of market power and information asymmetries with regard to the large shopping centres. And yet the retail tenancy legislation that's been brought in in each jurisdiction applies to all retail tenancy, even in areas where - - -

MR LONIE (ARA): I'd agree with you in terms of some of the amendments but, in respect of what it was originally, the strip shops formed just as much an integral part of the debate, and I've been around long enough, because I've been involved since 93, so I've crossed most of it. In those early days, there were significant problems that related to strip shops - misuse of land tax, for example, as an outgoing; charges for rates that did not apply to that particular property, as being another - because not all strip shops are owned by just a landlord that has one property. Often they have multiples, and what the legislation has done there is clearly to eliminate a lot of what was going on in respect of the paying charges that were not due to those strip shops to others where they could recover them.

DR BYRON: But in terms of the evidence that we've received in this inquiry, I would have to say the overwhelming majority of the issues raised deal with shopping centres.

MR LONIE (ARA): I would accept that.

DR BYRON: And that there may be a great deal of normal commercial argy-bargy between small tenants and small landlords in the strips but they're not the sorts of issues that we're covering here.

MR LONIE (ARA): No. Well, I'll put to you that perhaps the vast majority of strip people are not aware of your particular inquiry, in some cases. The ones within shopping centres operate within a very confined market. They are well aware. The moment that your Commission was invoked, the tom-toms started beating and they started to get out and started to muster, whereas clearly there is not the same homogenous group operating within strips. I do believe you have one or two from the strips within your area where they had been badly dealt with, in their view.

DR BYRON: But certainly in the minority.

MR LONIE (ARA): In the minority; I would accept that. A lot of the problems, as I indicated, that were taking place have largely been resolved. However, if we look at the dispute resolution procedures and we look at the state of a building and we look at what is the landlord's obligation as capital to repair roofs, sub-flooring

structures and so forth, I think you will find that if you go and investigate, with the Retail Tenancy Unit in Sydney, the Small Business Commissioner in Melbourne, you will find that those disputes are still going on. They're still there and they're there in large numbers.

DR BYRON: But those disputes are very rarely about abuse of market power.

MR LONIE (ARA): No, agreed. You're focusing on the market power, okay.

DR BYRON: I'm just trying to get your reading on to what extent we should look at issues across the entire spectrum of retail tenancy or only - some people have referred to this as a shopping centre inquiry, but from our point of view - - -

MR LONIE (ARA): It's not.

DR BYRON: It's not; that's right.

MR LONIE (ARA): I could draw your attention to the dominance of a certain landlord in Oxford Street, Paddington, that virtually controls a significant proportion of the strip. That particular landlord does have a market dominance. I think he's got somewhere about 40 per cent of the available stores. That's a very strong strip.

DR BYRON: Yes, good point. If we could pick up now the point that you raised about the voluntary code, we tried to explain in the draft report that we weren't thinking of the code along the lines of the old New South Wales one - where, as you say, cherry-picking did occur - where it was optional whether or not the parties complied with the code. We were thinking more along the lines of something like the Franchising Code or another code that the ACCC administers under the Trade Practices Act with regard to car repairers and car insurers where, once a party signs on to the code, everything in that code is binding and enforceable, so there's no option for cherry-picking and saying, "It's not convenient for me to comply with the code in this case, so I'll just ignore it."

We're not in any way wedded to the idea of that. We were just floating it to see whether people thought it might be one way of taking a great deal of heat out of the situation if the major parties, which ARA would certainly be one, could actually reach an agreement there.

MR LONIE (ARA): It is a way we're going, and I think the way in which - although it took a lot longer than what we would have hoped, the casual mall leasing code, which was basically formed on what was legislated for in South Australia, has now become the basis of a code that is national. It was the length of time, I guess, that we got frustrated with, the same as with the shopping centre council, to basically

get to the finality of it, but if it's that, yes, and if it's bandaided under working in conjunction with the ACCC, yes, but it only would be applicable to those who are signatories to it. So what about those that stay outside it?

DR BYRON: Is there some sanction with not being a signatory to the code?

MR LONIE (ARA): Yes.

DR BYRON: Would tenants choose to avoid them like the plague?

MR LONIE (ARA): No. Look, as an organisation we have a number of codes. The outworkers, for example, that relates to the manufacturing of garments and apparel, that now virtually is becoming a national code, and many of the retailers are only too willing to sign up to it because it's starting to drive out of the business some of those that are taking an unfair advantage of others, especially the outworkers, at the expense of sales.

DR BYRON: As you say, if it's going to take six or 10 years to come up with a code that's mutually agreeable and then it does very little in practice on the ground, then we wouldn't want it either. There is no point in having another layer of unnecessary red tape in all this. You only mentioned in passing the provision of turnover data, which still seems to be one of the most egregious points from the retailers that we're hearing from, retailers who are tenants at large shopping centres, and we'll be asking everybody a lot more questions about that.

MR LONIE (ARA): I think you need to look at sales figures historically. They originally commenced going back in the 60s when the shopping centres first commenced, and in those days the rents were significantly lower and the landlord and the tenant decided that they would share the risk and, if one did well, one was prepared to pay an overage over and above what the base rent was, and that worked very efficiently and very effectively for a significant period of time. It went through the 70s, perhaps into the early 80s, but then two things occurred. Firstly, there was some doubt about the veracity of the figures that were being provided, even though there were audit provisions in most of the leases, but, secondly, many of the landlords then were requiring the income to be clearly defined. Some of that was for borrowing reasons but some of that also was for valuation purposes, and rents also started to escalate.

I remember doing a survey back in 1995 of occupancy costs where there were some 4000 respondents, of which four of those 4000 - and it included national chains as well - paid percentage rent, because their base rent was always in excess of the percentage payable. If you look at percentage rents, they vary somewhere between 6 and 10 per cent depending on the category, as a rule. The average occupancy cost,

even using the latest or some of the JHD Urbis for most of those categories, is in the 14, 15, 16 per cent. So they're never going to pay percentage rent, but I put to you that the figures will have - all of the actual declaration of sales figures was left in the list because clearly the landlord wanted to know how well the tenant was trading.

There is in some instances, I believe, misuse of those, and there are other times where the perception of misuse clearly sets - especially when some of the rent increases are in the order of 20 or 30 or 40 per cent, and I'm not talking about on top of somebody who has had a very low start-up rent, and the feeling there was the guidance that the sales figures were used to basically take them to the maximum that they could take but still leave the trader in business. So historically sales figures were not used originally to judge the centre. That is something that clearly has come - and especially with the REITs and especially with the asset valuations that go with it and the importance that many of the REITs place on the performance of the centre with the analysts.

DR BYRON: Can you suggest to us an alternative which would give the shopping centre owners-managers some sort of information which they claim they need for management purposes, without providing information that can be misused or seen to be misused?

MR LONIE (ARA): In various reviews throughout Australia we basically have put that the aspect of a third party taking those figures, of which all within the industry sector, the landlords and tenants, would have the availability to those figures, but that basically is all it's been - it's been a suggestion - and in the various reviews it's not seen the light of day. But one of the things that many of my members put is the fact that they're quite happy to provide those sales figures to a third party, and even in the last review in New South Wales put that it should go to the Retail Tenancy Unit here, as being one, and I know Victoria were thinking about putting it to the Small Business Commissioner, but that didn't eventuate. So a third party, albeit the likes of a major Price Waterhouse, KPMG, Ernst and Young, to give you three without sort of picking one, that would be charged with the responsibility of it.

DR BYRON: So that the information needed for managerial purposes would come through but it would be filtered and sanitised.

MR LONIE (ARA): Yes.

DR BYRON: And without disclosing - - -

MR LONIE (ARA): The individuals.

DR BYRON: - - - the individuals. I have to say that it surprises me that any

business would willingly supply what I would have thought was extremely commercially confidential information.

MR LONIE (ARA): I would agree with you.

DR BYRON: Coming back to your comments about the differences between commercial and retail tenancies, I think we did try to recognise that there is one very different aspect with retail as opposed to other business tenancies, and that's the importance of location - location, location. So, yes, the markets are different, but I guess my question is how different does the legislation applying to those markets have to be, because we were getting the impression that the way retail tenancy lease markets were being regulated was actually diverging significantly from the way of all other business leases. It's not just that they're different but they're getting more different with every new piece of regulatory change, and we were questioning whether they needed to diverge that much.

MR LONIE (ARA): Some of the regulatory changes that have occurred have largely occurred as a result of, I guess, the legal profession in parts trying to circumvent what was intended in the original legislation, and there are a number of those that are on the record. The other part quite clearly - and I've got to say this - is that at times parliamentary counsel occasionally took a different view to the stakeholders in their interpretation of it, which has also meant that perhaps we would not have ended up with what we originally wanted, and some of the amendments quite clearly that have gone on in a number of the reviews - I notice you focus on just how many reviews have taken place - were as a result of: whilst the stakeholders had agreed to certain positions, it was not necessarily what was reflected in the actual legislation that was introduced, and occasionally it has been the insertion of a "not" in the legislation.

DR BYRON: Yes.

MR LONIE (ARA): It has totally changed the whole intent of what we were trying to achieve.

DR BYRON: Right.

MR LONIE (ARA): The other aspect I think in terms of what you're inferring in terms of the layering possibly came about from the attempt to get a more open and transparent market in regard to information. You've seen that in parts in the growth of the disclosure statement, for example. Now, a lot of that was available, but I would put to you not freely available, especially for the smaller tenant who perhaps would not know to go and look it up in the annual report of the property trust.

Again, some of the layering there was that, if you look at the obligations that we sought from the landlord in respect of the disclosure statement and the information that they provided, they in return asked us to provide the lessee's disclosure statement to say, "Yes, this has been provided. I have read it and I have acknowledged it." You know, is that adding complexity or is it a right that they should have had to say, "Well, we've given you something. We want to make sure you understand the responsibilities that go with it."

DR BYRON: Good point. In your earlier submission there are a number of places where you talk about how the centres have become dominant in terms of retail spaces; that in one place any retailer requiring good foot traffic is forced to locate to these centres as there's no other suitable space available if the retailer is to achieve the necessary productivity and sales to support the format. None of them are about, you know, it limits the choice that retailers have as to where they can open a store. I was wondering if you can elaborate a bit more on that, because it seems to me that if I was considering opening a small specialty retail business, which I'm currently not but if I was - - -

MR LONIE (ARA): Wise man.

DR BYRON: Well, I have to say, having read all the submissions, I'm a little bit dissuaded at the moment. If I was to do that, I would presumably look at what sort of package I could negotiate for retail space in a street and with, you know, a couple of different shopping centres. I realise that the ingredients in those packages might differ in terms of not only the duration of the lease, not only the amount of rent, but even - for example, I wouldn't be required to disclose turnover data if I was in a small strip, et cetera.

I would then weigh up is it worth going to a major retail centre given that, yes, the turnover is likely to be much higher but the rent is also likely to be much higher and there are all these other strings attached which I might find unpalatable. You know, do people go through that sort of exercise or do they just - - -

MR LONIE (ARA): Well, someone in a start-up may, right, because you're basically incubating. If you're into food shops, for example, and you want to open a pizza shop, the options there are much greater than if I want to open a good boutique in terms of female apparel, and especially if I'm in the high-end sort of spend area, which is what I want to do because I've been sitting at a dinner party with a whole host of my girlfriends and it's a good idea. So you've got two differing views and two different business models.

If I'm in an apparel shop, with rare exceptions I'm not going to go and look at a supermarket based shopping centre. You know, I can nominate two in Sydney that

perhaps I would - Northbridge and St Ives - but they are so atypical to the rest of the supermarket based centres and they've got good demographics around them. The likelihood of me as an incubator getting in there also is going to be quite nil because there are very limited, because the landlords of both of those clearly are seeking to maximise what they're getting through it.

Outside of Melbourne, as I said earlier, which has some extremely good strip shopping - part of which is due to the geographical aspects; wide streets, long, all based on the trams. Most of Sydney's transport largely is based on rail, with smaller retail at the train stops, whereas you go along High Street, you know from Prahran all the way through to - - -

DR BYRON: Chapel Street or Bridge Road.

MR LONIE (ARA): Chapel Street, Bridge Road. You know, the same out around Brunswick. There's a whole host of those long roads. We don't quite have the same in Sydney. If you look at it, the quality of it is very poor. There is some extremely good stuff in King Street at Newtown. Turn right to head out towards Marrickville and you're immediately falling off in the quality of it. You might open a pizza shop but you're not going to open any other retail store in that strip shop. You know, that incubator clearly will follow the route that you establish.

However, if I'm a successful retailer and let's say I've opened in the strip shop but I'm only doing three or four hundred thousand dollars a year because that's all I can get out of there and I'm wanting to grow my business, the only place that I can get the increase in sales is clearly within the larger shopping centres. I might go to a discount department store based centre; community, larger catchment, more people through. I could try (indistinct) Square, for example. But if I'm really wanting to get into something that I know I can do, I will go to the regional shopping centre.

Now, most of those, they dominate the area. You know, if you were to say to someone at Bondi Junction, "Well, you can always go down into Oxford Street adjacent" - I'm not talking about Paddington or Woollahra outside - you have a look at the difference in the foot traffic and you have a look at the quality of the foot traffic that you've got in that particular sector. I'd suggest that perhaps before you leave the city you might like to have a walk through there. You'll see a significant difference.

Even if you take Westfield at Bondi Junction versus Eastgate, it's almost as though Bronte Road - there's something that runs down Bronte Road that segregates the demographics. They are two distinctly different shoppers; one at the lower end, budget end, the other clearly across the full spectrum. There are many other suburbs. Paul might think I'm picking on Westfield, but I'm sure he'll appreciate - but, you

know, you look at Miranda, which absolutely dominates that particular sector. I'll go to Chadstone in Melbourne. Where are you going to open in a strip shop?

DR BYRON: There's nothing around Chadstone except suburbia.

MR LONIE (ARA): Yes, that's my point.

DR BYRON: But, I mean, the number of submissions that we've received that basically say, "The terms and conditions of a lease in a major centre are such that, if I sign it, I'm likely to lose money over the term of the lease," my question is, well, why would a rational person sign that?

MR LONIE (ARA): I agree with you. They're not forced to.

DR BYRON: Yes. Nobody has yet told me that a gun was held at their head and they were forced to commit retailing in a major - - -

MR LONIE (ARA): I think in some instances, and especially in terms of the small independent trader, I would suggest that a number of them have not looked at what the compounding impact is going forward, but when you are with a chain retailer, for example, and they are in the position that they're looking at the overall - and I'm not just talking about one centre - structure of the whole business, they could be doing a mill, 1.2, 1.3 mill, maybe more, out of a centre. Are they going to forego that as a part of their overall operation? That's a significant part of sales, especially if they're in a 30 or a 40-store chain. They may accept it and it may be marginal or it could be lost.

DR BYRON: Semantics seem to be important in some parts of this. It came up on Friday at the hearings in Canberra, the word "renewal", which is like in terms of leases. Is the understanding now that a fixed-term lease basically means a fixed-term lease, in which case we shouldn't use the word "renewal" and at the end of five years or seven years, or whatever it is, that lease will expire, full stop? There may or may not be another new lease. If that was more widely understood, and people stopped thinking about, "My lease is going to be renewed," which may mean the same terms and conditions for a similar period, would that remove some misconceptions that tenants may have?

MR LONIE (ARA): I'm not sure. I understand where you're coming from, but I suppose a number of them take it on the basis of what they read and what they accept, that 98 per cent, or whatever the figure is that has been quoted - 97 per cent I think of all leases are renewed within shopping centres.

DR BYRON: Replaced perhaps.

MR LONIE (ARA): Replaced, right, at the end of it.

DR BYRON: But so many of the submissions that we've received, and from people coming to the hearings, are saying, you know, "We understood that if we paid the rent every month" - and most people did - "that at the end of the term, whether it was five years or whatever, the lease would be renewed." So there was that understanding and expectation that, "I'm building up a valuable business," and so on, and when the lease expires and they find out there may or may not be a second lease and it may be on quite different terms and conditions, that's when people feel like they've just been cheated. The word "renewal" may contribute to that.

MR LONIE (ARA): Look, I can't answer that and I'll tell you why: because anyone that I advise, the first point that I make in that advice is, "Do you realise that this term is for five, six, seven years, and at the end of that period there is no guarantee that you will get it renewed?" That virtually is my opening comment. Now, how many of them have sought advice and how many of them weren't educated to that, I'm not sure, but, you know, as a person involved in the industry it would be remiss of me if I did not highlight that very much when I've been asked for advice on it.

DR BYRON: We heard on Friday about - it was a pharmacist who borrowed money on a 10-year loan repayment when the lease was for, you know, six or seven years. When his lease was not renewed, or the chance that it might not be renewed, he was extremely vulnerable, but it seems to me that he may have put himself unwillingly into that situation - - -

MR LONIE (ARA): Well, I believe he has, and I believe that many finance companies and many banks quite clearly give finance arrangements that exceed the term of the lease. I've seen people who have lost their home on it and it should never, ever be. Sure, if that pharmacist was to go back and look at his business and look at: if he borrowed for the term of that particular lease, he might have changed his perception as to the affordability of the business he was buying.

DR BYRON: Alternatively, if he goes to the retailer who was offering, say, a seven-year lease and says that, "Given the loan that's necessary to set up the business, given the tax write-off period for the fittings, et cetera, unless I can get at least 10 years I'm not interested in signing a lease, full stop, and that's my bottom line," is there a reasonable chance that a landlord will say - - -

MR LONIE (ARA): Well, I would have thought that in respect of a pharmacy, which is not easy to move - it's controlled - that would have been the case.

DR BYRON: So if the prospective - - -

MR LONIE (ARA): Because a pharmacy is an integral part of a shopping centre.

DR BYRON: Yes.

MR LONIE (ARA): And the movement of pharmacies, which you would be well aware of, is fairly significantly controlled by the Commonwealth in respect of where they can pick up and go from. It has got a kilometre radius on it. If it was a good pharmacy, I would have expected any landlord, or a reasonable landlord, would have negotiated a commercial arrangement.

DR BYRON: I've noted your comments about the market information that's available in the UK.

MR LONIE (ARA): I'll forward you details on that - - -

DR BYRON: I was just going to say, if you could point us in that direction.

MR LONIE (ARA): Yes.

DR BYRON: Because, I mean, the fundamental, I think, behind the entire debate with regard to large shopping centres and small specialty retailers is about the information asymmetry.

MR LONIE (ARA): I would agree.

DR BYRON: That's very, very fundamental to where the market power comes from for negotiations and everything that flows from that. So we're trying to focus in on that aspect. A lot of the submissions that we've received from small retailers - and I don't know whether they're members of your organisation or not - have in effect been asking for a form of rent control, that lease rentals shouldn't be allowed to increase by more than the CPI, for example. I was wondering what you thought of that and what you thought might be the longer implications of something like that being brought in, in terms of what might happen to the quality and attractiveness of centres.

MR LONIE (ARA): We've never advocated rent control, as an organisation. The one thing that we have advocated - and this again is something that's really integral in the UK but for various reasons here has not been - is that the market rent review provisions, in terms of determining a rent, be used more than what they are. Now, part of the UK scenario is that the UK does not have annual increases but they do have market reviews at fixed rates, fixed times. For example, you could have a

10-year lease in the UK with a market rent review at five.

That market rent review does have the ability to clearly state really what is the market position for that particular trader in that particular location. You know, our view has been that we would rather see that type of provision apply rather than fixed rent controls. But, you know, you talk about a CPI. At the end of the day, again the rent increase annually is still subject to negotiation. It doesn't happen often, but I do know where certain retailers have been able to negotiate the increase that they wanted. CPI would be the minimum.

DR BYRON: But in the UK, as you were saying before, there's a great deal more market information available.

MR LONIE (ARA): Precisely.

DR BYRON: And even if we go to the Australian Property Institute, for example, the valuers I think are on record in some cases saying, "Well, we can't really do a market rent review, because we don't have access to the information." So again, we're coming back to the - - -

MR LONIE (ARA): It's the asymmetry in the information.

DR BYRON: Fundamental availability of the information.

MR LONIE (ARA): I saw that just recently, as of last Friday, with a market determination where the valuer basically had used, for a discount variety shop based in a discount department store centre, what those that were located in regional shopping centres were paying. There's a significant difference between the two of them. It will be subject to a review. Now, whether or not he could not get the other information, I'm not sure, but I believe he ignored it because it suited the purpose.

DR BYRON: Well, we have also received some information about how the market rent review figures in the UK can be gained a bit by various practices, like getting - if you've got a strip of five shops, you get a mobile phone company in one of them and he sets the levy for all the others.

MR LONIE (ARA): The highest and the best use. Whereas, you know, if you look at the legislation here it's basically for the permitted use and not the highest and best use. But a strip shop does have that difference.

DR BYRON: I guess my final question is, we've been looking at all the differences in legislation on retail tenancy around jurisdictions, As you're very well aware, just about every state has brought in some new innovation in an attempt to fix a particular

problem. It's almost like there's a bit of an experiment going around. You can look and say, well, okay, Queensland doesn't have minimum lease terms. Does that make any difference compared to New South Wales? South Australia has an automatic right of renewal. Does that make any difference vis-a-vis its neighbours? Does that make any difference between Canberra and Queanbeyan?

We've been looking at all these, you know, new, additional, innovative features that have been brought into retail tenancy legislation around the country and trying to see whether any of them have actually had positive effects either compared to the previous situation or compared to their neighbouring jurisdictions. Basically it's very hard to find any evidence that any of these innovations or additional bits of legislation have done much, you know, real heavy lifting and made much difference. First of all, are there particular bits of regulation that have come in in the last 10 or 15 years in any one state that you think have been particularly successful and where could we find the evidence to substantiate that and its adoption by other jurisdictions?

MR LONIE (ARA): To answer your question, I think what in fact has happened sort of in the period that I've been involved is that there has clearly been a significant change in the culture of retail leasing. I look back at sort of 93, 94, of some of the difficulties that were around at that particular point in time. By and large most of those things don't even manifest themselves today. I was talking about the misuse of outgoings, for example, what levy is being - you know, you look at land tax. Well, land tax across the board in most states now has been removed, with the exception of New South Wales. In the introduction of that into New South Wales, quite clearly I don't believe that I would have seen a misuse of that particular aspect since about 1996, so it's gone. By the way, a lot of those were not the shopping centre landlords either. They were the strip shops. That has been cleaned out and tidied up, so there have been some positive sides that have come out of it.

I suppose the concern that I have had is that we have seen a number of states, for example - and I passed no comment on unconscionability in my introduction, but quite honestly the hurdle is so high that to me it's - again that was a part of changing some cultures, which I think it has done. We've seen a couple of states introduce additional to what was in the TPC or the TPA, and I don't believe they really achieved anything. It could have been left at - what was it, 13 or 14 aspects that were drawn down into state legislation from the federal Trade Practices Act. That's one area. Introducing the ability to prove that they were misused is almost impossible and so, you know, we would have been better off just leaving it as it was.

DR BYRON: Would you like to change your arm on a comment about unconscionable conduct, because the debate seems to be at the point of inconclusiveness where, you know, it's very rarely used and therefore it's toothless or

it's very rarely used and therefore it's working very well.

MR LONIE (ARA): Look, the difficulty comes back to (a) semantics and (b) perception. Much of the behaviour that people are calling unconscionability or unconscionable is in fact either hard bargaining or unfair. It does not necessarily meet the hurdle of being unconscionable. More importantly, in some of the disputes - and I go back to being critical of some of the legal profession in this regard - when they would wrap up a dispute to take it to the various units, just for good measure they would put unconscionability into it. Guess what the first thing that was thrown was. The unconscionability. So it has been sort of misused in that regard.

If you go back to again the history of unconscionability, the Reid report spoke about "unfair". Reith was the one that did not accept unfair and basically, when he moved the changes to the Trade Practices Act, introduced 51A(c) as unconscionability, and there was a significant difference in the height of the hurdle between those two. The other aspect also, I think, amongst the smaller particular people who may feel that they've got a case of unconscionability, the cost of it is one thing that does put them off, that's for sure, but again I suppose I look at how long it took us in terms of other aspects of the trade practices law to really get some definitive cases, and none of them occurred within the first four or five years. It was usually a much longer process, and I think this may be the same case.

DR BYRON: I think, in view of the time, that probably is the limit to my questions. Is there anything you wanted to say in closing, Michael?

MR LONIE (ARA): No, I don't think so.

DR BYRON: Can I just thank you very, very much for all your input into the inquiry and sharing your views and your points with us.

MR LONIE (ARA): It has been a pleasure. Thank you.

DR BYRON: Mr Peter Pitt from Hype DC Pty Ltd.

MR PITT (HDC): Good morning.

DR BYRON: Good morning, if you'd like to just take a seat there. If you'd just like to introduce yourself for the transcript and then take us through the main points that you want to bring to our attention, thanks.

MR PITT (HDC): Thank you. My name is Peter Pitt. I'm a director and one of the owners of a footwear retailer business called Hype DC. We have 14 stores in Sydney; we have four in Melbourne, with three being opened at the present time, so there will be seven there; we have one in Brisbane. About 22 leases: some of those are in major shopping centres, some of them are in strip centres. Many of them are in their first term but some of them have been renewed leases as well. All the stores are profitable. They're trading very well. Any other comments you want by way of introduction?

DR BYRON: No, that's an excellent introduction. Thanks. Do you want to move straight onto the comments?

MR PITT (HDC): I wanted to come and speak to the Commission because I couldn't disagree more with some of the comments in the draft preliminary report. In particular, in the front section it says that:

> The Commission's preliminary assessment is that overall the market is operating effectively. There is competition between landlords for tenants and there is competition between tenants for space.

The only part that's correct about that is that there is competition between tenants for space. There is no competition at all between landlords for tenants. In our 22 leases, not on one single occasion did we have the luxury of negotiating with two or more prospective lessors. In every single case we could negotiate only with one lessor.

You were talking with Michael Lonie earlier about, you know, why can't a retailer just go and open a site in a strip centre and avoid major shopping centres. Well, we now have 22 stores. In order to get a geographic spread and in order to be able to serve a market as a whole, you end up having no choice but going to places like Chadstone and Highpoint and those major shopping centres. It becomes inevitable.

Even in the case of strip centres, it's very, very rare to find two shops of the same approximate size with similar prominence in a similar good location available

at the one time. They're never available at the one time. They come up one at a time. For example, in Paddington - we have a shop in Oxford Street, Paddington. When we negotiated that lease, there was just that one shop available at that one point in time, and of course if we didn't find the terms acceptable we could say no and sit back and wait and then sooner or later another shop will come up and you can negotiate with the landlord, but you can only negotiate with one landlord at one point in time and, unless there are simultaneous shops on offer which are by and large similar, then there is no competition between the landlords for our space.

I'll give you some examples of what that leads to. We have, I don't know, 30 or 40 suppliers, people who sell us shoes, people who sell us advertising space, people who do our printing for us, the guys who clean our windows. All of these people sell to us on credit. Some of them are owed many hundreds of thousands of dollars at one point in time and none of those people get a director's guarantee or a bank guarantee, but landlords do. How come?

DR BYRON: Isn't that a feature of the property legislation?

MR PITT (HDC): No. If you can negotiate your way out of it, you do but not in - hang on, in one case out of 22 shops we were able to negotiate no guarantees: no bank guarantee, no directors' guarantees.

DR BYRON: But in your submission you talk about - that landlords should be treated like every other unsecured creditor.

MR PITT (HDC): Yes.

DR BYRON: I thought that the point was that the landlord, under the legislation, was treated deliberately - knowingly treated as a secured creditor and that security comes through the guarantee.

MR PITT (HDC): But why would the legislation put the landlord in a preferential position to other creditors of the business? I don't think it's compulsory. There is nothing in the legislation to my knowledge that says it's the law that you must provide a guarantee.

DR BYRON: No.

MR PITT (HDC): And certainly if you can negotiate your way out of it you do, but the effect of it is that if a business went broke the landlords get some money preferentially to the Tax Department, to the staff's entitlements, to their long service leave, their holiday leave. Well, why? We buy shoes from Reebok and Nike and Lacoste and a whole bunch of people; hundreds and hundreds of thousands of dollars

owing at the end of every month. The landlord gets paid in advance at the start of the month and he's got a guarantee.

The only reason he gets the guarantee is because there is no competition between lessors for tenants and, as I said, even in a strip centre there's only one shop usually available at one point in time, so there is only one landlord you can negotiate with, and the case is even worse in the large regional shopping centres where, as I said, if you wish to have a shop in Doncaster and you wish to have a shop in Chadstone, which we do, there is just one landlord you can negotiate with. We negotiate very well and I think we get good terms, but you can't get out of the bank guarantees, and those end up being very, very expensive.

DR BYRON: Sure. I understand that.

MR PITT (HDC): We've got 22 shops, we have $600,000 tied up in bank guarantees and that's about three shops we can't open, and on average one of our shops delivers about a couple of hundred grand in contribution towards overheads and profits, so the cost to us per annum of that 600 grand sitting idle is about 600 grand a year in opportunity cost.

DR BYRON: Is this situation perennial or is it simply a function at the moment of the way the economy has been going? It's been put to us that there is supply and demand at work in that there is a limited supply of premium retail space. There's lots of junk out there but there's a limited supply for the sort of premium retail space that you're looking for and there's a very large number of retailers who would like to get in there, and that imbalance between supply and demand is what gives the landlords or their managers the ability to make demands that you consider excessive. Perhaps it won't always be like that. If there was a major recession, for example, there might be a lot of vacant shops perhaps. So the first question is: is this sort of imbalance between supply and demand permanent or is it something that goes in cycles?

MR PITT (HDC): I don't know the answer to that question.

DR BYRON: Then I ask myself: where does the market power come from that gives the landlord the ability to demand all the things that they do demand as part of the contract and which most retailers apparently agree to? The answer that I'm repeatedly given is: because the retailer can say, "Look, if you don't like these terms and conditions, next please," and somebody else will come in and, "We'll meet those terms and conditions." So in that sense they can say that is supply and demand. There are lots of people looking for retail space of high quality, and if we ask why isn't there more premium retail space available, well, one answer might be zoning restrictions that limit the number of places you can put a shopping centre.

Your answer in the submission is a different one, that the ACCC has allowed concentration to a level that you don't think should have been allowed, but I think we're coming to a similar diagnosis, that at the moment the shopping centre owners seem to have more aces in their hand.

MR PITT (HDC): I think the central point is that you have said in here, or the Commission has said in here, that there is competition between lessors for tenants, and I don't believe that is true, because it can't be competition unless it's simultaneous competition. I have to have a choice, I could have that shop, that shop or that shop - three different landlords - and we negotiate between them and we squeeze for the best deal we can get. It never ever happens, ever.

DR BYRON: The other angle on that that we were given is where shopping centre managers told us that they're always on the lookout for someone who's got a great business model and somebody who's a successful retailer; they want to have high-quality, high-performing businesses coming into their centres and that they're always out there trying to find someone and persuade them to come in.

MR PITT (HDC): Yes.

DR BYRON: Now, isn't that an example of the landlords actually looking for good tenants?

MR PITT (HDC): Yes, they are, they're looking for tenants, but they're not in competition with each other in that respect. We happen to be in that category; we're an attractive retailer for major centres and, yes, my phone rings all the time with people wanting to rent us a shop, but there is no competition. When you start to get into a discussion with them, there is no alternative. They want a shop in Pacific Fair, there is just Pacific Fair. They can't say, "Well, 10 metres away there's a strip shop there. I could take that one instead of that one and they're interchangeable." That never occurs.

DR BYRON: They'll always be different.

MR PITT (HDC): Yes. The central comment in this report is incorrect. There is not competition between lessors for tenants and, as a result, they get terms which in a competitive situation would not be given, and I can evidence that in the sense that the same business gets other businesses to sell us things on credit without guarantees but landlords don't. In the case of landlords the amount of rent at stake is relatively small each month compared to what we owe to footwear companies, but they get guarantees, and it's simply because there's a lack of competition; simultaneous competition. When our buyer is looking at a range of shoes, he's got 20 different brands he can choose from. He can buy maybe 10 per cent of what he's offered.

There is enormous competition to get into our shop, to get on the wall. There is no competition between lessors because there's only ever one site at a time that's being negotiated.

DR BYRON: I'm still trying to reconcile that.

MR PITT (HDC): By the way, I'm not saying that that's a thing that the legislation ought to fix, because I don't believe it can be fixed. It is not possible to fix it. The only thing that can be done is, the Commission can improve the amount of information available to tenants before they sign up. In that respect, leases should be registered compulsorily in every state, because at the moment I've got an enormous amount of information available to me for leases in New South Wales. There's a web site you can go onto and every bit of information is there. But you try to find out the same information for Victoria; there's nothing available. So you're totally in the dark.

Even in New South Wales, it's not all the information there. For example, we commonly get substantial fit-out contributions, like 100 grand, 150 grand, from the landlord to fit out a shop, but that is in almost all cases not written up in the lease. That's in a separate agreement. So the lease gets registered and you go and research and you see what people are paying. You don't find out that they got maybe a year's rent in a fit-out contribution.

DR BYRON: That's why some of the submissions we've received have suggested that that sort of registration of leases could actually be misleading and would give people an inflated view of what rents are worth because all the side deals wouldn't be disclosed. So unless it's complete, it could be misleading.

MR PITT (HDC): It could be in the legislation that all relevant terms of the lease must be contained within the lease.

DR BYRON: Or the agreement to lease, which does contain it.

MR PITT (HDC): Yes.

DR BYRON: I understand that in most jurisdictions, if not all jurisdictions, it's possible for the tenant to register a lease of over three years, which many do for their own protection, but the Law Society of Victoria, for example, has told us, "Please don't recommend compulsory registration because it's prohibitively expensive and it doesn't actually do anything useful. It just generates disinformation and misleading information."

If there was a way of getting accurate information, timely information - not a

year old but up-to-date information - which was complete in a way that everybody could see what was going on, that might be very attractive.

MR PITT (HDC): Another alternative is for the legislation to require that in the disclosure statement the lessor provides relevant terms of comparable premises in the same centre. For example, if you want to lease a place in Highpoint shopping centre, Highpoint has to give you a disclosure statement and in there it gives the relative terms of half a dozen other sites in the centre that are of a similar size.

DR BYRON: In the same segment?

MR PITT (HDC): It could be. In our case it could be three other footwear retailers are paying this per square metre, they have this lease condition, they got this fit-out money, that kind of stuff.

DR BYRON: You mean the average for three other retailers, not necessarily disclosing what each of your three competitors are doing?

MR PITT (HDC): No, just saying - - -

DR BYRON: Because confidentiality might come in there.

MR PITT (HDC): Yes.

DR BYRON: So that, you think, would be useful?

MR PITT (HDC): What I'm saying is that the information is not available and it's terribly one-sided at the moment. If the registration of leases in all states is expensive and not very useful, there must be another way of solving the problem. The purpose of a disclosure statement is to disclose the things you need to take into account in deciding whether to sign or not sign, and I would have thought that having some knowledge about what is the market price of rental in this centre for comparable size boxes is something very relevant you ought to be taking into account.

DR BYRON: That sort of information is something that you, as a retail business, currently find very hard to get. Is that right?

MR PITT (HDC): In states other than New South Wales, yes. As I said, I don't believe that the lack of competition between lessors is something that can be fixed - certainly not fixed by legislation - but what the legislation can do is improve the imbalance of information. It can correct some of the worst excesses of the monopoly, if you want to call it that, and that is to outlaw guarantees and to outlaw

the provision of sales figures to the lessor.

I've got no problem giving sales figures to a government body or to an accounting firm, and they then supply those sales figures to the landlord in an aggregate so the landlord knows what the total sales for the centre are, they know what the footwear retailers are doing and all of that stuff, but they don't know what Hype DC sales are; because I can tell you now, the rental increases we get in leases where we have to provide sales figures are substantially higher than the rental increases we end up paying in strip centres, where they don't get sales figures.

If I was running a big, regional shopping centre, I could well imagine that, over a long period of time, you would become very knowledgeable as to the tolerance that a certain business can pay: a chemist shop or a footwear or whatever. You would know that, once the rent gets to this amount relative to sales, they walk. So guess what the renewal offer will be? It will be 1 per cent below their tolerance level every time.

DR BYRON: That may well be one of the secret ingredients of the business model of the larger shopping centre owners, that they have accumulated a great deal of in-house knowledge and expertise in knowing how hard they can push things.

MR PITT (HDC): So I've really come along today with just those four comments. One is, please do not write in the final report that there is competition between lessors because there is no simultaneous competition between lessors. You can't fix it but, as a result of that, you can at least take some of the heat out of it by improving the information, outlawing guarantees and outlawing the provision of sales figures direct to the lessor.

DR BYRON: I was wondering what would happen if, when you're talking about a new lease somewhere, you're talking to the landlord and say, "And by the way, it's our company policy now that we would never reveal turnover data to any of our landlords." Would they show you the door? Would they say, "Gee, we'll have to think about that"? What do you think their reaction will be?

MR PITT (HDC): I think, in the case of the major shopping centre managers, they would show you the door. You see, some things you can negotiate, other things are just written into their rule book. They aren't going to negotiate on them. Bank guarantees is one of them. We have now reached the point where we are able to negotiate leases without directors' guarantees. Okay? But getting out of the bank guarantee is - like I said, in one case out of 22 we have been able to negotiate that. I suspect if we said we're not providing sales figures, we would either be not offered the lease at all or not offered renewal or we would end up in a dispute.

DR BYRON: I realise I interrupted you in your opening remarks before, but I think we've covered all the things you wanted to say. Is there anything else?

MR PITT (HDC): No.

DR BYRON: Can I just get your reaction to the point that I put to Mr Lonie about the renewal. Do you have that same understanding; that a fixed-term lease is a fixed term, full stop?

MR PITT (HDC): Yes. I don't understand how anybody can be misled by that; it's black and white. You go into the site. You know all of your costs of setting up. You've got to get back that and a profit within the five years. Don't even think about longer than that.

DR BYRON: Are all of your leases five years or have you been able to get - - -

MR PITT (HDC): No. There are some that are three but almost all are five. No, we have some of seven years as well.

DR BYRON: I would have thought that your business would not be entirely dependent on traffic and be something of a destination, a sort of a drawcard that shopping centres would like to have.

MR PITT (HDC): Yes. We've not had any problem with - what was the word you were finding? - renewing a lease. Was that the one? Or replacing a lease.

DR BYRON: Replacing a lease.

MR PITT (HDC): We've had no problems replacing leases with new leases. Yes, we happen to be a funky footwear retailer and landlords want us, but if there was a better act came along I'm sure, at the end of the five years, they would wave goodbye to us and replace us with somebody they want.

DR BYRON: So you're quite conscious in your business that you have to recoup the set-up costs, the fit-out and make your profit and everything else, because there are no guarantees after the end of year 5 or year 6 or whatever it is.

MR PITT (HDC): Yes, and I don't know that there's any reasonable way around that, because the landlord has to be free to change the mix of their centre and all that stuff. I don't know how you can lock it in for ever and ever. It just makes no sense.

DR BYRON: Yes, well, a number of the other submissions that we've received basically would like to see a situation where as long as you've paid the rent every

month you'd automatically be renewed indefinitely. You know, a continuing number of five-year leases, one after another. But I suspect that if a landlord was required by law to automatically renew, the price may not be the same. If they knew that if they let you in today you were going to be there forever, the terms and conditions might be a bit strict or a bit different.

MR PITT (HDC): Probably.

DR BYRON: Anyway, I'm getting off the subject of the points that you wanted to talk to us about. Thank you very much, you've made some very good points very forcefully, and we'll certainly take them into account.

MR PITT (HDC): Thank you.

DR BYRON: Thank you very much for sharing your experience and expertise with us.

MR PITT (HDC): Any time.

DR BYRON: I realise that it's not free for people in your situation to come along and spend an hour talking to me to improve my education. Thank you very much.

MR PITT (HDC): Thanks.

DR BYRON: I think we've now got time for a tea-break, and we will resume at 11.00 with the Shopping Centre Council if they're still here. Thanks.

MR COCKBURN (SCCA): [Milton Cockburn. Executive Director of the Shopping Centre Council of Australia.]

MR RYAN (SCCA): My name is Mark Ryan. I'm Director of Corporate Affairs for the Westfield Group.

MR WALSH (SCCA): I'm Tim Walsh, General Counsel, Australia and New Zealand, for the Westfield Group.

MR HYNES (SCCA): I'm Bryan Hynes, AMP Capital Investors, head of Retail Asset Management.

MR COCKBURN (SCCA): Commissioner, as you know, a number of our individual members lodged individual submissions with you as well. We thought that rather than taking up the time of the Commission during the public hearings we would appear as the Shopping Centre Council, and this is the small subcommittee that was appointed to oversee our submission, with one exception: Mark Philps, who is head of retail from GPT, was unable to make it today, so he's an apology. We will be very brief in our opening remarks, because obviously it's the questioning that you will regard as important. We will obviously be lodging a submission in response to the recommendations of the draft report, but we wanted to have the opportunity of this discussion with the Commission before finalising the submission.

We generally support the findings of the draft reports. We believe the market is competitive and operating reasonably effectively. We don't believe there's evidence of major market failure. As the Commission noted, there is competition amongst landlords and tenants, and there's obviously competition amongst tenants for retail space. The case for additional regulation we believe is weak, and we believe less prescriptive approaches should be explored and there should be a move at the same time towards greater national consistency.

We would, however, like to discuss with you, Commissioner, two of your draft recommendations. The first is the voluntary code of conduct. The Commission has floated this suggestion, obviously, as a cornerstone of an alternative approach to retail tenancy regulation, as a genuine attempt to try and unscramble the egg.

If we understand it correctly, the idea is that, as part of progressive unwinding of the current prescriptive retail tenancy legislation, shopping centre owners should negotiate a voluntary national code of conduct for shopping centre leases. This is based on the idea that regulation can really only be justified in a shopping centre context, since it is only in the shopping centres where an imbalance of negotiating power is presumed to exist and where retail vacancies tend to be low. If such a code was developed, it would not be as prescriptive as retail tenancy legislation. This

would be of benefit to owners and retailers and its existence would then facilitate the removal of retail tenancy legislation that currently constrains market efficiency and raises compliance and administrative costs.

While we congratulate the Productivity Commission on giving thought to an alternative approach, we are sceptical about whether this is a viable incentive. While the Productivity Commission recognises that a code "should not be developed to add an additional layer of regulation on the market and should only be pursued if the current legislative arrangements are to be reformed", we believe it is too much of a leap of faith for owners, given our experience over the past decade or so, to enter into negotiations on such a code without a clear commitment from all state and territory governments that the quid pro quo will be delivered; that is, that we would be released from retail tenancy legislation.

We've seen no evidence that this would be acceptable to retailer associations and/or to state governments, and so far in these hearings I think just about all the retailer associations that have addressed the Commission have opposed the code. I note also that the Law Institute of Victoria has opposed it in its submission that's on the web site as well. We could not take the risk of negotiating such a code, having it made under the Trade Practices Act and therefore enforceable by the ACCC for those who sign up to the code, and then find we are saddled with simply an additional layer of regulation. We also believe this would be a lawyers' picnic. I'm assuming that the state governments would not repeal, or would not release us from, state and territory legislation.

If there is an inconsistency between the provisions of the code and the provisions of state and territory retail tenancy legislation, the code would presumably prevail over retail tenancy legislation. We suspect there would be constant legal challenges by retailers and retailer associations. It also assumes that all shopping centres are the same; that is, that the conditions that apply in super regionals are the same that apply in small, neighbourhood centres. Surely the conditions that apply in the latter are more akin to the conditions in strip shopping centres - in shopping strips - that is, the balance of power regularly resting with tenants, particularly major tenants, and much higher vacancy rates.

If that is accepted - in other words, that there's a vast difference between the conditions that apply within the shopping centre industry - why should neighbourhood shopping centres also be removed from regulation? We shouldn't forget that there are more than 1300 shopping centres in Australia. Only 65 of these are regional shopping centres or, if you want to subdivide them further, super, major or regional centres, and only about another 100 could be considered leading subregional shopping centres. When tenants complain about the conditions that apply in "large shopping centres" - that is, high market rents, low vacancies, et cetera - we are talking at most of around 15 per cent of shopping centres.

There are also practical issues. Presumably the code would require a dispute

resolution process. Would state and territory governments make available the existing processes if state and territory legislation was no longer applicable? If not, would the ACCC be the relevant body? We doubt that this is an appropriate role for the competition regulator. We believe a more productive approach would be to follow the approach we suggested in our original submission; that is, a move towards uniformity among the states and territories driven by a COAG working group, which would be also tasked with eliminating unnecessary regulation. We know that the present federal government is seeking to revive COAG and has already established a COAG working group on red tape reduction, and I think another one was established recently as well.

The second issue we wanted to raise was the comments of the Commission in relation to planning and zoning laws. In the draft report the Commission has recommended that states and territories examine the potential to relax planning controls that limit competition and restrict retail space and its utilisation. The draft report notes submissions from the ARA, the ACCC and the Bulky Goods Retailers Association, that claim that planning laws have led to a concentration of ownership of the larger shopping centres and an escalation in the price of land in those urban centres. By contrast, the draft report notes that retail strips and local shopping centres don't seem to be facing the same supply pressures.

It should be stressed that planning laws do not restrict the amount of retail space per se but they do restrict where retail development can occur. So why have governments intervened in the market to stipulate where retail development should take place? For many years governments in Australia, and also in the UK and many other countries, have required retail and other commercial developments to co-locate in urban centres or activity centres, as they're called in Victoria, with established public transport services and infrastructure and have prohibited them from locating outside such centres.

In economic terms, governments have intervened in the market in this way in order to minimise the environmental and economic cost to the community of dispersed retail and commercial developments and to maximise the public benefit. The costs include greater traffic congestion and air pollution as people make multiple car trips, to disperse shops and offices, greater demands on scarce public resources for duplicated infrastructure and the blight caused by half empty town centres and shopping centres.

The public benefits include greater use of public transport and therefore more efficient use of the public investment in this infrastructure, improving the vibrancy of town centres and providing more convenience, choice and competition for consumers because retail and commercial services are located close together. We do not consider that there is any evidence of a shortage of retail space at the subregional and

neighbourhood shopping centre level.

It should be noted that Australia has per capita levels of retail space greater than the UK but less than the US, which suggests that our level may be just about right. It is worth noting too that Australia's per capita level of retail space is also slightly more than that of New Zealand, which has a much less rigorous land use planning system than Australian states and territories.

In relation to the claims of ownership concentration, the draft report considers that, "Evidence of such commercial advantage has been demonstrated by some landlords disputing through the courts retail establishment in areas zoned for bulky goods." It also states that the distinction between bulky goods zoning and general retailing appears arbitrary. We accept that bulky goods development should generally be an exception to the notion that all major retailing should be concentrated in urban centres.

In many of the established urban centres there is not sufficient space for those retailers with genuinely bulky retail offers, so there is a justification for giving bulky goods retailers the advantage of locating outside retail zones because they usually need greater floor space than other retailers and this often can't be provided in the urban centres. Our concerns are only that these zones do not then also become general retailing zones because that, first, diminishes the amount of land available for bulky goods and obviously drives up the price and, secondly, turns them into de facto urban centres, which will then duplicate the demand for scarce public resources to provide the necessary transport and other infrastructure.

We think the draft report errs in appearing to suggest that there are other retail property formats, particularly retail outlet centres - or factory outlet centres as they are sometimes known - that have a similar justification for being located outside the urban centres. As retail outlet centres are simply shopping centres by a different name, there is no reason why they should be allowed to operate on land on which traditional shopping centres are not permitted to be located. To allow them to do so is simply to give one retail developer a windfall advantage over another. It's hardly proper competition if, in fact, it simply results in one retailer, one retail property developer, getting an advantage over others.

We should point out that the majority of retail outlet centres in Australia are operating in the proper retail and commercial zones. The Shopping Centre Council has never been involved in legal action against outlet centres which are located in commercial and retail zones and where they, arguably, provide closer, and therefore greater, competition to established shopping centres.

As a final comment, we also think the draft report fails to acknowledge that

the main determinant of the availability of retail space available for lease in major shopping centres is not the planning system but the availability of major retailers to anchor new shopping centres or redevelopments of shopping centres. Without a pre-commitment from a major retailer to be the anchor tenant, the centre will not be developed or redeveloped. While we are limited in the number of department store chains - really only two - and in the number of discount department store chains - three - but in the ownership of only two companies, there will always be a limit imposed on the growth of shopping centre space, which is unrelated to planning considerations. That's all we wanted to say, Commissioner, at the outset and we're obviously happy to take questions.

DR BYRON: Thank you very much, Mr Cockburn. I'm gratified that there are at least a few things that we agree on, but there are a few things that I'd like to add to the couple of points that you have put on the table, but let's work through the points you have raised first. The idea of a code, rather like the Franchising Code or so on, that would be enforceable by the ACCC was floated as a possible way of taking some of the heat, given that most of the heat seems to occur between the 65 super major regionals, or the 165 if we include the big subregionals, and their small specialty retail tenants. I guess the idea was that, if there was some way of hammering out a code that would take a lot of the heat out of that, much of the state and territory retail legislation would eventually be seen to be redundant and might be repealed. But I think you're quite right in saying that, if it wasn't repealed, all we've done is added another layer of red tape, which certainly wasn't out intent.

There are probably half a dozen issues that we've devoted a couple of chapters to in the draft report between specialty retailers and the landlords of those 165 or 200 or whatever larger shopping centres - is where all the allegations of abuse of market power seem to come from, which isn't to say that everything is rosy everywhere else in retailing, but that seems to be a major sort of sore thumb that is sticking out, and we were casting around for creative ways of dealing with that.

Do you think it's possible to set out, if not in a voluntary code, some sort of principles for the lease negotiations or lease renewals or replacements that could in some way be a circuit breaker to the misunderstandings, perhaps mistaken perceptions, on the part of some small retailers who haven't been well informed or well advised, as a way of just sort of clearing the air so that people knew precisely what they were signing up for? It may not be a code administered by the ACCC, but it seems to me that there is a major sort of education task that, if it was performed by someone, might make your members' lives a lot easier.

MR COCKBURN (SCCA): I think that task is being performed already by the bodies that state governments and territory governments have set up to assist in this area. If you look at the information that is made available, for example, from the

Retail Tenancy Unit here in New South Wales, most recently they have just produced a package of documentation which includes a retail leasing guide and my recollection of that material is that it continually stresses that a lease has a finite term and that there is no obligation on the landlord to renew that lease.

It's hard to see how much further one can go when there is so much material around that actually is emphasising to the small retailer, particularly the first-time retailer. It would be difficult to see how a retailer, even a first-time retailer, could go through the entire process of receiving the offer from the landlord, the disclosure statement from the landlord, the retail tenancy guide, which the landlord is required to supply and then the lease, and hopefully a qualified solicitor who's advising him or her on that matter, without being well aware that that lease has a finite term. You know, it's the old thing, you can lead the horse to water but you can't make them drink. I can't see how it could be possible to add any other arrangement to that which would actually drive that point well and truly home.

DR BYRON: We've seen all those brochures and pamphlets and information kits that all the state and territory retail tenancy units or their equivalents put out, that the ACCC puts out, small business and the Office of Fair Trading and so on, and yet we've got an awful lot of submissions from small specialty retailers who tell us that they were led to believe that, you know, as long as they paid the rent every month and abided by the terms and conditions of the lease, then it would be renewed and all their expectations were built around that, including working their backsides off for years and taking very little money out of the business, assuming that they were building up goodwill in a major asset which they could sell, and then suddenly when the lease isn't renewed they feel like they've just been robbed.

MR COCKBURN (SCCA): There are two issues there. If the tenant is a good tenant, has fulfilled all the obligations of the lease, whose retail offer is still relevant, have worked their butts off, as you said, it would be an irrational landlord that didn't renew their lease, unless there were circumstances - for example, a need to change tenancy mix, a redevelopment of the centre and such likes. But, as I said, if the retail offer was still very relevant to the customer base at that centre, the landlord does want that tenant to stay. So it's not as if the lease is not being renewed. I think the circumstances that you're talking about are that the lease might not be renewed on the terms that the tenant particularly wants.

DR BYRON: No, I was just wondering, to the extent that "renewable" sort of implies some continuity, and if we talked about, "At the end of this fixed-term lease, you may or may not be offered a new lease on a completely new set of terms and conditions," including a higher rent perhaps, or whatever, it would underline in their minds the idea that this business that I'm setting up in the shopping centre has a finite life of five years or six years, or whatever the lease term is, and that if there is

another lease, a different lease, after that, then it's a whole new ball game. Just that sort of clarity might prevent people from assuming certain things.

MR COCKBURN (SCCA): As I said, I'm not quite sure what - I think there are two issues here. One is you started to talk about tenants being naive and unaware that a lease might not be renewed and, as I said, I think that that is being addressed in just about every piece of documentation, that education task. The second issue of course is the negotiation of the new lease, which is quite a separate issue. I'm not sure that there's a great deal of naivety or lack of knowledge about the fact that the lease is finite. I think that the issues that have been raised with the Productivity Commission mainly revolve around that issue of the negotiation of the new lease.

DR BYRON: We've received a number of submissions basically saying that, provided the tenant doesn't violate the conditions of the lease, the legislation should be changed so that the lease is automatically renewed for a similar term, unless the landlord can make some special argument to some body, such as a tribunal or ombudsman, of why they should be allowed to sort of take back vacant possession and lease it to somebody else, and that seems to me like a major redefining of property rights. Could you sort of speculate on what the consequences might be if such legislation was introduced?

MR COCKBURN (SCCA): Yes, and we have gone into that in some detail in our original submission. I mean, you're quite right. It's essentially tenants who argue that, and by the way, I don't believe all tenants do argue that and I don't believe all retailer associations do argue that. It's essentially wanting the benefits of freehold without any of the risks and obligations of freehold. That's what it essentially amounts to, and there is a big difference between leasehold and freehold and, as I said, I think a great majority of tenants do make that distinction and understand that leasehold is simply that.

In terms of the management of shopping centres, it would be enormously difficult, and for that reason if you speak privately to a lot of the retailers, even though they're not willing to say this sort of thing publicly, they will concede to you that they are often the ones who want particular tenants out of the centre. I mean, if you're in a centre and you're saddled with a poorly-performing tenant on one side, and perhaps even on both sides, the last thing you want as a retailer is for those people to be staying there. You're also in a situation where you're often after another particular site in the centre yourself; you've had your eyes on a particular location in that particular centre. You're not going to get that if in fact the tenant who is already in occupation of that continued to get their lease renewed. I'll pass this over to Bryan Hynes, who has been a former shopping centre manager, to elaborate on it as well, but I'll just provide you with an anecdote.

During the review of the Retail Leases Act in Victoria quite a few years ago now, the reviewers asked if we would bring into the room representatives of our organisations instead of just the salary packs like me who were doing the negotiation, and the ARAV, as it was then, brought in a retailer who was explaining to the reviewers some of the realities of retailing. And we got onto this very subject and the retailer said, "I don't want that. Non-renewal of leases, I don't want that. What happens if I get saddled with a crook retailer?" He said, "It took me 10 years to get the particular site in the centre that I'm in now." So, as I said, I think retailers themselves are not particularly enamoured about that sort of notion of transferring freehold rights onto a leasehold situation. Bryan, would you just - - -

MR HYNES (SCCA): I might just call on some anecdotes of the many years that I've actually been in centre management, and this comes out very strongly where a lot of your good retailers don't want a business that actually doesn't perform next to them, because it is detrimental. We've taken on a number of centres that we've purchased and seen exactly that occur, where we've had retailers that have been in situ maybe one, two, three lease terms, and we've actually remixed the centre to significantly increase productivity and the benefit has flowed.

You know, in our submission we actually pulled one case point, which is Royal Randwick, for example, where we bought that from a receiver - well, it was in mortgagee possession. We spent a significant amount of capital on upgrading it. The tenants came along with the journey. There were a few that we didn't renew, that we didn't perceive had a long-term future in that particular centre, and you can go and have a look at that centre today and the productivity is significantly increased, the presentation has increased, the customer base has changed significantly, and that's a real live example. We've only owned that centre now for about two and a half years, but also we used the reinvestment in capital, not just by the lessor but also by each of the retailers as well, to keep their fit-outs relevant to the market that they're trading in.

We've got many cases where we've had centres that we've bought from other ownership and we have to perform refurbishments, redevelopments, on, and the people that may have been in those centres for two, three lease terms will sit there and have the mindset that you talk about, but when you actually sit down and talk to the retailers that are very successful, et cetera, they understand that retail changes. A great example is mobile phones. 20 years ago nobody would have thought of a mobile phone shop; juice bars; those sort of things. So it's an evolving product to keep up with the market. If you've got automatic right of renewal, how can you remix those centres to actually keep them relevant? That is one of the things that we, as an industry, compete with each other.

We don't have an automatic right to the customers that put the dollars in each

retailer's till, so we must compete with the Stocklands, with ourselves, with Westfield, in each of our products that are there. So they are all competing for similar customers, and that product and changing that retail mix to keep it relevant is very important.

DR BYRON: I'd just like to explore a little bit more the consequences of not being able to do that sort of remix over time. What might happen if new regulations were to constrain the ability of the centre management, you know, to refresh or renew or to change the mix of retailers?

MR HYNES (SCCA): If you virtually assume that a centre sits in situ with the leases that are there and assume that you have a number of retailers that aren't performing or businesses that aren't relevant, you don't have the opportunity to actually introduce new concepts and keep the whole product relevant to the market, so therefore you - and when I say "you", collectively; the retailers that are trading in the centre - and the centres owners will lose market share to a competitor that offers that. We see that very, very clearly in the market today. If you refurb a centre or actually reposition it that you may go for a better food offer or a better fashion positioning, et cetera, the customers will spend the dollars in those locations, so it will have a detrimental effect to the retailers and to the centre itself because it will lose market share.

DR BYRON: So ultimately if you stop moving, you're dead.

MR HYNES (SCCA): Exactly right.

MR COCKBURN (SCCA): And of course when it does die, when it does become moribund, every retailer in that centre suffers. It's not as if sometimes harsh decisions do have to be taken in terms of remixing the centre. Some retailers will not get their lease renewed, but that's in the interest of all the other retailers in the centre, because if it was just constantly renewed, there was no attention to remixing the centre, there was no consideration being given to ensuring that in fact the centre remained relevant to the customer base, then every retailer in that centre would ultimately suffer.

DR BYRON: And is it possible that not only the other retailers would suffer from an inability to get rid of underperformers, but in trying to protect or give greater certainty and security to the incumbents, would that in some way discriminate against new entrants? You know, new people who have got new products or new concepts who would like to get space in a centre?

MR COCKBURN (SCCA): Well, yes, it would.

DR BYRON: If the incumbents are locked - - -

MR COCKBURN (SCCA): It's certainly an incredibly anticompetitive measure. I mean, for example, when we negotiated the code of practice in relation to casual mall licensing that Michael Lonie referred to this morning, one of the things we had to do was to have that authorised by the ACCC because we had received legal advice that it was in contravention of parts of the Trade Practices Act. The contravention was the result of the fact that part of the code says that certain outside competitors cannot be brought into the centre. It defines what is an outside competitor. It also says that certain internal competition can't take place as well, so that was in possible breach of the Trade Practices Act. That's why it had to be authorised.

I think if you passed a law that says, if you are now lucky enough to be a tenant in a shopping centre or a strip centre and now effectively you automatically will have that resumed - that right of renewal - well, how does anyone else get involved in retailing from now on? You know, as you say or as you're implying, I think it's an extraordinarily anticompetitive measure to adopt.

DR BYRON: The benefits of enduring occupancy without having to buy the freehold. Moving on a bit, your second point was about the effect or otherwise of planning and zoning controls. I mean, we certainly appreciate the rationale for their existence. Can I start by asking what your reaction was to what I said earlier this morning about: can we characterise the current situation as being a limited supply of premium retail space and many prospective retailers who would like to be in a premium retail space? The corollary is, is there anything we can do about the supply constraint?

MR COCKBURN (SCCA): I made the point at the outset, I don't actually think it's the planning laws that constrain the supply of retail space, other than governments make decisions obviously about new urban releases and suchlike. Leaving aside the decisions about new urban releases, the operation of the planning and zoning controls per se I don't believe actually limit the amount of retail space. That's very much a function of the market and very much a function of things like the level of competition. It's very much a function of the supply of major anchors and major tenants.

DR BYRON: Can we just explore that aspect a bit further, because I think we're all very familiar with sort of the concept of the large shopping centre with the anchor tenants and so on as it operates in Australia, but in other parts of the world there are presumably a number of different types of large centres. In the US some of them apparently don't have anchors. In some parts of the world, I think, you know, the centres could be strata titled, for example, and they're run as a cooperative of small specialty retailers.

I'm sort of intrigued as to why none of these alternative sort of formats seem to have appeared here. There was some study from New Zealand that suggested the shopping centres that weren't actively managed, such as by, you know, one of your members, tended to have much higher failure rates than the managed centres. I speculated in Friday's hearing that if 30 small retailers got together and decided to build their own shopping centre and run it themselves - body corporate, et cetera - would it work and what sort of rules would they need to bring in to make it work, and would it end up looking very much like one of the existing centres anyway?

MR COCKBURN (SCCA): Well, yes, the reason why that doesn't happen is of course the moment that happens the retailer is taking on the property risk. At the present time the advantage of leasehold is that you're not actually - well, it's two advantages. One is you don't have to spend more of your capital or go further into debt in order to buy your premises. Secondly, you're not actually carrying the property risk. That property risk is being carried by the person who has put up the capital or has gone into debt in order to invest in that particular retail property format.

To some extent I think it would be an illogical action for a retailer to actually do that because, as I said, you're eroding your capital base or you're winding your debt and then you're taking on a risk which you don't really want to take on. The beauty of leasehold is that there's some other mug who's carrying that risk and - - -

DR BYRON: Which presumably is why the banks, the petrol stations, the supermarkets, et cetera, were getting out of owning property and leasing them back.

MR COCKBURN (SCCA): Yes. It all comes back to the balance sheet. That's right. You know, we made the point in our submission that when the last major property collapse occurred in Australia in the early 90s, a lot of the retailers were immune from that collapse because they themselves weren't carrying the property risk. I mean, times got tough. We went into a recession, of course. I'm not suggesting the time was easy for retailers, but it was much easier for them in the sense that they weren't carrying this additional risk. That was being carried by people who got savagely burned. At the present time it's the investors in Centro who are being savagely burned not the retailers in Centro centres. That's why, you know, I doubt very much whether retailers are ever going to group together and go into the shopping centre business, because why would they want to take on all that extra risk?

Just to come back to your first point, it is true that in the United States there is a much greater variety of retail property formats. Shopping centres, as we know them here, are very different - a lot of them don't have anchor tenants - but that's the way in which the market developed over there. It's quite unusual, for example, in the

United States to find a supermarket in a shopping centre. The supermarket chains over there prefer to be outside the shopping centres. Some of them I don't think have discount department stores. One of the big difficulties that the Westfields and Centros and Macquaries have had when they've gone in to invest in the American market has been trying to actually change that nature. People don't really appreciate that we have in Australia a very unique shopping centre model in which everything has been gathered under the roof - - -

DR BYRON: Under one roof.

MR COCKBURN (SCCA): That of course is one of the reasons why the productivity of our centres is so much higher than in other countries, but it's also the case of course that America's population is so huge that some of these centres can operate without anchor tenants, as we know them. In Australia that's still a problematic debate about what would happen to some of our big shopping centres if indeed the anchor tenants weren't there, and we've seen only in the last couple of years - and it's too soon for any sort of judgments to be made - with the withdrawal of Daimaru from Melbourne Central, for example, the owner had to invest a huge amount of capital in redeveloping that centre - a significant amount of money in redeveloping that centre - to accommodate the departure of the anchor tenant. It may well be that we'll see more of that in the future, but at this stage it's doubtful whether we'd have the - you know, 21 million people - market to accommodate that sort of thing.

DR BYRON: So you don't see the emergence of any new prospective anchors on the horizon?

MR COCKBURN (SCCA): If you look at department stores - Daimaru, as I recall, has been the only new entrant in the last two decades, and that wasn't a successful venture for them. If you look at the two department store chains, at any one time one of them has been struggling. I mean, in recent years it has been Myer that has been struggling. Prior to that of course it was DJs that was in difficulty. Even when you go down to subregionals and supermarkets - I mean, Coles and Woolworths, one of them has usually been struggling at any one point of time.

I mean, Woolworths is seen to be a very powerful retailer now. 15 years ago there were significant doubts about whether Woolworths was going to survive as a company, so it does come back to the difficulty we do have. In terms of different forms of anchors, it may well be that that's something in which the shopping centre model does evolve in Australia. We've seen, for example, in the last two decades the rise of the bulky goods centre - that's something that really didn't exist more than two decades ago - and of course, as a result of that, the creation of bulky goods space, which has been additional retailing space that has been made available. We've

seen in the last decade the rise of the retail outlet centre. Retailing is such a vibrant game that these different retail property formats are emerging all the time.

DR BYRON: I guess I'm fishing around for your reaction to the people who are telling us that they have to go into a centre if they want their retail business to be viable and, when they do go into a centre, they find that they have very little choice but to accept the terms and conditions that are offered to them. I guess I'm just wondering what alternatives they might have apart from not being in retailing or whether you would simply say that there is enough choice between centres and other formats and within centres.

MR COCKBURN (SCCA): As you point out in your report, the vast majority of shops are not in shopping centres, so the notion that you actually have to be in a centre in order to make a living out of retailing is just not correct and, when you break it down further, the vast majority of shops are not in regional shopping centres either. So the people who are saying to you, "Well, I've got to be in a super regional centre if I want to stay in retailing" - it clearly is not correct and the figures show that that's not correct.

DR BYRON: Maybe they're saying, "I would like to be - - -"

MR COCKBURN (SCCA): Well, I'd like to live in Vaucluse, but I can't afford to live in Vaucluse, you know. If you can't afford to live somewhere, you cut your cloth accordingly and you find somewhere where you are happy and you can afford to live. The same may be true of retailing. I don't have a right to live in Vaucluse and nobody has a right to be in a super regional centre. You go into that super regional centre if you believe you have a business model that can afford to be in that sort of centre, and the vacancy rates show that the vast majority of retailers can afford to be in those centres.

MR HYNES: I think there are some important points where retail formats can actually exist in a number of locations. Take JB Hi-Fi, for example. You'll find them sitting in strips, you'll find them anchoring some of our mini major malls, et cetera, so they do transition. And some of the retail chains - Witchery, for example - you can find them in strong retail strips and you find them in the majority of centres, so it depends on the retail offer that is relevant as well.

MR COCKBURN (SCCA): I had to deal with a media issue last year. A retailer who had been faced with a fairly substantial increase in his rent for his new lease; didn't really negotiate with the landlord over it; went off to the media to get some media publicity for it. The upshot of all of that was that he moved out of the centre he was in into the street opposite and he actually said on camera, "Well, my turnover is only half of what it used to be in the centre but my rent is only half, so I'm happy."

That is a good answer; that is the market answer.

He was prepared to pick up his business and move to another location, fully acknowledging that in fact his turnover would not be as great, but the compensation was that his occupancy cost was obviously not going to be so great. Yes, everyone wants to be in super regionals, but there are a limited number of super regionals, not limited, by the way, by the planning scheme; you just have to cut your cloth accordingly.

DR BYRON: Moving on to a few other topics now, you have argued in the submissions that the collection of turnover data is extremely important for the management of a centre, and this, I have to say, is consistently one of the most contentious points of most of the retailers we have spoken to. Are there other methods of collecting information, such as Michael Lonie said this morning, having aggregated data by category, putting it through some third party, that would provide the centre management with all the information that they legitimately need to manage the whole centre enterprise well and keep it dynamic and vibrant without revealing the sort of innermost, commercially-confidential material on individual retailers?

MR COCKBURN (SCCA): Again, I don't think the assumption should be made that this data is only to the landlord. It is true that in our original submission we went into some detail about why in fact it is necessary for landlords to collect turnover information, because otherwise effectively you would be running a significant business blindfolded, without access to that data. It's also of great benefit to tenants, and all of our major landlords tend to be the ones who collect turnover data; make that data available to their tenants in a form that doesn't identify who individual retailers are but in a form that enables those retailers to be able to benchmark themselves against their competitors in particular centres, and that's done on a very regular basis.

I know Westfield is very advanced in terms of the data it now provides to retailers. One of my other members told me just before Christmas that he'd had one of the big national chains in for negotiations and they provided them with their turnover data in a form with which they were able to benchmark with their competitors in particular centres, so they were able to see how well they were performing against their competitors all over Australia, and they in fact said, "Thank you, this is invaluable data for us." So the assumption should not be made that this data is only of benefit to landlords.

DR BYRON: You wouldn't be surprised if I told you that many of the specialty retailers would be surprised to hear that the turnover information is of benefit to them. They certainly see it as the other way round.

MR COCKBURN (SCCA): Again it's not just the chain retailers who have access to this information; individual retailers approach their landlords to get this benchmark information as well. As I said, it can't really apply in very small neighbourhood shopping centres, because it's very difficult to aggregate the data in any way which doesn't identify individual tenants. Nevertheless, it is available to individual retailers as well.

DR BYRON: But if you received aggregated data from a third party for each centre that had been sort of sanitised and names and addresses removed, you could provide that to individuals and they could benchmark it themselves, across all their peers.

MR COCKBURN (SCCA): So who pays for the third party? Presumably by "third party" you mean a government authority.

DR BYRON: Perhaps something more like a major accounting firm.

MR COCKBURN (SCCA): Again it's a question of - they're not going to do it for free.

DR BYRON: No.

MR COCKBURN (SCCA): So someone has to pay for it. Are you suggesting it's the landlord that has to pay for it when in fact the information, as I said, is available to tenants as well? A tenant is going to be prepared to pay money in order to allow KPMG to be the authority of this sort of information.

Secondly, landlords do this to micro-manage their centres as well. So it's not as if they use it only in terms of redevelopments and suchlike, as important as that is. They are able to keep track of individual tenants - see how they are performing - to know whether corrective action needs to be taken with a particular tenant. In many cases it means the transition out of the centre can be a much more amicable one than would normally be the case, of a retailer falling behind in their rent and suddenly finding themselves in the courts and such like.

Even if you had a third party, I do not believe the third party would be providing that information on such a regular basis to be able to assist the landlord to do that. It's a bit like saying to David Jones, "Look, from now on you're not going to be able to have a breakdown of your turnover information according to your homeware section, according to your women's fashion section and according to your men's fashion section. Mark McInnes, you're going to have to run the David Jones chain without actually knowing what the relevant parts of your stores are actually contributing to the whole." Mark McInnes would turn around and say, "Look, you're

mad. We couldn't possibly run our business without access to this sort of analysis."

That's in effect what people are saying when they say landlords shouldn't have access to the turnover information. If someone said to Mark McInnes, "Well, look, instead of your accountants having access to this information, we're going to get the Institute of Retail Studies in Melbourne to collect this data from David Jones and you'll have to go to them to get the details about how you're going to expand your business or redevelop it or run it on a day-to-day basis." Again they would tell you you're mad.

I can't really see why it is that Australia has to erect another edifice in order to have access to information that's vital for the owner of that business to run the business. If you go to New Zealand, there's no debate about this issue. It's a non-debate. You don't hear retailers say, "Oh, boy, you know, our leases require us to provide at the end of every month our turnover data to the landlord. This is an outrageous thing." The debate just doesn't exist. So why is it in Australia? It is allegedly such a big thing, but in comparable countries retailers, including Australian retailers by the way - there are a substantial number of Australian retailers operating in New Zealand and for them it's a non-issue. I don't understand it.

DR BYRON: I was going to ask you, why do you think it is that it's a non-issue there?

MR COCKBURN (SCCA): I actually have a theory about that. I really think that regulation begets regulation. We have had 20 years of regulation in Australia and the answer to everything is more and more regulation. We've reached a stage now where many retail tenants expect the solution to all their problems to be more and more regulation. The fashion now, according to you, is to abolish turnover information, whereas other countries get by without any regulation at all, yet no-one will demonstrate that in fact the retailers in those countries are in a more disadvantageous position than retailers in this country are. The problem with regulation is that we develop a cocoon mentality, and I think that's largely what's happening in relation to these issues.

By the way, you said a couple of times now you're receiving all of these submissions. You have only received, I think, 50 submissions from retailers, maybe 60, out of 290,000 retail leases in Australia. So I think you are receiving a limited perspective when you talk about the issues that are being raised there. There are an awful lot of retailers who are just getting on with life.

DR BYRON: You're right. There is probably only 60, but they are all saying very similar things, I think. Changing the subject - - -

MR COCKBURN (SCCA): Incidentally, just before we move off that, retailers quite frequently and quite happily give their turnover figures to a landlord if they're in trouble. If they're in trouble meeting the obligations of their lease, they have no qualms at all about going to the landlord and saying, "Here are my turnover figures. You can see how badly I'm going. We need to talk about an incentive. We need to talk about what I can do about it."

There seems to be a notion that, well, if you're doing badly there's no problem at all about handing your turnover figures to the landlord, but if you're doing well there is a problem. I don't understand why it can be quite permissible, indeed welcomed, in one set of circumstances but be a terrible thing in another.

DR BYRON: One of the other points of contention, if we can move on: redevelopments and changes in the number of competitors operating within a centre. These all influence a store's trading performance. They are all factors outside the given retailer's control. If I have signed up to a lease under certain terms and conditions - you know, the centre is in a certain state, I can look around and see who are my competitors and neighbours, I can see traffic flows moving - and I say, "Yes, if I come into this space, I expect to be able to be viable paying a certain rent," I sign a lease for five years, say, and then suddenly all these things around me that were fundamental to my decision start to be changed and suddenly I'm in a totally different situation than the one I signed up for, isn't there a case for some sort of recourse there?

MR COCKBURN (SCCA): There is recourse but, firstly, that's more likely to happen to you outside a shopping centre than it is inside a shopping centre. If you look at your local shopping centre - I'm thinking of the one near where I live - the vast changes of use that have taken place in that centre - and I'm not talking about a shopping centre; I'm thinking of the North Sydney business district - have been many and it's occurring on a regular monthly basis. There's nobody sitting over the top there, saying, "Oh, no, we've got too many coffee shops already and we don't need another coffee shop."

If you move into a shopping centre environment, that is a much more controlled process than is occurring elsewhere. There are people who are giving detailed consideration to the balance and the mix of the retailers within that environment, so it is a much more controlled environment inside a shopping centre. That's why I would argue that the changes that you're talking about are more likely to be occurring out on the street than they are inside a shopping centre.

Yes, it is true that shopping centres have to develop and evolve. They have to be redeveloped; I suppose a major shopping centre has to be redeveloped, on average, about every 10 years, but again there are already protections

for retailers in those circumstances and retail tenancy legislation lays down very significant predictions in all states for a retailer in those circumstances. I can't think of any additional protections that would be warranted in that situation. I'm thinking of the last couple of reviews of retail tenancy legislation that I've been involved in. I don't think there were any demands from the retailer associations that we needed to add additional protections to those that are already there to govern those circumstances.

You can't be relocated, for example, unless there is a relocation clause in your lease. The relocation clause in your lease is subject to the provisions of the legislation. That legislation lays down detailed provisions about what must be involved if you are in fact relocated within the shopping centre to enable a redevelopment to occur. I think that's one area which is already incredibly highly regulated and therefore, from a tenant's point of view, very highly protected.

DR BYRON: Bryan?

MR HYNES (SCCA): I think regulated and disclosed as well, because the comprehensive disclosure statements that we have got to comply with in each state address redevelopment in the centre. A lot of tenants when they're entering into a lease - a landlord outlines whether there is any proposed development, what it's supposed to be, tenancy mix that's around them - all those key elements right across the country.

DR BYRON: I guess I'm looking for measures that might rely less on regulation and more on getting the incentives right and the price signals clear, so that if you as the centre manager were thinking of doing some sort of change which might actually enhance the overall performance from your point of view and the point of view of all the other retailers there but would disadvantage me, then you would say, "Okay, I have to factor in the calculation of whether or not to do this or when to do it or how to do it; the fact that I'm going to have to offer this guy some quid pro quo, so that he's no worse off than he was when he signed a lease."

Alternatively, if you're doing something that's going to, you know, double my turnover, you can come back to me and say, "Look, I've done this, this, this. I've doubled your turnover and therefore, you know, because of these major physical changes that have taken place" - whether it's upside or downside - "there is an automatic right to have another look at the lease terms and conditions. We'll renegotiate if there has been some major structural change in the centre." Now, I think that that would clarify for both parties to the lease, you know, what the costs and benefits were of making these changes.

If you thought that the benefits in terms of, you know, increased rental income

across the whole centre were going to be sufficiently high that you could afford to compensate those who were going to be made worse off, you'd go ahead, and that way there's much less grounds to complain that I'm no longer just a straw blowing in the wind at the whim of whatever you decide to do, because you would basically be required to restore me to a condition of being no worse off than I was before you started making these changes.

MR COCKBURN (SCCA): Well, that's what retail tenancy legislation already does. It already provides what are those protections, so it requires that, if the landlord is obliged to find an alternative premise for the tenant during the duration of the redevelopment, the landlord has to pay for the relocation. A negotiation takes place over the rent for those alternative premises. If indeed it's not a comparable premise, then there's a commercial negotiation as to what rent therefore the tenant will pay. These costs are always part of the equation when a landlord is considering a redevelopment. It's one of the costs that he has to take into account when he's - - -

DR BYRON: But the typical situation that's being put before us is that somebody is operating a pharmacy, a newsagency, a bookshop, a jewellery shop or whatever, and there are two or three other competitors in the centre and then suddenly there has been an expansion and there are six competitors. Basically, you know, a slightly larger traffic flow is now being spread across six rather than three and each of the incumbents finds that, you know, their turnover has greatly diminished and therefore their ability to pay the rent, et cetera. Now, if something like that happens which is outside their control and substantially affects their commercial viability, do they have any redress at the moment?

MR COCKBURN (SCCA): Well, I come back to the initial point that, if you're outside a shopping centre, those changes are equally likely as well.

DR BYRON: But the difference there being that it's more in an act of God or randomness rather than somebody who is deliberately doing that.

MR COCKBURN (SCCA): Yes, but that's the point I'm making. It's a random act. If you've got a strip centre and each of the particular shops are owned by individual owners, this particular owner doesn't care if suddenly a vacancy arises there and he has to fill that shop. He doesn't care whether it's a coffee shop or a bookshop or whatever, and he certainly doesn't care whether there are five of them there already. Provided he can fill that shop and get the rent for it, he's happy to go at it. Because it's zoned for retail, the other retailers can't step in and say, "Hey, hold on a moment, you know, there are already four of us here. What are you doing?" whereas inside a shopping centre that is very much a considered decision.

You have to take into account the needs of the customers and if you found in

fact that the customers were effectively telling you that there aren't enough coffee shops in that particular centre, because every time they tried to get a coffee they couldn't get anywhere near the cash register to order it, then you would say to yourself, well, we need to have more coffee shops, or whatever the fashion is. Mobile phone shops; we need to have more mobile phone shops. These things are done on a rational basis. You don't allow random acts to occur, because in fact if a random act did occur you may be damaging your existing tenants. So there is at least a considered judgment or decision being made about those leasing decisions. Those considered decisions aren't occurring outside the shopping centre. I mean, in the interests of getting in an additional tenant in a particular area, no owner certainly wants to be damaging existing tenants. That would be an irrational act if, in order to get the rent from someone else, you are suddenly losing two other retailers. You know, that's irrational.

Secondly, there are also the leases. A lot of leases are written on the basis that - you know, it mightn't occur in large shopping centres, but in other shopping centres they do write usage clauses into their leases, so that gives them some protection in terms of these things. There's always recourse if in fact those usage clauses are breached. The point I'm trying to make is that part of intensively managing a shopping centre is to take into account all those various considerations so that the decisions that are taken are far less random than those that would occur, you know, outside a shopping centre.

DR BYRON: I was just thinking if I was running a coffee shop in a small suburban neighbourhood and suddenly, you know, the medical centre or the pharmacy or the newsagent or whatever closed down, my business would suffer and that's totally outside of my control too. I guess that's one of the things that makes location, I think, so important, but it also adds that element of - very large element - risk, if one of your neighbours falls over or relocates, the profound impact that that can have on your own business.

MR HYNES (SCCA): Doesn't it actually bring us back to the turnover reporting element of it, so that it highlights that to the owner and they can actually assist the retailer in how they reposition the business and take it to the next level? Say, for instance, your example where a pharmacy or a medical centre may have closed down and it may be an offer that you may not get back - doesn't give you, as a tenant, the opportunity to sit down with the owner and say, "Well, this has changed significantly in this centre." I think Milton makes a very good point: as owners, we don't deliberately go out and say, "All right, we've got three successful newsagents. We want three more." There are regulations on pharmacies and newsagents that can actually be put in.

What we're trying to achieve when we're actually developing the centre is to

grow the total market share for that particular centre to cater for the customers that shop there. We want a one-stop shop where customers can come and get their food, get their fashion, do their whole lot at the retail shop in the one location that benefits everyone, because at the end of the day if we have very successful retailers in our centres we have very successful centres. We don't go out of our way to actually make sure that people's businesses are carved up. That is a misconception. We are trying to make the retail offer relevant to the market that it trades in.

Yes, there are examples of where developments go through significantly hard times. They may be before their times that they've put into markets, but they grow into those particular markets, and I can speak from experience. I've done fairly significant developments where centres in the early 90s when we did Castle Towers, for instance, in the north-west sector of Sydney. People were questioning - you know, putting it out there, and I remember the first time I drove out to Castle Hill and now it's one of the most successful centres in Sydney. So it shows how, with the foresight, with our research, with the demographic knowledge that we know, that we can actually grow retail businesses that benefit everyone.

MR COCKBURN (SCCA): There are now firms that use very sophisticated techniques to look at all these issues about turnover, turnover growth, what particular shops are more likely to operate in this particular demographic. Those firms are now selling their services to shopping centre owners in a very large stint, so this all goes back to the point - I think you alluded to the study in New Zealand, which you do point out is a bit dated now, but it does suggest that in fact the market failure in managed shopping centres was less - sorry, I think the exits were less in managed shopping centres than they were outside them, and a lot of this does come back down to that intensive management that does occur in a shopping centre environment.

DR BYRON: And also the selection of who gets tenancy in the first place.

MR COCKBURN (SCCA): Yes, exactly. But nobody should go into a shopping centre under the belief that in fact they will not experience competition or they might not experience new competition, just as you can't operate outside in a retail market under the belief that in fact you won't experience competition or additional competition. But, as I said, inside a controlled shopping centre environment a lot more consideration goes into what is the right mix of tenants than could ever occur outside a shopping centre.

DR BYRON: We might move onto another topic. I'm hoping we've got about another 15 minutes, if that's okay with you gentlemen.

MR COCKBURN (SCCA): Sure.

DR BYRON: The information that's available for tenants at the time of either the negotiation of an initial lease or for a subsequent lease is a major issue, and a number of people have suggested to us that mandatory registration of leases is a way of generating a great deal of public information that would solve this. Other people have suggested a few wrinkles of what might go wrong with that. Where does the SCCA stand on mandatory registration of leases?

MR COCKBURN (SCCA): We strongly support mandatory registration of leases because we believe this is intimately tied in with the turnover debate. If there is a perception among some retail that in fact the declaration of turnover information is giving the landlord an advantage in lease negotiations, rather than taking action that will possibly damage the ability of the owner to manage their business, such as through abolishing declaration of turnover information or making it available only through a third party, we think it's far more sensible to say, "Okay, why don't we level up the playing field?" If the landlord has an advantage through turnover information, why don't we ensure the tenant has the advantage of knowing precisely what the rents are in that particular shopping centre or in that particular location or in that particular precinct?

Again, fortunately, the market has stepped in and there are now quite sophisticated retail tenancy advisers who are using that information to assist tenants in their negotiations, and we have referred to that in our submission as well. So we think, rather than possibly damaging the entire industry by taking action in relation to turnover, why not just level up the playing field by ensuring that in fact leases are available to be searched either individually by tenants or by tenant advisers so they can go into the negotiations with full knowledge of what prevailing rents are in that particular centre or that particular precinct or whatever?

DR BYRON: There are a whole lot of secondary questions about that in terms of who actually does it. I understand that it's the tenant who usually would register the lease as part of the - - -

MR COCKBURN (SCCA): Yes.

DR BYRON: So are there any issues about confidentiality?

MR COCKBURN (SCCA): Certainly I've never heard that confidentiality issue being claimed in New South Wales or Queensland where there is effectively mandatory registration, or the ACT or the Northern Territory. I heard one of the gentlemen on Friday saying that there were Privacy Act issues in the ACT, which I must confess we were not aware of. We will investigate that, but we're certainly unaware of Privacy Act issues in New South Wales and Queensland.

DR BYRON: I think somebody complained to us that the landlords were taking too long to register these things and they were deliberately stalling for a year or - - -

MR COCKBURN (SCCA): Yes, well, there's no deliberate stalling of these at all. In fact, it's not in the interest of the landlord for stalling these things because, as you know, in New South Wales - I think it's the case of Queensland - it's got significance through the Rural Property Act, and if ever you're found in a situation of selling your centre, for example, and you had unregistered leases, you'd have to be furiously registering leases in order to ensure that you've got proper title. So there is no economic reason as to why landlords would stall it. It is a much more difficult exercise now, however, because we've now got a situation where major shopping centres are owned by sometimes three different owners, and so actually getting that lease signed by the three owners can take a bit of time, but that's really realistically the only reason why there are delays.

We've had complaints - it's no secret there were complaints in New South Wales, because under the Retail Leases Act there is only a one-month period in which leases can be registered after they've been executed, and that has actually caused some difficulty, and the ARA have realised the difficulties that are imposed there and have agreed that that period should be three months. But even if it took six months to register a lease, I mean, no-one is seriously suggesting that that lease is going to be out of date after six months. So a good retail leasing adviser wouldn't have any problems about currency of data in those circumstances.

DR BYRON: Have you seen the submission that we got from the Law Society of Victoria?

MR COCKBURN (SCCA): And I don't understand it. I don't understand it. I frankly don't understand the legal argument that they put forward against - and legal advisers of ours don't understand it either. So if you can decipher it, I'd be grateful.

DR BYRON: We'll take that up next week.

MR COCKBURN (SCCA): There has been hostility from the Law Institute of Victoria to the notion of registration of leases for as long as I've been involved in the Shopping Centre Council, because in the process that led up the Retail Leases Act 2003 in Victoria, we actually put that forward as a suggestion of registration of leases in Victoria, and there was furious resistance from the LIV - furious resistance. The LIV in Victoria has incredible influence on the Victorian government when it comes to retail leasing. So I've sat down with their representatives and said, "Look, what is the problem?" I think its just a resistance to change. New South Wales have it, we don't. We don't really want to do something that New South Wales is doing, I think is what it boils down to.

DR BYRON: The benefits of federalism.

MR COCKBURN (SCCA): Yes. I notice, for example, in the submission they put forward arguments and said that they do not necessarily take into account incentives and things like that. Again, a good leasing adviser knows whether a centre has stabilised or not and so knows whether to take into account whether, in fact, the face rents are really the effective rents. They also said there were delays, and again there are delays but not delays to such an extent that they would make the material out of date.

DR BYRON: We did receive the argument that, if the information doesn't disclose incentives, the apparent rent would be inflated compared to the true rent and that that might actually mislead the market rather than inform it.

MR COCKBURN (SCCA): I don't think it would mislead the markets. It is true that if a tenant goes on to an incentive, that doesn't necessarily have to be registered, and I've never yet found a retailer who wants that information to become public, as it's not in their interests for it to be known that they're in particular trouble at the present time. So it's to protect the tenant that those side deals aren't registered.

But, as I said, I could name you a dozen retail tenancy advisers here in Sydney who do work on behalf of tenants. They know very quickly whether a centre is stabilised or whether it's not stabilised, and therefore they know when to take into account whether the face rents can be accepted. Even with the minor difficulties like delays in registration, the fact that incentives aren't necessarily picked up, it would still be a significant negotiating weapon for a tenant to have access to this sort of information. I come back to our original point: the reason we support registration of leases is to - if there's a perception that the negotiating table is unbalanced, then why don't we level it up?

DR BYRON: The final point, from me anyway, is that in your opening comments I think you agreed with us about the benefits of some harmonisation, if it can be achieved in terms of reducing the cost to both landlords and retailers who operate across state borders. We would be very grateful if we could get more information on what the additional compliance costs are likely to be of the sort of state and territory retail legislation that we have at the moment. I guess we're also cognisant that if someone is a very small retailer that only operates a single business in a single spot in one town in one state, uniformity is of absolutely no interest to them whatsoever.

MR COCKBURN (SCCA): Yes.

DR BYRON: But I guess an increasing amount of Australian business does

transcend state borders for both landlords and tenants, so it's one thing to say, "Well, we think that there are probably some compliance costs of red tape that don't seem to be necessary," but getting a handle on that - - -

MR COCKBURN (SCCA): Sure, and we did provide you - and I think you used that in the interim draft report - of examples of compliance, but we haven't - and it would be very difficult to do this, I think - we could certainly see whether we can do it - is to turn that into a dollar figure.

DR BYRON: One of the large shopping centre owners said, "Oh, well, it's not really such an issue. We've got a legal department with 100 people that deals with that." If that's what the legal department spend a lot of time dealing with, then that's presumably a real cost."

MR COCKBURN (SCCA): Exactly. If you could just take one example, we have eight different disclosure statements around Australia. The lawyers that do the leasing for owners who are operating in most of those eight jurisdictions have to keep abreast of changes that are occurring to the disclosure statement in this particular jurisdiction, but not in that jurisdiction. It would be a significant advance if, in fact, we had a common disclosure statement around Australia. There's no question that compliance costs and admin costs for national landlords and national retailers would be significantly reduced if we were operating on a single disclosure statement.

DR BYRON: And that could be done?

MR COCKBURN (SCCA): That could be done actually quite easily, and in fact the bones of it are already in existence. The Victorian government has announced a project under their red tape reduction scheme of looking at the disclosure statement in Victoria and seeing whether you can get rid of any unnecessary items of information. They intend to commission a consultant and consult with all the parties and, hopefully, come up with an agreed disclosure statement which all of the parties are happy with and which addresses two things: one is that it gets rid of unnecessary and time-consuming information that is irrelevant but, secondly, would reach a disclosure statement that everyone is happy with. If that was the case, then I believe that same disclosure statement could quite easily be rolled out around Australia.

It just would take the New South Wales government to say, "Yes, look, we're not particularly happy that they lost that, or they don't have that, but in the interests of conformity, let's adopt it." Queensland will do the same. You know, it just means that state jealousies could be put aside and an agreed disclosure statement - which a lot of work has gone into it - can be rolled out around Australia quite easily.

DR BYRON: I was just wondering where the starting point for that would be - if your organisation and one or two of the retailer organisations could come up with something as a prototype and say, "This we could live with," and then took it to all the state and territory governments and said, "Have you got any objection - - -"

MR COCKBURN (SCCA): Funnily enough, we did start - the Shopping Centre Council and the ARA decided that we want to take action ourselves to try and gain greater uniformity, greater harmony of legislation around Australia, and we thought the only way to do this is to chip certain items off the block, rather than tackling it as a whole. The first item we chipped off the block was the disclosure statement, and we actually had quite a few meetings. Unfortunately, at that stage the ARA fell apart, the national organisation of the ARA fell apart, and they were in abeyance for a couple of years until they got themselves back together again. But the only reason it stopped was because of that.

DR BYRON: I just thought that something coming from the interested parties themselves is far more likely to be effective than something that is - - -

MR COCKBURN (SCCA): I think that's right, but it just - - -

DR BYRON: - - - formed by a committee of bureaucrats.

MR COCKBURN (SCCA): - - - seemed to me that the Victorian government has effectively now provided the perfect opportunity to do this, because having announced that they intend to tackle this, it seems to me that rather than us going off and doing some separate exercises, if we all put our effort into the particular one in Victoria - but, as I said, unfortunately it just does involve other states and territories saying, "Well, we're prepared to accept whatever these guys have worked out."

DR BYRON: Okay. I think that exhausts my list of questions. There is an opportunity for any of you gentlemen to make a closing statement.

MR COCKBURN (SCCA): Just to come back to the voluntary code of conduct, we do appreciate the fact that you guys have come up with this alternative way forward. I don't want it to appear as though we were bagging your effort in doing so. It just seems to us, unfortunately, the egg has been so badly scrambled - if we were starting off again in the early 1980s, it seems to me that that would have been a logical way for everyone to go. I'm not convinced by the way that the code of conduct in New South Wales failed because of noncompliance.

I know that you've heard a lot of evidence and it's become the accepted wisdom that that is the case. I've actually spoken to people who were involved in the negotiation of that code of conduct who actually claim that, no, that wasn't the case;

it was just not given sufficient time. I mean, the code was virtually negotiated and almost immediately the decision was made to turn it into legislation. In any case, I think it was unrealistic, politically unrealistic, to think that the New South Wales branch of the ARA was going to sit at national council meetings being the only state that didn't have legislation.

So there was always going to be a political imperative on the New South Wales ARA to go down the legislation route as well, but I don't think there is any necessarily - I'm not aware of any evidence that in fact the code failed. I know it has become accepted wisdom that that's the case, but it just seems to us that given the strong opposition that we have witnessed and we expect to hear from retailer associations, which are largely state based organisations, we think it's unrealistic to think that state and territory governments will fulfil the other side of the bargain and say, "Yes, if you get a viable code up and running we will exclude shopping centres or particular types of shopping centres from retail tenancy legislation." We are very doubtful that that would happen and that's the reason we oppose the code. So we oppose the code on practical grounds, not any other grounds.

DR BYRON: We certainly weren't wedded to the idea, but we simply wanted to float it as looking around for other ways that might be more effective in resolving the tensions that existed, rather than expecting black letter legislation to do it all, because as we said in the report, the evidence of the ability of state legislation to predict and prevent what problems are going to arise, the track record is not that great. But if that's not going to be a feasible way of working, then I guess we'll keep thinking about other ways that might be conducive to better landlord and tenant understandings.

MR COCKBURN (SCCA): We're puzzled by the fact that New Zealand, where the shopping centre industry is dominated by Australian landlords, you walk through any of those shopping centres and you'll see that the retailing is dominated by Australian retailers; gets by quite well without any regulation at all. Not even a disclosure statement is provided to a retailer. They receive a letter of offer, they receive a draft lease and that's basically it. The retailer is expected to go out and to inform himself or herself very adequately before they sign that lease, yet you're struck by the fact that the retail tenancy relationship in New Zealand is far less adversarial than it is here in Australia, far less adversarial. There's certainly no evidence that their retailers are in a more disadvantageous position than retailers in Australia.

So the notion that in fact we could remove retail tenancy legislation I don't believe is actually a far-fetched notion, when you can actually look at a very similar country, a country that - we either follow them or they follow us in most things we do - can get by quite well without any regulation at all. The only regulation that

exists is regulation through I think it's called the Property Law Act, and that applies across all property classes, not retail property. It's a very difficult thing to understand why it is that we have such a highly regulated system, we have such an adversarial system in Australia, and I think the two are linked. I think the adversarial nature of our relationship stems very much from the highly regulated nature of the industry.

DR BYRON: Thank you very much. I think we'll leave it there. Thank you for coming and for your submissions, past and future. I think we can adjourn now for a lunch break and resume with the South Sydney Retailers Association at 2.00. Thank you, ladies and gentlemen.

(Luncheon adjournment)

DR BYRON: The next participant we've got is Mr Craig Kelly from South Sydney Retailers Association. Craig, if you would just like to take any seat at all in front of a microphone and when you've made yourself comfortable, if you would just like to take us through the main points you want to make in terms of comment, criticism on our draft report, and then I'd like to discuss that with you for a while after you've been through that.

MR KELLY (SSRA): Yes, certainly.

DR BYRON: On the timetable we've allowed, we've got a bit over an hour.

MR KELLY (SSRA): Okay.

DR BYRON: We've got at least an hour, but we'll see how we go. Thank you very much for coming today.

MR KELLY (SSRA): Okay, thanks. First, I'd like to introduce myself. My name is Craig Kelly. I'm the president of the Southern Sydney Retailers Association. I welcome this opportunity to assist this inquiry, because following the draft report quite frankly you do need a lot of assistance. First, I'd like to give you my background in this sector. I was involved in the retail sector when I was still in high school. As soon as I got my driver's licence I had a car, I bought some stock from local vendors and hired a stall at Paddy's Market. I've been involved in the industry ever since. Currently my business exports product to over 20 different countries around the world, which has given me a unique opportunity to see different retail markets internationally.

I've been involved in setting up several retail businesses here in Australia. I've developed a franchise and I've been both a landlord and a tenant, so I think I have a very wide view, or wide experience in this market. Now, for the last three decades I've seen the market, as far as the consumer has been concerned, deteriorate. One thing that has happened is that, as retail rents have increased, retailers such as myself have been forced to increase our retail margins, and that has forced an increase in consumer prices. There are great problems in this market for retail leases. I said in my initial summary that I cannot overemphasise the damage that is being done to the Australian economy through the market failures.

I'm giving up my time today. I don't have a tale of woe to tell. I'm not seeking any special protection or special privileges for any of our members associations. I'm just here because I think this is an important inquiry for the benefit of the economy. To be frank, I think your draft report gets it totally wrong. The market for retail leases in this country is not working well. To the contrary. It's the absolute opposite of a normal functioning market. There are a lot of problems and the ultimate victim

is the Australian consumer. Now, I'd like to go through a few issues about your consideration: is the market working effectively? I'd suggest there's one single test, or one single determination, if the market is working successfully or reasonably well, and that's from the point of view of the consumer.

There has always been a centuries-old struggle between landlord and tenant and whether the tenant is winning or the landlord is winning should not be the point of this inquiry. It should be aimed entirely at the consumer perspective. I'd like to quote from McHugh J of the Australian High Court in the much-heralded Boral decision. He stated, "While the conduct must be examined by its effects on the competitive process, it is the flow-on result that is the key - the effect on consumers. Competition policy suggests that it is only when consumers will suffer as a result of the practices of a business that will require the courts to intervene and deal with the conduct."

Now, I would suggest that should be the basis of this inquiry. It should be other legislative settings at both state and federal government for the market for retail leases, ensuring that there's a highly-competitive environment delivering a world-class shopping experience for consumers in terms of price and variety. However, unfortunately, going through your 233-page report, I could not find one single consideration on the effect on consumers. I'd like to go through a few specific points that you have made in the inquiry. The first of those is on page 150. There you state that:

> On average, small retail businesses - those employing less than 20 employees - have performed as well as medium to large retail businesses over the period of 2001-2002 to 2004-2005.

Quite frankly that statement is just completely false. I don't know whether it was part of the last government's agenda where they simply refused to acknowledge the problem and the fallen profitability of small business, but this is absolutely false.

DR BYRON: Sorry, can you just remind me what page that is on?

MR KELLY (SSRA): Page 150. If I could I'd like to pass you this copy from the Australian Bureau of Statistics. The Australian Bureau of Statistics produces a report called Industry Performance, and it reports the profitability of the operating profits of each different industry sector such as the retail trade, construction trade, mining trade and so on, and it divides it up into three categories - for small, medium and large businesses. Now, for the retail trade where small businesses are those employing less than 20 people, large businesses are those employing more than 200, between 2001-2002 to 2005-2006 the total operating profit from the 120,000 business in the small retail sector increased just 3 per cent, and if you take that in terms of EBIT, as

a percentage of sales, profit has actually decreased.

This was during a so-called golden period of economic prosperity. It should have been the most buoyant time for a retailer to have a business and the profitability of small businesses has actually gone backwards. In comparison large businesses in the retail sector, those employing more than 200 people, their profitability has actually increased 135 per cent. So we have 3 per cent for small business, 135 for large business and we have in this report a statement that says, "On average small retail businesses have performed as well as large retail businesses." Now, if we look at other sectors of the economy, in construction and mining, you'll see that in those sectors small business have enjoyed just as vibrant a time as large businesses. It's only been in the retail trade, and also the cafe and restaurant trade, that small business profitability has gone backwards.

I'd like to then comment on how the Productivity Commission actually came to the conclusion, that small business is doing as well as large businesses. The universally accepted method for profitability is EBIT - that's earnings before interest and tax expressed as a percentage of sales. But what the Productivity Commission have done in their report is actually come up with a new method. They've included wages and salaries and taken those out to come up with a thing called EBIT XWS, which is unknown as far as I'm concerned in any other economic literature as a way of recording profits. But that's the method that's being used in this report to state the false assumption and the false conclusion that small business is doing as well as large business.

To further demonstrate the difficulty that small business has had over the last several years because of the problems with this market, I'd like to give you the example of a tenant that decided to start a retail business in a shopping centre in 2002. If they took up a five-year lease in a shopping centre they would have had to probably invest $250,000 on the fit-out of the shop and, say, another $150,000 in stock, computers and equipment, making a total investment of $400,000. Now, if instead they had have realised that this market was broken and needed a lot of remedial changes, they might have realised the difficulty that small business faced because of it. They instead could have invested that $400,000 in Woolworths shares.

For $400,000 invested in Woolworths on 2 January 2002, by the end of 2007 when their lease had been up, that would have increased in value to $1.2 million, a profit of $800,000 plus dividends. For Coles, if I had - instead of investing in a small business in a shopping centre- put $400,000 in Coles and decided to go to the beach or practice my golf game and reduce my golf handicap, that $400,000 before the company was flogged off in a distressed state at below market value, would have been worth over $1 million, giving me a profit of $600,000 plus dividends. Now, I'd like to compare that against the small retailer that's invested $400,000 in establishing

a retail business in a shopping centre.

If they started in 2002, when their lease was up in 2007, that $400,000 is effectively worth zero. They have no goodwill. They are simply left at the mercy of the landlord to increase the rent to whatever they like or they may not even offer them the option of another lease. So I would expect, given that this statement in the Productivity Commission was so incorrect, there should be a retraction in the final report. I'd expect something such as this:

> On average, in terms of operating profits, small business, those employing less than 20 employees, have performed very poorly compared to the large retail businesses over the period of 2001-2002 to 2004-05.

Small business in the retail sector have failed to benefit from an otherwise golden period of economic prosperity and on average they appear to have even gone backwards. Although their substantial decline in operating profits for small business does not indicate any detriment to consumer or market failure, such a poor performance during such prosperous economic times causes great concerns for the continuing viability of small business in the retail sector should interest rates continue to rise and the economy is slow, and questions the efficiency of the market.

The next major failure I'd like to comment on in the draft report is it's complete failure to understand or even acknowledge market power or the monopolistic powers of shopping centre landlords over specialty tenants. You simply cannot understand the workings of this market, the market for retail leases, without an understanding of how retail landlords have market power. I detailed this in my submission number 3, but unfortunately this seems to have been completely overlooked, and a comment is made in this draft report that states that tenants can vote with their feet at the end of the lease. That is just simply not the case. A tenant that has established a business in a retail shopping centre does not have the ability just to pack up at the end of the lease and walk if he doesn't like the terms of the lease. He simply doesn't have any other alternatives.

Even the ACCC, who I think have been described as not the friend of small business over recent years, has stated - this is actually a report that they did into Westfield's acquisition of Penrith and Woden:

> The Commission recognises that appropriate retail space in an alternate regional shopping centre or larger subregional shopping centre may not necessarily be available for those tenants wishing to move. For example, there may be fewer any vacant premises. It appears that the landlord of Penrith Plaza effectively exercises considerable market power over most

of the small retailers in the centre.

Now, one of the questions is: what is market power? What gives a landlord market power? I refer to the definition of it by the Australian High Court again in the Boral decision by Gleeson CJ and Callinan J. Now, they held that market power of a supplier is in terms of the ability to raise prices above supply costs without losing business to another supplier. They stated:

> Pricing may not be the only aspect of market power. Other aspects may be the capacity to withhold supply or decide terms and conditions apart from the prices upon which supply will take, but pricing is regarded as the ordinary test.

If we apply that in the market for retail leases, you have evidence before this inquiry where at the end of the lease a landlord is able to extract 10, 20, 30, 40, 50, or even higher, rent increases from a tenant. It's an irrefutable fact that shopping centre landlords have market power over small tenants. I notice in table 6.1 of the draft report there is a list there of a confidential submission that reports percentage increases at the end of the lease.

You're looking at 57, 52, 71, 49, 49, 15, 19, 37. A thing that's also important to understand is that during the term of the lease the rent also increases, so you've got a CPI increase plus 1.5 or 2 per cent compounding every year, so from the time a five-year lease starts till a five-year lease finishes it has already increased 20 to 25 per cent and then it gets up for the next five-year renewal and it's getting another 40 or 50 per cent increase.

Despite this, the draft report states, "Perceived imbalances in negotiating power between small and large tenants". There are no perceived balances in this market. To use the word "perceived" demonstrates a fundamental misunderstanding of how this market works. The balances are not perceived; they are real and they've massive; in fact it's hard to think of any other market that exists in Australia where there are such massive disparities in bargaining power, but yet despite this there's a further comment in the draft report which states:

> More generally, it needs to be recognised that considerable differences in negotiating power is not a unique feature of the retail tenancy market. Such imbalances are common in any other markets.

I don't know of any other market - other than if you were dealing with the Gambino crime family; they can sort of extort or demand such increases and such prices at the end of a term. If there's any other - I'll ask the question: which other market has such imbalances of power that exist between a shopping centre landlord

and a small specialty tenant at lease end? There are none. Again, I think this statement needs a complete retraction and a correction in the final report.

Instead of, "Generally it needs to be recognised that considerable differences in negotiating power are not a unique feature of the retail market and such imbalances are common in any market," I would suggest it should state, "The extreme differences in negotiating power between a shopping centre landlord and a small tenant are a unique feature of the retail tenancy market. This balance is extremely rare and is more akin to the imbalances of dealing with a member of the Gambino crime family."

Despite the whole fact to understand this market is the necessity to understand market power, the one single mention of market power in the report is in box 5.5, where you state, "Price discrimination does not mean market power." I would suggest again this is a shallow and simplistic commentary that gets it completely wrong. By "price discrimination" we mean the difference in rent paid per square metre between different tenants.

Certainly price discrimination can be pro-competitive but it can also be very anticompetitive. It's widely acknowledged that price discrimination becomes anticompetitive when a supplier's price differentials of a business input to firms in competition with each other exceeds the differential in cost in supplying that business input. Price discrimination in rents is one of the major issues and major problems that this market faces.

Now, whether or not price discrimination in shopping centres is pro or anticompetitive, this factor has not even been considered by the Productivity Commission; instead, they have jumped straight to the conclusion that price discrimination does not mean market power. This analysis simply fails to consider the depth of price discrimination in rents. I think the Productivity Commission can be excused in this because they may have had the wool pulled over their eyes. There's a passage by the Shopping Centre Council of Australia to this current inquiry where, at page 61, they state:

> It is not surprising that the rent paid by these major retailers, when expressed in dollars per square metre, is less than that paid by specialty retailers. Incidentally, this is not only true of shopping centres; major tenants occupying large space in office buildings are able to negotiate a lower rent per square metre than small tenants in the same building. These sorts of economies of scale are common in business everywhere.

Really? I'd like to pass to you a rent schedule for Westfield Parramatta and for Castle Towers in Sydney. This information is obtained from retail leasing services,

from their database. I have to acknowledge that it's not 100 per cent accurate because the pricing of retail rents remains a secret market with secret rebates and kickbacks hidden to disguise the actual rents paid, but that graph gives you some indication of the degree or the depth of price discrimination.

Maybe I could hold that up for some of the people in the audience so you guys can see it, as well. This is Westfield Parramatta: here we have the large major retailers paying around $150, less than $200, and here we have specialty retailers paying between a thousand and almost up to $3000 per square metre; that's the depth of price discrimination that exists in that market. To suggest that this is very common in business everywhere is, quite frankly, a lie. It is simply an attempt to hoodwink this committee and this inquiry.

An example of these economies of scale that operate in other businesses: I had a quick look on the search site propertylook.com and it listed the rents for Sydney's MLC centre, just down the road here. Now, rents start at $550 per square metre for a large office of 6000 square metres, but if you took a smaller space of just 30 metres the rent is offered at $825, representing a 50 per cent premium paid by the firm leasing a small space. In shopping centres we're talking about a 1000 per cent premium. This is simply outside the normal economies of scale that exist in the market.

Now, where we have price discrimination to this extent it shows that market power does exist, the total opposite of the draft report. You simply cannot lease out space for $150 to $250 a square metre in land zoned for retail use, where there is carparking supplied, dock facilities and all the costs that go into running a shopping centre - $150 to $200 per square metre is simply below the economic cost of supplying that space; therefore, by definition, if goods or services are supplied below cost then you need to engage in price discrimination to recoup your losses. In the High Court McHugh J explained, in the major decision of Boral, the connection between recoupment and market power. He stated:

> The greater the degrees of recoupment that a firm can achieve the greater is its market power -

and that is what we see in shopping centre rents. We see the space being leased to large tenants at below economic cost and then those costs being recouped from the small tenants. This is evidence of market power. This is not the sign of a normal functioning market; in fact this type of price discrimination is a sign of predatory pricing. When you supply a good or service at below economic cost to lure your customers away from your competitors for the purpose of damaging your competitors, which enables you to increase your prices to others to recoup losses, this is predatory pricing and it's currently illegal under section 46 of the Trade Practices

Act. So, again, the draft report gets it completely wrong and the facts are the complete opposite of what has been stated.

Again a correction should be issued in the final report and instead of saying "price discrimination does not mean market power" it should be corrected to state, "The depth of price discrimination in the market for retail leases is further evidence of the undue market power held by shopping centre landlords. Pricing policies of the major shopping centre landlords exhibited evidence or characteristics of predatory pricing and may well be in breach of section 46 of the Trade Practices Act."

Now, the next thing I'd like to comment on in the draft report is the statement that says, "The interests of tenants and retail landlords are mostly aligned." Quite frankly, that's something you'd expect from a Monty Python sketch and will have anyone that has run a small retail business in a regional shopping centre rolling in the aisles with laughter. I think even the Shopping Centre Council wouldn't dare to claim that the interests of landlords and their small tenants are mostly aligned.

The management of the regional shopping centres of Australia, they have an obligation to their shareholders to maximise profits. This means they have an obligation to extract every single cent they can out of a small retailer. There's nothing wrong with that. That's how our free markets work; but their interests are not aligned. To understand why they're not aligned, you also need to understand the economic structure of a regional shopping centre. On average, 70 per cent of the space leased in each shopping centre is rented out to either one of our retailing duopolies, such as the supermarket duopoly of Woolworths and Coles, the department store duopoly of Myers and David Jones or the discount department store duopoly of Kmart, Target and Big W. That's leased at space below cost.

The management of the regional shopping centres then have a duty to the shareholders to exploit their market power and to price-scout specialty retailers and recoup these losses. Now, when we have occupancy rates in our regional shopping centres at 99.5 per cent and we have zoning regulations that restrict competition, the landlord's sole aim is to extract every cent they can from the tenant. If the tenant falls over, the landlord knows that we're an entrepreneurial nation and they can quickly hoodwink someone else into taking their place. I'd like to recall evidence of another submission. That was submission 123, which didn't actually have someone's name in it. This is what they stated:

> When it's time to renew our leases, they tell us others are willing to pay X for the site and that we must do the same, otherwise we will lose our business. We later find out that there were no others to begin with. Our franchisee agreed to pay the required amount. The landlord insisted under duress. The leasing executive apparently walked back into her

office and screamed, "I renewed a lease at a 35 per cent increase." Her colleagues applauded.

How can you possibly write in the draft report that the interests of tenants and landlords are mostly aligned, when such evidence is before this inquiry? The interests are not aligned. It's a completely exploitative relationship. This is the reason why we've had so many complaints in the industry. Now, I'd also like to explain the reasons why it's so important for landlords to increase the rents. The profit that they make from increasing the rents is only chicken feed. The real profit in this industry comes from the increase in property valuations.

Take the example of an existing 200-square-metre shop that's paying $1000 per square metre, so their total rent is $200,000. Now, with our shopping centres valued at yields between 5 per cent and 7 per cent, if we use the 5 per cent figure, that rent of $200,000 makes the value of that premises worth $4 million to the landlord. We've got in the outer suburbs of Sydney, Melbourne and Brisbane, 200-square-metre concrete shells probably maybe twice the size of this room which are valued at $4 million.

Now, if the landlord is able to extract a 25 per cent rent increase, the rent goes up from 200,000 to 250,000, but not only does the landlord pick up 50,000 a year, the property value then increases by 4 million. Instead of this space being worth $4 million, it is then increased to $5 million. To get a $50,000 rent increase out of a tenant enables a shopping centre landlord to record $1 million dollars worth of profit in their books. If I could just quickly pass you a copy of the annual report from Westfield, there's $3.4 billion in profit in income from property revenue but there's also $4.5 billion from property revaluation.

The great danger that we have is that the whole structure of our shopping centres is built on a house of cards, because it works in reverse. If we have tough economic times and rents start to fall, you have the reverse happening. If we have these inflated rents that come down, we're going to have these massive losses in all our listed property trusts, which threatens to undermine our share market and our entire economy. This is why it's so important that we make changes that are necessary to fix the market, because we've created basically this giant bubble of valuation. Unless we can take the air out slowly, we're heading for an implosion down the track.

The next issue I'd like to comment on is international comparisons. Now, I made a detailed submission to this inquiry about the horrendous difference in shopping mall rents between Australia and the rest of the world; not only the US, but Canada, Europe and Japan. It is an indisputable fact that shopping mall rents are 130 to 200 per cent higher in Australian shopping malls than they are in shopping malls

in the USA, Canada and Europe. Now, we know the Australian Shopping Centre Council are very nervous about this fact, because it exposes the claims that our market is working well here in Australia as a sham. It was little surprise that they commissioned a report in an attempt to repudiate my submission and in an attempt to muddy the waters.

What I'm really surprised about - in fact, I find it almost unbelievable - is that the Productivity Commission, the Australian government's principal advisory body on all aspects of micro-economic reform, the organisation that is trusted with a statutory function to initiate research on industry and productivity issues, has turned a blind eye on international comparisons and international benchmarking. Today we use international benchmarking to measure all aspects of economic performance and business performance. Today our retail shops compete in an international market.

If we have a situation where our retail stores are paying 200 per cent higher rent than other retail stores in the USA, once the Qantas and United duopoly looks like being broken down, we're going to have a great increase of travel between Australia and the USA. Now, I know a lot of guys when they go on holidays like to play golf. Women when they go on holidays like to go shopping. If we have a situation where our retail stores in Australia are paying 100 to 200 per cent higher rents than in the USA and other markets, we're simply going to lose a lot of business to these overseas markets. Now, what the inquiry actually said, taking in mind how important the international comparisons are - this is what it used to dismiss - on page 117:

> Such comparisons ignore differences in location, quality and potential earnings, amongst other things. Despite the arguments on either side, if occupancy costs are found to be different or the same in Australia and the United States, it does not provide any direct evidence of market failings. For example, a short number of external factors influence what returns landlords would expect, such as construction costs, geography, market risk and return on investment, and what such level of rents would be paid.

I'm sorry, this is an absolutely pathetic excuse to ignore international benchmarking. If we use this logic, we may as well disregard all international benchmarking comparisons of economic growth, inflation, rural wages, cost of living, industry performance, et cetera. This implies that the tens of thousands of economists around the world that compile and analyse these figures would be more productive on the golf course.

Now I'd like to give you a quote from an organisation called the Centre for Organisational Excellence in Research in relation to the importance of

benchmarking. They state:

> Benchmarking is the key to achieving business excellence; that is, excellence in management practice and business result. Benchmarking provides a systematic process for identifying and implementing better or best practices. Why spend time reinventing the wheel when you can learn from the experience of others?

Now, we should be looking at international markets to compare ourselves, to see how we're going. If we just turn a blind eye and say, "It doesn't matter," we are on a slippery path of lower economic growth, lower productivity and our living standards in Australia falling behind. This is, unfortunately, exactly what the Productivity Commission has done in relation to international benchmarking in this market.

If the comparison was made between Australia and Swaziland, there may be some excuse for ignoring these international benchmarks, but in the USA we're talking - here we have a country that operates with a free market, right? It's our major trading partner; it's a country we have a free trade agreement with; we share a common ancestry and history and taste in fashion and styles. This should be the number 1 market we look at to compare how our market in Australia is going for retail leasing, and the facts are we are 130 per cent to at least 200 per cent higher in price.

The reasons that have been given by the Productivity Commission to ignore international benchmarking, or have been used to attempt to explain these massive differences, have been construction costs, geography, market risk and the alternate return on investments. If we take construction costs, can the varying construction costs between Australia and the USA, for a shopping centre, be used to excuse 135 per cent to 200 per cent higher rents? Is there any evidence that bill costs of building materials are different between Australia and the USA? Is there any difference in the cost of labour for construction workers and tradesmen between Australia and the USA?

Westfield recently published some figures which allow us to make this comparison between Westfield in Liverpool, in Sydney's south-west, and Westfield Topanga, in the western part of Los Angeles. Westfield Liverpool, an additional 25,000 square metres of leasable space was created at a cost of $A2 million. That worked out to at least $8000 cost - construction cost or development cost - for each square metre, okay? In comparison, at Westfield Topanga in the USA they created an additional 50,000 square metres at the cost of $US350 million. Now, if we convert that to Australian dollars, we're looking at the cost of construction space for a shopping centre in Los Angeles in Australian dollars at $9612 as compared to $8000

in Australia. So the construction costs of a shopping centre in the USA are actually higher than they are in Australia, so we can't use construction costs as an excuse for the higher rent; it should be an excuse that we have lower rents.

The second excuse given is market risk. The higher the market risk, the higher the rate of the return that an investor is going to require. No-one would object to that. In reverse, the lower the risk, the lower return that an investor will demand. So what's the difference in market risk between a shopping centre in Australia and a shopping centre in the USA? Submission number 138 to this inquiry, which is a report commissioned by the Shopping Centre Council by Mr Michael Baker, comments on this. He says:

> The US regional centre segment has been particularly hardly hit by competition in recent years from a plethora of emergent formats that don't even exist in Australia, such as power centres, warehouse clubs, supercentre and lifestyle centres. As a result, many regional centres have closed or are closing.

He states:

> Australian regional centres are much more stable and dominant in the overall national landscape.

So that is evidence from Mr Baker, an expert from the USA and Australia, that states the Australian investments in a retail shopping centre in Australia - the market risk is less than it is in the USA. We've all seen that recently by the Centro fiasco. If we have less market risk, that's another reason that we should have lower rents in Australia, not higher.

The third excuse used in this report is return on alternative investments. Now, that may have been true 30 years ago, but in today's - where there's global capital flows - it simply doesn't stack up. Today an investor with funds in the USA is freely able to invest their funds in Australian shopping centres or vice versa. Australians are now the biggest investors in US shopping centres and Americans are the biggest foreign investors in Australia. There is simply no excuse to explain the 135 to 200 per cent difference by the excuse of return on alternative investments.

But there are some differences between Australia and the USA. In the USA, shopping centre landlords don't have market power over small tenants and other pricing information and market information is open and transparent. This is a book I'd like to show you. This is called the Dollar and Cents of Shopping Centres in the USA. It has the full statistical information of rents, sales and occupancy costs through all different types of shopping centres and basically thousands and thousands

of pieces - whatever data that you would need about shopping centres for any type of benchmarking of rents is in this book. This information is publicly available. In Australia the information is not publicly available. It's all sort of hidden under lock and key. That is the reason why there's 135 to 200 per cent difference.

Again, I would expect a clarification in the final report. Rather than sort of saying that we ignore international benchmarking, we should say that international benchmarking is the critical and analytical tool to measure the performance of all aspects of the Australian economy, and the market for retail leases is no exception. If a retailer in Australia is forced to pay rents 100 per cent more higher than retailers in the USA, Canada and Europe, this will place the Australian retail sector at an international competitive disadvantage and damage Australia's balance of trade and increase our current account deficit. Further, as rent is a major business cost, if retail rents are higher in Australia than the rest of the world, these higher costs will flow through to Australian consumers, who will also face higher retail prices.

Even Professor Hilmer, who was often called our father of competition policy and was also a director of Westfield, stated in his Independent Committee of Inquiry back in 1993, which has formed much of the basis of our current trade Practices Act:

> Regulatory restrictions on competition imposed by state and territory law can have important interstate and national implications. Firms enjoying statutory protection from competition can impose extra costs on consumers in business, including businesses that must contend with international competition, thus influencing the trading success of the nation as a whole.

This is exactly what we have in the market here for retail leases. We have regulatory restraints on competition through restrictive zoning laws, right, that basically protect our regional shopping centres from competition. This imposes extra costs on business's consumers and it ends up ultimately influencing the trading success of the nation as a whole.

Despite ignoring international benchmarking, this report uses benchmarking to consider the percentage of businesses running at a loss. In figure 8.1 on page 149, it lists out all the different industry sectors and it has the retail trade - this is, sorry, the percentage of businesses running at a loss - between 2001 and 2005, and it has the retail trade at around about 28 or 29 per cent, and it's come up with an average which it has drawn a line across to show that the retail trade is about on average for businesses operating at a loss.

I would suggest that this is like comparing apples with turnips. You simply cannot compare businesses running at a loss in the retail sector with that in the

agricultural industry which is in the middle of a drought, or the mining sector which, by its very nature, is speculative. For the mining sector, if you do strike profit, or you do make a profit, you've literally struck gold. You have to look at the different return on investments. However, what is interesting is if, we look at the ABS figures for businesses operating at a loss and how they have changed over a period of time, between 1997 and 2006 businesses running at a loss in the retail sector have increased threefold. During what has been called the goldilocks economy, during prosperous economic times, we've had a threefold increase in the number of businesses in the retail sector running at a loss.

This is something you might have expected from our agricultural sector, suffering from a drought. It might be something you'd expect in the construction industry if there were a major downturn in construction. For this to happen in the retail sector during such prosperous economic times indicates there is something fundamentally wrong with the workings of the market. I detailed this in a submission to this Commission, and it was simply left out of the draft report and instead it basically stated that:

> Indeed, the proportion of retail businesses running at a loss is close to industry-wide average.

I'd again suggest that this needs to be basically struck out from the draft report and I would suggest the following should be written in the final report: "There has been a near threefold increase in the number of retail businesses running at a loss since 1997. For this huge increase in businesses running at a loss, during overall prosperous economic times, gives great concern if the market is operating effectively and gives further concern at the viability of the retail sector if interest rates continue to rise and the economy slows."

I'd also like to comment on the actual figure of businesses running at a loss in regional shopping centres. It has been my experience that virtually none of these businesses make an appropriate allowance for depreciation of their fit-out costs and their establishment costs and a provision for the make-good at the end of the lease. Given that the typical costs are around about $3000 per square metre to establish a retail business and to allow provision to make good at the end of the lease, where the leases only have five years with no option, a typical retail shop should add $600 per square metre towards expenses to correctly allow for depreciation. This is often 10 or more per cent of the cost of running a business, which is absolutely crazy.

If that depreciation were fully accounted for, I would suggest that you would have a struggle to find one single retail business in a shopping centre that's not running at a loss. It has been common things. I've spoken to retailers. They think they have a good business. They think they're doing well. They think they're

making a profit. All of a sudden their lease comes up for renewal. They might think they had goodwill left in the business, where in fact it's worth zero. They are left with a bank overdraft that if they close their business down they have no way to service. So they're simply trapped. They have a bank loan. Unless they renew the lease, they face instant bankruptcy.

This is one of the reasons why the five-year lease was introduced and why it's so important and why length of lease term is so important. It gives a retailer the ability to depreciate those costs. The shorter the lease time, the higher the depreciation cost; the higher the cost of running a business, the greater retail mark-up the more the consumer pays.

The second issue was the hidden number of failures. There have been numerous statistics that were quoted in the draft report that refer to the number of businesses that failed to renew their lease. One thing that's overlooked in this factor is that, when a franchisee actually goes broke, that is not recorded in a change of lease because the lease is held by the franchisor.

I know at Bondi, up the road here, for example, all the homeware franchises that set up originally were held by the head office, which is the standard practice, so the franchisor, the head office, holds the franchise. The franchisee comes in and runs the business. He goes broke. Someone else comes in. He goes broke and someone else comes in. But all the time that lease is in place. So it allows the shopping centre council, or the owner of that shopping centre, to say, "Well, you know, this lease has been renewed," when, as a matter of fact, two or three tenants who are franchisees could have actually gone broke during that period. So it's basically hiding the business failure that actually exists out there in the marketplace.

I'd now like to suggest that there are six factors that we need for an efficient, functioning market for retail leases. The first of those is that no firm receives any special government privileges that enables it to protect itself from competition. What I find appalling about the representatives from the Shopping Centre Council is their appalling hypocrisy. They attempt to perpetuate the myth that the Australian retail market is highly regulated. They talk about the need to wind back prescriptive legislation; you know, let the free market work. At exactly the same time they're seeking for themselves unprecedented protection from competition.

There is no other industry sector in this economy that enjoys protection from competition like our regional shopping centres do. They've simply, with highly prescriptive zoning laws, fenced off the competition, and we're left with a series of regional monopolies in each of our cities.

There was one case recently which involved Woolworths v Clints Warehouse.

Clints Warehouse was part of the Warehouse group and they had a retail shop at Warwick Farm in Sydney, not far from my office. Woolworths took them to court and basically said, "You're not allowed to sell teddy bears, you're not allowed to sell books, you're not allowed to sell kites, you're not allowed to sell toys or games or music." That's the type of prescriptive legislation we have in this country that prohibits someone that owns a retail shop from selling a book or a teddy bear. The prescriptive legislation we have is not governing the market for retail leases and regulation between tenant and landlord, the prescriptive legislation is in the zoning laws.

There was an article written about this in the Sun Herald, back in 2006, by a journalist called Mr Mike Nahan. He stated, "Under Melbourne 2030" - which is the equivalent of Sydney's centres policy - "retail activity is to be increasingly concentrated in a number of existing areas. This is reinforced by existing planning laws that require retail developments to prove they will not have a deleterious impact on existing retail centres; in other words, they will not compete with existing centres." Can anyone tell me any other sector of the economy where you're not allowed to go into business if it has a deleterious effect on the existing competitors? That's how the market for retail leases works and that's why we have such problems in this industry.

It's often suggested that these zoning laws benefit the consumer, but where is there any evidence that these existing zoning laws are assisting the consumers? I know a few certain retail strips where I live, in Sydney South. Hurstville used to be a very vibrant retailing strip, with a range of quality shops. Today it looks like something out of the Third World. If I go through the CBD of Liverpool, which was once a vibrant shopping centre, there are boarded-up shops, graffiti. It's something similar to what you wouldn't want your kids to walk through.

There is simply no evidence whatsoever that these restrictive zoning laws benefit the consumers. All they have done is to hand out monopoly privileges to our landlords and to sit back and say, "Well, you can have these monopoly privileges and we'll let the market work it out," which is a recipe for disaster for the consumer. It will increase our inflation and lead to economic decline.

The second important factor that we need to make sure our markets are working effectively is that every firm pays the true economic cost of the resources they use. This is a basic tenet of our free market economy. We see this problem where firms can pollute the environment and they don't have to pay the economic cost of the damage they cause. One of the greatest distortions in this market that we have is that many of our retailers, especially our larger retailers, are able to escape the true economic cost of the resources they use.

This is the opposite of how a retail strip works. In a retail strip, every business that's there has to pay the true economic cost of the resources that they use. There are no cross-subsidisations; everyone pays the fair cost of rent, they pay the fair cost of the rates, the garbage collection and so on and so on and so on. But in a regional shopping centre their policies have subverted this fundamental requirement for the operation of a free market. Where we have some tenants paying over $150 per square metre, they are simply not paying the true economic cost of the resources they use. The market then becomes one of cross-subsidisations and distortions. Then our larger retailers become free riders. This results in a substantial lessening of competition and consumer detriment.

I'll give you the example of the Coles Myer organisation. This is an organisation that, with their rents, doesn't pay the true economic cost of the resources they use. What inefficiencies does that lead to? Well, basically Coles Myer evolved into a stumbling, bumbling giant, larded with redundant layers of management, with a handful of senior executives rewarding themselves treasures like African dictators. In 1997, a former Coles CEO was gaoled for four years for misappropriation of $4.2 million of company funds to undertake his lavish homes. There are inquiries of corruption in their meat buying and all different areas of their buying sector.

In the last four years, before the company was flogged off in an underperforming and distressed state for below-market value, three executives at Coles Myer had personally pulled out $110 million from that company. Respected financial journalist Alan Kohler of the Sydney Morning Herald has written about Coles Myer. This is a unique company in so many ways. It's headquarters at Taronga, nicknamed Battlestar Gallactica, became a joke, complete with marble, gold taps, silver service and butlers. Their head office is thought to have 2000 employees more than world's best practice.

These are all the inefficiencies that get created because firms are able to escape paying the fair economic cost of the resources they use. If we had an efficient and effective market, all these inefficiencies would be weeded out, right, and at the moment all these inefficiencies are being paid for by the consumer in higher prices. The third factor that we need to make sure our retail market is working efficiently is that no firm has undue market power which enables them to artificially increase prices. The forerunner of the Productivity Commission said, going back to 1996:

> The antithesis of competition is undue market power, in the sense of the power to raise price and exclude entry. Where there is significant market power, the firm is sufficiently free from market pressures to administer its own production and selling policies at its discretion.

This is exactly what we have in this market. We have shopping centre

landlords that have undue market power. They're able to increase rents artificially to small retail shops, and this gets passed through to consumers in higher prices. Last week the new treasurer Mr Swan stated:

> There is a significant problem for this country. High inflation certainly does put upward pressure on interest rates. There is a substantial inflationary problem inherited by the government and one that we are determined to act on. What the Rudd government will do is everything within its power to put downward pressure on inflation.

I would suggest that one of the most important things to put downward pressure on inflation is to fix this market for retail leasing. It's often been said recently that the drought is to blame for pushing up retail prices. The facts are the costs of a farmgate - these are some of the costs of the farmgate percentage of retail prices. For breakfast cereals, the farmgate cost of the ingredients is only 2 per cent of the retail price; for potato chips, it's 2 per cent; for a loaf of bread, the farmgate ingredients are only 4 per cent; for a lettuce, the farmgate price is only 7 per cent of the retail price; for a sirloin steak, the farmer or the rancher gets 15 per cent of the retail price.

If we compare that to the percent that the landlords take, which is now getting towards 20 per cent, the landlords' take is higher than what the farmers' take is, so a landlord increasing rents has a much greater inflationary effect than the farmgate price does. Farmgate prices have been going nowhere. In fact, if we look at it, the farmgate price for milk has actually declined since 1990. The price of eggs since 1990, 17 years, has only gone up 6 per cent in 15 years. There was an article from the Farmers Federation late last year which I would like to read. It said:

> Over the last four years to June 2006, retail food prices rose on average by 17.8 per cent while average prices received by farmers rose by just 2.3. Food prices increased much faster than inflation. The increase certainly isn't going to farmers.

If we compare that to the increases that landlords have imposed on retailers - we've had every lease in every shopping centre - it increases CPI plus 1.5, and now Westfield has increased that to CPI plus 2, and then at the end of the five-year lease we've got a typical rent increase of around 20 per cent. I cannot think of any greater inflationary evil that this country faces than the undue market power of shopping centre landlords continuing to increase their rents.

The next issue we need for an important functioning market here is openness and transparency. There have been numerous empirical studies that have found that pricing transparency leads to lower prices, and that's a view constant with prediction

of standard economic theory. Pricing transparency helps businesses obtain pricing information easily. Simply, the more informed the market is the more efficient investment decisions are and greater productive use of our nation's limited resources, but if we look at the market for retail leases it is one of secret pricing, hidden kickbacks and secret rebates. These all lead to market inefficiencies.

The previous government has claimed that this secrecy should be allowed because of confidentiality. I would suggest that perhaps they will be the first witness for the defence called at the trial of the Australian Wheat Board executives when they try and explain why they are guilty of giving hidden kickbacks to Saddam Hussein. If our stock market or residential market had such secret pricing, there would be a national outcry. Even recently I note there was a submission from another participant to this inquiry where they brought up a comment by the new treasurer Mr Swan, where he stated:

> To judge whether or not a market is competitive you need to have transparency.

The right to secret pricing does not have priority over consumer welfare, and the right to secret pricing should not exist where a firm is a common supplier of business inputs. One example in California, under Governor Schwarzenegger: section 17045 of the Californian Business and Professional Code states:

> The secret payment or allowance of rebates or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

Now, penalties for that include six months. So if I'm a landlord and I give a secret rebate to one retailer and not a rebate to another, in California that is punishable by six months' imprisonment. I think one of the first things we need to fix in this market is disclosure. The secret pricing simply must come to an end. I know there have been some comments on compulsory registration of leases.

The theory behind this is very good - basically so there's transparency of information; anyone can see what the leases are; we're finally able to have a market price - but the dangers are that if secret rebates and hidden kickbacks are allowed landlords will exploit this situation; they will put into a lease a price of, say, $2000 a square metre, which will be done at the Land Titles Office, but then they will have a separate thing as the agreement to lease and have a 25 per cent rebate, so anyone that goes to the Land Titles Office will think, "Ah-ha, the market price is $2000 a square metre," but in reality, because they're unaware of the secret rebate, it's actually $1500

a square metre.

One of my companies has in fact recently done a lease and the figure that's registered at the Land Titles Office is actually double what we're actually paying. So if anyone goes to the Land Titles Office, they are going to say, "This is the rent that this store is paying," but they don't realise all the rebates that we've gotten back - it's actually half that price - so if we're going to have this national registration of leases in some way, it must be done in a way that these secret rebates and these hidden kickbacks are all fully disclosed. It just can't be just the headline rent, otherwise it's completely meaningless. Another aspect to make sure we have efficient markets is - I state here, "The competitor is not my friend and the customer is not my enemy."

That was a quote from a company called Dennis Archer Midland, which were involved in one of the greatest price-fixing conspiracies ever seen in modern times. Their executives used to get around and joke around the bar and they used to say, "The competitor is our friend, the customer is our enemy." If you look at those terms, that is exactly what we have here in the market for retail leases. We basically have where landlords treat the small tenant, the retailer, who is their customer, as their enemy, and their competitors as friends.

If you look at the relationships, the cosy relationships, between Westfield, AMP and Centro, this is an industry that has all the class characteristics of a cartel. If you look here in Sydney, for example, basically the whole of Sydney is divided up. You could take the map and you could colour in blue for Westfield, red for Centro and yellow for Lend Lease, and this is like their exclusive economic territory where the others do not go in and compete. That's not how a normal market functions. Take, say, the hotel market. If a Sheraton Hotel sets up in a location and that becomes popular and more people go there, the Hilton Hotel will go right next door and establish a premises and bring competition to that market in that area. But here we have the situation where at, say, the Liverpool area, if Westfield Liverpool are doing well in that area, Centro or AMP or Lend Lease don't come in and set up next door to them. They just leave that market. The market has all the classic characteristics of a cartel.

It's easy to say that all these problems exist, but what evidence is there? What evidence is there that there is an effect on the consumers? Firstly, you have to understand the link between rents, prices and inflation. When occupancy costs increase, there's only one place that a retailer can take them from, and that's his cost of goods. So if I have a retail business and I'm marking up my product 100 per cent - so if something costs me $100, I then sell it for $200 - I have a 50 per cent cost of goods. If my rent increases as a percentage, that means I have to decrease that cost of goods, which therefore means I'm actually increasing my profit margin. I can tell you from my experience over the last 15 to 20 years the profit margins in retail have

increased, simply because of the need to pay the rent, and that has led to higher inflation.

The other factor is increasing depreciation costs, and this is why one of the suggestions that lease terms be made seven years has some merit, because the shorter the lease term, the greater the depreciation cost becomes. As in the example that I gave before, a tenant really should have about 10 per cent of his expenses as depreciation, which simply takes him out of the ball park and makes him uneconomic. He therefore has to increase his prices to be able to afford that.

Another factor is the small size of retail shops in Australia. Some of the submissions have commented - which is correct - that the retail shops in Australia are about half the size of the retail shops in the USA. Having a small retail shop is basically inefficient. No matter what size your shop is, you really need at least two people to run it, so one person can go to the bathroom or have a lunch break or something. If you have a 200-metre square shop, it doesn't cost you double to run a 100-metre square shop. If we had larger retail premises, our retailers would be more efficient, they would be more operationally efficient and they would have lower costs. But unfortunately most of our retail stores are much smaller than they are in the USA, which is a significant problem for costing and inefficiency for running the business. These small spaces are only caused again because of the undue market power that landlords have through restrictive zoning laws.

The third factor is that there has been a substantial reduction in competition through the policies of landlords between large and small business. Basically in a shopping centre we have our Woolworths, our Coles, our large department stores locked in in leases for 20, 25 years, paying a small rent. Those rents are fixed, which basically increase in relationship to sales. So basically for our large retailers, their occupancy costs haven't changed over the last 20 years. In contrast, for our small retailers their occupancy costs have increased from about 10 per cent to up to 20 per cent, so the competitive disadvantage that the small retailer faces every year is stretching like an elastic band. He's being put at a greater disadvantage year after year because his rent is increasing faster than his larger competitors'. This has substantially reduced competition in the market.

What evidence do we have that this is a detriment to the Australian consumer? I'd like to pass you this: the OECD record food inflation for every country around the world, for all the major economic countries. If we look at the figures from Australia, as unbelievable as it is, Australia has the developed world's highest food inflation, not just by a little bit. We're twice the developed world's average. In fact, if we look at the figures from 1990 to 2006, Australia's food inflation has been 68 per cent. The world average in developed countries has been 34 and for our neighbours across the Tasman in New Zealand it has been 27. So what has caused

this massive increase in food inflation?

The only thing, I would suggest, has been the failure of the market for retail leases. If we look at what this is costing consumers - on food, our expenditure in Australia is something around $70 billion annually. If our food inflation had been kept intact with the rest of the developed world, we'd be 20 per cent less. We're talking about here a 14 to 16 billion dollars extra being spent on food because of the failure of this market. It's not only food inflation that Australia is doing very poorly in. I also did, just as an exercise - I'm very fortunate in my work that I get to travel once a year to the USA. I've always just found things are dearer in Australia. Clothing is always dearer. I'll buy it in the USA because I know I'm going to get a better deal, better quality, bigger variety.

The reason used to be because we had much higher tariff rates on our product here, to protect our footwear and clothing industries. For example, in the mid-80s, every time you'd go to the USA, every friend would say, "Bring me back a pair of Nikes," or a pair of running shoes, because we had our tariffs set back in 1990 and a pair of Adidas or Nike running shoes were 50 per cent plus $12 a pair. That made an effective tariff rate of 10 per cent. Quite correctly, the government has done the right thing and we've slowly reduced those tariff rates back to 10 per cent today. In the USA, the tariffs have always been either 10 or 20 per cent on running shoes. So today there is simply no reason why a pair of running shoes or any item of clothing should be any dearer in Australia than it is the USA.

But I've done a study and I've looked at the price of Nike running shoes, and we're 30 to 40 per cent higher. Simply, the benefits of the reductions in tariffs haven't flowed through to the Australian consumer. They've been taken by the landlords in higher rents because our market is not working. Again, this is adding to inflationary pressure in the country. A lot of this is being masked because we have had since 1990 basically a one-off golden period. We've had reductions in tariffs. We've had the China price, where prices from China have come down for basically all manufactured goods and the quality has improved out of sight. Things like clothing, televisions and furniture have all come down in price, so it's masked a lot of these underlying problems that we've had.

We've now hit the very bottom. Our tariffs really don't have anywhere further to fall. Prices in China are starting to rise. Their labour costs are starting to rise, their material costs are starting to rise. We deal with a lot of companies from China. They're all putting their prices up. We've got big inflationary clouds on the horizon and we've still got this market for retail leases that is pumping up rents which is adding to costs of doing business.

The other detriment to consumers is the second-rate shopping experience that

we get. Because we have these limitations on competition for our shopping centres and our shops are much smaller, it means that our shops simply don't have the same cutting edge of displays. Because they're small, they have to have a smaller range of product.

I know I'm a big guy. You go off and you'll find they will have sizes like 32, 34, 36 and 38, and that's all they've got, and I need the bigger size. Because the retailers are restricted on the size that they can carry because of the smaller space, this is also a detriment to the Australian consumer.

The other issue that we have that is really damaging Australia through the practices of our shopping centres is the damage to country towns. In every country town that we have, where we have a retail strip - again, every retailer pays his fair price for his rent. It's a level playing field. No-one is getting any special advantages over it. So the guy that's the local merchant can compete for rent just as effectively as an out-of-town merchant. There's been studies done in America that show that if you spend $100 with a local merchant, 65 of that recirculates in the economy, whereas if you spend it with an out-of-town retailer only $45 stays in the local economy. So where we have a chain store going into country towns and supplanting local merchants, it's having a detrimental effect on the building of our country towns to grow and survive.

The problem comes where a shopping centre opens up in a country town and they automatically engage in price discrimination that gives the out-of-towner or the chain store an advantage, because again they will give a much lower rent to the chain store than they will to the local retailer. The local retailer is then put at a disadvantage; he closes down so the country town then becomes dominated by out-of-town chain stores and then the profits simply flow out of the town and back to Sydney and Melbourne. If we look around our country towns many of them are in decline. The downtown part of the towns are all going backwards and we've got more and more concentration of people living in Sydney, and the problems that that creates. We really need to look at our country towns and what we can do to make sure that the local retailers in those towns are, at the very least, on a level playing field and they're not put at a competitive disadvantage.

I also would quickly like to comment on the unconscionable conduct provisions. Unfortunately, unconscionable conduct, which was introduced in the Trade Practices Act, and brought down into the various retail leases acts, has been a great disappointment for small business. The term "unconscionable conduct" is undefined; no-one knows what it is. I think the ACCC has only run six cases in the last four or five years. We're saying in the entire country the ACCC has been able to find six incidents of unconscionable conduct in five years.

It has been commented that perhaps there has been a lessening of complaints to the ACCC because there's been less incidence of unconscionable conduct. I would suggest that is an incorrect interpretation and the correct interpretation should be that small business have simply given up on the ACCC. There is a perception out there that the ACCC are anti - against the interests of small business - and many people I've spoken to that have taken cases to the ACCC have been disappointed and found out it has actually been detrimental and prejudiced their case later.

We had, at the small business summit last year, in July, the ACCC chairman, Mr Samuel, state that the ACCC had gone soft and had been lax on pursuing unconscionable conduct cases. If any small business had run it and said, "Look, I've been lax and I've been slack looking after my customers," they'd be out of business. That's the reason why there's been a decline in complaints to the ACCC - not because there's been a decline in unconscionable conduct, but because simply the legislation simply does not work. It has the concept that - there was a recent case at the Ministry of Decisions tribunal here, where the tenant was just completely unfairly treated, and basically the tribunal member said, "Look, we're very sorry. You've been unfairly treated but unfair is not unconscionable. Bad luck, go away. Here's a claim against you; you now have to pay your landlord $250,000, thanks very much."

The tribunal said, "Yes, unfair; but, sorry, not unconscionable." Now, it's said that the concept of unfair cannot be used in our Act. Now, I don't know actually where that comes from, but "unfair" is a term used in competition law in both England and Europe, and also the USA. In Europe and in England the competition Act states that if a firm has a dominant position they cannot imply any unfair price increases or unfair trading terms. The law in England uses those words - "unfair" - but here we say, "No, sorry; can't use 'unfair' because that will cause uncertainty." But there's great uncertainty at the moment because no-one knows what unconscionable conduct is. The original legislation or unconscionable conduct was listed to be as unfair. In fact, the Act, I think, was called the Unfair Practices Act when it was introduced into parliament. I think there needs to be something. There also needs to be a complete relook at the unconscionable conduct provisions. Do we need unfair trading terms in that? Because it's currently not working and it's been a great disappointment to small business.

I would quickly like to sum up and suggest some of the changes that need to be made. Basically if I could sum up the draft report it's basically saying that shopping centre landlords have a monopoly; let the market work out how their monopoly position applies. I suggest that has been proven throughout history as a recipe for disaster. Where one market participant has monopoly or market power, there must be some regulation to control the exploitation of that market power. So, yes, we should be winding back the prescriptive laws in this market, but not the prescriptive laws regarding the conduct between landlord and tenant. The prescriptive laws we

should be winding back are the zoning regulations. We should be allowing shopping centres like Orange Grove to develop here.

Further, to make sure that no firm receives special privileges from government, the other thing we should be looking at is a complete ban on political donations. There was an article in the weekend's paper - we have some of our largest shopping centre landlords filling the coffers of both the Liberal and Labor parties in this country with massive political donations of hundreds of thousands of dollars. This is a corrupting influence on our government and it basically undermines people's confidence - is the government making the right decision for the public, or are they doing a special favour for their mates that have handed over to them a large wad of cash?

The second issue to address is that we need complete transparency in pricing and other market information. The current disclosure statements are an illusion. They simply do not disclose the most important things that a retailer needs to know. He needs to know is he paying a fair market rent? Is he paying a rent that is going to put him at a competitive disadvantage against other stores in the centre? What are the benchmarking averages for his category? What businesses have run at a loss, or what business value has there been in my category? All these things are not disclosed and, instead, there's a whole lot of other information that is, in the main, meaningless.

Further, the disclosure statements have basically been a poison pill for many retailers. Hidden in the very back of the disclosure statement there's also a thing called a lessee's disclosure statement, where the lessee is meant to write in every representation that was made to him. Whoever thought that up, I commend them because it's absolutely a genius way of getting a way of enforcing a disclaimer statement. As you know, the courts have always sort of basically ruled out disclosure statements, so if you put it in any contract they said, "Well, any representations made are not to be considered part of the contract and can be ruled out." What this has done is enabled basically a leasing agent to go in and make any representation they want and, if it's not written down by the lessee in his disclosure statement, the landlord can then argue, "Well, I'm sorry, that disclosure was never made until you've signed it out." In fact, the current disclosure statements are working against the interests of small retailers.

I've commented before on the need for a national lease registration. That has some merit but I think that could be simply done. It can be done in two ways: either as a registration or it simply should be on a web site where it is disclosed to the tenant, or he can go in - he can be given some type of password or code and go in to have a look at what the market rent is in that centre, so he knows. If he is going to be put at a competitive disadvantage, he has the right to know. So if we could repair our

- and have meaningful disclosure statements, which disclose the market rent, which have benchmarking information and business value and disputes disclosed, that will really open the market up and make it work much more efficiently than it currently is.

The second thing is to make sure that every firm is paying the true economic cost of the resources they use. Now, freeing the market to competition will achieve this. If the protection that shopping centre landlords - if their protection is wound back they will not be able to recoup the losses like they currently can. Therefore they will be forced to price more effectively to the market - more accurately to what their costs are, especially to the large retailers, and also an enforcement of predatory pricing laws. This will enable large retailers - rather than be able to lease space below cost in a shopping centre, this will reinvigorate our strips, where the large retailer will have just as much incentive to be located in a retail strip as in a shopping centre, if the shopping centre is prohibited from leasing space below cost.

The other thing that we need to look at is to make sure that all property, including intellectual property that is created by firms, is adequately protected by legislation. Now, we do this: we recognise copyright, we recognise trademarks, we recognise design patents, and we have special legislation for those factors to make sure that they're protected - the firms that create them, protect them but we don't have that same protection for goodwill for a retailer. In a fully open and competitive market, there would be no need to protect goodwill because a retailer could easily relocate somewhere and take their goodwill with them; there would be no incentive for a landlord to be sort of basically auctioning off goodwill at the end of the lease. This law exists in England. In England under the Landlords and Tenants Act, goodwill is protected. We need to look at that to make sure that intellectual property is protected here in Australia as well.

The other thing we need to look at is to make sure that the legal system exists to provide equal and low cost of access for justice. In the draft report it has sort of been claimed that it's low cost and easy access sort of thing. I would suggest that is not the case. I've been assisting one of our members who has a dispute, and he has just been the victim of - where the landlord has basically just completely ignored the law of the land; completely turned their back and they've broken about half a dozen sections of the Retail Leases Act, sections of the Trade Practices Act, and they've basically said, "Well, sue me."

Now, this guy at the moment has spent 25 to 40 grand on legal fees and hasn't even got before the tribunal. I know there's another gentlemen that I spoke to recently. He said he spent $50,000 on legal fees; hasn't yet got to the tribunal, and his claim was only like $150,000. He can't even get his costs back at the tribunal. So where there are very small disputes, yes, the tribunal might be working well, but

where there are major disputes where people have lost a lot of money, simply there is not a low-cost system where these people can go.

We also, I think, need to look at the state tenancy tribunals to be able to apply the Trade Practices Act as well as just the Retail Leases Act. This would perhaps limit some of the duplication of the laws, because currently, I know here in the New South Wales tribunal, they cannot apply the Trade Practices Act, they can only apply the Retail Leases Act, and this has caused duplication and inefficiencies. We also need a more active enforcement by the ACCC. Many small businesses think that the ACCC is there - and the government have actually sort of alluded to this - that the ACCC is there; if you have a complaint, you go to the ACCC.

It seems the ACCC are only interested in cases that have national significance. So if you are a tenant and you've been done over, and you're a victim of unconscionable conduct or a victim of misleading and deceptive conduct, you really don't have the ACCC as a backup there. We perhaps need to look at some other body that can do that, or some other type of - you know, a separate division of the ACCC that small business can actually take their complaint to and have it resolved in a low cost way. These changes are nothing about protecting any competitor, it's all about letting the free market work.

What are the costs of inaction? The first cost of inaction, we're looking at higher consumer prices and higher inflation, a continued reduction in competition, a continual misuse of our limited resources, lower productivity growth, a continued increased trade deficit, a continuing decline in the viability of small business. In fact, we'll be undermining our nation's future prosperity, and I would suggest we would also be undermining the standing of the Productivity Commission unless many of these oversights are corrected in a final report.

The winners of this will be the Australian consumer who stand to enjoy lower prices and have greater choice. The other winners will be the nine million Australians that own shopping centres, because at the moment, the way the market is working, it's creating a giant bubble and we're seeing what happens with Centro. If these changes are made it will slowly let the air out of the bubble, enabling these nine million Australians that rely on our shopping centres and their future success for their superannuation savings. I thank you for your time.

DR BYRON: Thank you very much, Mr Kelly. That's, as they say, broad ranging. I think you've covered the whole field there. In view of the time, I don't think that we can explore those things you've raised, except I will say that I think we are probably in heated agreement about your six criteria of things that are necessary for efficient markets, and there's no disagreement on that, although there are probably a few other things that we may disagree on in the future.

MR KELLY (SSRA): If we all agreed, there would be a big problem, I think.

DR BYRON: But you have given us a lot of material to chew on there and we'll certainly look at all very closely.

MR KELLY (SSRA): Thank you.

DR BYRON: I certainly do appreciate the enormous amount of time and effort that you've put in to preparing all this for us, and we will take it very, very seriously. I think if we get started we'll be here all night, but can I just say thanks very much for all of that and we'll start chewing.

MR KELLY (SSRA): Thank you.

DR BYRON: Next is Joanne. If you'd like just to come and take a seat down near the microphones. Thanks for coming. If you could just introduce yourself and your organisation for the transcript, and then take us through your critique of our report.

MS HOWARTH (EFTAG): My name is Joanne Howarth. I'm here today to represent a group called the Erina Fair Tenants Action Group. In the first instance I would like to clarify that I have been on both sides of the fence. I have a very substantial background, having worked in property for many years, before I owned Arizona Restaurants. I've owned and operated Arizona Restaurants for 15 years very successfully, with six different outlets right throughout Sydney and New Zealand, and it's not until three years ago now that I was I say enticed to enter into a lease with Lend Lease at Erina Fair that my destiny was changed forever.

So I'm here today to represent the action group. When last we met with the Commission the action group comprised a collective of about 80 small businesses, all of whom had been financially destroyed in this one shopping centre, and all within a period of two years. The action group is now a national group. As well as comprising tenants, both existing tenants, current tenants, and former tenants, we have advocates, we have prominent property industry people working with us, we have former Lend Lease staffers, and we're very much united in our cause. We have representation from Lend Lease centres in New South Wales, in Queensland, and now as far away as Perth. If you were to change the names, the stories are all the same; so the group is no longer dominated just by victims. We are lobbying the government for the badly-needed reforms to the legislation to create a level playing field.

Craig spoke so often about the imbalance of power and the dominance of the landlords, and this for us is the most contentious of all issues. When the inquiry was announced, there was much cynicism in the retail sector. So many people said it was too little and it was too late and enormous damage had already been done, and I've actually been subject to much criticism in coming along here today wanting to tender further evidence when it seems that there is just such a blatant disregard for the evidence that we tendered initially. I provided to the Commission evidence - full case studies of the people's lives that had been destroyed and the circumstances under which that had happened; names, telephone numbers and the impact on these people's lives.

As much as it's emotional and it's a very different approach to, say, Craig Kelly, it's indicative of what the problems are, and I think that we can get all too caught up in the statistics and analysing things from an outsider's point of view. Our account is from a first-hand personal experience point of view, and that really shows the issues that are facing this market. People have called for the inquiry to be disbanded; keep the evidence and start over. That's how badly wrong we believe it

is. I feel betrayed, I guess. When I went - and I was very excited as a result - I think I was very instrumental in prompting the inquiry in the first instance. I had many, many discussions backwards and forwards to Canberra with Minister Fran Bailey and with Peter Costello and when the inquiry was announced I was very excited, and I think I was naive to have thought maybe now - I look in retrospect and it was political propaganda; that's how I feel.

Like Craig, I think the conclusion that the market is operating efficiently is badly misguided. How can the Productivity Commission properly consider the correct market conditions without knowing first-hand people's experience? We're the people that are in the market here and now, and our stories are recounted not through the eyes of an observer but first-hand. We are real people and our experiences reflect a very dysfunctional market. I've read the report, 233 pages, in great detail and there are so many areas - you know, I could sit down - and obviously Craig has spent copious hours. I'd like to discuss today two issues: security of tenure, okay, and as well as that, the dispute resolution mechanisms.

If the market is working efficiently, how is it that there's a need for the Erina Fair Tenants Action Group to even exist? The current structure of the market has made winners out of a comparatively small number of companies: the AMPs, the Lend Leases, the Westfields. Since the "greed is good" mantra began to dominate in the mid-80s, the winners are most surely the senior executives and, to a lesser extent, the shareholders. No truer words were ever uttered than, "The winner takes it all, the loser has to fall." If it is, as the Productivity Commission purports, that the market is working efficiently, why is our membership growing on a daily basis?

More than 80 small business families were totally destroyed in one shopping centre as a result of Lend Lease's decision to extend the centre. I'm informed that Lend Lease were aware in advance that 30 per cent of businesses would fail as a result of the redevelopment. The size of the shopping centre was increased by 134 per cent. It was more than doubled, and the traffic flow, according to Lend Lease's own figures, has increased by less than 4 per cent per annum. So you have existing tenants that are making a nice living for themselves, sitting up there as a cafe against six other people selling coffee and, as a result of the extension, all of a sudden they're up against 29 other outlets selling coffee.

It doesn't take two and two to know that their market share gets smaller. Lend Lease went ahead, knowing full well that many of these businesses were doomed to fail from day one. The decision was supply driven rather than demand driven, and it is this that destroyed so many businesses. They had no control - zero control - over their destiny. The same phenomenon is evident in other centres right across the country. Every single aspect of the shopping centre environment is controlled by the landlord, or the owner and the manager. The shopping centre owners and managers

advertise and promote the centre. They know the catchment area. They control direct and indirect competition within the catchment area. They negotiate with suppliers: the cleaning, the airconditioning, power, lifts. They collect sales information. They know how people are trading. They can monitor and benchmark all of these. They decide when to renovate, refurbish or redevelop and they control how, what, where and when that is done. They relocate businesses and allow casual mall leases and kiosks into the area as well.

The duty of care and onus and responsibility therefore falls firmly on the landlord's shoulders. Even those in fiduciary areas of responsibility believe that they can shirk their responsibilities, but they cannot. When they are controlling everything, they need to take responsibility when things go badly wrong. The last decade, as Craig has rightly pointed out, has been the golden period, the boom times, a period of sustained economic growth. If this is true, something is dramatically wrong in the retail sector. Why is it that 11 per cent of small businesses were trading at a loss in 1997 and that 10 years on that figure has increased threefold to 30 per cent? Why is it that over a 10-year period small businesses in the retail sector have less than a 50 per cent chance of survival? This shows that the market is not working efficiently.

I'd just like to comment briefly on profitability. The conclusions in the draft report and the Productivity Commission's analysis of business profitability is flawed and superficial. It compares the percentage of businesses trading at a loss in the retail sector against other industry sectors and it concludes, wrongly, that the percentage is on a par across all sectors. As Craig has pointed out, rightly, the agricultural sector has been one that's subject to one of the worst and longest droughts in the country's history. Is it not logical then that there would be a high percentage of businesses in this sector that have been trading at a loss? The mining sector - how is this relevant in terms of the comparison? It is highly speculative and if one strike gold, so to speak, then you would expect extraordinarily high returns on investments. But what proportion actually strike gold?

What is even more astounding than this simplistic approach to the analysis is the fact that the comparison is done by excluding wages and salaries in the retail sector from the financial trading figures. So many of the retailers in Erina work seven days a week. I can honestly say, from the heart, that I haven't spoken to a retailer in Erina Fair who is declaring a profit. People are working and there are tenants there that have actually just registered for the dole. They work seven days a week, and very long hours, and they are able to draw from their business $100 or $200 a week. The statistics of business bankruptcies are not a true indicator of business failures. I'm personally not bankrupt, although I'm verging on it, but I've suffered debilitating financial losses and I have, for now 16 months, fought long and hard every single day just to survive.

When you've been robbed of everything, as we have, okay, you've got debts to suppliers, you've got sheriffs on the doorstep, people chasing you for money, and some days you're trying to get together a few coins to go to work - to go to work to pay for a debt, a mountain of debt - you don't want to declare bankruptcy. It's the last little bit of integrity that you have. Of the 80 tenants in case studies in our original submission, only 11 of them are bankrupt. Okay? They are, as a group, individuals who are entrepreneurial, they were motivated, they took risks, they employed people, and they've worked long and hard and contributed to the economy. They have been robbed of their health. They've had marriage breakdowns. There have been four attempted suicides in our group. The personal toll on these people's lives far surpasses any financial losses.

The Productivity Commission's analysis makes no reference to the enormous personal toll on these people's lives once their business has been wiped out. These people will never enter the market again as a small business. They have been individuals who have been highly productive. Their entrepreneurial skills are destroyed. Not only has their capital been extinguished, they often become shells of their former selves, their lives destroyed. This has long-term ramifications for the economy. The impact on everyone's life is different but of equal personal significance.

I have to say that I spoke out initially because of my background, and I'm probably one of the smarter tenants, if you like. I wrote something in my lessee's disclosure statement - in fact I wrote 20 things in my lessee's disclosure statement - but I knew, more than other people, what to do. When I started to speak out I had no idea that other people were in such trouble; I was overwhelmed by the people's stories and their response. Even now, it's a very big struggle for me, personally, to cope with my own problems and to try and be a support - the group is like a support group - and to offer the people some emotional assistance; you know, when the bank is moving in and the bank is taking their home, and they've got to tell their children.

I've just chosen four people that I'd like to tell you about, just a little glimpse. [One tenant][personal/confidential details withheld] had a [shop] … at Erina. She's now a single mother, due to a marriage breakdown. She broke down and cried, two weeks ago, because she's unable to afford - two of her young teenagers need braces. She has lost everything, and she can't afford braces for her children.

[Personal/confidential details withheld], they had [a] store there: again, very experienced business operators. They've been fighting a battle with their bank - ANZ - for the last seven months, to hang onto their house. They lost that battle last week. They sat their two teenage sons down and they told them that the bank was moving in to take their house. [Personal/confidential details withheld].

[Another couple][personal/confidential details withheld], … had [a] store. [Their] … young daughter … started school just last week. They resent more than anything that they've been robbed of the choice as to where to educate their daughter. [Personal/confidential details withheld].

Then there's [Personal/confidential details withheld]; original tenants I might add, having been there 20 years. Since the centre was extended in 2003 they've tipped in 650,000 of their own personal money, and their superannuation. Their lease expired. They tried repeatedly to get some rent abatement and assistance when Lend Lease put in three other … [shops] in competition with them, one next door. Their lease expired, and Lend Lease demanded a new fit-out from them. They had no money. They have no money.

Lend Lease turned around and negotiated a new lease with their franchisor, so the franchisor is happy to capitalise on all the goodwill that they've built up over 20 years, and the lease terms are such that they negotiated the lease at half the rent that [personal/confidential details withheld] were paying - half the rent. If that's not unconscionable conduct? But when they talked to Mr Samuels, Mr Samuels doesn't want to know about it. All right? This is theft of the highest order. They've been robbed of their assets and the right to sell their business. They've invested 20-plus years of their lives. [Personal/confidential details withheld].

Lend Lease declared a $497 million profit last year. The CEO took 12 million for himself. Okay? There are people there that can't feed their children. This market is not operating well.

One can only draw such erroneous conclusions that the market is operating well if one ignores the evidence. The system is designed to support those with the deepest pockets. My losses are the aggregate of my trading losses. Like I say, I was one of the smarter tenants. I was in occupation for 24 months and I was given 21 months rent-free. So I know what to do. I know to open my mouth and I know to document things. I was in a jurisdiction, in an area, a new precinct, where eight out of 10 tenants failed, and all of us were given that sort of unprecedented rent-free. That only happens when there's something that's seriously wrong.

So where do I go for resolution of my matter? Firstly, my claim is in the order

of close to $2 million. So the $400,000 limit under the Administrative Decisions Tribunal, there's no recourse for me there. There is no low-cost dispute resolution mechanism. If tenants are misguided - and I say "misguided" - and brave enough to fight legally, they are bled to death by continuing delay tactics and exorbitant legal fees, in the hope that they'll either be bankrupted and unable to continue the fight or that they'll go away and die in a corner somewhere.

Within our group there are people that have been hurt by not only Lend Lease, now, but other landlords as well. There is one woman that took Lend Lease on legally, 10 years ago now, and she went to every court in the land, on appeal, and she spent $650,000 in legal fees, and then they bankrupted her. You can't win legally. The tenant has no rights.

The situation is, for these big shopping centre landlords, the fact that there is no dispute resolution mechanism; it's a game. The problems are endemic, and the Shopping Centre Council of Australia is unchallenged at every single level. One of the most fundamental issues, as I said, to be addressed to correct this massive imbalance of power is that of the security of tenure. At the end of the lease the tenant has no rights.

Only this morning I spoke with a tenant who contacted me for the very first time today. They were in a Lend Lease centre in Perth. Lend Lease had demanded a 100 per cent increase in their rent, at the expiration of their lease. This poor tenant, the same tactics. They've said to the tenant that they have other people lined up ready to go in there, that they have a supplier of his that is wanting to take over the lease. The man is being pressured by his wife, that they've invested so much of their lives into this business and that he can't let this fall away. So he has the threat of a marriage breakdown, the threat of the landlord not renewing his lease and the loss of his business, and he's on the brink of financial devastation. He's reluctantly inclined to accept the 100 per cent increase in his rent. Now, this is absurd. This is not indicative of a market that's working well.

The Productivity Commission's draft report specifically ignores the current, fully-functional Tenancy Act in the ACT in Canberra. This has eliminated virtually all of the significant retail landlord tenant problems. The Act came about in the mid-1990s as a direct result from the recommendations of an exhaustive working committee of all of the industry stakeholders. These industry groups spent many months in hard-nosed commercially based negotiations across the table. The resulting legislation transformed Canberra from the worst to undoubtedly one of the best jurisdictions in the country in respect of commercial and retail tenancies.

One of the most fundamental differences between the ACT legislation and that of the other states is the provisions relating to security of tenure. The report, on

page 104 quotes the conclusion of three reviews undertaken in relation to lease renewals. In 2000 Victoria had 74 per cent of leases renewed upon expiration - 74 per cent. In Western Australia the figure was only 62 per cent. A similar study in Canberra established that 89 per cent of leases that expired were renewed in 2004. This clearly shows that the ACT legislation is more effective in protecting the rights of existing tenants.

On the issue of dispute resolution, I refute that there is a low-cost dispute resolution mechanism in place. My own personal case is a classic example of why this is not true; I speak from first-hand experience. As I said, there's no avenue for me to go to the ADT. I am well and truly outside the $400,000 jurisdiction.

Let's assume, though - because others in my group are in that position - that my claim is under the $400,000 threshold and that I am able to go there, I would be forced to engage lawyers to represent me. This involves a not insignificant amount of money and, even if I was successful in winning to a maximum of 400,000, as Craig rightly pointed out, there is no opportunity for me to recover my legal expenses. I might as well spend $100,000; it may well cost as much as $100,000 to recover $400,000. There are better odds probably at Randwick.

If the lessor elects to appeal the decision, as has been the case in Erina with some people, the process starts over. One of the consistent strategies adopted by the shopping centre landlords is to delay, and this comes at great expense to the tenant. It's a fallacy to say that the tenant can represent themselves at the tribunal. Generally, people don't have the expertise to do this. Only last week a current tenant in Macarthur Square at Campbelltown sought an interim order at the tribunal to prevent the landlord from locking them out of their premises.

They had applied for mediation. They were waiting on the date for mediation and Lend Lease stepped in and said, "We're going to lock you out." They had no choice but to go there. The tenants tried to represent themselves, without success. Their matter has now been set down for hearing. They were advised to get legal representation. The member told them to go away, get their act together, get legal representation and come back in 14 days' time. Now, these people are on their knees financially. Where is the relief in this case?

One other tenant in the action group has spent 57,000 on legal fees, okay, and they have been waiting for seven months to get there and, at this stage, after 57,000, the matter has not even gone to hearing. For 15 months now the ACCC have had my file. I have been dealing at the most senior level of the ACCC [personal/confidential details withheld] …, okay? I can say my dealing with the ACCC has been a joke; in a word, a joke.

Without a doubt, they are some of the most incompetent and misguided public servants I have ever encountered. My experience indicates that they lack any business, commercial experience, or any understanding of the issues that are confronting small business. The tenants in Erina have for the last 10 years repeatedly approached the ACCC to investigate Lend Lease's conduct, but always to no avail, with statistics like four cases in the last 10 years - you know, it's understandable.

When an approach has been made by an individual the ACCC says, "But you are only one tenant, you are only one complainant. There has to be a collective or a group for us to consider investigation," so these people go away in despair and try and gather themselves together and then, when a group presents, the ACCC's retort is that they can only take on cases that they believe they can win through the legal system. They have to be extremely confident in the outcome through the courts to test their matter and to take it on.

To form a conclusion as to whether or not there is a likelihood of success in the courts one would consider that you need to do a little bit of investigation in the first instance, and that calls for evidence. The evidence will only be unveiled if the ACCC decides to investigate and the ACCC will not investigate because I am told they have no powers to call for evidence unless they believe that the alleged conduct is in contravention of the Act. It's illogical; it's absurd. What comes first: the chicken or the egg?

The Erina experience and my own personal dealings with the ACCC highlight both the inherent weaknesses in their legislation relating to unconscionable conduct but also the gross incompetence and the lack of training of their compliance personnel. In 1997 the Reid report recommended that the Trade Practices Act introduce a new section called Unfair Conduct; like many of the other recommendations in the Reid report this was totally ignored. Instead, unconscionable conduct came along and so the provisions were introduced, but they were very, very cleverly worded so that unfair conduct is not unconscionable conduct and the harshness of the result, or the outcome of the conduct, is not a factor that the courts consider - can consider.

As such, the provisions of section 51AC of the Trade Practices Act and the equivalent provisions that are drawn down into the various state legislation have had the opposite result of the original intention. The wording of section 51AC makes it virtually bordering on an impossibility to prove the unfair conduct. The conduct must be highly unethical, not just unfair, and this is difficult to prove. As a result of this threshold and the definition of "unconscionable conduct" big business and landlords are able to freely engage in all sorts of unfair conduct that has a harsh result, but all the time it's perfectly legal.

I hope that you are starting to see that the market is not working efficiently. The ACCC has decided not to take my case at this stage - I qualify this because it's not yet over - and this decision is seemingly based on their opinion - and that is all it is; an opinion that I was enticed into a lease by the lure of a fit-out contribution offered by Lend Lease. The ACCC wrongly conclude that, by our acceptance of this sum, we were aware of the risk.

If the ACCC had any commercial experience they would know that a fit-out contribution is common practice and, in Erina, all the tenants in The Hive received substantial contributions, the majority of which, I might add, were channelled back into the Bovis Lend Lease pockets by virtue of the requirement that Bovis undertake all of the services work within the tenancies. Not one single dollar of that fit-out came to us personally and all of the services it funded are still in situ and used by the tenant that replaced us when we were given our marching orders.

We had no interview with the ACCC, okay? We met with them only to submit our complaint. When we presented there with our files, highly organised and all documented, we were promptly put in our place by the assistant director here in Sydney. She looked in horror and said, "Don't think you're going to leave all that evidence with us. You can take that with you. Let me make it very clear to you: don't think that all your problems are over because you've come along here to the ACCC today."

This woman had no empathy, no people skills, and no entitlement to a job as far as I'm concerned - not one that is funded by taxpayers' money. The ACCC requested no further information to support our allegations; no contact with any other tenants. In this precinct eight out of 10 tenants all failed, okay? Even Charlie's Angels would go and speak to the other tenants, but the ACCC chose not to. Does this statistic not tell the story?

Several of the tenants in The Hive have all been gagged and they're willing - in fact wanting to speak out and expose the trail of lies and deceit that led to our collective demise. The icing on the cake, however, is that the ACCC claimed to have been in contact with Spurs, the tenant who replaced us. This tenant signed an agreement to lease five months before we were given our marching orders, so they were not ready at that stage to take possession of the property - they needed to go back to South Africa; they needed to get money and they needed to plan their fit-out - and Lend Lease left us there to bleed to death until they were ready to hand over and for five months we continued to lose money.

Spurs, of course, have been bought off and they assert that they are trading well. This is not going away. I have a private investigator that goes there every day and Spurs are not trading well and The Hive is still a black hole and Lend Lease still

have major problems there. Mr Cassidy, the CEO of the ACCC, asserts that he has spoken personally with Spurs. Spurs advised that Lend Lease have made some changes to the area now; they've made some changes and Spurs is now trading well.

Not even this statement in black and white registers with the ACCC that there was a problem and there was a need to make changes. The ACCC is a joke, an absolute joke. The ACCC can't be serious. They're grossly negligent and incompetent and there is no recourse for small tenants. What is worse, however - and this is really the thing that hurts most - is that the ACCC reported back to Lend Lease and they reported back that Lend Lease are not guilty of any wrongdoing and that they have nothing to worry about and that they will not be taking on this case.

Lend Lease now are cocky and defiant; they're confident. Yes, they've won the game again. Whenever a tenant - and there are many tenants in our group that are current tenants, and we're not able to disclose their identity because they are too intimidated, but they're silent supporters, they call themselves, and whenever they moot the words "ACCC", Lend Lease say, "Joanne Howarth tried to take us to the ACCC. Her matter was thrown out. There's not a lawyer in Australia that will take up this matter because they cannot win." This reflects the fundamental rot in this system. Until the ACCC takes up some of these cases and sets a precedent, okay, this landlord-tenant bastardry will continue unchecked.

Our action group motto says it all: "How many more small businesses have to die before something is done?" I submit that the Productivity Commission needs to review its findings in relation to unconscionable conduct in terms of the economic and social disaster that prompted this inquiry initially. Despite the conclusions drawn in the draft report that many of the recommendations of the 1997 Reid report had not been adopted, the Productivity Commission dismisses them. The last 10 years have witnessed an enormous transfer of wealth to the few chosen shopping centre landlords that continue to dominate the market, and enormous suffering and hardship and trauma inflicted upon those who have been robbed of their assets. Trade practice law in this country is failing to help small business and to protect them from big business. The Act is inadequate, as are the personnel who administer it. The definition of "unconscionable conduct" needs to be extended to include harsh and oppressive conduct, which focuses on the outcome of the conduct rather than the intention of the parties.

In my case, [the ACCC] [personal/confidential details withheld] explains to me that if at the time of making all the promises that Lend Lease made - that this was going to be a busy area with people and music and entertainment and activity - if at the time they made those promises it was their intention, it can't be considered misleading or deceptive. The fact that they changed their mind or ran out of money or didn't have a marketing manager, well, that's irrelevant. I just invested my whole

life savings on what they thought at that

particular time and they have no accountability when they turn around and they don't deliver. The system is badly corrupt.

Our initial submission gave many examples of where the legal process has broken down. Small business tenants have tried repeatedly, without success, to win through the court system. The results and recommendations of this inquiry have potentially long-term ramifications for our economy. The Rudd government has declared inflation its number 1 priority. To this extent, it will be important for the government to take careful stock of this review. The Productivity Commission needs to understand that every business is different. They have different price points, income levels, margins, investment in capital, labour, and as a result they have a different capacity to pay.

Whilstever the shopping centre landlords continue to enjoy their monopolistic power, small business will continue to be screwed. 10 years on and many hundreds of casualties later, the time for finding the balance is now. When a cyclone rolls in and hundreds of families lose everything, it is declared a national disaster. When hundreds of retailers lose everything, the Productivity Commission says, "This is healthy, competitive, hard bargaining." Yes, we urge you to think again. Thank you.

DR BYRON: Thank you.

MS HOWARTH (EFTAG): Thanks, Neil.

DR BYRON: That's all right. Would you like to talk about that a little?

MS HOWARTH (EFTAG): Yes, I'm more than happy to talk about it. It's emotional but it's true.

DR BYRON: Yes. Well, as I hope you already appreciate, we're very well aware of how many small business people have been very badly hurt, and I don't mean only financially. I also personally have a number of very close friends and members of my family who have been bankrupted and lost their homes, and had their families split up, et cetera, as a direct result of the failure of small business. I appreciate absolutely - it's the centre of my heart - what that means and the cost of it. However, in none of those cases that I'm personally familiar with have I been able to convince myself that the root cause, the primary cause, was because there was something fundamentally flawed in the way the market for retail tenancy works. Now, as I am sure you're aware, there are dozens of other things that can go wrong in a business, in terms of stock selection and pricing, or in terms of staffing, and all sorts of things.

MS HOWARTH (EFTAG): And there are bad operators out there as well; inexperienced people, yes.

DR BYRON: And there are a number of people - and I've met quite a few of them in the course of this inquiry - who unlike you have gone into retailing thinking that it was easy, "and any mug can do it". Wrong; absolutely wrong. To be a successful retailer obviously requires very real skills and talents and a whole lot of expertise that everybody doesn't have. A lot of these people went into it thinking that to operate a retail business in a major shopping centre was going to be the equivalent of winning Lotto. Wrong; absolutely wrong. A lot of them thought that at the end of the lease term they would have goodwill that they could sell for a few million and go and live the life of Riley on the Gold Coast and own a block of flats. Wrong. A lot of these people that I'm talking about really didn't do their homework very well.

Now, I appreciate that you're different, and perhaps many of your members, but the point that the ACCC made to us is that you can't use legislation to protect those people who got into trouble because they basically made poor business decisions. Now, where they have to draw a line is: what's the difference between somebody who got into trouble because they made poor decisions and didn't do their homework well and somebody who was systematically exploited? I think you'll agree that that's not always an easy distinction to make.

MS HOWARTH (EFTAG): Most definitely. I made a decision. I made what I thought was an informed business decision based on the facts that I was presented with. The facts were misleading and deceptive. I invested my life savings in this business on the basis that it was going to be something that I was sold, and it's not.

DR BYRON: I guess if it was simply a case of misleading and deceptive representation, the ACCC I think would have very little hesitation in taking on the case, because that is something which can be, and frequently has been, very successfully argued in court. The unconscionability point, as you have said and as we said in the draft report, is something that's very ambiguous.

MS HOWARTH (EFTAG): It can't be proven. This is the whole problem.

DR BYRON: It is a concept which nobody actually knows what it means at the moment.

MS HOWARTH (EFTAG): But my discussions with the ACCC have been on the basis of misleading and deceptive conduct and unconscionable conduct, and they've declined to take on the case, on the basis that it doesn't fit the parameters of either.

DR BYRON: Either.

MS HOWARTH (EFTAG): Yes. [Personal/confidential details withheld] - - -

DR BYRON: Thanks. Can we follow up a little bit on that point, because I know that the issue of security of tenure for tenants is one of the most central arguments in this entire case that we're looking at. The line that we have been told is that a fixed-term lease is a fixed-term lease; that if you have a lease for five years, at the end of the fifth year, that's it. You may be offered another lease, and people said to us at the hearings last Friday in Canberra that they thought the word "renewal" was misleading because it's not a renewal; it's actually a new lease, a different lease. It may be on completely different terms and conditions, et cetera. I believe, from what we've been told and what we've got in submissions, that many people believe that, as long as they paid their rent each month for the five years or whatever, it will be automatically renewed, but that belief may be fundamentally wrong.

MS HOWARTH (EFTAG): But Lend Lease did renew the lease. Okay? First of all, these people were paying a 38 per cent occupancy cost and for three years they tried repeatedly to get some sort of assistance. That wasn't forthcoming. So, finally, when it comes that they've been bled of everything and they're of no further value, Lend Lease turn around and say, "Well, yes, we will renew the lease but you're required to do a new fit-out." Now, these people don't have the money for the new fit-out. They've been exploited by the system, by the dominance and the power of the landlord, and then Lend Lease turns around and does a deal with their franchisor who comes in to capitalise on all that goodwill and does a deal at half the rent that these people are paying.

DR BYRON: That's a very interesting case to follow up.

MS HOWARTH (EFTAG): Yes.

MR HOFBAUER (EFTAG): Can I make a comment?

DR BYRON: No. If you had been here at the beginning, I said comments from the floor are never accepted in any Commission inquiry. I always give, at the end of the day, an opportunity for anybody in the room who wants to come forward to say something on the record to do so. So if you can just hang on to it for a while. There are no mikes back there for a start, okay? So if you'd just let me handle the process in my own cumbersome way, thanks.

MS HOWARTH (EFTAG): [Personal/confidential details withheld].

DR BYRON: We have met with a number of other people who, you know, at the end of 20 years in the same location, in the same shopping centre in various states, have found out that the existing lease expired, the terms and conditions of the new

lease that they were going to be offered were such that they thought they couldn't make a go of it over the next X years, and so they walked away. Now, we have a few pages of discussion in the draft report. I understand why many people see that as, "The landlord has stolen our goodwill." I think it's actually a much more complicated issue than that in terms of what the goodwill was and who actually had an entitlement to it.

Another way that it's been put to us is that when you sign a lease for five years you are basically buying the right to operate a certain shop in that space for five years. At the end of five years, the thing is, if you like, put up for auction again. You may get it, you may not. So it seems to me that the way that the system works at the moment, anybody who thinks that there is an implication that they have a life for that business for more than the initial fixed term may be seriously misleading themselves.

MS HOWARTH (EFTAG): So it comes back to the length of the lease term. Craig was making the point about amortising the fitout, and - - -

DR BYRON: Yes, but again, as I said to people - - -

MS HOWARTH (EFTAG): And the protection of goodwill as an asset. These people have spent their lives building a business in the hope that they would have an asset that they could sell and retire.

DR BYRON: I appreciate that, but my question was whether they may actually have been mistaken in that expectation.

MS HOWARTH (EFTAG): In another situation we've got - and Craig spoke at length about the disclosure statements, and the disclosure statements are a myth really. There's a tenant that went into Erina 11 weeks ago, and after 11 weeks he knows he's in trouble. He's gone into a tenancy. He has a discount-type business and there have been three discount businesses in that location that have all failed in the last three years. Now, that needs to be disclosed. He said, "If only I knew about your action group and what was happening in the market and Erina before I signed my lease" - he nearly broke down in tears on the phone. He said, "I now know I've just shot myself in the foot. I've got two other successful businesses and I'm doomed to failure here." It's disclosure.

DR BYRON: Did he make inquiries?

MS HOWARTH (EFTAG): Yes, he did make inquiries. But, you know, he was marched around the centre and, "We're going to do this," and all that at the time. You know, he believed the representations of what was going to happen, as did I.

And I made a decision to enter into this lease and, as I said, I'm one of the smarter tenants. I've got 20 points in my lessee's disclosure statement and I've got a clause in there that says that one of my neighbour's was trading - and the ACCC's not taking my case - that one of my neighbour's, the Erina Ice World, was trading beyond expectation; beyond its expectations. I wrote that in my lessee's disclosure statement.

I'm putting together my case at the moment because we intend to run a class action. And I've got evidence that, first of all, the first owner of the Erina Ice World went into receivership after only 14 weeks. The second owner of the Erina Ice World, which was the owner at the time that Lend Lease were making all of these representations to me, he was doing $55,000 a month and his rent was $88,000 a month. Now, what sort of goose goes into business expecting that he's going to turn over less than his rent? It's lies, it's deceit, and the ACCC says, "No, you haven't got a case."

DR BYRON: I can't speak for them, I'm afraid.

MS HOWARTH (EFTAG): But that's what I'm saying, yes.

DR BYRON: Okay. Thank you very much for coming.

MS HOWARTH (EFTAG): Thank you.

DR BYRON: Now, sir, would you like to come forward and we can do this officially and on the record, thanks. Thanks for being patient with me.

MR HOFBAUER (EFTAG): I just wanted to make one point. My name is Peter Hofbauer. I'm Joanne Howarth's business partner and I'm sorry I'm a little bit late. The point I wanted to make was that in Erina Fair the centre increase - and I don't know if this has been said already; it may have been - that it has increased 134 per cent, and when you sign the lease, as we did, we expect that the tenants that have signed their leases, or supposed to have signed their leases and supposed to have a five-year lease, are there for the term of the five-year lease and that we know for the next five years that this tenant is going to be a butcher, a baker, a candlestick maker for the next five years. We don't expect, when we sign a lease, that one year after we sign a lease all of a sudden we have competition within our own business.

In other words - and that, I think, was one of the problems with the [Personal/confidential details withheld]. With a 134 per cent increase in the net lettable space, all of a sudden there's a new traffic flow in this whole new shopping centre. Now, you've got a lease that says you're next to all these other tenancies. All of a sudden there's a change in traffic flow, so then instead of having a bookshop or

whatever it may be here, we've

got four bookshops down the road in the new tenancy. But we didn't sign a lease - when we signed our lease that wasn't in the lease. Sure it is - it says "exclusivity". So that means you can't have exclusivity, but there can be similar types of operators that come next to you. I think this is a fundamental flaw.

When you sign a lease, then that would mean that those neighbours next to you should be the same neighbours. If that neighbour, for whatever reason, is not trading well, not a good operator, or whatever and he decides, "This is too hard for me," okay, you've got to put another similar mix that you have - and not putting someone who says, "Yes, I like that shop, I want to take that shop." And I'm a steakhouse, a pasta shop or whatever, and all of a sudden the developer - because all of a sudden he is paying the rent, whatever - "Yes, let's put him in there." That happened to us on a couple of occasions.

DR BYRON: Could I ask you if later you could have a look at the transcript of this morning's discussion, because I put what I think was precisely that proposition to the people from the Shopping Centre Council: that if I go in and sign a lease, "I know who my neighbours are, I know who my competitors are, I know what the traffic flow is, I do my sums and I say, yes, if I pay that rent I expect to be viable given the turnover." Then suddenly all these things start to change and it's nothing like the deal that I signed up for.

MR HOFBAUER (EFTAG): But I still expect the shopping centre operator to produce traffic flow. I still expect that. Okay, I've got all these tenants the same, and I'm happy with that because that's when I signed the lease, on the basis that the shopping centre is going to produce a specific traffic flow.

DR BYRON: Yes.

MR HOFBAUER (EFTAG): For my business and all the other business. If that doesn't happen, why am I paying these huge rents, why am I paying such a bit fitout, which is a lot more if I'm building at a Lend Lease centre or if I'm building it in my own building? If I can't get traffic flow, that's a responsibility of the developer.

DR BYRON: That's what you're paying the rent for.

MR HOFBAUER (EFTAG): That's why you're paying; that's why you're spending so much on the fitout; that's why Lend Lease Bovis is designing, building, doing all these things and charging a lot more for the completed product. That's the reason. Well, I don't know any other reason. That's why I go into a centre - is for traffic flow - and that's their argument; that they are building these huge shopping centres and attracting huge traffic flow. Now, that is not the case in Erina Fair.

Sure, they've got traffic flow but they've increased it to such a level and their increasing traffic flow is not even that much, but there's no responsibility there. What responsibility is there? There's no fall-back position to them; can't say to Lend Lease, "Hold on a minute, guys. You're not doing this. You have to compensate me," even though they say - even though they say - "You can't expect us to get it right all the time" and we say, "You're right. We don't expect you to get it right all the time, but when you get it wrong you've got to compensate people for it."

DR BYRON: That's basically the argument I put to them this morning and I would like you to have a look at the reply they gave me and then get back to us with a counter-reply because that is precisely the proposition that I put to them. If they start changing things and it adversely affects my traffic flow, and therefore cash flow, then maybe the lease should be renegotiated or compensation paid.

MR HOFBAUER (EFTAG): Or compensation, because that's what they do on so many occasions where they decide that a product - someone can't make it as a butcher shop: "Okay, let's make it into something else." It affects other people along the line, but there's no fall-back position for it. No-one can sort of say, "You can't do that." "We can do whatever we want," so you can.

DR BYRON: They would claim to have the expertise in doing that.

MR HOFBAUER: Yes, but that's fine. "Give me traffic flow. Show me the figures. You're expert, and I agree. You're the expert. You're fantastic. Your shares are going over the roof, but where's the traffic flow? You tell me where the increase is, walking past these shops." They can't. It's only 3 per cent. They've increased the centre 134 per cent. Where's the traffic? No traffic. Where's the penalty? No penalty.

DR BYRON: I think that's a very strong point. Thank you very much.

DR BYRON: Is there anybody else in the room who would like to come and - thank you. You have seen what the procedure is: just introduce yourself first and then take it away.

MR BRADLEY: My name is Michael. I'll be coming here again on Wednesday. [Personal/confidential details withheld] … when I took my $120,000 cash out of my share portfolio and bought a business in his shopping centre, I asked him if I would get another leasing position that I was buying into and he assured me I would. [Personal/confidential details withheld] … was put there to remodel the centre. He didn't tell me that, so I went ahead and bought my business at that time, hoping to increase the turnover 3 per cent. We did 6 per cent, and I think he actually gave me an award, a $500 cheque and a plastic award, for being the best-run that type of business.

I will tell you on Wednesday the full story of that. I didn't think we'd get so much time to speak but, from what I've heard here today, the dots aren't joining up from what's happening to the small trader. I've been in one centre for 20 years and I'm seeing now that it's being constricted and I'm seeing people being pushed out, franchises coming in, and the Commission is not getting it right.

DR BYRON: Okay. I will look forward to the elaboration on Wednesday.

MR BRADLEY: I will tell you more on Wednesday. Thank you.

DR BYRON: Thank you very much. In that case I think we can declare stumps and resume tomorrow morning at 9.00 with Carnaby Holdings Pty Ltd, Howard Kerr-Smith. Thank you very much, ladies and gentlemen.

AT 4.41 PM THE INQUIRY WAS ADJOURNED UNTIL
TUESDAY, 5 FEBRUARY 2008

PARTICIPANTS