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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 TUESDAY, 5 FEBRUARY 2008, AT 9.10 AM

Continued from 4/2/08

DR BYRON: Ladies and gentlemen, welcome to the second day of the Sydney public hearings of the Commission's hearings, the inquiry into the market of retail tenancy leases in Australia. I think without any further ado we can start with Carnaby Holdings. If you could just introduce yourself for the transcript and then take us through the main points that you wanted to make and then I have some questions and would like to discuss those issues with you.

MR KERRSMITH (CH): Okay.

DR BYRON: Thanks for coming.

MR KERRSMITH (CH): Thanks, Neil, and good morning, everybody. My name is Howard Kerrsmith and we have been Angus and Robertson franchisees for 30 years, starting in Taree in 1977, and the last 20 years as tenants of Lend Lease's Erina Fair. I understand that the whole idea of these sessions is to put a human face to the actual stories rather than all just submissions from trading organisations or lobby groups, so that's what I would like to do today; to tell you our story and I'd be happy to discuss with you or answer any questions that you have in regard to our situation.

Firstly, a little bit of background: as I say, we've been tenants of Erina Fair for the last 20 years and we've been very involved in the industry. I've been the president of ARFRANC Inc, which is the franchise council of Angus and Robertson Booksellers. This is a council, an organisation, that represents the issues of all Angus and Robertson bookshop franchisees. I've also been the president of the Australian Booksellers Association, New South Wales branch. I've been actively involved in the Chamber of Commerce at Erina since it started and I've been president of the Rotary Club of Erina, so I think that would demonstrate that we have been involved with what's going on.

For 20 years we were tenants of Lend Lease at Erina Fair and I have got to say that the relationship that we had with them was pretty good, except for the last few years and the end result, we believe, of the conduct of Lend Lease was that I sit before you now, having lost all of our superannuation, all of our savings. All we've got left - I guess, fortunately - is a house and a couple of old cars and we believe we've been destroyed by Lend Lease.

It's a very simple matter. As I say, we've been booksellers at Lend Lease for 20 years and it's only in the last few years when the shopping centre was expanded and didn't attract a proportionate share of people. I mean, you just have to have traffic flow in these big shopping centres. I've always been of the opinion that you don't mind paying whatever the rent is providing the business is there and the traffic is there and, usually, that's a partnership between the landlord and the tenant, which

is understood.

We've actually been in the situation where our turnover grew and a turnover clause kicked in and we had to pay extra rent to the landlord. Now, a lot of people might say that that's unfair; that if you do well and your turnover increases you shouldn't have to pay extra rent. I don't see it that way. I, again, feel that it's part of the partnership thing where, if you do well, and that's because of the actions of the landlord and the shopping centre, well, then we should all share in it but, by the same token, when it goes the other way - and this is what happened to us - the shopping centre was expanded, they brought in extra competition, and the pie simply was just not big enough to support the number of book outlets in the shopping centre.

As a consequence of that our sales went down, despite the fact that our franchisor Angus and Robertson had absolutely no issues with the way we were running the business and, right until the very end, I'm sure that everybody would say that we ran a good business. In the last year our turnover dropped to three-quarters of a million dollars a year. Now, that's not a bad turnover for a small bookshop, but there is no way that you can pay an occupancy cost of around a quarter of a million dollars when you're turning over three-quarters of a million dollars.

Our issue simply - and it really is very, very simple - that despite repeated discussions with the landlord, representation from our franchisor, they just would not accept the reality that the trade wasn't there and they forced us to serve out until the end of the lease and continue to pay an exorbitant rent. At the end of that time we just had to de-fit and walk away. Now, what I'm trying to tell you is a personal story, but I'd like you also to understand - and I think other people have said this - that there are over 80 tenants at Erina Fair who have been destroyed in the last five years and, before that, others.

When people go through a difficult time, a hard time, it's natural, human nature, to move on, get on with their life, move away from it, and not to revisit it, so that's why there's not 80 people here today, telling similar stories. Some of the other tenants at Erina Fair have been forced by the situation where they've lost everything; I guess we'd been in business a bit longer, so we still have a house, but others - particularly younger ones - that have gone in, had a go, done their best, they've lost everything and the tragic stories that are out there are just absolutely horrendous, so that's what I'm trying to do today - is to present a human face to this; to tell our story.

I guess, as I say, we are probably more fortunate than some of the others in that while we've lost all of our savings, all of our superannuation, all of our retirement funds and, at age 66, instead of looking forward to a retirement, we're still trying to keep going. I have submitted a few suggestions for your consideration and I believe that the draft report of the Productivity Commission does not really address

situations like ours: for the report to say that the retail legislation as it stands at the moment is satisfactory and that everything is working fine, I don't believe really takes into account the individuals that are affected like we have been.

The sort of things that I think needs to be done is that tenants need to have an easily accessible and affordable tribunal at which they can discuss these difficulties. I mentioned that I have been president of ARFRANC, which is the Angus and Robertson franchisee council, and I think that's a model which is a good one. The constitution of ARFRANC is agreed on by the franchisor and the franchisee; it has a properly elected committee and it's used on a regular basis to sort out issues between franchisor and franchisee.

There's nothing like that that exists in shopping centres; in fact discussion amongst tenants in shopping centres is actively discouraged; in situations where a settlement might be reached with a tenant for whatever reason the landlord usually gags that tenant or the tenant is so demoralised and disillusioned that they just don't want to have any more to do with it and they just want to try and get on with their life.

I believe it should be much easier to walk away from a lease when the business is not trading well and I believe that this would be an advantage for both the landlord and the replacement tenant. It's beyond my comprehension why landlords insist on keeping tenants right to the very end of their lease, destroying their lives, taking away their homes and their savings and then replacing them with another tenant, often in a completely different sort of business.

When we were forced to leave Erina Fair - our shop, which had a new shopfront and new lighting and wiring and so on in it, was taken over by, or relet, to another tenant with an art supply business at a little bit more than half the rent that we were paying and Angus and Robertson, our franchisor, moved into another site within the shopping centre, again at a little bit more than half the rent that we were paying, so the landlord knew what the market was and knew what was being realistic, but insisted to bleed us to death right until the end.

I don't blame Angus and Robertson, the franchisor, for doing what they did - they have to protect the brand - and while they tried to help us, at the end of the day, our franchise agreement was up, our lease was up, and there's no way that we could afford the \$150,000 that would be needed to refit a new shop and the \$50,000 that would be necessary to sign another franchise agreement. This is what I'm trying to point out to you, to demonstrate to you, that these are the sorts of things that are going on in the big shopping centres and I just don't believe that there is sufficient support and encouragement for tenants in that situation. I don't really want to go on. I have made a few suggestions on paper, which I have submitted. I would be happy

to answer any questions that any of you might have.

DR BYRON: Thank you very much, Mr Kerrsmith - the questions come from me. It's a one-way conversation.

MR KERRSMITH (CH): Sorry?

DR BYRON: The conversation is between you and me.

MR KERRSMITH (CH): Okay, fine.

DR BYRON: Other people will get a chance to put their views on the transcript later on.

MR KERRSMITH (CH): Okay.

DR BYRON: Thank you very much for coming and for sharing that and for your written submission. I think there are a number of points that you have made that we would be in very vigorous agreement with you, and there are a few others on which I would just like to seek a little bit more elaboration. The second point on your written notes here, "Retail tenants have no protection against landlords bringing in unfair and unnecessary competition during the lease term." I assume that you mean landlords in major shopping centres?

MR KERRSMITH (CH): Yes.

DR BYRON: Because when I raised this very issue with the Shopping Centre Council yesterday their response was, "Well, think about what happens in the shopping strip." I mean, there is no need for me to paraphrase what they said yesterday, but if your bookshop was in a strip it's quite possible that another bookshop could have - - -

MR KERRSMITH (CH): Yes.

DR BYRON: Somebody could observe, "Gee, you're doing well. You always seem to have people in there, next to the counter," and you could end up with a book store beside you and across the road - - -

MR KERRSMITH (CH): Absolutely.

DR BYRON: And I appreciate the damage it does to your turnover and viability and so on, so is the situation in a managed centre substantially worse than what could happen through a random event on a strip?

MR KERRSMITH (CH): Yes, I think it is. I mean, we didn't go into the last five-year lease without really discussing this with the landlord and without discussing it with our franchisor, without taking advice from Himee Zawatzke, who were regarded at that time as one of the best retail lease consultants in the business. I don't think anybody minds competition but, to me, it's just commonsense that if the pie is just so big and you divide it up too many times there's not enough for everybody to eat.

What I'm saying to you is that we ran what we believe is a good business right until the end; we were still turning over three-quarters of a million dollars, which is not bad for a small bookshop, and at the end of the day the only problem was - and we don't mind competition - that the occupancy cost was too high and, to me, it is short-sighted of the landlord - and it wouldn't matter if it was a strip shop or a big shopping centre - to basically destroy that tenant. I mean, it's like killing the goose that lays the golden egg. Why do it? Why not support and encourage your tenants so that they can continue on in business and then sort of pass it on to other people, whether they sell it or whatever?

I think it's different if you run a bad business. If you run a bad business then you deserve to go out of business, but our franchisor had no problems with the way we ran our business. I mean, we won retail awards within Lend Lease shopping centres, so I mean we're not new chums that don't know what we're talking about. We've been booksellers for 30 years. To me, it's just so simple; it's just commonsense. It doesn't matter how many coffee shops or how many bookshops you put in, it's just not good business to charge those people so much money that they are destroyed. It's not commonsense.

DR BYRON: Sure. Over the last lease period - I assume these were all five-year periods, were they?

MR KERRSMITH (CH): Yes.

DR BYRON: We've had a lot of discussions in the hearing so far about what happens at the end of the lease period and so many tenants have said to us, in person and in writing, about, "We had assumed we would be offered another lease."

MR KERRSMITH (CH): No, that's just being naïve.

DR BYRON: Yes. You knew that it was a fixed-term of five years, so - - -

MR KERRSMITH (CH): Yes. I mean, every five years you go through this exercise, where you sit down - and, as I said, for our last five-year term - and bear in

mind this wasn't our first five-year term; it was after 15 years as original tenants in this particular centre - we took all this advice and had all of these discussions with the landlord. You do understand that it's only for a five-year period. Perhaps - and we have had earlier leases where there was a review to market at three years - if we had been in that situation - I think that's probably a mistake that we made. We should have insisted upon a review to market at the end of year 3; that wasn't in this lease and it didn't come up and we didn't consider it necessary because we were trading well; the centre was going well, and we believed we were running a good business.

DR BYRON: Hypothetically, if this expansion hadn't happened and you had got to the end of this fourth five-year lease, what do you think might have happened? You say your franchise agreement expired and the lease expired at the same time: would you have assumed that you would go into another five years after that or you would attempt to negotiate - - -

MR KERRSMITH (CH): That's an interesting proposition. I don't know how franchise territories work with many other organisations but, in our case, with Angus and Robertson, the franchise agreement is for a territory and some franchise agreements are just for like the shopping centre and I think some of them might be just for the shop itself and 10 metres all around it, but in our case the franchise agreements are for a territory and we are encouraged by our franchisor to maximise the sales within that area, so the thing is that in the 20 years that we had that territory on the Central Coast we ran shops at Woy Woy and Gosford, as well as at Erina, so as far as the franchise agreement is concerned you're not confined to Lend Lease Erina Fair, and that is in fact what we did.

DR BYRON: But what a number of people have suggested to us is that if you have got a fixed-term lease, unless there are some special features of your business that you can take with you, at midnight at the end of the fifth year your business is worth approximately nothing because you don't have a place to operate it out of unless you can write another lease.

MR KERRSMITH (CH): That's right.

DR BYRON: I'm just trying to understand the thinking behind this. Most of the small business people we've been talking to are assuming that they're building up the value of the business.

MR KERRSMITH (CH): Yes.

DR BYRON: But another way of looking at it might be that every month that passes you're a month closer to the day when your business is going to be worth

nothing.

MR KERRSMITH (CH): That's right.

DR BYRON: Did that make any sense?

MR KERRSMITH (CH): I think that's generally understood these days. I mean, past time's goodwill was something that you could build up and then that's something that you could sell as part of the business, but I don't think that applies any more.

DR BYRON: Would it have been different if you were in a strip where your lease expired here and if you couldn't reach a satisfactory agreement with the landlord you could move across the road and three doors down.

MR KERRSMITH (CH): Absolutely.

DR BYRON: Put a sign on the door, all your loyal customers would follow you across the road and you'd still have a business.

MR KERRSMITH (CH): Yes.

DR BYRON: You'd take all your goodwill with you.

MR KERRSMITH (CH): That's right. Absolutely.

DR BYRON: But being in a centre is just fundamentally different.

MR KERRSMITH (CH): It is, yes. I mean, a centre like Erina Fair is - I hope you don't mind me, if you like, going on about this, but 20 years ago in 1987 when we were original tenants of Erina Fair and we had a shop in Gosford people in Gosford and all around the district said there's no way that a big shopping centre like that will survive, and the reality is that over the 20 years Gosford has basically been destroyed as a retail centre, and Erina Fair has become so big that the peripheral retailers like your Harvey Normans and these sort of people, and the carpet shops and the Bing Lees and so on - they've all sort of concentrated around this hub, so I mean they are giant drawcards and not only for the tenants that are in them but for the peripheral business that it attracts.

So at the end of the day I'm just saying in simple arithmetic, I just don't understand why landlords in these big shopping centres extract so much out of people that at the end of the five years they've had it and they're gone. It doesn't make sense. Yes. So where I feel that the legislation needs to be amended is that there is some more easily, inexpensive tribunal that people can access; that the law

seems to be in favour so much of the landlords and against the tenants. I mean 51AC, the unconscionable conduct provisions of the Trade Practices Act, I don't know of anybody having successfully won a case on those grounds.

DR BYRON: Very few.

MR KERRSMITH (CH): Yes, it's difficult. It's really, really difficult.

DR BYRON: I think in terms of access to easily affordable accessible tribunal, that's one of the areas that we're in vigorous agreement. But that in a sense is trying to sort of trying to deal with the consequences of the problem after it happened.

MR KERRSMITH (CH): That's true.

DR BYRON: And I'd also like to find a system that sort of prevents those problems from arising rather than cleaning up the mess afterwards.

MR KERRSMITH (CH): Sure. But you see, in our situation the game changed halfway through, and that's fine provided the landlord adjusts as well. I mean, commonsense - it's just ridiculous to keep on charging exorbitant rents that destroy people. What's the point? There's no point. It's just commercial stupidity.

DR BYRON: And in your case the people who occupied the space after you left, actually paid a lower rent than you had been paying.

MR KERRSMITH (CH): Yes, a bit more than half of what we were paying.

DR BYRON: So if you had been offered that you might have stayed.

MR KERRSMITH (CH): If we could have, we would have, but after 20 years and having lost all of our superannuation and savings to prop it up, and we're talking hundreds of thousands of dollars - I mean, we don't have any money left. You know, if we had the money and if the opportunity arose to go again at that lower occupancy cost we would.

DR BYRON: Yes.

MR KERRSMITH (CH): But that's what I said, it costs you \$150,000 to fit out a shop and \$50,000 for a franchise agreement, so there's 200 grand just to kick off.

DR BYRON: What we're trying to do in this inquiry is look at the public policy issues and what legislation might be changed.

MR KERRSMITH (CH): Yes.

DR BYRON: What do you think would need to be changed to make sure that this sort of situation doesn't continue to arise in the future? Can you put your finger on one thing or a handful of things that would have prevented - is it simply a requirement that when turnover goes down, rent has to be adjusted down? That's not simple.

MR KERRSMITH (CH): No, it's not that simple. I mean, you're the guys that can advise on legislation and I mean, I don't really know how you would write that. I mean, I understand the retail leasing legislation in the ACT results in a much lower level of dispute and that there is sort of a higher renewal rate of leases in the ACT, but I don't know the nuts and bolts of it. I mean, I sit before you as somebody who's been a successful book seller for 30 years and I know how to run a book shop, but I don't know how to write legislation.

DR BYRON: No, but there is an awful lot of red herrings, I suspect, floating around here, and we're trying to cut through all that to find out what are the sort of fundamentals in terms of - there have been countless attempts over the last 20 years to change retail tenancy legislation.

MR KERRSMITH (CH): Yes.

DR BYRON: And there have been all sorts of innovations and adjustments to the legislation made, and yet the problems still persist.

MR KERRSMITH (CH): Yes.

DR BYRON: So we've been trying to work out what's been tried; what hasn't been tried; what, if anything, has worked. There are all sorts of suggestions we've received about change the law in this way or that way, and basically we haven't been convinced that any of these things look like dealing with the fundamental issues. If the landlord and the tenant have signed a lease that says, "You're going to occupy this site for five years," and then circumstances change for whatever reason and the tenant would like to be released from the lease, perhaps legally the landlord can argue, "You've signed this, you've committed to that, we have a contract that says you're going to pay the rent for five years." They may actually have an argument to stand on there.

MR KERRSMITH (CH): Yes. Yes, I understand that. It's hard.

DR BYRON: So this is something where the state has to intervene to tell landlords that you can't actually exercise the contract that you've mutually agreed to sign. On

the one hand we're being told tenants should have some sort of enduring right or first refusal for continuity and security of tenure so that if they want to stay on they should be allowed to, unless there's a very good reason. And you're also arguing that if they want to the tenant should be allowed to leave the lease early, if there's good reason.

MR KERRSMITH (CH): Yes.

DR BYRON: Now, both of those things in a way are sort of departure from conventional property law where the lease being - - -

MR KERRSMITH (CH): Can I just ask, how do you relate this to percentage rent where you have a situation where the landlord runs a brilliant shopping centre and everything goes well, and the tenants sales go up and the percentage rent kicks in? I mean, it should work the other way, that if the landlord doesn't run a good shopping centre - and that's what we would argue the case with Erina Fair where they expanded it.

DR BYRON: Yes.

MR KERRSMITH (CH): And I mean, again it's just commonsense that population there and everything else, if you double the size of the shopping centre you're not going to just suddenly double the turnover.

DR BYRON: Sure.

MR KERRSMITH (CH): In that situation where it doesn't work and basically the landlord hasn't worked it out properly, hasn't attracted the traffic flow to the centre, why should the tenant suffer.

DR BYRON: Yes.

MR KERRSMITH (CH): Now, I don't know how you write that into legislation but I mean, it's seems that percentage rent when sales go well is acceptable, but when the shopping centre causes the turnover to go down, there's no comeback.

DR BYRON: Well, is this something that has to be written into legislation, or is it something that could be negotiated as part of a lease that you, in negotiating with the landlord, say, "Okay, we're quite happy to accept turnover rent when it goes up, but only if it also goes down."

MR KERRSMITH (CH): Yes.

DR BYRON: Now, there's nothing to prevent two parties from a contract agreeing to that. I'm not sure that state law has to change to permit it.

MR KERRSMITH (CH): Well, I've never heard of that happening. I don't know that it does. I mean, whether that's something that should be encouraged - I mean, I guess some of the advisory people, the Retail Traders Association and so on would be better equipped to answer that than I am.

DR BYRON: No, but I mean it's something that I was trying to dig into yesterday, in terms of shouldn't the centre be accountable for the changes that they make - - -

MR KERRSMITH (CH): Well, that's the bottom line, yes.

DR BYRON: You know, they claim to be experts in designing and running shopping centres and they're willing to take all the rewards when they get it right.

MR KERRSMITH (CH): Exactly.

DR BYRON: Shouldn't they also be willing to take some of the blame if they don't?

MR KERRSMITH (CH): Yes.

DR BYRON: That's your position - - -

MR KERRSMITH (CH): But, I mean, at the same time you've got to have, you know, shopkeepers, tenants that are doing the right thing too. You know, you don't need to protect people that are asleep on the job. So I don't know. It's difficult. I don't know what the answer is.

DR BYRON: I guess the one last question from me is that - well, a comment too. Your final paragraph here, "The Commissioners say the present system is working okay." I don't think we argue that the present system is perfect by any means. The draft conclusion is that, you know, on average most of the time it's reasonable, but clearly not perfect. But then you go on to say, "The high failure rate of retail businesses." Now - - -

MR KERRSMITH (CH): In my experience.

DR BYRON: Yes, well - - -

MR KERRSMITH (CH): I mean, obviously there's shopping centres where everything is going fine and there isn't a high failure rate.

DR BYRON: Well, that's the point I was coming to, that one of the things that we're trying to get a hold of - you know, there's an argument about whether the failure rate of specialty tenants, small business, in shopping centres is substantially worse or substantially better than what it is outside of shopping centres. Is the failure rate of small retail businesses very different from other small businesses? The evidence that we've found so far is that it doesn't seem to be substantially different. You know, if it's true that there is a very high failure rate of small retail businesses in large centres, then this is clearly something that needs to be investigated a lot further.

If it's just particular centres then, you know, what is it about those centres that leads to it? But I must say we're finding it very hard to actually document how much worse the failure rate for small retailers in centres is than for basically any other small business. I'm sure, as you would agree, there are an enormous number of things that can go wrong, apart from relationships with the landlord in terms of stock, pricing, staffing, business model and so on.

MR KERRSMITH (CH): Yes.

DR BYRON: You know, there are many reasons why businesses don't continue. Would you like to make any closing comments?

MR KERRSMITH (CH): No, I don't think so.

DR BYRON: Can I thank you very, very much for your time and effort in coming and informing us of all that.

MR KERRSMITH (CH): Yes, it was an early start, a bus and a couple of trains.

DR BYRON: Well, I thank you even more for coming then.

MR KERRSMITH (CH): Okay. All right, thank you everybody.

DR BYRON: Mr Anthony Herro. Thank you very much for coming, Mr Herro. If you could just introduce yourself for the transcript, and then talk us through the main points that you wanted to make in terms of comment, criticism, feedback on the draft, and then we can talk about that. Thanks for coming.

MR HERRO (HS): Thanks, Commissioner. My name is Anthony Herro. I'm principal solicitor at Herro Solicitors. I'm a mediator on the Retail Tenancy Unit panel also, and in practice I specialise in retail leasing. Commissioner, if I could just add some points from the previous speaker - I do apologise, I didn't catch his name, but it was very good of him to have made the effort to speak. It seems to me that the real issue there was that the centre later leased the same space at half the rent, and your question, "Would the strip have been any different if a competitor opened across the road?" Probably with a national franchisor the market would have accommodated that tenant at a different rent.

The speaker did talk about that there's been no, or hardly any, unconscionable conduct cases, but if I can just add a caveat to that: I think it's because often they do settle. I don't think that unconscionable conduct provisions in both the Retail Leases Act or the Trade Practices Act are not operating. I think they do operate, because when there is a real case, from my experience, the parties reach a settlement.

DR BYRON: Thank you very much. I think that's an incredibly important insightful point to have on the record, that just because there aren't cases recorded doesn't mean that there's no action below the surface. Thanks.

MR HERRO (HS): Thank you. I sympathise greatly with the previous speaker's position. I just add another caveat: in relation to a tenant friendly, or a cost-effective tribunal, I do think that exists with the Administrative Decisions Tribunal, and I think we're fortunate to have that. Probably the only other final comment I'd say, there was a very interesting point about the turnover rent. If turnover goes up the rent can increase, but what happens if the turnover goes down? Commissioner, your suggestion to negotiate that into the lease - the only thing I would say is, it's very difficult negotiating with shopping centres in seeking amendments of that nature.

I think if there would be some legislative - I don't know - I must say I agree with the previous speaker. I don't know how you would draft it, but the majors can negotiate like that, but the smaller ones - sometimes it's very difficult to negotiate even basic amendments. Again, I suppose that's part and parcel of shopping centre leasing, because the argument is that there's someone else that will take the lease as it's written. But I think the logic is most correct and interestingly the examples I'm about to share are very similar. I think that the real concern for injustice relates to both shopping centres and tenancies of less than 1000 square metres, and the Retail Leases Act focuses on those. For example, tenancies over 1000 square metres are

exempt from the act. I think that's correct. I think that's where the real focus should be.

I thought the best way to present my arguments was to cite two examples. These examples actually have quite a bit of an overlap to the previous speaker. The first example - and I'll read through the numbers for those present - is that the tenant starts their business. There's a fit-out cost, and I think that's part of the - the problem for the Commission would be seeing costs, which are not documented and the landlord would not have a costing of what the tenant's fit-out cost is, but it's a significant investment at the commencement of each lease. In this example I've estimated the fit-out cost to be \$180,000.

So before the tenant gets started the tenant has that cost and, again, in looking at data it's probably not quantified anywhere. Also the way shopping centre leasing is, is that nearly every single expense is shifted to the tenant. In fact, I started to think last night, "Well, what costs did the landlord actually have?" Because most shopping centre leases even shift the costs of having the landlord's architect review the tenant's plans. So all the cost is shifted to the tenant. Even things such as sprinkler head location and airconditioning ducts. Sometimes the landlord has preferred contractors, and sometimes even those contractors are owned by the landlord. So before the tenant starts the tenant has this large capital outlay. This example is 180,000.

The second thing is the annual increases. Most shopping centre leases have got CPI plus 1 and a half per cent. Right from the start that should be CPI; it shouldn't be 1 and a half per cent. If we're measuring it to cost of living, that requirement alone must add millions and millions and millions of dollars every year to the rentals and also all outgoings are shifted to the tenant. So like when we had the case where there was a large increase in land tax, that was all shifted to the tenant. So in this example I've estimated that the rent is going to go up each year by 6 per cent by that mechanism of either CPI plus 1 and a half per cent or the fact that all the outgoings are shifting to the tenant.

The next point is, in this example one of the great injustices is that the tenants' turnover is disclosed and if we take this example: the first year the rent was 120,000, the sales were 750,00; that's fine. The second year the rent was - the 6 per cent increase moved to 127,000 and the sales increased by 9 per cent, also fine. So the sales have gone up for the tenant, 9 per cent; the rent has gone up - gross rent to the landlord - 6 per cent. But then year 3 comes and it seems that the previous speaker was a live example. The landlord sees that the per square metre rate in that category is high or sees the increase and introduces a competitor. So year 3 the rent goes up 6 per cent, sales go down 20 per cent, and that is where the tenant is stuck because the tenant's sales have now dropped to 654.

If we look at year 4, rent goes up 6 per cent, sales go up 6 per cent; year 5, rent goes up 6 per cent, sales go up 4 per cent. So after the five-year period, the situation is that the rent has gone up because of the six - it's actually gone up not 6 per cent a year but, because of the compounding, it has gone up 26 per cent in the five years but the sales have gone down 2 per cent and then comes the new lease. Typically - and I've estimated in this example a 38 per cent increase. Now, that might sound harsh but the example that I took it from actually had a 44 per cent increase.

So the tenant is now facing, "Well, what do I do? I've spent all this work building my goodwill. I've personally guaranteed this lease, as if I enter into a new lease." So the new lease is offered, 38 per cent increase is suggested or is agreed to, plus the 26 per cent that's already occurred. So you've got a 60-something per cent increase from the landlord for the new lease and the tenants are faced with a dilemma. I note in the report it was said, "Well, no-one forces the tenant to sign," but let's look at what has happened. The tenant invested 180,000 to start. They've worked for five years. They've built the goodwill. Sales have actually dropped 2 per cent. Rent has gone up 60-something per cent. What does the tenant do?

Commonsense would dictate, okay, you walk away. Maybe that is the answer. But if that's the person's livelihood - they've already invested the 180 - often they will accede and they will agree to the higher rental, hoping that, "Look, we can try harder. We can do something to increase our sales." They're doomed to fail because on those figures the rent to sale percentage is 28 per cent, which is just not sustainable. But it gets worse because what happens then is, as part of the renewal process, the tenant has to refurbish the tenancy. That, I've estimated, would cost about \$100,000. In practice, the tenant has to deal with the landlord's architects who sometimes can be quite unreasonable in the finishes and the requirements that they seek and such cost doesn't in any way impact the bottom line of the tenant. In that case, the tenant has nowhere to go because they're forced to get the approval of the landlord's architects.

If I can cite, as a real live example as to how silly it can get - and this occurred about eight months ago - is that in the disclosure statement it was said that there must be brand-new fixtures and fittings in this tenancy and what happened with this tenant, the tenant had been in the same shop. It was owned by two of the major shopping centre owners. They'd been in the same shop for 25 years. The centre wouldn't renew in that location. They said that they'll offer them a shop in a lesser position so the tenant had to refit - and the words "brand new".

So I questioned the landlord's solicitor and wrote and said, "Look, isn't that environmentally irresponsible, to say 'brand new,'" because what the tenant wanted to do was one of the fixtures, they wanted to actually just have it totally redone and it would have looked brand new and the response was, "Whilst our client considers

itself a good corporate citizen, they wouldn't accede to the request." That's the silliness that often goes on in relation to refurbishment. The whole part of that story was very sad because in the end the tenant lost her home and actually has nothing for her retirement, but that's probably beyond the scope of today.

The thing to emphasise too is throughout this process the tenant usually has to provide personal guarantees so all of the tenants' personal assets are exposed; usually their family home. The landlord, on the other hand, all of the costs have shifted to the tenant. They're a multi-billion dollar entity and, even if you look at the leases, often they've got trustee limitation clauses anyway, not that there's much claim against the landlord under the lease in any event.

That is a shopping centre scenario. In contrast, if this occurred in a shopping strip - say there weren't shopping centres - it would be a different outcome because instead of one landlord, the tenant would have hundreds of landlords to deal with and the market would dictate different criteria. The market probably wouldn't shift all fit-out costs onto the tenant and currently in strip shopping centres that's the case: is that often the landlord will provide some of the fit-out on a strip centre. The strip, if you had hundreds of landlords to deal with, you wouldn't get a 60 per cent increase. It would be interesting to see the statistic of increase in profit over the last 20 years for small retail, as against increase in rent. I can just imagine how steep that curve would be because I don't believe that this example is extreme. I believe it happens.

Again, the injustice of the landlord seeing the tenant's sales - and I don't think there is loyalty there - and I think the landlords over the years have encouraged tenants that are in one city to move to another city and when they do see that the per square metre rate is rising above the norm, then they do introduce the competitor. But the injustice is that the tenant is bound by that lease secured by their house so they can't walk away. Again, if you compare it to strip centres, it's different because you don't just have the one landlord.

If I could raise a second example which was interesting - it was touched upon, Commissioner, by yourself with the previous speaker - is the case where the centre's sales drop. By the way too, in that example, even if the tenant leaves, of course, the tenant has a deficit cost which I estimate at \$18,000. In the case of the centre where you go into the centre: \$180,000 to fit out again. Rent in this case is 90,000. Sales I put at 560,000. The centre is not working. What happens the second year? Rent goes up 6 per cent, sales go down 10 per cent. What happens the third year? Rent goes up 6 per cent, sales go down 8 per cent, and that continues.

The tenant is in a real dilemma because what does the tenant do? There's two cases I have which are live cases which are similar to this. We actually asked the landlord for sales data. The landlord wouldn't provide it. I mean the landlords, when

they issue a disclosure statement, have to give certain information; but the tenant, of course, has to give their sales every month. When a centre is going down, the landlords, I've found, are quite cagey in what they're prepared to give but also they can be, in practice, a little bit misleading because they may be leasing to \$2 shops or temporary tenancies which have high turnover but low margin, which does show some sales increase, but in fact they knew the centre is not working. But what does that tenant do in that situation?

The lease binds the tenant, and with fixed increases to the landlord, but there's no obligation on the landlord to deliver a successful centre. Again, about the protection, the tenants got their personal assets exposed to this lease so they're in quite a vulnerable situation. They may walk away, and commercially some of them do, but legally that exposes them to being sued for breach of lease which could include rental until the end of the term of the lease, subject to the obligation to mitigate, and where I find this occurs is if a centre closes down for a number of years to refurbish, all with good intentions of improving, when they reopen the market has shifted to another centre and they struggle to regain.

I don't know the answer to this but in some ways a lease no longer fits shopping centres because a lease creates fixed rental increases but doesn't take into account changes in that particular category and changes in the centre itself. I always keep thinking there must be another document, another legal relationship, and I don't know the answer - I just highlight that - but those two examples illustrate.

I note in the report that there was discussion about transparency and about registration of leases and if I could just make some comments on that. I certainly agree that for the cost of - in the report it said \$18. I think you could even get it cheaper; you can search a lease and so a tenant can have access to the lease, and I think that's a fair comment that was raised by someone by submission to the report. I would just like to raise some caveats to that thinking.

The first thing is that in my experience whenever there is a lease incentive - and in fact I thought about it and I could only think of one, possibly two, leases over the last many years that I could recall where this didn't occur. The lease incentive is never in the lease - it's in the agreement for lease or a side letter - and in fact I even battled with the landlord's solicitors in these situations to say, "Hold on. We've got to change the boilerplate provision which says at the end of the lease that this lease contains all the terms and conditions between the parties."

Fortunately, in the end, I've always had agreement - we've referred to the agreement for lease or we've referred to the letter because, arguably, the landlord could say it didn't exist; that clause would override it. I think the Commission should have a caveat on the idea of disclosure because the incentives and the rent freeze are

very rarely in the lease. The second point I'd like to make is that the only reason a landlord delays registration of the lease - the only reason - is so that the deal is not exposed to the market.

Why do I say that? Because it's in the interest of both the tenant and the landlord to have the lease registered, particularly the tenant, because they don't get indefeasibility of title under the Torrens system. The third point is that I did recall one lease that did have a seven-month rent-free period with a major landlord; as I recall it, that actually was in the lease, and then I recalled that that particular lease wasn't registered for four years and the only reason we found out that it wasn't registered is because the tenant wanted to sell its business, so I would put that caveat to the idea of transparency.

I note that the Commission talked about lowering of compliance costs. I think the point I wish to make with my two examples is that I think that that goal - two points: one is, provided it doesn't expose or weaken the tenant's rights in any way but, secondly, I think the real issue is the fact that shopping centres are monopolies and the two examples I have raised show the difficulty that the tenant experiences in those situations. I think that is the real challenge in this area - is, how do we address that? How do we bring some level of fairness, improve competition? It's a difficult question because in many senses the horse has already bolted.

If I can just make some general comments. It's terrific that both tenants and landlords - the number that have made submissions. I really admire someone like the previous speaker as it wouldn't have been easy for him to come and speak. I would just like to make some comments as to why maybe more people, particularly tenants, have not given their submissions. I really think that a lot of them are struggling to survive and I really believe they are struggling to survive because of the increases like the examples I have cited - meeting their day-to-day costs - so their focus is on survival. Also, they may not be sufficiently skilled to make a submission.

Another point is that I really believe there is fear in tenants; that if they do speak out that they will be penalised in lease negotiations. I really feel that that is there and I really experience that in relation to lease disputes, where the tenant does have a good case and they might win that battle but then their fear would be, "Well, is the shopping centre owner is going to lease them space in that centre and other centres?"

I think there's a scepticism about the role of government, particularly since Orange Grove, and I think that if recommendations can be made to restore the confidence of tenants that things will be - I sense that, dealing with tenants every day, that there is that in the marketplace. One suggestion I do make and which is a positive one and which I think is worth looking into is if the government did fund an

organisation equivalent to the Shopping Centre Council, which is for the landlords - a similar organisation for the tenants.

What sort of powers that organisation should have I'm not sure, but there should be a body for the tenants that can collect data, that can represent tenants, because I feel that there is fear for them doing it themselves. An idea of how that could be funded would be the bond money, which is currently invested under the Retail Leases Act. There's a differential between what the tenants used to get if they - it was in a term deposit as to what the tenants currently get through the scheme; that differential could be used to fund this body.

It could also be a method then where there could be dialogue between the Shopping Centre Council and this organisation. I note there was talk about a voluntary code. I mean, I commend that, provided that there is a warning to say, "Look, industry, if you don't get this right we will step in," but if there isn't that sort of backing behind a voluntary code I don't think that that will have enough legs. I note also the recommendations regarding bringing certain conduct under the Trade Practices Act and if I could just make these comments: what is terrific about the current system is that there is compulsory mediation.

I think there are two issues: there's the monopolistic environment of the shopping centre - which I think is the real issue - and the second one is dispute resolution and how you deal with problems. I think the dispute resolution side is working and working well; in fact I think compulsory mediation should be used in many other areas besides retail leasing and retail leasing can be an example because 81 per cent of retail lease disputes either settle at mediation or shortly thereafter; that's an outstanding success rate.

I put the caveat here that, as long as any changes don't detract from a system that's working. Secondly, with the Administrative Decisions Tribunal: it's a cost-effective venue and, except in special circumstances, costs cannot get awarded to the tenant. The problem with taking proceedings under the Trade Practices Act is that if a tenant, who is already struggling, loses he could get a costs order against him of very significant proportions. They would be my concerns.

My final comment is the comparison to commercial tenancies, which I note in the recommendation. I think that that is a mistake. I think one significant difference between retail and commercial is that retail needs location and position is critical. Commercial tenants often can be located anywhere; they don't need a location; they don't feed off the trade of others, so I think they have very different concerns, particularly because that location is controlled by an entity which is like a monopoly.

Also, the market is more competitive in commercial tenancies. You don't have

to supply your own ceiling; you know, with a shopping centre you have got to supply your own shop front but, with a commercial tenancy, they do give you a door; you don't have to disclose your sales. I think it is a very different category and I think it would be a mistake to move towards commercial tenancies. In summary, I would say that from my experience the real injustice in this area is because of the monopolistic power, which unfortunately is used and it does create injustice to the tenant. I think the challenge is: how do we make the market more competitive?

DR BYRON: Thank you very much, Anthony. That's been extremely interesting and helpful. I appreciate the years of experience at the coalface that you've had on this, and I think you've touched the most salient points in the whole inquiry. I think we've got plenty of time for discussion if you've got time.

MR HERRO (HS): Sure.

DR BYRON: Can you spare us another half an hour or so?

MR HERRO (HS): Certainly.

DR BYRON: I think you really put your finger on the fundamental issue of the whole inquiry in terms of - out of the whole landscape of retailing in Australia the most contentious issue in terms of public policy is the situation of very small tenants in large shopping centres. There are issues elsewhere in retailing but it's that particular combination where there is this major asymmetry in information and market power, okay. As you've said the real issue is the market power of the shopping centre owners, landlords, managers. We've been asking ourselves, what's the source of that market power, and one explanation we've been given is that there is a relatively limited supply of high quality retail space and there is a very large number of existing or prospective retailers who'd love to get into it.

It's that imbalance in the supply and demand; not all retail space but in that highly desirable area that gives the owners of that space the ability to insert all sorts of clauses into the lease of contracts that you and I might think were outrageous. How can they possibly shift all the outgoings and even the landlord's solicitor's expenses are paid for by the tenants and so on? How can they do that? The answer is because if you don't want to sign the lease the next guy will. But if you think about the market power basically coming from the imbalance between supply and demand for good quality retail space, the next step in that logic is that's actually the market working; you know, the owners of the thing that's scarce can actually charge more for it because there are so many prospective buyers.

Now, what that means is the price goes up. What would it take to either increase the supply of high quality retail space, or reduce the length of the queue of

people who want to get into it? It seems to me that one of the reasons that there are a large number of applicants for retail space that gives the landlords this market power is a perhaps misguided belief that if you open a retail business in a major shopping centre you're going to make a monza. The evidence doesn't seem to support that. In fact we're getting a lot of evidence to the contrary and I'm sure you've seen cases.

So from your experience working with hundreds, perhaps thousands, of small retail tenants, do they go into this situation knowing that there's a fundamental imbalance of power in the sense that they're dealing with multimillion dollar global companies who have access to the best lawyers, the best accountants, everything else, and I'm just a humble shopkeeper, or got a dress shop, shoe shop, coffee shop, whatever, and how do I expect to negotiate a favourable lease term sitting opposite the 800 pound gorilla? Are they conscious of that imbalance and does it affect the way they go into it?

MR HERRO (HS): The first point I think - and I commend the Commission for picking up on amazing issues on zoning. I think the starting point is that, number 1, when the first shopping centres were set up the land would have been so much cheaper, so those people are in, I think there are high barriers to entry now; zoning being one of them, but also I think - and I think new shopping centres have to be very careful because I think the mix is critical to the success of a shopping centre, and the other thing is that if an existing centre already has all of the mini majors it's difficult to know how to set up a competing centre to that.

So it's a difficult question. Turning to the question about do tenants realise that, I think at the start it's not so bad though because they do their sums and at the start, "Yeah, I should achieve these sort of sales," and often at the start they are okay, but like the example I cited, it's year 3 when the competitor comes in. Some do have a fatalistic attitude, they sort of think, "I'll just sign the lease," but there is a lot of inward resentment when you talk to tenants. They really do feel the system is unjust and there's no-one to do anything about it. You hear that, like, all the time.

DR BYRON: Yes, we do.

MR HERRO (HS): I bet you do. And I hate to say it but often the ones that are complaining the most - I say, "Look, I hear you but to be frank your deal isn't that bad."

DR BYRON: Little consolation perhaps.

MR HERRO (HS): You know what, I don't know - yes, good advice does make a difference because often the tenants don't - like if someone's green they don't know that, yeah, there are contributions to fit-out if you try; certain terms are negotiable.

So yes, I think that - I suppose too sometimes to the credit of the tenant, if the tenant really does their homework they can negotiate better, but I think looking at the bigger picture - relaxing of zoning laws, yes; I don't know how we overcome barriers to entry, and I don't know - I think again we've got to be careful because new centres do open and don't succeed. So I think somehow we've got to focus on making that existing centre act more competitively or put in stops - because it is the fact that it's a monopoly.

In relation to prime space, I suppose large tenancies often don't go into shopping centres. Is it Harvey Norman or one of the big ones, they stay well clear of them and they do lots of marketing to drag the tenants to them. I mean I hear exactly what you say, they're in high demand. When you go to the opening nights they are so motivating. If you go there as a retailer you think, "If I don't get in that centre - that's how I'll make my name," so you do - I mean, retailers generally are people that are visionary, they want to succeed, they want to try, they're dynamic. They've got a lot of positive qualities, so I think they get romanced in to it. They don't look at the figures.

Like, even the compounding - I really think that the major landlords understand the effect of compounding of the increases each year, but the tenants say, "Oh, look, it's not that bad," but they don't realise that, yes, that's 26 per cent at the end.

DR BYRON: But as you say, the landlord's business is being a landlord and knowing exactly how the system works. The tenant's business is dresses or shoes, or coffee or books or newspapers or something, and they may negotiate a lease, you know, once every five years. The person they're dealing with on the other side of the table is doing it a couple of times a day perhaps, and has been doing it for decades. I mean if that's not an asymmetry - but to me that's probably an even stronger case of caveat emptor, that the need to do the homework and get expert professional advice when you know that the people on the other side of the table are absolute experts in this.

MR HERRO (HS): Yes.

DR BYRON: The point that sort of follows on from that is, you've made quite a lot of the disclosure of tenants' turnover data to the landlord and we've been giving quite a lot of thought to this, but just in the last few days I'm beginning to wonder if this isn't a bit of a furphy because imagine, for example, the legislation was changed and it was prohibited to require disclosure of turnover data, given that the landlords and their agents are experts in the business of running a shopping centre, I would think that they could go around and look at every shop by shop and say, "Yep, they're doing well. They could afford to pay more in rent. These guys aren't doing so well, there are very few customers in there, we can't put their rent up because they're right

on the limit already."

Even without disclosure of monthly turnover data I think the expertise of a centre management would be enough to basically know who's doing well and who's not.

I can almost do it and I'm by no means an expert in this. I think I can do it. This is also what happens on a strip. You know, somebody notices the Rolls Royce parked outside the toy shop and says, "There must be a quid in being a toy shop owner," and suddenly two or three more toy shops open just down the strip. That's got nothing to do with disclosure of turnover data. There are ways of reading the signals if you know what to look for. There has been an enormous amount of angst in this inquiry about the disclosure of tenant turnover information. I'm just wondering if that's a bit of a red herring. Would the landlords still be able to judge how much they could put the rent up before the tenant walks away, even if that turnover data wasn't disclosed?

MR HERRO (HS): I agree.

DR BYRON: Sorry, that was a very long statement, rather than a question on my behalf. We talked a lot about goodwill and we're asking ourselves what is the value of goodwill at the end of a fixed-term lease. As I said to Mr Kerrsmith before, with regard to the bookshop, if you can move across the road and down the street and all your customers come with you; if you can physically move your fit-out at the end of the lease, no problem. But if you don't have anything that's relocatable and you no longer have a site from which to run your business, I would have thought your business is worth approximately nothing the day the lease expires.

Over the life of the lease, every day closer to expiry date, the value of your lease is slowly declining. Yet, people are assuming the value of their business is going up all the time. Is that the sort of perhaps misperception; that people are thinking that, "At the end of five years I'm going to have an asset, my business, that's worth a great deal of money that I can sell," and then find the reality that the day their lease expires their business is worth nothing.

MR HERRO (HS): Yes.

DR BYRON: I can understand why they feel robbed but the question is whether they've actually been robbed and what the state can do, through legislation, to explain that. Is it a regulatory problem or is it an educational issue; that if people knew the day their lease expires their business is worth nothing unless they can get another lease, that would change basically the way they ran the business the whole time - whether they ran the business - wouldn't it?

MR HERRO (HS): I think it's a sad reality that what you said is exactly right. Two years left on your lease and you've got no guarantee that that lease will be renewed or, even if there is compulsory renewal that has to be offered, you've got no guarantee that it's at a rent that's sustainable to you. In the old days if you were on the strip you could even have the goal of owning the store and then you would reap that reward, but now the shopping centre really, I think, owns the goodwill; and all that capital increase which in the past an owner could then retire on, that's changed. Is it a matter of educating?

DR BYRON: The concept of goodwill, if you're on the strip and you've got options or if you own the building, absolutely true. But people have transplanted that concept into the shopping centre where it may not be quite as appropriate.

MR HERRO (HS): Yes.

DR BYRON: In which case, if more people understood that the day the lease expires the business is worth nothing, there may not be a long queue of people wanting to rent that space and that starts to address the imbalance of market power, perhaps, or am I being too optimistic?

MR HERRO (HS): No. It's a shame there's no way we can somehow give that goodwill back to the tenant. That would be the ideal. I don't know how to achieve that. It's a shame too that the face of retail changes because the problem with the way this industry is heading is only certain businesses will survive and the other businesses did have something to add to society as a whole but they will be gone. They're only surviving in certain locations. That's a different argument but I think it's, you know in the old days you'd have a village centre. People knew each other. As people get older there was interaction. The butcher remembered their name. That whole personal thing - and I think it's more a society thing, it's not just a shopping centre thing - but I think the society has replaced the village centre but it's sterile. There isn't that personal thing.

I think as a society it's not a good direction, and they're very noisy. If you go into a shop they're extremely noisy. No wonder we're so stressed as a nation. That's a whole new different thinking but - - -

DR BYRON: One of the interesting corollaries of what you're saying is that we said that the most egregious situation appears to be the case of the micro-tenant in the mega-centre, and yet that situation itself is increasingly becoming a rarity. Most of the big shopping centres that I've been through, they're basically all the same because they've all got national chains and franchises.

MR HERRO (HS): That's right.

DR BYRON: And you wonder whether you're in Brisbane or Adelaide because there are very few of those mum-and-dad sort of family businesses in the big centres.

MR HERRO (HS): Yes.

DR BYRON: In which case what we're seeing now is a situation where the very small family business - especially retailers - are in trouble; is it because they're basically on the way to extinction? I'm sorry, I don't mean that in a biological sense, but the concept. I mean, the suburban butcher shop seems to have almost faded because people buy their meat at the big supermarkets. That may well be regrettable but it seems to be the way that the society is going.

MR HERRO (HS): What I think we can do though, if we look at it now - bearing in mind I think the horse has bolted to some extent - I'll take Chatswood as an example. At least if you've got one centre at one end of the strip and another centre up the other, the strip still is alive. I think that's a positive. They're both marketed differently. One is positioned higher and one is positioned - I think that's not a bad compromise. In Parramatta it's a shame that - I think it was McNamara at the time - wanted to do a riverside development up one end and I believe David Jones was going to go in there, but unfortunately David Jones went into the other centre in the end and that development didn't go ahead. That would have been terrific because the strip would have stayed alive. I think that would be good for the community, and then you'd have two centres. Maybe that is the answer for the future.

We certainly don't allow concentration, for example, in the CBD. You should not have one shopping centre owner controlling all the centres. I mean, that will heighten the problem that's already there. So maybe they are constraints that in the future they're - that way there can be strips but how you legislate it, how you implement it - I'm sure the Shopping Centre Council would oppose thinking like that, but maybe not. Maybe in the long run there can be - I don't know.

DR BYRON: Thanks. We might move on from that point then. I appreciated your comments on registration and we will certainly be having more discussion over the next few days here, but even yesterday we were talking about the fact that if incentives and side deals are not disclosed, then you're actually generating misinformation which would actually give everybody inflated estimates of what the true market rental value is. Whether the answer is to put up the agreement for lease rather than the actual lease, or whether there's some system where all the information is disclosed - but if you systematically do not disclose the incentives, you're obviously biasing the information you're putting out there.

MR HERRO (HS): The sad part is too though, that regime itself could mean that the landlords give less incentives.

DR BYRON: Yes.

MR HERRO (HS): So it's a two-edged sword, isn't it?

DR BYRON: But would it not be a more accurate situation to say instead of charging you a rent of X and giving you a \$200,000 rent-free period or fit-out contribution or something, the lease will state the true rental equivalent, net, and that would actually provide honest information?

MR HERRO (HS): Yes.

DR BYRON: Anyway, I think you're right there, that it's something you have to look at much more carefully. You also referred to the tip of the iceberg problem and one argument is that we're only hearing from 100 or 200 or 500 people out of 290,000 small businesses in retailing.

On the other hand, as you say, there may well be thousands, tens of thousands, out there who have a grievance, but either are too busy surviving or who may be too frightened. The problem for us is, it's hard to know how many people are out there. You can't measure what's underneath the tip of the iceberg. We can't see them. They're not putting their hands up and coming forward, so it's speculation whether 98 per cent of tenants are happy, or whether it's only 10 per cent are happy, but the other 90-odd per cent, 80 per cent, are too scared to reveal themselves. We can only see what we can see.

So I understand, you know, that there may be a lot of people out there with concerns that we're not hearing from but how do we get a handle on that? I was very taken with your point about how to restore the confidence of tenants and I think I'd bracket with that how to put back some trust in the landlord-tenant relationship, because there does seem to be some, or a lot, of mistrust, distrust. I guess that was what we were groping towards when we floated this idea of if the major landlords and the major tenants organisations could get together and agree with what was a reasonable code of behaviour, and sign off on that, it might be a bit of a circuit-breaker and do that - you know, restoring confidence in the system. But the feedback that we've had so far is that nobody thinks it's going to fly, so I guess we're still looking for a mechanism to start to rebuilt trust in the system. So any further suggestions that you have would be greatly appreciated. Any ideas?

MR HERRO (HS): I think the idea of setting up a tenants body.

DR BYRON: But isn't the ARA already something like that?

MR HERRO (HS): They are, but maybe this body would have more power than, say, the ARA. Maybe it could be, to some extent - I don't even know if the body could have some connection to the ACCC or - there definitely needs to be - - -

DR BYRON: Well, the ACCC does have a Commissioner for small business, doesn't it, John Martin?

MR HERRO (HS): Do you know what I found myself? I don't think retail leasing is a focus with the ACCC. I don't abuse wasting their time. I've only referred one case recently to them, which I thought was of such magnitude, but I think we - yes, some sort of body. Some sort of tenants body. Yes, there is the ARA and they do a great job, but maybe a body that is resourced such that it can look at data, it can make recommendations, or maybe even that the body could be empowered to look into certain conduct.

DR BYRON: Well, how about retail tenancy units? Don't they do that sort of thing too?

MR HERRO (HS): They do, and maybe the answer is strengthening that existing body, which I think helps both landlord and tenant: provides lots of advice, are committed, give lots of information. Maybe the answer is to continue along that path, but strengthen that unit even more, but maybe give them the power to investigate abuses of market power and make recommendations to government. Maybe that is the answer, because the dispute resolution I'm under, that is working very well.

DR BYRON: That was the next point I wanted to come to, because you mentioned that you're involved in mediation.

MR HERRO (HS): Yes.

DR BYRON: I think you'll agree that in the draft report we've said that nationally, generally, the dispute resolution system may not be perfect, but it seems to be working pretty well.

MR HERRO (HS): Yes.

DR BYRON: Now, we've been roundly criticised for making that assessment by people who say, "Well, it didn't work for me."

MR HERRO (HS): Yes.

DR BYRON: So I'm very interested in your experience of how the mediation dispute resolution has been working here and whether you think it needs improving. If so, how?

MR HERRO (HS): Well, if the people that complain, let them look at the alternative. Try going to court, see how much it costs. You only make the lawyers rich and you could get a costs order against you. The beauty of mediation is you can to some extent restore the relationship sometimes - not always - but you can certainly resolve the dispute. The sort of statistics of 81 per cent are fantastic. But it's cost-effective, that's the big difference. Court is not cost-effective. The landlords can afford, but the tenants can't. I hate it when it's said to me, and it's said to me more often than not, "We'll bankrupt your client," because the landlord knows the costs of litigation.

Also I'll say this too: I find, in experience, when the landlord knows there is a case and they see that it has been well presented, my experience is they settle, and it does settle at mediation. The landlords don't want disputes too. They would want happy customers. And the point about unconscionable conduct - unconscionable conduct comes up every single day. Most of the time I find you're telling a tenant, "Look, that's unfair but it's not unconscionable. I'm sorry, you don't have a case."

DR BYRON: Yes.

MR HERRO (HS): There's no law to say that the landlord has to be fair, that's not the issue, but I think that those provisions do help. I think having the amendment - the amendments to the act, most are good. Some of them I think are there - sometimes I think the disclosure statement protects the landlord more than the tenant. I think there are certainly more amendments that can be made to the Retail Leases Act, but to the credit of both the landlord organisation and the tenants organisations they do work together, and with government - and amendments coming through every few years. So you credit both parties for doing that. I think that's working. I don't think dispute resolution, except maybe further educate the landlords and tenants of the availability of those services - I don't think that is the problem.

It's the use of the market power, like hiking the rent up to 38 per cent, but that sort of falls outside of that dispute - there's no legal ground to prevent a landlord from doing that. That's the problem, not the dispute part. Like, the previous gentleman's issue, we couldn't help him through a court process, or a mediation process. The sad part about his case, and I've seen it too, is they release the site at half the rent and that's the misfortune of his particular case. Obviously he has been a very successful tenant all those years. I suppose I'm frightened when the words "Trade Practices Act" are used, because sometimes you'll have a case where you

know that the tenant will get a better cause of action under the Trade Practices Act; for example, if there was misleading and deceptive conduct prior to the amendments to the Retail Leases Act.

So you will know that there's a better chance - they'll have a better damage claim. But you also know it will cost so much more to take that avenue. Years of litigation. So that's why I was frightened by using the words "Trade Practices Act" in the sense that I think it should be there as a safeguard for really big cases that, yes, go to the courts. Maybe increasing the jurisdictional limit of the ADT up to \$1 million would be a good idea instead of 400,000, but that part seems to be working. Again, I think there's dialogue from both sides. I think the shopping centre representatives put good arguments forward, the tenants' organisations put good arguments forward and then government considers them. I think that's such a positive part. It's the big picture, which I don't think - and it's the one that's the hardest to answer.

DR BYRON: Of course, but one of the criticisms that has been given to us about mediation is that there's nothing to stop a landlord going to the mediation and saying, "Well, we're going to stall," or something. "We think that the tenant is pretty fragile and if we just stonewall for another few months they'll go away." Now, I understand that in Victoria the way the system works under the Small Business Commissioner is that if one party doesn't mediate in good faith, or doesn't attend mediation, the Small Business Commissioner can make a certification.

So that if it goes to VCAT, VCAT will always award costs against the party that didn't participate in mediation in good faith, regardless of the outcome. So, as a result, you tend to get 100 per cent turn-up at mediation and good-faith negotiation, rather than the sort of stonewalling that we've been told about here in New South Wales. Does any of that sound plausible?

MR HERRO (HS): That sounds terrific, because it is true. I think with one mediation we had 13 parties recently and, yes, it didn't go anywhere and the tenant is dissatisfied. That's a great suggestion. The other may be to give the Retail Tenancy Unit the power to take action themselves or to prosecute certain conduct or investigate certain conduct. They may be able to disclose that on their web site, for example, the outcome - maybe methods such as that. Because it's true: mediation will not always work and, yes, you can get the landlord who takes a view that, "This person can't afford to fight," and yes, that's probably the weakness of the system. I suppose, knowing what the alternative is is what makes me favour that system.

DR BYRON: Sure.

MR HERRO (HS): But an improvement like that would be, I think, very welcome,

yes. I think also that disclosure is a great weapon, because like when the previous speaker talked about the unconscionable conduct - and I'm thinking of how many unconscionable conduct cases I have seen settled with confidentiality clauses. I think if maybe the Retail Tenancy Unit is given the power to disclose that - because I also believe that shopping centres do value their name, value their reputation, and don't want to be seen to be causing hardship to the tenant; they probably don't want to cause hardship to the tenant, if they can avoid it. Why would they want to? So a method of disclosure of harsh conduct and unsavoury practices, that in itself could be a great deterrent.

DR BYRON: In terms of disclosure, you mean like, "There were 10 out-of-court settlements involving company X during the last 12 months"?

MR HERRO (HS): Yes, that type of thing, or even like on the ACCC web site where they go into the case and they talk about, "This franchisor did this," because a lot of things - I mean, when you're practising you do see a lot of sharp practice, and often it's done at a lower level. It's done by a leasing representative. I can cite an example: there was one case where, of course, I asked the tenant, "Were there any representations made to you?" He said, "Well, actually, yeah. The agent said to me, 'Renew now. Don't go on the next floor because there won't be any tenancies there. We're shifting this category, keeping it on this floor.'" I said, "Okay," so we put that all in the disclosure statement, sent it back to the other side, and also the other side had put in the lease to say that there were no representations. I said, "Well, also we'll need that clause amended to contain this representation."

In the end, the landlord wouldn't execute the lease and they said, "Unless you remove it, we won't sign the lease, won't renew the lease," and I said, "Well, I think that's unconscionable conduct. You know, the disclosure statement says, 'Tell us the representations.' Your lease says, 'There were none.' You're trying to force us," so then it was threatened to go to mediation. In the end it settled, because the tenant met with the senior person of the landlord and that leasing agent was present and the tenant said, "You did tell me that. I'm not telling my lawyer something that - you told me that, didn't you?" and the agent in question, I think the more senior person, could see that the representation was made. So in the end a new lease was negotiated with favourable terms to the tenant, but only because the tenant was persistent and was prepared to litigate.

DR BYRON: And also had a knowledgeable adviser, and it does seem to me that there are a lot of people out there who will sign a lease for half a million dollars without being willing to pay even a thousand dollars for expert professional advice. These are the same people who would pay to have an NRMA inspection if they bought a used car but will sign a half-million dollar lease without getting the equivalent.

MR HERRO (HS): Yes, that's so true.

DR BYRON: I'm not saying that explains all of it.

MR HERRO (HS): No, but it's so true. I could cite another example that probably is worth citing, where a tenant had been for 10 years in a shopping centre - 10 years; real struggle. All the family worked in the business, really hard-working people. She had four years to run on her lease and she was a few days - I think two days after the 14-day period - late in her rent, because she was trying not to - asked the landlord not to implement the CPI increase because there were lots of vacancies and she had discussed it with centre management. Anyway, she was a few days late; she got served with a notice "Your lease is terminated." Anyway, it's now week to week.

Several months later, she got a notice saying, "You're now to make good your premises and vacate in two weeks." Her lawyer at the time recommended that she do it and, fortunately, she was referred to me and we did take on that case and we achieved a very successful settlement at mediation. The only reason the landlord did that - she was paying her rent - the landlord wanted to refurbish the centre and wanted to get rid of her, and she had one of the last remaining leases. What was frightening is to think that, yes, she was advised to actually go. I don't know, frankly, how you overcome that.

DR BYRON: Very sharp practice perhaps.

MR HERRO (HS): You know what? The landlord's solicitor said to me, if we'll drop the unconscionable conduct case they'll agree to reinstate the lease, and I said, "No, we want damages now. We want this, we want this. What you've done to this" - and it was a good outcome. But of course you also had a tenant who, when she came to me she said, "I've done the right thing." She had faith in herself. She couldn't speak good English but she knew that she'd done nothing wrong, so she had conviction as well, and I suppose that in any cause you need a person that's got conviction, and if the tenant doesn't have conviction - and it also, in fairness, should be said that not all tenants - like, it must be difficult for the landlord if you have a tenant who is not performing because of the tenant's conduct. It must be difficult for the landlord to run a successful centre. It's not always the landlord that's the bad guy.

Some tenants shouldn't be running their shops. The example you cited at the start: they don't do their homework, or they buy a business with a very high goodwill component when they don't understand that business. Purchasing a business in itself is a whole area of caveat emptor and people have, I think, a false impression that you buy a business and it just generates money. You can't protect some people against themselves and, in fairness to the landlord, the landlord cannot

be blamed for the tenant that's underperforming. But maybe, as the previous speaker said - I think he made a very good point - "Should the tenant be stuck in the lease, having their house exposed?" Does that help anybody?

This whole idea of a lease: I don't even know if it is the right legal document any more for a shopping centre. We talked about if the centre goes down, the tenant is locked in. It's a document that used to work, but I think there's something else that should be in its place; something linked to centre performance. But then having said that, I would rather not have the tenant have to disclose their sales, but then how would the landlord then disclose its sales.

DR BYRON: There is provision for risk-sharing, I guess - you know, having turnover-linked rental payments - but the argument against that is that the retail business isn't actually a joint venture between the landlord and the retailer.

MR HERRO (HS): Yes.

DR BYRON: But if they choose to negotiate a risk-sharing agreement - in both directions presumably - but I take your point. In practice, it will probably never happen. I think I've exhausted my list of questions and I've probably exhausted you. Thank you very much for the time. Are there any closing comments that you would like to make?

MR HERRO (HS): Commissioner, not really. It's a difficult issue to solve, because I think in many ways the horse has bolted; the centres are there; the monopolies are there. How do you make that environment more competitive? I think that's the question. I would say this to tenants as well: too much focus on dispute resolution. No, I don't think that's the issue. It's the bigger picture, the day-to-day problem faced by anyone that's involved in the industry - and even if it's hard to quantify, I think anyone in the industry - you cannot, whether you are black, white, whatever your religion, whatever your political persuasion, come away from thinking there is something unfair about how this monopoly system works. I think when you're in it every day that feeling is at the top of your mind, so what can be done to make that system fairer.

DR BYRON: Thank you very much. I know I have exploited your goodwill in picking your brains, but I value all your experience, both as a solicitor and as a practitioner at the coalface, so thank you for being so frank and constructive with your contribution today. Thank you.

MR HERRO (HS): Thank you, sir.

DR BYRON: I think we have got time now for a tea break and we'll resume shortly after 11.00.

DR BYRON: Thank you very much, ladies and gentlemen. If we can resume the public hearing. Next on the agenda we have Mr Simon Fonteyn from Leasing Information Services. Simon, if you would care to take a seat next to any of the microphones and when you're ready if you could talk us through the main points in your submissions - the first or the second one - and then perhaps we can discuss the issues that you've raised. Thanks very much for coming and for all the assistance you have already given us in terms of access to your database.

MR FONTEYN (LIS): Commissioner, deputy Commissioner, ladies and gentlemen: thank you for the opportunity to present to you today at this public hearing. This paper is prepared in response to the draft report released by the Productivity Commission in November 2007. Since the release of this report we have conducted further research and analysis, which we would like to table today. Our comments in relation to this draft report will be limited to chapter 8, which is Market Information Transparency and Disclosure, and chapter 11, which was the Commission's draft recommendations, which relate to market information issues, which is our area of expertise.

This paper will be divided into two sections, the first being, discussing draft findings of the report in relation to section 8, which is market information and transparency, and the second will be to make some recommendations on alternative methods of delivery of leasing data, particularly in states where leasing data is not commonly registered. I have also added some additional comments in light of evidence presented yesterday.

DR BYRON: Thank you.

MR FONTEYN (LIS): Before opening my address I would like to briefly introduce our company. Our company is known as Leasing Information Services and we have currently over 350 retailers subscribing to our product, which we estimate represents more than 40,000 shops, whether franchised or independent, Australia-wide. Whilst these retailers may not have made direct submissions to the Productivity Commission, they have participated in a number of surveys, which we will present to you today; therefore, I hope, that the Productivity Commission will take on board what they have said through us.

The first finding we would like to discuss is finding 1 on, "Leasing advisory and market information services have evolved to provide information to landlords and tenants" and that's on page 147 of the draft report. We would like to challenge this finding. Where retail leasing data is not commonly available - and when we say "commonly", it's not registered. In our survey we have found that advisory services, particularly to small tenants, have not in fact been able to evolve. The report states on page 146 that:

More information is available in jurisdictions where most leases are registered. Accordingly, the most comprehensive market information appears to be available in jurisdictions such as New South Wales and Queensland where lease registration by market participants is more prevalent.

In order to test this finding we conducted a survey of tenant representatives who specialise in providing retail leasing advice and who are not commercial-based agents. The reason we have excluded commercial agencies is that they tend to predominantly act for lessors and are therefore often conflicted in acting for lessees. The results of our findings shown in a table which I presented to the Productivity Commission, but I will read out for the benefit of this room, are: in Queensland there is a total of 13 pure tenant representatives; New South Wales, ACT, 15; Victoria, six; South Australia, four, and Western Australia four.

Of those lists the independents are approximately two less than the list I have read before. The big tenant advisory services are United Group Services and 5D. The results of our findings show that leasing advisory services have only evolved in states where there is leasing information available in the public domain. Leasing advisory and market information correlate, particularly in relation to companies that act predominantly for tenants.

Logically, it is virtually impossible for a tenant representative to provide comprehensive leasing advice without an extensive and up-to-date database of rental and other information. In Western Australia, Victoria and South Australia there is scarcity of registered retail leasing data. The number of retail advisory firms servicing the local state market is disproportionately lower than in states where leases are predominantly registered; namely, New South Wales, Queensland and the ACT.

Furthermore, if you exclude the major multinational companies - ie, United and 5D, who have their own private databases, as well as access to the public registers - the actual number of independent firms providing retail leasing advice is actually alarmingly low. Supporting this view is Martin Dempsey, head of the Western Australian Retailers Association, who has made a number of submissions to the Commission already. He stated:

There are a couple of firms in WA that act for franchisors; however, the lion's share act for lessors, depending on the group. This is because there is virtually no leasing data available, making tenant representatives reluctant to assist retailers as all the information resides with the landlords.

Furthermore, in the Australian Financial Review in October 2007 there was an article by Tina Perinotto reporting on the severe shortage of valuers in Western Australia willing to act for tenants in market rental reviews. This is a direct result of the lack of publicly available information. This is creating a major problem for retailers with market rent reviews, which predominantly affect retailers in major strips and the larger anchor tenants; therefore we would like to suggest to the Productivity Commission that they may reflect or adjust their statement as follows:

Leasing advisory and market information services have evolved in states where registered data is predominantly available.

The next finding we would like to challenge is in relation to the statement on page 159:

In some states where the incident of registration is higher, potentially related to reference clauses in existing retail tenancy legislation - for example, New South Wales - many retail tenants seemingly do not make use of the available information or of specialists who analyse and report on this information.

Once again, we challenge this finding. In order to analyse the availability and use of leasing information in Australia one must examine the history of retail leasing data and the providers who service the industry. Companies such as ours have only existed for a very short period of time; in our case, a little over three years. Prior to the introduction of Leasing Information Services registered leasing data was predominantly purchased from the Land Titles Office over the counter or via an information broker.

This process was expensive, time-consuming and frustrating. However, with the advent of advanced computer technology all leases in New South Wales, Queensland and the ACT are now electronically scanned by the relevant Land Titles Office and can be uploaded, electronically, in a matter of minutes. This has created the ability to provide data en masse on a scale that was not possible five years ago.

The considerable ease with which leasing data can now be obtained in the states where it is predominantly registered has meant that it is now cheaper than ever for small business operators who are obviously strapped for cash, to utilise the data. The fastest growing sector of users is in the one to 10 store category. These are wholly managed or usually managed by small independent operators. The access of these users to leasing data has been further facilitated by the introduction of discount services such as ours which allows small operators to access our database for a nominal fee. Given the history, we challenge this finding.

In our experience the uptake of leasing data has been phenomenally embraced by the retail leasing community. Evidence of this is in the subscription numbers to our service which number of 350 and include multinationals, investors, governments, industry groups, universities and independent operators. In total we estimate that the number of shops that now have access to leasing information data in New South Wales, Queensland and ACT either via the corporate franchisor, industry association, tenant advocate group, valuer, buyer's group or individual operator is in the order of 30,000-plus shops. This has been in the space of little more than three years. This gives some sort of indication of the demand for retail leasing data in both shopping centres and strips.

The next finding that we would like to challenge, page 159. It is unclear where tenants in these states and territories, namely New South Wales, Queensland, ACT and Northern Territory, are in a significantly improved negotiating position and consequently are making better business decisions than their counterparts in those jurisdictions where lease registration is less common. This is summarised again in the overview section on page 25 and is one of the major findings. In order to test this finding we conducted a survey of our own clients on 31 January 2008 which was provided to the Productivity Commission.

The criterion for selection was that the retailer must be a paying subscriber and must have a multi-site portfolio that consisted or at least one shop in a jurisdiction where data is predominantly not registered, ie Victoria, Western Australia, South Australia and Tasmania. The survey was conducted on the basis that the organisations would be kept confidential but they could make further comment to us which would be released. The survey questions were simple. The first one being, "If comprehensive and up-to-day retail leasing data were available in Victoria, South Australia, Western Australia or Tasmania, would you organisation find this information useful. Yes or No." The second question, "If comprehensive and up-to-date retail leasing data were available in Victoria, South Australia, Western Australia and Tasmania, would this allow your organisation to make better business decisions. Yes or No."

A couple of respondents commented further on the survey questions and I'll give you the results shortly. Andrew Knott, group property manager of Gazelle Corporation, stated, "Up-to-date retail leasing data in those jurisdictions where data is not registered would be extremely helpful in making valued business decisions. Without this data we are flying blind." Erin Green, national property manger of Medibank Private Ltd added that, "This information must be timely. Registered data needs to be done within a specified period otherwise the information is not necessarily relevant." Our survey consisted of 109 responses on the day with the results which I show below. 98 of the respondents, which is 90 per cent of the

participants, answered yes to both questions. One said no to both questions, and 10 did not respond.

So we estimate the 98 respondents that we got represents more than 10,000 stores across Australia. That's 10,000 shops who would like the benefit of having data in Victoria, South Australia, Western Australia and Tasmania. We then conducted a further telephone survey of some of the larger retailers to ascertain whether they would be prepared to pay for such a service, as obviously people always want something for nothing, but if they're prepared to pay then it's a different story. The response was 100 per cent positive response for subscription on the basis that it was of a similar cost to other states such as New South Wales, ACT and Queensland.

The second area in relation to the usefulness of data was an attempt by our company to find a correlation between dispute resolution and the availability of retail leasing data in those jurisdictions where data is not commonly available. We tested two areas, one was the availability of registered leasing data in relation to a speedier settlement of retail leasing disputes covering both leasing renewals and market rent reviews. I should point out here that the majority of speciality retailers do not have market reviews in shopping centres. However, the reverse is true in strips. The majority of retailers in strips contain an option and the option predominantly contains a market review.

This in fact forms the bulk of retail leasing market in Australia. We conducted a test in order to see whether in New South Wales, where registered data is predominantly available, and a similar test in Western Australia, where less than 5 per cent of all retail leases are registered. In New South Wales figures were supplied by the Retail Tenancy Unit which is administered by the New South Wales government. These revealed that of the last 379 mediation reports between July 2006 and December 2007, 208 had rent listed as an issue for mediation. Of these 208 80 per cent had been resolved within five weeks of applying for a hearing.

By contrast in Western Australia, we conducted our research into area of pharmacy retailers. We chose pharmacy retailers for two reasons. One, we had access to the Pharmacy Guild of Western Australia who provided that information to us, and the second was that pharmacy retailers carry a high proportion of market rent reviews in their leases. In several of the leases that we examined there were market rental reviews that dated back to 2005 that were subject to a Western Australian State Administrative Tribunal decision, which is known as WASAT, and remained unresolved. In one particular case a tenant had several reviews in the one lease still unresolved.

Again Martin Dempsey, chief executive of the Western Australian Retailers

Association, stated:

The assessments of landlords and tenants valuers in relation to market rent reviews results in 100 per cent disputation rate. Disputes are taking years to settle, as in many cases the WASAT does not have sufficient leasing data to make a decision. The WASAT then seeks to appoint a determining valuer. However, in many cases valuers are unable to carry out this task as there is insufficient public data to make the determination.

Whilst in Perth we also attended a meeting with the current head of the Western Australian Valuer-General, Mr Gary Fenner, Mr Dempsey and several state government ministers in relation to this particular problem. At the time of this meeting Mr Fenner, who incidentally collects rental information under the constitution of his position, was considering providing this data to the WASAT. The purpose of this would be to speed up the process of dispute resolution which had become completely unmanageable. There is undeniable evidence that the role of leasing data in speeding up dispute resolution process is highly correlated.

I know this for a fact myself because I am a registered valuer and I'm on the Administrative Decisions Tribunal Panel in New South Wales. In New South Wales the settlement of market rental disputes is smooth and sees the majority of disputes resolution in six to eight weeks. The process involves the appointment of a panel of retail valuers by the ADT. These valuers must be approved by the New South Wales division of the Australian Property Institute. As stated I'm on that panel. If a lessee and lessor cannot agree on a market rent review they must choose from a panel of three retail valuers. The valuer then appoints by the ADT, acting as an expert, with either party paying 50 per cent each.

The assessment is made within six weeks and each party has the right to have the initial valuation reviewed by another valuer whose final decision is binding. This results in a much more effective way of resolving disputes than in states where data is not freely available, so therefore we can categorically conclude that the provision of publicly available retail leasing data leads to a reduction in the speed at which disputes are resolved.

The next finding that we would like to discuss is on page 160 of the report. The regulatory structure for lease registration is already in place in all jurisdictions. While there is scope for market participants to use these provisions more fully, the Commission's preliminary assessment is that there appears to be little justification for further government intervention as there are currently no legal impediments to the registration of retail tenancy leases.

We, from our organisation, understand how the Productivity Commission may

have reached that finding because it is true that it is possible to register a lease anywhere in Australia. However, we know that there is overwhelming support for mandatory retail leasing data across every state in Australia. Supporting this view is the Shopping Centre Council's submission to the Productivity Commission which stated:

To improve the transparency of the retail tenancy market, there should be mandatory registration of leases in those states which predominantly do not require registration - namely Victoria, South Australia, Tasmania and Western Australia - to ensure details of rents or other lease conditions are publicly available to informed retailers during lease negotiations.

Similarly, the Australian Property Institute, which is the peak body for valuers, and the Royal Institute of Chartered Surveyors, both support registration of data across Australia, I suspect, for the reasons outlined previously. The Franchise Council of Australia and the Council of Small Businesses support it. Industry groups support it. In fact, it is hard to find an organisation that opposes it. What the Commission may be attempting to say here is that politically it may be very difficult for mandatory registration to be achieved in WA, South Australia, Victoria and Tasmania. This is, in fact, correct because registration is governed by the Real Property Act in each state and, being a matter for each state, is out of the jurisdiction of the federal government.

The federal government would be probably loathe to enter into battle with each state and force changes to their relevant state Real Property Acts. Further, the Law Society of Victoria has also raised the issue of costs in implementing such a mandatory data registration system. However, in the following sections, we would like to outline two ways of providing retail leasing data without any major additional cost to any sector, be it private or public. Furthermore, I would like to briefly address some of the other issues raised in yesterday's seminar, particularly in relation to the areas of incentives.

Incentives in retail leasing have been around for a long time. An incentive can be defined as any contribution that the landlord provides to the tenant which induces the tenant to sign a lease within that centre over and above the rental agreement in the lease. Incentives typically take several forms, including rent-free periods, contributions to fit-out, cash or some combination thereof. Incentives are typically reported in either an agreement to lease or a deed of agreement with approximately 20 per cent of incentive deals being recorded on a registered lease.

Incentives are well-understood by property and leasing professionals and are commonplace in other commercial markets such as commercial office and industrial property. However, for some reason, certain tenant advocates seem fixated on this

topic as though it is unique to retail property. Well, it is not. In fact, retail leasing incentives represent a much lower proportion of total rents than the commercial office market when compared to retail. Research undertaken by Leasing Information Services in 2006 indicated that incentives typically represent a very small proportion of rents over the term certain of the lease. Across the board of retail strips and shopping centres, incentives represent less than 5 per cent of the total net rent of a five-year lease.

In shopping strips, our research indicated in 2006 that incentives were predominantly confined to rent-free periods and usually corresponded to between three and six months rent-free for a typical five-year deal. Therefore, the idea that registration or equivalent is a waste of time because it doesn't capture the whole deal is just simply nonsense. Having up-to-date data provides invaluable information, for the reasons previously outlined. The other point is that you will never get all landlords and tenants to agree to disclose incentives. It is just not going to happen. The previous Productivity Commission or equivalent noted that, in that the ability of the lessee and the lessor to contract remains an issue and remains a fundamental right. So instead of throwing the baby out with the bathwater on this topic, let us just at least get a national system of retail data so that we can deal with 95 per cent of the retail leasing rents which are reported on registered leases.

I would also like to mention a point that was raised yesterday on other solutions that have been put forward in relation to providing retail leasing. There have been solutions proposed by various industry groups such as forcing landlords to provide tenants with secure access to their leasing data. This solution, in our opinion, will never work and will never be effective across all aspects of retail; in other words, strips and centres, for the following reasons. Strip shops are disaggregated and landlords will not collectively be able to provide this data. The second reason is shopping centre tenants will not agree to have their rents disclosed unless every retailer in the state must follow suit. The third reason: retailers would not be willing, necessarily, to trust this leasing data unless they could receive a copy of the deal to prove it, which would not be possible unless it was in the public domain.

Turning now to the last section of our paper, which is possible solutions to provision of retail data in states where it is not predominantly available. Solution 1: it is possible to create a fully-informed market for both tenants and landlords without having to register leases and effect major changes to the Real Property Act or the relevant legislation of those states. The easiest solution would be to create a summary form which details and summarises the main commercial terms of the lease such as the store area, commencement date, expiry date, term of the lease, option, initial rent, rent escalations, promotion levies, outgoings and such other terms as the industry sees fit.

Such a system already exists, in part, in Victoria and is administered by the Victorian Small Business Commission. It was set up originally to ensure that tenants were receiving their minimum five-year terms. The Victorian Small Business Commissioner already collects all retail leases and records information such as the pay to lease, the terms of the lease and any option period. This system could be augmented to capture those other relevant fields and release to the public. This would avoid the need to change the Real Property Act and would also streamline the leasing process as tenants and information providers would not have to wade through 60 to 200 pages of lease documentation to find the key terms.

Costs to the private and public sector would also be avoided, creating a fully informed and efficient market. Alternatively, if a particular state government did not want to administer the collection of this information, the private sector would be more than willing to fulfil this role, thereby relieving the burden on public sector resources. Such a system could be set up in each state by a simple amendment to the Retail Leases Act in those states.

Solution 2: another solution would be to facilitate the removal of non-disclosure clauses in relation to retail leasing data across Australia. The Productivity Commission has discussed this at length in their report on page 159. However, one correction: the Productivity Commission neglected to point out that nondisclosure clauses in Western Australian leases are prohibited under the Western Australian Retail Leases Act. Therefore, it would be technically possible to collect all the retail leasing information in WA. However, this would not be an efficient way to collect that information and keep it up to date. Given that the Western Australian valuer-general, however, already collects and updates this information under the constitution of its powers, why not simply allow the valuer-general to release this data, as occurs with residential data?

In Western Australia I can freely download any title in Western Australia for a fee, as I can in any state. This would have no additional cost to the public or private sectors and would not breach any nondisclosure requirements. We have not fully investigated whether Victoria, South Australia and Tasmanian valuers-general have the same power as the Western Australian valuer-general. However, we would assume that they would, given that they must rate shopping centre land. In order to do this they must collect retail rental information.

In conclusion, there is overwhelming evidence that the availability of leasing information in shopping centres and strips leads to more informed decision-making by retailers. It also expedites dispute resolution and facilitates the settlement of cases involving market rent reviews and leasing disputes where rent is mentioned. There is an unprecedented level of demand for leasing information in all states, but particularly in those states that do not have comprehensive lease registers, namely

WA, South Australia, Victoria and Tasmania. The availability of leasing information is supported by most of the major participants in the industry, including the Shopping Centre Council, peak retail bodies and industry associations.

It is possible to provide leasing data at no additional cost to the private or public sector in those states which do not have comprehensive lease registers, without changing the property act in each state. This could be achieved by simply amending the Retail Leases Act in each state to collect the key terms of the lease and disseminate to the public. This could be done either through the public sector or the private sector. Furthermore, it is also possible to allow valuers-general in WA, Victoria, South Australia and Tasmania to distribute their shopping centre leasing data to either augment or supplement, or augment or provide public data in relation to this area. I thank you for your time.

DR BYRON: Thank you very much, Simon. I suppose we might as well work through this in the same order.

MR FONTEYN (LIS): Yes, sure.

DR BYRON: Yes, we did say in the draft finding that leasing advisory and market information services have evolved to provide information. I didn't hear anything in what you said that contradicts that statement. Five years ago these leasing advisory and market information services didn't exist. Your company didn't exist and now it does. Therefore, these advisory services have evolved. We haven't said they've evolved to the maximum possible state that's conceivable, but there are now systems that are available to provide information to landlords and tenants in all states that did not exist three years ago or five years ago. Is that correct?

MR FONTEYN (LIS): No, my point was that leasing advisory and market information services have only evolved in states where registered data is predominantly available. That is the point I was trying to make.

DR BYRON: And we've met people in every state who provide leasing advisory and market information services to small tenants.

MR FONTEYN (LIS): Yes.

DR BYRON: And many of them were not in business five years ago or 10 years ago, and now they are. There are leasing advisory and market information services in all states that did not exist before, and your table confirms that there are at least four or six in South Australia for example who weren't there five or 10 years ago.

MR FONTEYN (LIS): No, that's correct.

DR BYRON: Okay.

MR FONTEYN (LIS): The point I'm trying to make is that there's a disproportionately large number of advisory services, particularly in New South Wales, Queensland and the ACT, when compared to WA, Victoria and South Australia. Western Australia and Victoria are huge retail markets. Victoria, I believe, has more than 25 per cent of the total retail shopping centre in Australia. So to say that it's evolved is somewhat - this is my point, that when you think about Victoria, which has up to 25 per cent of the total market of retail shops in Australia, and they've only got six representatives - - -

DR BYRON: Who were not there five years ago.

MR FONTEYN (LIS): Yes.

DR BYRON: That's the point. We did not say that there are equal numbers in every state. The table that you have presented does not in any way contradict, logically, the statement we have made in that these new advisory services have come up, okay? Now, your second point, the fact that your company itself didn't exist three years ago, is a further example of how these systems are appearing to provide information. Our second finding that you took exception to is that there are many retail tenants who seemingly do not make use of the available information, and of the specialists who analysis and report on the information. It's terrific that you provide advisory services to 30,000-plus retail shops. Out of all the shops in New South Wales, Queensland and the ACT this is still a relatively small percentage. We have spoken to many people who have not heard of your organisation, who do not make use of it, who didn't know that there are organisations that can provide small tenants with expert advice.

So the fact that you've got a rapidly growing, very helpful, dynamic, useful, interesting, worthwhile business is terrific, but it doesn't negate the fact that there are still an awful lot of people out there who should be using your services, or services of companies like yours, but who don't. Now, that was the point that we were trying to make, that if you had every small retail tenant signed up, then our statement would be patently false. But what we're saying is that there are still an awful lot of people who don't use the systems that are available. More of them should, whether it's your company or other companies.

MR FONTEYN (LIS): Yes, but the point of - sorry, just to reiterate or go back on it - the point I was trying to make there was that the services such as ours, or there are other members in this room who provide such services, they do not have a long history in Australia. I've just made that point.

DR BYRON: So did we.

MR FONTEYN (LIS): Yes, one of the points that I'm trying to highlight is that the availability of information en masse in any state, whether it be New South Wales, Queensland, the ACT - forget about the states that don't provide data. That just wasn't available. The reason in part why more people have not used services like myself or other prominent members, Mr Spring, et cetera, is because in part that information was not available or could not be provided in a timely manner three to five years ago. It has only been with the advent of the Internet and computerised systems at the Land Titles Office that such services actually exist. So if the Land Titles Office would have automated their leasing databases 10 years ago, the proliferation of services like ours would be probably 10 to 15 times what it is now.

If you examine, for example - in the States I recently had the opportunity to meet a company called CoStar. CoStar is the world's biggest commercial data provider. They cover retail, they cover office - those companies have been around 30 years. The majority of tenants in America, whether they're represented by a franchisor or an independent, have access to that data. It's just commonplace. Whereas here, we don't have that information. You mentioned Craig Kelly was here yesterday. He had a book called Dollars and Cents.

DR BYRON: Yes.

MR FONTEYN (LIS): That information in America has been around for a long time. Here, it's new. So if more people - my point is, which I won't repeat again - but my point is that the systems have only been around to provide this data en masse over the last short period of time.

DR BYRON: Yes, and our point was that there are still an awful lot of people who don't know about it, who aren't using it and probably should be, which is a different point.

MR FONTEYN (LIS): I don't disagree with you.

DR BYRON: Thank you. The third point is about, would more information be useful. I'm amazed that you didn't get 100 per cent yes to both questions.

MR FONTEYN (LIS): No. It was 90 per cent.

DR BYRON: All but one response. I mean, those questions, I still think, are not terribly different from asking people, "Would you like to pay less tax?" I'm glad that it's confirmed what I think is obvious - that people would rather have more and better

and more up-to-date information than not have it. I would have thought that that was incontrovertible and that's why I say I'm surprised that anybody would say no to that. We're in absolutely no disagreement at all about that. If we move on to the - - -

MR FONTEYN (LIS): But hold on. Sorry to interrupt you, but you do say in your report in relation to your finding that there's - it's unclear whether the provision of data leads to significant improved negotiating position and consequently tenants are able to make better business decisions than their counterparts in those jurisdictions where lease registration is less common.

DR BYRON: Yes, and your survey simply doesn't answer that question at all, no offence - at all. We are looking for evidence in terms of outcomes; not in terms of statement of intent.

MR FONTEYN (LIS): Right.

DR BYRON: If you say, "Let's look at the level of disputation, the level of business failure - whatever. We've got some states that have this system, some states that don't. Let's look at the difference between them. Is there any statistical difference? We can't see any. Is there any difference of what was happening before registration and what's happening after registration? We can't see anything," so what we're saying is that in terms of looking at the results you can't really say on the basis of the evidence that it has made a substantial difference in the results. In terms of, would people like to have more and better data? Of course, everybody would.

If we're going to make a recommendation that the other four jurisdictions should follow what New South Wales, Queensland and the ACT have done, we need to have some sort of evidence so we can say, "Look at the difference it made. Before it was like that and now it's like this; therefore it works. You can see the results."

MR FONTEYN (LIS): Okay.

DR BYRON: If we had that information that you can say, "Look, this is New South Wales, this is Victoria. See the difference."

MR FONTEYN (LIS): I have attempted to make a survey there. If you want to draft your own survey in the way that you want to word it I'll give you access to 350 retailers who have multi-site portfolios and we'll do a test. I can give you the results.

DR BYRON: Thanks. We'll take that up.

MR FONTEYN (LIS): Well, take that up, by all means.

DR BYRON: I think there's a more interesting question - - -

MR FONTEYN (LIS): I'm not experienced in surveying. I conducted this survey on that day that I spoke to you - - -

DR BYRON: Yes.

MR FONTEYN (LIS): - - - and I followed up with another question, which we discussed. If you wish to avail yourself, as experienced reporters on the government, you will be able to frame it in a much better way than I can.

DR BYRON: Fantastic. Thank you very much, Simon. We'll take you up on that.

MR FONTEYN (LIS): Okay.

DR BYRON: Your statement later that, "We know there is overwhelming support for retail leasing data across every state in Australia." I agree completely with all the organisations that you have listed said that they have supported this. What I am wondering is, if it's so obvious to everybody and everybody is in favour of it and nobody is opposed to it, why do they need the Productivity Commission to tell them that it should be compulsory? I mean, every retail tenant in Australia has the option of registering their lease if they want to.

MR FONTEYN (LIS): Correct.

DR BYRON: Is it actually compulsory in New South Wales, Queensland and Victoria?

MR FONTEYN (LIS): No, it's not compulsory.

DR BYRON: It's common. It occurs most of the time.

MR FONTEYN (LIS): It's common because it relates in New South Wales, Queensland and the ACT to the lease being recognised in the courts other than in the court of equity.

DR BYRON: Yes.

MR FONTEYN (LIS): It relates to indefeasibility of title issues.

DR BYRON: Yes.

MR FONTEYN (LIS): Then there are further provisions in New South Wales under the Retail Leases Act to register it within a certain time frame if they are required to do so.

DR BYRON: Yes, okay, but that then takes us on to your two alternatives because, as we discussed, the Law Institute of Victoria thought that using the existing leases - for some fairly complicated technical reason they weren't in favour of compulsory registration. I'm very impressed by the two alternative solutions that you have put up and I think they are both well worthwhile exploring in more detail. As you say, the Victorian Small Business Commissioner is already collecting a lot of this information, but apparently not using it.

MR FONTEYN (LIS): Correct.

DR BYRON: I thought your Western Australian example was extremely interesting and that the Western Australian state government appears to have allowed this horrible backlog to build up when another part of the same state government apparently has the key that could have unlocked the whole log jam in their pocket and it's a bit surprising that they didn't think of a way of unblocking that earlier, but the two alternatives that you have put up I think are extremely helpful and positive and both warrant very serious consideration, so I congratulate you on them.

MR FONTEYN (LIS): Thank you. Can I just make one point. In relation to Victoria - having had some experience with both - the Victorian Small Business Commissioner actually only collects part of the information - - -

DR BYRON: Yes.

MR FONTEYN (LIS): - - - but from my experience it's not well administered and it's virtually not used, so it is almost a redundant system and it's creating, quite rightly, an additional level of bureaucracy that doesn't really serve any purpose. It could, however, be augmented to become incredibly useful and I'll tell you why: it's done over the Internet. The information is updated over the Internet, which allows information to be done in real time and en masse. If it was a matter of sending in pieces of paper, again I would start to say we're going to have a paper trail problem here, but because it's already automated and electronic and there is a database behind it it allows for the mass capture of that information.

DR BYRON: Yes, I think that's exactly right and the Small Business Commissioner told me that the reason they don't maintain the database very well is because they have no use for it at the moment; that they are required under law to collect this stuff, but why would you spend a lot of resources maintaining it? As you say, with very minor additions, it could be made into an extremely valuable and

useful database and then it would be worth really finetuning the thing and making it work brilliantly.

MR FONTEYN (LIS): Yes.

DR BYRON: The core of it is there already.

MR FONTEYN (LIS): Yes.

DR BYRON: I'm glad you made those comments about the existence of incentives and the discussion that we had here yesterday about whether registration of the lease could actually be misleading if it consistently overestimated the true market value by ignoring all the incentives and free periods. Just to clarify that I understand the point you're making, are you saying that it's possible to fairly reliably adjust and say, "Okay. If the nominal rental on this lease is X, if you take into account all the side deals, it's probably 95 or 96 per cent of X"?

MR FONTEYN (LIS): In fact that's exactly right.

DR BYRON: If the bias is consistent we can correct for it.

MR FONTEYN (LIS): Correct, and that happens. I'm a valuer and the actual technical term is "a face rent", so a face rent means that it's the rent reported on the lease, but there are incentives and it's common not only in retail - it's common in industrial, it's common in commercial - where the tenant receives an incentive, which may reflect supply-demand issues and which then result in what is called "an effective rent".

DR BYRON: Yes.

MR FONTEYN (LIS): Valuers adjust for this all the time, where they look at the face rent; they make an allowance for a market level of incentive and they arrive at the effective rent.

So the point I was trying to make there is that you'll never get landlords and tenants to agree to abolish or put all incentives on a lease. It's just not going to happen, because they have that fundamental right to contract on that basis. It's much more prevalent in actual fact in other markets, being office; incentives can represent up to 20 to 25 per cent of the actual deal. In large office deals the incentive may be 20 to 25 per cent of the deal. In retail we're talking about a much smaller proportion. In shopping centres the level of incentives are generally somewhat higher than on strips. Strips tend to be more in the form of a rent-free. To make another point, approximately 20 per cent of those incentives are already reported on the lease.

DR BYRON: Yes.

MR FONTEYN (LIS): So for example, I can name you a few CBD landlords who actually show clearly on the lease what the incentive is, whether it be a contribution to a fit-out or the rent-free, but it's true that 80 per cent don't. They're normally contained within a side deed or an agreement to lease.

DR BYRON: Yes.

MR FONTEYN (LIS): Unless you want to start registering the agreements to lease, which I think would be an administrative nightmare - I mean, it's already hard enough to get people to register the lease. If they're going to have to start registering agreements to lease, then we need to start registering everything. You know, it's going to become information overload, and there are industry groups that report market level of incentives for retail, for any sector. If you just log into any major valuation company - I'll give you an example, LandMark White, they will show you what the level of market incentive is by centre type, by state, so you can see in New South Wales for regional centres the market level incentive is 10 per cent. So it's quite easy to effectively adjust to get the effective rent without having to simply change the whole system.

DR BYRON: Yes.

MR FONTEYN (LIS): So the point being: don't throw the baby out with the bath water.

DR BYRON: Good.

MR FONTEYN (LIS): Just one other point in relation to incentives and I won't keep you because I know you're busy. Incentives come and go. So incentives in times of high supply exceeding demand, incentives tend to be much bigger.

DR BYRON: Yes.

MR FONTEYN (LIS): But at the moment because you've got such a high demand for shopping centres, incentives are not a big deal. They might be five to 10 per cent at maximum of the rent. So you're not talking about something that's going to change people's fundamental decision whether or not to go into this centre. The other thing is major advocates like, for example there is a prominent advocate just there - any advocate worth his salt will say, "Okay, this is the face deal," but actually they'll ring up both the tenant and the landlord and say, "Why did you get an incentive?" Of course they tell them.

DR BYRON: Excellent, because that brings me into the last sort of question of clarification. We talk mainly about a way of generating reliable, valuable, timely information to inform the marketplace based on the information contained in the leases. What we were wondering is are there other ways of generating useful, reliable information. Now, the people that we met with in Victoria and South Australia and in Perth, when we asked them how they get information, given the absence of lease registration and so on - a whole variety of systems. One guy says, "I go around, I talk to people, I buy somebody a cup of coffee and he tells me what he's paying. I talk to his neighbour," and eventually over time they build up their network of informants and they would claim that even though there is nothing on paper, there is no web-base system, they have a pretty good idea of what a certain type of space in a certain shopping centre in Adelaide ought to go for.

As the demand increases for that sort of advisory service these people are finding it worth the while to send out more spies to talk to more people; buy more people a cup of coffee or a beer or give them a free glass of champagne if they tell them more - whatever. So there are ways of these adviser people getting good, timely information that they can give to their clients, even without lease registration. Now, I know your system is based on getting the information off the databases. Firstly, would you agree that there's more than one way to provide information for tenants? I guess you would argue that your system based on the leases is much more reliable than the others.

MR FONTEYN (LIS): I would say one thing. This is an inquiry into retail leases in Australia, not just shopping centres.

DR BYRON: Yes.

MR FONTEYN (LIS): So we've got to cover the whole of the gambit. With shopping centres, the majority of leases in specialty retailers do not have market rent reviews.

DR BYRON: Yes.

MR FONTEYN (LIS): I'll tell you why that's important. With a market rent review you need to provide evidence because you need to get a valuer like myself to actually be able to write a report. Now, myself as a valuer - if I go and ring one of my clients, say for example, Gloria Jeans, and say, "What are you paying over in Colonnades in South Australia?" They'll tell me. "Can I use it in a report?" Absolutely not. I cannot use that information. It's only hearsay. I cannot categorically put that into a report and if I did that I'd get my rear end sued off.

DR BYRON: Yes.

MR FONTEYN (LIS): Because the information, whilst it's hearsay, cannot be used as evidence.

DR BYRON: Yes.

MR FONTEYN (LIS): So that's the point that - - -

DR BYRON: I get it.

MR FONTEYN (LIS): - - - the valuers who are a very important part of dispute resolution, cannot use information on hearsay. In fact in South Australia, if you go - I did this survey myself where there are secrecy clauses - there are a number of companies who do leasing advice, but they're loath to give that information out to you unless you're a client to them because they're scared because there's no freedom of information - in other words there is a requirement under the contract to keep that information confidential, they're not allowed to release that information en masse.

DR BYRON: Yes.

MR FONTEYN (LIS): So whilst it might be somewhat of a solution to a small section of the retail community, namely top-end shopping centres, where 75 per cent are controlled by franchisors, it's not a solution for the whole of the retail market.

DR BYRON: And if I was asked information, hypothetically, on what Gloria Jeans is paying in that particular spot, and only for the purpose of telling somebody else who is looking for a space in that same centre, "You might try a price of about X because I hear that somebody else is there," you can use that sort of anecdotal, but not in a formal sworn valuation because it's not on public sources.

MR FONTEYN (LIS): Yes, but there are also other issues in relation to that. If, for example, a tenant advocate collects the information on behalf of - because the companies represent major chains and they do collect that information in their database. They do not necessarily have the permission of the tenant or the landlord to release that information.

DR BYRON: Sure.

MR FONTEYN (LIS): So there can become serious issues down the track if that information is released without their permission, particular in states such as Victoria and South Australia where there is something that prevents them from doing so. That's why I mention in my report in WA there is actually a ban on secrecy clauses.

DR BYRON: Yes.

MR FONTEYN (LIS): Not a ban, but - - -

DR BYRON: Yes, the legislation prohibits non-disclosure clauses.

MR FONTEYN (LIS): Yes.

DR BYRON: Yes, I knew that.

MR FONTEYN (LIS): So whilst it might help a number of small advisory companies who collect that information, it won't help the general mums and dads who are basically often not able to afford to engage a prominent tenant advocate to represent them. In my system I can provide - and this is what I've said in my report - someone who has got one shop with 10 leases for \$300. That's less than the replacement cost of going to the Land Titles Office and getting that information themselves.

DR BYRON: Yes.

MR FONTEYN (LIS): It will cost them \$600. So I can do that. I'll give you an example. I just did that for a butcher down at Shellharbour. He had never heard of this service and he was certainly not going to engage an advocate. He said, "I've spoken to a few advocates. I can't afford it." I said, "Well, this is what the rents show." He said, "Show me a report," so I did and he paid \$300 on the spot. Now, as I said in my submission the fastest growing area of demand is in the zero to 10 shop market.

DR BYRON: Yes.

MR FONTEYN (LIS): They're all buying this data now because it's at a relatively cheap cost and it allows them to be able to make an informed decision.

DR BYRON: Good. Excellent. Thank you very much. Was there anything else you wanted to say in closing?

MR FONTEYN (LIS): No. I think I've said enough.

DR BYRON: We will certainly come back to you in terms of what we discussed before about looking at ways of monitoring the results, the outcomes that have changed since people have had access to information.

MR FONTEYN (LIS): Yes, absolutely.

DR BYRON: I think that's a very constructive suggestion of yours, so thanks; and thank you very much for sharing all your expertise and having time with us already. Thank you for coming.

AT 12.32 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY

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