

REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE NO. 4

**INQUIRY INTO THE APPROVAL OF THE DESIGNER OUTLETS
CENTRE, LIVERPOOL**

At Sydney on Monday 6 September 2004

The Committee met at 5.30 p.m.

PRESENT

The Hon. J. A. Gardiner (Chair)

The Hon. J. C. Burnswoods

The Hon. K. F. Griffin

Ms S. P. Hale

The Hon. D. E. Oldfield

The Hon. P. T. Primrose

The Hon. J. F. Ryan

JOSEPH D'AGOSTINO, Solicitor, 18 Nelson Street, Fairfield, sworn and examined:

CHAIR: In what capacity are you appearing before the Committee? Are you appearing as an individual or as a representative of an organisation?

Mr D'AGOSTINO: I am appearing as an individual and a representative of D'Agostino Solicitors, solicitors for Gazcorp.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr D'AGOSTINO: Yes, I am.

CHAIR: If you should consider at any stage that certain evidence you may wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request.

Before we proceed to questions I wish to make an opening statement. During earlier hearings I made extensive comment on the sub judice rule in relation to matters to be considered during hearings. The witness today has indicated that he may raise issues of legal professional privilege and sub judice during his evidence, so I will repeat my comments in an abbreviated form. It is possible that some of the issues raised by witnesses during the hearing may be the subject of legal proceedings elsewhere, such as the Land and Environment Court, the New South Wales Court of Appeal and the Independent Commission Against Corruption.

The sub judice convention has been the subject of a number of rulings in the House. Put simply, the convention requires the Chair to judge whether proceedings of the Committee are likely to prejudice a matter before the courts or the integrity of the judicial process. As a parliamentary convention the onus falls on the Chair to adjudge whether any matter is sub judice. As former Legislative Council President Johnson ruled, "the Chair may decide to intervene on its own volition or may be called upon to decide on a point of order brought to its attention. If the matter is before a court, in order to make a decision whether the public interest outweighs the possible prejudice to the case, the Chair must be apprised of the specific matters before the court and the Chair must hear enough" to decide whether the matter may proceed.

Therefore, if a witness or a member objects to a question on the grounds of sub judice, I propose to hear argument as to why answering the question may lead to a substantial interference with the judicial process, and make a ruling on the basis of the arguments presented. As with other inquiries, the Committee will consider any requests by witnesses or Committee members that evidence be heard in camera. If a witness does give evidence in camera following a resolution of the Committee, however, they need to be aware that following the giving of evidence the Committee may decide to publish some or all of the in-camera evidence. Likewise, the House may, at a future date, decide to publish part or all of the evidence even if the Committee has not done so.

The Committee previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the broadcasting guidelines are available from the table by the door. In reporting Committee proceedings, the media must take responsibility for what they publish, including any interpretation placed on evidence before the Committee. In accordance with these guidelines, while a member of the Committee and witnesses may be filmed or recorded, people in the public gallery should not be the primary focus of footage or photographs.

Under the standing orders of the Legislative Council, evidence and documents presented to the Committee that have not been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by a Committee member or by any other person. Witnesses, members and their staff are advised that any messages should be delivered through the attendant on duty or through the Clerks. Please turn off any mobile phones during the hearing.

Mr D'Agostino, thank you for your forbearance in waiting while the Committee had a lengthier than scheduled deliberative meeting. Do you wish to make a brief statement before we proceed to questions?

Mr D'AGOSTINO: Yes. The statement I wish to make is that most, if not all, of my communications and my knowledge and dealings with Gazcorp Pty Ltd are subject to what I would consider legal professional privilege and client confidentiality. My dealings with them are virtually exclusive in respect to the issues relating to the leases. Any disclosure, or any possible disclosure, would result in my disclosing to the Committee what is part of an ongoing and partially formulated advice that both myself and my instructed counsel are in the process of formulating. It is still in the process of being formulated, it is partially formulated; it is certainly not settled yet, and it has not been communicated to my client. This is the issue that I have before me. That is the statement I wish to make at the outset.

CHAIR: We may have some questions that may not go to any question of privilege or confidentiality. Perhaps we could deal with such matters in the first instance, and then if we veer into an area in respect of which you believe we should proceed to hear further evidence in camera, please indicate that fact and the Committee will consider such a request.

Mr D'AGOSTINO: Yes. If you will bear in mind that I may need to seek advice from counsel.

The Hon. PETER PRIMROSE: We will need to take advice from the Clerk in relation to the status of a claim of legal professional privilege if evidence is taken in camera.

CHAIR: Yes. Will now proceed to questions.

The Hon. JOHN RYAN: Were you the solicitor who acted for Gazcorp in the preparation of any or all the leases involved with the designer factory outlets?

Mr D'AGOSTINO: Yes, I was.

The Hon. JOHN RYAN: All of them?

Mr D'AGOSTINO: Yes.

The Hon. JOHN RYAN: You have acted for Gazcorp in the preparation of all the leases that have been completed?

Mr D'AGOSTINO: I have acted for all of them in respect of the designer outlets centre, as opposed to the mega centre, which is a completely different building.

The Hon. JOHN RYAN: Can you tell the Committee how many leases are involved?

Mr D'AGOSTINO: Could you explain what you mean by "leases"? I think you used the phrase "completed" leases?

The Hon. JOHN RYAN: First of all, are there any leases that have been completed?

Mr D'AGOSTINO: What do you mean by "completed"?

The Hon. JOHN RYAN: Signed by both parties.

Mr D'AGOSTINO: That question goes to the heart of the advice, or part of the advice, that we are presently formulating as to Gazcorp's position with the leases.

The Hon. JOHN RYAN: Can you describe to the Committee how a retailer would go about signing a lease with a tenant and what are the requirements that the retailer is expected to comply with?

Mr D'AGOSTINO: Generally?

The Hon. JOHN RYAN: Generally.

Mr D'AGOSTINO: We are talking about a notional centre and what would be the norm in the preparation and execution of a lease?

The Hon. JOHN RYAN: Correct.

Mr D'AGOSTINO: What would normally happen is that the premises would be advertised, most likely by an agent. That agent, or possibly the centre owner or operator, would then, upon the conclusion of some form of negotiations, enter into a disclosure statement as required by the Retail Leases Act. They would enter into that disclosure statement between the tenant and the landlord. That disclosure statement and the contents therein would then form the basis of the lease preparation. The lease would then be prepared by what I would imagine to be the solicitor for the landlord, and it would then be forwarded off to the lessee's solicitor.

I would safely say that in 99 per cent of cases the lease would be always subject to the contract, which means that there is usually no binding agreement until all parties have met their obligations under that lease. The lessee would have certain obligations to provide correctly executed documents—insurance policies, bonds, and whatever the case may be; it is different in every single situation. Once all the requirements have been met, the lessor would execute a lease, which would then be forwarded off to the bank, which holds a first-registered mortgage over the title to the land that the shopping centre sits on. The bank would then consent, if all the requirements have been met, and the bank would then produce a certificate of title at the Land Titles Office and the leases would be registered. Upon a lessor's solicitor acknowledging that the requirements had been met, normally a key would be handed over—but that is at the lessee's discretion, usually when they want to take possession.

The Hon. JOHN RYAN: Is it possible that the lessee can take possession of the shop prior to a lease being signed?

Mr D'AGOSTINO: I have seen that done in the past, yes.

The Hon. JOHN RYAN: Is it common?

Mr D'AGOSTINO: I would not say it is common. I would not recommend any of my lessee clients, but it is a matter for them. They are all separately independently advised.

The Hon. JOHN RYAN: At which point in that procedure you just outlined does the lease become a legally binding document on both parties?

Mr D'AGOSTINO: I have just been advised there is something in the order of 900 cases which debates when a—what have you: a number of cases.

The Hon. JOHN RYAN: So there is a variation?

Mr D'AGOSTINO: With debate, yes.

The Hon. JOHN RYAN: Are there any legal requirements of what must be included in a disclosure statement? If so, where are they outlined?

Mr D'AGOSTINO: The Retail Leases Act provides a pro forma of the disclosure statement. However, it also states that it does not have to be in that form. I believe that it is possibly even still undecided. I am not aware of any cases in what other forms it can take but it is clear that it does not have to be in that form. But it certainly, the Retail Leases Act, does not provide for instances of updating a disclosure statement, and it is silent in the sense that it does not provide for when circumstances may change, and it does not make any other provisions that it has to be current right throughout the term the negotiation, I would imagine. So it basically says it has to be current at that time.

The Hon. JOHN RYAN: When the disclosure statement is first—

Mr D'AGOSTINO: Given—

The Hon. JOHN RYAN: passed to the potential lessees?

Mr D'AGOSTINO: There is no other obligation to update it and there is no actual obligation to say it must be in a particular form.

The Hon. JOHN RYAN: If a disclosure statement is made, for example, I imagine that legal action of the nature that Westfield took against the factory outlets, would it be a requirement that the retailer would have to disclose that in the disclosure statement?

Mr D'AGOSTINO: That, unfortunately, is part of what I am attempting to formulate.

The Hon. JOHN RYAN: I do not need you to give me advice about that matter. It has been said in the media that that sort of information is required to be disclosed in the lease. Is that true?

Mr D'AGOSTINO: I would not think I am able to answer that question on the basis that I do not think there is even any legal precedent about that, with the exception that I can say that, you know, disclosure—there is no predefined what has to be disclosed, or what not matters have to be disclosed. But I cannot and that question.

The Hon. JOHN RYAN: Is there a variety of opinion as to whether legal action against a lessee has to be disclosed, and how it is to be disclosed in that disclosure statement?

Mr D'AGOSTINO: I would think there is a variety of opinion of which I am still formulating one. I do not have an opinion about it yet and I believe I think it is untested legally.

The Hon. JOHN RYAN: Section 11 of the Retail Leases Act provides up to 50 penalty units for a lessor under a retail shop lease who is guilty of an offence if subsection (1) is not complied with in relation to a lease. Subsection (1) states:

At least 7 days before a retail shop lease is entered into, the lessee must be given a disclosure statement for the lease.

And it continues. Are you aware of any circumstances with regard to direct factory outlets in which the law—in terms that it could attract penalty units—has not been complied with? I would have to say, I will have some difficulty if you are not at least able to answer that.

Mr D'AGOSTINO: I am not aware because the mandate that my firm was given did not include preparing the disclosure statement.

The Hon. JOHN RYAN: You did not produce the disclosure statement?

Mr D'AGOSTINO: No, and it is usually not done by a solicitor for the lessor.

The Hon. JOHN RYAN: It usually is not, so there is nothing unusual about that?

Mr D'AGOSTINO: No.

The Hon. JOHN RYAN: Have you seen any disclosure statements relating to the designer factory outlets at all? Have you seen any of them?

Mr D'AGOSTINO: Yes I have.

The Hon. JOHN RYAN: Do any of them at all disclose information about the legal action taken against—

Mr D'AGOSTINO: That is again part of the formulation of my legal advice and the disclosure statement, and its format, and its form, and its contents form what is going to be part of our advice to Gazcorp.

The Hon. JOHN RYAN: There would be some question as to the form that it took. We may infer from that, that is going to be an issue, the form that that statement was made—

Mr D'AGOSTINO: No, because I have not formulated the advice.

The Hon. JOHN RYAN: Are you aware of any codes of conduct or any information delivered from the Government which instructs lessors how they are to formulate what is placed in the disclosure statement?

Mr D'AGOSTINO: The Retail Leases Act would be the primary piece of litigation.

The Hon. JOHN RYAN: I realise that is the primary statute, but are you aware of any other material that might instruct a lessor—given that they do it themselves? Is there anything that instructs them as to what they should and should not include?

Mr D'AGOSTINO: No, I am not aware, but then again, I have never prepared a disclosure statement, and never intend to.

The Hon. JOHN RYAN: Are you familiar with material that has been given to the committee, signed by Nabil Gazal, jnr, in his position as project manager which was sent to the committee? The committee has one version of it addressed to an individual lessee, in particular. The committee was told that a version of this letter was given to every tenant which states a number of things relating to the handover and then includes:

With regards to the Land and Environment Court proceedings in which Westfield are taking action against Liverpool City Council and Gazcorp challenging the development consent granted to Gazcorp in November 2002, Gazcorp is defending the challenge vigorously and are continuing development relying on that DA granted by a competent Liverpool City Council.

That letter was dated 8 September. Have you seen that correspondence?

Mr D'AGOSTINO: Yes, quite some time ago. I have seen it, not recently.

The Hon. JOHN RYAN: Could that letter amount to the appropriate disclosure?

Mr D'AGOSTINO: That is part of my partially formulated legal advice and, unfortunately, I cannot comment on that.

The Hon. JOHN RYAN: Is it also possible that that might not amount to proper disclosure?

Mr D'AGOSTINO: I cannot comment on that.

The Hon. JOHN RYAN: The information at the moment is confidential to the committee, but can you confirm that you are the author of correspondence sent to the committee on 13 August 2004 addressed to the attention of Mr Nabil Gazal, jnr, and regarding the current position of the leases?

Mr D'AGOSTINO: I sent a piece of correspondence—I am not sure what it is—but I sent a piece of correspondence to my client and, I directed it to a facsimile number, yes.

The Hon. JOHN RYAN: Are you aware that that material has been given to the committee?

Mr D'AGOSTINO: What my client did with it, I do not know.

The Hon. JOHN RYAN: Did you prepare it for your client so that he could give it to the committee?

Mr D'AGOSTINO: Yes, well I imagine.

The Hon. JOHN RYAN: Did your client ask you?

Mr D'AGOSTINO: My client asked me to prepare a piece of correspondence which outlined the current position of the leases.

The Hon. PETER PRIMROSE: So he did not seek your advice on that matter?

Mr D'AGOSTINO: In respect to the non-tabling of the leases? I do not think it was raised.

The Hon. PETER PRIMROSE: Did you, as Mr Gazal has said in his evidence, provide legal advice in the drafting and executing of the leases in relation to Orange Grove?

Mr D'AGOSTINO: Provide to Gazal advice in respect of the drafting of the leases?

The Hon. PETER PRIMROSE: The drafting and executing of the leases with the operators at Orange Grove?

Mr D'AGOSTINO: Yes, I did.

The Hon. PETER PRIMROSE: As a legal practitioner I understand that you have a fiduciary obligation to ensure Gazcorp made appropriate disclosures regarding legal action to tenants, is that the case?

Mr D'AGOSTINO: My answer to that question is that my duty as a solicitor—and I am speaking generally now—to a client is to the client. I think you speak of duty to a third party as a result, but in any event my retainer did not include the preparation of a disclosure statement, and it is quite normal that it does not.

The Hon. PETER PRIMROSE: I would have thought that your obligation first and foremost is to the law?

Mr D'AGOSTINO: I am just having some difficulty with that question because my obligations are obviously to the court and to my client, and I just do not understand.

The Hon. PETER PRIMROSE: Did you have, in your role in relation to Gazcorp, any fiduciary obligation to ensure that Gazcorp made appropriate disclosures regarding legal action to the tenants?

Mr D'AGOSTINO: That was outside of my retainer. I prepared leases when instructed, that is it.

The Hon. PETER PRIMROSE: So your answer—I do not want to put words in your mouth—

Mr D'AGOSTINO: It was outside of my retainer.

The Hon. PETER PRIMROSE: So you had no fiduciary obligation, is that right?

Mr D'AGOSTINO: That is right.

The Hon. PETER PRIMROSE: If you knew Westfield was suing Gazcorp and did not insist that this be disclosed in leases and disclosure statements, is that not contrary to proper conduct?

Mr D'AGOSTINO: Could you repeat the question?

The Hon. PETER PRIMROSE: If you knew Westfield was suing Gazcorp and did not insist that this be disclosed in leases and disclosure statements, is that not contrary to proper conduct?

Mr D'AGOSTINO: To answer that question would require me to waive privilege, and I do not.

The Hon. JOHN RYAN: Could I just ask a question about procedure? Could you ever complete a lease without seeing a disclosure statement generally? Is it normal? I must say, not being a lawyer and not having seen a lease, I always thought this was something that was attached to the document—

Mr D'AGOSTINO: We are talking about a notional scenario?

The Hon. JOHN RYAN: Absolutely, yes.

Mr D'AGOSTINO: I have acted for lessors in the past where a disclosure statement is not forwarded to me. However, leasing advice is forwarded to me. So it is a question completely of a lessor—it is a matter for themselves. If they want to provide it to me I would obviously encourage it.

The Hon. JOHN RYAN: You would have to ask though. Would it not be part of your standard operation that you would ask?

Mr D'AGOSTINO: It depends on the level of information that is forwarded to me inside a leasing advice. I might have enough information to prepare a lease.

The Hon. JOHN RYAN: Let me put it another way. In the preparation of a lease would you not, as a standard practice, always make sure that there was a disclosure statement either by having it forwarded to you voluntarily by the lessor or seeking it from them?

Mr D'AGOSTINO: Yes.

The Hon. JOHN RYAN: Is the disclosure statement then not normally appended to the lease?

Mr D'AGOSTINO: A notional scenario would be I would use that disclosure statement. The information disclosed would then form part of the information that I am required to complete my leases. My leases are a set of standard documents that have been agreed to by the lessor. Then you plug that information into the standard lease and it gets sent out.

The Hon. JOHN RYAN: If you prepared the lease without that disclosure statement, because the lessor did not give you one, you would have to tell him, "I prepared this lease without a disclosure statement", would you not?

Mr D'AGOSTINO: Yes.

The Hon. JOHN RYAN: You would have to say that was the law?

Ms SYLVIA HALE: Just following up on that, if there was a disclosure statement and you used the contents of it incorporated in that lease then you would not have a statement that would be appended to the lease, it would be wholly incorporated in it?

Mr D'AGOSTINO: Everyone is different. I have seen leases that have the disclosure statement attached as an annexure; I have seen leases without them. My lease format does not have them annexed; there is no need to have them—

Ms SYLVIA HALE: The Act does not require there be a separate statement attached?

The Hon. JOHN RYAN: Just a requirement that there be one?

Mr D'AGOSTINO: Yes.

The Hon. PETER PRIMROSE: So back to the notional statement. A notional group of tenants who were not aware, it was not disclosed by a notional solicitor that their notional client was being sued, then these notional tenants could level complaints to the Legal Services Commission or the Law Society, if they wished to do so, about that solicitor's action, notionally speaking? It is difficult dealing in mythical paradigms here.

Mr D'AGOSTINO: Notionally speaking a solicitor for a lessor would not be under any obligation to a lessee in respect to disclosure or nondisclosure. How could he be? I am just being reminded that the terms of reference—

The Hon. PETER PRIMROSE: Contract law I would expect.

Mr D'AGOSTINO: But the terms of reference for this inquiry are not relevant to my conduct as a solicitor.

The Hon. PETER PRIMROSE: No, I am talking about a notional obligation here. But if you would like to, we can go into committee and discuss it more specifically.

Mr D'AGOSTINO: I am just confused about where the question is heading, that is all, in the sense that if what you are saying is a notional solicitor for a notional lessor responsible to a notional lessee, I believe not, in no circumstances.

The Hon. PETER PRIMROSE: So there would be no obligation for the disclosure in leases and disclosure statements?

Mr D'AGOSTINO: No.

The Hon. PETER PRIMROSE: Mr Gazal has continually stated that full disclosure of Westfield's legal action was made in disclosure statements or leases for tenants at Orange Grove. Would you say that is the case?

Mr D'AGOSTINO: What I know about disclosure has been conveyed to me as part of my retainer, which in turn is now part of a partially formulated advice that I am hoping to get to Gazcorp very, very soon in respect to its obvious obligations in respect to the lease, and I cannot comment on that.

The Hon. PETER PRIMROSE: Mr Gazal has continually stated that full disclosure of Westfield's legal action was made in disclosure statements or leases to tenants at Orange Grove. You cannot answer whether that is the case or not?

Mr D'AGOSTINO: Well, the question of the disclosure statements is part of the advice that I am partially formulating, which I have partially formulated along with counsel, and I have not yet conveyed my advice in respect to the lease, the agreement to lease or the disclosure statement and Gazcorp's position.

The Hon. PETER PRIMROSE: We may have to come back to that in committee. Given that legal action commenced in June 2003, did all leases entered into on or after that date include disclosure of Westfield's actions against Gazcorp at the time of tenants entering the lease?

Mr D'AGOSTINO: Again, as you can imagine, there are 60-odd leases with 60-odd different positions and 60-odd different conversations and what have you, which we are in the process of sifting through, formulating, preparing advices, and, bearing that in mind, and the mammoth task of trying to get an advice on what is potentially 60-odd, or whatever there is, different scenarios, I just cannot answer that question without disclosing confidential communications between myself and my client. I cannot put myself into that position, or my client.

The Hon. PETER PRIMROSE: So you cannot tell the committee whether or not all the leases entered into after that date included disclosure of Westfield's actions? You are not in a position to do that?

Mr D'AGOSTINO: No, I am not in a position, but on top of that, I did not prepare the disclosure statements; I did not have carriage of that; it was not part of my mandate.

The Hon. PETER PRIMROSE: So it may be the case that when individual leases were offered after June 2003 that every tenant received a disclosure statement detailing Westfield's pending legal action, or maybe it is not the case?

Mr D'AGOSTINO: Again, I am not at liberty at that. But by "disclosure statement" I take it that you mean the formal as set out in the Retail Leases Act?

The Hon. PETER PRIMROSE: Yes.

Mr D'AGOSTINO: The Retail Leases Act does not necessarily say you have to disclose in that format, and this is part of my mandate which I am formulating.

The Hon. PETER PRIMROSE: In terms of your mandate can you tell us, without giving us the specifics at this stage, what form would the disclosures have to take to be legal? For instance, could they be in a verbal form?

Mr D'AGOSTINO: That is part of what I am formulating, the different types of disclosure, because the Retail Leases Act is silent in that regard. It actually says it does not have to necessarily take that form.

The Hon. PETER PRIMROSE: But it could be verbal?

Mr D'AGOSTINO: Quite possibly. I am investigating that.

The Hon. PETER PRIMROSE: Is there a particular case you could point us to?

Mr D'AGOSTINO: Not at this moment.

The Hon. PETER PRIMROSE: Will you table for the Committee today copies of the disclosures that you have seen? Can I stress that the Committee, as in other committees, is perfectly capable of taking commercial in-confidence material. The names and any other matters other than the dates can be blanked out.

Mr D'AGOSTINO: That document was obtained by my office for the purposes of giving legal advice and forms part of the process that we are formulating at the moment. I would not be at liberty to provide that document, it is an integral part of that advice that I am in the process of.

The Hon. PETER PRIMROSE: So, you are claiming legal professional privilege?

Mr D'AGOSTINO: Most definitely, yes. Sorry, I clarify that. I am claiming confidentiality, not legal professional privilege for that.

The Hon. PETER PRIMROSE: Commercial?

Mr D'AGOSTINO: Yes.

The Hon. KAYEE GRIFFIN: Mr D'Agostino, were you aware of legal action either discussed or commenced against Liverpool City Council by Gazcorp, or Mr Gazal?

Mr D'AGOSTINO: Am I aware?

The Hon. KAYEE GRIFFIN: Yes. Are you aware of any legal action either discussed or commenced against Liverpool City Council?

Mr D'AGOSTINO: I have heard discussions about it, but I am not briefed in it.

The Hon. KAYEE GRIFFIN: So you have not been, at any time, instructed to sue the council on behalf of Mr Gazal?

Mr D'AGOSTINO: No.

The Hon. KAYEE GRIFFIN: Have you sent any correspondence to council about this matter?

Mr D'AGOSTINO: No.

The Hon. KAYEE GRIFFIN: Or had any conversations with any Opposition or crossbench members, or their staff, before appearing today?

Mr D'AGOSTINO: No.

The Hon. KAYEE GRIFFIN: Did you have any role with the contract that engaged Flagship Communications?

Mr D'AGOSTINO: I do not know who Flagship Communications are?

The Hon. KAYEE GRIFFIN: So you have not had any involvement with that firm, at all, on behalf of Mr Gazal?

Mr D'AGOSTINO: No.

The Hon. KAYEE GRIFFIN: As you are Mr Gazal's legal counsel, is it right to presume that you have handled the legal matters that Westfield has brought against the Orange Grove outlets?

Mr D'AGOSTINO: Sorry, could you repeat that?

The Hon. KAYEE GRIFFIN: As Mr Gazal's legal representative or counsel, is it right to presume that you have handled the legal matters that Westfield has brought against the Orange Grove outlets?

Mr D'AGOSTINO: No, it is not.

The Hon. KAYEE GRIFFIN: So you have not handled the writ issued by Westfield's lawyers?

Mr D'AGOSTINO: No.

The Hon. KAYEE GRIFFIN: You cannot provide any advice on that? Have you sought any advice?

Mr D'AGOSTINO: No.

The Hon. KAYEE GRIFFIN: So, you have done nothing in relation to that of behalf of Gazcorp or Mr Gazal?

Mr D'AGOSTINO: Nothing at all.

The Hon. JOHN RYAN: Madam Chair, can I make a disclosure here, because, probably, the witness has answered a question inaccurately without knowing.

CHAIR: Yes, Mr Ryan.

The Hon. JOHN RYAN: I had a conversation with Mr D'Agostino about 10 days ago in which I was asking him, because he was Mr Gazal's lawyer, some questions about the formulation of leases generally and the operation of the Retail Leases Act. There was nothing further about his evidence today discussed, of course, but we did have a discussion about the law generally and the Retail Leases Act. Mr D'Agostino endeavoured to assist me, but also told me that he was limited in the same way that he is limited today; that he is not able to breach client confidentiality. He may not have been aware that I was the person to whom he was speaking on the phone.

Mr D'AGOSTINO: Oh, I am sorry.

Ms SYLVIA HALE: Returning to generalities, if a solicitor who has been retained solely to prepare a lease and in the course of the preparation of that lease becomes aware that his client has neglected to make what is in the solicitor's view a material disclosure, is the solicitor obliged to draw this to his client's attention?

Mr D'AGOSTINO: Theoretically it would depend on the scope of your retainer.

Ms SYLVIA HALE: All right, thank you. In what regard?

Mr D'AGOSTINO: I mean that, theoretically, if your retainer would include the preparation and service of a disclosure statement.

Ms SYLVIA HALE: But, if it did not involve the preparation of that disclosure statement?

Mr D'AGOSTINO: Well, if I am not involved in it.

Ms SYLVIA HALE: No, okay.

The Hon. DAVID OLDFIELD: Mr D'Agostino, on 10 July you filled out a statutory declaration. I will read some of it to you. You are a solicitor of Gazcorp Pty. Ltd. "On or about late June 2004, Mr Joseph Tripodi, State member for Fairfield, attended my office at 18 Nelson Street, Fairfield. In passing, at the conclusion of the

conversation I was having with Mr Tripodi pertaining to unrelated matters I commented to him that Nabil was still awaiting the Minister's sign-off to the amendment to the LEP and that he was under great personal stress as a result of this. He said to me words to the effect, 'Tell Nabil I have tried a few times to make inquiries as to what is going on, but I keep getting the door shut on me.' He then indicated that this was being dealt with at a higher level than himself."

Mr D'AGOSTINO: That is right.

The Hon. DAVID OLDFIELD: What did he do that indicated that it was being dealt with at a higher level than himself?

Mr D'AGOSTINO: The conversation was a very quick one, as he walked out my door. But he indicated something along the lines like, "It was just dealt with higher", you know. I got the impression it was being dealt with at a higher level. I do not know, he did not elaborate any further than that. It is words to those effect, because I did not really pay particular attention to that conversation.

The Hon. DAVID OLDFIELD: But you have put it in a statutory declaration, you must have had a fairly reasonable idea of what he was talking about.

Mr D'AGOSTINO: That is why I said, "words to those effect". I made it pretty clear.

The Hon. DAVID OLDFIELD: Yes. You got the impression, as in words to that effect?

Mr D'AGOSTINO: I got the impression that it was dealt with at a higher level, that it was not something that he could assist in. It was a comment that I made in passing and it was unsolicited by Gazcorp, because the general feeling was that we were just waiting for this sign-off of the LEP.

The Hon. DAVID OLDFIELD: Yes. No, you said "He", being Tripodi, "then indicated that this was being dealt with at a higher level."

Mr D'AGOSTINO: Yes. He made a comment, like he pointed higher. He goes, "Beyond me". He walked out straight after that.

The Hon. DAVID OLDFIELD: Clearly based on your statutory declaration he left you with the distinct impression that it was being dealt with higher than himself?

Mr D'AGOSTINO: Yes.

The Hon. DAVID OLDFIELD: He did not elaborate as to who or what or where?

Mr D'AGOSTINO: No, definitely not. That conversation was made as he walked out of my office, halfway out of my door into the hallway. It probably lasted about five seconds. But I got the distinct impression that it was dealt with higher.

The Hon. DAVID OLDFIELD: It was out of his hands?

Mr D'AGOSTINO: Out of his hands, yes.

The Hon. DAVID OLDFIELD: Are you aware of the statements made by Mr Bargshoon and Mr Gazal and Mr Nabil Gazal junior with regards to statements made to them by Joe Tripodi? Sorry, I could be wrong there, it might be Mr Frank Mosca as the third person. Are you aware of the statements that have been attributed to them as having been made by Joe Tripodi to them?

Mr D'AGOSTINO: I am aware of what I have seen on the public record, read in the newspapers.

The Hon. DAVID OLDFIELD: In essence, if I could remind you that statements that have been attributed to Joe Tripodi as having been put to Mr Bargshoon, Mr Mosca and Mr Gazal were that essentially the Premier had contacted the Minister for planning, Diane Beamer, and in whatever words one might use asked her to stop, or instructed her, to stop and now allow the LEP to be approved? Is that your understanding?

Mr D'AGOSTINO: What I have read in the papers, yes.

The Hon. DAVID OLDFIELD: Is there anything inconsistent with your quick conversation with Mr Tripodi with that? Anything inconsistent with that?

Mr D'AGOSTINO: Inconsistent?

The Hon. DAVID OLDFIELD: In the sense that whilst Mr Tripodi has perhaps not been quite as disclosive in giving names as he was with the other three, is it fair to say that the way he acted with you, as you put it, he then indicated that it was being dealt with at a higher level? Is it fair to say that his indication to you, whilst not as disclosive, was not inconsistent with what he later disclosed more specifically with them?

Mr D'AGOSTINO: I did not form a view of whom he was speaking of. I formed the view that it was out of his control and that was the end of it. I will be honest with you, I really did not have another thought about that conversation until now.

The Hon. DAVID OLDFIELD: You did not form a view of who, you only formed the view that it was someone higher than himself?

Mr D'AGOSTINO: I do not know whether it was a planning, or what type of issue. I did not take it any further than that. Whether it was consistent or not, I am not—

The Hon. DAVID OLDFIELD: How well do you know Joe Tripodi?

Mr D'AGOSTINO: He is a client of mine.

The Hon. DAVID OLDFIELD: How long have you known him?

Mr D'AGOSTINO: Six years, maybe.

The Hon. DAVID OLDFIELD: Six years?

Mr D'AGOSTINO: Something along those lines.

The Hon. DAVID OLDFIELD: Are you also a member of the ALP?

Mr D'AGOSTINO: Yes, I am.

The Hon. DAVID OLDFIELD: Which branch?

Mr D'AGOSTINO: I think the Liverpool branch. I am not active. I have made that perfectly clear, paid up, but not active.

The Hon. DAVID OLDFIELD: How long have you been a member of the Labor Party?

Mr D'AGOSTINO: A few years now. At least five or six years, I would imagine.

The Hon. DAVID OLDFIELD: Would Mr Tripodi be described as a friend of yours at all?

Mr D'AGOSTINO: Yes. A client and a friend.

The Hon. DAVID OLDFIELD: He is a client as well.

Mr D'AGOSTINO: Yes, he is a client as well. I operate a practice and have been a solicitor in the Fairfield area for number of years.

The Hon. DAVID OLDFIELD: We are not holding it against you that he is one of your clients. Some might, I am not. In regards to your client relationship with him, were you surprised to hear that he had disclosed these names to at least three other people?

Mr D'AGOSTINO: Well, I was not party to those conversations. So, I am not going to make a comment on it.

The Hon. DAVID OLDFIELD: You have no reaction?

Mr D'AGOSTINO: No. I am briefed to act for Gazcorp in certain commercial transactions and that would be the extent of it.

The Hon. DAVID OLDFIELD: When you became aware, be it through the media or through anybody else, that allegations have been made that Joe Tripodi had disclosed the Premier and Diane Beamer and what have you, and Mr Lowy, in regard to these matters, did it click with you at all that this must have been what he meant when he, as you said, "indicated to me that it was being dealt with at a higher level than himself"? I do not see how this relates to your legal advisor, it is not a question that is related at all to anything of privilege, or commercial in-confidence.

Mr D'AGOSTINO: The advice I am getting is that the terms of reference and the warrant of the inquiry, and what my thoughts were, how that relates to this warrant.

The Hon. DAVID OLDFIELD: It probably relates in this sense: You have given a statutory declaration in which you said that Joe Tripodi had a conversation with you that indicated that what was happening with regards to Ocean Grove was out of his hands.

The Hon. PETER PRIMROSE: Orange Grove.

The Hon. DAVID OLDFIELD: Did I say Ocean Grove?

CHAIR: You did.

The Hon. DAVID OLDFIELD: I always have water my mind.

The Hon. JAN BURNSWOODS: Or on the brain.

The Hon. DAVID OLDFIELD: At least you have acknowledged that I have got one, which is more than I do for you.

The Hon. JAN BURNSWOODS: It is debatable, whether you have.

The Hon. DAVID OLDFIELD: Debate is a matter of logic that has to be upheld with such, and you are not likely to do that. Do not play repartee with me; you will lose. You always do.

The Hon. JAN BURNSWOODS: He is so charming.

The Hon. DAVID OLDFIELD: I am not trying to charm you. You are out of my category of charm in so many areas it is just hilarious.

The Hon. JAN BURNSWOODS: You are so objectionable.

The Hon. DAVID OLDFIELD: Only to you. It is something I practise and hope to do on a lot of occasions. Mr D'Agostino, coming back, rather than the interruptions from the peanut gallery of Larry, Moe and Curly over here, I am simply asking this question in relation to your stat dec. Surely it must have occurred to you at some stage, "This must be what Joe Tripodi was indicating to me. These higher people are the Premier, Frank Lowy, Diane Beamer." Or, another way, what else could it have been?

Mr D'AGOSTINO: As a solicitor to Gazcorp I did not have a mandate to act in respect of the litigation that was on foot. So I effectively remained out of all that. And I needed to remain out of all that because my

mandate was complex enough and demanding enough preparing 60-odd leases and what have you. I offered that statutory declaration in respect of that very quick conversation so that my limited involvement in all of that was recorded. And I have not got an issue with that. My thoughts about Gazcorp's allegations as opposed to my conversation with Tripodi I did not mix because what he told me was definitive. Nabil Gazal asked me to tell the truth about what happened and I did. It was a very brief conversation I had with Joe as he ran out my door. Their allegations I was not part of. I was not in attendance at any time when Joe made these things. And to cast an assertion on their allegations would be to cast an assertion on either my client or Joe Tripodi, who is another client, and I am not buying into that because I was not part of it.

The Hon. DAVID OLDFIELD: How did Mr Gazal know to contact you and ask you to do this? How was he of the understanding that this conversation had occurred and was somehow pertinent?

Mr D'AGOSTINO: My statutory declaration says that I actually ran and told Nicholas that Joe had been looking into it and he had not got anywhere yet. See, at the time this happened—

The Hon. DAVID OLDFIELD: It does not actually say that. It said that you asked if he minded if you told Nabil and he said yes. It makes no reference to your actually doing it.

Mr D'AGOSTINO: Sorry, I did do it. That is how he knows. We were sitting about waiting for what we believed was the eventual sign off of the LEP. That was the extent of my involvement. Like I said, I did not have any involvement.

The Hon. DAVID OLDFIELD: So you did not in any way convey to Mr Gazal that your conversation with Joe Tripodi had suggested anything else that had been said by Mr Gazal, Mr Mosca and—

Mr D'AGOSTINO: What they thought of what I said but I said what is in the statutory declaration. That was the extent of what I spoke with Joe about.

The Hon. DAVID OLDFIELD: Does your knowledge of Joe Tripodi indicate that Joe is a person who believes he can get these sorts of things done?

Mr D'AGOSTINO: No.

The Hon. DAVID OLDFIELD: Did he seem exasperated at all that this was now apparently out of his hands?

Mr D'AGOSTINO: I asked him a general question, "Do you know where it is up to?" I only asked him that unsolicited question because I think one of Nabil's sons or what have you told me that he was stressed out about it and was waiting for this sign off of the LEP. A multitude of people were sitting back waiting for the sign off of the LEP. Although I had no direct involvement in it I unsolicitedly asked Joe whether he knew anything about what was going on and he said, "I have made some inquiries." I thought where it was up to and he could not elaborate and I asked him, "Can I tell Nabil that you have made some inquiries?" And he said, "Yes." What he was doing in the background I have not got any knowledge.

The Hon. DAVID OLDFIELD: As of this stat dec of 10 July you say that you have not had any further contact with Tripodi regarding this matter. Since this stat dec have you had any contact or conversation of any kind or correspondence with Mr Tripodi about this matter?

Mr D'AGOSTINO: About?

The Hon. DAVID OLDFIELD: This matter.

Mr D'AGOSTINO: About my statutory declaration, no.

The Hon. DAVID OLDFIELD: Or anything that you have said or he has said in regard to the matter?

Mr D'AGOSTINO: No. Not about that statutory declaration.

The Hon. DAVID OLDFIELD: Not just about the stat dec. Have you had some other contact with Mr Tripodi?

Mr D'AGOSTINO: Yes, of course I have had contact with Mr Tripodi. He is a friend and a client of mine.

The Hon. DAVID OLDFIELD: But nothing in relation to Orange Grove or your stat dec or any of the allegations or anything relating to Orange Grove?

Mr D'AGOSTINO: He certainly knows that I have done a statutory declaration, and I have advised him of that. But we agreed that we are not to speak about it. We have both mutually agreed that we are not going to be speaking about it. But we have spoken. Time, date, place I cannot tell you right now, but I have spoken to Joe on a number of other occasions but they were in the conduct of—

The Hon. DAVID OLDFIELD: So you have had a conversation with Mr Tripodi since 10 July where you have both mutually agreed not to speak about the matter?

Mr D'AGOSTINO: Amongst other things, yes.

The Hon. DAVID OLDFIELD: You have mutually agreed not to speak about other things or just this matter?

Mr D'AGOSTINO: Generally this matter. I am still talking to him because he is a current client of mine.

The Hon. JOHN RYAN: So Mr Tripodi has not expressed any opinion to you about whether or not the allegations that he is reported to have made were true or untrue?

Mr D'AGOSTINO: He has expressed a brief opinion to me.

The Hon. JOHN RYAN: What did he say?

Mr D'AGOSTINO: He did not agree with the statutory declarations—not my one, the other ones.

The Hon. JOHN RYAN: And when did he do that?

Mr D'AGOSTINO: I have not got a date.

The Hon. JOHN RYAN: Since his return from his honeymoon? In person or over the phone whilst he was away?

Mr D'AGOSTINO: I think it was over the phone.

The Hon. JOHN RYAN: Whilst he was away?

Mr D'AGOSTINO: Yes.

The Hon. JOHN RYAN: What were the circumstances in which Mr Gazal asked you—

Mr D'AGOSTINO: I just want to make it clear that we agreed that I am not talking about it because of this whole issue. I tried to make it very clear that I did not want to talk about it, and the same with him.

The Hon. JOHN RYAN: Yes, so you had a conversation in which it was obvious that you had made a statement and you discussed that and both of you mutually agreed not to discuss that. Is there some reason why not?

Mr D'AGOSTINO: I am his solicitor and I am Gazcorp's solicitor and I just did not want to have any issues. Just like I am protecting my clients' confidentiality and their legal rights to the fullest extent, if I have private communications I would expect someone to do the same for me.

The Hon. JOHN RYAN: So you are protecting Mr Tripodi?

Mr D'AGOSTINO: No, I am talking about Gazcorp's position. I do not want to discuss it.

The Hon. JOHN RYAN: It is probably better that that is said rather than have other people put you on the record as meaning something else.

Mr D'AGOSTINO: The point is that I am not going to discuss where there is a duty to Gazcorp, and especially where I have asked Gazcorp whether they wish to waive client confidentiality and they have said no. I am not going to put myself into any position in any way shape or form.

The Hon. JOHN RYAN: Were you asking this question to Mr Tripodi because you had been asked to do so by someone from Gazcorp?

Mr D'AGOSTINO: One hundred per cent not.

The Hon. JOHN RYAN: How did this issue enter your mind for you to raise it with Mr Tripodi?

Mr D'AGOSTINO: Mr Tripodi was attending my office for completely unrelated matters. Maybe his son or someone had told me. For some reason I have this thing that Nabil was stressed because we were waiting—

The Hon. JOHN RYAN: So it was your own initiative to raise—

Mr D'AGOSTINO: My own initiative completely, absolutely, unequivocally. No-one asked me to ask a question. Whether they even knew that he was a client of mine or not—I do not go around advertising it.

The Hon. JOHN RYAN: Did Mr Gazal ever report to you separately the allegations he has made in his statutory declarations?

Mr D'AGOSTINO: I have not even seen his statutory declarations. No, I have never had a conversation about what is in any of his statutory declarations.

The Hon. JOHN RYAN: You said that everyone was waiting on the LEP. In the course of waiting on the LEP did Mr Gazal ever express to you, "Mr Tripodi told me this so I am not expecting good news from the Government" or something of that nature?

Mr D'AGOSTINO: No.

The Hon. JOHN RYAN: So all of the material that was part of the statutory declaration was news to you until you saw it ventilated in the media?

Mr D'AGOSTINO: I think as it got closer some rumblings were in respect of these accusations but I really did not play any part in it at all. My mandate was preparing leases, punching them out and getting them out, full stop.

The Hon. JOHN RYAN: Who initiated the conversation you said you had with Mr Tripodi?

Mr D'AGOSTINO: I did, in my office.

The Hon. JOHN RYAN: The conversation you had in which the two of you mutually agreed not to discuss this subject. Who initiated that?

Mr D'AGOSTINO: At the time that we were preparing the statutory declarations I think there were a number of us—myself, maybe Frank Mosca, I am not sure, maybe Nabil and what have you—were trying to contact him and I sent an SMS to him asking him to contact me. Some time after we prepared the statutory declaration he rang me back. Amongst other things we said, "I am not going to talk about it any more."

The Hon. JOHN RYAN: Did Mr Gazal explain to you why he wanted this statutory declaration? When he requested it to you did he tell you what was going to be in the contents of his, for example, made on almost the same day?

Mr D'AGOSTINO: I assumed what was going to be verbatim. I would not have a clue what was in it. To date I still have not seen it. I have never seen a copy of them.

The Hon. JOHN RYAN: Did you attend Mr Tripodi's wedding?

Mr D'AGOSTINO: Yes, I did.

The Hon. JOHN RYAN: Do you know Mr Mosca?

Mr D'AGOSTINO: Yes, I do.

The Hon. JOHN RYAN: Do you know Mr Knowles?

Mr D'AGOSTINO: No, I do not.

The Hon. JOHN RYAN: Do you know Mr Bargshoon?

Mr D'AGOSTINO: I met him for the first time at the signing of the statutory declarations at Gazcorp's office.

The Hon. JOHN RYAN: And you obviously know Mr Gazal?

Mr D'AGOSTINO: Yes.

The Hon. JOHN RYAN: Do you think Mr Gazal is a person who has surrounded Liverpool council with a circle of influence that is somehow inappropriate?

Mr D'AGOSTINO: My comment to that would be completely uninformed. I have absolutely no dealings at council level with Mr Gazal. I have no dealings at all—

The Hon. JOHN RYAN: Do you know personally any of the councillors on Liverpool council who represent the Australian Labor Party or otherwise?

Mr D'AGOSTINO: Can I be honest with you?

The Hon. JOHN RYAN: Yes.

Mr D'AGOSTINO: I do not know even who they are. I might know somebody in Liverpool council but I do not know if they are councillors or not. I do not make it a practice to involve myself at council level.

The Hon. JOHN RYAN: So you are not actively involved in politics? Have you ever been to a Labor Party branch meeting?

Mr D'AGOSTINO: Maybe one a number of years ago.

The Hon. JOHN RYAN: Have you ever participated in a Labor Party preselection?

Mr D'AGOSTINO: No.

Ms SYLVIA HALE: How do you renew your membership without turning up at a meeting?

The Hon. PETER PRIMROSE: I think that this is way outside the terms of reference. Madam Chair, if you are going to get into Labor Party rules we might get into a few other rules as well.

Mr D'AGOSTINO: I am looking at the terms of reference and I cannot see how that relates here.

CHAIR: We might have to ask that in another forum.

Ms SYLVIA HALE: Mr D'Agostino, you said you sent an SMS to Mr Tripodi asking him to contact you. You would be able to obtain the date of that SMS from your mobile phone.

Mr D'AGOSTINO: Are they recorded going out?

Ms SYLVIA HALE: Presumably they are.

Mr D'AGOSTINO: I think it is the same date because I did it along with maybe Frank or whoever else was there.

Ms SYLVIA HALE: But you would be able to check your records and ascertain that date?

Mr D'AGOSTINO: I do not have an issue with that. I do not know if phone records record them going out, do they, or only coming in?

Ms SYLVIA HALE: Yes, they record the number to which they were addressed. Was Mr Tripodi overseas when you rang him back?

Mr D'AGOSTINO: Yes.

Ms SYLVIA HALE: Was it long after you sent him that SMS?

Mr D'AGOSTINO: Maybe a couple of hours.

Ms SYLVIA HALE: So you would have a record of his incoming call?

Mr D'AGOSTINO: That would not be recorded, no.

The Hon. JAN BURNSWOODS: Mr D'Agostino, Ms Griffin my colleague asked you before have you met with or have you had any conversation with Opposition or crossbench members or their staff before appearing here, and you said quite quickly "No".

Mr D'AGOSTINO: Yes, I did not realise—

The Hon. JAN BURNSWOODS: And then Mr Ryan made a disclosure about his conversation.

Mr D'AGOSTINO: With all due respect to Mr Ryan, I did not know who he was. John Ryan rang me.

The Hon. JAN BURNSWOODS: May I ask you the question again and can you answer it again?

Mr D'AGOSTINO: Yes, of course. Yes.

The Hon. JAN BURNSWOODS: Have you had any conversation with any other Opposition or a crossbench member or their staff?

Mr D'AGOSTINO: About what?

The Hon. JAN BURNSWOODS: About this inquiry, prior to appearing here.

Mr D'AGOSTINO: I know I spoke to someone from the Committee on about 10 different occasions to try to tee up a time, and I have spoken to a couple of different people. What is their position—

The Hon. JAN BURNSWOODS: No, I am not speaking about—

Mr D'AGOSTINO: Whoever these two or three different people were, including Mr Ryan, I did not take notice of their position. I apologise for that. I did not take notice of what his position was. I spoke to him.

The Hon. JAN BURNSWOODS: Again getting back to the questions Ms Griffin asked you; she asked you about your awareness of your role in relation to legal action discussed by Gazcorp against Liverpool City Council and also in relation to an arrangement that Gazcorp has with a company called Flagship Communications, and you said you did not have anything to do with that. Can I just get straight your knowledge of how many legal advisers that Gazcorp has and how your role is differentiated from that of other legal advisers?

Mr D'AGOSTINO: Can someone tell me who Flagship is?

The Hon. JAN BURNSWOODS: Flagship Communications is a kind of legal party, some PR firm, but that is not really the issue. I am trying to get straight your awareness of how many legal advisers Gazcorp has and where the boundary lines are about what you do for it?

Mr D'AGOSTINO: The easiest one to answer would be my boundary lines. I would think, but I am happy to double check, the only mandate I have ever had, the only retainer I have had, from Gazcorp Pty Ltd is in the preparation of these leases, full stop. That is it.

The Hon. JAN BURNSWOODS: And nothing else related to the outlet centre?

Mr D'AGOSTINO: Nothing else related to the outlet centre. I have now just been reminded I have a mandate now in respect to advising as to the current position of the leases, which is what I am in the process of formulating an advice on.

CHAIR: And there were the statutory declarations?

Mr D'AGOSTINO: The statutory declaration was not part of the mandate. It is not part of the retainer.

The Hon. JAN BURNSWOODS: So, other than preparing the leases, you had nothing to do with issues relating to the LEP or other tenant and management sort of issues?

Mr D'AGOSTINO: My sole retainer to date by Gazcorp Pty Ltd has been in the negotiation and preparation of the leases, and now this new retainer with respect to providing advice with respect to its obligations with respect to the leases, which I am partially through formulating, along with council.

The Hon. JAN BURNSWOODS: There were proceedings before Justice Sheller in the Court of Appeal on 25 August, and a lawyer told the court there was no evidence before the court to suggest that Mr Gazal was sharing advice with his tenants. Given your answers earlier, are you telling this Committee that the lawyer who said that on behalf of one of the outlet centre tenants is wrong?

Mr D'AGOSTINO: That is the first time I have heard that statement. I was not involved in any way, shape or form with those proceedings. Did he make an indication that what, I am sorry?

The Hon. JAN BURNSWOODS: This was in the Court of Appeal proceedings involving the tenants and Gazcorp last week, the week before. I am using it as an example.

Mr D'AGOSTINO: It is not possible for me to answer that. I do not know exactly what was said and what was suggested.

The Hon. JAN BURNSWOODS: Are you aware that the Australian Retailers Association has been holding discussions with many of the Orange Grove tenants?

Mr D'AGOSTINO: No.

The Hon. JAN BURNSWOODS: I might perhaps mention that those tenants who have been interviewed by the association—these are the tenants you were preparing leases for—every one of them who has been interviewed by the association has told the association that all tenants had been given a disclosure statement as required under the Retail Leases Act; further, that everyone of them interviewed told the association that none of those disclosure statements contained any information about pending legal action with

the centre or any breach of zoning laws. The owner, Gazcorp, knew of the pending legal action at that point in time. Tenants also told the association that none of them was advised of the pending legal action until about March 2004 and even then the owner had an ambivalent attitude towards the challenge. As Mr Gazal's or Gazcorp's solicitor, are you aware that where a lessor fails to disclose critical information like pending court action, that person has possibly breach both the Trade Practices Act and the Retail Leases Act?

Mr D'AGOSTINO: Again, that question goes the heart of exactly what we are attempting to formulate an advice about. To disclose would be to disclose confidential information, and partially formulated confidential information at that.

The Hon. PETER PRIMROSE: So you will have to come back to the Committee on this?

Mr D'AGOSTINO: Yes.

The Hon. JAN BURNSWOODS: Perhaps Mr Primrose is right.

Mr D'AGOSTINO: This is the problem. I am faced with this position that I am trying to get together an advice. I am not going to put myself at professional risk. On top of that, the client has not waived client confidentiality. There are matters of legal professional privilege and there is threatened legal action on foot.

The Hon. PETER PRIMROSE: We can discuss it in camera.

The Hon. JOHN RYAN: If you complete the advice, can you give it to the Committee when it is complete?

The Hon. PETER PRIMROSE: We will be seeking to ask questions. A number of questions are outstanding and it is appropriate for us to consider them in camera.

The Hon. JAN BURNSWOODS: Given your answer about privilege, confidentiality and all the rest of it, with names deleted but with dates included, are you prepared to give this Committee all of the leases offered and signed by the tenants since June 2003?

The Hon. JOHN RYAN: I cannot imagine Westfield agreeing to nonsense like that.

The Hon. JAN BURNSWOODS: Are you trying to influence the witness? Could the witness think about the question without—

The Hon. JOHN RYAN: Our friends up the back there would not do it either.

[Interruption from public gallery.]

CHAIR: Order! People in the public gallery are not entitled to speak.

The Hon. PETER PRIMROSE: I think we have heard these are on the public register at the Land Titles Office.

The Hon. JAN BURNSWOODS: Committees do not normally allow legal advisers. I am not sure we should be doing it, but I ask you to make it as short as possible.

Mr D'AGOSTINO: Just considering the seriousness of what we are facing—

The Hon. JAN BURNSWOODS: Mr Jacobs, is it Mr Sydney Jacobs?

CHAIR: Order! Mr Jacobs is not here to answer questions, even about his name.

The Hon. PETER PRIMROSE: But he is giving legal advice.

CHAIR: Mr D'Agostino will answer questions.

Mr D'AGOSTINO: Those leases form an integral part of the advice that I am attempting to put together in respect to Gazcorp's legal obligations. They are an integral part.

The Hon. JAN BURNSWOODS: We probably do not need to hear all that again. Have the completed leases been registered with the Land Titles Office?

Mr D'AGOSTINO: No.

The Hon. JAN BURNSWOODS: Why?

Mr D'AGOSTINO: That exact question is something that is part of where I am coming from with the legal advice.

The Hon. JAN BURNSWOODS: But do you not have some responsibility to ensure that completed leases are registered with the Land Titles Office?

Mr D'AGOSTINO: I am speaking hypothetically. A solicitor for a landlord has certain obligations subject to a lessee complying with its obligations. However, my obligations are not part of the warrant and those obligations and the facts surrounding them and what is happening and the processes and where the leases are up to are part of the entire legal ambit that I am attempting to get to the bottom of and formulate my legal advice.

The Hon. JAN BURNSWOODS: Let me get this straight. Some leases, we know—we do not know how many perhaps—are complete?

Mr D'AGOSTINO: By complete, you mean—?

The Hon. JAN BURNSWOODS: There have been all these arguments about whether people have signed them and whether or not there were errors in them and they had to go back and forwards—

Mr D'AGOSTINO: It is extremely complicated on 62 different cases.

The Hon. JAN BURNSWOODS: We know all that, but we also know that some leases are complete but some leases have not been registered with the Land Titles Office and you are telling me that your answer to that question is that you do not believe that question is within the terms of reference of this inquiry?

Mr D'AGOSTINO: That is right. Your question related to my obligations—

The Hon. JAN BURNSWOODS: No, it did not. I asked you why the completed leases had not been lodged with the Land Titles Office. Then, when you answered, I asked that, as a solicitor charged by Gazcorp Pty Ltd with the responsibility of preparing the leases, would you not agree you had some responsibility to ensure that the law was complied with.

Mr D'AGOSTINO: The best way to explain is that with 60-odd different leases there are 60-odd different scenarios.

The Hon. JAN BURNSWOODS: I know that. I am asking you about the ones that were all finished and tidied up.

Mr D'AGOSTINO: Hypothetically speaking, when a bank is involved and has to give consent, in normal circumstances, it would want all of the leases submitted to it for consent and production at the one time and not on 60 different occasions. It would be an accounting nightmare.

The Hon. JAN BURNSWOODS: If one of the leases were outstanding and not fixed up that would mean years could go by before the Land Titles Office would have them registered.

Mr D'AGOSTINO: No, because every lessee has a contractual obligation to his or her landlord.

The Hon. JAN BURNSWOODS: I am talking about the ones that the lessee has complied with the obligations. No-one seems to be able to see these leases; that is, the ones where the lessees have done everything that they should have done.

Mr D'AGOSTINO: Every tenant has a copy of the lease.

The Hon. JAN BURNSWOODS: Does every tenant have a copy of the lease signed by Gazcorp? Our understanding is that they do not, and that Gazcorp has been very slow to sign the leases.

Mr D'AGOSTINO: Considering the circumstances, and in the ambit of the advice that I am trying to formulate, it would not be proper for me to disclose the current position of the leases.

The Hon. JAN BURNSWOODS: You have just said that every tenant has a copy of the lease.

Mr D'AGOSTINO: Yes, most definitely.

The Hon. JAN BURNSWOODS: My question was—

Mr D'AGOSTINO: They were given a copy of it in duplicate when I was instructed.

The Hon. JAN BURNSWOODS: But if they are not signed by Gazcorp they have no standing.

Mr D'AGOSTINO: That is an interpretation.

The Hon. JAN BURNSWOODS: But you will not tell me whether they are signed by Gazcorp.

Mr D'AGOSTINO: It is not that I will not; I cannot because of my boundaries of client confidentiality and legal-professional privilege.

The Hon. PETER PRIMROSE: We are happy to come back to that.

Mr D'AGOSTINO: This is my real issue. I am not trying to be obstructionist. I have certain obligations to a client who is in the throws of potential litigation.

The Hon. PETER PRIMROSE: Parliament has certain powers and we will come back to that.

The Hon. JAN BURNSWOODS: Tenants have also initiated action against Gazcorp with the Government's retail tenancy unit. Are you aware of that?

Mr D'AGOSTINO: Yes, I am.

The Hon. JAN BURNSWOODS: All the tenants say they were not issued with a disclosure statement detailing Westfield's legal action. Does that surprise you?

Mr D'AGOSTINO: That was outside my retainer. I did not control what Gazcorp did. They were very thorough with their preparation.

The Hon. JAN BURNSWOODS: Your boundaries were pretty narrow.

Mr D'AGOSTINO: Yes, I admit that.

The Hon. JOHN RYAN: I refer to your statutory declaration. I think you said to the committee that you had no idea about the contents of other statutory declarations made by other people on the same day.

Mr D'AGOSTINO: That is right.

The Hon. JOHN RYAN: Is it not a fact that you signed your statutory declaration in the presence of other witnesses?

Mr D'AGOSTINO: Yes I did, but I was the first one to do it. I was the first one to leave and the last one to attend.

The Hon. JOHN RYAN: Although you attended, you signed yours and left and did not read anyone else's.

Mr D'AGOSTINO: That is exactly right.

The Hon. JOHN RYAN: Were you aware of why you were all gathering to sign statutory declarations?

Mr D'AGOSTINO: Of course.

The Hon. JOHN RYAN: What were you told was the reason you were making a statutory declaration?

Mr D'AGOSTINO: I was at an auction that morning and Bill asked me to come to the office. I told him I would come after—

The Hon. JAN BURNSWOODS: Madam Chair, there has been some discussion with the clerks. We have not seen these statutory declarations. Obviously some members of the committee have seen them. However, it is very difficult for us when questions are being asked about documents we have not seen. Can they be tabled and made public?

The Hon. JOHN RYAN: I have no difficulty tabling this material. I have made—

The Hon. JAN BURNSWOODS: I am not asking the honourable member to table it. The clerks have a copy.

The Hon. JOHN RYAN: It is my document.

The Hon. JAN BURNSWOODS: The Hon. Mr Oldfield asked an enormous number of questions before—

The Hon. JOHN RYAN: I will save you the worry of being sanctimonious. I am happy to table it. I simply make the point that exactly the same question was asked of another member representing the Australian Labor Party and that member did not table the information. But, of course, I will make it available. You can have this one.

The Hon. JAN BURNSWOODS: The only reason I made the comment about the Hon. Mr Oldfield is that you said, "It is my document." That is when we asked the clerks for a copy.

The Hon. JOHN RYAN: Problem solved, you have it.

The Hon. JAN BURNSWOODS: We do not actually have them yet.

The Hon. JOHN RYAN: Before I forget the point, I will continue my question.

CHAIR: The Hon. Mr Ryan has tabled a document—a statutory declaration.

Document tabled.

The Hon. JAN BURNSWOODS: And made public. That is what I need.

The Hon. JOHN RYAN: What did Mr Gazal ask you to do? Did he explain why he was getting people to sign statutory declarations?

Mr D'AGOSTINO: I was asked to come over.

The Hon. JOHN RYAN: Where?

Mr D'AGOSTINO: To Gladesville—to his office. They were there with a number of people. When I got there, he told me that they were preparing statutory declarations in respect of these allegations. There were rumblings about the allegations. I was never directed and I was never put in the throws of it absolutely, but we did speak about it generally. However, I was well aware that the reason that we were attending was to make statutory declarations. Where they were going I was not sure, but I think it was to the Independent Commission Against Corruption or this committee.

The Hon. JOHN RYAN: So it is not true that you did not know the contents of the statutory declarations until you saw them?

Mr D'AGOSTINO: I have not seen any of the statutory declarations to date; no-one has given me a copy of them.

The Hon. JOHN RYAN: I agree with you, but I think I asked you about whether you had heard the content of the statutory declarations prior to hearing about it in the media.

Mr D'AGOSTINO: No, I think you asked whether I had heard what the allegations were. Everyone has heard what they are.

The Hon. JOHN RYAN: Yes, but did you hear that only for the first time in media or did Mr Gazal tell you about them?

Mr D'AGOSTINO: Mr Gazal told me about them.

The Hon. JOHN RYAN: When did he tell you about them?

Mr D'AGOSTINO: If it was not on the date that I came, it was a matter of days before that.

The Hon. JOHN RYAN: It is important to clarify because, again, people will put words in your mouth if that is not explained. I refer to the phone call you had with Mr Tripodi. What other matters did you discuss with him during that phone call?

Mr D'AGOSTINO: I spoke about what was going on with these allegations. That is when he suggested that they were not true. He said these sorts of matters should be referred to the Ombudsman, and I suggested that to Frank Mosca. But he did indicate to me not to say anything about our conversation and we were not to talk about it again.

The Hon. JOHN RYAN: Who did he mean you not to say anything to?

Mr D'AGOSTINO: He did not want me to pass on—and I respected his wishes—to Gazcorp that I had spoken. However, he did say that if what they were looking to do was to overturn this type of administrative decision, they should go to the Ombudsman. I suggested that to Frank Mosca.

The Hon. JOHN RYAN: During the conversation did he indicate that he had discussed this with anyone else prior to calling you?

Mr D'AGOSTINO: Who.

The Hon. JOHN RYAN: Mr Tripodi.

Mr D'AGOSTINO: No, the conversation lasted only a matter of minutes.

The Hon. JOHN RYAN: Was anything else discussed?

Mr D'AGOSTINO: I told him that they were all trying to get hold of him. We were all trying to get hold of him. He was on his honeymoon, and out of respect we should leave him be. He had only just started his honeymoon. He asked me not to say anything and he did not want to talk about it again. But he did indicate that if they wanted something overturned it should go to the Ombudsman, and I made that suggestion to Frank or someone else; I do not know.

The Hon. JOHN RYAN: Did he speculate to you the reasons that Mr Gazal might have been making these allegations?

Mr D'AGOSTINO: No. I really did not want to talk about it with him.

The Hon. JOHN RYAN: Did he seem annoyed that the allegations had been made?

Mr D'AGOSTINO: Annoyed or frustrated; he was certainly not jovial about it.

The Hon. JOHN RYAN: Fair enough.

Mr D'AGOSTINO: As I said, and out of respect for Joe, if anyone says that I should not say something, I cannot.

The Hon. JOHN RYAN: Is there anything illegal about a tenant moving into a retail complex prior to completing a lease?

Mr D'AGOSTINO: Not to my knowledge.

The Hon. JOHN RYAN: There is nothing illegal on the part of the lessor or the lessee?

Mr D'AGOSTINO: Illegal as opposed to prudent? It is possibly not prudent.

The Hon. JOHN RYAN: It might not be prudent, but there would be nothing illegal about that.

Mr D'AGOSTINO: No.

The Hon. JOHN RYAN: If a tenant moves into a complex without the benefit of a lease, does it suggest that the lessee or the lessor has done anything wrong? For example, if a tenant said, "Look it is nearly Christmas, I want to get into the place and we can deal with the paperwork later," would anyone be doing anything wrong?

Mr D'AGOSTINO: Theoretically speaking, if I had a tenant who wanted to move in without waiting for a lease to be finalised, I would not object.

The Hon. JOHN RYAN: It is essentially a matter for himself.

Mr D'AGOSTINO: It is his issue and they are all independently advised, presumably by quite competent solicitors.

The Hon. JOHN RYAN: The disclosure requirements in the Retail Leases Act largely relate to the formulation of a lease document being done properly, not really to whatever arrangements a tenant and a retailer might have with each other. There is no requirement for a tenant and a retailer to have a lease.

Mr D'AGOSTINO: There are certain consequences under the Act, and certain contracts have to be in writing. The Act specifies that certain contracts have to be stamped, registered and so on.

The Hon. JOHN RYAN: That is a proper lease.

Mr D'AGOSTINO: Yes. The matter of disclosure goes to a different question of a relationship between a lessor and a lessee. I am speaking hypothetically. It goes to the lessor's knowledge at the time of entering into the disclosure statement. As I said, I believe it has serious deficiencies in respect updating it and so on.

The Hon. JOHN RYAN: Do you mean the law?

Mr D'AGOSTINO: The Act is silent.

The Hon. JOHN RYAN: Hypothetically, if a disclosure statement had been made to tenant or prospective tenant prior to any litigation being commenced, there would be no requirement for any information about the litigation to be included in that statement.

Mr D'AGOSTINO: No, I would imagine not.

The Hon. JOHN RYAN: There is no requirement for the statement to be updated if litigation ensues.

Mr D'AGOSTINO: Not under the Retail Leases Act that I am aware of.

The Hon. JOHN RYAN: Hypothetically, only the tenants of a retail centre who are required to have an appropriate disclosure are those who have sought to have a lease after the relevant litigation has commenced.

Mr D'AGOSTINO: Hypothetically?

The Hon. JOHN RYAN: Yes.

Mr D'AGOSTINO: It might even go further than that and say that even after a decision has been made in respect of that. What is the prospect of success of that litigation? Anyone can start litigation against anyone for anything, whether or not it is likely to be successful.

The Hon. JOHN RYAN: So there could be a view that if it was thought that there was no prospect of the litigation being successful there would be no need to disclose it, or there could be legal argument as to whether it should be disclosed.

Mr D'AGOSTINO: I am not proclaiming to be a Retail Leases Act expert. I am stating some facts that it is silent in this regard. I am certainly not aware of any settled litigation which states what you have just said. I am just speaking hypothetically, and I am speaking logically. Who is to say litigation is going to be successful? There are any number of vexatious litigants around.

CHAIR: Given that it is now 7.15 p.m., you have been here for quite a while. The Committee will hold meetings here on Thursday and Friday of this week. Obviously a number of members of the Committee have questions to ask you in camera. I know you are a very busy person. Would it be possible to arrange the timetable on Thursday or Friday, to accommodate your commitments? Alternatively, we could continue with the hearing now.

Mr D'AGOSTINO: Counsel is just indicating to me that he is in court tomorrow, as well as Thursday and next Friday. I do not have my diary with me, so I would not have a clue what position I am in.

CHAIR: Would it be better if we plough on now?

Mr D'AGOSTINO: I would be happy to come back at, say, 4.30 p.m. or 5 o'clock next Thursday. But I am also happy to press on now.

CHAIR: The Clerks allocated 90 minutes to this session, and that has now expired. They also asked members whether they had any problems with that allocation of time. Mr D'Agostino, are you happy to come back late on Thursday?

Mr D'AGOSTINO: Counsel is indicating that late on Thursday is acceptable. I just have to check my diary, but I do not think it would be a problem.

CHAIR: We will slot your evidence in after court on Thursday.

Mr D'AGOSTINO: That will be in camera?

CHAIR: Yes.

The Hon. JAN BURNSWOODS: You spoke about a statutory declaration, of which we now have a copy. Because we did not know what you were talking about when you started, I am not quite sure whether

these statutory declarations have ever been given to the Committee. When speaking to them, you also spoke about other statutory declarations. Can you tell us how many there are and where they are?

Mr D'AGOSTINO: I know there are three. Where they are, I have no idea.

The Hon. JAN BURNSWOODS: That is Mr Gazal, Mr Mosca and yourself?

Mr D'AGOSTINO: No. Mr Gazal, Mr Mosca and Mr Bargshoon.

The Hon. JAN BURNSWOODS: And your own?

Mr D'AGOSTINO: And my own.

The Hon. JAN BURNSWOODS: Were they sent to the Committee?

Mr D'AGOSTINO: I left them with Gazal, my client. Where they went from there, I do not know. I took a copy for my own records, obviously. Where they went from there, I do not know. I have not delivered them anywhere.

The Hon. JAN BURNSWOODS: This was not tabled by you today?

Mr D'AGOSTINO: No. I have no idea where they went.

CHAIR: The public hearing is now closed.

(The witness withdrew)

(The Committee adjourned at 7.20 p.m.)