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PRODUCTIVITY COMMISSION

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

DR N. BYRON, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON FRIDAY, 15 FEBRUARY 2008, AT 9.13 AM

Continued from 13/2/08

DR BYRON: Thank you very much, ladies and gentlemen, if we can resume the public hearings of the Commission's inquiry into the market of retail tenancy leases in Australia to get feedback and critique of our draft report released last December. We start off today with the representatives from the Franchise Council of Australia. I understand that you might have another person joining when he escapes the traffic, but if each of you could introduce yourselves briefly and your organisation for the transcript and then take us through the main points that you wanted to make. Thank you very much for the written input we've already read and thanks for coming today.

MR WRIGHT (FCA): Thank you, Commissioner, Steve Wright, executive director, Franchise Council of Australia. We have an apology from Chris Malcolm, also a director of the Franchise Council, who may appear but we think possibly not. He is also the CEO of Clark Rubber, a major national franchise organisation.

MR YAMMOUNI (FCA): My name is George Yammouni. I'm the deputy chairman of the Franchise Council of Australia and also CEO of a national franchise organisation called Bathroom Works, and I'm here today to support Steve in our submission, their Honours.

MR WRIGHT (FCA): Thanks, George. Supporting me is a curious concept coming from George, because he has infinitely more experience of franchising than I do. So to the extent that I am speaking on behalf of the council and the broader franchising sector then George is definitely the person who has the true expertise in those areas.

DR BYRON: Just by way of introduction, do you want to tell us a little bit about the Franchise Council and the nature of your constituency and whether you represent franchisor, franchisees, or both; that sort of thing.

MR WRIGHT (FCA): Yes, thank you, I'm glad to do that. The Franchise Council represents the entire franchising sector - franchisors, franchisees, the suppliers and service providers who participate in the industry, and we've recently taken on some other related representation in our board as well that is in one area that I think is of great interest, education for instance. We also have taken on a director who has an accountability for women in franchising. So we have a fairly broad church, I guess you would say. It's a possibly unique association in that it's representing a sector which crosses many industries. So we have, if you like, a unique insight into many industries, but of course are interested in one very specific part of the business relationship and that is the one that occurs between franchisors and franchisees. The retail tenancy issue is directly relevant to many of our members who of course have shopfronts in shopping centres particularly and that, I guess, are the constituents about whom we are talking with most interest today. Do you want to add anything to that, George?

MR YAMMOUNI (FCA): Yes, our membership comprises of most people in the industry. We're very representative of the franchising community in Australia. Our

members would represent approximately 55,000 franchisees and about a third to half of them would be franchisees that operate businesses in shopping centres, so this is a very important submission to us and a very important inquiry to our members who are small business who struggle to make a living in that environment.

DR BYRON: Thanks, George.

MR WRIGHT (FCA): Commissioner, to pick up on what George just concluded with our, I guess, main response to the draft report as we have indicated in the supplementary statement which we've given to you is that the Commission doesn't regard landlord behaviour as described in many submissions as warranting intervention although we accept, having said that, that another attempt at more prescriptive legislation may not be the most fruitful course in addressing these well-documented market issues.

DR BYRON: I truly don't want to interrupt you, but I'd just like you to clarify that. I don't understand how you concluded from our report that we don't regard landlord behaviour as warranting intervention. I thought that was the reason why we floated the idea of a code of behaviour for shopping centres.

MR WRIGHT (FCA): Okay, hopefully the next thing that I say just gives some clarity to that. I would suggest that a summary of the draft report has an inclination toward measures such as we suggested as a code of conduct as opposed to direct legislative intervention in perhaps a similar way to has been attempted in the past. We strongly urge the Commission in its final report to further explore the possibilities that a code could offer. We have found the code of conduct to be extremely effective in the franchising sector. We know that there was a voluntary code attempt in New South Wales many years ago, but we do not believe that the apparent lack of success of that initiative should deter the Commission from considering the usefulness of a code of conduct going forward.

The self-evident difference in the situation that a lessee, particularly a franchise lessee if it is a single store owner, faces at the time of renewal of a lease arrangement - if in fact there is a renewal opportunity, or renegotiation if the lease has come to an end - in the shopping centre versus the strip, tells us that something is happening at that renegotiation point which is not reflecting a balanced market interaction as was evident at the time that the first lease was signed. Our contention is that that is because of the imbalance of information and also the actual market power that the shopping centre owner has within that shopping centre. There are different remedies which we describe later in this document to address that, and I'll come back to those at the end.

We also urge the Commission to recommend national harmonisation of legislation and regulation, and are also very supportive of any efforts to refine the dispute resolution process to allow independent low-cost mediation where it is desired by landlords or lessees and we are certainly encouraging any intervention which can retard the

landlord practice of demanding business sales figures from lessees, one of the alternatives to that which we suggest may be useful being the creation of an independent third party where sales figures may be held as well as landlord shopping centre tenancy information. We also suggest that a national register of that information, that being the landlord tenancy information, would be a very positive step as well and although it's not in our submission, we are also supportive of the concept of that being a very simple document, perhaps a one-page document which forms the meat of the database, if you like.

The things which we observed, as reflected in our submission, are that while well intentioned the legislation has failed to protect tenants from potentially business-debilitating rent hikes, especially at times of lease agreement renewal or renegotiation. The particular circumstances of many small franchisees is that they see a potential business success from two sources: (1) the franchisor; (2) the shopping centre environment, both of which give them a sense of strong likelihood of success of the particular business because it brings to them marketing skill, a proven formula and a known venue where traffic into the store is going to be or highly likely to be provided.

The relationship that occurs between the franchisor and the franchisee on average in Australia outside shopping centre arrangements is about seven years. The history of franchisors with franchisees in successful systems that are growing is that that figure is quite a lot of higher, so remembering that an average of seven years where small business failure is probably around 50 per cent in the first two to two and half years tells you that the franchisor-franchisee relationship is working very well in the business market and in fact the growth in the sector also reinforces that. The franchising market has been growing at about 7 or 8 per cent for the last three or four years, obviously outstripping the broader market by multiples.

The profitability is there and Australian franchisor's businesses are going to the region to the world and they are beating competitors who know their local markets better than they do obviously. Even in the United States, which you might regard as the home of franchising, franchise businesses from Australia are showing their credibility on the world stage. That is the result of a symbiotic relationship between the franchisor and the franchisee. If it doesn't work, then the business fails. So there is an incentive for it to work from both sides and yet many of our successful franchisors experience great difficulty in assisting their franchisees to maintain their business success model in the shopping centre environment and that is because they do not have the power to control the rent.

Only when they get to a very large scale, as represented by Roger Gillespie, the ARA president on Wednesday, do they actually step up to a position where they have real negotiating power. The lessees who are stand-alone franchisees who do not have that power have very little ability to effectively negotiate for themselves a

future profitability even when they're in a franchise system which in all other places is providing that security. So it is our contention that there is a breakdown of what was a fair market at signing of lease at the point of renewal or renegotiation in many cases.

The FCA has not formally considered, but is positively disposed towards some of the things which have been brought to your attention in the hearings, Commissioner, including any measures that empower the player with least power in rental negotiations, as opposed to trying to impose some kind of penalty against landlords who we obviously acknowledge are not routinely playing an unfair game, so to speak. But we do suggest that it is very common for landlords to be of a mind-set which is to maximise the profitability they can extract from the business of the lessee as opposed to having a focus on, if you like, the average performance yield per square metre and then moving up or down against the type of store that's operating there and their mix.

What we're seeing is a store by store, lessee by lessee, individual analysis of their capacity to pay as opposed to a fair negotiation on real rent, that which does not include incentives, which were there at the outset and which disappear at renewal or renegotiation time, unless there is very strong market power on the part of the lessee. We're also very strongly supportive of pre-entry education. This is a theme for franchising generally. We have only 1 per cent dispute, in fact less now than 1 per cent dispute amongst those 66,000 franchisees annually. That has come down dramatically from something approaching 10 per cent since the introduction of the code of conduct in franchising. We would like to get that figure down even further and believe that education before franchisees actually enter the market is the way to try and get that down further. So we certainly by the same token support efforts in that regard for imminent lessees. In fact we believe there is quite possibly a cooperative role for governments and organisations such as the Property Council and the Shopping Centres Council and Retailers Association and the Franchise Council to get together to support that kind of approach.

We're supportive of the concept of a risk statement to be presented to lessees for landlords. There again is an analogous situation in franchising where acknowledgment of recommendation on the part of the franchisee to seek legal advice before signing a franchise agreement has to be received by the franchisor before that agreement can be legal. So there is a strong step taken in the code of conduct requiring franchisors to make it very clear that they recommend to franchisees before they sign an agreement that they get legal advice about the agreement and they need to get a written acknowledgment that that has taken place or that the franchisee understands that.

We support the concept of simplifying the tenancy agreements, as I've said earlier, possibly including the standard terms and conditions in a similar way to a real

estate contract of sale. I think that's a very good idea and the one-page summary again, terms and conditions, which could form the document base for a national register, again we regard as a useful idea. The concept of dispute resolution taking place before the conclusion of a lease is also a very positive suggestion, we would say.

Do you want to add anything to that, George?

MR YAMMOUNI (FCA): Yes, if it's okay with you, Commissioner.

DR BYRON: Sure, please.

MR YAMMOUNI (FCA): I'd just like to bring a bit of heart and soul to this inquiry because I feel I'm here to represent the franchisee that's out there in the shopping centre, the person who gets up every morning and opens up his shop, works hard all day, seven days a week, only has one or two days off a year on average, and just to bring the human side a little bit to you. Sometimes it gets a bit lost in papers and everything else that happens.

When a person decides to buy a franchise, part of most Australians' dream is to be in business for themselves and to own their own home and it's a big step for a lot of people. They put their life savings on the line when they buy a business. When they go into a shopping centre, they make decisions to get into a franchise business because they want to reduce risk and then if that business is involved inside a shopping centre, then there's another level of insecurity attached to that decision as well, which is what happens when the lease expires and it's time to renew?

When a person first buys a franchise, it's like a marriage, it starts on a high, and the first six to 12 months of a person running their business, they're on a high. They're confident things are going well and they're progressing. But as they start to get used to the day to day of running the business and time goes on and the hard work of paying your monthly rent and then seeing that rent go up every year, then at the time realising that you've now got to renegotiate your rental with the shopping centre - and it's that shopping centre that has all the power over your future, not your franchisor, it's the shopping centre - and we've got plenty of instances and examples we could give you of the grief that shopping centres use their power excessively to put franchisees in a position where they feel they have no choice. They just have to sign and pay the increased rentals. Sometimes those increases in rentals make their business unviable and that's the thing that we're hoping this Commission picks up, that the shopping centres do use those powers, I think, and I feel unconscionably.

What can we do about it? That's what the Franchise Council is about, trying to level the playing field. How can we bring a bit of fairness and equal negotiating power to all the parties involved, because at the end of the day, a franchisor and a

franchisee are in business together. They take the risk of running the business in a shopping centre, not the shopping centre; the landlord, they just collect the rent. They're not in the business of taking a risk. The franchisee and the franchisor together take the risk of running that business. So where shopping centres get the idea that they can request turnover figures and then charge accordingly, to me it's an abhorrent idea and if you're a capitalist and believe in a free economy, it just goes against all that, that they can force those figures out of you and then charge you a rent based on what your turnover is. My main argument there is it's not the shopping centre that's taking the risk of running that business, it's the franchisee and the franchisor. What right do they have to charge rents based on those turnover figures?

The things that we've asked for in our submission about pre-entry education, the Franchise Council is very committed to doing that because we do feel that that's a great way of educating small business before they get involved in businesses that are run out of shopping centres, because we feel there is a lot higher risk attached to those businesses than there are normally because of this unknown factor at the end of the lease of what the shopping centre management is going to do about your lease rentals or whether they're going to renew, or whether they're going to make you do a complete new fit-out and just exactly where your future lies.

Steve made a great point before with Bakers Delight. Once a franchise system gets to a certain size, then they have a choice. They don't have to put up with the rents, they can just move out, and Bakers Delight has done that before. They've just moved out of shopping centres because they weren't prepared to cop the huge rental hikes that they were asked of. But a lot of our franchise systems in Australia aren't of that size that they can do that. They're just not there. So at the end of the day, they either have to accept the rental hikes or they have to negotiate a way out of the arrangements that they have made with the shopping centre. It becomes a very difficult thing.

MR WRIGHT (FCA): If I can just chip in there, it was enabled in the Bakers Delight case more effectively because they have a mix of company-owned and franchise stores as well. Again, that gives them a different characteristic in their ability to negotiate their power.

MR YAMMOUNI (FCA): I think it's important that the Commission understand that most franchisor organisations are only small businesses. The average franchisor would employ about 15 people. It is not a large business. The perception is that they're a huge organisation and that they're rich and they can afford it. That's simply not the case. They're just a small business that are trying to provide support services to all their franchisees. So they don't always have the ability to just shut down a shopping centre in the shopping centre and incur the losses that go with it.

Some of the things the franchisees report to me that they find abhorrent is the

fact that at the end of the lease renewal term, if they can't afford to pay the increases in rent because it makes their businesses unviable, they've just got to walk out. They just lose all their money, all their investment, and walk out. They take all their shop fittings and go. That's just heartbreaking. The other big thing they talk about is that the shopping centre managers can force them to completely refit their shop, refurbish their shop completely which is another huge cost, to meet whatever specifications the shopping centre has required at that time, so the burden that gets added on to people that are running a small business is just excessive. That's all I'd like to say.

DR BYRON: Good, thanks very much, George. I can well understand that. Can we talk about some of the issues that you've raised. It seems to me that there's probably some pretty good parallels between a lease and a franchise agreement. They're two different types of business contract. As somebody said to us last week in Sydney, with the lease, you're renting the space from the landlord, the physical space; with the franchise agreement, you're actually buying the right to use the intellectual property, the system, the logos, the brand, the whole business management from the franchisor. But also in both cases, if the contract expires and isn't renewed, your business can basically just - - -

MR YAMMOUNI (FCA): Let me just add to what you just said, Commissioner. There is a big difference between a lease and a franchise agreement. A lease is, "I give you the right to use my asset. I don't take the risk of you using that asset, that's your risk. If you go broke, it doesn't affect me." A franchise agreement is, "We're in business together and we're both taking the risk of running the business and we use that asset to make money out of." There's a big difference.

DR BYRON: I was going to say that franchises typically supply turnover to the franchisors.

MR YAMMOUNI (FCA): Because they're in business together, they're entitled to. They both help each other to achieve that turnover.

DR BYRON: Yes. We were talking outside in the corridor before about the differences between retailing in the strips and retailing in the centres and I think the hundreds of year old system of renting retail space on a high street, under common law and all the rest of it, we all know and love that and we understand that and how that works and that's been refined over 200 years of practice et cetera. The managed shopping centre model that basically came to Australia in I guess the 60s, nearly all the retail tenancy legislation that we have in Australia started in the 1980s, was justified on the basis that this new shopping centre model, concrete, climate controlled, under one roof and a manager. So maybe, as one of the lawyers said to us in Sydney last week, the conventional lease and the way we think about retailing in a strip doesn't actually transfer very well into this centre where there's a single manager and where the managers and the centre owners are basically saying, "We do

have an interest in your business rather like a franchisor, and we are going to run this whole centre in such a way that it buzzes and hums and people come in and your return will go up and we want a cut of that."

MR YAMMOUNI (FCA): Can I answer that? Sorry to interrupt you but my feeling there is, "That's fine and that's a great sentiment but if you want to be in business with me, why don't you put some money into my business too and take on some of the business risks with me. You're not doing that. You as a shopping centre aren't doing that. I'm the one taking all the risks."

DR BYRON: That I think is a very, very pertinent point. They'll take a share of the upside but they don't seem to take a share of the downside.

MR YAMMOUNI (FCA): Correct. If you're going to take a share of the upside then you'd better be prepared to take a share of the downside, otherwise it's not a fair economy if you do it that way.

MR WRIGHT (FCA): We could say that though is a fundamental difference between the franchising model and all others in the business world. I would like to go a step further on the legal comparison, the (indistinct) comparison you reference at and agreed - and I don't think anybody would contest, is a different scenario. It is a different mini-market, the strip versus the shopping centre.

DR BYRON: The rules of the game - - -

MR WRIGHT (FCA): The rules of the game are a bit different. The comparison is made at the start so a prospective tenant, a business person, can make a choice based on what is presented to them at the start. The difference is that when the negotiation time arises at the end of the lease if it's a negotiation based on a renewal, the power dramatically shifts so that that which was an understood market difference and decision based on a set of economics completely changes. It's thrown on its head. That is not disclosed to anybody starting business in that shopping centre which does mean that those who fail to understand it are in a perilous position. But it doesn't justify it. The fact that it happens does not justify it in terms of a transparent, fair, open market. That may have existed at the time when the business person chose to go to the shopping centre versus the strip, but in the strip scenario the imbalance does not occur at that next point.

DR BYRON: So if at the end of the lease in the strip I as a small retailer, if I cannot reach an agreement with my landlord about terms and conditions of another lease, I have the option of dealing with somebody else across the road and three doors down, and if I can get space over there at the right price, I put the notice on the door, "All my loyal customers follow me across the road and down the street," and everything is fine and I carry on, and the landlord will have to find somebody else to rent his

shop. In the shopping centre model it's not quite like that, is it?

MR WRIGHT (FCA): It's not like that but why not? Well, number one it's not like that for one very big reason and that is that the landlords insist on having turnover information which they then use to make a decision on a rent review based on capacity to pay, not on an assessment of the underlying true rent.

DR BYRON: That's the next point I was going to ask you about because you referred a couple of times to this, that the centres are basically looking at the capacity for small retailers to pay. You were contrasting that with real rent. Now, can you just clarify, because it seems to me that if we're on a strip there's sort of a going rate per square metre pretty much the same and every retailer along that high street is probably paying pretty much about the same levy as selling animals, vegetables or minerals or whatever. If your rent is 110,000 and your gross profit is a million, then you've got 900,000. If on the other hand you're at a centre and your gross profit is a million, they're basically saying, "Well, we'd like 998,000, please."

MR WRIGHT (FCA): Yes.

DR BYRON: But what they're saying is that this isn't about just a space, it's about, you know, "You're in our managed environment, we've done promotions, we've brought people in, we've managed the centre to make" whatever. It's a very different game.

MR WRIGHT (FCA): It's a different game and it's based on the concept of market power that allows one side to create a transfer of profitability into a market rent, so that which may have been a margin built up over a period of time for a business through its effective operations, its brand cachet and possibly other centre related factors, is transferred from that business to the landlord. Now, it's entirely understandable and right in the business world that a process like that should occur which accounts for those elements, but in most other circumstances the elements vary in degree but there is a substantial amount of increased profitability that is generated by the business that is retained by the business and then reinvested, and if it is because of the effective way that business is run, as opposed to some other factors such as a landlord has provided X more human traffic past the front door which you can account for, which you can measure, the margins may have increased simply by the store stocking better garments, if it's a clothes shop, but have higher margin.

If that is the case then the store owner should be entitled to believe that they are entitled to retain most of that profitability. In this case a rent change is taking that away and you're seeing what we would regard as a change from the real rent that was understood at the start of the lease to a new one which does not account for purely those factors which have changed from the landlord side to the benefit of the

business.

MR YAMMOUNI (FCA): I can add to that too. My comments are that you're paying the premium to be in the shopping centre, that's why you pay the premium because the landlord is doing a lot of marketing and advertising to bring people in. You're paying a premium for that. Also in franchising, most franchise stores in the shopping centre are also doing their own advertising and marketing and bringing in people as well, but the shopping centre doesn't pay them for doing that. There's a mutual benefit that goes both ways.

DR BYRON: That's why we were exploring in some of the other hearings the idea of saying, "If you're in a centre you may be paying X to the landlord but there's actually two components: one is for the space and the other one is for putting the sizzle in the sausage." Yet there's no accountability around that, you've got no performance indicators, you've got no measures to say, "Well, how much of the business is because of what the landlord has done and how much is because of the tenants?"

MR YAMMOUNI (FCA): Well, landlords keep store traffic figures, meticulously, because they use that argument to hike up the rents.

DR BYRON: Okay. Coming back to the requirement to disclose turnover to the landlord, which is something that just about everybody who we talk to mentions, it's said is the most important thing. I don't know if you were here yesterday when I was saying if the centre staff are really confident and professional and experienced, they would probably have a pretty good idea of how each business in the centre was trading. Now, having the actual numbers of the turnover basically confirms their intuition. If they didn't have the numbers they might still basically approximate. They wouldn't know how much you could afford to pay but they would have a darned good guess, and sometimes they would be too high and sometimes they would be a bit low, but they might still go and say, "We're going to try and get as much out of you as we think you can accord to pay, whether we've got the actual numbers out of your cash register printout or not."

MR WRIGHT (FCA): That's a very valid observation and I'm sure that that is a facet of market assessment that is available to any scenario, whether a shopping centre or not. But Roger Gillespie did say in response to you asking him a question on that very topic that he would be very surprised if an estimate could be within 20 per cent of the true number. That 20 per cent may just equate to margin in rough numbers and I think that's his experience and I think it's probably a fairly telling point.

DR BYRON: The other line that's been put to us is that if I go to you and I'm thinking of opening a small retail business and you're centre management and you say, "And by the way, one of the terms and conditions of this lease you're about to sign is that you

have to give me your turnover data every month," do I say, "I refuse to do that. Go to hell," or do I just say, "Yes, if that's what I have to do to get in here I'll sign it"? I may not like it, I'll grumble about it, I'll regret having done it, but if it's disclosed and people see that as part of the package that they're taking, you know, there's good bits and there's bad bits in this package, a bit like the parson's egg, and that's one of the less palatable bits but it's - - -

MR YAMMOUNI (FCA): It's very unpalatable. It's like the only person that has the right to ask you that is the Tax Office. Are they the Tax Office?

DR BYRON: And the franchisor.

MR YAMMOUNI (FCA): No, they're in business with the franchisor, they're in partnership. That's a very important relationship.

DR BYRON: The way that centre retailing seems to be going as it was described to me in the US, the landlords are now basically offering concessions of who wants to operate the Polo Lauren space in this corner of this building, who wants to operate the Chanel perfumery place over here, and that's on a three-year, five-year concession and we'll take X per cent of your turnover, and at the end of that time you've got no right to stay there. We can put them out and put in somebody who is selling budgerigar food or whatever. The centres seem to be moving a long way from the old-style strip that we know and love where it was purely a price to use the space to actually saying, "Yes, you can come and use our space and we want a share of your profits."

MR YAMMOUNI (FCA): Then take the business risk that goes with it, as simple as that.

DR BYRON: No, I'm not advocating this. I'm just observing it.

MR YAMMOUNI (FCA): But they want their cake and they want to eat it too.

DR BYRON: Yes.

MR YAMMOUNI (FCA): Shopping centres are working on a formula that is, "Here's a space. We'll get an anchor tenant there. We'll give them cheap rent to attract them and then we'll squeeze the rest of the rent that we need to capitalise the rental we get out of this place to make the whole property development viable by getting it out of the smaller one-man operation, the small shops, the small man." They squeeze him for the rents and the big boys get the little ones. It's very unfair.

DR BYRON: Okay, it may be unfair and my question is: why do people sign up to go into that? Because they don't know it's unfair?

MR YAMMOUNI (FCA): Because people have the great Australian dream, "We want to get into business for ourselves." They are exploited by these organisations, that's the reality of it.

DR BYRON: No, I mean this is a very important question. There's no doubt that if somebody gets to the end of five years - I mean we had an example that was put to us at one of the other hearings where somebody has borrowed money over 10 years to start the business, they're going to write off the fit-out over seven years, they've only got a lease for five. At the end of five years, of course they're over a barrel. It's very hard for them to walk. The retailers we've spoken to in these hearings who seem to be very successful are the ones who say, "Yes, we know five year means five years means five years and we have to run the business ourselves so at the end of five years if they offer us a deal that we don't want, we are in a position where we could walk if we had to. We don't want to but you don't want to put your own head in the noose and then tighten it."

MR YAMMOUNI (FCA): Mr Commissioner, our Prime Minister yesterday showed us great leadership by saying, "Let's have restraint of wages," and the parliament is leading the cause and they're trying to ask CEOs to follow. My point here is that the same thing doesn't happen in shopping centres. There is no restraint there. They're making their money out of the small man and they're out to bleed him as much as they can get because it increases the total rental they get from the shopping centre, which increases the capitalisation of the valuation of the whole property, which increases its share price in the market. That's where it starts and finishes.

DR BYRON: Yes, but can you understand why the people in that system do that? I mean, that's the shopping centre's model of how they work.

MR YAMMOUNI (FCA): The point I'm leading to is at the end of the day who pays for all this? The consumer in higher prices. So what's the point of parliamentarians withholding their pay if down the road shopping centres are asking enormous prices, the man in the street has to pay those prices because it gets reflected in the goods and products they have to buy. Everyone ends up paying more. Inflation becomes rampant.

DR BYRON: Yes, at the end of the day if the price that they're asking is unaffordable, people will no longer be able to pay it for rents. At the moment the reason the centre managements can say, "We're after X. We're after 2X and if you won't pay it there's somebody outside who will."

MR YAMMOUNI (FCA): Correct, that's what they do.

DR BYRON: When I ask myself, okay, if they've got market power, where does that market power come from, it's because there's a relatively limited supply of high quality retail space and there's a lot of people out there who would like to be in it.

MR YAMMOUNI (FCA): Correct.

DR BYRON: If there was nobody out there who was willing to pay that amount, then the terms and conditions would start to change. But as long as there's somebody who is willing to pay whatever they ask, that's what's going to happen, isn't it?

MR YAMMOUNI (FCA): Yes, prices go up and we have inflation.

MR WRIGHT (FCA): Yes, absolutely, Commissioner, and that is where we're headed no doubt until the market corrects itself. A question if I could just to change the perspective: if the shopping centre owners know their business well, the manager knows his shopping centre well, and we certainly have no reason to believe that there's any question about either of those assertions, they're highly successful businesses, why do they need so much turnover information? Are they not able to make an accurate enough assessment by doing what you described before?

DR BYRON: It's simply a question: do they actually need it? I understand why they don't mind having it if they can get it. Whether they actually need it to do what they do, I'm just curious. It seems to me that this is something that everybody complains about - a bit like the weather or the traffic - but the point the shopping centres keeping coming back to is, "Well, this is in the terms of the lease. If you sign the lease, you sign the lease. If you don't like it, don't sign."

MR YAMMOUNI (FCA): That's a terrible argument because people want to get into business. It's like, "It's hot, I want to go swimming and that's the local pool." There's the price you've got to pay to go in to have a swim. If you don't want to have a swim, don't come in. What sort of an argument is that?

MR WRIGHT (FCA): We do address eyes wide sharks in the franchising sector through the code of conduct and franchisors in the agreement signing transaction are required to disclose financial information, so that's an element of improving the balance, if you like, of information at negotiation time. The franchisors are also required to provide information about what has happened historically with this particular franchise so that it is, for instance, if there has been a failure it is apparent. It would also be apparent if it was a rental business, for instance, if the price had gone up 100 per cent after the first expiry of agreement.

DR BYRON: That's why we look at the franchise code and we know and as you've said today that the code has been very, very effective in among other things improving the reputation and the standing of franchising as a business model. It's taken a lot of the aggro out of it. It's enabled both the franchisors and the franchisees to get on with doing good business. It seemed to me that the franchising code was a bit of a circuit breaker. It put trust and confidence and mutual respect back into business. Maybe something similar could do that for the landlord-tenant relationship. I'm not expecting miracles, but

it may be one way of doing something similar to what's happened in franchising.

MR YAMMOUNI (FCA): It is, it's a great way of doing it. The code has been that successful that our Asian neighbours have now taken on the code. We're sending delegations over to Malaysia, Vietnam, Philippines, Korea, because they want to know how it's working and want to know more about it. We are, as a sector, educating those countries in our code.

DR BYRON: Yes. Keep blanks - - -

MR YAMMOUNI (FCA): Yes.

DR BYRON: Sorry, George.

MR YAMMOUNI (FCA): Then the second point I wanted to make is everything you've said, Commissioner, is fine. But let's make it a level playing field. They want turnover, they want to charge whatever they want to charge, "If you don't like it you don't have to come here." "Fine. If that's your attitude, fine." But you should disclose what the rents of all the tenants in your shopping centre are paying instead of keeping it a secret and hiding it and pitting one person off against the next. Have it out in the public forum. Let everyone see what everyone else is paying and then negotiate with me.

DR BYRON: Well, I gather - I've been told that there's one of the shopping centres whose motto is, "our retailers are our customers".

MR YAMMOUNI (FCA): Good motto.

DR BYRON: Just looking at the time can I change the subject a bit and talk about the national registration of lease information. We've had lots and lots of discussion about that. But I guess when we're looking for evidence, if having information on who was paying what for leases readily available in a national database that's easy and quick and cheap to search and so on - if that was going to be the key to sorting out all these information imbalances you'd think that in New South Wales, where they have lease registration, everything would be sweet and in Victoria, where they don't, everything would be in chaos, absolute bloody mess. Now, that's not what you actually see. There doesn't seem to be that much difference between New South Wales and Victoria.

MR YAMMOUNI (FCA): It's because New South Wales has become the benchmark for rentals and that's where a lot of franchisors - - -

DR BYRON: Okay.

MR YAMMOUNI (FCA): - - - get their information from and make decisions about in Victoria. So it has been very important contribution to make in - to helping the sector work a little bit better.

DR BYRON: So the Victorian retail tenancy market has been informed by the New South Wales, Queensland, ACT stuff?

MR YAMMOUNI (FCA): Well, franchisors are national organisations.

DR BYRON: Yes.

MR YAMMOUNI (FCA): They don't have boundaries. I think that's a very important thing to understand.

DR BYRON: Yes.

MR YAMMOUNI (FCA): We work across the whole of Australia. Therefore if the information is available in New South Wales we will use that information and extrapolate it all over Australia. That's what happens.

DR BYRON: But it would be obviously better if the information came from all over - - -

MR YAMMOUNI (FCA): Agreed.

DR BYRON: - - - rather than just being based on two or three jurisdictions?

MR YAMMOUNI (FCA): If it was open information available to the market it would make the market more free. The more information available to the market then the less argument anyone can have against the rentals that are set by the market, because that's what will happen there, market forces then can play out.

DR BYRON: But we still come back to Steve's distinction between the real rent and the capacity to pay, that even if I as a retailer can say, "Look, the guy on this side of me is only paying X and the guy on this side is only paying 20 per cent more than that and you want 3X from me," they can still come back and say, "Yes, but we think you can afford that."

MR YAMMOUNI (FCA): I think we should let them have that argument there. We don't need to get involved. Let the market play out its information. We've made everything available for everyone to see.

DR BYRON: Inform the marketplace.

MR YAMMOUNI (FCA): We've informed the marketplace, now it's a negotiation. That's the way it should be.

MR WRIGHT (FCA): It may very well be that once that is effected - and by the way I think some other submissions to you suggested that it's not exactly working perfectly in New South Wales, the register system, and so it could be improved - - -

DR BYRON: Yes.

MR WRIGHT (FCA): - - - timeliness, information provided and so on.

DR BYRON: Yes.

MR WRIGHT (FCA): It may well be that there are a number of franchisees who choose not to do it, who actually do go, "Uh oh, this does not look like the holy grail I thought it might have been. Nice brand from the franchisor, great shopping centre but now I see what they do; rather than just entice me with incentives to lure me in I now perceive what they have done in the past or next door or" - and so on and think, "I'm just not sure that I really want to take that risk."

DR BYRON: So that's part of education and informing.

MR WRIGHT (FCA): Education and informing. That then may have an impact on - over time, of bringing down perhaps, you know, if you could divide it up into sector by sector types of shops and so on. Over time it might lead to a little more difference, you know, some differentials which is what I'm loosely calling closer to real rent scenario - once you take out all the capacity to pay incentives and distorting influences. You might find that there is something that returns to some of the characteristics of the street.

DR BYRON: Or if more people understand the rules of the game and look at the proposition that's in front of them and say, "Listen, if I have to pay that much for the fit-out, I have to pay that much per month for rent and I've only got five years - doesn't stack up. I don't want to sign this deal." Then there may not be such a queue of people waiting outside the leasing manager's door.

MR YAMMOUNI (FCA): Correct.

MR WRIGHT (FCA): Does it have to be the same model for all? Could the US trend you described earlier apply to the huge international brands who are quite happy to go in - know exactly what they're doing and go in for a short term on a cut of the action and stick around if they like it; if they don't, move on, you know, where turnover for them is not such a big deal - not sales turnover, shop turnover. Cannot a Westfield Shoppingtown accommodate both that and a sole trader franchisee who

has a very different set of economics he has to deal with, particularly a high cost fit-out in a high quality shopping centre and de-fit cost disincentives and so on to deal with.

DR BYRON: Well, all those - you know, the cost of getting in and the cost of getting out just add to the extent to which the sitting tenant is either - whatever you want to call it, an economic captive or over a barrel or relatively less powerful in the negotiations. Yes, okay, I - there are a lot of other things to talk about but I don't think we can spend much time talking about them because I think basically we agree with all those other things. So thank you very much for that.

MR WRIGHT (FCA): By the way, there was a - - -

DR BYRON: Any closing comments?

MR WRIGHT (FCA): Yes, a little asterisk down the foot of that document - - -

DR BYRON: Yes.

MR WRIGHT (FCA): - - - which says we intend to provide some supplementary information. I think it's a reflection that should be made - again, it's something you've heard before - we have had, as an organisation, a difficulty in getting raw information, empirical data, to present to you because there is a fear factor amongst franchisees. They fear that presenting the real story from their point of view may result in an even more unpleasant situation for them the next time they have to face the landlord. We are trying to get around that by providing you with some information in a confidential basis from some of these systems.

DR BYRON: Yes.

MR WRIGHT (FCA): If that is useful to you we'll do that by your closing next Friday.

DR BYRON: I have no reason to doubt the people who tell us about that.

MR WRIGHT (FCA): Yes.

DR BYRON: But it's very hard for us to get some sort of count on it when people are understandably reluctant to put their hands up.

MR WRIGHT (FCA): Yes.

DR BYRON: So it may be that the number of formal complaints is only the tip of the iceberg. We can't tell how big the iceberg is underneath - - -

MR WRIGHT (FCA): Yes.

DR BYRON: - - - because we just can't see it.

MR YAMMOUNI (FCA): Commissioner, can I just implore you to have a walk around your local shopping centre on the weekend? Don't tell them who you are, just talk to people. Just talk to people. Pick half a dozen people at random. I bet you you will get similar responses from each.

DR BYRON: I've actually - - -

MR YAMMOUNI (FCA): You will see there's pain and heartache there - - -

DR BYRON: I've actually been doing that for about six months.

MR YAMMOUNI (FCA): Okay, so you've got the evidence then.

DR BYRON: In three different jurisdictions so far.

MR YAMMOUNI (FCA): Okay, so hopefully what I've said - - -

DR BYRON: That's how I spend my weekends.

MR YAMMOUNI (FCA): Hopefully what I've said then makes sense to you.

DR BYRON: Yes. No, I - there's nothing that you have said that is inconsistent with what dozens of other people have told me privately.

MR YAMMOUNI (FCA): Okay.

DR BYRON: But, you know - thanks anyway.

MR WRIGHT (FCA): By the way, just to add - by the way, a real case. Right now one of the franchise systems that is Australia-wide he is currently negotiating through their head office in four shopping centre locations in four different states. The lowest rent increase that they are attempting to negotiate is 28 per cent and the highest is 60 per cent and the average is somewhere in the 40s. That is routine. So it's definitely a real phenomenon which is not showing any signs of trending down.

DR BYRON: Yes.

MR YAMMOUNI (FCA): My closing comment is level the playing field and provide information to the marketplace. Thank you.

DR BYRON: Thank you very much. That's two very good positive sensible notes to finish on. Thanks very much, both of you.

MR YAMMOUNI (FCA): Thank you, Commissioner.

MR WRIGHT (FCA): Thank you, Commissioner.

DR BYRON: Can we move straight along now with Mr Trevena from TCM Consulting. Thank you very much for coming this morning.

MR TREVENA (TCM): Good morning, Commissioner.

DR BYRON: Good morning. Take a seat.

MR TREVENA (TCM): My apologies for the brevity of the submission. I have a more detailed submission that will follow but I'm happy to obviously talk about that.

DR BYRON: Yes. If you could just introduce yourself, perhaps a little bit of background for the transcript and then take us through the main points of the comment and criticism that you wanted to make on the draft. Thanks for the email, we've read that, and it's made me pretty eager to hear more from you.

MR TREVENA (TCM): Yes. I think, as we all know, the juggles of work. I've been in the retail property industry for several years, on both sides as a retail leasing agent for a landlord, as well as for a large property agency, as well as for a retail organisation or several, as well as a third party provider to retail businesses providing corporate real estate advisory services. Currently, I am CEO of a company called Syntek, which is a software company which owns and operates a retail lease management solution that's the leading one in Australia with over 4000 stores under management and also one of the founding members of a group called the National Retail Tenants Association which has barely got off the ground but is a chapter of the US National Retail Tenants Association of which I'm a member for two years.

DR BYRON: Thank you very much. So would you like to take us through the comments.

MR TREVENA (TCM): Sure. The three points that I want to address today are I think, somewhat surprisingly but excitably contradicts some of what you've heard previously and some of what you've heard this morning. The registration of all retail leases in Australia as an option to me, as I suggest, might provide a Glenn McGrath or an ooh-ah style initial response from the market. I cannot see it having any mid to long-term benefits for the industry. That's point number 1.

The second point is that the information imbalances between small tenants and shopping centre landlords - and when I'm saying "small tenants", I could interchange that with "retailer", I'm not talking a single retail outlet, even a hundred-store retail outlet has the same information imbalance - is the single greatest thing holding back any fairness I think in the industry, coupled with sales turnover. I think for a lot of businesses, providing sales turnover to landlords is a positive thing. The reason I suggest that is because it can provide - does provide to some degree but can even

more provide - the only true performance metric of a shopping centre or a significant performance metric, not the only, but one of the significant performance metrics of a shopping centre.

I think the sort of prescriptive approach to everyone knowing what everyone is doing on a commercial basis in a market as big as this is fraught with danger. Coupled with that is that these are entrepreneurs; they should be able to do business and take risk and be rewarded for that risk. There are companies who have strategic advantages in negotiating leases that will be exposed to having better deals than other people. The impact of providing an open book on retail rents in Australia has more likely a chance of pushing rents up than pushing rents down. It will not be a case of finding the lowest common denominator, it'll be finding just how far we can squeeze everyone who has got a good deal here, who's got a good deal there, and that's primarily because of the concept that you rightly identified, there's still great demand for retail space by tenants in Australia. It's as in demand a commodity as there is in any industry. So without that drop in demand, people will still be looking to squeeze themselves into lease deals.

I'm obviously covering two points in part together but landlords have an enormous amount of information beyond rents that they are not providing to retailers. A couple of examples I could give would be tenant sales productivity; sales value in terms of what this category's total sales are; average weekly pedestrian counts by hour for every entrance of the centre; all of this information they're capturing but due to the provisions of the Trade Practices Act and ironically the risk of unconscionable conduct, the disclosure of that information is done off the back of a truck, not in an open and transparent way. So in forcing on shopping centre landlords - and I do use the word with some consideration, and landlords with property above 5000 square metres, that sort of size, is really where the opportunity exists for retailers making commercial business decisions to benefit from more information. The level of disclosure at the moment as a technical term in terms of a disclosure statement is how many carparks are there, how many tenants are there, what's the area of the centre. I mean, whether that is not granular enough to provide significant benefits to a tenant in making a commercial decision, how much per square metre productivity tenants in the centre are turning over, that provides significant and better advantage to make a decision.

So rather than exposing everyone and allowing this sort of middle ground of rents to possibly occur, require landlords to provide in an open and transparent and regulated way greater information about their shopping centres. You mentioned before there's no accountability for that level of rent that's deemed to be because of the performance of the managing group and the centre. Put that down on paper and let people be able to make entrepreneurial, risk-involved decisions based on open information, not prescribing that everyone knows what everyone's commercial agreement should be. Does that extend to a strong employment market and letting

everyone know what everyone else gets paid? The establishment of a national lease register to me benefits a lot of lazy people who really just basically want to find out what everyone else is doing, rather than trying to work out how they can actually make better decisions themselves. There's an enormous amount of information that landlords are capturing that retailers never get to see.

When you're a tenant in a centre, you do get some of the information; tenant rankings in your category, performance measures against other tenants, those sorts of things. It's never disclosed before you go in there, however. So there's a great imbalance between the information that you might capture while you're there and the information before you actually get in there. Greater disclosure of that information would be a better approach, and a basis for that is actually providing turnover information. The horse has bolted on that. If you stopped providing turnover information now, for the next two, three or four years, it would have very little impact because there's historic information already in the system and there's unlikely to be significant growth in that, so that really, you're talking about a long-term effect or even a mid-term effect of removing that ability, not least of which is the fact there are already commercial agreements in place for however many years from today that will prescribe that exact requirement.

I would like to see more onus put on the landlords to be able to be able to provide the information they're capturing on these tenants back to these tenants and to also prospective tenants to really justify to them the performance of the centre, not just at a macro level of, "We turn over 400 million," but how many people through this door every hour for the past year, what's the total amount of sales for fashion tenants in this centre. As long as there is anonymity in the figures in terms of the commercial sensitivities of people individual sales figures, this benchmark or performance analysis approach is something that can drive some real value too, people making commercial decisions that fundamentally are there to make commercial decisions because they want to take a risk that they can make more money. That's what they're trying to do, they're trying to make more money.

So by taking away their one key ability to make a judgment call on a very important part of their profit line by exposing all of the rents, it will have a negative effective for a lot people, a lot of companies. The third point I wanted to make which is a component, but a smaller point is that percentage rent - at the moment you've got a concept of base or minimum rent in a lease. You've then got either percentage or additional rent, I think it's really just to try and water down the term. Additional rent means I can charge you more if you turn over more. While there is a great lot of work done in terms of rent reviews to protect ratcheting of rent reviews so that if by chance there was deflation rent might actually go down, there is no such provision with most percentage rent clauses such again some retailers use percentage rent as a great opportunity to go into an unproven location and try and achieve an outcome without being lassoed or constrained by a massive base rent.

We've seen through any of our clients and any client I have dealt with, hundreds of leases that have percentage rent as a mechanism to test a site or test a location. Given that percentage rent or additional rent is really just reviewing rent, why should an annual rent review be able to go up or down, but percentage rent not be able to go up or down? That's really the key issue in my mind, that if a tenant is performing badly because of whatever - given it goes both ways - and they've got a percentage rent clause, then perhaps it should also be able to go down and at the moment that's not the case.

DR BYRON: That the percentage would go down?

MR TREVENA (TCM): That the total occupancy costs, the total cost of their occupancy would go down.

DR BYRON: If the additional rent is as a percentage of turnover and turnover goes down, then the dollar amount of that additional rent goes down. But you're talking about changing the turnover rent from 8 per cent to 6 per cent?

MR TREVENA (TCM): No. In a true percentage rent clause, so rent is established by pure percentage of turnover, it's a floater, so if it goes up, it goes down. But the standard shopping centre lease is, "You will pay \$100,000 for minimum rent and if you turnover - given your percentage rent contribution is 10 per cent - \$1 million, I'm going to take 10 per cent of every dollar over \$1 million. But if you turnover \$500,000, you're still going to pay \$100,000." My suggestion is that given that we're talking about a review, although not a review to property, but a review to turnover, that why are rent reviews allowed to float up or down and a CPI-plus percentage, there's no ratchet - if CPI goes to negative 5 per cent, then there will be a reduction in rent - then why is it that percentage rent is fixed or floored or ratcheted. That should be removed.

DR BYRON: Just on that, the other proposition that was put to us the other was that if somebody is paying 100,000 and then because they've had a really good year and they've had the right colour for this year's fashions or whatever, they're paying 20,000 turnover rent in addition to the base rent.

MR TREVENA (TCM): Yes.

DR BYRON: At rent renegotiation the new base rent shouldn't necessarily be taken to be 120 plus turnover rent because the turnover is volatile and just because you had a good year the year before the lease expired, doesn't justify assuming that that will now become a new base. But that's a different point to the one you were making, isn't it?

MR TREVENA (TCM): I think it absolutely is. I mean, I would go a bit further and say that over the last 20 years you've seen a great dynamic shift in this industry to ownership being controlled by very traditionally passive investment vehicles in property trusts. That's absolutely opposed to what is a very dynamic market in retailing. It goes up, it goes down; people spend more, they spend less. So you've got the investment decisions of landlords driven by a passive income, return to shareholders, minimum growth versus a very dynamic consumer-driven sales cycle. There's always going to be problems when those two don't meet, which they clearly don't. So there are percentage rent clauses that take a quarter of sales into account or a half-year of sales into account. What is the true cycle of sales to be able to get an indication of the performance of the business? Is it a year or is it five years? But at the end of the day there is absolutely no doubt that everyone has a choice of signing this or not. There is no gun to a head. I don't believe that for a second.

I think that there are plenty of people who make bad decisions, but they make bad decisions a lot of the time because of not being informed. I think making it easier for them to be informed, not about rent, because at the end of the day that should be a privacy issue. That should be a commercial engagement between two parties. If I pay you \$100 no-one else should really have to know about that, not least of which is the fact that currently in Australia, even in the jurisdictions where prescriptive or compulsory release registration exists. All parties have supplementary agreements that detail incentive component. So you're not even seeing the real picture anyway, it's a falsehood. So instilling that as the bastion of saviour for retail tenants to me is just misguided and will satisfy a lot of lazy people.

DR BYRON: But not actually solve very much in the long run.

MR TREVENA (TCM): Won't do a thing. I've never heard of a landlord reducing a rent just because someone found out that the rent next door was less. The landlord is not driven by that, the landlord, as a shopping centre landlord - which is, I'm sure, 90 per cent of your Commission's hearing - is driven by other factors and that rent will be sustained because it will impact on the trust's income which impacts on the shareholder value which is the ultimate driver. That's all okay, but let's not fool ourselves by the fact that the landlord is suddenly going to go, "Oh, you got me."

DR BYRON: Just on your point about the really volatile dynamic retailing business and the fact that only a managing centre seems to be a lot more stable long term. Is there a trend for some centre managers to actually want to engage and to ride the cycles with the retailers, to be much less passive and just sit there and say, "Okay, we'll settle for a nice steady long-term income from rent and gradual capital appreciation," and to then actually become much more dynamic and plugged into retail?

MR TREVENA (TCM): It's an exception. I've seen it happen, generally with

individual, private family or private company situations. I worked on a centre in Queensland across a period of eight years right through from planning to first renewal round of renewals five years later and you had a situation there where the family who owned the centre took a very different approach to their tenants, but that's an exception. It's very much an exception. If you talk to, without getting too flowery, old school centre managers they knew all their tenants by name, they knew their kids' names, they knew them. They knew their business, they'd have a beer with them and in fact perhaps that was the world worked back then, but that's not the way the world works now and a centre manager has much less, if any, control over the income of the portfolio. In fact rarely does a centre manager dictate the budget for his centre in a large shopping centre environment, certainly never independently. He might contribute to it, but often it's done by more financially-minded folk.

DR BYRON: We've also been made aware of the differences between centre management and leasing executives.

MR TREVENA (TCM): Yes, it's like accountants, solicitors, sales guys. It's just different groups.

DR BYRON: Your comment about an open book is more likely to push rents up than down. I don't think there is anybody else that we've talked to has even hinted at that possibility but it reminded me that disclosure of CEO's and director's fees was supposed to keep those things down and it probably had the opposite effect.

MR TREVENA (TCM): I know of several retail companies that have better than market deals, significantly better than market deals because of who they are. The worst thing that can happen to them is that they'll be exposed for having better deals and their rents will go up. So I say in my larger submission while some people will gain from this, there is probably no doubt about that. Overall as an industry it has no impact on the affordability decision that a retail business still must make.

DR BYRON: Basically this organisation's approach can generally be characterised as saying inform the marketplace is nearly always a good thing. If one side has a lot of information and the other hasn't, putting more information on the table is more likely to lead to inefficient marketplace and I guess you're one of the few people who has suggested not necessarily.

MR TREVENA (TCM): On rents? Given that you may not actually be informing the marketplace of the entire cost of that occupancy?

DR BYRON: So we may be misinforming them?

MR TREVENA (TCM): A greater risk. Do we tell everyone what we paid for housing rent just because the housing rent market has gone up? There is definitely a

philosophical point I'm making here that it's a contract between you and me, it's no-one else's business.

DR BYRON: Traditionally under contract law the parties have the right to decide whether to keep it private or disclose it.

MR TREVENA (TCM): Absolutely, and to remove that right is not to the betterment of all and it only should be done if it's to the betterment of all.

DR BYRON: We've had some debates on that of whether the public interest in informing the marketplace overrides the private interest in keeping the details of the contract confidential.

MR TREVENA (TCM): Perhaps it's not apparent or perhaps it's as obvious as it seemed to me when I read the report which is extensive and I think it's an incredible dossier of the issues that have existed in this marketplace for some time. But it was obvious to me that there was very little that both the Shopping Centre Council and the Australian Retailers Association agreed on, but that was one that they agreed on and it seems simplistic to be able to deliver on that as a means to appeasing both sides. There is a reason why a lot of landlords would like to see this and that is because they want as much information but I don't think that's because they want to do the right thing by the tenants.

DR BYRON: Just on your comment that the horse has bolted on the turnover, the required disclosure of turnover, given that just about every retailer's representative organisation has raised this issue of the misuse of turnover information at rent negotiation time, even if you're right that it may not actually make much difference, would it be a great circuit breaker, dare I say a symbolic gesture? Would it be the thing that would actually start to restore some mutual confidence, even if it's not the magic silver bullet that's going to cure all the problems.

MR TREVENA (TCM): I've been an advocate for the last eight years for retailers in several capacities. I make no bones about the fact that that's the side that I sit on. The fact that I'm giving you a contrary view to what might be the well-held view, is just a matter of what's happening as a circumstance, I suppose. In terms of the symbolic nature of it, it's going to appease a lot of people. It's definitely going to make a lot of friends. I'm sure that's not within the bounds of the Commission's responsibility.

DR BYRON: No, we're not looking for measures that are popular, we're looking for things that might actually work and make a difference.

MR TREVENA (TCM): Exactly. I'm not at all being facetious, I'm highly aware that that is where we need as an industry to be, there's no doubt about it. This is one

in a, dare I say, lifetime opportunity to address these issues. So actually I've long and hard about this and I think if you could stop - there is no reason why a landlord should know the profitability, given they know the turnover of a tenant. That's true, there's no doubt about that. I think that in the same instance that I used, you don't tell your landlord at home what your salary is necessarily; you certainly don't show them your bank statements. So there's definitely that debate. But I say again, if that is the outcome, then it will take a long time for any impact on that to actually really, really occur because you've already - - -

DR BYRON: There is a legacy in the system already.

MR TREVENA (TCM): You cannot repeal the contracts that are there now, I would dare to say. I'm no lawyer, but I would find that impossible. So there is, if it took a year to mandate that, there's at least six or seven years of legacy contracts to wash through and at that point whatever we know now is not going to be relevant but they're still going to be getting it in six or seven years' time. So there's a three or four-year period after that where some gap will occur in terms of what they used to turn over and what they turn over now. So I just say that, listen, I can see that there may be great - I disagree with the fact that the landlord should get retailer turnovers and perhaps a line has to be drawn in the sand now but it will not achieve anything in the short - I don't think it's the holy grail that it's been held up to be at all.

I think more importantly is the education of people that are making the decisions, both on what their business can afford. Should we be supplementing people who make bad business decisions? If they're paying too much for a shop, should we be supplementing that? So what we're talking about in the submission is giving them the information to make informed business decisions about the affordability of the lease.

DR BYRON: One interpretation of what's happened with retail tenancy legislation over the last 20, 30 years is that governments have concluded that, yes, there is a significant imbalance in market power which probably relates to differences in information available to the sides, so do you basically hold down the better informed, better resourced, more powerful party or should you be trying to empower and inform those who currently are less so? I think one could argue there has been too much emphasis on the former and not enough on the latter.

MR TREVENA (TCM): I agree we should better inform the less informed. There is no doubt about that. In fact that's the premise of the National Retail Tenants Association is education of retailers. So it's not about arguing with landlords and telling them that they're terrible people, it's about educating retailers on what makes a good retailer and what makes a good business.

DR BYRON: And what you can afford and what you can't.

MR TREVENA (TCM): Absolutely. If you build a business that relies on being in a tenancy for 10 years and you've only got five years' tenure, that's a bad business decision. That fundamentally is an incorrect, bad business decision, something that any board would be hung for in front of shareholders at an AGM. While I absolutely want to see better outcomes for retailers, I have not addressed any of the perhaps more emotional, more difficult to define factors that are going on in this marketplace. They are well documented in here. I've fought over 70 per cent increases at renewal for retailers regularly. I have fought over unconscionable conduct that the client would never take forward because of fear of retribution for the other 75 franchisees. That exists day in day out. You've got entirely unskilled people negotiating leases worth millions of dollars on both sides of the fence. You've got guys who are great shop owners who don't negotiate good leases, with 25-year-old leasing execs who haven't been to any sort of university or training getting paid \$150,000 to negotiate a \$10 million lease. You're going to get problems in behaviour when you've got an unregulated, unskilled, essentially untrained workforce taking on those deals. But that's well documented. I'm talking about what I think are positive outcomes that can contribute to this report, not the solution for all things.

Just the concentration in shopping centre ownership that we see in Australia at the moment creates a dynamic that makes it impossible. The ACCC's version of competition is too localised. They talk about competition between suburbs when you're negotiating leases. As the gentleman here mentioned before, it's a national business. You're negotiating a deal in Booragoon with the same person as you're negotiating in Banyo in Queensland. So you do two deals at once, three deals at once, it's got nothing to do with geography, it's got shop and shopping centre, that's what it's all about.

DR BYRON: I think I might have to leave it there, but I look forward to reading whatever more elaboration you can give us and for the constructive criticism feedback on the draft.

MR TREVENA (TCM): I hope it contributes effectively. Thank you.

DR BYRON: Thank you very much, ladies and gentleman, I think we can stop for a cup of tea and resume at about 11 o'clock with Veritax Business Consultants, thank you.

DR BYRON: Thanks very much, if we can resume. Mr Zawatzky.

MR ZAWATZKY (VBC): Yes.

DR BYRON: Thank you very much for your written submissions. I've got two actually. Thanks for the time and trouble and effort you've put into that. So if you'd like to take us through the main points you want to make.

MR ZAWATZKY (VBC): Yes, certainly.

DR BYRON: Perhaps if you could just introduce yourself and a little bit about your background, your business for the transcript, thanks.

MR ZAWATZKY (VBC): My name is Hymie Zawatzky. I have a business called Veritax Business Consultants. I have been in the industry about 20 years, was there right at the beginning when the 1986 act came out in Victoria and have been living with changes in legislation, changes in all states since then. I look at about 200 to 220 leases a year for various clients of all shapes and sizes, and I also do an enormous amount of education for retail groups trying to educate their members in how to negotiate a lease. That's basically my background. I am by profession a chartered accountant, not a lawyer. You have some eminent lawyers this afternoon so we don't need my legal advice.

So what I want to talk about today to the Commission is not the legal side of what's going on. There are some eminent lawyers who can do that quite easily. I'm trying to handle the practical side of what's wrong with the system that we have at the moment. From a practical point of view having to live with it and to actually look at those leases and make the changes and request changes from solicitors, there are a number of practical points which I think the Commission should be aware of. My first point that I want to talk about is the question of public companies and retail stores greater than 1000 square metres in size. Why in heaven's name should these people be excluded from the protection of the retail leasing acts? We have this absurd scenario right now where in New South Wales if you're a public company as long as you're under 1000 square metres you get all the protection of the act. In the other states it's one way or the other, you're either 1000 square metres and you're out, or a public company, or in Victoria even if you're a public company in a foreign listed exchange you could be excluded from the act.

Going back to 1986 when this issue first raised its head, the problem came about was we had a lot of mum and dad type operators operating retail operations and it felt, "We need to protect these people, but the big guys can look after themselves." But if you look at the make-up of a shopping centre today it's mostly franchise groups, chains, large operators. That's the people who can afford to pay the

rent in shopping centres today. So why should we go to the point of excluding retail chains that have seen fit to go public to be excluded from the Retail Tenancies Act? There is no earthly reason. The people on the other side, some very large landlords, are all public companies, but they have the protection of the act. This fallacy which goes back I would say 20 years or 22 years should be removed once and for all. Everybody who enters a lease should either have a set of rules or regulations affecting that lease, not to say, "Well, am I a public company? Oh my goodness, I've just arrived in this country to open 30 coffee shops but I'm listed on the Nasdaq in America. I'm automatically excluded from Victoria from being under the protection of the act."

The opposite side absurdity is you have a company - and I mention their name - is Aldi. Aldi is a privately owned company which operates stores of 800 square metres in size and has the full protection of retail tenancy legislation all over Australia. They are bigger in purchasing power than some of our largest supermarkets that are automatically excluded, and yet they have the rights. That they wish to take advantage of it, good luck to them, but the point is it shows the anomaly of having some companies excluded and some companies included. Either have them all in or have nobody in, but don't exclude people on some sort of basis due to size, or whether they're public, or whether they have gathered enough shops to become a public. Why exclude such people? At least let's have some consistency in all legislation around the country. I feel that this issue is quite important. I know it comes up from time to time, but there is no reason today for excluding them because the landlords who are also large companies have got the protection and there is protection for them too under retail tenancy legislation. That's the first point I want to make.

The next point I want to make is that I know Mr Rudd said, "I am a Queenslander," well I'm a Victorian and have been involved since the inception with the Victorian legislation. I sat on the working parties that looked at the legislation and I think the Victorian legislation is probably the most progressive of all legislation. Why? Because last time they brought out the changes to the Act, they actually had a supplementary issue where they asked people to look at the practical implementation of the act, not the law changes, the practical implementation of the act and brought out some very, very good practical changes that people who live with leases every day can deal with it. You can't get a landlord who is overseas during December to sign a lease within 30 days, but we allowed a methodology of getting around that issue.

One of the things the Victorian legislation did which none of the other states at this stage really want to do very seriously and that's to govern the equality and cost-effectiveness of fit-outs. A fit-out in a store is a very costly issue. You're talking about stores that don't get very little change - and I'm talking about simple 130 square metre shops - for four or five hundred thousand dollars for a fit-out. You've signed the lease. That's fine, you've agreed the commercial terms of the lease. But we now have a situation where the fit-out could cost you absolutely an arm and a leg. It is strange to see - and I see it every single day - the amount of consulting fees that landlords throw at

tenants as part of the fit-out of their stores. I've seen six, seven thousand dollars worth of fees being charged for signing a tick that a plan is all right, for signing a tenancy design fee, for a consulting fee, for anything under the sun. I think consulting fees has reached a point of stupidity and we need to be able to have some sort of tariff or table or something which says, "Yes, the landlord does incur some costs in doing this, but there should be some sort of cap on this particular thing."

We have this absurd scenario with hoardings. If you walk through a shopping centre you'll see the hoardings around a shop while it's being fitted out. Do you know that they charge up to \$4000 to a tenant to have those hoardings up. He doesn't want it, he doesn't even need it, but just so that the place looks pretty and you can't see the construction going on while everybody is shopping in nice peace and quiet, a tenant has to pay \$4000. By the time he's finished with consulting fees and hording fees he's up for up for an extra 10, 11 thousand dollars simply for what - for making sure that the property itself has value and that's all the tenant has been doing.

Now, the Victorian legislation saw fit to cover the question of fit-outs. It now allows category 1 works if you don't like it, to virtually go along to a consulting engineer and have an arbitration done, if it's done. To be forced maybe certain parts of your category 1 works from organisations that may be owned by the landlord has already been done away with. We don't need to go through that again. But if you read the fit-out guides that come out as part of the fit-out - and it's a book that thick - and you suddenly look at the back of the section at the fees section charged you will be horrified at the cost this is costing a tenant simply to go in. He's done a good job negotiating his commercial terms but by the time he's gone in his ingoing costs are so expensive it's ridiculous.

I really think that legislation should be raised to at least the level of the Victorian legislation to cover this whole question of fit-outs, its costs et cetera. If necessary the government should bring out a little tariff which says, "This is acceptable and this is not acceptable," but at the moment you have no choice because you've done the deal, you've gone and bought your stock, you've done everything you have to do, and then along come these extra charges of 10,000, 11,000 dollars and you say to yourself, "Where did I get these particular costs? I can't amortise it. I've got to pay this thing so what do I do?" To me that's one of the most critical areas that we need to raise the rest of the country to the level of at least Victoria when it comes to covering the fit-out. The fit-out is part of leasing, it's not a little issue somewhere on the side.

Now, I come to something that I have been a strong advocate for and I sit on the alternate disputes panel in Victoria under the heading of Outgoings. I've been examining the outgoings of organisations, I've got about 200 or 300 a year I look at. I compare line item by line item and I'm absolutely horrified at this whole question of outgoings. We tend to concentrate on rent but outgoings today costs an average

retailer about \$175 a square metre roughly in a shopping centre. I have seen numbers up to 230 and 240 dollars a square metre for outgoing alone. But what control is there on outgoing - not very much, because it's somewhere down there, it's not part of the lease. What is missing - missing from all legislation - is somebody having the guts to sit down and define what is an outgoing. There's no doubt about it, the intention of outgoing was that tenants in a shopping centre should share in the costs of running that particular shopping centre, but how they share is another issue.

Landlords in the old days used to put depreciation in. That was done away with. In Victoria and now in New South Wales we've gone away with catch-all clauses. But what is really important is the need to define what is an outgoing and how it's supposed to be shared. As far as I'm concerned the landlord is given a task of collecting the costs of running the centre - the costs of running the centre - and then distributing it to the tenants on a basis set down in the legislation that's usually the area of the shop, area of the centre. The one thing that we do not want to see out of outgoing is that the landlords would have a right to make a profit out of outgoing. In the South Australian legislation there is an actually a statement saying you can't make a profit out of outgoing. But does that happen? No, it doesn't happen, because it's very hard to get behind cost versus profit. That brings you to the situation that costs should be accountable for, and we do that. Lots of the legislation have auditors who send out an outgoing statement to tenants. That's fine. But when we come to some of the charges you will be horrified to see how that is done. It's the most incredible accounting sometimes that you can imagine.

Let us look at this question of management fees. The whole question of management fees has been a sore point with tenants for years and years. When you see management fees and admin charges up to \$10 million in shopping centres, whereas a shopping centre of an equal size and complexity is \$3 million, you start to wonder where is all this coming from and how are management fees in fact determined. Putting on my hat when I used to be on the property side for landlords, management fees has never really had a real try-out. It had a couple of people who objected to it in the courts but management fees should be the cost of managing the centre: the costs of a centre management office; the costs of the maintenance people in the shopping centre - the costs of managing the centre, not as we have today, "Well, we'll take 4 per cent or 5 per cent of revenue and say that's a management fee." That's not a cost, that's an estimate done by somebody to manage a centre.

If you have a look at management fees you will be horrified. I took out management fees across 120 shopping centres not so long ago. When you have a centre like Chatswood Chase in New South Wales with about 63 or 64 dollars a square management fees against others of 30 and 20, something says to you, "What's special about it?" Sure, I understand that some centres are more complex to manage than others. Some have railway stations underneath, some have bus terminals outside the door, all of that good stuff. But management fees are something that's a

problem. In Victoria, the state in the last review finally recognised that something had to be done with management fees. What they did is they said, "Fees can only go up by CPI. There's a cap on management fees."

In Western Australia they went even further. What they said in Western Australia is, "You cannot charge management fees. The word 'fees' is anathema. You can charge administration costs. So the costs of the centre management, all of that you can charge." What happened in Western Australia as soon as this was introduced, the basis of leases changed dramatically. Instead of net rent plus outgoing, we finished up with semi-gross leases plus statutory charges. This whole problem with the management fees was incorporated into rent. What the landlord was not prepared to do was to take a chance as to what the local councils would charge for rates and taxes. You paid for that separately and you did semi-gross deals.

Obviously if two states in Australia have seen that there is a high cost for something that the tenant need not pay for then we need to be able to expound those two theories across all states. I know New South Wales and Queensland, the retail bodies, tried to do something about it but couldn't get away with that. It is important that this whole idea of management fees be accepted, that it's recovery of cost, not an opportunity to make profits. I got that off my chest because I'm a great believer that management fees is a way to make more equal leasing.

The next thing Victoria did - which none of the other states have done, apart from the ACT in a small way has done - and that's to say, "We have lots and lots of commercial buildings all over the city, and here we're sitting in one right now. If you go downstairs you will find a coffee shop, you will find a dry cleaner, you will find all sorts of people who occupy the first and second levels, maybe the basement levels, of a building. What we did in Victoria is we brought out legislation which says that tenants who sell goods and services - which is a simple definition under the GST legislation - who are on the first three levels of a building are entitled to be covered under retail tenancy legislation. In the ACT I think it's about 300 or 350 square metres of commercial space in a building is also covered. But Victoria is where the issue became important enough for it to be included in the legislation and it's very, very important that we have it. I can remember doing a seminar for 250 people at the tennis centre and mentioning for the first time this particular issue and there were lots of real estate agents who did commercial buildings only who did not even know - did not even know - that those particular tenants in their commercial building, their leases had to be registered with the Small Business Commissioner's Office. The next day, there were dozens of them standing there negotiating their fines. That's a problem we have, but slowly that's being incorporated. People understand that the first three levels of a building are covered, if you sell goods and services are covered, and there are definitions because they are peculiar type of buildings. But Victoria grasped the nettle and brought these people under legislation. The rest of the country doesn't want to know about it.

We now come to the problem of people with licence agreements. You will hear from our legal people this afternoon. We talk about this problem of a licence agreement and I think Dr Croft in his book says if it looks like a lease, it's a lease. Why do we have licence agreements? We have licence agreements to cover lots of food operators who may have a little seating area around their coffee shop. We have licence agreements for food operators who may have a place where they bake in the morning at the back. They have storerooms. All of these are under licence agreements. What we need to do in retail tenancy legislation is to recognise that a licence agreement which is part of the business operations of any small business should be treated the same as a lease and have the same protection of retail lease legislation. There's hope out there because what happens is the lease, from a practical point of view, gets done with the leasing department of a particular shopping centre; the licence agreement gets done with the centre management office who also do casual mall leasing and all other stuff in a shopping centre, so we have a strange anomaly that we have these pockets all over the centre which are under licence agreements. I think what we need to do is once and for all entrench into legislation that these licence agreements, if they are part of the leasing, is a lease. So that covers those questions of the licence agreement.

Now, what is quite obvious to a person like me who looks at leases all the time is the similarity that's now developing between the wording of leases, and it actually gets silly when you see small legal firms in a country area use the exact same wording that's in a Westfield lease. I know leases are proprietary rights of landlords, but if we're getting to a situation where the same wording is starting to be used in all leases because people have adopted it, then I think the ACCC should have a look to see whether those leases are not an infringement of their regulations, because wording in a lease is quite important.

The biggest problem that we have is we have a commercial deal that is done between a tenant and a landlord; that's fine. That's pure negotiation and that's working okay because people are negotiating. But then you get sent this draft lease with clauses which add on to the cost of operating the lease enormously to the tenant who has gone in, who may not have even taken this into account when he first did it. Yes, they're supposed to give you a draft lease and all that, but in the initial stages of your negotiations, you're busy, involved with the commercial terms, not the lease terms. If the lease terms are now going to become similar for all sorts of leases, then they need to be looked at.

In the case of shopping centres, we have a problem. We have a problem that it's not working well. When a landlord goes ahead and develops a shopping centre, he does so with the best skills and knowledge that's available. He also knows a number of particular types of usages that are in a particular centre and he tries to say, "Well, the centre can't hold more than two chemists," or "three chemists". "The

centre can't have more than five optometry shops," whatever the case may be, and he tries to stick to that as he goes along. But as the life of the shopping centre goes on for a period of time, the tenancy mix starts to change. The tenancy mix starts to change and the landlord in disclosure statements tells the tenant quite simply, "Yes, during the life of your lease, the retail tenancy mix will change." But when you are one of five jeweller shops and all of a sudden the only tenant that wants to go into that shopping centre is a jeweller and you've got 12 jeweller shops all of a sudden, the profitability expectancy or whatever of a tenant who's signed up when there were only four or five has obviously changed because the choice available to the customer has changed dramatically, yet there is no opportunity in any leasing legislation anywhere in Australia which allows a tenant who has had a major change in his category to go back and say, "I want to cancel the lease and let's talk about a new lease again because I'm now competing against 11 people, whereas previously when I went in, I'm competing against four."

Yes, some legislation talks about major changes, but what's a major change? If you're going to Chadstone and there are 34 fashion shops and you now make it 36, it doesn't make a lot of difference, but in certain categories, like pharmacy, like optometry, like certain areas where only two or three can make a living in a particular shopping centre, you're killing the person in there because you're changing the category. You're not changing his lease, you're not changing his commercial rent, you're not changing any of those things, but what you're doing is you're changing the opportunity of that person to actually pay his rent, because the amount of competition that you have inputted into that centre is not something that the tenant can control, only the landlord can control. So we need to have some sort of mechanism throughout the country which allows some renegotiation to take place.

Somebody told me once that in Vietnam, you could just tear up the lease and start again if a major change takes place. That's a developing country, not Australia, but things like that can happen and we should somehow have a mechanism which allows that anomaly not to happen.

Now, I want to come to - and stop me if I'm talking too much, Mr Chairman - the practice of electricity. The practice of electricity charges is now becoming quite serious. We have a national grid in Australia which you can only get on to with a certainty quantity of purchasing power. If you own 10 shopping centres and a number of other properties, there's a pretty good chance that you can negotiate to go on to the national grid and to buy electricity on wholesale terms. Today, you might not get the same discount you got some years ago on the national grid, but at least you are getting a discount.

To put into a lease the words "the tenant shall purchase electricity from the landlord" and to then stipulate in the agreement that it shall be at the single consumer rate, when you yourself as the landlord is buying electricity on a wholesale basis on

the national grid and making a profit - and substantial profits are made out of electricity, Mr Chairman - it's just not fair. I think what we somehow need to have the ability for is if the landlord, as his duty of management for which he is getting a management fee, should buy outgoing for the centre at the best possible price and pass on any savings that are made to all tenants equally, not to buy it and make a profit on electricity. I think that would be contrary to the South Australian legislation but certainly it should be on a national basis.

DR BYRON: Isn't that just a particular case of profiting from outgoing?

MR ZAWATZKY (VBC): Yes, but this is one of those issues where it's not the outgoing of the common areas of the centre, it's the outgoing attributable directly to your shop which is a different one, because you are normally responsible for the costs of washing your shop and cleaning inside your own shop, but electricity is a big problem, a very big problem.

You have simple sort of little side issues, if I can give you an example of an anomaly of a simple thing. If I've got a kiosk, Mr Chairman, in the middle of a shopping centre, why should I pay for the airconditioning in my kiosk? I'm getting the airconditioning from the common area airconditioning, and you quite often get these doubling ups that take place. Why should it be? So the whole question of outgoing needs a better look at by everybody concerned. It's a cost, Mr Chairman, not a profit-making mechanism in addition to rent.

Now, some of the issues that I wanted to bring up again, I can remember doing a submission to government when, in 1996, the Labor government then brought in a bit of legislation called the Better Business Conduct legislation, because on the floor of parliament, when the Labor Party lost office and the bill never went further, I understand Mr Beasley introduced it as a Private Members Bill in parliament. But it's this whole question of a tenant not having his lease renewed, and it's a very simple one: it was there to protect tenants who had invested money in what's called "sunken assets" and in actual fact did not have their lease renewed and lost their goodwill. I think it's one of those bits of legislation, it was a good idea, lots of work went into preparing it and the thinking behind it, just to pick up this legislation again and have a look at what it was intended to do and whether it's applicable in the current environment which we're looking at.

The next one - nothing against my friends there, the legal profession, I deal with them all day long. But we've got to get to a situation where solicitors have got to be recognised as part of the leasing process, whether they actually prepare the lease for the landlord who gives it on to the tenant; whether they act as the person who deals with the consultant or other legal person about the contents of the wording. Solicitors are part of the leasing process and I think as such should become part of the unconscionable conduct provisions in negotiation. Just to say "not

agreed" is not very funny when you get that from a legal firm - why, how, "What are my reasons for saying no?" Unconscionability in the act talks about fair negotiation and all that type of thing. I just think that's the first aspect that I think solicitors should be part of the unconscionable conduct provision of the act.

The second one is something even more serious that has happened out there. Every single bit of legislation in Australia has a clause at the back of it. The clause at the back of it says, "If any of this lease is contrary with the Act, the Act shall prevail." That's wonderful stuff. If you ask a coffee operator who's just gone in, he doesn't know the provisions of the Act. He's had some initial advice when he started the exercise. He's told it's okay. In many cases he might be a franchisee who's taken advice from a franchisor who thinks he's done the best he could possibly do. But you have a situation where despite the wording being contrary to the Act it's still in the lease. The person in ignorance picks up the lease, reads the lease and says, "I can't do that," not knowing that at that moment in time that clause is absolutely contrary to the legislation in that particular state and yet he says, "I can't do it because it's in my lease." If it's contrary to the lease it's void which stands in legislation, rather than in leases, should not be perpetuated in wording in leases. If we go forward - we can't do anything about stuff going forwards, but if we go forward the provisions which are contrary to that state legislation should not appear in a lease. It's just not fair and takes advantage of less understanding people of the legislation.

The idea of security deposits which the New South Wales government introduced I think should be a national issue because security deposits are sometimes very hard to get back from landlords, particularly non-resident landlords. You've got to go and find the landlord to find out where you can get your security deposit back. The New South Wales government not only introduced it but introduced the principle that old leases had to have the security deposit paid in by 1 April a couple of years back, and it really shook a lot of people. But this whole question of the security deposit, which is money belonging to you which you've left for somebody else, should at least be protected by somebody, and I think a government body as in New South Wales is the right way of doing it.

CPI: we have the Prime Minister stand in parliament and asks us all to be careful because CPI is going to run away with us. Here we have a situation in our leasing industry, except in the state of Victoria, I might add, where leases' annual increases should be CPI, whatever that comes out. Instead, except for Victoria, you cannot get a lease today from a major shopping centre which doesn't say, "CPI, plus 2 per cent, CPI plus 1 and a half per cent," et cetera. So whether we like it or not, every single lease that we sign - because property costs are part of our inflation cycle - has automatically got an inflation built into those particular leases.

In Victoria we said, "If you don't want to pay CPI, pay 4 per cent or a fixed number, but you can't have CPI plus a number. You can have one and that's all." I

think this concept that Victoria has introduced should become a national standard. We have a scenario now where the CPI came out last quarter - and I think it was Queensland or Western Australia - where it was something like 4 point something per cent because they happened to have a high quarter. People who have their lease negotiations during that particular period are paying 4 per cent plus 2 per cent, that's about 6 and half per cent increase when the CPI nationally was maybe 3 per cent.

So every lease that has CPI plus 2 per cent has got a natural built-in of CPI which we might accept or not accept, but every single quarter when this goes through we have the problem. I think the national standard should say, "You can have one type of increase, not a CPI plus a percentage," because all that's doing is building in an insurance policy for the landlord but at the same time it's causing a CPI blow-out in this particular area.

We have a situation of national operators. National operators - people who work in all states - have got a situation where they like to refer - I love this word - to "national leases" that they enter into with their clients - that's tenants who operate in all states. But they don't have the same legal firms in all those particular states. I think it should be the responsibility of a landlord who has a national operator to actually have these standard clauses or amendments to their standard lease available on a database, so that when I sign a new lease in New South Wales for a new store and I'm a national operator, I will be given at least the same amendments automatically that I negotiated previously, except for the legislation in that particular state which may override that particular point. But we need to have national leases with national databases kept by a landlord so that the parties don't have to reargue the whole thing all over again. It's just a waste of time and it's a waste of money.

Finally, I want to talk about the availability of the information about leases. In New South Wales we can get the retail rents that are paid by all landlords because leases are normally registered with the title deed. There are some organisations who very nicely sit there all day long and copy it and put it into a book and actually sell it to people who are going into a shopping centre, so when you go in you know what your opposition is paying for rent so you're in no way disadvantaged. However, we only have one other registration, that's in Victoria, but that's only minimal. That's just registering the lease. The details are not available and at this stage not available to the public.

I think if we're going to be serious about transparency then the rents paid in a shopping centre should be available to everybody. It's available to a lot of people when you suddenly decide you want to buy that shopping centre. Try and put in a letter saying, "I'm interested in buying the shopping centre." The first thing they will do is they will send you the whole tenancy schedule if you sign a confidentiality agreement. The information is available, the landlord gets lots of information from

the tenant anyway, so I can't see why the rental aspect should not be included on a national register so people know what it's all about. It's not the information alone that's important.

One of the biggest problems in New South Wales was when this first went up, so that you could get access to the information, there were certain key bits of information that were not there. The key bits of information were fit-out contributions given by landlords to assist tenants to go in with a fit-out. What was done, when people suddenly looked at it and saw these things there, they said, "But you didn't tell us so-and-so got a fit-out contribution," so we had a whole long, unnecessary argument. What the landlords went and did is they went away and created a lovely document called a deed of agreement - deed of agreement, part of the leasing documents, not covered by any legislation, probably covered by some financial legislation somewhere around the place. But the deed of agreement talks about, "Yes, we gave you \$50,000 for a fit-out contribution. If you leave during the term of the lease you've got to pay us back a proportion of it," but that information, being a financial document, never gets registered so we have no idea that such information is in fact out there.

Last but not least, which is not on your schedule, Mr Chairman, is a comment that you have in the report which talks about the need for education. Having been a practitioner who has been doing education for 20 years now, it's an amazing bit when government bodies try to do education, it's government bodies doing education. There needs to be lots more education of particularly retailers in how to go about negotiating their leases, because many of them walk into a room with a very clever lease negotiator who does it for a living and hasn't got a clue whether he's right, wrong, or indifferent; whether the level of rent his paying is right, wrong, or indifferent. If you try to buy the benchmarks of what's available it costs you three or four thousand dollars. Not every retailer is prepared to lay that out for one lease that comes up every five years. So you have no idea that you're paying a reasonable rent. The way rentals have risen over the last 10 years in Australia, we are reaching a level where rentals could quite easily become uneconomical.

I think the need to educate people as to the levels of rental that is payable and whether in fact you can afford to pay the rent becomes quite a critical issue. There's an old rule that I've had in 20 years that I've been in the industry. It says: If you take 30 per cent of your gross margin, that's about what you should be paying in rent as a percentage of sales. So if you're making 30 per cent gross profit and you take 30 per cent of that, you should be paying a gross - that's including all outgoings - of no more than 9 per cent. It's been an old rule of thumb. Whether it works or doesn't work, I have no idea, but it should at least give people a guide as to whether they're overpaying or they're not overpaying. As competition in industry gets tighter and tighter and tighter, and margins get smaller and smaller and smaller, there reaches a limit where rentals cannot be paid any more than what the tenant can afford.

Mr Chairman, that ends my dissertation on the subject.

DR BYRON: Thank you very much, you've helped fill in a great deal of detail for us and provided a lot of interesting information. I guess one of the thoughts that occurred to me when you were talking particularly about outgoings and management fees and so on is that the fundamental question is: what costs have to be borne by the landlord and can't just be shifted back to the tenants? It seems to me that that's a bit vague in many jurisdictions and certainly not uniform nationally.

MR ZAWATZKY (VBC): That's one, but there are structures in place out there which overcome legislation, Mr Chairman, and we used to have structures where you had a company which charged a management fee to the trust company, which charged the management fee to the tenants. If it was just between the tenants and the trust company there would be elements of that charge - capital expenditure, percentage of assets, all that's got nothing to do with running the business, that's just a financial thing - which would have been disallowable to be charged. But yet coming from a third party it just becomes the management fee.

DR BYRON: I heard that there was a draft code on outgoings that was put together a few years ago.

MR ZAWATZKY (VBC): I haven't seen that one. There's been a case on management fees right in the beginning when the act came out, but it just seems that it's reaching such a large number that it needs to maybe be looked at just to see if it's - it may well be fair and reasonable, Mr Chairman, but it should be a recovery of costs, as I said during my speech, not an opportunity to make an additional profit.

DR BYRON: We had somebody talking to us in Sydney last week who was suggesting that the tenants should have a statutory right to demand an audit, not only that the amount that was charged back to tenants coincided with the amount on the invoice and so on, but more also of an efficiency audit or that that amount was legitimately incurred. The sort of example that was given to us is suddenly you find out that the cleaning charges for the centre have gone up three times. How do you know that centre management actually took the best quote rather than the most expensive quote, those sorts of things. So should the tenants or I think he suggested if three or more tenants wanted to basically require an audit, then an independent audit would be conducted and if mistakes were found then the centre management would be responsible for both paying for the audit as well as making good.

MR ZAWATZKY (VBC): You're correct. In some of the states, in Victoria particularly, you can actually write to the auditor asking for an explanation of the outgoings. I think auditors today are very careful of their professional standards and their signing of audit certificates. Efficiency of outgoings should be a function of management to ensure that they get the best possible deal. To take your example one

stage further, there are many shopping centres owned by insurance companies. When it comes to the question of the insurance charge in outgoings, are you trying to tell me that that insurance company is going to go to the market and get three quotes to get the best deal, or are they going to phone the general section of the company that they're in and say, "Charlie, what's the figure for so-and-so shopping centre?" The efficiency bit that you're talking about would be a great advantage to the tenant to feel comfortable that what he's paying for is reasonable.

DR BYRON: But isn't the other way to do that to move to the gross rent plus statutory charges, as you suggested?

MR ZAWATZKY (VBC): The gross rent plus statutory charges is the fairest.

DR BYRON: It puts the incentives where they belong, doesn't it?

MR ZAWATZKY (VBC): Correct, but what it does, the most important thing, if CPI or 4 per cent or whatever you're going to charge is rent is annual rent then outgoings will only go up by the percentage of the increase in rent. So you to a degree have some control over the annual increase on word "rent". That would be marvellous because if you look at outgoings, the increases are 15, 20, 30, 40 per cent some years. Gross rent plus statutory charges would be the fairest - it would take - the first year would be a bit of an anomaly while the landlords sort out what that rent is, but that is the fairest way of controlling outgoings, look at it from an outgoings perspective.

DR BYRON: Okay. The point that you made about unconscionable conduct provisions in the negotiation of a lease and so on, we had some solicitors talking to us last week about a statutory duty to act in good faith. I was just wondering if you were aware of that concept and if you thought that that would help.

MR ZAWATZKY (VBC): I accept that. I have no problem with the legal profession. They are doing what they can. But in the heat of settling a lease when you just get the word "not agreed" without an explanation as to why it's not agreed, is a little bit disconcerting to say is the person - it may be a junior person in the property section of that legal firm that's doing it for all we know - but it needs the legal profession to realise that they are part of the leasing operation, not just a bystander, Mr Chairman.

DR BYRON: Yes. You talked a lot about the CPI plus 2 per cent and this sort of figure. I appreciate the point you're making, but are you suggesting that state governments bring in some form of - I mean what amounts to as a cap on rent increases?

MR ZAWATZKY (VBC): No, I'm suggesting that we follow the Victorian model. It sounds like I'm a Victorian, but the Victorian model says you can charge any one of those, you can charge CPI, you can charge a fixed, but you can't start to combine it.

DR BYRON: Yes.

MR ZAWATZKY (VBC): What they used to do in the old days before it changed they said, "You shall pay the higher of CPI or 5 per cent." CPI was running 10 and 11 in those days. So you were caught in a CPI spiral and if you weren't caught in that spiral you were caught in a percentage spiral. The combinations caused a lot of problems and that's what I'm trying to say. I don't mind what they do, as long as they have one methodology, not a combination.

DR BYRON: But is this the state, in effect, interfering in the ability of parties to negotiate voluntary contracts on whatever terms they wish?

MR ZAWATZKY (VBC): No. It says you can do whatever you like. You can have a percentage, you can have CPI, you can put a number in there. You can do anything you like but you can't combine them because the combination of them creates the unnecessary increase that takes place.

DR BYRON: Your point that in the case of shopping centres any substantial increase in the number of tenants in a particular category - - -

MR ZAWATZKY (VBC): Yes.

DR BYRON: - - - must result in other tenants in that category being offered the right to renegotiate their leases, I can understand where that's coming from. It certainly occurs to me as if, as you say, if you sign a lease based on there being four or five other jewellers in your centre and suddenly you've got 12, you know, "That's not the deal that I agreed to," sort of thing. But would there be a practical problem in defining substantial increase?

MR ZAWATZKY (VBC): No.

DR BYRON: Is it one or two or is it five or six or?

MR ZAWATZKY (VBC): No. I'll give you where your problem comes about. When you have categories like ladies' fashion, where there might be 35 in say Chadstone, or you have jewellers where there may be 15 or 16, that major one or two means nothing. If you're a pharmacist - and I see the gentlemen here from the Pharmacy Guild as well - if you're a pharmacist and there are two operators, two could make a living; three: the other two will not make a living. So the concept of the one, to certain categories is so vital.

DR BYRON: Yes.

MR ZAWATZKY (VBC): Therefore "substantial" and how you define it, it will

be substantial to the base that already exists at the time of writing.

DR BYRON: But all I'm suggesting is that might that be difficult to actually write in to legislation about what do we mean by the term, "substantial increase in the number of tenants in a particular category"? I understand the point you're making very clearly. I'm just wondering about how you would word it and how you would enforce it if it was written into the legislation.

MR ZAWATZKY (VBC): The word just as used was "substantial" and therefore it was left to interpretation in each particular category.

DR BYRON: Okay.

MR ZAWATZKY (VBC): But I think the word "substantial" has got to relate to something. It has got to relate to what it was when you started the lease.

DR BYRON: Yes.

MR ZAWATZKY (VBC): Now, 10 years ago - - -

DR BYRON: But the mechanics of it? So that if I was a small retailer in a centre and suddenly there was what I thought was a substantial increase in the number of tenants, would I go to the Small Business Commissioner and say, "Mr Brennan, I have a problem with my lease" - lah lah lah dah - "there used to be four of us and now there's seven and I think that that constitutes a substantial increase and therefore I should be allowed to tear up the lease"?

MR ZAWATZKY (VBC): No. Then you should go to mediation to try to negotiate a level of abatement on that lease until the end of the term of that lease which brings it in line with several operators versus three operators. But that can be done at a mediation level. All you want to try to produce is fairness to a particular person. The fairness could come back and saying, "Look, we understand that. We'll waive the next two increases, which will allow you to catch up to the situation." I'm sure there are some very well meaning and understanding legal people who can define "substantial". But I think it should be a ground to be able to go to Mr Brennan and say, "Look, can somebody mediate on the fairness of the scenario?" The fairness could well be tear up the lease and start again. But if we give the mediators and the VCATs of this world the right to at least see fairness and transparency, that's all we want.

DR BYRON: So that if there's been an expansion of the centre, you know, turnover has gone up by 20 per cent but the number of my competitors has gone up by 50 per cent then I might have - - -

MR ZAWATZKY (VBC): A case.

DR BYRON: - - - grounds for initiating something?

MR ZAWATZKY (VBC): Exactly. I think it should just be there because people sit there for the last two, three years of their lease, feel hard done by and just get up at the end and leave, if they haven't gone broke in the interim because they can't compete.

DR BYRON: Yes. To move to the point you made about the renewals or non-renewals or inability to negotiate a mutually agreed subsequent lease and the proposal for compensation for loss of goodwill if the lease is not renewed.

MR ZAWATZKY (VBC): Yes.

DR BYRON: My understanding is that in the shopping centres, at least, most of these leases are fixed term - - -

MR ZAWATZKY (VBC): Correct.

DR BYRON: - - - whether it's five years or six years.

MR ZAWATZKY (VBC): No option.

DR BYRON: I'm assuming that fixed term means fixed term, that there may be a subsequent lease but there's no guarantee of it. The thought that I've been exploring with a few other people as we have gone round the states is that if I've got a fixed term lease and my business is such that it relies very much on the foot traffic in the centre - so that if I was to take down my shingle and move out onto the high street a couple of blocks away and hang it up there, very few of my customers would follow me - then my business basically virtually evaporates the day the lease expires if I don't get another one.

MR ZAWATZKY (VBC): Yes, but I want to - - -

DR BYRON: If that were true, the value of my business the day before the lease expires or the hour before the lease expires is pretty close to nothing.

MR ZAWATZKY (VBC): Yes.

DR BYRON: Now, if I had a 20 year lease or if I owned the building the business is clearly worth something as a going concern.

MR ZAWATZKY (VBC): Yes.

DR BYRON: But if fixed term actually means fixed term, there might come a time when the business basically is worthless.

MR ZAWATZKY (VBC): Well, if you have a look how the goodwill of a business in fact grows, it is really length of time, people getting to know you, customers coming back. That sort of value is quite critical.

DR BYRON: Yes.

MR ZAWATZKY (VBC): But what is necessary is to create a time period. For some reason in Australia we have put five years as a minimum period of time in all leases. I would say if you have been there for the first five years - and probably the first 18 months or two years you're just starting the business. If you have one lease and it has been renewed once again, in other words, you've had two periods of your lease, then you have built up a sufficient goodwill to be able to have a case for the third one not being renewed - unless they need your premises to develop the centre because they're going to go right through the middle of your store, that's another story.

But I would think that if you have had a number of - at least two renewals or one renewal of your term of lease then you should be entitled to goodwill because what was being used in negotiation was, "I won't renew your lease unless you pay X, Y, Z." That needed to be stopped. So what was used is the - all that hard work over 10 years being confronted to a tenant who wouldn't pay the major increase in rent. Somehow or other there has got to be some offset against all that 10 years that I've been in the centre, paid all rent, done all the things than just saying, "Sorry, I'm not going to do it. I'm not going to renew your lease unless you do that."

Now, I've seen the statistics in the book, beautiful presentation by the landlords of how many people renew and all that sort of - but they should still be an opportunity for a person who has been in centre for a period of time where the goodwill has been built up, and he would have to prove that there was a goodwill attached, to be able to say, "I'm entitled to some compensation just because I can't afford to pay a 50 per cent increase in rent." There must be some offset and there isn't as exists at the moment practically.

DR BYRON: But the counterargument is that a fixed term means a fixed term and that every day I get closer to when my lease expires is one day closer to when my business is worth nothing. So I understand that people believe the value of their business is going up every month because they're working hard and they're taking almost nothing out of the business, they're putting in 80 hours a week and all the rest of it. But rather than the value of your business actually going up each month or each year, if you're getting closer to the day when your lease is going to expire,

maybe the value of your business is going down.

MR ZAWATZKY (VBC): This argument was put in when the better business conduct legislation came up. I remember Senator Schott was the minister in charge of this operation - produced a very extensive paper outlining exactly what you said versus the - - -

DR BYRON: I thought I was the first one to think of it.

MR ZAWATZKY (VBC): Yes. No, it's in the paper arguing both cases. Your case is as strong as my case that I'm saying. But what I'm trying to say is that somewhere there needs to be some compassionate argument for somebody just being told, "Sorry, if you don't pay the 50 per cent increase I'm not going to renew your lease." The expectation is that it will be renewed. The landlords in the presentation said very carefully 99.9 per cent of leases are renewed. That's wonderful, but there are lots of people who will walk away because they can't afford a 50 per cent increase in rent, and that's sadness of the legislation.

DR BYRON: I've been trying to avoid using the word "renewal" in a shopping centre context because it seems to me that it's more like one lease expires and another lease between the same two parties may or may not be negotiated, but the terms and conditions could be completely different, not just the rent but all sorts of other things could change. It seems to me, again not being a lawyer, but that the parties to that contract, that second lease, have to both be willing to sign, and it would be a bit of a departure from traditional law to say that, "If we're negotiating and you want to sign the new agreement and I don't then I should be forced to just because you really, really, really want me to."

MR ZAWATZKY (VBC): The South Australia government recognised that argument. The South Australian government is the only one that allows a form of security of tenure.

DR BYRON: Yes, a right of first refusal.

MR ZAWATZKY (VBC): Call it right of first refusal, that's exactly what it is. At least to have a right of first refusal is better than having nothing other than a letter which says to you six months before the end of your lease term, "We are hereby not going to renew your lease," and the reason that they do that is because of the problem with being able to stay on six months after the parties agree not to go. So they do that six months before, and then three days later send you a letter saying, "We will let you stay on on the following terms and conditions." So therefore the haemorrhage has ceased and we can now talk about the negotiations.

We need to have some sort of security. I know security of tenure has been done to

death since 1986 and it comes up at every inquiry, but it needs to be at least looked at again and again and again to see whether there is something that can be done.

DR BYRON: As you say, we've gone through all the history of this and it's probably the most perennial and one of the most contentious things of every inquiry that's looked at it. It seems to me that in spite of all the inquiries and legislative changes it still hasn't really been sorted out. It's still contentious. The property law experts are basically still saying that it's up to the landlord to decide whether or not he wants to sign a lease and with whom, and "willing parties" and all that sort of thing.

I understand why it's important, but as I said earlier this morning, the people that we've spoken with in the course of this inquiry who seem to be very successful retailers in centres have said to us that you've got to manage the business so that you don't have a whole lot of liabilities and so on at the end of the term so that if you can't negotiate a mutually acceptable second lease you can walk away with relatively little pain if you have to. You hope that you won't have to, but if five years means five years there's no point in getting to that point and still having another five years to pay on your loan and another three years to write off your fit-out and all the rest of it. That basically puts you over a barrel. The people who have achieved security of tenure are the people who have informed themselves and made all the provisions all the way through.

MR ZAWATZKY (VBC): You're actually are inhibiting a person from selling his business, because once he crosses over a certain period of time who's going to buy a business in a shopping centre with 18 months to go unless you know you're going to have an extension? So what you're virtually doing is you're saying to the individual, "Sorry, once we get past a year or so of your five year lease your business is worth nothing." That's what you're saying to the individual, because it's like these sub-prime loans. Wonderful stuff that the banks bought but they can't resell it therefore it has a nil value.

DR BYRON: I'm sorry, I'm not advocating this. I'm simply running through the arguments that have been put to us. We've had people sit where you're sitting and say, "I bought this business with a year and a half to go on the lease. I asked them, 'Will I get another five years at the end of this?' and they said, 'Yes, of course.' 'Can I have it in writing?' 'No, of course not. But don't worry, mate, she'll be right,'" and of course a year and a half later there is no renewal and the guy then realises that he's done his dough.

What I'm trying to work out is how do you avoid that situation happening, where the guy who's gone into this ends up losing everything. One answer is to say if it's only got a year and a half to go it is not worth paying that much for it. Instead of paying 200,000 maybe you should pay 2000.

MR ZAWATZKY (VBC): What you have in New South Wales legislation and now in Queensland is the right to early negotiation. So if you're about to sell your business you can actually go into an early negotiation for an extension of the lease and the landlord, if he agrees to that, is bound by the extension. That is a first step towards solving the problem. At least it takes out the uncertainty of people wanting to buy and sell businesses, and the many people who operate as agents buying and selling businesses, to know that the business will continue, because the next thing we'll have is a lot of litigation against "You said I was going to get a lease and you didn't give it to me" type of thing.

DR BYRON: But if there's two years to go on the lease and I think the business is worth \$1 million and the prospective buyer also thinks that it's worth \$1 million, and we're close to a deal, we go to the landlord and the landlord says, "Okay, I'll give you another five years on that but the rent is not going to be X, the rent is going to be 1.5 X," that business is no longer worth \$1 million if the rent is going up by 50 per cent. It might be worth 700 or 800 or something. So now where do we go in the negotiations? Or does the vendor say that, "The landlord has just taken \$300,000 out of my pocket."

MR ZAWATZKY (VBC): You've actually killed that person's retirement superannuation if he's getting on by a simply act of, if you like, bastardry by not saying, "I'm not giving you another lease." Can you do that in the society in which we're living today? Have the landlords got so much power under legislation that they can actually have that control over people's lives who are retiring, who want to sell out, want to retire, want to do all that sort of thing, by the strength of the lease? Have we imbued them with this power under legislation, and in terms of what you said, with such power? Is that fair in the society that we're living in today? I don't think so. People would never be able to sell their businesses because they're in the hands of a landlord who may or may not give you a lease and who can demand an increase in rent as you've just said.

So really, that sort of power I don't think was ever envisaged by federal or state legislature that that could happen in the world we live in today where people are reaching retirement age and they want to sell their businesses and they can't. They can't from virtually the second year of their lease because there's no certainty they will get it any more. If you want to be practical, give everybody an option of an extra five years but make the option conditional on a lot of things: that you run your business properly, that you do everything correctly, that you're on time, that you open your shop on time. That's fine, I don't mind the conditions but give somebody an option to renew the lease which you can go along with a product to sell your pharmacy or whatever you have.

DR BYRON: Thank you very much.

DR BYRON: The Law Institute. Thank you, gentlemen, very much for coming. If you could each introduce yourselves for the transcript and then take us through the main points of your submissions. I would like to thank you very much for the three submissions and thank you very much for the time and effort you've put into this.

MR DAVINE (LIV): Thank you. My name is Derry Davine, I'm from Dibbs Abbott Stillman but I'm here representing the Law Institute of Victoria as a member of its leases committee.

DR CROFT (LIV): My name is Clyde Croft, I'm the senior counsel, and I'm here representing the Law Institute of Victoria as a member of its leases committee.

MR REDFERN (LIV): My name is Michael Redfern from Russell Kennedy. I'm also a representative of the leases committee of the Law Institute of Victoria.

DR BYRON: Thank you very much, gentlemen.

MR DAVINE (LIV): We and the Law Institute are very grateful to have the opportunity to be able to make submissions on this draft report and also to appear before you today. The points we want to make are drawing some of the threads made in the last submission of December last year. I've been chosen by the team to speak initially to each point, and almost like a tag team the others will add a bit of quantity and quality to that.

The first point is in relation to the continuity of retail tenancies legislation in Victoria. We consider that the Victorian legislation is working very well at the moment, in particular its administration is working well. There are always issues in relation to the drafting of the act and it doesn't seem to matter how many reviews there are you never really seem to iron out all the wrinkles. We were no sooner finished the last review that there were further problems discovered. But the administration is working very well, particularly the activities of the Small Business Commissioner's office are very successful in relation to the administration generally but also to the administration and resolution of disputes. They have a very high resolution rate there, something like 80 per cent, but no doubt you'll be hearing in more detail on that from the Small Business Commissioner's office, if you haven't already.

DR BYRON: Yes. I have met with them a couple of times.

MR DAVINE (LIV): Right. Also we believe that for matters that don't resolve at mediation and that go to VCAT, VCAT works very well and is very responsive in terms of timing of hearings, availability of urgent injunction hearings and so on. We would like that to continue. Whatever occurs in relation to uniformity we would like

the administration of the act to remain in state hands.

DR CROFT (LIV): Perhaps if I could just add a bit of legislative history in Victoria. As you would know, Victoria started off with a Retail Tenancies Act in 1986 that was reviewed and re-enacted as the Retail Tenancies Reform Act in 1998. Then in 2003 there was a substantial review and new legislation. Each of those processes of legislative review and legislative experience has really been very important because I think we've learnt a lot since 1986. There were problems with the 86 act, and the 98 act sought to address some of those and created more problems, particularly with disclosure and the penalties for nondisclosure. But we learnt from the 1998 act and hence the 2003 act.

I'm not saying one doesn't change things at all because sometimes it isn't a good idea to change, but we certainly have learnt a lot during the processes of the three acts. I think one would want to be very careful in perhaps dispensing with that experience in further new legislation at this stage. The other thing we need to remember is that some of the difficulties and complexity with the retail tenancies legislation in Victoria and other states result from the fact that the underlying law of landlord and tenant has never been properly reformed and reviewed.

You would be familiar, I think, with the process of complete review and rewriting of the property legislation in England in 1925 which reviewed the Law of Property Act and related legislation, all of which Victoria and the other Australian states adopted more or less lock, stock and barrel. That was a very important exercise. But the landlord and tenant project was never started and finished, so a lot of the law of landlord and tenant is very arcane and there's some nasty old common law rules that sort of come out of the woodwork and bite you from time to time.

The retail leases legislation in Victoria and other states just sits on top of all that. There's been no attempt made - and I don't say that in a critical way - to reform the underlying law, so every so often something will bite you from beneath the retail leases legislation. That's just comment by way of background.

MR REDFERN (LIV): Particularly there are problems in respect of the common law as far as determination of leases and whilst it's been addressed in residential tenancies legislation around the states, it still hasn't been addressed in the retail legislation, and that is one of the significant concerns that I think most lawyers have that it's simply out of date and needs some sort of consideration at an early date. Would you agree with that, Clyde?

DR CROFT (LIV): Yes, the residential legislation is much more in the nature of a comprehensive code, and the retail legislation, as I said, just sort of sits on top of the general law.

MR DAVINE (LIV): The next point is a related point in relation to uniformity of legislation. As we've indicated in our submission, the Law Institute supports the idea of uniformity but maintains that the various jurisdictions should retain control over the act. While applauding the idea of moving to uniformity we recognise that there are significant obstacles to achieving that because states that have a lesser degree of regulation won't necessarily want to move to a higher degree, and states that might be out in front won't want to peg their legislation back to conform to a mean set of regulations, I don't think.

In relation to mandatory legislation of leases, the Law Institute supports the draft recommendation that registration not be mandated simply because if a primary objective of mandatory registration of leases was to create transparency in relation to effective rents to enhance the knowledge, if you like, of tenants negotiating leases in shopping centres and other places, that goal will never be achieved because parties will inevitably include incentive details in ancillary documentation. So all that appears in a lease in terms of rent will be the face rent and you will have to go to some other document which won't be on the register to determine the real position between the parties.

MR REDFERN (LIV): Also when there's a rent review, that's not noted on the lease. So as soon as there is a rent review you lose your transparency.

DR BYRON: I guess this topic of registration has come up every day of the hearings we've had so far and fortunately we had a submission from a solicitor in Brisbane who explained to us why the practice in terms of lease registration was so different in various jurisdictions with regard to title and so on. He came up with the suggestion of a sort of one or two-page epitome of lease which would be signed simultaneously with the actual lease, and this would not be for title or property law type of reasons, but purely to generate information to inform the market. If there was going to be such a thing, then we discussed what it should contain and whether it should disclose all the incentives of whatever sort - rent-free periods and contribution to fit-out and so on - and other people suggested that they would like to know what the arrangements with certain outgoings would be as well. We've had contradictory views on whether the information on face rents that comes out of leases actually misinforms the marketplace because it's consistently above the real figure. The other argument that was put to us in Sydney was that everybody knows that the incentives are approximately X per cent and therefore you just make it - as long as it's consistent bias we can adjust for it anyway. So I'm very pleased to hear the Law Institute's views on both whether it would actually generate information for the market and what, if anything, would need to be contained in this short document for it to be of any use.

MR DAVINE (LIV): Under section 25 of the Victorian act there's already an obligation to lodge with the Small Business Commissioner's office certain details in

relation to the lease, but they're not very extensive and they don't go to the rent, certainly not to the effect of rent. They talk about the end date of the lease and they give the parties details and so on. That came in in 2003 and that information isn't put to any use at all. Nobody knows why it's there.

DR BYRON: Or why it's even collected.

MR DAVINE (LIV): Or whether it's going to continue in the future is something that the next review might look at.

DR CROFT (LIV): It doesn't pick up assignments either.

MR DAVINE (LIV): No.

DR BYRON: But somebody suggested to us that with relatively small changes, that could actually form the nucleus for a very useful database that would better inform the market.

MR DAVINE (LIV): It could certainly if it was available for searching by the public, because as well as listing a certain number of things in the section it says "Such other matters, if any, as are prescribed by the regulations", so it would be a relatively simple matter for the regulations to prescribe the other information that has to be provided. It wouldn't even require an amendment of the act, but maybe some amendment would be required to deal with the issue of disclosure and ability to search the register and so on.

MR REDFERN (LIV): At the moment it's only required to provide the details in the lease itself, so you wouldn't get your incentives disclosed at all.

DR BYRON: But that also raises the trade-off that's been put to us, between the public benefit of informing the marketplace versus the traditional right of the parties to keep the contract confidential if they wish to. That's probably a pool that we'll leave for the politicians.

MR REDFERN (LIV): The Victorian act at the moment provides, I think, that valuers have a right to obtain information from tenants on a confidential basis. That's correct?

MR DAVINE (LIV): From landlords.

MR REDFERN (LIV): Yes, from landlords, so there is a procedure for finding out what the rent is for valuation purposes, which is the only reason you'd want it.

MR DAVINE (LIV): Just before the Productivity Commission's activities were announced in Victoria, the Victorian government was having its own investigation to reducing the cost of compliance and one of the things it was looking at, as we attended a

stakeholders meeting there, was to consider doing away with the section 25 notification altogether because it was seen to be serving no useful purpose.

DR BYRON: Yes, I'd heard similar and nobody has been able to point me to any useful purpose that it serves, so it seems to be a candidate. But the question was whether if augmented and re-badged and searchable and then the question of whether that would actually be useful or dysfunctional.

DR CROFT (LIV): I think it would be very difficult to frame legislation or guidelines which would really catch a full range of incentives or the real rent, factoring in the actual incentives that are provided. Certainly if you had a registration of leases scheme the incentives wouldn't appear on the register because the register will only be what's in the lease. But it's even hard to think of redrafting section 25 in a way that really would catch all the lease incentives, but I suppose one could try. But I think that would certainly better in terms of a regulatory or deregulation outcome than contemplating registration, because we know from the registration of interests in freehold all the difficulties you get with the cost and delay and the registration process. If a registration process is to be introduced, you have to resource the Titles Office properly so there aren't delays and all the rest of it and ridiculous requisitions on the form of the lease and all this sort of thing. I think practitioners here who have lived very successfully over 150 years or so without registering leases because of the Torrens exception in favour of a tenant in possession are just horrified at the prospect of having to negotiate Titles Office requisitions on leases.

MR REDFERN (LIV): It's a sledge hammer to crack a nut.

DR CROFT (LIV): It would be a terrible imposition on the cost of leasing in Victoria.

DR BYRON: We eventually got to understand why that was and the presumption of tenants in possession with indefeasible title in Victoria.

MR REDFERN (LIV): That section I referred to of "Valuers have a right to obtain information" is section 37(4) of the Victorian act. It gives the valuer to the right to obtain information from the landlord of the rents payable.

DR BYRON: The counter-argument that we're getting comes from New South Wales, I guess, where a similar term probably doesn't exist and that the valuer can only use public information rather than information that's been provided confidentially in terms of doing a valuation. So the valuers seem to be particularly concerned to have a public source that they can cite in doing the valuation, rather than being able to use information that they have been given - - -

MR REDFERN (LIV): The section that I referred to of course only give the valuer a right to obtain information from the landlord. It doesn't allow the valuer to obtain information from other landlords in, say, where he's looking at a strip shopping centre,

it's only really appropriate in a shopping centre situation which is limiting - - -

MR DAVINE (LIV): We find it hard to understand how valuers in New South Wales could be assisted by searching the register anyway because they're still left with the effective rent and - sorry, not the effective rent - - -

DR BYRON: The face rent.

MR DAVINE (LIV): The face rent and they don't anything.

DR BYRON: They still need to estimate what - - -

MR REDFERN (LIV): Is virtually happening.

DR BYRON: Yes, okay. Sorry, I interrupted the flow of your presentation before.

MR DAVINE (LIV): Not at all. Our next point to be made was in relation to unconscionable conduct and we would very much like to see greater clarity in relation to what conduct might be considered unconscionable. In relation to the suggestion of a lack of uniformity which is implicit in the draft report, the institute considers that the Victorian treatment could be made more consistent with other states if the exceptions contained in sections 79(b) and (c) of the Victorian Act were removed. As well as having the Fair Trading Act - which is identical, I believe, between all the jurisdictions and the Trade Practices Act where it applies, the Retail Leases Act in Victoria also has section 77 dealing with unconscionable conduct of a landlord and 78 dealing with unconscionable conduct of a tenant and they add a few things to the check list, if you like, in the Trade Practices Act and the Fair Trading Act. Section 79 says:

A person is not to be taken for the purposes of section 77 or 78 to engage in unconscionable conduct in connection with a retail premises lease merely because (a) the person institutes proceedings in relation to the lease or refers a dispute, application or claim relating to the lease to arbitration, conciliation, mediation or some other form of alternative dispute resolution -

now, we have no problem with that, but -

(b) the person fails to renew the lease or enter into a new lease; or (c) the person does not agree to having an independent valuation of current market rent carried out.

Now, we believe that probably the most common instances of unconscionable conduct being alleged would arise in relation to the circumstances contemplated in (b) and (c) where there's no option to renew and the landlord fails or refuses to renew

either absolutely or on terms that the tenant pay whatever rent the landlord nominates. It is only in the context of this re-letting that we suggest that it ought to be regarded as unconscionable or at least potentially unconscionable for a landlord to refuse to allow a market rent to be carried out.

By saying that those types of conduct, without more, won't be treated as unconscionable seems to remove much of the effectiveness of sections 77 and 78. In Victoria it's likely too that where the provision in the Fair Trading Act might have appeared to provide a remedy for certain conduct, if it falls within one of those exceptions, the Retail Leases Act, because it's more specific and probably would have priority in relation to a retail tenancy dispute, might take away that right altogether or it might remove the characteristic of unconscionability from that conduct.

DR BYRON: But would such a - removal of 79(b) basically mean - would alter a presumption. It would give a presumption of renewal, wouldn't it?

MR DAVINE (LIV): Well, we don't suggest that it should be reversed, that a refusal to do those things should be regarded as unconscionable. We don't suggest, for example, that it should be made - (o) and (p) of section 78, for example, as something that the court might regard as unconscionable. But it's just conduct that may or may not be unconscionable.

DR CROFT (LIV): In certain circumstances.

MR DAVINE (LIV): Yes, depending on the circumstances in which it occurs.

DR CROFT (LIV): Yes, something almost sort of not technically misleading or deceptive conduct but there's some conduct by the landlord which seems to be representation short of an estoppel to the tenant that there will be a lease renewal and would otherwise be - it's not misleading or deceptive conduct but in the circumstances it might be regarded as otherwise unconscionable under 77. Then it falls - go straight to 79(b) and it will take the dispute out of the field of unconscionability where there might have otherwise been a remedy.

MR DAVINE (LIV): So then if those exceptions were removed and they weren't added as positive instances of unconscionability in section 78, you would then have to look to see whether the party acted in good faith, the extent to which the other party was prepared to negotiate terms reasonably and so on. So you would be looking, just in general terms, under the existing parts of the - the primary part of the section, really. So it would be going too far to reverse the thrust altogether.

We also feel that a greater emphasis on bringing cases to trial by the ACCC would go a long way in providing greater clarity in relation to unconscionability. So

far the few cases that there have been about it are quite unhelpful and really take a very strict view in relation to whether conduct might be unconscionable or not. Strict but in favour of - strict in favour of contractual provisions regardless of the outcome.

DR BYRON: Would it be fair to say that one of the reasons that there's not a lot of examples of ACCC and sort of consequential case law is because that frequently there have been settlements - - -

MR DAVINE (LIV): Yes.

DR BYRON: - - - once the ACCC starts to inquire? So we never actually get to the point of seeing what the decision is.

MR DAVINE (LIV): Yes.

DR BYRON: I'm not - - -

MR DAVINE (LIV): Yes, they'd have to run - - -

DR BYRON: I'm not sure if that's a good thing or a bad thing.

MR DAVINE (LIV): They'd have to run them as test cases, wouldn't they, really.

DR BYRON: Yes, and basically refuse a settlement.

DR CROFT (LIV): Maybe one way of assisting that would be for some ACCC or perhaps even Small Business Commission guidelines as to what unconscionability might amount to. It seems to me the two big problems with the unconscionability jurisdiction in Victoria - the first is it's nebulous and you don't really know, apart from reading the trade practices cases what might be unconscionable. So it's difficult, even on the authorities. But there's a particular problem in some of the Victorian authorities, particularly, I suppose, the VCAT authorities, because there's a very strong line being - has been taken, perhaps softened a bit more in recent times - that, sort of, ipso facto it cannot be unconscionable conduct if all a landlord is doing is relying on its strict contractual rights under lease provisions which were freely negotiated between the parties.

Now, it seems to me that reduces the intended effectiveness of the unconscionability provisions of the Retail Leases Act. But it also seems to me it's contra to the general equitable jurisdiction where one of the main points of equity was to relieve against the unconscientious enforcement of strict contractual rights. That's what equity is all about. So I think given the state of Victorian authorities probably something needs to be done in terms of the legislative provisions and perhaps a set of guidelines so that you can reduce some of the nebulousness. It's not

easy.

DR BYRON: Yes, you're right, it's not easy. It's a very finely balanced point, I think.

DR CROFT (LIV): I mentioned landlords but I mean tenants can be unconscionable too.

DR BYRON: I took that as given.

DR CROFT (LIV): Yes.

DR BYRON: Yes.

MR DAVINE (LIV): The next point is in relation to shopping centres and voluntary codes. We don't really have any faith in voluntary codes and we don't imagine that they work in Victoria or elsewhere as they lack any teeth. We find it really hard to even imagine a situation where the conduct of shopping centre landlords wasn't regulated in an enforceable way.

DR BYRON: We were talking about a code where it was voluntary in the sense of whether or not the party signed on to it but once they had signed on all elements of the code would be fully enforceable by the ACCC. So the only element - I understand that - the description I was given of the previous New South Wales voluntary code was that it allowed parties to cherry pick or to say, "Well, at this moment it's not convenient to abide with clause X." We certainly didn't mean anything like that.

The idea of voluntary - I think partly to avoid the definitional question of who the code must be applied to so that if it was optional whether or not a landlord, for example, choose to become a signatory to the code, it would signal those who agreed to by the code of good behaviour and those who wanted to reserve the right to make out like cowboys or bandits. But once a party became a signatory then all items of the code would be enforceable by the ACCC, rather like the franchise code and the code between the car repairers and insurance companies, both of which seem to have performed the role of a circuit breaker in trying to restore some sort of mutual trust, confidence et cetera in - - -

MR REDFERN (LIV): But the franchising code is not voluntary, is it? It's compulsory.

DR BYRON: No, it is a compulsory code, yes.

MR REDFERN (LIV): Well, if it's good enough for a code why shouldn't it go in

legislation or be made compulsory?

DR BYRON: Well, again, one advantage that - I don't know, it may not be an advantage - with a code was that that could be reached nationally, like the other two examples I just gave. If the need for revision became apparent then the code, I imagine, could be updated or improved relatively easily compared to getting legislation through eight jurisdictions' legislature. I thought it would be extremely difficult to achieve harmonisation of the state and territory legislation on retail tenancy, but it might be possible to achieve agreement on a code of conduct that would do most of the work in the most egregious areas of retail tenancy, namely large shopping centres, and that if behaviour could be laid out in that code, enforceable, the differences in retail tenancy legislation covering everything else, those differences between states and territories would probably become less critical than they are that the moment. It was a backdoor way of achieving a certain amount of national uniformity through the use of a code.

Having said all of that, I'm not in any way wedded to the idea of a code, voluntary or mandatory. A similar argument that was put to us was that there be some sort of ombudsman, whether that was federal or state. I imagine that if somebody was appointed as an ombudsman to look into retail tenancy disputes one of the first things they would do would be to draw up some sort of code, baseline, what would seem to him or her to be reasonable behaviour so that they could look at the cases that came before them. Whether the existing Retail Tenancy Units in some states, or the Small Business Commissioner here was given a slightly different role, I can see many different ways of achieving the result of trying to improve mutual trust and restore confidence and to actually achieve between behaviour on both sides in the centres. One way to do it is to put it through legislation, another way is through code, another way is industry self-regulation or ombudsman.

MR REDFERN (LIV): The legislation has a lot already in respect of shopping centres, so you'd be having to deal in and out with the legislation.

DR BYRON: I guess one of the conclusions in the draft report is when we look at all the state and territory legislation and the differences between them it's very hard for us to make an assessment that the differences between states - Queensland doesn't have a minimum five-year term and yet retail tenancy seems to still survive and flourish there much as it does in places that do have a minimum five-year term. New Zealand doesn't have any retail tenancy legislation at all but the same companies that deal in Australia as landlords and tenants deal in New Zealand and life goes on. Tasmania has a code but not retail tenancy legislation per se, and yet people there commence retailing. We were talking about South Australia with the right of first refusal for the incumbent tenant, the ACT has something similar, other states don't. Can we see any differences between those with and those without? Queensland introduced a requirement to have both a solicitor and a commercial sign-off before

the lease came into force. Can we see an improvement before and after?
Queensland has it, New South Wales doesn't, is there a difference? We can't see any evidence.

So we've got all these policy experiments that have been put into legislation and things that may well be a good idea, but we have been able to see the evidence of what has changed in the outcomes on the ground. So it's very hard for us to say all the other jurisdictions should copy South Australia, or Queensland, or the ACT, or Victoria when we can't actually see evidence of what difference it's made.

MR REDFERN (LIV) : There's a lot of evidence about renewals. If you scratch the surface hard enough, in Victoria as against South Australia you've probably - - -

DR BYRON: Sorry, can you elaborate or point us in the right direction there?

MR REDFERN (LIV): In our own practice, and I'm sure in Derry's and Clyde's is we have many examples of shopping centres refusing to renew leases for their own reasons, which I'm sure wouldn't happen in South Australia. One of the problems is the unconscionable conduct provisions, as Derry has already pointed out, at renewal. Just in our own practice we've had at least three cases where's there's been an absolute refusal to renew for arbitrary and unconscionable grounds, we would say, but they're not strong enough to take to court.

DR BYRON: The counterargument that's been put to us by tenants in South Australia, and probably will be again next week, is that there are so many what they see as loopholes in that even though they appear to have the right of first refusal and so on it actually doesn't deliver very much to them in practice.

MR REDFERN (LIV): That's only an argument for strengthening their legislation, not putting it away altogether.

DR BYRON: Precisely.

MR DAVINE (LIV): Is the evidence that you've received about South Australia and the ACT, does that suggest that it's regularly signed away, the right to renew? You can contract out of it, can't you?

DR BYRON: It's not that it's contracted out, there are provisions in the legislation that says, "The landlord doesn't have to offer the renewal if" - and they're fairly generous terms there. So there's nearly always one of those things that the landlord can point to and say, "Therefore that's why I'm not going to give you the right of first refusal."

MR DAVINE (LIV): But you can also contract out of that provision, I think,

subject to obtaining advice and so on.

DR BYRON: Yes. We'll certainly keep digging and keep following up the observation in terms of the almost continuous cycle of reviews across all the jurisdictions, and each one seems to either review their own experience and look over the fence and say, "That's not a bad idea, what so and so has introduced. We could put that in too." Yet in many cases there doesn't seem to have been a hard-nosed or a cold-headed assessment of that clause that the other jurisdiction has really changed very much on the ground?

MR DAVINE (LIV): One practice of shopping centres is to threaten not to renew because they know they don't have to renew in order to negotiate better terms as far as a renewal. So they can use that as a threat to require a tenant to comply with unreasonable terms. That's quite familiar, we're quite familiar with it and we just have to live with it.

DR BYRON: We were told here on Wednesday that that's almost certain practice, six months before the five-year term expires everybody gets a letter to say they're not going to be renewed.

MR DAVINE (LIV): That's required by the act.

DR BYRON: Then a few days after that the negotiation starts.

MR DAVINE (LIV): Which is hardly fair.

DR BYRON: And, I imagine, extremely demoralising to the novice tenant.

DR CROFT (LIV): All the goodwill is gone, all five years worth has disappeared. I was going to say, in terms of voluntary codes, I'm reminded of I think it was about 78 or 79 the Trade Practices Commission produced guidelines for shopping centres which has never - I think I'm right, about that date - been updated. It seems to me there's some core behavioural issues that a code could usefully address itself to like those TPC guidelines, and that's really related to the unconscionable, misleading or deceptive conduct type of behaviour. It seems to me if you go much beyond that into the nuts and bolts administration in each of the state jurisdictions you start to run into some difficulties, I would have thought. For example, would you think the code might prescribe how outgoings are to be treated or reported or whatever? You can see as you get away from core behavioural issues it's going to get harder and harder.

The other thing is of course that most of the state acts will contain a provision which says you can't contract out of them. So if you're running a voluntary code on the basis that it's not voluntary to the extent that the landlord and the tenants sign up to it that's fine in a general sense, but you might run into particular problems with the

state legislation. Obviously that can be changed, but it's something that you need to keep in mind, I think.

DR BYRON: In Sydney last week we were told about and I think shown a copy of a draft of a code on shopping centre outgoings which the parties had spent a couple of years negotiating and had got almost to the point of signature when some administrative turmoil happened and it's sort of sitting on the shelf waiting. But there is the code on casual mall leasing that has come through. Now, it may well be that rather than one big code to rule them all we actually have a series of things that are much focused, much more discrete and possibly where it's easier for the parties involved to actually come to some sort of concrete agreement on, "This is reasonable and that simply isn't."

DR CROFT (LIV): Yes, that would also be helpful because one of the problems with this legislation is it tries to deal with strip shop stand-alone tenancies and shopping centres altogether. Yet you see problems there with disclosure requirements and other things that sort of apply across the board. So if you did provide a package of different codes you could avoid that problem by having things that apply to strip shops, things tailored for shopping centres.

DR BYRON: We were taken to task here on Wednesday for having devoted much of this report to dealing with the issues of large shopping centres - small specialty tenants in large shopping centres. But for the reason that we try and explain in the introduction is that this seems to be the area where the most consistent assertions of abuse of market power the information seems to have come from. When we read all the second reading speeches and so on going back over 30 years, the retail tenancy legislation seems to have its firm roots and coincide with the evolution of the large shopping centre model.

Now, it's quite true that 80, 90 per cent of the cases that go to the ADR or the Small Business Commissioner may well involve Mr and Mrs Smith versus Mr and Mrs Jones on a strip, but those seem to be more along the lines of, "She won't pay the rent but that's because he won't fix the whole in the roof." It's not about the systematic abuse of monopoly power which is more of a public policy issue than I think we're asked to deal with. Of course there's always a certain amount of commercial argy-bargy that goes on but it's not systematic abuse. Our reading of all the legislation and the speeches made around that time was that it was very much brought in to deal with the new model of the large managed shopping centre and the perceived vulnerability of small tenants in them, particularly at the time of renewal.

MR REDFERN (LIV): The practices at the time of that legislation and the practices of landlords, yes.

DR BYRON: Yes. Now, the legislation does seem to have removed some of the

most egregious behaviour but clearly not all and so here we are again for the 14th inquiry or whatever it was.

MR REDFERN (LIV): One of the key issues that a lot of people have is simply the right to renew. If there was an entrenched right to renew, a lot of the practices might disappear.

DR BYRON: Would that be a fundamental change to property - - -

MR REDFERN (LIV): Certainly in Victoria. In Victoria there's only the right to five years, no more. If there was some stronger right than that I think a lot of the problems might disappear that we see.

DR BYRON: The counter-argument might be that the shopping centre owners are trying to compress the term because that increases their ability to extract a large amount of the surplus of the business; not that I'm putting that to you, of course, but it might be an alternative view.

DR CROFT (LIV): Well, I suppose if there's only a guaranteed, so to speak, five-year lease that does increase the market power of the landlord or a shopping centre. One possibility in terms of renewal, without getting into elaborate renewal rights and tribunals and all the rest of it, is to produce a provision along the lines which gives a tenant the right to renew unless a landlord can establish for any good reason why the lease shouldn't be renewed. That doesn't necessarily mean that the renewal is going to be on a rent that's favourable to the tenant potentially or for the landlord. It can still be market rent. But, I mean, it seems very difficult to understand why you can have a situation - you see it in practice that a tenant has been satisfactorily in a major shopping centre for 10 or 15 years and suddenly there's a real push - or they're just told, "We're not going to renew your lease," for no particularly good reason - no refurbishment of the centre, the floor, changing of the layout et cetera. The legislation really - it seems as a matter of public policy - should be saying, "Well, unless there's some good reason why not, they should have another five-year lease."

DR BYRON: Yes. Some others have put that same proposition to us in submissions that the landlord would have to go some form of tribunal to explain themselves as to why they wouldn't automatically offer another lease to somebody who had abided with all the previous tenancy conditions and was trading satisfactorily. I guess the question is how compatible is that with property law as we know it; the right of a landlord to decide whether or not he wants to lease a property or to whom.

MR DAVINE (LIV): It's not consistent with that but there are lots of ways in which residential tenancy law and retail tenancy law aren't consistent with the

Commonwealth law and they're there for the protection of people who have less bargaining power than the other party and so on.

MR REDFERN (LIV): The legal position is abused constantly by landlords with having the power to renew or not to renew. They're constantly upping the rents and the requirement of refurbishments. Are you aware of the requirement of refurbishments on renewals?

DR BYRON: Yes.

MR REDFERN (LIV): They just simply have the tenant where they want them and they can extract whatever they want.

DR BYRON: As a number of people have said to us these are beautiful examples of an incompletely specified contract where party A can require party B to do certain things, but the time and the expense and the consequences are not specified at the time the parties sign it. Now, this sounds to me something like a blank cheque and I wonder why people enter into them, apart from the expectation that the other guy would be reasonable.

MR REDFERN (LIV): What choice have they got if they want to go into the centre? They've got no choice.

DR BYRON: If they want to go into that centre, yes. But nobody has told us yet about having a gun held to their head requiring that they go into retailing in a centre. It does seem to be a choice.

MR REDFERN (LIV): Life is not perfect.

DR BYRON: It seems to be a choice, but my question is how well informed are the people about the terms and conditions of the contract that they're signing, and perhaps if they better understood all the ramifications of what they were signing, some of them wouldn't.

DR CROFT (LIV): With respect I entirely agree with that. It reminds me of some comments I made to the House of Representatives committee along these same lines that I think there is a lack of understanding often as to what obligations a tenant is entering into and whether that's a criticism of their legal advisers or they're seeing things as they want to see them and looking for positives rather than being pessimistic as to the outcome of their business they're going to establish.

DR BYRON: Natural optimists.

DR CROFT (LIV): Yes, of course. One of the points I made was it would almost

be better to call shopping centre leases "market stall licences" or something like that to make people realise that when you lease commercial premises in premises like that, you're not getting something like your house which is a solid bit of freehold that you can use as you like for the next five years. In fact it's a very, very mirage-like species of property because you can be moved around, you can be relocated, have to refit et cetera et cetera.

DR BYRON: It's much more of a licence.

DR CROFT (LIV): Yes. If you said that to people, "Look, don't think this is a lease like the milk bar on the corner shop," this is something that's quite fragile really.

MR REDFERN (LIV): It doesn't mean that just because people are foolish that someone should take advantage of them. That's what you're saying.

DR BYRON: Not at all.

MR REDFERN (LIV): Well, it is, isn't it?

DR BYRON: No, I'm certainly not inviting anybody to take advantage of less informed parties but I guess the implication is, to a certain extent, caveat emptor and due diligence.

MR REDFERN (LIV): But we've gone beyond that, haven't we, surely?

DR BYRON: No, but what continuously amazes me is that people who will enter into a contract for a million dollars and they receive brochures from the Small Business Commissioner or the ACCC that says, "Warning, careful, before you sign a lease, seek expert advice. You could lose your house and everything else," and yet people continue to sign such leases. Even in Queensland, where there is that requirement to get advice from a solicitor and from an accountant or a commercial business adviser, people are trying to evade that requirement to get advice. They don't want to pay \$5000 for advice that could save them \$500,000. When people are so determined to in effect commit financial suicide, I worry about the ability of the state to prevent them from doing so.

DR CROFT (LIV): With family members about to take leases and said, "Look, don't do it, you don't have enough of a term on the lease for the business." "Why are you being so pessimistic? Why? Is my business going to fail?"

DR BYRON: We were told here on Wednesday that somebody's legal adviser said, "Do not sign that lease, you'll lose a great deal of money," so he fired the legal adviser. I mean, really, I can understand people are naturally exuberant and

optimistic and they go into the business hoping that everything will be fine and you have to trust that the other party will behave reasonably because there are many things in the lease that actually do give them scope to behave unreasonably. Thankfully, in many cases the parties do get on reasonably amicably and it works but we keep hearing about the awful cases where, through either incompetence or malice, the small specialty tenant is hung, drawn and quartered.

MR DAVINE (LIV): I have to agree entirely with your characterisation of the sort of disputes that arise in relation to strip centres, they're not paying rent because there's a hole in the roof and that sort of thing and the sort of dispute that arises in shopping centres. In my experience, it's generally relating to their refusal to renew. People just don't seem to contemplate that up-front. They seem to assume that if they operate their business successfully, they will be given a further term on reasonable terms, and what happens is they're either not or if they're offered a term at all, it's at some rent that seems to be based more on what they can afford to pay or what the landlord thinks they might be able to afford to pay than what the premises should really fetch in the market by valuation.

DR BYRON: Or the landlord may actually know that they can afford to pay because he's got the turnover data.

MR REDFERN (LIV): Exactly, a process of extraction.

DR BYRON: Indeed. But if the lease had in big red letters on the front page that says, "This lease is for five years only and there is no guarantee whatsoever that there will be a subsequent lease," would people still assume, "No, it'll be right, as long as I pay my rent every month and I'm trading well, they'll give me another lease."

MR DAVINE (LIV): I think they probably would. You can tick the education box but you can't tick the box in relation to fair outcomes and so on.

MR REDFERN (LIV): But is that a reason why people should be allowed to extract? Surely you've got to accept that there will be people who make the wrong decision and make mistakes, but is that a reason why you would allow the landlords to take advantage of it? Surely not.

DR BYRON: I guess what we're debating is to what extent one redresses the very obvious and perhaps inevitable imbalance because of different information and scale and access to resources and advice and so on by trying to limit what a better informed, more powerful party can do, or by trying to bolster the information, negotiating power ability, the education or whatever of the less powerful party. Do we need to do both?

MR REDFERN (LIV): At the moment, no matter what you do, if you want to go

into a shopping centre, you only get a five-year lease, no matter how well informed you are, no matter how good your business is.

DR BYRON: Indeed.

MR REDFERN (LIV): That inevitably produces an imbalance which is in many respects taken advantage of.

DR BYRON: I'm probably repeating myself, but what I don't understand is that if I'm considering opening a small retail business in a shopping centre and I'm told that the fit-out is going to cost this amount and the monthly rent is going to be that "and you've only got five years", I do the sums and say, "I cannot possibly incur that expense at the start, pay that rent and get my money back within five years." The fit-out has to be cheaper, the rent has to be lower or the term has to be longer or all of three of those - - -

MR REDFERN (LIV): But the facts of life are there are hundreds of people in Melbourne and other states doing exactly that and they will be in that situation. Whether you like it or not, whether it's a good thing or it's a bad thing, it's happening and those people are out there and a lot of them are suffering.

DR CROFT (LIV): I think as you said before, people are very exuberant and optimistic. I mean, logically you would think that if you can't get your investment back in five years, you shouldn't go into that project - - -

MR REDFERN (LIV): But people do it.

DR CROFT (LIV): - - - unless you're prepared to take the risk and lose everything if you don't get a renewal, but of course that's not part of the basis of - - -

DR BYRON: That's why I keep coming back to the sort of educational thing. If it was explained that, "Your sales performance would have to be better than the top 1 per cent of people in this category for you to achieve this. You would have to work not 80 hours a week but a hundred hours a week. You would have to pay yourself half the minimum wage if you were going to make this" - it seems that what information is available is either not picked up or if it's picked up, it's not read or even if they read it, they say, "Yes, but that won't apply to me." I'm not trying to blame the victim here but if people don't seek advice or don't take notice of the advice and get themselves into a situation where they are extremely vulnerable, we shouldn't be surprised at what happens next. That's why I think there is a very important educational role for novice small retailers as well as a regulatory role on the other side.

MR DAVINE (LIV): There's certainly a case for more education but just to

address the education part only doesn't really do enough, I don't think, because it's a bit like putting a sign up on a footpath saying, "If you walk past this point, a large man with a big stick will hit you." You know, you've educated the people but if they go ahead and get hit, you haven't prevented the conduct.

DR BYRON: That's true.

MR REDFERN (LIV): We have cases where clients actually go to the shopping centre and ask about renewal and they're told that it will be renewed on reasonable terms. Now, maybe they're silly to accept that but at least they address the issue, and what happens on renewal is there's either a new shopping centre owner or a new manager or someone and they renege on their deal.

DR BYRON: We've had multiple examples of exactly that, where the person buying the business with 18 months to go on the lease did ask, was told, "Don't worry, she'll be right, we'll renew you," and said, "Can I have that in writing, please," and they say, "No, we never give that in writing." By the time the actual lease expires and renewal comes up, there have been five more executives through the centre before then or whatever and it's only then that the person realises that they've parted with a large amount of their life savings to buy a business which is now worth approximately nothing.

DR CROFT (LIV): Of course that's a different problem from the problem where the shopping centre says nothing or actually says, "No, there's no guarantee of renewal," but you still find people enthusiastic enough to press on regardless on the basis that the business will succeed and the chances are the leases will be renewed. The example we're just talking about, of course, the removal of 79B of the Retail Leases Act would greatly assist in a case like that because you would think that subject to proof, that's a case of real unconscionable conduct which should be relieved against under the act but presently would fall within that exception.

DR BYRON: Yes.

MR DAVINE (LIV): The final point we wanted to make was in relation to the usefulness or lack of usefulness of comparing the Australian situation with the UK situation. I think you've had a submission by Prof Crosby of Reading University and he also published an article in the Australian Property Law Journal which you no doubt have read.

DR BYRON: Yes.

MR DAVINE (LIV): He proposed a lessening of regulation as long as the right to renew leases was strengthened, but it seems that the draft report favours a lessening of regulation but without taking up the cudgel of the strengthening of the right to

renew. If that were to occur it would be taking up his recommendation, if you like, but without the central plank of it which is the strengthening of the right to renew.

Further, in relation to the UK situation, based on information - we have no information relating to England ourselves but based on what Neil Crosby said to us that shopping centres in the UK constitute a much smaller part of the market than they do here, that they are generally filled by national tenants and you are less likely to find smaller retail tenants in them. So they're more savvy, have greater market power, if you like, and so on. High street locations are often as desirable in terms of location for retail purposes as the shopping centres and prime positions there. Tenants also have right to renew in the UK.

DR BYRON: Yes.

MR DAVINE (LIV): So there's a lot of reasons why the UK experience is so different to ours.

DR BYRON: Typically much longer terms.

DR CROFT (LIV): Yes.

MR DAVINE (LIV): Very long terms.

DR CROFT (LIV): Yes.

MR DAVINE (LIV): Yes.

DR BYRON: We were going - well, we're still trying to find out a lot more about the New Zealand situation given the absence of any retail tenancy legislation, especially since, as I said, many of the same landlords and retailers operate in Australia.

MR DAVINE (LIV): Do the retailers have a strong industry body over there?

DR BYRON: I can't answer that at the moment.

DR CROFT (LIV): I suppose there are fewer shopping centres in New Zealand. I mean if - we were discussing before the development of the legislation in tandem with the development of shopping centres. Perhaps that's some reason for the delay. I don't know.

DR BYRON: It was probably 20, 25 years between the advent of shopping centres here when legislation was thought necessary to control them.

MR REDFERN (LIV): If national tenants in Australia go to New Zealand they're obviously in a strong bargaining position because they're probably pretty large enterprises; like Harvey Norman I know are over there and Priceline. Well, they know how to look after themselves. So probably not an issue in respect of those sorts of tenants. It's more the other way around. They might be abusing the landlords.

DR BYRON: Who knows? Yes, okay. Is there anything else that any of you want to say?

MR DAVINE (LIV): No, that's - - -

DR BYRON: I found that incredibly helpful. So I really would like to thank all three of you for coming, very much and to allow me to sort of think out loud with some of these ideas and other propositions that have been put to us.

MR DAVINE (LIV): Thank you very much - - -

DR BYRON: Thanks for allowing yourselves to be used as sounding boards.

MR DAVINE (LIV): Thanks for giving us such a good hearing.

MR REDFERN (LIV): Thank you.

DR CROFT (LIV): Thanks.

DR BYRON: Thank you. I think we can now break for lunch and resume at 2 o'clock with the Pharmacy Guild of Australia. Thank you.

(Luncheon adjournment)

DR BYRON: Well, thanks very much, ladies and gentlemen, if we can resume the hearings with the representatives of the Pharmacy Guild of Australia. Thanks for coming, gentlemen. If you could just each introduce yourselves for the transcript, perhaps maybe a little bit about yourselves and then take us through the main points of comment and criticism on the draft report.

MR SCLAVOS (PGA): Sure. My name is Kos Sclavos, I'm the national president of the Pharmacy Guild. For transparency I'm a Queensland-based pharmacist and in a major shopping centre in the CBD of Brisbane. I'm only a partner in one pharmacy.

MR SHEEHAN (PGA): My name is Maurice Sheehan, M-a-u-r-i-c-e. I'm the Victorian director of the Pharmacy Guild of Australia. We represent the owners of community pharmacies across certainly Australia but particularly my interest is Victoria. The main presentation today will be from Kos, our national president, Mr Chairman.

DR BYRON: Thank you.

MR SCLAVOS (PGA): Well, first of all, thank you, Commissioner, for again allowing us the opportunity to put forward our views. I guess the Pharmacy Guild has set out in the hearings thus far our case, our belief case, about the imbalance of bargaining power that affects the efficient operation of a pharmacy business. This has generally been outlined through state-specific concerns and case studies. I guess for the hearings today I was hoping, obviously, in my position as national president, to state a broader view perhaps outlining some broader issues and commenting on the Commission's draft report.

So if I could just start with some introductory remarks. I guess the Guild is concerned and we object to the manner in which the Commission outlines its observation of the market of retail tenancy leases on page 78 of the draft report. I quote this particular paragraph:

In the Commission's assessment, the term "war" is not representative of the balance of evidence provided to this inquiry - a few skirmishes, some lingering resentment, hard bargaining and some disappointments but not "war".

I would like to place on the record if I surveyed the vast majority of my members I would almost with certainty predict that 90 per cent plus would state they're in a state of war when it comes to rent negotiations. We believe that such simplified notions and qualifications serve only to trivialise the genuine hardship felt by many of our members as a result of a market that is clearly delivering a significant inequity in

bargaining power.

The evidence we have received from our members, as the Commissioner has previously heard, is that there is a major bargaining power imbalance between landlords, particularly shopping centre landlords, with significant rent increases typically extracted at the time of rent renewal. If I could quote another segment of the Commission's draft report on page 207. I quote:

Entry and exit in the shopping centre segment -

may be tightly controlled. However,

the shopping centre "package" in a retail tenancy arrangement that tenants can either accept, negotiate around, or reject in favour of other tenancy options elsewhere.

I guess I would like to clarify our view of this notion by commenting a little bit about zoning and planning issues. It may seem strange but I'm going to read a paragraph from the Westfield Group submission on page 15 which actually supports our case. I quote:

Planning laws in place throughout Australia which limit the location of retail development ... obviously have a constraining impact on the supply of retail space, particularly when one compares the Australian retail space landscape with other countries, such as the United States, where planning is far less regulated ... Australian planning laws which, by agreement between the various states, supports a "centres policies" -

that's in brackets -

approach (concentrating commercial and retail activities in designated urban centres served by public transport) are designed to create an orderly and sustainable system of urban development which is environmentally sound and which minimises unnecessary car use and traffic congestion whilst optimising the conditions for sound investment in private and public infrastructure.

I guess I want to thank Westfield because it makes a strong case that it is not just simply to either accept, negotiate around or reject in favour of tenancy options elsewhere. In many of these locations now pharmacists have nowhere to walk. We increasingly see the nature of shopping centres now becoming community centres or community hubs. In the last decade, certainly the last five years we have seen a plethora of retail tenancies such as pubs. So they are trying to become communities within themselves. So the notion of a pharmacy being able to move means they

would have to leave that community altogether.

Residential level shops and strip retailing is becoming far less a factor in the Australian retail landscape. The Guild has data out of the top 20 retail locations in Australia. Only one of those is a strip location in terms of maximum productivity for a pharmacy. Gradually the growth of shopping centres is ensuring that more retail space is located under the control of a shopping centre landlord or management group.

I just want to give an example of some additions, obviously from my home state of Queensland, about - and cases that I know personally of where pharmacists have had limited options in terms of tenancies elsewhere. In the Redcliffe peninsula north of Brisbane a pharmacist's base rent 452,000 had to renew at a 32 per cent increase of 600,000 in a new lease. In Caloundra on the Sunshine Coast - to give an example, this is not a CBD issue alone - base rent 357,000, the new lease 650,000, a staggering 68 per cent increase. Bundaberg, going even more regional, base rent 250,000, the new lease 510,000. Just this week we have notification of Chirnside which - going back to Brisbane, where the pharmacist is now facing a 60 per cent increase of his rent and yet the centre itself has added another pharmacy in the centre, a third pharmacy, in the last two years.

I would like to now address the issue about the notion of buying a job. The Guild does not accept that a pharmacist or any other retailer for that matter running a business, or in our case a pharmacy business, is just buying a job as suggested at page 109 of the draft report, or of the same position somehow becoming a subcontractor.

I can only speak for the pharmacy sector, but costs borne by pharmacists in the retail setting are costs that a subcontractor need not worry about. For instance, the average fit-out of a community pharmacy shopping centre is somewhere in the order of 600,000 to 800,000 of those 30 pharmacies that we've surveyed in the last year. Landlords often require refit at particular periods. Moreover, many landlords want refits done after hours and in non-trading periods. Upon contact with various shop-fitting companies, they believe this adds 20 to 25 per cent to the cost of a fit-out, hardly ordinary market conditions, unlike a subcontractor who can come in and out and take all their gear with them when they leave.

Specifically when it comes to the pharmacy setting we have other considerations. Obviously for a fit-out the pharmacists have certain legislation and requirements in terms of the specifications. I'd like to raise the key issue of stock. In many retail environments if a tenant leaves all stock goes with them. From a pharmacist's perspective, for the vast majority in terms of the value of the stock being prescription medications, those goods cannot be resold because of this notion of continuous cold chain. The Guild is in a very strong position to advise on this because we own an

insurance company and in essence if there's a prescription drug and because the integrity of that medication cannot be guaranteed, if I leave a premise the prescription medications in my premises can't be onsold to another retail because the integrity of the cold chain can't be guaranteed.

So when we make a decision to walk from a centre, adding the stock costs to the fit-out costs, it is a \$1 million consideration, which again puts it in the perspective that perhaps many of the pharmacies are resigning or entering into new leases because this issue is at the back of their head in terms of what is the net cost. It is therefore common experience that many pharmacists suffer significant increases at time of rent renewal because of these artificial market conditions within a shopping centre which has created this unbalanced market. Because of what we previously indicated in terms of stock and fit-outs we can't just walk away.

The draft report suggests that low vacancies and high renewal rates show a properly functioning market. I hope I have outlined that in the case of the pharmacists in these centres, in terms of the low occupancy rates this is not a factor that contributes to this. It is difficult to amortise the cost of a fit-out, loans, run a business and yet have only a limited security of tenure, for example such as five years. All these things mean that the argument that the main bargaining chip available to tenants is the ability to vote with their feet, as indicated on page 106 of the draft report, is actually wrong. There are sunken costs that simply cannot be rationally walked away from. We equally therefore feel strongly that we are not just buying a job as suggested on page 109 of the draft report.

DR BYRON: In a quote. That's not our words, is it?

MR SCLAVOS (PGA): No.

DR BYRON: Thank you. Yes.

MR SCLAVOS (PGA): In the view of the Guild the combination of planning laws which obviously rations retail space, in addition the inequity of bargaining power between large corporations who may have full knowledge of that local market versus the small business operator such as a pharmacist, and thirdly the cross subsidisation of rentals that occurs from small retailers over the larger retailers taking space in those centres then there is an overwhelming net benefit in favour of retaining and in fact extending the current tenancy legislation.

If I could move, Commissioner, please, to the area of transparency. I know you have already heard probably time and time again about the issue of transparency and information asymmetry that exists between landlord and tenant. We'd like to get straight to the point on this issue. The Commissioner said that a great deal of information is already available. Can I give you a perspective again from a

pharmacy on a specific issue. Pharmacy typically is bundled in market sectors such as beauty and cosmetics if a pharmacist takes the time to get information in terms of data on rentals. Many of these locations such as beauty kiosks are in smaller locations therefore the rental per square metre is at a much higher rate than what a pharmacist faces. So it is our view that at best this information is not useful and at worst it's mischievous. In fact our advice to our members is to ignore this specific data.

It is difficult to know how much is paid for similar spaces in the same location or nearby centre. For example, when we try to get the information from a centre we are obstructed by the shopping centre owner. As an example, a pharmacy in Brisbane last year recruited a professional company to count foot traffic in the centre to assist in rental renewal negotiations yet that consultancy was kicked out and banned from coming to the centre. If the survey had occurred in a normal retail environment such a survey could not have been stopped. There is no level playing field, then, in terms of information gathering by some tenants.

For the rent to be linked purely to the turnover is an issue that I'd like to give some examples of why there's asymmetry from a pharmacist's perspective. The vast majority of pharmacy turnover is what we called PBS medicines, the Pharmaceutical Benefit Scheme. I will give an example of two medications that to a consumer costs \$31.30, the same price. The largest cost in terms of a group of medications to the PBS is a group of medications called simvastatin cholesterol lowering medications. To a patient that's \$31.30 and the cost recovery from a pharmacist from the government for the remainder is only a few dollars, around \$7. If a pharmacist, however, dispenses a Globec, which is one of the newly listed cancer drugs, that cost is over \$2230. The net profit to the pharmacy for those goods is exactly the same. The PBS remuneration for a pharmacist is such that there is flat remuneration. In essence the government has a view federally that there's cross-subsidisation from higher cost items to smaller cost items which may be more profitable for a pharmacy.

The pharmacist in a retail tenancy, however, is paying perhaps percentage rent where on the pharmacy's books there's turnover of \$2300 and yet the item and the profit from that may be a flat \$18. So an item that is extremely expensive for the good, because the pharmacist is a health professional and owns that premises the pharmacist sells that good because obviously they put foremost their health professional obligations but from a rental perspective the pharmacist is in fact losing by selling that item to the patient. The Guild believes that each of the major shopping centre operators should have a disclosure at the very least of the effective market rent, again a term used by the Commission, charged at each of their complexes in the same way that the major petroleum wholesales, for example Caltex, are required by law to place the terminal gate price of some petroleum products on the Internet.

I guess the Guild would like to put that there are other options for the Commission to consider which would be more meaningful information, obviously from our perspective in terms of ease of a small business. The sooner that's available on a web site also would make life easier for a small retailer. This would provide a benchmark which retailers can make informed decisions before entering into or renewing leases. There is some scope for a compulsory code of conduct enforceable by the ACCC that the owner or owners of shopping centres over a specific size shopping centre should comply with. The code, in our belief, would have to be compulsory. The concept would not work if one or two major corporations chose not to participate in some voluntary code.

Finally, I would like to talk about the issue of the right to good will. The Guild does not accept that all good will is locational as perhaps is implied by some reading the initial draft report. Some good will - - -

DR BYRON: Sorry, don't we actually say that there are three components, of which that was one?

MR SCLAVOS (PGA): I'll address that. Some good will derives from the skill of the operator and the nature of the store, in the case of a pharmacy the service of dispensing prescription medicines especially in locations where the shopping centre is the hub of a whole community then the pharmacy is in fact an essential service. So whether it's in a shopping centre or in a strip those people have medicine needs which they would go to a pharmacy for. If good will was location then it is our view that a franchise would expect the same turnover no matter who operates the business. Looking from another perspective, there would be the same turnover for the business no matter where it was located in the centre, and the same turnover if, for example, the pharmacy was any of the particular marketing groups or in fact branded as an independent.

In that context the code of conduct would at the very least contain elements similar to those in the Northern Ireland model, which is contained in an appendix to the Guild's submission. This model contains a formula designed to provide the tenant with compensation on termination of a lease, such that a landlord does not subsume the value built up over time. The net market effect by my colleagues in Ireland has been that the landlords become more reasonable in terms of negotiating new leases. It is an important point of equity, given that the planning laws that are encouraging the development of larger shopping centres and discouraging the development of smaller retail centres, becoming the trend in the Australian retail scene, one cannot see why such a move would not be of benefit to the small retailers.

Finally the Guild notes the Commission appears to accept that there is a need to clarify this concept of unconscionable conduct. The elements of what constitutes unconscionable conduct would be set out in the proposed code that we're talking

about which can be amended more easily than some act of parliament. Again we understand and appreciate that circumstances do change over time. We will be expanding on this point in our subsequent submission. Again, may I thank the Commission for allowing us to make a further submission.

DR BYRON: Thank you very much, Kos. I think we might see if we can go through those approximately in order and get some clarification or elaboration on some of those things. The first point that you brought up was following the quote from the Reid report, wasn't it, that said, "It's no exaggeration to say there's war out there." My understanding of what we were trying to say at that point was that all of the reviews, the legislation and everything else that's been enacted over the last 10, 20, 30 years may not have perfectly solved all the problems but it does seem to have dealt with some of the most outrageous things that were spoken of 10 or more years ago.

You're actually the first one to say, "No, it's still war." The impression that we got from speaking to basically every other group was, "Yes, there are still problems but it's a lot better than it used to be."

MR SCLAVOS (PGA): Sir, can I clarify something. First of all, obviously, not only am I the president of the Pharmacy Guild but I'm involved in other small business groups and ethnic community council groups, many of which operate small businesses. I guess the benefit you have from a group like the Pharmacy Guild appearing which is a homogenous group of retailers and with the strength of our membership is that we have the resources to then poll and seek the views of our members, and in terms of data gathering we're not like one of the representative organisations who may have some members that are happy, some that are extremely unhappy. Again most of the other organisations who have made a presence have obviously varying membership.

If I could introduce this other concept. The Guild reports for our members this notion which is not in the normal marketplace, this notion of what is the rent that a pharmacy pays as a percent of the net profit of the pharmacy, together with the rent. In other words, if we have this concept that your landlord is sharing the profit of your business, where are you in that centre? If a pharmacy made a profit of 100,00 before they pay their rent, and the rent is 50,000, then notionally the landlord is sharing in 50 per cent of the profit. The Guild surveys that from our members. That figure has gone from some 8 to 10 per cent say a decade ago to today where that figure is nearing the 50 to 60 per cent mark.

Let me clarify. If we took out rent, if we have a notion that your net profit is there and we just count the concept of the landlord is a partner. "We're actually signing the agreement, myself and the landlord, we're going to run this pharmacy business." That as a balance has become completely distorted even over the last

10 years. Our members say to us, "Whatever legislation is out there it's clearly not working because I can't go anywhere else. My refit costs are going up." Obviously we know there's other factors. In the same way that property costs are going up, the refit costs are going up. We have distorted market conditions, such as a pharmacist who's told, "Great, you can do a refit and you must do a refit but you can only start at 9 pm and you must be out of here by 6 pm, and the laneway must be free from 5.30 for the fruit shop proprietors who are coming in." These are the sort of imbalances that I'm trying to give you a sense where for many pharmacists they sense no improvement in conditions over a period of time.

DR BYRON: Those figures that you quoted are basically all about pharmacies in large shopping centres. It doesn't reflect a movement from the high street into shopping centres as well?

MR SCLAVOS (PGA): No. Well, in some high street locations the pharmacists own the premises perhaps or there's other small business people. If I can make a sweeping statement, the rental periods are much longer in the strip locations because there could be the superannuation fund of the local butcher who had the shop 40 years ago. So, no, it's a much more concentrated share - to the point where obviously for some pharmacists, it's a negative. In other words, the pharmacist is not making a profit and more than the net profit is going to the landlord. That happens in a lot of retailers, but in terms of pharmacy we're seeing this trend line moving, and because of this notion that there's such a big cost to move or make that decision to go elsewhere. I guess the difference between pharmacy and other retailers - but to some extent it happens with all retailers - I'm looking after a clientele on prescriptions. It's not just a casual business relationship. I have their health records. I am really an integral part of the family, if I could put it that way.

Often the pharmacists know a lot more and even though, for example, you can purchase complimentary medicines from a dozen retailers, in my pharmacy they will come to me because I then record it on the system, because they have blood pressure or they have epilepsy and they want to make sure of these things. So I guess pharmacy is a little different. As national president, Commissioner, I want to make sure that pharmacy in Australia continues to be in these high-profile locations because it supports this notion of pharmacists being the most accessible health professional.

What happens in America, the pharmacists have disappeared from the shopping centres. I know there are options, and the options are to leave, but I think Australians will be the poorer if pharmacies are not located in shopping centres because of the fact that a lot of Australians enter these centres. Having an accessible health professional which in fact there's no net cost, then we're saying hundreds of millions of dollars each year from unnecessary, for example, Medicare costs. You can't see a doctor these days, Commissioner, unless they swipe their Medicare card.

I'm just giving you a sense of our concern. Obviously, because of the strength of the Guild, we have links with many countries in the world. Westfield could report to you that in their shopping centres in the US, the pharmacies are just not there. They're in stand-alone or they have big box formats or they're the same anchor tenants because they have been priced out of the market. I guess at the end of the day if we're going to have legislation that's a net public benefit, it is a net public benefit to have to ensure that some retailers remain in shopping centres. We don't want to price medical centres out of shopping centres. We don't want to price perhaps other activity out of shopping centres. Again unless we continue with legislation, perhaps somehow strengthen it, that could in fact be the scenario.

DR BYRON: Just on that point you raise, my understanding was that a lot of shopping centres are trying to attract or encourage medical centres and pharmacies into their shopping centre because they seem them as destinations, as drawcards, that will actually bring in foot traffic.

MR SCLAVOS (PGA): I'll give you another scenario. Because shopping centres still want their returns - and I can tell you politically obviously the Guild is involved very heavily in the scene in Canberra - there is enormous lobbying that goes on to get Medicare centres into shopping centres because again that acts as a drawcard. There is no concession of rent to say, "We'll give you a sweetheart deal," so the same issue is political pressure is brought to bear on the local member of parliament to say, "Look, we've got this major new shopping centre and you'll be remiss in your duties as the local member of parliament if you don't get a Medicare office in the centre."

There is no notion, "Well, this is an essential service so it will be below market rent," the same sort of premiums are asked - I won't even include pharmacies in this notion. There are lots of activities if I can go on, in this artificial market, that Medicare offices are a great example where there's enormous pressure always put on the local member to get a Medicare office in. That is the community hub. I'm thinking particularly of Mango Hill on the north side of Brisbane where there was enormous pressure on the local member. Again that's an artificial situation. If there was a normal retail environment and shops were still strong in that area, we could put a Medicare office anywhere. Does that sort of - - -

DR BYRON: Yes, or a post office or whatever.

MR SCLAVOS (PGA): Whatever the service is, yes.

DR BYRON: Okay. My next question was going to be about if you could elaborate on these artificial market conditions, but I think you've just done that. We've had some conflicting advice on whether basically everybody who's in a large shopping centre gets five years or whether newsagents can sometimes get six to

seven and pharmacists typically get eight to 10. Could you enlighten us at all on how that works?

MR SCLAVOS (PGA): Sure. The trend certainly has - for example, if I could go back a decade it might have been common to get a three by three by three. These days options periods are largely disappearing.

DR BYRON: Everybody tells us that, yes.

MR SCLAVOS (PGA): So in terms of a tenure, because we advise our members, naturally, that you really need seven if not eight years to recoup a lot of your sunk costs, this period is shrinking. So I guess our concern is that - and because there's this knowledge by the property market that, "This person has got \$1 million, they've spent it. It's year four" - it's not even the notion of year five. We have to understand that from a negotiation point of view no-one leaves the negotiation to the last minute. So even if it's a five year lease, the thing that I guess when I read some of the reports that no-one thinks about is when you start discussing it it's four years, and when you're looking at bank balance and what your fit-out costs have been written down to you've hardly put your feet on the ground in terms of settling down.

So I think sometimes people forget that you see what we call a term, but at four years and one day, if you mark your diaries as we advise our members and say, "You must engage at this period of time and you must make your intentions felt," then it becomes even a shorter period of time, unlike for example an option, which largely doesn't have the same sense of concern because at least in terms of historically where options were - I guess I'm trying to give you a sense as a small retailer that that's not as stressful as what we call renewal.

DR BYRON: I've been asking everybody this. If I'm thinking of going into a centre as a small retailer and the three key pieces of information I pick up are that the term is only going to be five years, say, and you want me to invest how much in the fit-out, and you want how much for the monthly rent, and I run this through my spreadsheet and say, "You've got to be kidding. If it's only going to be five years the fit-out has to be a lot less and the rent has to be a lot less. If you want that quality of fit-out, with the marble and the tapestry and the gold-plated taps or whatever I'm going to have to have at least 10 years and I probably won't be able to pay that rent either." So something has got to give here. But if those three variable basically don't add up then I would be an idiot to sign the lease.

MR SCLAVOS (PGA): It's a good point. Can I put it another way, because many pharmacist say that to us. In fact, I'll give you a scenario that I give when lecturing students. There are many things, for example - I use the notion as a health professional, we may have deep religious beliefs that, for example, I should not give the contraceptive pill. I may have deep religious beliefs that someone who's

morbidly obese shouldn't be smoking. However, that is the market which you operate. So I guess I'm saying, "Here is the Australian market. There are some givens. They will expect a fancy fit-out, they will expect that you only have a short period of time." So I guess it's an artificial situation, is what I'm saying. My quote to pharmacist is, "That is the retail environment that has been created in Australia and at the end of the day we have to deal with it as best as we can."

I guess I'm giving you the sense that we're not happy with it, but in the same way as if a pharmacist says to me, "I'm sorry, I'm a Catholic and I don't like dispensing the contraceptive pill," then the Guild's official view is that the law of the land is what the pharmacist needs to follow, and if that's the market conditions, I'm trying to give you a sense that that's where we operate.

DR BYRON: I appreciate the point you're making, but I guess mine is that if I look at a proposed lease and scratch my head and say, "Look, if I do that I'm committing financial suicide," why would I sign it? Or would I say, "Listen, a couple of blocks away or whatever there's a space in the high street. Sure, the turnover would only be half of what it is, the foot traffic is not the same. But on the other hand the rent would only be a third of what they're asking for in the centre and the outgoings are less and the fit-out standard won't be as expensive, et cetera. Even though the turnover is going to be a lot lower maybe I should go there."

MR SCLAVOS (PGA): Okay, I'll answer that too.

DR BYRON: "At least if I go there I might make a bit of money rather than losing a lot of money," which makes it pretty attractive.

MR SCLAVOS (PGA): I'll give you an example of myself, and I'm only in one pharmacy now, as I told the Commission, but I've opened greenfield sites. With greenfield sites there are very favourable conditions. A lot of pharmacists make that decision, a lot more risk, but again even the owner of a greenfield site is unsure what shopping centre numbers, et cetera, are. So when I enter into a lease, and I can give you numerous greenfield sites - I guess I wanted to show you the changed environment. That's why I'm quoting renewal prices in the quotes and in the cases that we're giving.

But in terms of the greenfield site, to answer your specific question, we almost see always that somebody signs an initial lease, three, five or three plus market review three year option, all those sorts of tricks. In good faith I enter into that saying, "Yes, I'm entering this arrangement. I'm not sure if this shopping centre will bring numbers in but I've done my market survey, the catchment area is 30,000. Look, we should be pretty good." What a small business cannot predict at that time of signing, perhaps often two years out where there's still scrubland and there's still no houses, they haven't got the foresight to know that, "In five years time I'm going to get a

renewal notice to say, 'If you'd like to come back in there's a 60 per cent increase,'" or a 68 per cent increase as I've quoted.

So often the trap is, "Let's get the retailer in and then trap them on the renewal period because at that juncture" - if I could be mischievous and put my hat on as a developer of a site, why would I sell a site which has perhaps not fully matured? If I'm a developer and at some juncture I want to sell it to a superannuation fund or the like the best time to sell is when the market has matured. So guess what that would be, year six. I've got the five year leases, I've renewed everyone, I've jacked the rents up because now I know I've got a captive market, and when the multiples that are on 6, 7 per cent returns some of the shopping centres have sold over recent years, astronomical figures. There's no humanly possible way despite - I'm not talking about the scenario with prime dramas now. Those sort of returns are made with the notion that, "We will jack the rents up next time."

So I'm giving a sense that no-one, not even the smartest member, can say, "I've eyeballed the shopping centre owner, this seems like a fair deal." They cannot predict that in five years time they're going to cop a 60 per cent increase. So they're making wise decisions two years out from a development opening. You know, I'll give you real figures in my pharmacy in Ipswich, which is on the outskirts of Brisbane. It was an extremely good deal. We were disappointed, there was supposed to be a McDonald's, et cetera. Those things happen. Didn't happen, there was some dramas with one of the housing groups that went bust. However, five year mark, bang, that's when you cop it. They're in there and guess what, now that centre has been off loaded. So that's quite a common scenario.

The most horrendous cases, Commissioner, are not in fact in greenfield sites, they're when the people are already there. They've got their fit-out, they've got costs, they've settled down, and there's also some emotional connection to the site, they've poured their blood, sweat and tears. To say, "By the way, you're a small business operator, you've been operating for five years and now we're kicking you out and there's no notional good will left," then I'm trying to give you a sense that there's ways you can manipulate a market and there is a lot of that manipulation going on.

DR BYRON: Some of the retailers have said, when I ask about this five-year term, the compression lease and so on, "It's the only way you can do it. You've got five years, you've got to organise yourself so that if push comes to shove at the end of five years you can - you don't want to. If you don't organise yourself, if you've still got liabilities outstanding and undepreciated fit-out et cetera you know that you're negotiating position is going to be that much weaker." The ones who said, "Yes, I've been here for three five-year terms but it's only because I've organised myself so that if I had to I could walk." It sounds plausible. I'm not saying it's ideal, but it seems to me that a few people have been able to say, "Okay, if that's the way they want to play the game then I'd better learn to play it too. I'll write my fit-out off over five years if

I can."

MR SCLAVOS (PGA): Yes.

DR BYRON: "I'm not going to have debts outstanding that have to be paid in year 6, 7, 8, 9, 10 even if I haven't got a business after year 5."

MR SCLAVOS (PGA): Well, let me give you a sense - because it sounds like we're over-simplifying saying that all costs are up-front costs. I'll give you a real scenario from my own experience. I could be dealing - that's all right.

DR BYRON: They told me to turn that off. Sorry.

MR SCLAVOS (PGA): That's all right.

DR BYRON: Can somebody else turn this off for me?

MR SCLAVOS (PGA): That's all right. I'll give you an example. In most of these larger groups, Commissioner, you're dealing with a manager of an outlet - - -

DR BYRON: Yes.

MR SCLAVOS (PGA): - - - who, you know, quite frankly their job is to be the link and they are very friendly and they're quite nice. So even in year 3 - I'll give you an example. Our profession has moved a lot in the last two years for - what we call PBS online. If you're on any medication, Commissioner, you go in now it goes off to the Commonwealth and it checks the highest level of entitlement and it comes back. That infrastructure has cost the average pharmacy 70 or 80 thousand dollars. I then make a business decision like you're saying in - I'm now year 3 or 4. The environment is great, my landlord is fine, we might even have a drink now and again.

Where the market is going is a lot of these major groups have what we call - and I'm sorry to add to this war scenario - we call them the "kill teams". The kill teams are the three or four expert negotiators who are flying in. We've never met them before. I could be in this centre for five years. I have known Joe, the centre manager, for five. We're mates. We could even - you know, often their wife or the husband is on medication. So I'm looking after that person. He says, "Look, sorry, Kos, I'm not going to be doing the rental negotiations. We've got these - the boys from Melbourne are coming up" - I'm talking about Queensland now. "The boys from Melbourne are coming up and they're going to negotiate the deal." I had no sense, Commissioner - like, you know, there's this environment that all is going swimmingly well. So it's not just an initial investment. From a pharmacy point of view because of the changing nature of IT there's ongoing investment.

DR BYRON: Yes.

MR SCLAVOS (PGA): I guess I would be making a decision if I knew the kill team was coming in then I'd be thinking twice about some of these scenarios. That's what we're advising our members. Our members are saying to us, "How do we deal with this?" We're saying, "That is a new phenomenon." Less than five years ago, Commissioner, 90 per cent of the time at the worst it would have been perhaps one of the major groups would have someone from the Brisbane head office coming but even the local manager would sit down at the negotiating table. Now it's totally independent teams flying in. Their job is purely to extract the best deal. You know what? After that meeting where you're counting your fingers you go back to the shopping centre manager, he's saying, "Look, I'm really sorry about that, Kos, you know, out of my hands. Can you now give me a discount on my medication?"

So there's this really artificial environment. I guess one group then follows the other and these sweeping rent negotiating teams are quite common now in the larger property area, which again causes further distortion in terms of, you know, an average small business operator despite whatever resources they have trying to - I mean you can't see it coming. It's like getting - you're walking down the street and someone king-hits you from the side. I know I'm sounding like I'm exaggerating and as an ethnic Australian we're known for that. But I can tell you, I can advise the smartest member - and you will see pharmacists affected who you think, "I couldn't - how did he not see that coming? How did she not see that coming?" It's just - that's the nature of the game at the moment.

DR BYRON: But part of it is that the other side of the desk that you are negotiating your re-lease with are presumably people who do this every day of the year, been doing it for years. You do it once very five years. You have a great deal of professional expertise but it's not necessarily as a lease negotiator.

MR SCLAVOS (PGA): Yes, but can I give you - I know, but it's not - I understand that. But my angst is - and I'll give you another personal scenario. We had a situation where Franklins were - you know, Franklins are a major drawcard. The centre I was in, Franklins - so two years ago then there's a changeover and the IGA but there was a lot of angst in the marketplace. Again, we're talking about centres where - you know, you've been talking about - I guess the theme of my presentation is these larger centres.

So all these centres in the changeover to an IGA or to whatever the group was, there's a lot of disruption to business. I can assure you nobody gave us rental compensation. So you would hope to say - and the expert team coming in didn't understand this history. We entered into this deal five years ago. I'll give you a scenario. I'll say look, when I entered into it I was well and truly informed but we had a Franklins here, they were the third largest group. In Ipswich, because of the

nature of the socio-economic group, Franklins was the group of choice because as you know, at the time Franklins was the cheapest supermarket. So Ipswich people didn't care about the frills. They just wanted the cheapest. So they're gone.

My lease is a lease, and I understand that. But I would hope then as part of the fact that the manager of the shopping centre knew the history that when we come up to negotiate and say, "Look, [personal/confidential detail withheld], we were negotiating well at the beginning. We understood. Who could have expected that Franklins would go belly-up. I'm entering into a new lease now. Let's discuss it." But the attitude of the sweep-in kill teams is, "Let's just - we don't care. You bring up issues like that - don't care." If you bring up - anything that has happened before 8.30, the time of that meeting, irrelevant to the discussion, whereas that's not normal business operations.

There's business disruption that occurs from time to time, I believe personally that it should be taken into consideration because we don't want pharmacists then suing. Theoretically then someone could say, "Did anyone" - any of our members. "Dear members, did you have any sense that - did anyone forewarn that perhaps Franklins wasn't going to be in the shopping centre? No? For those that have been replaced by BI-LO which is" - again from a pharmacist's perspective we spend a lot of money getting data on the turnover per square metre of the three or four major supermarkets, which is not in the public domain. Theoretically there could be a case to sue landlords, but that's not the nature of what we're trying to do. We're trying to say, as pharmacists, is, "That's your landlord. You should get on with the landlord." But I guess if that's where we have to go then that's where we have to go. But it would be a sad day if that was the scenario.

MR SHEEHAN (PGA): Mr Commissioner, this morning you heard a submission from Hymie Zawatzky of Veritax. Hymie, in his submission, indicated the educational aspects. That certainly is an area where pharmacy endeavours to bring their members - where the Guild endeavours to bring their members up to a level, and we will continue and work on that. But as Kos says, they really are babes in the woods when it comes to dealing with the sort of teams that Kos is referring to. We can bring them to a level but they're - that's not their skill. It's a real difficulty that we see right across Victoria on an ongoing basis. It isn't just isolated to those areas of Queensland that Kos has referred to.

DR BYRON: Okay. Yes, I don't think I have any more questions. I probably should but I don't actually have any more questions at the moment. I'll think of something later that I meant to ask you, no doubt. But is there anything you wanted to add in the way of sort of wrapping this up?

MR SCLAVOS (PGA): Well, I guess I was only saying, Commissioner, obviously one of the reasons why I didn't appear in - I wanted to get a sense of other things.

Even though you are - I understand and thank you for going to Adelaide and Perth as well - I guess from our point of view, and we are a structured organisation. We're hoping to hear all the evidence and analyse the evidence across Australia and then obviously get a subsequent submission as soon as possible, but it may be a few days beyond the deadline, Commissioner - - -

DR BYRON: Yes.

MR SCLAVOS (PGA): - - - but that's all we wanted to do, was to try and give maximum input on reading all the evidence that you've heard before you.

DR BYRON: Well, we're trying to get all the transcripts up on the web site as quickly as we can.

MR SCLAVOS (PGA): Yes.

DR BYRON: Because we're actually hoping that people will have time to look at what others have told us - - -

MR SCLAVOS (PGA): Yes, and then - - -

DR BYRON: There's some synergies here and we can bounce ideas off and people will add to or comment on what others have told us. That's one way of verifying the veracity of what we're told. So yes, you've added quite a lot of practical on the ground detail to our understanding of how these things work. Given those figures I can understand why a lot of your members are pretty upset.

MR SCLAVOS (PGA): Thank you, Commissioner. Well, all we can do is present it and we appreciate your listening today. Thank you again.

DR BYRON: Okay.

MR SHEEHAN (PGA): Thank you.

DR BYRON: Thank you very much for coming all the way.

MR SCLAVOS (PGA): Thank you.

DR BYRON: We have now got Mr John Rees. Thanks very much for coming.

MR REES: Thank you very much.

DR BYRON: Take a seat. Whenever you're comfortable and got your papers sorted out and that. If you could just introduce yourself, a little bit of background for the transcript and then take us through the main points that you wanted to make today.

MR REES: Good afternoon. My name is John Rees and I have asked to be allowed to make a presentation to the Commission here in Melbourne today for which I thank you for the opportunity. I have been a newsagent for over 30 years - 17 years on the high street and approximately 13 years in a shopping centre, and I come from a family that has had an involvement in the industry since 1890. I purchased a newsagency in a shopping centre in the eastern suburbs of Melbourne in 1988. This centre was the second centre established in Melbourne in the 1960s and the last of the major five centres to be redeveloped. At the time of purchase, this business had an occupancy cost of just over 6 per cent with a turnover of approximately \$37,000 per week. These figures were obtained from the original schedule of purchase prepared by the then Newsagency Council of Victoria. Myer the retailer had a 99-year lease from the local council at this centre. The first three to four years of trading were quite profitable and a reasonable cash balance had been created to assist the business.

The early 1990s saw changes to the newsagency industry start to occur: the trade practices situation, deregulation. Having invested a large sum of money at this shopping centre I decided to purchase the neighbouring newsagency business to protect our investment in this centre. The redevelopment of the centre was taking considerable time as the local council and Myer endeavoured to work out a solution to the lease situation. At the time of purchase we had no extended lease term. Myer had been a reasonable landlord during the early years as Myer being a retailer understood more about the figures of your business. Our business worked closely with centre management in the early years and a vacancy next to the newsagency during this time saw us knock out a wall and expand our retail area at our own expense during this time.

The first stage of the redevelopment commenced about 94 and our business had to downsize for what was supposed to be only six months, but was eventually to be over 12 months. A department of the newsagency which turned over nearly \$500,000 in the last year prior to downsizing was greatly reduced. Together with the redevelopment and changing times at Myer, the relationship between retailer - that being me - and the centre management moved apart slightly. I had joined the industry association VANA of which I was a director for six years and it was becoming apparent that newsagents in shopping centres were having occupancy cost problems. During that time I would have attended in excess of 10 to 12 meetings at which the majority of newsagents in shopping

centres in Melbourne were present. We weren't able to achieve much from our outcomes unfortunately.

The return to the new site of the newsagency was eagerly awaited, but economic conditions at the time were reasonably slow and it was taking longer to attract back new and former customers to the centre. A new lease had been signed and it was evident quite early in the lease period that occupancy costs were far too high. I sought the assistance of the national circulation manager of News Ltd who had become a good friend, as the newsagency had been used as a training base for prospective newsagents. A visit to Myer at Tooronga to obtain some rental relief was arranged. The question was asked, "Do you want a newsagency in a shopping centre?" and the reply was yes. Myer sold a 50 per cent stake in the shopping centre to another party to reduce some of their problems. The people at the property section at Myer left shortly after and went over to what is now Centro Property. The newsagency introduced Ticketek and also acquired another neighbouring newsagency on terms to try and assist the situation.

The shopping centre approached us to purchase one of the Tattersalls agencies in the centre. After negotiations were completed it was hoped that this would assist, but still the occupancy cost was too high - 18 per cent. A situation developed where I the owner became ill. I had a breakdown. I was a workaholic and despite still trying to obtain rent relief, I stopped paying the rent for a short period. A retailer next to us was the Reject Shop and even though their premises were somewhat larger, the rental differentiation between them and the newsagency on an annual basis was approximately \$100,000. If the newsagency had the same rental rate per square metre as the Reject Shop I may still have been the owner of this newsagency. An independent retailer would appear to receive less favourable treatment than a multi-store retailer.

I have a document showing rental figures of the newsagency, Reject Shop, and other independent retailers at this centre, and I'm willing to give a copy to the Commission for their records as it may enable them to understand the great rental differentiation between independent retailers, franchisees, and so-called multi-retailers. My son joined the business full-time when I became ill and we endeavoured to work through a situation with the shopping centre owners. But matters finished up at VCAT and as my pockets were not as deep as the landlord's, the business was split in two and sold. Retail and distribution were separated and all debts repaid, but 30 years of hard work was lost, in dollar terms to me and my wife approximately \$1.5 million.

In summary, I believe that the shopping centres do not understand the profitability of a newsagency. Approximately 50 per cent of turnover is on a fixed margin of 25 per cent. As an independent retailer, I did not have the strength of numbers to negotiate for a better deal. The rating of retailers from department stores, to majors, to chains, to others needs clarification for rental determination. A newsagency is a destination store in most retail areas and as such has a strong connection with the local community. If the shopping centre was not there, a newsagency would still exist on the

high street and the rent would be a lot different. One very hard thing for me to take was a remark that was made by the then shopping centre manager to a leasing consultant that we had engaged and that was, I was supposed to have hidden bank accounts with vast sums of money.

My former newsagency today has the same problem - rent - and the current owners face a large capital loss on its anticipated sale. It should not be. A partnership should exist between both parties for a fair and reasonable deal. The owners of this centre should be exposed. I refer you to their submission - of which I have a copy here and am quite happy to give to you - and part of the text: "Retail assistance is nothing more than crap." I thank you for the time in being allowed to speak this afternoon and I hope a universally accepted outcome is achieved with this Commission's report.

There are just a couple of other things that I would like to say. I'm fortunate that I have a brother who is in the legal fraternity and as such is well aware of what happens at Commission hearings. I emailed him what I had written earlier this week and I received this back from him:

As I understand, it is the major point in that there is a bargaining imbalance between owners of large shopping centres and small business people such as yourself, and that same owners abuse that imbalance in your case and presumably that of many others. There is clear evidence that the result of owners abusing that bargaining imbalance is the cessation of a small business. As a result the community as a whole suffers because we lose diversity and competition in the marketplace.

He also made a couple of other suggestions to me and whilst I've been sitting there listening to what the pharmacy have - and like me the pharmacy are two very important independent retailers in the community, whether it be a shopping centre or a high street. Shopping centre landlords need to increase the educational range of their centre management and leasing staff. As an example, leasing staff to be shown how a newsagency derives their gross profit. A newsagent gets 25 per cent Commission on newspapers; lottery is between 7 to 8; Ticketek 5 per cent; cards is a gross margin of 46; stationery anywhere between 65 to 80. The radio industry had what was known as cash for comment. The shopping centre had cash for keys. This was fixed. Now it has cash for fit-out. This cost is then averaged out over a period of time and recouped. Why not just give a fair and reasonable rent at the start?

The eminent business journalist Robert Gottliebsen wrote a very interesting article during his days at BRW, and I'm talking about going back to May 96. The thrust of the article is that shopping centre landlords should work harder with their tenants and understand their respective markets. Thank you for taking the time.

DR BYRON: Thank you very much for sharing all that with us, Mr Rees. I appreciate that it is extremely difficult and extremely painful to have to go through all that again.

MR REES: I've been resilient enough to be able to bounce back to the tune that I'm still involved in working in the industry; not that I own one. I originally sent a similar communique to the ANF which was included as part of their - but since then certain, I would term, material things changed in the marketplace and that being, as I made reference to, I'm aware that a friend of mine is in the process of endeavouring to buy my old business. I'm assisting him in the background with a number of matters. As I indicated I have a copy of a rental schedule. On that rental schedule there are such retailers as Jetty Surf, Katies, Brashes, Dimmeys, Wrappings - a card and gift shop - The Reject Shop, Priceline, Sanity and myself.

If you would care to take it, I'm quite happy to give the Commission a copy. Have a look at the figures, even advance these figures forward into today's market, and we know for a fact that there's still the great rental differentiation between (a) the newsagent and The Reject Shop. The Reject Shop is a publicly listed company. It has the ability to possibly trade in the majority of shopping centres throughout Australia. I, as an independent retailer, am only in one. I have the option of owning more but it depends on your capital ability to be able to do it. But one asks, why should there be such a great difference in the rate per square metre. It all comes back to the classification from your majors to your chains.

We've had the growth of franchisors over time. It's been well reported in business journals. A lady started a sandwich type one - I've just forgotten the name of it - and she virtually had to go and buy businesses in centres and she could then re-badge them under her name, it gave her greater bargaining power. But I, as an individual retailer, only have a single chance. Therefore the centres don't understand how your profitability is made up.

DR BYRON: I guess what you're also saying is that a multi-site business can probably negotiate a pretty good deal with a landlord if they're going to take space in 20, 50 or 100 different places.

MR REES: Your Centro properties on The Reject Shop, we're looking to start up, and you come to me and say, "I've got 20 shopping centres, are you interested?" "All right, yes, I'm interested but at a deal." But as an individual - the pharmacy people outlined it much better than what I can. Mine was more to give you an individual perspective.

DR BYRON: Yes. I appreciate that very much.

MR REES: But, as I said, look, I'm fit and healthy. It just hurt, as I said, to hear

those comments. Thank you very much.

DR BYRON: Yes. Well, I'm not often speechless but I think you have left me speechless today.

MR REES: Would you like a copy of that?

DR BYRON: Yes, thank you.

MR REES: Thank you very much.

DR BYRON: Okay. Now, I said at the start of the hearings that anybody who is not on the program today but if you wanted to come forward and put something on the public record or somebody wants to come back and add to what has already been said or contradict what someone else has said, it's an open public hearing that everybody gets a chance if they want one. If you are all done then I guess we'll pull up stumps and on Monday morning at 9 o'clock Western Australian time we'll be in Perth. Thank you very much for your attention, ladies and gentlemen.

AT 3.10 PM THE INQUIRY WAS ADJOURNED UNTIL
MONDAY, 18 FEBRUARY 2008

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