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**TRANSCRIPT
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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 BRISBANE ON MONDAY, 11 FEBRUARY 2008, AT 9.03 AM

Continued from 7/2/08

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DR BYRON: Good morning, ladies and gentlemen. Welcome to the public hearings of the Productivity Commission's inquiry into the market for retail tenancy leases in Australia, following the release of our draft report in December last year. My name is Neil Byron. I'm the presiding Commissioner at this inquiry.

The inquiry began with a reference from the Australian government on 21 June last year, and examines the operation of the retail tenancy market. I would like to put on record in each city that we visit how grateful we are to the many organisations and individuals who have already participated in the inquiry.

The purpose of hearings like this is to receive feedback and to facilitate public scrutiny on the Commission's work. We are seeking comment on the draft report on any errors of interpretation or of fact. I understand the matters at issue are extremely important to many small businesses and their families. A great deal is at stake and passions can be raised, but we are trying to analyse the evidence objectively and see what has been tried in various places, what has worked, what hasn't, and what more the Australian and state governments should do or not do.

We began these public hearings on 1 February in Canberra. We spent four days taking evidence in Sydney last week. We will be in Melbourne on Wednesday and Friday this week, Perth and Adelaide next week, and then we have about six weeks to finalise our report, which has to be with the Treasurer and the cabinet by the end of March, having considered all the evidence that has been presented in the hearings and submissions.

Participants in the inquiry will automatically receive a copy of the final report once it has been released by the government, which is normally within 25 sitting days of the completion of the inquiry. We always try and conduct our hearings in a reasonably informal manner, but we are taking a transcript and so interjections from the floor are not helpful.

The Productivity Commission Act requires that participants should "be truthful in giving their evidence". I'm sure you all will be. At the end of each day's proceedings I always ask if there is anybody in the room who wants to come forward and put something on the public record. Please come and do so, whether it's someone who has already given evidence and wants to add to it or anyone who has been moved to speak by what they have heard during the day. There will be opportunities for anyone who wants to participate before we finish the day's proceedings.

The transcript will be available, as soon as it's been checked, up on the Commission's web site, and also hard copies will be available. There are order forms in the room. To comply with the Commonwealth's occupational health and safety legislation, I have to draw your attention to the fire exit, which is in the corridor outside the door. The toilet facilities are beside the elevators. As the final piece of housekeeping, I would ask everybody to turn mobile phones to silent

mode or to off. We can now start.

I would like to welcome Mr Cameron Graham, from Barry Nilsson Lawyers. Thank you very much for coming. Thank you for the notes that you sent through by email, which were extremely helpful. Normally we suggest people take 15 to 20 minutes to talk us through the main points and then we can have a discussion about that. Also, I have a couple of questions that I would like to put to you.

MR GRAHAM (BNL): The area I would like to discuss this morning is in relation to the mandatory registration of leases. Having read through the draft report, there was some discussion about the utility of mandatory registration of leases with a view to having a fully informed market as to the commercial terms of leases and thereby enabling tenants to better negotiate with their landlords.

My background, I particularly act for institutional landlords, owners of shopping centres. I have acted for Suncorp, AMP, Lend Lease in the past, for the last 10 to 12 years, so I feel as though I have some background knowledge of retail leasing from a landlord's perspective. I also do act for tenants on occasion, and have assisted them to navigate through some of the pitfalls of retail leasing transactions.

In the context of mandatory registration of leases, the first point I would make is that registration in each state is voluntary at present. There is no mandatory requirement in any legislation to register a lease. The leasing practice in each state and territory differs. Largely, that is due to variations in the Torrens title legislation in each state. It's funny that we have this concept of Torrens title which gives indefeasibility by registration, but in the context of leases there is a different spin put on it by each state and territory.

Part of that rationale is that short-term leases to tenants who are in possession don't require registration to obtain what is called indefeasibility, that is, an unassailable title. However, the concept of what is a short-term lease differs from state to state so that in New South Wales, Queensland, Tasmania and the ACT a short-term lease is three years or less. In South Australia and the Northern Territory a short-term lease is one year or less. And in Western Australia, it is five years or less. Straightaway we have differing regimes for the need to register leases. The exception is Victoria, where there is no minimum term, so a lease for 20 years to a tenant in possession will grant that tenant indefeasibility. Consequently, in Victoria leases are rarely registered. Even a lease to a supermarket is rarely registered.

The benefit obviously of registering a lease is so that the lease is effective at law and the tenant obtains protection against a successor in title of a property. Without going into some of the minutia of the property law, there are some covenants in a lease which will bind the parties personally, and there are others

that will run with the land. There is a huge amount of case law as to which side of the coin those types of lease covenants fall on, and so the need to register leases will differ from state to state as a result.

The next point is that the retail leasing legislation in all states other than Queensland mandate minimum five-year terms. Not only have you got the Torrens title legislation, which talks about short-term leases and long-term leases; you have minimum five-year terms for retail leases in all states and territories other than Queensland. However, everywhere except Western Australia you can contract out of that minimum five-year term by getting an appropriate certificate, whether it be in Victoria from the Small Business Commission, and New South Wales from a lawyer who is not acting for the landlord. Again, you have another layer of complexity as to which states you are in and what are the rules.

In Queensland and the ACT, when you want to register a lease, let's say it's a lease for a shop in a shopping centre, which is the typical situation that I'm involved with, you must attach a survey plan of the shop to the lease, and which identifies the shop. That survey plan must be prepared by a surveyor, and there is a whole range of requirements about the particulars of that survey plan.

Typically, in my experience, the cost of that is about \$300 to \$500, to get a survey plan done, and that is invariably passed on to the tenant. The rationale for that is that the tenant obtains the benefit of indefeasibility by registration; therefore, the tenant should pay for the preparation of the survey plan. On top of that, there are registration fees in each state. The draft report sets out what those fees are, which range from about \$50 to \$160 depending upon which state you are in. Again, there are variations.

I can speak from experience having acted for ING in the past, which owns shopping centres in Queensland, New South Wales, Victoria and the ACT. At one time I was doing leasing work in all those states and having to think, "Now which state am I in? What hat am I wearing? What are the requirements?" It was quite challenging to do that, but it really focused me on the differences between the states and the differing practice of lawyers in each state and territory.

In terms of those jurisdictions where registration is not required to obtain indefeasibility either because it is a short-term lease or, in Victoria, regardless, there doesn't appear to be any benefit to a tenant in registering a lease because of the additional costs involved in going through that process. The other aspect is that there is a significant time delay in actually getting a registered lease. In an ideal situation the lease is signed before the tenant moves in; not always the case. Then some landlords, in my experience, can take some months to get around to signing leases. They typically have a room full of documents, and the attorneys walk in there one day a month and sign all day; they have shopping centres all over Australia. In some cases it has taken me over a year to get a landlord to actually sign a lease, which is very frustrating for me.

On top of that, in many cases you need to get mortgagees' consents, because if a landlord doesn't own a shopping centre outright, there is a mortgage. And in some cases mortgagees through their lawyers or directly can take three to six months to grant consent to the lease. Suddenly, you are 6, 12, 18 months down the track from when the lease commenced and it is not yet lodged for registration. The registration process, once it is lodged, typically only takes a couple of weeks, and in some cases days. But certainly the information contained in that lease can be well and truly out of date by the time the lease becomes publicly available on the title to the property.

Another challenge - when you are doing a search of a title search to a property, you say, "Okay, I want a title search for this shopping centre." You might come up with, in some cases, 30 or 40 pages worth of registered leases on the title. The name of the tenant will be the actual company's name, which in many cases bears no resemblance to the trading naming. Then you have to guess. "I want Joe Bloggs." But Joe Bloggs is Bill Smith Pty Ltd. So, you really don't know which tenant or which actual business corresponds to which registered lease. That information can often be a bit of a guess.

The next point I would make is that many lease incentives are not dealt with in the lease; there is a side deed. Many institutional landlords like to keep that type of information confidential. Historically, for obvious reasons, they don't want the market to know what incentives they have given. That's a commercial decision they have made. Typically the side deed has confidentiality provisions in it so that the parties can't disclose without the other party's consent. Straightaway merely registering a lease potentially will not give you the information you are seeking; it will not give you the transparent market that you are looking for.

If the legislature saw fit to say, "Okay. There will be no more side deeds; it has to be disclosed to the marketplace," and that's, I would suggest, quite a fundamental policy decision for the government of the day to make, because of the competing interests of the parties to have freedom to contract and maintain the confidentiality of that contract as opposed to the benefits of having a fully informed marketplace. Obviously, there are competing interests. If the government of the day said, "Okay. Let's force parties to disclose the exact commercial terms, including incentives," the most effective way, rather than registration of leases, which would require in almost every jurisdiction fundamental changes to practice, like leasing practice as in what landlords or their lawyers do, would be to prepare some form of epitome or summary of the lease which would set out the essential commercial terms. It could be signed by the parties when they sign the lease, so it's done at the same time and the information is current. The parties would probably be required to certify as to the accuracy of that information. The epitome could then be lodged promptly with a central authority. The central authority could then create a public register of those terms, and for a nominal fee or whatever make that information available to be searched

by whomever.

I would suggest that, from a cost perspective, the cost to the parties to prepare that epitome of the lease would be minimal, especially given that most institutional landlords require their lawyers to prepare a sign-off letter which has the commercial terms, and many tenants, larger, more sophisticated tenants who engage lawyers, again require an epitome or summary of the lease to go through a relevant sign-off process before the lease is actually signed. In many cases the additional paperwork would be minimal. It could be lodged electronically and it could potentially be quite a minimal imposition on the parties, rather than going through the whole, in the case of Victoria, fundamental change to their practice.

I suppose the big issue is in the context of disclosure of information, the policy decision: do we disclose incentives? Do we require the parties to disclose incentives? I'm happy to leave that one to the elected officials to make that call. No doubt the Productivity Commission will make a recommendation on that point. But if the objective is a transparent market, then incentives really must be disclosed.

DR BYRON: Thank you very much. That has been extremely helpful. That logic is pretty inescapable. We had a very interesting discussion about this during the four days in Sydney last week. There are two points. One is about registration and the other one is the completeness of the information. If we take the first point first, a lot of people said that, rather than having a lease document that's anywhere from 70 to 100-plus pages that people would have to search through, would it be possible to have a sort of one-page summary? I had forgotten the word epitome, but that's exactly where we were heading during the hearings last week, something that would be done simultaneously with the lease and therefore would have credibility/legitimacy and that the parties would sign that it was accurate. As you say, the extra cost of signing a one-page summary at the same time as you sign the lease would seem to be pretty small. We have been told about registration as being something that is done for the purpose of the property law, but as a spin-off in some cases it generates information to inform the market.

MR GRAHAM (BNL): Yes, that is right.

DR BYRON: What we are talking about now is, rather than mess around with the complexities of property law and all the differences between states, leave the property law as it is, just make a one-page summary whose sole purpose is to generate information for the market, at very small additional cost, and arguably with substantial public benefit. I think you have given us the way to do that.

With regard to what information would be in that, a number of the people that spoke to us last week warned us that, if it didn't include all the side deals and incentive payments and lease-free terms and contribution to fit-out, et cetera, it would actually misinform the market. The counterargument that was put to us is

that it's actually quite easy to guesstimate the fit-out contributions; that across New South Wales, Queensland, and the ACT over the last six months they have averaged about three or four per cent, so long as the bias is consistent. If we went into a recession, the undisclosed amount might go to 20 per cent or something if there were a lot of empty shops, hypothetically. Hopefully that won't happen. That argument was, yes, we know if we only take the face value and all the confidential side deals are not disclosed it will be biased. But provided it's consistently biased and we have a good proxy for that, it doesn't matter; valuers could still do their job by saying that market rent in this location, according to the public database, would be X. But when you are allowing for a downside, it could be 95 per cent of X. Do you have any comments about that?

MR GRAHAM (BNL): Typically, if you are looking at what is the market rent, then the face rent on the lease would be a useful guide. A market rent is typically determined, say, if a tenant has a five-year option, and the rent is reviewed to market at that point, I think the face rent to tenants would be a good guide. When you are determining market rent you usually disregard incentives on the basis that it's an established business and what is a fair rent for those premises. But certainly valuers could probably give you some more guidance on that. I don't profess to be a registered valuer or have that expertise.

The challenge will be anecdotally determining what is the current level of incentives. I would suggest to you that it would be in most landlords' interests to downplay the level of incentives. The other point I would make is that an incentive that might be offered to a national chain tenant would not be available to a mum and dad tenant, the rationale being that the national chain tenant has more customer drawing power; a well-known brand is going to draw foot traffic in and potentially be destination shopping rather than just wandering by and noticing something that looks good. That will be a challenge. From the perception I have, most of the tenants who have failed have been mum and dad tenants who don't have the financial resources to know what a fair deal is and possibly don't have the resources to research the market as effectively.

DR BYRON: Coming back to the fundamental public policy point that you so very neatly summarised, it is whether the public benefit of having an informed marketplace should be seen as outweighing the traditional rights, freedom of contract and the right of parties to keep it confidential. I guess, as you say, that's something that we are going to have to consider at length. We have been repeatedly told that the marketplace is not fully informed about market rents at the moment. Although information is available for a price from various consultants, it's often not easily affordable for a small new business starting off. When we look back at the reasons why small especially retailers have failed, it frequently is the fact that either they didn't have access to information or they didn't take any notice of it. So, providing information, one could argue, would be a good step forward. Making sure the information is actually used is another question.

MR GRAHAM (BNL): The old story, that you can lead a horse to water but you can't always make it drink.

DR BYRON: Yes. A one-page epitome could generate a great deal of information for a public database that was known to have accurate information that was easily searched. I guess people would at least then not have the excuse of saying, "Well, we couldn't find out."

MR GRAHAM (BNL): I suppose the utility of that information would be stronger in the shopping centre context than it would be, say, in strip shops along the street where you have a variety of landlords. The challenge also would be, if incentives are to be disclosed, to disclose them in a consistent fashion. There are so many different ways you can dress up an incentive and describe it in so many different ways in terms of whether it's a fit-out period, whether it's a rent-free period, whether it's a cash payment by the landlord, whether the landlord retains ownership of the fit-out; there are so many different ways to draft those deals. Every day I see even more innovative deals coming across my desk, which I have to try to document. To reduce that to one number as some proportion of the first year's rent would be very difficult. Conversely, then, if you describe it as being a rent-free period, if it's a box-checking exercise, how many months, how many dollars; potentially in the context incentives that could take up a page in itself.

DR BYRON: If you try to make a list of all the forms of incentive that are to be prohibited, then you just encourage people to be even more creative.

MR GRAHAM (BNL): That is quite right.

DR BYRON: Changing the topic very slightly, in Queensland there is a requirement for small tenants to have both legal and commercial advice.

MR GRAHAM (BNL): That's right.

DR BYRON: That is when the lease is signed and becomes effective. Could you give us any insight into how effective that has been? If someone was going to sign a lease where the rent was clearly in the wrong ballpark, would that be picked up by the lawyer or commercial adviser as part of that process?

MR GRAHAM (BNL): Probably not by the lawyer unless the lawyer had particular experience with those premises or that shopping centre. Certainly the financial adviser, I would expect, should have regard to the projected budget for the next three to five years. If the rent was projected to be higher than a normal proportion of the turnover, then the financial adviser should say, "Don't enter this deal. It's uncommercial", especially if the suggestion was that the turnover figures projected were way above what was reasonably likely to be received.

DR BYRON: Or if the business model suggests that this new party is going to be

in the top five per cent of the country.

MR GRAHAM (BNL): That's right.

DR BYRON: And is this really likely to happen in the first couple of years in business.

MR GRAHAM (BNL): A lot of landlords do collect turnover information from tenants. That's a reasonably controversial issue. The benefit of that information being given out is that it enables the landlord to determine the moving annual turnover for the shopping centre on a per square metre basis. That can be categorised and divided up further into categories of retail. Armed with that information, a new tenant could much more readily build a more realistic financial model as to whether they are likely to succeed or not based on the MAT for that centre.

DR BYRON: Just to follow up on the sign-off on the lease, we have been trying to find evidence of the difference that that has made either before and after in Queensland or the situation in Queensland now compared with the situation across the border. A number of people have suggested to us that this has been fantastically successful and therefore every other jurisdiction in Australia should basically adopt the same. Yet when we ask for the evidence that this has actually made a big difference and to what, we have not found very much. Is there any way you think we could make some progress on that point?

MR GRAHAM (BNL): My observations are that, despite being required under the Act to deliver legal and financial advice reports, a significant proportion of tenants don't, because they don't want to incur the cost. Typically, if I was asked to give a legal advice report, having regard to charge-out rates and the fact that I need to read the lease and advise, the proposition would be that it would be some thousands of dollars in legal costs. I imagine similar in terms of obtaining a financial advice report. In some cases a tenant is quite capable of reading a lease and making sure that their interests are protected. In other cases, that's not the case. I deal with a lot of shopping centres where it's obvious to me that the tenants have English as a second language. I often have some concern about their ability to understand what can be quite a complex document. There are some fantastic local lawyers who service those communities, which is great, but there are plenty of tenants who just don't bother seeking appropriate legal or financial advice, enter into the lease and, unfortunately, in some cases they fail.

There is a mandatory requirement to give the certificates. The only remedy if a tenant fails to do so is to notify the dispute with the tribunal in Queensland. Presumably the tribunal would order the tenant to get those certificates after they are already bound by the lease, which is probably quite worthless. In terms of the potential consequence for the tenant not obtaining advice, in many cases - I won't use the word "useless" - the utility of it is probably

not there. In my experience, where tenants have not tendered those reports, in no case has a landlord client of mine pursued the giving of those reports by lodging a dispute. In April 2006 it was changed from a certificate to a report. I think the amendments came in some years before that. Probably I have seen 50 to 100 cases a year where a tenant hasn't given reports, and no action has been taken.

I'm always heartened when a tenant does send those reports in, because I think, okay, they have got appropriate advice. Hopefully they know what they are doing. But there are plenty of cases where that's not the case. The smaller the shopping centre - or if it's a sitting tenant renewing they often think, "Why bother? I have got the same lease as I had last time. I'm just continuing on with my business. Why should I have to get those reports when I have already been trading here for 10 years?" There is some scope for fine-tuning that, but I couldn't say that I have come across any positive impact on the market as a result of the mandatory requirement to give those reports.

Certainly from a lawyer's perspective that's great, there is more work for us, and for accountants, fantastic, some more work. And the opportunity obviously to get involved with a tenant and generate more work for yourself is a positive. I'm sure accountants especially can then get flow-on work with taxation returns, BAS statements and whatnot.

DR BYRON: Thank you very much for that. That has been incredibly helpful to us on the whole question of registration of leases and epitome. Is there anything else you want to say before closing?

MR GRAHAM (BNL): No.

DR BYRON: Thank you very much for your time and for sharing your knowledge and experience with us. That has been most helpful.

DR BYRON: Thank you very much for both of the submissions from your association. If you could introduce yourself and your organisation for the transcript, and then take us through the main points. I have read both the submissions very carefully, and there is a lot in them. I think we should take our time and work through it thoroughly. Thank you for having put so much effort into it already.

MR MACRAE (NRA): My name is Malcolm Macrae. I have been involved in retail tenancy work for about 15 years and, prior to that, in property development. I have been a consultant for the original Retailers Association of Queensland, which became the National Retail Association. I practise virtually exclusively in the area of retail tenancies. I think I have submitted a CV.

DR BYRON: Yes, thank you very much. Shall we launch straight into your very constructive criticisms of our draft report?

MR MACRAE (NRA): Could I just touch on the earlier discussion?

DR BYRON: Yes.

MR MACRAE (NRA): With regard to registration of leases, and that is to bear in mind that the business financiers like to see a lease registered, because that is frequently the security on which they are lending or the business prospects on which they are lending. If a lease is not registered, there would be cases in which - liquidation, receivership, change of ownership - the lease is called into question.

With regard to incentives, they are probably important for a transparent market, particularly with regard to valuers. There were huge incentives, for instance, in the original leasing at the Myer Centre in Brisbane, which resulted in massive distortions to the subsequent valuation and write-off of a couple of hundred million dollars. That's an extreme case of incentives transmitting into inflated perceived property values. The other thing is that, from the individual tenant's point of view, he shouldn't be too concerned with the passing rent of some other use or space or lease conditions elsewhere. In my opinion, there are very remote connections between rental value compared directly on that basis when you get into very highly specific uses and lease conditions and business opportunities.

DR BYRON: Thank you.

MR MACRAE (NRA): I will move on now to address the last couple of pages of our submission and to where we believe that some basic principles could be considered. I think it's unarguable that a nationally consistent retail lease framework effective in all states is highly desirable, subject to it not watering down particular important provisions that have been the result of very extensive negotiations and development of legislation over the years.

We don't advocate minimum lease terms, for the simple reason that a bookshop would have entirely different needs to a highly capitalised coffee shop, for instance. Minimum lease terms could preclude a range of uses that have a shorter, lower capital cost, a shorter term, or the maximum use of space, particularly in shopping centres where there are intentions to redevelop or expand/extend, and the uncertainties preclude longer term leases, whereas shorter term leases would give some degree of security and bankability and so on to the tenant; and more so for the benefit of the landlord, better lease terms should equate to better rental flows.

Ultimately, and the financial advice report kind of touches on this, the reason for the certificates back in 2000 was, among other things, to protect the landlord from subsequent allegations of unconscionable conduct where they may be taking advantage of a disadvantaged tenant. That financial advice certificate at least was meant to require the lessee to take advice before making the commitment.

In lease renewals in particular - in new leases it's a pretty hard sum to do, anyway, because one doesn't know within close limits what the business potential may be. In lease renewals there is a high degree of anxiety by the sitting tenant, and they may be more concerned to renew the lease even at subeconomic levels rather than face the consequences of loss.

We believe that the information flows to all parties has room for improvement. We don't oppose the idea of disclosure of sales. We think that they should be treated confidentially at the individual level. They can tend to be used against tenants at lease expiry. But the current way of processing at centre level and by classification of shopping centres, while it's very useful to benchmark shopping centres, the categories tend to be too broad and the information too broad or wide as well, such that averages are misleading and not fitting any particular tenancy. And to be used blithely or as a primary guide rather than taking into account all the terms and conditions of the lease and it's location and trading and competition and also the intentions, or possible intentions or reservations of lessors, to change that trading environment without notice and without recourse makes it a very difficult exercise.

We think that, for instance, the Urbis-JHD regional shopping centre averages would be better broken up into narrower bands of sales, so that it's easier to find a band that is reasonably comparable with the subject, and also that information such as the FMRC CCH averages with regard to particular uses is further developed and available, so that benchmarks not only in terms of sales but gross profit margins with critical elements of cost, capital expenditure and so on can be considered where it's available for better informed decision making. That's hardly able to be mandated, but it would be highly desirable and could be recommended hopefully to bring about improvements in that kind of information, which I suggest is much more important than whether Joe Blow is paying X

dollars per square metre for some undesignated use in some undesignated location or with a lease that may be very, very different in terms that affect its viability. For instance, lease term will affect the annual charges for depreciation, amortisation, and business establishment costs and close-down costs. That's just one aspect.

Getting back to incentives for the moment, there is no such thing as a free feed; if additional incentive is provided, the trade-off is usually additional rent. I think it's important for the property valuation process that incentives be known so that effective rents can be calculated, and that is a requirement under the Queensland Retail Shop Leases Act for valuations. It's not that incentives are ignored; the valuation should proceed having regard and making calculations for those incentives. The Australian Property Institute has been very specific on that process.

We suggest that there is a conflict between landlords' desire to keep a short rein on lease terms or lease term where the five-year minimum became the five-year maximum; it's still very hard to prise an extra year or two or three out of landlords who come from that tradition. But there are particular high-cost businesses, and they would relate sometimes to quality restaurants or coffee shops, as an example, or pharmacies and news agencies, which have other complications as well.

If a lease is exposed to, say, a 10-year or an eight-year, it may be desirable to amortise those costs and come out with a clean balance sheet. It would be important not only for fundamental changes in the market broadly to happen, but dramatic and immediate changes to a market, say, within a shopping centre, where a competitor is introduced. For instance, the second news agency or the third pharmacy doesn't necessarily generate additional paper sales or additional prescriptions. They are reservations that virtually all shopping centre landlords make, and I think for legitimate reasons by and large. But it can dramatically affect, if not ruin, the viability of particular businesses, where there is perhaps now less concern for business viability than there was in, say, the good old days of the early part of a shopping centre experience.

DR BYRON: Can we explore a little bit more that combination of compressing the lease term and also requiring a more expensive or more extravagant fit-out at the front? Increasingly, it is the situation where the small retail tenant basically can't depreciate the start-up costs of the business, pay that level of rent and be in a position at the end of the five years to have recouped his investment. I would have thought that, increasingly, if a landlord makes an offer and somebody looks at the combination of how much is the cost of the fit-out, how high are the rents going to be and how short the term is, they just say, "Look, I can't possibly do that." Either the fit-out has to be a lot cheaper or the rent has to be a lot lower or the term has to be a lot longer or maybe all three of those things.

MR MACRAE (NRA): Yes.

DR BYRON: But, "If you want me to pay that much rent and it's only for five years and you want me to do this sort of fit-out, that can't be done; I'm walking away." Would landlords eventually come to the conclusion, if nobody is stupid enough to take that sort of deal, they have to say, "Okay. We will relax the fit-out standards or lengthen the term" or recognise that they can't get that level of rent?

MR MACRAE (NRA): That's a fairly typical dialogue or a fairly typical negotiation. But where it runs into difficulty is where the leasing team in a large shopping centre are marching to a particular policy. I think - I'm reluctant to mention names - AMP still love the five-year lease and find it difficult to depart from it because it doesn't quite compute.

DR BYRON: But if they can't get people willing to accept that package of terms and conditions, something is going to give. If just one person after another comes in and looks at the proposition and says, "This is unrealistic. I can't run a business that is viable if you want that combination of those three things, the fit-out, the lease and the rent. Unless you change something" - if that happens half a dozen times, eventually somebody has to get the message that this is not an acceptable proposition. I guess it only needs one person perhaps inexperienced to come and say, "Oh, yeah, I can do that", and they think it's reasonable.

MR MACRAE (NRA): So, the deal is done and then they fall over in due course. I think that was a fundamental reason for the financial advice certificate and the financial advice report subsequently in the 2006 Act. It is honoured as much as in the breach as in the observance, and that's unfortunate and it will lead to higher levels of business failures. End of lease and lease renewal is a very different market environment. It's like the difference between getting married and getting divorced, as an analogy. That negotiating environment is a pretty reasonable analogy, I think. The end of lease is the crucial issue in the whole debate.

DR BYRON: You have a lot of comments in your submission so keep going and we will cover those end of lease things.

MR MACRAE (NRA): We believe in periodic access to market review where there has been some dramatic change that the landlord has initiated or after a period of, say, five to six years, which coincides with a formerly typical business cycle, where external market forces may have changed sufficiently to warrant that re-evaluation. We have sought to put up proposals or suggestions for improvement in the end of lease negotiation or the end of lease situation, which can on occasion be compared with an unfair dismissal, if you like, under wages and under labour laws. Where a complying tenant who has paid the rent, done the business, has a reasonably valuable business or with some reasonable profitability, and the new rent - and I can think of four at the moment in the pharmacy area

where they are seeking rent increases of 50-odd per cent - that has no relationship to the underlying market. There is for major landlords. So, that kind of thing goes on. Other experience - using a stalking horse, a news agency chain, for instance, to replace existing independent or different news agencies by way of a friendly relationship.

DR BYRON: There are a whole lot of issues there that we probably need to talk through. It seems to me that the situation in a large managed shopping centre is fundamentally different from the situation on a strip.

MR MACRAE (NRA): Yes. Not in every respect, but in major respects.

DR BYRON: Someone working in a strip environment, where there is a market rent, can find out how much each landlord up and down the street is asking. If you can't reach an agreement for a second lease after your first lease expires you can hang a little sign on the door saying, "We are moving across the road and three doors down," and all your loyal customers will follow you over there. In contrast, in a shopping centre, five years is five years is five years. Unlike the strip landlord who is probably happy to offer a 10-year plus five, plus five, plus five, in that managed centre they say five years and then all bets are off and you start again. Somebody said to us last week at the Sydney hearings that it is almost like they are offering a concession, "Who wants to be the pharmacist on the third floor of the mall?" Whoever pays the most will get it for five years. But that's all, and then, "After five years we will put it up again and who wants to pay the most to be the pharmacist on the third floor of the mall?"

You can see that seems to be not a bad approximation of how a lot of the large centres are actually being managed. If you knew you were going into a fixed term lease and you were buying the right to operate your business in this space for five years and at the end of five years there is no guarantee whatsoever you will get another lease, it seems, if those are the rules, every week that goes past is a week closer to the day when your business could evaporate into smoke.

MR MACRAE (NRA): Yes.

DR BYRON: A lot of small business people are thinking, because they are working their butts off, that the value of their business is going up every week, but in fact it is probably going down because they are getting one week closer to the day when they won't have a lease any more.

MR MACRAE (NRA): Yes.

DR BYRON: If you haven't got a lease, or premises, a place to operate your business, unless you can move across the road and down the street and get another lease, you are in trouble.

MR MACRAE (NRA): That is right.

DR BYRON: There is no doubt that somebody who pays a lot of money to buy or set up a business and do their fit-outs and so on, if they get to the end of five years and they have got a lot of undepreciated fit-out or if they have been assuming that they have got a business there that's worth a million dollars and suddenly their lease is not - I'm not using the word "renewed" - they are not offered a second lease, and the roof falls out, they are in deep trouble.

MR MACRAE (NRA): Yes.

DR BYRON: A lot of the retailers that we have spoken to in these hearings say, "Oh, yes, I knew that five years means five years," and so you have to organise yourself so that, if they don't offer you a second lease you can walk out and go to another centre somewhere else or start again. But if you haven't done that, you put yourself in a very vulnerable situation where you could be exposed. We are covering renewals and goodwill, vulnerability to divorce.

Coming back to your comment that it's like an unfair dismissal, if I have signed a five-year contract to work and I have worked hard and done my job but at the end of five years my boss says, "Look, sorry, we're not going to give you another contract," is that unfair dismissal or is that simply my contract has expired?

MR MACRAE (NRA): Not per se.

DR BYRON: There is no doubt that my living standards will be a lot lower if I'm not offered a second contract, but it doesn't mean that I can turn around and sue my employer and say, "I had a five-year job. At the end of five years you didn't offer me another contract. Therefore, I'm going to sue you."

MR MACRAE (NRA): I don't disagree with that proposition. It's not quite as simple as that.

DR BYRON: But that's the point I'm making. It's not a perfect comparison.

MR MACRAE (NRA): It wasn't meant to be a perfect comparison, just the shades of philosophy.

DR BYRON: The divorce is also not a perfect comparison. Marriages are intended to be permanent. If people are sailing along on the assumption that this is a relationship that has a very long-term indefinite length and then suddenly it's fractured. But that's quite different. You say, "We're going to live together for five years. At the end of five years, we will go our separate ways." Or, "At the end of five years, we will sit down and discuss whether we will sign up for another five." If you have your eyes open and you know that the deal is only for a certain time,

that's quite different from when you assume that it was going to be indefinite.

Likewise on the question of valuation of goodwill, we have had people say, "The business should be valued as a going concern, as if it had a very long-term indefinite life. That would be fine if you owned the site, the building, or if you had a 10 plus 10 plus 10 or whatever. But if you have five years full stop, does it make sense to value the business as if it was going to last indefinitely? I'm asking too many questions all at once.

MR MACRAE (NRA): Ask them again, please, if I miss something. Basically, shopping centre leases and valuations proceed on the assumption of lease renewal in the great majority of leases. And in fact that happens. Even my reference to the Reid report where I think AMP said, yes, 85 per cent or 90 per cent of their leases in particular centres were renewed.

DR BYRON: Should we use the word "renew" or should we say one lease expired, there was another lease between two parties but on completely different terms and conditions? It's really a second lease.

MR MACRAE (NRA): Indeed, but the existing tenant has a certain amount of baggage, like fit-out that's still relevant for a further term, or that hasn't been able to be written off in full because the original lease term was insufficient perhaps. But if those sums are done strictly on the five-year straitjacket, it really does drive the consequent rental affordability or rental value down. Business can't really be done in high capitalised start-up/close down situations in most cases within that limit. There is the optimistic or the mental framework of the probability of lease renewal, not the certainty but the probability. There is also the necessity to at times replace important parts of plant and equipment. Plant and equipment doesn't read the lease, and it might blow up in the fourth year, or the cold room or the refrigeration or the coffee machine, all of that kind of thing. It has to be replaced, and there are refurbishment components that come into it as well, and there is a fair bit of control done.

There is really the necessity to maintain reasonable security of employment for employees; otherwise they disappear over the last year of the lease. I remember an example of a hairdresser where the lessor flagged the intention of leasing those premises to another hairdresser. It was in a provincial city in a large shopping centre. Virtually all the hairdressers disappeared over the next few months, and the tenant was really in an impossible situation.

One way or another, business continuity is important and it has its cost if it's not achieved. By the same token, it can't be guaranteed because a tenant might not be doing the job or there may be fundamental changes. I'm not suggesting that the landlord's power to change or not to renew a lease be impaired in any way, but there would be occasional circumstances, if it has been a viable business and the landlord says someone else of the same use, like a news agency, can come in and,

"We are not going to renew your lease, but we won't require you to de-fit the premises. Therefore, leave much of it as it is," and then that has value and therefore higher rent to the incoming tenant. That can be the case in certain circumstances if there is no clear balance sheet, if it was a good business. If it wasn't a good business, the plant and equipment wouldn't have value, because that cost couldn't be serviced by an unviable business. You need an element of business goodwill to substantiate the value of your fixtures, fittings and plant and equipment, which is pretty much the property of the lessee, and it shouldn't be transferred to the lessor by those methods without some measure of payment perhaps of compensation. That would only rarely happen if it's good faith decisions.

DR BYRON: With the argument that if the lease isn't renewed or if a second lease isn't offered, then the tenant who is departing should be compensated for the loss in the value of his business.

MR MACRAE (NRA): I haven't said that.

DR BYRON: Other people have said that.

MR MACRAE (NRA): I'm sorry, yes. I believe that window is very narrow and highly specific. I have no basic policy problems with freedom to lease elsewhere and not to renew the lease. Nor even to substitute a similar tenant and similar use who would, in most cases, enjoy the benefit in business momentum, which otherwise could take some time and which transfers into rent, without some assessment, which I don't think is difficult.

DR BYRON: But a few people have put to us the proposition that, if you have been a good tenant and paid your rent and done everything by the book, you should have an automatic right for another lease for a similar period, similar terms, unless the landlord thinks, and there would be some sort of tribunal, that he has a legitimate reason for not renewing that. Other people have said, no, that fundamentally changes property law and the rights of the landlord to decide whether or not he wants to lease it. I think South Australia and the ACT have brought in rules that attempt to give some sort of right of first refusal to the incumbent, but there seem to be so many exceptions that you can argue whether they are actually doing anything. How do you in your organisation stand with regard to either an automatic right to rollover or at least a right of first refusal to match any other offer for that space?

MR MACRAE (NRA): I think it may be going a step too far. I think the automatic right of lease - no, I don't support that at all. That perpetuates privilege and perhaps reduces capacity to change.

DR BYRON: And it is a bias against new people who want to come in; the old people think they have the right to stay forever.

MR MACRAE (NRA): It embeds a new class of privileged or potentially privileged people. The right of first refusal could also inhibit change. It would only come into play where there was no intention to change. I think it's probably a good practice, but I wouldn't think there would be difficulties in legislating it. But the reality is that most leases are renewed and that shopping centres are valued on that basis. No individual business which is subject to that discretion can proceed with full confidence to match their costs and revenues.

DR BYRON: Again, we were told last week that just because there is a tenant in every space in the shopping centre - and leases have been signed - it doesn't necessarily mean that the tenants are deliriously happy with the terms and conditions.

MR MACRAE (NRA): I know.

DR BYRON: The rather colourful metaphor is the tenant is not dead, they are just in intensive care on life support.

MR MACRAE (NRA): There is a bit of that, because landlords don't want vacant premises and they don't want to see perceived failures, and they don't like to see closing down sales, that kind of thing. It is an art form and a necessary art form. I'm not critical of it, but it does disguise perhaps an element of economic pain that may be there.

DR BYRON: Sorry, I interrupted you before.

MR MACRAE (NRA): And I forgot what I was saying.

DR BYRON: Go back to where you were.

MR MACRAE (NRA): Better information will hopefully produce better outcomes and a better capacity, if there is good source material in the improved data, statistical data, for shopping centres. And it's not widely available or widely known, it's very much for shopping centre owners and people in serious practice. The individual is hardly aware of it and wouldn't know how to use it and where the traps and treats are. I think that could be dramatically improved at relatively little cost.

I mentioned the market reviews. The very narrow concept of compensation in very specific cases would at the least temper the more aggressive negotiation that says pay up or out you go, and there is quite a lot of that. It can be a pretty arbitrary and brutal process.

We talked about management fees. I think they could be largely resolved by gross rents and outgoings. Probably no more needs to be said about that. It

was expected that, when there was a move to stapled securities in the shopping centre industry, and therefore a unity of management and beneficial ownership, there would be no point in running a separate profit centre for management fees. Better labelled as "rent" and valued as such rather than being a lower valued profit centre. But there is a degree of opaqueness about some elements of centre management fees where you have mighty corporations that are going about growing their own business as distinct from the operation, management and maintenance costs of a particular centre.

DR BYRON: Just coming back to the difference between a strip and a major managed centre retailing, it's pretty obvious when you sign a lease on a strip you basically - it's clearly about the space.

MR MACRAE (NRA): Yes.

DR BYRON: But the way it was explained to us a few times is that, if you are in a managed centre, you are actually not only paying for the space in a sort of physical sense but you are also paying a premium to get the centre's management expertise; that their job is to run the whole complex, to make it buzz and hum and have people come in the door, opening their wallets.

MR MACRAE (NRA): Yes.

DR BYRON: In effect, the reason that you pay more when you go into a managed centre - if the management do their job well, you get a lot more turnover and so on. What if the management don't do their job so well and turnover starts to go down? At the moment they can just say, "Keep paying." But if that sort of contract to be in a centre was somehow split into two parts and they say, "Well, okay, your rent is X dollars a month for so many square metres and you are also paying us X dollars a month for the management, and in return for that we need some performance indicators." So, "We expect to have X people a week or a month or something going down this corridor of the shopping centre, and if it's 10 per cent less than that we start giving you money back. If it's 10 per cent more than that, you can start giving us a bonus or something." At the moment, there is no accountability for that centre management function.

MR MACRAE (NRA): I think what has been suggested to you is cumbersome and, to say the least, ridiculous. As Alan Briggs, the Westfield guy at the 1997 Reid committee, said, people don't rent space because it's nice space, they rent the business opportunity. That's true. It's not a matter of whether the rent is this or that; it's a matter of whether you can trade profitably. Your capacity to trade profitably will depend very much on the quality of the management and the quality of the centre and its capacity to draw customers and its tenancy mix management. You can go broke on low rents and you can make money on high rents. There are all of these variables that will affect the profitability of a particular business in a particular location in a particular centre. Trying to

translate rents from main street into shopping centres and saying they are high or that much higher and that's bad - that's irrelevant.

DR BYRON: We have been told that in the US there are increasingly almost like concession rents. Chanel perfumes can have this corner of the room and so-and-so shirts can have that corner of the room, and that's done purely on a turnover basis. There is no question of counting how many square metres there are. I guess that's equivalent to turnover rent. But the owner of the building says, "Who wants to sell perfume in that corner?" And they don't really care which brand it is.

MR MACRAE (NRA): Or the department store. They have the same arrangements for brands in their underperforming large areas.

DR BYRON: But that seems to be consistent with what the Westfield person told the Reid committee; they are actually offering the opportunity to run a business in a centre. You are not paying that much just to have a floor, three walls, no front and no ceiling. You are paying that much because - - -

MR MACRAE (NRA): It's the opportunity.

DR BYRON: Yes.

MR MACRAE (NRA): Look at kiosks, 10 to 15 square metres. Very high turnovers per square metre. Talking of, let's say, perfume and particular brands, they are a very narrow use or a highly specific use, where the numbers in terms of margins and so on tend to be fairly well known to the parties to fix the percentage rent that is relevant to that margin. It illustrates the point that value is not about space per se, it's about the business opportunity of that space, and sometimes shops can be too large and the incremental space doesn't deliver value. I think those are the main points that I had.

DR BYRON: If we can talk a little bit further about when a tenant is actually going for the business opportunity. If it was made perfectly clear, for example, there is a business opportunity for a news agent in a shopping centre but in big red letters on the cover of the lease it says, "This lease is for five years with no guarantee that there will be anything after that. We are going to require a fit-out that will cost at least X hundred thousand dollars," would a sensible person say, "Well, I think I will pay \$3 million for the right to be the news agent in the shopping centre for five years?" It depends on what you think the turnover would be. What we keep coming back to is: is the information available so that people can make rational decisions about is it really worth paying that much to buy in, do the fit-out, buy stock and everything else, if you have only got a five-year life and no guarantee of anything after that? We were told at the Canberra hearings about a pharmacist who has borrowed money over 10 years; his write-off for the fit-out is over seven years but he only has a lease for five. You can see immediately when there is only a month to go on the five-year lease his head is in the noose,

and the other side know it.

MR MACRAE (NRA): Yes. Those outcomes are economically irrational. The shopping centre landlords would really have a vested interest in good leases that permitted profitability and, therefore and consequently, attract higher and better quality rents. I think that's a fairly simple equation but it's a hard one to sell in particular cases.

DR BYRON: You made a comment in your submission about the experience of retail leases legislation to date that, to the extent that it's insufficiently prescriptive, it's ineffective. Would you care to elaborate on that further?

MR MACRAE (NRA): A good example is the outgoings, being necessary to progressively define outgoings, for instance. Because there were ways of circumventing outgoings charges, especially expensing capital items or whatever. There are one or two very bad cases in larger shopping centres. It's a bit of a cat and mouse game between lawyers and/or between the parties, if you like, and particularly the landlord side to seek to circumvent the intention of the legislation if possible, because that's a duty that you have to your shareholders to maximise your rent.

The other thing is the way that market rental has been devalued. The old ratchet rent was a situation where the landlord was not exposed to any downside risk at all. If one studies the progressive definitions and refinements, the abolition of ratchet rents became the abolition of market rents per se in shopping centres, because landlords weren't prepared to accept the risk of the rent going down. There are still ambiguities even in current leases which reserve the discretion to initiate or not to initiate. There are still quite a few leases out there that are drawn as commercial leases rather than retail leases, which generate all sorts of problems as well in terms of directives to valuers and what to regard and not to have regard for and comparison criteria and so on.

DR BYRON: What is bothering me is the comparison with the tax act. It has been said that for every person in the tax office who is trying to close a loophole there are hundreds of other people trying to find new ones. It seems to me that a lot of the experience with the retail tenancy legislation is that every time the legislation is changed to say that one party can't do this or must do that, they immediately start getting creative and find different ways of skinning the cat. I think the debate about outgoings and management fees and whether or not you can charge land tax and so on, every time the legislation has been tightened up or changed, it just morphs. It seems to me there are 101 ways for a landlord to take money out of a tenant's pocket. If you ban all 101, a 102nd one will come up.

MR MACRAE (NRA): If it is kept simple, it becomes a simple question of affordability and whether you can do business or not.

DR BYRON: You said before about gross rent. That seems to take a lot of the heat out of that. It also seems to put the incentives in the right place in terms of making sure that the centre management are actually trying to minimise the costs rather than just have a blank cheque to incur whatever they think and send it all back to the tenants.

MR MACRAE (NRA): The argument for net rents is that it provides certainty of income stream for the landlord. On the other hand, it provides uncertainty and expense for the tenant.

DR BYRON: We have been told about all sorts of anomalies that arise. For example, if the lifts aren't working it's a maintenance issue. But maybe the lifts are so old and broken that they should be replaced. But that's a capital item and would be the landlord's cost, so as a result they just never get replaced, they just keep getting fixed twice a week. That seems to be the wrong outcome, because the system doesn't put the incentive where it belongs.

MR MACRAE (NRA): I think as in a lot of office building leases the semigross lease permits cost to be passed on in the nature of rates, municipal charges and that kind of thing, which are imposed from outside. While an office building is a relatively simple product compared with a shopping centre, it really means that those elements that are controllable are the responsibility of the landlord. But it's also partly the rent fixing process to begin with.

DR BYRON: Just on the comparison with other business leases, commercial, industrial and so on, I think we explicitly recognise that they are quite different markets. Particularly of importance to location in retailing are who your neighbours are. But I guess our question was: to what extent do the regulations covering different types of business leasing need to be different, and not only different but getting further and further apart all the time? Maybe there is a case for them being different or for retail being a special category of business leases, but I guess it was the divergence that was continually bothering me. If a retail tenant is entitled to certain protections under the law, because they may be particularly vulnerable at end of lease or to protect them against abuse of market power by a landlord - - -

MR MACRAE (NRA): Business disruption is probably the most frequently litigated.

DR BYRON: But shouldn't other types of business tenants be offered similar sorts of protection? Why should the government not extend those protections against abuse of market power to any tenant, whether they are retail or some other form of business tenant? The example that was given to us was somebody who has got an industrial lease. Once he pours a couple of hundred thousand dollars' worth of concrete, he is stuck; the cost for him to get up and go if the lease is not renewed is very, very high. He is very vulnerable if his lease is not extended, as

much as a news agent or a pharmacist. Why wouldn't he be entitled to the same sorts of statutory protections as a retailer? That was the sort of question. I am just wondering how far apart the legislation needs to be.

MR MACRAE (NRA): I think there would be some areas of common ground. But I would suggest that the nature of the industrial lease negotiation on the premises is very much a what you see is what you get exercise. It is physical premises to conduct the lessee's business. It tends to be a more open market with alternatives that are available to the lessee or the potential lessee. To the extent that they put in specific building improvements with their lease, they tend to be longer term leases. I think it's a more open negotiation.

DR BYRON: I think that covers the questions I wanted to ask. Is there anything else you want to say by way of closing?

MR MACRAE (NRA): No, I don't think so.

DR BYRON: Thank you very much for coming and for sharing your very substantial experience with us. You have given us a lot to digest and think about. Thank you very much for attending.

DR BYRON: We can now take a tea break until about 11 o'clock, when we will resume with Phil Chapman from Lease1.

DR BYRON: Phil, if you could introduce yourself and your organisation and take us through the main points you want to make in your submission. Thank you very much for your interest and comments.

MR CHAPMAN (LEASE1): My name is Phil Chapman. My firm is Lease1, formerly known as Advantage Retail Management, which was formed in 1997 to directly represent independent retailers with their retail shop lease issues and matters. My background is in retail essentially - in 1978 with Coles Myer, and then going on to hold senior positions with Woolworths, prior to joining the shopping centre industry as a marketing manager, centre manager and leasing manager and attaining a CSMA.

At present I am referred to such groups as the members of the Spar Supermarkets, FoodWorks Supermarkets and have a formal arrangement as a certified service provider to the Australian News Agents Federation and their 2,500 independent retail members. Also, in the past nine years I have been on the industry working committee for the review of the Retail Shop Leases Act in Queensland in 2000 and 2005.

I have taken a fairly practical approach to my submission. As you can probably evidence from my experience, we are at the coalface and we deal with retailers in all sizes of shopping centres, from strips to independently held sites right through to the big regional and super-regional shopping centres, particularly with the likes of news agent groups, which you referred to before. I thank you for that; it must be top of mind. We see a lot of variance in what is happening out there.

One of big changes we have seen in the last couple of years, though, is because retail property is so tightly held we are seeing a lot of smaller community and neighbourhood shopping centres being purchased by some of the larger groups, vis-a-vis Centro and Stockland, for instance. Where in the past independent retailers in these smaller centres have had a fairly reasonable relationship directly with the lessor and had a fairly good equilibrium in negotiations in retail shop leases, this has dramatically changed in the last three to five years particularly. They are feeling the same pressures as do the larger retailers in the larger shopping centres.

You invited comment, and my submission speaks directly to those four points of comment in your draft. The first area - the mandatory registration and facilitation of leases. We would like to see the mandatory registration of leases in all areas and consistency in each state and territory on that subject. To the point that there are the same issues that Mr Cameron [Graham] raised this morning, I don't think I need to elaborate on those. He did a very good job in setting out the issues why registration doesn't provide any market evidence with transparency in a timely manner to retailers.

Also, the problem, too, is that retailers availing themselves of information requires them to have some formal training or knowledge of retail shop leases and how to read and dissect that information. What we would propose through a national code of conduct is that the actual disclosure documents, which in most states and territories are already out there but in different forms, be brought together under a simple form national document that could be registered along with the lease. They are being produced now, and I believe it would be a very simple process for those documents which disseminate the essential lease terms that are required to get the information required to make informed decisions, be registered and be available on a public register somewhere.

The Commission asked also about the feasibility and benefits of a national code of conduct. I believe a national code of conduct is obviously the natural step forward from this process. The franchise code of conduct is spoken of very highly around the nation as far as the changes it made to that industry. I think a national code of conduct for retail shop leases would have far-ranging benefits on top of that sort of legislation that is already out there and proven itself.

One of the things with the franchise code of conduct, though, is it became very academic in the fact that you are seeing the disclosure in a franchise document is larger than the actual franchise contract itself. I don't see that as the case with retail shop leases, because we already have legislation and we already have common goals in most states and regions into getting this process tidied up. By formulating a national code of conduct through some form of national committee, and the adoption of such things as common form simple disclosure, issues on outgoings and mall leasing, to name just a couple, would bring about naturally a credibility in the market and the other states and territories to bring the whole situation into line.

With that national code of conduct such things can be addressed as - and I mentioned these - outgoings. One thing raised before was management fees. One of the key issues and one of the ones that causes most of the inequities and angst out there among the independent retailers is management fees. If we were able to take management fees out of recoverable outgoings, albeit that they would still be able to recover issues of marketing and operational staff, but where the centre management or staff involved directly with the improvement of the investment of the lessor were taken out of the recoverable outgoings, I think that would be a very good step forward for retailers, particularly independent retailers.

The view is out there that essentially they are funding the landlord to resource themselves in situations such as lease renewals, lease renegotiation, market rent reviews and dispute negotiation. The lessee itself has to go out and resource themselves in these situations, and yet through the outgoings they are actually resourcing the landlord on the other side of the fence against themselves. That disparity out there is causing some angst.

The other issue, too, of inequity or inconsistency is land tax around the nation. That needs to be addressed as well. If land tax is removed from leases nationally, that would see a consistent benchmarking across the nation.

Part of the process and the suggested process here is already in most states and territories where they are reviewing the Retail Shop Leases Acts on different timetables there are already industry working committees, who are largely volunteers from the different associations or different retailer groups or businesses interested in such changes and adopting such changes in legislation to benefit the industry as a whole. By calling upon these different states and territories to formulate a national committee, I believe a step forward can be made, producing or certainly drafting a national code of conduct for retail shop leases. After a code is developed, I believe the rest of the states and territories, their legislation over time, a short period, perhaps three to five years, the different legislatures would adopt through the credibility and the use and adoption of the national code of conduct a consistent and more simple form of retail legislation in all the different states and territories.

Essentially they are the points that I wanted to raise today. One of the things I do want to harp on in conclusion is that the outcomes of this Commission, and certainly if there are any outcomes or directives to move towards a national code of conduct, is the education for retailers. It was mentioned this morning that you could lead a horse to water but you can't make it drink. That is very true. Retailers are their own worst enemies in a lot of respects with retail shop leases. In Queensland now we have the opportunity that 12 months before a lease expires they are able to ask the landlord if they can renew. They are not taking up that opportunity. It essentially gives them under our Act in Queensland 11 months to make a decision to relocate, continue negotiations, do more research. They are not availing themselves of these things. The apathy I have seen in the last nine years of the changes to the Act in Queensland and the adoption by retailers of these changes - the apathy is just growing and growing. They are so concerned with other issues, taxation, staffing and other things to run their business profitably, pretty much the lease is being left in the bottom drawer and forgotten until they expire. It is not the fact that the industry is broken. I think the industry is fairly competitive. We have retailers such as news agents vying for the same space. We have people competing and building new shopping centres. They are finding new people for them. It's an active and vibrant market, I believe. But the apathy amongst retailers in sourcing their information and doing their research is the issue that really is making it difficult for them to make informed decisions.

By having a national code of conduct and having a format where they can resource information, such as a common form disclosure across the nation, a simple form, where that can be resourced, I think we would go a long way to the transparency in the industry, and certainly making fairer and equitable negotiations.

DR BYRON: Thank you very much, Phillip. There are some very constructive suggestions there, too. A number of people have pointed us to the franchise code and have said that it basically took a lot of the heat out and started to restore some trust and mutual confidence; that prior to the code the reputation of franchising was starting to seriously deteriorate. But since the code the whole franchising industry is much better than it was before and it's held in much higher regard, and the code was given a lot of credit for having basically added to that legitimacy and credibility. The reason we floated the idea of that was that people were telling us that there needed to be some sort of circuit breaker for that sort of trust and confidence, which seems to have been damaged quite a bit, particularly in the large shopping centres. Is that consistent with where you are coming from?

MR CHAPMAN (LEASE1): Certainly. Mr Cameron [Graham] this morning set it out very succinctly. The differences in the lease conditions or the platforms in each state and territory are so inconsistent. Although we trade seamlessly between these territories and states, we need something there that, as you said, platforms it right throughout the nation.

DR BYRON: A few people have rubbished that suggestion on the grounds that, if you are a small business that basically has one outlet and one location, you don't even care what is happening in the next street or the next town let alone what is happening in the adjoining state or territory. We were told that we were obviously biased towards the national retailer chains and the national landlords because, if you are a one-location mum and dad business, national uniformity doesn't do a damned thing for you.

MR CHAPMAN (LEASE1): No, it doesn't. But when the time comes that those people want to expand or shift or have an adverse negotiation with a landlord, to be able to avail themselves of the resources of these types of information that would be available through common disclosure and registrable common disclosure would be far beneficial. In saying same, I have dealt over the years with the members of the Queensland Retail Traders [and Shopkeepers] Association and the Australian News Agents Federation. Retailers and independent retailers have an enormous amount of apathy towards their lease, and should obviously take more regard for it. I have noted in my conclusion that one of the biggest issues we had is educating retailers. We still do, and it will be ongoing. But in saying that, too, if I've can use some examples, people such as the Colorado Group, I have had comment from them that they don't even read their leases before they sign them; they have such market force, who is going to kick them out? But there is another group, Luxottica, who have some 900 leases around the country in sunglasses and optical chains. Some five different chains, and in some shopping centres have four or five different leased locations, don't use their market force towards their negotiation and certainly are pulling themselves apart. It also happens this apathy of utilising the information in front of us, it goes the same for the big ones as the little ones.

DR BYRON: That's a very pertinent point. But we are concentrating on trying to make more and better quality information available so that people can make more informed decisions about their businesses. But that doesn't guarantee that it will be used. We have spoken to a number of retail tenancy advisers who have in effect said that they have enormous difficulty persuading their clients to actually make use of the resources that are available.

MR CHAPMAN (LEASE1): That's very true. I have those issues as well every day. But there is a culture there that, particularly through the retailer groups and associations, I mentioned before, Spar, FoodWorks, are acknowledging that specialist information and skills are required that they can't resource within their own banner groups. More and more we are seeing the trend towards these banner groups outsourcing these types of services to the members who want to help themselves.

Way back in the late eighties/early nineties when the shop leases acts were put forward, the onus there was trying to defend those people who can't defend themselves. That's all well and good; there are some people you won't be able to help for the sheer fact of their own independent apathy. But there is a strong push in the banner groups to get more and more affordable resources for these people. Part of that affordability is having good access to some form of national register of common form, simple to read disclosure.

DR BYRON: It seems to me that all the states have retail tenancy units, different names and descriptions. The ACCC has a group working on this. I have an armful of brochures that say, "Don't sign that lease until you have got expert advice because you could lose your house," and yet there does seem to be a lot of evidence that people either aren't picking up these brochures or they pick it up but don't read it, or even if they read it they don't take any notice of it. I guess what we are grappling with is how much more can and should governments do to protect people particularly if they are not taking any notice of the information that is already on the table?

MR CHAPMAN (LEASE1): How much more intervention can government make? You can lead a horse to water but you can't make it drink, as was said earlier today. But on that subject, you asked for some evidence earlier this morning about the introduction of legal and financial certificates. Since the introduction of the financial certificates in particular - my firm, I found that I was getting phone calls from CPAs requesting information on benchmarking, et cetera, where they had no expertise on what was the rent and turnover and how it could perform. I can say here, without obviously bringing my numbers with me, that when that was introduced some years ago now the phone calls and inquiries from those professions grew threefold. They were inquiries usually through an association, Queensland Retail Traders [and Shopkeepers] Association at the time, asking to seek information on those particular numbers so they could advise their clients. But also as Mr Graham rightly said, there are a lot of people out there who

will avoid getting these documents prepared. And some evidence on that as well. When I was doing the work for the Queensland Retail Traders [and Shopkeepers] Association members, we put together a legal team and the financial team and myself as regards providing a very inexpensive one-stop shop for legal and financial certificates. We were charging only \$750 to do this work, as a format for those three entities picking up new clientele as well. We were doing it on probably a less than cost basis, and we were lucky to get two or three a month. That's a service that we provided at that time, and it was fairly heavily marketed to a membership of about 2,700 members throughout Queensland. That gives you an example of where the direct costs, as Mr Graham pointed out, can be quite exorbitant. But when you try to put packages together the apathy out there is such that even that's too expensive. There are for and against for what has happened out there.

DR BYRON: People were required to get this information, it was available at a very reasonable cost and yet still they would sign leases that may involve amounts of half a million or something without taking advantage of that?

MR CHAPMAN (LEASE1): That's right.

DR BYRON: That's quite an educational challenge, isn't it?

MR CHAPMAN (LEASE1): Yes, an enormous challenge. Even over the years when I first commenced business in 1997, and once again with the Queensland Retail Traders [and Shopkeepers Association], trying to put together a package for people to have their leases administered for them on an annual basis, and we would charge them a nominal annual fee. That was totally unsuccessful. It became evident then that it really gets down to educating retailers on a wholesale basis. The review in Queensland in 2000, there were booklets put out, the Leases' Guide and Lessors' Guide. They were widely accepted and I think they went a long way to educating retailers in Queensland on some of the changes. I think the registrar did a great job in getting those out. That type of education where it's in simple form breaks down the act and it's in a hand-held booklet. Mind you, you have to thrust it upon them in a lot of cases, but it's simply read. That type of education that they can readily get their hands on is invaluable.

DR BYRON: Do you have any comment to make on the issue that we discussed earlier this morning, about whether the legislation should give some sort of preferential right of renewal or right of first refusal in terms of a subsequent lease?

MR CHAPMAN (LEASE1): Essentially - and I will just quote on Queensland at the moment - I believe that in essence already exists in the new changes that were adopted in April 2006, whereby 12 months prior to the expiry the onus is on the lessee to write to the lessor asking to renew the lease. The lessor must, in a timely manner, 30 days, respond advising whether the new lease will be given or not and, if so, the terms. Therefore, negotiations are entered into in a

commercially prudent and timely manner. That's almost as good as without writing a first right of refusal. It's a softened form. I think that's commercially prudent. The problem is that people aren't taking the full benefit of it. If that was adopted nationally, it would go a long way. Once again, it is educating people to know that they have to make diary notes and act on an expiry that is spiralling towards an end at a great rate of knots. I believe if you had a first right of refusal it would, as Malcolm [Macrae] rightly put, promote some privilege. It would also promote some difficulties, I think, with some of the property owners as well.

DR BYRON: Quite apart from negotiating new leases and so on, is your firm involved in dispute resolution?

MR CHAPMAN (LEASE1): We do.

DR BYRON: We made the summary assessment in the draft report that overall in general, on balance, dispute resolution systems in each state and territory seem to be working pretty well. As a practitioner in that area, do you have any comment?

MR CHAPMAN (LEASE1): We find that 98 per cent of issues and disputes can be resolved quite amicably before even entering into the formal dispute process. One of our veins is to certainly get involved, take the egos and the heat out of it, put the commercial terms on the table and you usually find that both parties will get around the issue, particularly when you advise them of the process and what is the next step. They are going to be asked to sit down and mediate, anyway. With the recent changes of 2006, the tribunal can also conciliate to send them back for mediation. We are finding that people are trying to mediate. We usually find that an independent retailer who has an issue in dispute is probably ill-informed. Certainly we are not saying that we are trying to discount the dispute in question. But the process they are ill-informed in and how to go about supporting their claim or presenting their dispute to a lessor. We get involved in those. As I say, 98 per cent of the time, because there is a background platform that's the next step, both parties usually resolve.

DR BYRON: Good.

MR CHAPMAN (LEASE1): But saying that, it wouldn't be the case if we didn't have the process of the tribunal in the respective states and territories there to support it, as the next step.

DR BYRON: It doesn't have to be used all the time to be actually doing some work. The fact that it exists encourages people to sort it out pretty quickly.

MR CHAPMAN (LEASE1): Yes, it is effective.

DR BYRON: The last page of your submission states that the retail shop leases

code of conduct should recognise a lessee as not only the lessee, head lessee or assignee but also any licensee or sublessee particularly where a franchise operation is in place; that this would ensure that those parties directly affected in such events are suitably involved and directly receive the benefits. Could you elaborate on that a bit more? I'm not sure I follow.

MR CHAPMAN (LEASE1): In our 2005 review - and amendments were adopted in 2006 in Queensland - at the industry working committee I brought situations or cases where the franchisor who held the lease and allowed a franchisee to operate under licence received a benefit from a dispute resolution which wasn't passed on to the actual licensee. The licensee obviously was not recognised as the lessee and obviously had to go and seek intervention from other courts. That's a little bit of housekeeping. It was an adverse situation where the franchisor and the franchisee were also at each other's throats as well. To tidy that up, to make sure that any operator of the premises, whether it be under licence or under a franchise, is acknowledged as the lessee; acting as the lessee, they are contributing as the lessee and should be treated as such.

DR BYRON: You also had some comments there about management fees and land tax and so on. You have strongly recommended that any code address these two areas by removing them from the list of recoverable outgoings. Basically, you are talking about gross rents? Or semigross rents?

MR CHAPMAN (LEASE1): There are two arguments. I have two views on gross rents. I have been on the side of the fence for retailers and as a centre manager where I have seen gross rents introduced. The pressures on operating a centre with gross rents lessened the standards of the centre. I have seen that evidenced recently by retailers and I have evidenced it from operating shopping centres for particular owners. The pressure is on the management, as was rightly raised this morning, to improve their efficiencies, but sometimes those efficiencies were to the detriment of the standard of the shopping centre or the presentation and the services that were to be provided to the lessee.

DR BYRON: On the other hand, I could argue that you are more likely to see a centre gold plated if all the cost of the gold plating is being billed back to someone who signs a blank cheque.

MR CHAPMAN (LEASE1): I understand that, too. Under the act, they have to report the audited statement of recoverable outgoings. There is facility to question that. The retailer does have recourse to questioning those costs, more often than not very unsuccessfully. However, that process is there.

DR BYRON: Is that just to question that the cost was actually incurred or it can be more like an efficiency audit? We have been given examples, I think we referred to a couple in the draft report, where the cost of cleaning the centre has suddenly trebled or something. There is a paper trail that says, yes, X amount is

now being incurred and billed back to all the tenants, but what the tenants want to know is why that cleaning cost has trebled and did centre management actually take the lowest of three quotes or is the new cleaning contractor somebody's cousin or uncle or a subsidiary of the manager or something, so, is there the right - - -

MR CHAPMAN (LEASE1): Having been asked that question myself as a centre manager and having asked the question myself, the onus has really been - in areas such as security, cleaning, gardening, those types of areas, there has always been a culture to try and be transparent and seen to be doing the right thing. So, it's been positive. In saying same, too, there are areas that are out of control. When the HIA issue happened, insurances went through the roof. In some areas public liability insurance trebled. Everyone was screaming. But at the end of the day once it was put on the table it was fairly transparent that that was the market forces. In saying the same, too, I have seen just recently, in the last 12 or 18 months, I have seen shopping centres change hands, and the management fees have quadrupled, with no transparency, no change in performance and no change in added benefit to the lessee.

DR BYRON: That comes back to the point that the tenants see that they are working away to pay for the bullets that are going to be fired back at them?

MR CHAPMAN (LEASE1): That is exactly right. The lessee has to resource themselves, do their data research, do all of this outside the normal hours that they are working now, which are always getting harder and harder. That's the market; fine. They have to resource themselves. I think the lessor should resource themselves as well. The functionary of centre management has changed essentially over many, many years. It is very much an investment management. They are more to do these days with pushing spreadsheets around rather than out on the floor. That's an observation I can say from personal experiences. They are working more towards benefiting or improving the lessor's investment, not necessarily there as a contributor to the direct operation of the shopping centre.

To clarify that, you mentioned earlier about performance benchmarks, the number of people coming through, et cetera. A lot of shopping centres of a certain size now have marketing funds. Usually there is a marketing manager. They are funded out of that fund, which is a separate contribution from lessees. Once you get to a certain size of centre that seems to introduce itself and work fine. That is what that functionary is for. There are also staff in the centre responsible for opening the doors, electrical, common maintenance. They are a functionary of the operational shopping centre, and I believe a recoverable item. But when it gets to the stage of top-heavy management on a property, particularly with large portfolios, and particularly where the opportunity is there for the landlord or the public listed company to make an internal rate of return on their management fees, I think that should not be a recoverable function.

DR BYRON: I think a few other people have made that point very forcefully, too. That exhausts my list of questions. Do you have anything else to say?

MR CHAPMAN (LEASE1): That is all. As I said in the submission, I don't think the market is broken. I think it's healthy and vibrant. A focus to bring some added transparency and some efficiencies to it, I think, is a positive step and I can't support the Commission strongly enough in recommending that a national code of conduct be introduced.

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

MR LOGAN (PGA): My name is Tim Logan. I'm the Queensland Branch President of the Pharmacy Guild of Australia, which is an employers organisation representing the owners of pharmacies. I'm also a practising community pharmacy with a pharmacy that currently is tenanted inside a shopping centre in Nambour in Queensland. My experience in operating pharmacies has mainly been in the shopping centre involvement, going as far back, I'm distressed to say, to the Kern Corporation in the early eighties. I have mainly been around shopping centres in my professional career and have experienced some of the vicissitudes of dealing with those.

MR SOMMARIVA (PGA): I am Angelo Sommariva, a strategic planning officer at the national secretariat for the Pharmacy Guild of Australia. As the Commissioner pointed out, this is the third time we have appeared at the hearings. We certainly don't want to take up unnecessary time, so we will get straight to the point of what we want to contribute on this occasion. Thank you once again for this opportunity.

The first item that we feel is appropriate to bring up here, being in one of the major growth areas in terms of population growth here in south-east Queensland, is the issue of zoning and planning, and in particular the centres policy, which is brought up in the draft report. There is consensus in the report that out-of-centre developments are discouraged through state regulation. We know that in growth areas here in south-east Queensland and in other parts of Australia this type of policy is currently being implemented. There is little doubt that out-of-centre developments will continue to be discouraged, be that for environmental reasons as in limiting the number of times a person needs to move their car to go to a different activity - so, there is little doubt that this sort of out-of-centre development will be discouraged in the future. The question is what we do with the retail centres and the space that we have now and what is about to be built.

Currently, many such retail centres are put in the hands of a single developer. If I could read a quote from the draft report on page 60 - this quote is sourced from the New South Wales Department of Planning. It states, "It is believed that concentrating retail activities will also promote competition, leading to consumer benefits." Now, in the report it seems to me that it has taken to be a truth, even though it comes from an external source. What we find difficult to understand is how a retail centre with only one lessor can promote competition. What we can understand from that is that certainly it may increase competition for the centre's tenants, the ones inside the centre if it is a shopping centre set-up, but it dramatically decreases competition for the actual landlord as they are protected and handed really what is a virtual monopoly over a particular retail zone.

As we have heard time and again throughout the inquiry, this really does serve to increase the relative power of the landlord in terms of negotiating rents and obviously what we are here to talk about. In terms of a competitive market,

we heard earlier a gentleman speaking about the market not being broken. Because there is competition there, of course, a pharmacy will be coming in if one person opts to not go in there. However, we believe that that competition is at the tenant level only and not necessarily at the landlord level in areas where there is a particular zone that's been handed over to only one developer.

Also, we have the Queensland branch president here with us, who has run a number of pharmacies. He would like to put forward a short case study or example of what happens.

MR LOGAN (PGA): I suppose to highlight the experiences that I have had in dealing with landlords - the experience that I have had is that in the information on which a market review, let's say, is based is widely available to the landlord and is very difficult for a tenant to gather without enlisting professional assistance. I was fortunate in my last negotiation; I had a very effective negotiator, and he was able to predict which tenancies the landlord had utilised in proposing a like business in a like location and was able to demonstrate quite clearly that that was not exactly correct. They were bigger shopping centres, they were fully tenanted, they had no other competition in terms of centres surrounding, and so on, and much bigger businesses and bigger population and catchment areas.

From the point of view of an owner/operator, the whole process of these market reviews and lease renegotiations to someone who is trying to operate a business it's very disruptive, and particularly in the case of pharmacists who are required to be there in their pharmacy at all times or required to have a pharmacist on call at all times in their pharmacy it does really become a very disruptive process to deal with what essentially turn out to be ambit claims.

That was my last experience in this regard. As I said, fortunately I did avail myself of the professional assistance of a lease negotiator and got a more palatable result, although it was still reasonably painful compared to what I had negotiated with the landlord just two and a bit years before.

As Angelo said, there are areas in which these centres exist where your alternative, if you want to remain in that local market, the alternative tenancies are very limited. I think that's one of the major issues that we have had.

From a personal point of view, as someone who is involved in a national organisation, having a national code is a very worthwhile aim, we believe. I think the more consistency you have the greater expertise is developed across all regions rather than having to have local knowledge in various regions, and we would see that as a good thing. As Angelo mentioned before, those zoning issues, we perceive those as important things to get sorted.

MR SOMMARIVA (PGA): As I said before, we have made a number of points already in previous hearings and we will continue to make a few different points in

the hearings to come. We don't want to take up too much more of your time, but we certainly would be happy to answer any of your questions.

MR LOGAN (PGA): Thank you for the opportunity of contributing.

DR BYRON: Can I take up this line. Landlords clearly have much more information and hence negotiating power. To me, that's fairly obvious given that they are specialists in leasing. Leasing is what they do. It's their entire career. They are doing it basically every day of the week. Your specialty is as a pharmacist. You may have negotiated a lease a couple of times before. You might do it five or six times in your career. But if you are sitting opposite someone whose life's work is in that area and you are basically a newcomer to it, I would have thought it would be pretty obvious that you get somebody to bolster your side of the negotiations?

MR LOGAN (PGA): I understand that. Although what I had an issue with is if they are basing it on these other tenancies why couldn't they be detailed so that I was able to look for myself and argue the case? Even with the professional adviser I had, we had to basically pretty much guess, and they were pretty educated guesses in the end, as to where these likely other locations were. But I found that quite unfair, saying, "This is the basis on which this is being done, but we are not going to tell you so that you can check for yourself."

DR BYRON: I suspect that that's what the courts have sometimes referred to as tough bargaining. I don't think there is any legal responsibility on the other side to help you or make it easier for you to do your homework. It just seems to me that the thing is fundamentally stacked from the outset, that they have access to not only lots of information but they have teams and teams of lawyers and accountants. So, any mum and dad business - and I think you are probably much more qualified and educated than many other small family businesses - it's like me getting into a boxing ring and doing 15 rounds with a world champion heavyweight; you shouldn't be surprised if I end up with a lot of blood, and he won't.

MR SOMMARIVA (PGA): You might be surprised, Commissioner.

DR BYRON: The point is that we know that they are well resourced. There are large enterprises on the landlord's side. And that's why I would have thought that any small retail business would be looking for the best advice it can get or afford. I wonder if it would be a false economy to not pay \$1000 if that person can save you \$50,000 or \$100,000 or something over the term of your lease.

MR SOMMARIVA (PGA): There is, however, we believe, anyway, a great deal more information that could be available to tenants, and perhaps this is where the idea, as mentioned before, of a mandatory registration process, where that sort of thing could really help. No doubt you will hear more about this from us. But

we believe there are a number of ways in which a register could be set up to genuinely help out people with this information imbalance that is currently going on.

DR BYRON: Changing back to the zoning point which you brought up, I think you are probably right in the interpretation of that quote from the New South Wales government, that it creates a lot of competition within the centre but not necessarily competition between centres. When I ask myself why would a city council or a state government say, "There is only going to be one big commercial site in this district, and we are going to sell it all to one company to develop a big centre rather than having a number of smaller ones," I assume it's because the council actually gets paid a lot more if they sell a monopoly than if they sell the same amount of land to five different people who then have to compete. But elements of that monopoly, if there is only one centre in the whole suburb or whole group of suburbs - then if you are a pharmacy or a bank or a travel agent or a whatever in that centre, and there is only one centre, then you, too, are getting a sort of a secondary monopoly element; is that a fair assessment?

MR LOGAN (PGA): I guess provided that your share of that market remains similar. Normally when you negotiate a rental you are predicting your share of the available market in the centre, but that often doesn't preclude, and is seldom modified by, the addition of another direct competitor coming in. Yes, having that concentration of traffic and people can be of great desirability to a tenant. But I guess you are at the mercy of whether many other people in your market are going to get in there when you may have negotiated a rent based on a predicted share.

MR SOMMARIVA (PGA): Firstly, you certainly do pay for that secondary monopoly, if you want to call it that. The other thing is that I think it starts to get a little bit dangerous if we say it's okay the way things are set up now, because even though there is a monopoly you are benefiting in a secondary type of monopoly. Rather than looking at it from that point of view, where it's okay to have a monopoly because another monopoly cancels the first one out, I think it starts to get a bit dangerous if we look at it in that fashion. We really should be looking to address the original monopoly rather than allowing it to get worse and worse.

DR BYRON: I was simply trying to think through why would councils deliberately do that. One is because they think that they are going to get more money for that site if they market in a certain way rather than if they subdivide it and make it more contestable. But they don't realise that some years later down the track it's the ratepayers in that same area who will end up paying more as consumers.

MR SOMMARIVA (PGA): Yes.

DR BYRON: The council may have got more money and saved the ratepayers at the beginning, but it comes back to bite them later in their other role as consumers.

You just mentioned that you go into a lease and there is a centre and maybe there is one other pharmacy in there and you say, "Well, this is the turnover we can expect in this area. We know the demographics, we know the buying power, consumer spend. Given the costs of setting it up, I can expect this turnover. Okay. The business is viable, I will sign the lease." And then, blow me down, six months later there is another pharmacy comes into the same centre or another two. All of your figures are blown out of the water.

When we put that to the shopping centre representatives their reply was, "Yes, but that could just as easily happen if you are out on the street." If you have a pharmacy out on the high street, somebody else can see that there are plenty of customers in the shop, they are coming out with armfuls of stuff so they are spending money, and they decide to open up a pharmacy; that can happen anyway.

MR LOGAN (PGA): That certainly could happen. But when you are in a shopping centre you typically are paying for that location premium; because you are the pharmacy in the shopping centre, you are paying that premium. Whereas out in the strip or the high street there is probably a bit more competition amongst landlords for tenancies. You are not paying that kind of premium. I guess you are slightly insulated against other market entrants in that regard or losses of traditional pharmacy markets.

DR BYRON: I don't want to pry too much, but you said in your opening comments that you have mainly operated in centres. Have you had any businesses that were outside of centres, just for a comparison?

MR LOGAN (PGA): I haven't owned them, no. I have worked in a few that were outside. But as a proprietor I have only ever been in shopping centres.

DR BYRON: My understanding of a centre is that the rents are higher and the turnover is higher.

MR LOGAN (PGA): Typically, yes, that's right.

DR BYRON: I was just going to ask, if you had done it both ways, how you decide whether you would rather be in a centre or you would rather be out in the high street where the turnover is lower but the rents might be lower. Presumably people are making those sorts of comparisons all the time.

MR LOGAN (PGA): Whenever I have been confronted with a situation that I thought was contestable in a shopping centre market review or whatever I have never had much compunction in going and getting professional advice. Usually when you trot that out a little bit more commonsense is spoken. The last market review I had asked for a 60 per cent increase in rental. Seriously, especially when pharmacy is the customer of a monopsony supply, the federal government says, "We will pay you this amount for these prescriptions," you just can't cope with

increases in costs. I don't think any reasonable businessperson should be asked to try to predict those kinds of cost increases. As I say, the stress and distraction in the protraction of the negotiations to get it to a more sensible level - I just believe I could have been doing a lot more productive things as a tenant and as a service provider to the people who patronise my pharmacy.

I don't know how you look after a market like that without being too interventionist. I just perceive ambit claims like that on already substantial rentals as something that is a very undesirable part of this industry.

DR BYRON: Again, if it's not too rude a question, would you mind telling us whether you have a five-year lease or is it longer?

MR LOGAN (PGA): I actually managed to negotiate a bit longer than that and I did get the right of first refusal to continue my lease. I guess that was aided by the fact that the shopping centre that I'm in is, you would say, a second string shopping centre, the main shopping centre in Nambour, which is owned by the same company, which is Macquarie Countrywide, is over the road. I suppose they were glad to have a tenant in there. But once I had signed the lease, that first market review was when they really went after me with that 60 per cent proposition, which I found quite disturbing. I have dealt with Stockland in the past, and Countrywide before it was Macquarie Countrywide and, as I said, the Kern Corporation back in the old days.

DR BYRON: I don't think there is anything else that I wanted to ask at this stage. I thank you both very much for coming and raising those points and bringing them to our attention.

MR SOMMARIVA (PGA): Thank you once again.

MR LOGAN (PGA): Thank you.

DR BYRON: Is there anybody in the room at the moment who would like to take a microphone? We have a few minutes free before lunch.

MR MACRAE (NRA): On the code of practice - the code of practice is an excellent idea but only if it's mandatory. Past experience has been that voluntary codes of practice have been ignored by major participants.

DR BYRON: We were told about a previous voluntary code in New South Wales which was voluntary in the sense that, if you don't like clause 3 you can ignore that this week and, next week, if you don't like clause 12, you can ignore that. The sort of voluntary code that the ACCC was talking about, I guess, is one that it's voluntary whether you sign on to it or not, but once you have signed on every element of it is enforceable by the ACCC. There is no more cherry-picking. The reason for making it voluntary whether or not you sign on is that it gets

around the definitional question of who has to be covered by it. If you say we were going to have a mandatory code for all shopping centres, is it not just the regionals and majors and subregionals but does it go down to the neighbourhood centre or the community centre? If you say any shopping centre owner can sign on whether you are one of the big 10 or whether you are Fred Smith that owns a cluster of five shops in one suburb, if you want to put on your name on and say, "I have signed on to be a good corporate citizen and I will follow the code and from now on it's binding on me because I have signed on," the idea would be that people wanting to start a retail business would say, "I want to be in a centre where the management have promised to abide by the rules as written." If there is somebody else down the road who says, "I'm not willing to sign on and get the gold star for being a responsible corporate citizen, maybe I don't want to go there." That starts to put pressure on them, to say, "Okay. We better sign on, too, because as long as we want to reserve the right to do sharp practices the tenants are going to stay away in droves."

MR MACRAE (NRA): And the investors perhaps.

DR BYRON: That way you allow the possibility for someone who doesn't want to sign on to promise to do the right thing. But you leave it open for anybody no matter how big or small or where they are from. A lot of people have said to us that, although the 10 or 12 biggest landlords get a lot of publicity, often the most egregious practices are coming from the third and fourth tier landlords who basically don't know the law. The big boys, they have lawyers in house. They run training courses on what you can and cannot do. But the lower level of landlords are the ones that might not be up on what is good practice. We may well end up recommending that, if there is a code, it should be mandatory. But the thinking was let people self-select. If they want to show that they are good corporate citizens and they are going to abide by this agreed set of rules, that should give them some sort of recognition and advantage in the marketplace.

MR MACRAE (NRA): The voluntary code would certainly be better than not having a code at all, because it sets an example perhaps of good practice that may improve the conduct of the industry.

DR BYRON: The other thing that has been suggested to us - you could work out what would be a good code of practice that all the major retailers, their organisations and the major landlords and their organisations say, "This is what we think is fair and reasonable." If you could get that to become the way everybody does business, it doesn't really matter whether it's a voluntary code, a mandatory code or whether it's written into the law. The advantage of it being a code is that, firstly, it could be made national, like the franchise code is; and the other advantage is that, if you find a wrinkle in it that needs to be fixed, you can adjust the code rather than having to go through the whole legislative process. We are not wedded to the idea of a code. It just seemed like it might be one way of writing down - both sides agreeing that this is what we think is a fair and reasonable way

to behave.

MR MACRAE (NRA): Another advantage is that a code, even if it's not mandatory, helps to benchmark behaviour.

DR BYRON: Yes.

MR MACRAE (NRA): Or the relative terms and conditions and so on against some consensus of what is ideal.

DR BYRON: I think it has an informational content.

MR MACRAE (NRA): Thank you.

DR BYRON: Thank you very much. That is a valuable additional point. In that case, I suggest we adjourn now and resume at 2 o'clock, when we have the Queensland Retail Traders and Shopkeepers coming back.

(Luncheon adjournment)

DR BYRON: If you could introduce yourself and your organisation for the transcript and then take us through the main points.

MR GILBERT (QRTSA): My name is Don Gilbert. I'm a consultant and I do quite a lot of work for members of the Queensland Retail [Traders] and Shopkeepers Association. I do articles that go into their magazine, which goes across the country. Queensland Retailers represent the largest body of independent retailers in Queensland. They have obviously got affiliations and associations in Western Australia, South Australia, Tasmania, New South Wales, and obviously Queensland. I won't go into my background. That's on public record.

DR BYRON: Would you like to take us through your feedback, comments, criticisms on the draft report?

MR GILBERT (QRTSA): Basically, on the record is the Queensland Retail [Traders] and Shopkeepers' submission. I prepared that on their behalf. We tried to refer to one of the best independent persons in fact worldwide, I would say, Prof Neil Crosby. We try to draw comparisons from other marketplaces - obviously the United Kingdom. We also try to have a look at the fair trading inquiry and some of the recommendations in the fair trading inquiry, some of the observations that came out from chaps like Alan Briggs, who was with the Westfield Corporation, with a gentleman like Ian Newton, who was also with the Westfield Corporation.

Some of the observations that they put forward then are still some of the issues that we are seeing in the operation of retail leases in Australia. We said, okay, that was back in 1996. We went through until 2008. We have had many, many reviews of the tenancy law. We have had 13 or 14 reviews of tenancy law. What really has changed? Not a lot has changed. I have developed a lot more grey hair over that time. We have learnt a lot. We have tried to be more astute at what we do. Sometimes we do a bit of grandstanding. But that's because it is a very aggressive market. It's an aggressive industry. We have tried to take the independent/impartial view all the way through. Sometimes the perception is that we are standing on the side of tenants. But I don't think that's the case. I have, from a personal point of view, quite a lot of landlord clients as well.

I think some of the things that we have said - and we said we predict this is going happen, this and this and this will happen. We have been waiting for corrections in the markets and so on, corrections from the shareholder point of view. Those have started to occur.

We have been hamstrung very much to get the story out of what has been going on behind the scenes while the main players have been playing with other people's money. We have tried to analyse it and say what is happening, it's not an efficient market, it's not an informed market happening, and we have tried to come up with the ideas to really get it to be an informed market operating. That's what I

did in the Queensland Retailers and Shopkeepers Association submission.

The other things that we try to do is say you don't want to reinvent the wheel. There are mechanisms in place. There are the state tenancy tribunal systems that are essentially working pretty well. Do you want national tenancy law? Do you want a guideline for national tenancy law? What is going to be the best way to move this whole thing forwards?

What we did in our submission was to come up with what we regarded was fairly critical areas. We regarded security of tenure as being one. It is very important. There should be reasonable flexibility with tenure. There must be a lease dispute mechanism built into it. Zero based accounting should be incorporated or people should be able to use zero based accounting to decide whether they are going to invest \$200,000 to \$400,000 into a business, amortise that cost. If a lease is going to be renewed, that mechanism has to be reasonable and fair versus what is happening and in place at the moment, which is gazumping.

I got an email the other day from John Farrell of NFIB. He says that in the ACT, where they have an independent dispute resolution mechanism, it is working very, very well. He says that they are getting 90 per cent of leases being renewed compared to 60 per cent to 70 per cent elsewhere. Case closed. That was his comments. As I said, they have a good working relationship with landlords, because they know - and it's in capital letters - they cannot engage in conduct as can their interstate counterparts. They use rigorous financial models and sale value models to come up with results. It's always probably good to have someone like me in front of you rather than elsewhere. The mechanism is simple. I want to do business with you. How is it going to be fair? Here is an offer, it's a bona fide offer, it's a genuine offer. Are we going to do business together? Surely the negotiation mechanism should be fair. If you can't reach agreement, then the ACT mechanism builds into it that the parties have to go to mediation to reach an outcome that is at least fair and reasonable. In the very last instance, and I believe it doesn't happen very often, it then goes to independent expert determination, call it an arbiter, to decide what is fair and reasonable.

That's what we try to do in our submission. If I had to be ultracritical I could not advise anyone in this room to take their super and to put it into a retail business in a shopping centre. I have been around the traps for a long time. To set up a business, to get half-married to the business, at lease renewal time, when you might be semi-financed to that business, the family home is hocked up, et cetera, the lease renewal process comes along and that is when you, using the best Aussie words, are really over a barrel.

DR BYRON: You said you couldn't advise anybody to take their super money and go into a retail business in a shopping centre. I wanted to check whether most of the concerns you talk about relate to managed shopping centres rather than to

high street? Do you see that as the most egregious area?

MR GILBERT (QRTSA): Yes.

DR BYRON: That is not to say that everything is perfect in the high street.

MR GILBERT (QRTSA): High streets can be fun as well.

DR BYRON: Sorry, I wanted to clarify that.

MR GILBERT (QRTSA): If I was an investment adviser, I would be very hesitant to say to people, "Put your money into an LPT investment." We can see what has happened with the shares at the moment. I don't want to go into the statistics, but some of those have dropped significantly. Where I am heading towards - where some of my personal practice is going - is advising people about purchasing shopping centres. What I could tell you is that it is a dysfunctional market operating. Some of the gains that have been gained over the years I think could be lost. I say that with respect in the draft report.

DR BYRON: That seems like a good point to go back to your earlier comment about some predictions you have been making about some corrections. Would you like to elaborate a little on that?

MR GILBERT (QRTSA): I could do that, but then I would be going into my submission.

DR BYRON: Sorry.

MR GILBERT (QRTSA): For the record, my submission should be on record as being part of all the submissions. But those predictions are within that.

DR BYRON: Forget that.

MR GILBERT (QRTSA): Okay. Security of tenure was one of the issues that we raised. Disruption to trade - we feel that it is fairly well covered by state tenancy law. Maintenance of shopping centres, et cetera, et cetera. I have gone into end-of-lease rent review principles. Fit-out and pre-fit-out works - there is a lot of rorting that takes place over there. Third-line forcing, prescriptive, "You will use X, Y, Z," to do the fit-out and so on and so forth. Some of those prices are much higher than what one could get in the open marketplace.

Sales data and rental data - that is an area that we have thought very hard about which way to go. Maybe an independent party or parties collate that sales data. We try to think outside the square, and suggested BAS statements as being a fairly logical way to go. We are trying to get a mechanism in place for both parties to have proper scrutiny. The information is collected by the landlord. They use it

very, very well to maximise rents to justify their case with the other party. Running a business, you have probably 14 disciplines that they try to do to run their business, let alone try and understand tenancy law, understand rents, understand market rent and so on. Sales and rental data. Lease registers would be certainly a way to go. Outgoings code of conduct - one of my friends and colleagues, Bruce York, will talk about that. I don't want to cover that in detail.

DR BYRON: We heard from him last Wednesday in Sydney.

MR GILBERT (QRTSA): Yes. He and I were the authors of the code of conduct. It was my original idea. Bruce didn't like my format, and he said, "No, I'm going to change it," and he did, and good on him. Enforcement - state tribunals are definitely geared to retail. We submitted that \$500,000 compensation should be the minimum amount. Queensland has got \$250,000 at the moment. Soon after this was sent to you, I picked up five or six clients that have businesses where their losses are about \$250,000. But their consequential losses, that is, the loss of their fit-out/exposure, between a million and a million and a half. If compensation was in equity that would be a better way to go. The way I look at that, I see that the property owners have billions of dollars worth of money tied up, and small business owners, if compensation is not in equity, then the one party is subsidising the other.

When should tenancy law come into operation? Those are things that you guys can figure out. And guarantees, we have suggested that maybe an independent body like the Residential Tenancies in Queensland pick up on keeping those millions of dollars. As in New South Wales, where they fund the operation of retail tenancies, the same could happen over here. And also, for businesspeople that are really stressed out, perhaps funds could be put aside to run a case, to run some cases on their behalf. That is just an idea. That is in fact an article that I'm doing at the moment.

That's probably all I have to say about our submission. The table between pages 11 and 13 is really the basics. The detail is within the tenancy law. Victoria has some damned good aspects of their law. New South Wales has very good aspects. Queensland has very good aspects in their tenancy law, and of course the ACT has as well. A lot of the detail is already there. It's in place.

There is one point which I think is important. We said that commercial and retail tenancy should really come in under a tenancy law per se. But retail is a different animal to commercial, for want of a better word. Retail has its own characteristics. Business economics are quite different. You might incorporate commercial tenancy law under the umbrella of retail and commercial tenancy legislation, but it should have its own box per se. You can't treat them similarly. That's about all I have to say. I'm available for any questions.

DR BYRON: We appreciated getting your submission a few months ago. I have

been re-reading it. We are particularly looking for feedback on the draft report, as in the omission or co-mission. If we have overlooked any important element of evidence or if we have misinterpreted or incorrectly analysed the evidence that we have received, this is the opportunity for us to correct such things of omission or co-mission. Would you like to talk a bit more about reactions to the draft report?

MR GILBERT (QRTSA): Reaction to the draft report - I draw my knowledge from people all across the country, from WA to New South Wales to South Australia. The reactions weren't favourable. They felt there were a lot of omissions. If you want me to cover that, I think the best way to do it is for me to do it in writing. I prefer to do it like that, under the QRTSA's banner.

DR BYRON: As you would imagine, we have heard quite a lot from all sorts of tenants and tenants' representative organisations and other organisations about various aspects of the report that they think we have the wrong answer. As I have been telling everybody, we are only too delighted to fix it if they can show us where we have made the mistake or where we have got it wrong. That's the reason for having these hearings. It's a draft, it's amenable for correction. I can tell you now there are quite a few things in it that we plan to change over the next couple of months, based on what people have told us over the last month or so as we have gone around from these public hearings and submissions. I agree that it is probably better if you and the association can put it in writing and spell it out clearly, but we are certainly looking for feedback and input.

Do you mind if I take up a couple of the points that you mentioned a few minutes ago? The big one that keeps coming up over and over again is security of tenure and specifically what happens at the end of a fixed term lease in a shopping centre. To summarise, it seems that one view is that a fixed term means fixed term, and at the end of that the tenant basically has to be prepared to walk away because they have got no guarantee whatsoever that they will get another lease, at the moment, under the current rules. That has profound implications for how much rent they are going to be able to pay and how much they can spend on fit-outs and so on. If the landlord is asking for too much rent or too expensive a fit-out and only offering a short term, then it simply doesn't compute and any businessman would be crazy to put his head in that noose.

A number of the people who have spoken to us have suggested that there should be either an automatic right of renewal of a lease unless the landlord can make a very good case why not. Others have proposed a milder version which is the incumbent has a right of first refusal, which is the South Australian/ACT approach to it. Where does your organisation stand on that?

MR GILBERT (QRTSA): The organisation really stands on using the ACT mechanism. The ACT's is preferable. If you are going to have a fight, fight fairly. Fighting fairly means, "Mr Tenant, I want to offer you a lease." And Mr Tenant says, "Okay. Great." Then along I come and I say, "Right, your rent will be X",

knowing that you are in a disadvantaged position. There are myriad reasons, especially in small business. You might have a \$300,000 loan against that business, and the landlord comes along and says, "You have got to pay X and, if you don't pay X, then I have got another bloke, Y, who will be prepared to pay that." And it's exactly the same business except he effectively steals the business for virtually nothing. But if what happens - I'm offering you a lease agreement, it's got to be a bona fide offer. And you come to me and say, "You're mad. How can I pay this? It's impossible", the moment I have decided to lock horns with you and make you an offer is the moment that the parties should be negotiating. I would be happy or I would suggest it would be perfectly in order if I didn't offer you a lease. Or, provided it was not the same type of business, I have got a genuine reason to change the use of that particular location. From a frock shop I want to put in a food shop or a greengrocer - just taking any idea. I think it should be at the landlord's discretion. What we put forward in our submission was an eight plus eight-year lease. I think that was being a bit fanciful on my part. It's just upping the ante a bit.

DR BYRON: I can understand. If I was a retail tenant, I would love to have an eight plus eight lease in a centre. What we have been told in this hearing is that pigs might fly, too. As an ideal or a target to aim for, I can understand why any tenant would much prefer that than to have what seems to be the current situation where, "You can use that space for five years, but at the end of five years all bets are off and I reserve the right to do something else with it." That certainly comes back to the vulnerability that you mention of the sitting tenant, if their lease isn't expired.

From the discussions that we have had in all these public hearings, basically there are two approaches that arise to sort out that problem of what happens when you have a sitting tenant at the end of the lease and the landlord is threatening to not renew it. You can either put controls on the landlord and say, "You have got to renew it whether you want to or not", or you get the tenant into a situation where, if it's not renewed, it's not going to be absolutely catastrophic and devastating for him. Some of the pretty successful retailers that we have had sitting in the same sort of position you are in now have said, "Yes, of course it's a five-year lease. So I have to run my business so that I'm ready to walk at midnight at the end of year 5." There is no point in saying, "Well, I've still got three more years to write off the depreciation on the fit-out or I'm still going to be paying back the loan for the money that I took to start up the business for the next 20 years or something." If "fixed term" means fixed term and I only have a definite life of this business for five years, whether it's five years or six years or whatever, I have got to run the business so that, if it's not renewed, I'm still alive, still standing. That's pretty hard if the rent is high and the fit-out is expensive and so on. You shook your head when I said you can either put regulatory controls on what the landlord can do or you can empower and lift up the tenants so that they are not in such a disadvantaged situation. How do we get that more balanced negotiation at the end of the term?

MR GILBERT (QRTSA): I think shaking my head was thinking.

DR BYRON: Sorry. I shouldn't have read anything into that.

MR GILBERT (QRTSA): You hear that the minimum became the maximum or the maximum became the minimum, whichever way it was. Commonsense has to prevail. But I sometimes think that these blokes need a bit of a guide. What we try to say is eight years for taxation implications. But maybe a suggested range should be five to eight years. What that does is it forces the parties to think. It forces the parties to say, "Okay. Mate, do you want me to spend \$3000 per square metre on a fit-out? Zero based accounting, how can I do it in five years, and you want X rent? It's impossible. The numbers are not going to work."

DR BYRON: One of those three things has to give. Either the fit-out cannot be as expensive and fancy or the rent has to be lower or the term has to be longer or all three of those things.

MR GILBERT (QRTSA): Perfect.

DR BYRON: But the problem seems to arise is if the tenant gets all the information, gets the good advice, does the sums and it doesn't compute, "I cannot possibly sign this." The landlord then says, "Bad luck, because there is a bloke outside waiting who will sign it."

MR GILBERT (QRTSA): That is happening. I did quite a feisty article about 18 months ago on gazumping, and maybe a bit longer than that, two years ago. It was exactly what you have said. That threat is a terrible threat against any half-intelligent businessperson. That is where John Farrell has said that the ACT mechanism is working extremely well for them. It's a combination of what you were saying, the tenure plus the fit-out plus the rent. And those three factors have to work. But that's only going to work, in my opinion, if there is a genuine requirement to make a genuine offer. "We genuinely want you. We are going to have genuine negotiations now."

DR BYRON: In good faith.

MR GILBERT (QRTSA): In good faith. That is an area that is just not happening. If you can have that, it would really get to the core of negotiation difficulties. And then there are other peripherals.

DR BYRON: A number of people have said to us that that's basically the problem at the moment, there isn't good faith negotiation and we need some sort of circuit breaker or some way of putting trust and confidence and a bit of mutual respect back into the system because it seems to be lacking.

MR GILBERT (QRTSA): If you look at the RICS submission, they also put in end of lease is an area that must be teased out. That is what we are doing at the moment.

DR BYRON: One of the problems perhaps with statistics like the high percentage of leases in the ACT where the existing tenant is offered a second lease, that doesn't necessarily tell us how happy they are with the terms of that second lease. And as somebody said to us rather colourfully in Sydney, no, the retailer hasn't died, but he may be in intensive care on life support. He is still there.

MR GILBERT (QRTSA): Some of us live off the carcasses of dead retailers, I promise you that.

DR BYRON: I better not pursue that too far. Certainly some of the people who came to the ACT hearings didn't seem to suggest that everything there was a paradox. Anyway, that is certainly something that we need to follow up. If there are some interesting special features in the way the ACT system works that gives it a much higher level of success and satisfaction and win-win outcomes for both the landlords and the tenants rather than lose-lose outcomes, that would certainly seem to be something that should be brought to the attention of all the other jurisdictions.

MR GILBERT (QRTSA): Can I suggest there that I have written a paper settling rental and other retail lease disputes by expert determination. Someone from your office called for that paper. It's going to be published pretty soon, I now understand.

DR BYRON: I look forward to reading it.

MR GILBERT (QRTSA): Unless you have had at least two glasses of red wine before, may I suggest rather not, because it's one of those things that has been fairly well researched and it's pretty boring really. But in the ACT I think there is a degree of - and generally out there, there is a degree of understanding of the market review process. I have been a writer in that for many years now. The more I think I know, I'm meant to be an expert, it is a very difficult area to get your head around, and understanding what two well informed parties to a contract should negotiate, number 1; and, number 2, what the experts should determine the rent at. You have these competing interests. That's why the valuer needs a bit of protection. And New South Wales has that. We do not have that here. But that might be looked at in due course. I'm just answering what you were saying in a roundabout way. In the ACT they have the mechanism there but people don't understand it and they don't know how to use it.

DR BYRON: In terms of the market for retail tenancy leases, the way some people have put it to us is that, if you look in terms of supply and demand, there is

a relatively small fixed supply of high-quality retail space, and there seems to be a very great demand from retailers who would like to get into that high-quality retail space. So, supply and demand would say you would expect the prices to go up. But if hypothetically in, say, Canberra there was quite a lot of high-quality retail space and the number of people who wanted to set up small retail businesses was not that great, you would end up with much less pressure, much less imbalance in the system similar compared to, say, Sydney CBD. Any reaction? Does that sound plausible?

MR GILBERT (QRTSA): I would say to you that this is a very, very cleverly engineered way the system has of getting people into leases. It is far deeper than what anyone really understands. There are few of us consultants out there that really understand the mechanism well. In fact, some consultants are not independent. Some retail consultants are acting for the landlord and they are hooking in and locking in businesspeople and ordinary people with their capital into leases. Some so-called independent consultants out there are not independent. They are working very much for the landlord.

DR BYRON: You see large managed shopping centres as a way of basically transferring wealth from small people's own savings or superannuation funds to the assets of the big landlord companies?

MR GILBERT (QRTSA): I identified that many years ago. Malcolm Macrae was a chap in here earlier. He has even got a better understanding about it than I have. But that effectively has been what is occurring. To quote, "These guys aren't harvesting, they're mining." And that's what you are saying over here; they are gouging the one party's assets over the other. If you talk to Milton Cockburn and those blokes, end of lease is the thing that they have fought to keep out. If you look at Alan Briggs' commentary, and that is in my submission over here, Alan Briggs recognised that.

Point number 10 quotes Alan Briggs, "Turning to rental renewals with a sitting tenant and the concept of market rent, we have as an industry formally recognised the issue of the sitting tenant and the problem of market rent on renewal, which is one of the most vexatious issues that faces all of us. It is a key component of retail argument right the way round the country." This is going back to 1997.

DR BYRON: Yes.

MR GILBERT (QRTSA): He continues, "We are actively working with the Australian Retailers Association and are committed to seeking a resolution. Indeed, one party has put together some preliminary work which we will work on to see if we can get it to fruition." That was well recognised at that point in time. Ian Newton, also of the Westfield Group, has said that you have to start up your business, you have got to run it in five years and that's it. The only way that is

working is price gouging one party over the other party. They have teams of leasing executives in place that are really working ordinary businesspeople over, to get them in, the new fit-out, the higher rent, "If you don't pay, someone will." They have perfected that. If you look at the flipside of that, my valuer colleagues are valuing some of those assets out there. They are instructed to value at passing rent. It's not at market rent. So, the valuation of the asset is not market value, it's above market value. You know what has been happening in the marketplace; I don't need to tell you.

DR BYRON: The balance sheets get inflated. That quote continues:

Mr Briggs: There is no goodwill.

Chair: No goodwill?

That does seem to be a pretty accurate description of how the rules of the game are played at the moment. One part of the problem is that I think many of the small retailers don't actually know what the rules of the game are as played in the shopping centre. If it was spelled out in big red letters on the front of the lease that says, "This lease is for five years and there is no guarantee whatsoever that you will still be in this space after that," people would at least know where they stand. But I suspect that a lot of people at the moment are assuming that, "Well, as long as I keep my nose clean and pay the rent I'll get a second term, and then I will be able to pay the loan and then depreciate the rest of the fit-out, et cetera." Then if the worst happens and they don't get a second lease, everything hits the fan. One way of sorting that out is to make sure people know exactly what they are getting into and what they are not getting into.

MR GILBERT (QRTSA): It's probably useful to say at this point in time I think that there is a bit of a cultural issue over here. A lot of people just get led. "Sign here." "Yeah, I'll sign there." And they hope that it's what you are saying. You can put up as many warning signs. Many small businesspeople go in on the basis that she'll be right.

DR BYRON: If somebody has been a public servant or in the military or working for CSIRO or whatever and at the age of 55 takes his super and says, "I know what I'll do. I'll go into retailing."

MR GILBERT (QRTSA): It's emotional.

DR BYRON: They very stupidly think that retailing is easy and anyone can do it, which I now understand is profoundly wrong. They also think that, if they can get a space in a retail centre, the money will drop from heaven. We have also found out about that. People are parting with their hard-earned lifesavings or whatever on some very, very rose-tinted optimistic assumptions.

MR GILBERT (QRTSA): What we tried to do in Queensland was to get the accountant and the solicitor to sign off on the way into leases. I have just had a case of a client who went into one of these leases. The accountant charged him \$5000 for the privilege of doing a business plan based on his figures. The solicitor charged him \$7000. So, that was \$12,000. Within one year he has lost \$150,000. He is a fiery chap. I'm not going to say anything because it will be in the tribunal fairly soon.

DR BYRON: A lot of people have said to us, "Look, that's a good way of protecting people who are inexperienced, make them get expert professional advice." But what that one example suggests is that, even if you do get expert advice and pay for it, it still doesn't guarantee that the business will be viable. There are still any number of other things that can go wrong, or the advice may not be worth what you paid for it. But we don't know that. There is any number of reasons why a business can fail, only one of which relates to the lease. The others could relate to staffing or pricing or product selection.

MR GILBERT (QRTSA): Many, many other things.

DR BYRON: In this inquiry we are focusing on the lease.

MR GILBERT (QRTSA): A lot of accountants, in my opinion - and I'm from a family of many accountants, or they are all chartered accountants - many accountants that I come across don't understand, they are taxation accountants, going through the numbers. I have done hundreds of these things. It's not really difficult to do, to find out what is a fair and reasonable rent. In fact, that's my paper. Rent is a residual after you have allowed for all your reasonable operating expenses, come up with a reasonable formula for amortising your fixtures, fittings, plant and equipment over your tenure, your term. And, okay, as a residual component what would the rent be? I wrote a paper in 1995, "Market rent, what is it?" And I came up with that formula then. But Malcolm Macrae uses that methodology as being zero based accounting. I have also used that methodology.

In a shopping centre in a controlled environment you can fairly well predict what a business is going to be turning over, particularly if you have got access to the sales figures, access to the category sales figures. You look at the location, "Is it an A, B, C, location?" You can track those numbers. I think we would probably be better at it than a lot of the shopping centre managers themselves, because we have probably got those sorts of brains. You can see in the last three years the centre has gone this way, the specialty shops have gone in this way, the category has gone in that way, whoops, it went down. Why did it go down? Another two or three competitors were introduced. The turnover per square metre falls; the category itself might be up, but the turnover per square metre might fall.

All I'm trying to say is that a business owner could have a reasonable idea of what his sales are going to be. You can go into retail business and have a look at it and on observation you can say, "Yes, this business should be doing X, should be doing Y, et cetera, et cetera." There are many reasons, but I think the most vexed issue is this end of lease. If you guys could get that right. The guideline is the ACT, in my opinion.

DR BYRON: That seems like a noble task for us to pursue vigorously. I think you are right; if we could make a significant improvement there, then we have done something worth while.

MR GILBERT (QRTSA): QRTSA wanted me to say that we support the following. I'm going to your review of selected submissions, 4 September 2007. Under the QRTSA points put forward, Ian Baldock, who signed off on the submission, sees longer tenure and sufficient amortised set-up costs as being important; prescriptive end of lease dispute resolution mechanisms, they reckon that is important; access to transparent sales and retail data, that is important; freedom to procure set-up costs in an open market; and then prohibit reletting to similar tenants. He was of the opinion that relinquishing tenancy law to federal level - had no problem with that. And then grab the best of everything that's out there.

My opinion is that the state mechanisms are in place already and you don't want to completely reinvent the wheel. That's ridiculous. There is a wide body of knowledge there. There are people who can answer those questions. I phone in to Retail Tenancies over here and I always get some guidance if I am looking for something.

DR BYRON: That is a very interesting point of practicality, about whether the Commonwealth government actually has a head of power to do this. There are a few people who have said to us in the hearings that the last thing we want to do is add an additional layer of bureaucracy. If there was going to be some sort of uniform national regulation, template, Ombudsman, code of conduct or something like that, you would hope that the states would actually be part of that and it would be instead of not as well as. But there doesn't seem to be anybody on either side of this debate that is in favour of more layers of regulation.

MR GILBERT (QRTSA): No.

DR BYRON: We might be in favour of smarter regulation or more effective regulation, but I don't think anybody wants more red tape.

MR GILBERT (QRTSA): No more red tape. If you can get that power imbalance sorted out - and it really is unfair. Just a little bit about my background, we had retail business tenants in our properties for years, 20, 30 years. It wasn't this five-year stuff. We had good relationships with all our tenants. I can't see

why it shouldn't be the same relationship. It has just got more and more adversarial. I watched it get more and more adversarial over the years. It doesn't need to.

DR BYRON: We have had a couple of really inspirational examples of where a retail business was getting into trouble, and rather than turfing them out the landlord did actually give some rent reliefs and promotional assistance and put in someone as a mentor, counsellor, adviser, third party. And over the next three months they got the retail business back on its feet, and then it was in a position that everybody lived together happily ever after. Unfortunately, that seems to be the exception rather than the norm, but it tells me that it is possible with a bit of goodwill to help somebody who is getting into trouble rather than just sort of flicking them and bringing in the next one.

MR GILBERT (QRTSA): I have a matter at the moment, and I can talk about it, Portside. The whole state government gave the land to Multiplex to deliver a world-class cruise ship terminal. It's both a retail and cruise ship terminal facility. I got requests to represent a lot more of the business owners there and I said, "No way. I'm not prepared to take on a lot. I'm prepared to take on three, four, five." They are now working through it. I confronted the senior guys at Multiplex. I said that this can't carry on and this is not working. The local management over here were in denial and it was only when I knocked on the top door and I said, "This is what is going on. Now, it needs to be fixed," that they are getting together and sorting it out.

A lot of the time there isn't the will to do it and there is a very aggressive attitude by some of the institutional guys. They are milking those people. You see the share market going up and down. That's because people now know what is going on. Their rental income streams are on much shakier ground. I would suggest to you that, had there been an end of lease dispute resolution mechanism in place going back to Alan Brigg' days, the industry would be a lot more stable, it would be a lot more amicable, people would be happy to shake your hand and have genuine in good faith negotiations. That is what business is about.

DR BYRON: That exhausts my list of questions. Was there anything else you wanted to say by way of closing comment?

MR GILBERT (QRTSA): I will have a look at the submission and go back via Ian Baldock. Are you happy with that?

DR BYRON: Yes. Thank you very much.

MR GILBERT (QRTSA): Thank you very much for having me.

DR BYRON: I said this morning before we started that there would be an opportunity before we closed today's proceedings for anyone in the room who

wanted to come forward and say their piece on the public record. Going once, going twice. Can I thank you all very much for your interest and enthusiastic participation during the day. We will adjourn and resume on Wednesday morning in Melbourne.

AT 2.43 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 13 FEBRUARY 2008