



**SECOND SUBMISSION by
THE PHARMACY GUILD OF AUSTRALIA to the
PRODUCTIVITY COMMISSION**

INQUIRY INTO THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA

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1. The Pharmacy Guild of Australia

- 1.1 The Guild is a national employers' organisation registered under the *Workplace Relations Act 1996*, which functions as a single legal entity rather than a federation. It was first established in 1928 and currently has Branches in every State and Territory.
- 1.2 The Guild's members are the pharmacist proprietors of some 4,500 community pharmacies, which are small retail businesses operating throughout Australia. Almost 80% of all pharmacist proprietors are Guild members.
- 1.3 Community pharmacy makes a significant contribution to the Australian economy with an annual turnover of \$8 billion and \$200 million in tax revenue, employing some 15,000 salaried pharmacists and 25,000 pharmacy assistants.
- 1.4 Through the Pharmacy Assistant Training Scheme, the Pharmacy Guild provides a significant career path for young Australians, particularly young Australian women.
- 1.5 The Guild's mission is to service the needs of proprietors of independent community pharmacies.
- 1.6 The Guild aims to maintain community pharmacies as the most appropriate primary providers of health care to the community through optimum therapeutic use of medicines, medicine management and related services. A range of services are provided to members including:
 - (a) to negotiate an ongoing Agreement between the Government and the Guild to facilitate suitable conditions for approved pharmacies to dispense under the PBS, including an appropriate level of remuneration;
 - (b) to maintain close liaison and negotiation with governments, manufacturers, wholesalers and other organisations involved in the health care delivery system;
 - (c) to implement strategies to enhance the professional role of pharmacists and to assist community pharmacists practising in rural and regional areas of Australia to ensure that the current network of community pharmacies in Australia is maintained; and
 - (d) to provide economic and management information to community pharmacists to assist them in making their pharmacies more efficient.

2. Responding to the inquiry

2.1 The Pharmacy Guild of Australia welcomes this further opportunity to make a submission to this inquiry.

2.2 As the Commission would be aware, the Guild has made presentations in each jurisdiction in which the Commission conducted hearings following the publication of its draft report *The Market for Retail Tenancy Leases in Australia* (the **Draft Report**), providing information relevant to the operation of the retail tenancy market in that jurisdiction.

2.3 The Guild objects to the somewhat flippant observation contained on page 78 of the Draft Report that:

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

2.5 The available evidence is that there is inequality of bargaining power between landlords, particularly shopping centre landlords and tenants, with significant rent increases typically extracted at the time of rent renewal. Tenants have no warning of the likely situation they are about to face at lease renewal time because large shopping centres keep the people involved with the day to day management of the centres separate from the 'negotiating teams' who are likely to be persons the tenant has never met.

2.4 As the President of the Pharmacy Guild told the Commission in evidence:

Where the market is going is a lot of these major groups have what we call - and I'm sorry to add to this war scenario - we call them the "kill teams". The kill teams are the three or four expert negotiators who are flying in. We've never met them before. I could be in this centre for five years. I have known Joe, the centre manager, for five. We're mates. We could even - you know, often their wife or the husband is on medication. So I'm looking after that person. He says, "Look, sorry, Kos, I'm not going to be doing the rental negotiations. We've got these - the boys from Melbourne are coming up" - I'm talking about Queensland now. "The boys from Melbourne are coming up and they're going to negotiate the deal." I had no sense, Commissioner - like, you know, there's this environment that all is going swimmingly well.¹

2.6 The effect of zoning laws is that they encourage the creation of 'retail areas'; large shopping centres under the management of one organisation, which leads to the "micro-managing" of small tenants. This phenomenon is increasing in the major cities where the majority of Australian population resides.

2.7 This submission:

- reviews submissions made at the hearing;
- comments on the Draft Report; and
- provides the Guild's final observations.

¹ Transcript of Proceedings Productivity Commission *Inquiry Into the Market for Retail Tenancies in Australia* (transcript) p.655

3. The main distorting element of the retail tenancy market - zoning instruments

3.1 The Commission said at p.207 of its Draft Report:

Entry and exit in the shopping centre segment may be tightly controlled. However the shopping centre package is a retail tenancy arrangement that tenants can either accept, negotiate around or reject in favour of other tenancy options elsewhere.

3.2 However, it is not that easy.

3.3 As the Westfield Group said at page 15 of its first submission²:

Planning laws in place throughout Australia which limit the location of retail development....obviously have a constraining impact on the supply of retail space, particularly when one compares with the Australian retail space landscape with other countries, such as the United States, where planning space is far less regulated..... Australian planning laws which, by agreement between the various states support a "centres policies" approach (concentrating commercial and retail activities in designated urban centres served by public transport) are designed to create an orderly and sustainable system of urban development which is environmentally sound and which minimises unnecessary car use and traffic congestion whilst optimising the conditions for sound investment in private and public infrastructure.

3.4 Increasingly, shopping centres are being presented as being "community centres" or "community hubs". Residential level shopping centres and "strip" commercial developments are becoming less of a factor in the Australian retail space. To make the point of shopping centres becoming community centres, one only has to look at the new mix of tenants in shopping centres, which include pubs, cinemas and external restaurants.

3.5 The operating premise of the Commission appears to be that a retailer is free to move to cheaper accommodation if a shopping centre tries to extract too much in rent.

3.6 However, it is increasingly the case that in many areas, particularly the designated "growth corridors" of Australia's major cities, alternative trading space is unavailable.

3.7 As the Shopping Centre Council told the Commission:

For many years governments in Australia, and also in the UK and many other countries, have required retail and other commercial developments to co-locate in urban centres or activity centres, as they're called in Victoria, with established public transport services and infrastructure and have prohibited them from locating outside such centres.³

3.8 This has led to developments such as the Rouse Hill development, in Sydney's northwest.

3.9 An article on the shopping centre published on page 12 of the *Daily Telegraph* of 18 February 2008 is contained in **attachment 1**.

3.10 This is the nature of shopping centre development in the 21st century.

² Submission 85

³ Transcript p.81 The Western Australian Government also imposes a retail floor limit on shopping areas in Perth – *Statement of Planning Policy 4.2 – Metropolitan Centres Policy*

- 3.11 The Guild notes the oral testimony from the Shopping Centre Council's representatives when they said:

In economic terms, governments have intervened in the market in this way in order to minimise the environmental and economic cost to the community of dispersed retail and commercial developments and to maximise the public benefit. The costs include greater traffic congestion and air pollution as people make multiple car trips, to disperse shops and offices, greater demands on scarce public resources for **duplicated infrastructure and the blight caused by half empty town centres and shopping centres.**⁴ (emphasis added)

- 3.11 On one analysis, one person's duplicated infrastructure and half empty town centre/shopping centre is another's alternative retail space that a tenant such as a pharmacist can move to if a shopping centre seeks too much rent – a necessary precondition for a properly functioning retail tenancy market.
- 3.12 The Guild accepts the accuracy of the submission of the Shopping Centre Council. It means that increasingly, alternative retail space outside of shopping centres is not available.
- 3.13 It equally means that the Commission's basic operating premise on the functioning of the retail tenancy market is increasingly tenuous.
- 3.14 Zoning instruments have the effect of limiting the ability of retailers to locate in a manner that would be regarded as being theoretically economically rational.
- 3.15 As Professor Zumbo from the University of NSW told the Commission:

Efficient markets require low barriers to entry and contestability within those markets, very simple economic principles. If you have high barriers to entry, what happens is that people can exploit their market power to derive monopoly rents to the detriment of consumers. In the shopping centre market, it would appear that there are very high barriers to entry. You simply can't open up a shopping centre. There are zoning laws. Those zoning laws prevent or deter new entrants to the market. So the theory of contestability says that if markets are contestable, that will keep everyone honest because if markets are contestable, if one particular player in the market is extracting monopoly rents, that will attract others into the market to secure some of those monopoly rents or profits from themselves. But if you have - and this occurs in other industries - bottleneck facilities like refineries or you have a monopoly in relation to a shopping centre where people cannot build a shopping centre next to you or very close to you because of zoning laws, that's a very high barrier to entry, and that very high barrier to entry means that that market is not contestable.⁵

- 3.16 Because it is not an efficient market, retail tenancy legislation is not only required, but it requires strengthening. It also needs to be nationally consistent.

⁴ Ibid

⁵ Transcript p.331

4. Information asymmetry and inequality of bargaining power – another market distorting element

- 4.1 The evidence available before the Commission is that information asymmetry and inequality of bargaining power exists.
- 4.2 When entering into a lease, there is difficulty in being able to “benchmark” what similar tenants in similar complexes are paying.
- 4.3 Small businesses such as pharmacies are obliged to deal with professional managements representing a very small number of landlords, with significant experience in negotiation, who are capable of extracting what the Commission regards as “hard bargains” relying on both the lack of market knowledge of the tenant and the fact that many small tenants must borrow heavily to invest in their business, and simply can’t “walk away” from their investment.
- 4.4 As the President of the Pharmacy Guild told the Commission:

If I could move, Commissioner, please, to the area of transparency. I know you have already heard probably time and time again about the issue of transparency and information asymmetry that exists between landlord and tenant. We'd like to get straight to the point on this issue. The Commissioner said that a great deal of information is already available. Can I give you a perspective again from a pharmacy on a specific issue. Pharmacy typically is bundled in market sectors such as beauty and cosmetics if a pharmacist takes the time to get information in terms of data on rentals. Many of these locations such as beauty kiosks are in smaller locations therefore the rental per square metre is at a much higher rate than what a pharmacist faces. So it is our view that at best this information is not useful and at worst it's mischievous. In fact our advice to our members is to ignore this specific data.
- 4.5 A number of submissions have been made to the Commission to obtain meaningful information in a convenient form. The Guild proposes a possible method later in this submission.

5. Renewal and rent escalations

- 5.1 In the oral hearings, the Commission spent some time exploring the issue of lease renewals.
- 5.2 It tested the hypothesis that a lease “renewal” should be regarded as being a lease “replacement”.
- 5.3 It particularly tested the premise that a tenant should not presume that a lease be renewed, and that it could be possible that if a lease is renewed/replaced a tenant could be faced with a lease with a new set of conditions and a greatly increased rental.
- 5.4 In one sense, it is legally accurate to say that in most Australian jurisdictions, there is no legally enforceable right to receive a renewal, and that even in those jurisdictions where sitting tenants have a notional first right of refusal, there are ample statutory exemptions that can negate the exercise of that statutory right – for example, a landlord wish for a change in the tenant mix of the shopping centre.
- 5.5 That said, it is noted at page 104 of its Draft Report, the Commission made a draft finding that (amongst other things), the majority of retailers in these centres are offered lease renewals.
- 5.6 Moreover, most of the remedial retail tenancy legislation deals with a concept called “renewal”.
- 5.7 For example, section 44A of the *Retail Leases Act 1994* (NSW) reads:

44A Negotiations for renewal or extension of lease

(1) A lessor of a retail shop must not, by written or broadcast advertisement, indicate the availability of the shop for lease or invite tenders or expressions of interest for tendering, during the term of the lease, unless:

(a) the lessor has offered the lessee a **renewal** or extension of the lease under section 44 (1) (a), the offer has not been accepted and (not earlier than one month after the offer was made) the lessor by written notice informs the lessee that negotiations are concluded without result, or

(b) the lessor by written notice informs the lessee that the lessor does not propose to offer the lessee a **renewal** or extension of the lease and there are no arrangements to allow the lessee to remain in possession of the shop, or

(c) the lessee by written notice informs the lessor that the lessee does not wish to enter into negotiations for the **renewal** or extension of the lease or that the lessee wishes to withdraw from the negotiations, or

(d) the lessee has vacated or agrees in writing to vacate the shop, or

(e) the lessee consents in writing to publication of the advertisement.
Maximum penalty: 50 penalty units.

(2) This section does not affect the industry practice of testing the market, otherwise than by written or broadcast advertisement, in connection with the leasing of a retail shop.

(3) This section does not apply to a lease of community land within the meaning of the Local Government Act 1993.

5.8 The Commissioner said during oral hearings:

But so many of the submissions that we've received, and from people coming to the hearings, are saying, you know, "We understood that if we paid the rent every month" - and most people did - "that at the end of the term, whether it was five years or whatever, the lease would be renewed." So there was that understanding and expectation that, "I'm building up a valuable business," and so on, and when the lease expires and they find out there may or may not be a second lease and it may be on quite different terms and conditions, that's when people feel like they've just been cheated. The word "renewal" may contribute to that.⁶

5.9 However, the level of rental renewals and the language of rental tenancy legislation have led to the development of the practice for lenders to offer loans requiring amortisation over a period longer than the originally offered lease.

5.10 In the context of pharmacy:

- the cost of stock for pharmacies that must be covered by the pharmacist is generally \$1426sqm;
- fitout costs average \$1300sqm, with some major landlords requiring specific forms of fitout that can add up to \$200sqm. Some also require fitouts to be conducted/upgraded periodically; and
- other costs such as procurement of a pharmaceutical benefits scheme number and other establishment costs average out at \$300,000 per pharmacy; because of the practical difficulty in amortising such a loan over the standard length of a retail lease; therefore
- it is common practice that financiers make an assessment of the capacity of the pharmacist as a business operator and will advance loans over a 10-15 year period – well and truly longer than the average retail tenancy.⁷

5.11 Further information is contained in the document *Pharmacy Business Models and Viability*, contained in **attachment 2**

5.12 In passing, the Guild has noted the comments contained part 6.5 of the Shopping Centre Council of Australia's second submission⁸.

5.13 It should be noted the assertion "that these location restrictions were introduced by government at the pharmacy industry's request in order to limit potential competitors"⁹ is factually erroneous.

⁶ Transcript p.64

⁷ SOURCE: JR Pharmacy Services – Johnson Rorke Chartered Accountants

⁸ Submission 197

⁹ Submission 197, p.40

- 5.14 These rules were introduced by the Hawke Government in 1991 after it argued that there were too many pharmacies in Australia, which were causing market inefficiency.
- 5.15 Most importantly, location rules were designed to maintain a network of accessible and viable community pharmacies throughout Australia including in rural and remote areas – a stated objective of government policy in this area.
- 5.16 As argued throughout the public hearings, the greatest threat to this network today is the monopoly power handed to shopping centres around Australia through zoning restrictions.
- 5.17 The Guild finally notes the Council continues to use imperfect data, which in turn, delivers a imperfect argument.
- 5.18 The Urbis figures quoted in the SCCA Submission groups pharmacy and cosmetics. They are simply two different market sectors, with no particular interrelationship with each other. It is well documented that cosmetic stores have smaller retail footprints, and can even have 'island' locations in the middle of the mall. These formats have higher rentals. Combining this format with pharmacy data increases the average rental per square metre giving misleading information regarding 'expected' rents.
- 5.19 The Guild again refers to the comments made by the President of the Pharmacy Guild, referred to in paragraph 4.1 of this submission.

6. Unconscionable Conduct

6.1 It is helpful to repeat what the Guild said in its first submission to the commission.

4.8 It is noted that the explanatory memorandum to the Trade Practices Amendment Bill (No.1) 2007, currently before Parliament, says that the Bill adds "the capacity of one party to unilaterally amend a contract" to what is described as the "non-exhaustive list of matters" that *can* be considered when considering whether a party has displayed unconscionable conduct.

4.9 Recent cases that have considered the section, such as *Bowen Investments Pty.Ltd v. Tabcorp Holdings Ltd* and *Coggin v. Telstar Finance Company (Queensland) Pty.Ltd* have held that the notion of unconscionability used in the section is wider than that recognised by the common law in Australia.

4.10 However, as the Full Federal Court said in the leading case of *Hurley v. McDonalds Australia Ltd*:

For conduct to be regarded as unconscionable, serious misconduct or something **clearly unfair or unreasonable**, must be demonstrated - *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. Whatever "*unconscionable*" means in sections 51AB and 51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions **showing no regard for conscience**, or that are **irreconcilable with what is right or reasonable** - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term "*unconscionable*" import a **pejorative moral judgment** - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283-4 and 298.13

4.11 It is also noted that the NSW Court of Appeal has said in *Attorney-General of New South Wales v. World Best Holdings and Ors* in relation to NSW legislation being similar in construction to section 51AC:

121 The Ministerial Second Reading speech, quoted above, **indicates a similar concern to distinguish what is unconscionable from what is merely unfair or unjust**. Even if the concept of unconscionability in s62B of the *Retail Leases Act* is not confined by equitable doctrine, as the decisions under s51AC of the *Trade Practices Act* suggest, **restraint in decision-making remains appropriate. Unconscionability is a concept which requires a high level of moral obloquy**. If it were to be applied as if it were equivalent to what was "fair" or "just", it could transform commercial relationships in a manner which the Minister expressly stated was not the intention of the legislation. The principle of "unconscionability" would not be a doctrine of occasional application, when the circumstances are highly unethical, it would be transformed into the first and easiest port of call when any dispute about a retail lease arises.

.....
123 There is a suggestion that the Tribunal in the present case may have adopted an unacceptably low standard. After setting out its conclusions, the Tribunal found: "we consider the conduct of WBH to be quite unacceptable ... having regard to normal industry standards and practices" (at [69]). It then proceeded to determine what were called "the legal issues", including unconscionability, by identifying which of the considerations in s62B(3) of the *Retail Leases Act* were applicable without further analysis of matters of fact and degree that need to be considered when applying a test of unconscionability. **If, as appears likely, a test of "unacceptable conduct" were adopted, this is a far lower standard than unconscionability.**

124 The matters to be considered under a retail tenancy claim, turning on the contract and well established doctrine, were intended by Parliament to continue to have considerable scope. The Parliament was careful to ensure that the **amorphous and ambiguous term, "unconscionability"**, did not come to completely override the legal rights and obligations created by the lease relationship. Parliament did not intend that "unconscionability" claims could be made so readily as to virtually take the place of retail tenancy claims. They needed to meet a high standard of moral obloquy

- 6.2 It is clear from the evidence that the legal concept of “unconscionable conduct” does not quite cover the mischievous behaviour that the law intends to cover – the “unfair” treatment of tenants.
- 6.3 Probably what is needed are provisions contained in something like the *Independent Contractors Act 2006*.
- 6.4 This legislation deals with the same policy issue as retail tenancy legislation – the inequality of bargaining power between thinly capitalised business people and more highly capitalised corporations.
- 6.5 These could be conveniently contained in a code of practice made under the *Trade Practices Act 1974*, and would be compulsory in effect.
- 6.6 The proposition is discussed in more detail later in this submission.
- 6.7 The next section discusses the recommendations of the Commission contained in the Draft Report.

7. Comments on recommendations contained in the draft report

DRAFT RECOMMENDATION 1

The following measures should be pursued by State and Territory governments to further improve transparency and accessibility in the retail tenancy market.

- **Enhance the use of simple language in all tenancy documentation and provide clear and obvious contact points for information on leases and dispute resolution.**
- **Elaborate the significance of jurisdictional differences in the definition of unconscionable conduct and align definitions where practicable.**

- 7.1 The Guild agrees with the Commission's recognition with respect to greater transparency and accessibility.
- 7.2 The legal concept of "unconscionable conduct" has its own legal meaning, and is probably misapplied in the context of retail tenancy legislation.
- 7.3 The Guild wishes to propose an alternative, discussed later in this submission (at 8.19–8.24), with detail at **attachment 5**.

DRAFT RECOMMENDATION 2

State and Territory governments should seek to improve the consistency of lease information across jurisdictions in order to lower compliance and administration costs. They should:

- **Encourage nationally consistent (plain English) models for retail tenancy leases and for tenant and landlord disclosure statements (for example, all jurisdiction and other specific provisions could be set out in annexes to the standard documents).**
- **Institute nationally consistent reporting by administering authorities on the incidence of tenancy inquiries, complaints and dispute resolution**

The Commission invites comments on the feasibility and benefits of more widespread lease registration and facilitation of this process by landlords

The Commission invites comments on the feasibility and benefits associated with the introduction of a voluntary national code of conduct for shopping centre leases enforceable by the ACCC.

7.4 The Guild agrees with recommendation 2.

7.5 The Guild agrees there should be some central recording of information to allow a retailer proposing to negotiate with a shopping centre to “benchmark” the real state of the market.

7.6 However, compulsory lease registration may not be the most appropriate method to move forward. As the Law Institute of Victoria told the Commission:

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

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

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

7.7 The Guild proposes an alternative later in this submission.

7.8 See also the comment to recommendation 4.

DRAFT RECOMMENDATION 3

State and Territory governments should relax key restrictions in retail tenancy legislation to better align the regulation of the retail tenancy market with the broader market for commercial tenancies.

7.9 The Guild does not agree with this recommendation.

7.10 It is contrary to the evidence provided to the Commission during the inquiry process.

7.11 As the Australian Retailers Association said:

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

Retail, especially relating to shopping centres, is not able to go down that road. Quite clearly, part of that is to do with zoning, and I think you've possibly recognised that in your last recommendation 5, but that perhaps does need to be explored. We also would like to put that we have over the years looked at voluntary codes, and in terms of New South Wales we originally started with a voluntary code. Unfortunately, it didn't quite work to the extent that parties would have liked it to do. Parts were cherry-picked to suit the purpose and large parts were ignored, especially some of those that were key parts.¹⁰

7.12 The Guild agrees with this submission. It would not be logical to align retail and commercial tenancy legislation, as different dynamics are at work in each market – driven in part by planning legislation.

7.13 This recommendation should be abandoned.

¹⁰ Transcript p.54

DRAFT RECOMMENDATION 4

As unnecessarily prescriptive elements of retail tenancy legislation are removed, State and Territory governments should seek, where practicable, to establish nationally consistent template legislation for retail and commercial tenancies available to be drawn down to each jurisdiction.

7.14 The Guild agrees that greater national harmonisation of retail tenancy legislation is desirable.

7.15 The Guild agrees with these observations from the Law Institute of Victoria:

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

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

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

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

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

MR REDFERN (LIV): Well, if it's good enough for a code why shouldn't it go in legislation or be made compulsory?

7.16 Regulation should be contained in a compulsory code of conduct underpinned by legislation, and enforceable by the ACCC. Such a code would effectively replace state based legislation.

7.17 Although recent case law would suggest that the Commonwealth has the capacity to regulate under pl.51(xx) of the *Constitution*¹¹, to remove any doubt (and duplication) the states should probably vacate the field and refer responsibility for the regulation of retail tenancies to the Commonwealth pursuant to pl.51(xxxviii) of the Constitution.

7.18 Such regulation should deal with the subject matters discussed later in this submission.

¹¹ *New South Wales v. Commonwealth* (WorkChoices) 231 ALR 1

DRAFT RECOMMENDATION 5

While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

7.18 In its Draft Report the Commission canvassed the social reasons why retail space has been consolidated.

7.19 As the Shopping Centre Council of Australia observed in its second submission:

All Australian Planning and Transport Ministers have committed to this 'centres policy' approach through the *National Charter of Integrated Land Use and Transport Planning*, which "seeks to ensure that the bulk of goods and services are located at hubs and linked effectively by an efficient transport system" which "allows for the optimisation of investment decisions and better use to be made of existing infrastructure and services". This objective seeks to ensure that provision of public goods is efficient and that social and environmental externalities are minimised.

Retail developments that are permitted outside these urban centres generate their own demand for road and transport infrastructure and, in a constant climate of scarce public resources, this will inevitably be at the expense of continuing public investment in designated urban centres. Out-of-centre developments which generate significant transport demand (such as major retail developments) are therefore to be discouraged because of their significant community and environmental cost.

In NSW, for example, the concentration of commercial and retail activities in urban centres has been the basis of planning laws for over 40 years. During this period, many shopping centre developers (like some retail outlet centre developers today) wanted to locate in stand alone, out-of-centre locations, as developers were able to do in the United States. They were, however, largely prevented from doing so and instead were required to locate in existing centres. That is why, today, the vast majority of major Sydney shopping centres are located in urban centres, with obvious community and environmental benefits. Some other states which did not impose such requirements decades ago, such as some parts of Queensland, are now confronting the problems that dispersed retail development has generated.¹²

7.20 It is not plausible to think that these policy settings will change merely because of the effect it has on competition.

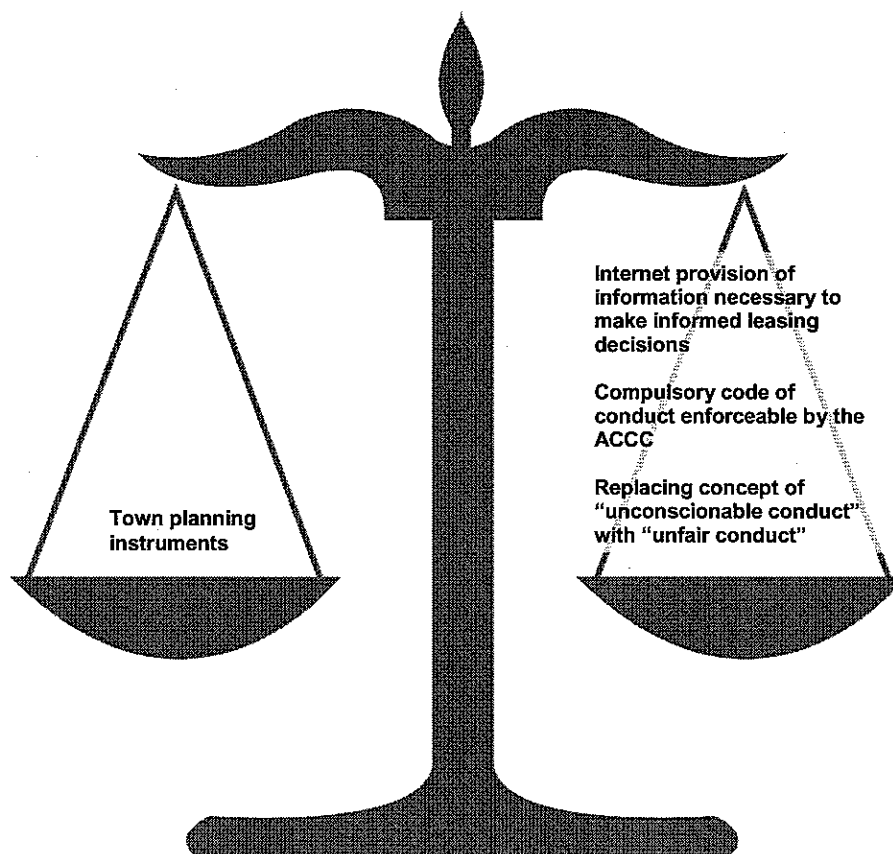
7.21 For that reason, retail tenancy legislation should be retained and enhanced in the manner set out in the final part of this submission.

¹² Submission 193, pp 30-31

8. Way forward

DR BYRON: (A Sydney solicitor) made what I thought was a very, very pertinent observation that the leases we all know and love that evolved over the last 200 years in a sort of a High Street strip-shopping sort of format - he said, "They don't seem to be quite the right instrument for this new concept of the large managed shopping malls. We need something else, but I don't know what it is."¹³

- 8.1 The Guild concludes this submission by putting forward some suggestions that could be incorporated into the Commission's final recommendations.
- 8.2 For the reasons discussed earlier, there needs to be a counterbalance between the advantages held by shopping centres and the legitimate interests of retailers.



- 8.3 These are some possible ways forward.

¹³ Transcript p.298

WAY FORWARD PROPOSITION 1

POSTING OF INFORMATION ON THE INTERNET

- 8.4 This proposal deals with the issue of information asymmetry that is clearly an issue identified by the inquiry.
- 8.5 Section 8 of the Oilcode, made under the *Trade Practices (Industry Codes – Oilcode) Regulations 2006* has the effect of requiring corporations providing various classes of petroleum product to place on the internet the “gate price” that it is prepared to sell product at for a period of 24 hours.
- 8.6 This is so independent petroleum retailers can make informed decisions as to when to purchase wholesale product, and so that the market price is available to all participants.
- 8.7 **Attachment 3** is a screen capture of the Caltex website, which displays the gate price as required by law.
- 8.8 As the owners/operators of shopping centres are constitutional corporations, that is, trading or financial corporations under falling within the terms of pl. 51(xx) of the *Constitution*, either regulations or a code of conduct could be made under the *Trade Practices Act*, in a manner similar to the Oilcode regulations, detailing:
- location;
 - parties to the lease of six months or more;
 - permitted use of premises;
 - moving average turnover by category of store and growth/decrease compared to the previous three years;
 - centre annual turnover and growth/decrease compared to the previous three years;
 - centre annual customer turnover and growth/decrease compared to the previous three years
 - commencement and termination dates of anchor tenants;
 - area and rental by category of stores;
 - outgoings by category of stores; and
 - all incentives offered.
- 8.9 Such a provision would have the effect of overriding “non-disclosure” provisions that may be contained in agreements.

- 8.10 In that way, retailers will be able to do their "homework" by being able to consult a website containing all relevant information, without relying on vague aggregations published by specialist companies or on hearsay.
- 8.11 They will also be able to identify some of the disparities inherent in the market, such as the lengthy lease terms and favourable rent terms offered anchor tenants when compared to other retail tenants, which may assist smaller tenants in negotiating superior terms to those that may otherwise be offered.
- 8.12 Transaction costs are reduced for all parties, and decisions can be made with the best information possible.
- 8.13 This is particularly important, given the rationing of retail space that is a function of zoning legislation.

WAY FORWARD PROPOSITION 2

A COMPULSORY CODE OF CONDUCT

8.14 So as to facilitate a national harmonisation of retail tenancy legislation, a code of conduct should be made mandatory under the *Trade Practices Act 1974* governing the contents of retail tenancies with respect to a shopping centre (or cluster of shops under the one management) over a particular size.

8.15 Matters that should be dealt and include:

- the nature of the disclosures listed in paragraph 8.5
- specification of minimum term of seven years for leases, as set out by COSBOA in its oral submissions¹⁴;
- Contents of pre-lease disclosure documents
- Manner of conduct of rent reviews;
- Manner by which relocations are undertaken;
- Procedures relating to the assignment of leases;
- Recovery of lease preparation costs;
- Prohibition of the disclosure of turnover figures to lessees or disclosure of turnover figures aggregated when lessees are not disclosed on an individual basis.
- a proper independent market review assessment where parties cannot agree on the rent at lease renewal time;
- the nature of outgoings for which the tenant would be liable; and
- more generally, the procedures and standards contained in Part 12 of the *Leases (Commercial and Retail) Act 2001* contained in **attachment 4**.¹⁵

8.16 The Guild would add that there should be a compensation mechanism where a sitting tenant is not renewed, along the lines suggested in the Guild's first submission.¹⁶

¹⁴ Transcript p.282 ff.

¹⁵ Although the lease term suggested would be 7 years rather than the 5 years contained in the ACT legislation.

¹⁶ Submission 109 pp.17;20-1

8.17 This is because, as COSBOA indicated during oral submissions to the Commission:

MR SPRING (COSBOA): In actual fact, it's worse than that, because what happens in shopping centres is that - one of the things that happens in shopping centres is when one person moves out or one person's lease is not renewed, often the usage stays the same - not all the time. Often the usage stays the same so you might have an optometrist, for instance, that's been there for 20 years. They can't agree on a rental so the landlord has obviously pitched his rent too high so the optometrist then moves out, a new optometrist comes in and pinches all the customers that go with it and basically he has, in effect - maybe not from a legal point of view but certainly from a commercial point of view - has robbed the goodwill of that previous person because whilst many people would refuse to deal with the new incoming - the new tenant - a lot of them would say, "Okay, you're the new person. You're my new optometrist," you know. So therefore the new guy might be prepared to pay a higher rental because of that.¹⁷

8.18 Or, as the Guild submitter to the Commission's WA hearings said:

MR WRAGG (PGA): I think from a turnover point and from the power of the goodwill the transfer could be as high as 100 per cent. There's no expectation that there would be a large loss, assuming that the person leaving - in most cases in shopping centres in WA there are no alternatives to move to, so we'll assume that they've just closed down and left. The person coming in is likely to get all of the goodwill and all of the business instantaneously, and that's one of the carrots and the stick that really, really makes it difficult when you go into lease negotiations.

Even if I'm only making a small amount of profit I am making a profit and the leasing agents can in reality put the lease up to a point where the business can still make a profit, and because the incoming party doesn't have to buy the goodwill they really only then have to come up with the stock. In some cases, if the party leaves the store with its fixtures and fittings intact as a negotiating - I could walk in just for the cost of stock and keep some goodwill which I in fact didn't foster over the last five to 10 years.

DR BYRON: And get the fit-out at a discount.

MR WRAGG (PGA): Exactly.

DR BYRON: The landlord is actually capturing a lot of that through a higher rent than the previous person was paying.

MR WRAGG (PGA): In my experience over the last 30 years the landlords are very, very clear in understanding that they believe they own part of the goodwill of the business and that's why they charge the higher rental. So you could in fact look at it this way: the higher rentals are actually a profit sharing in the business because they have created the turnover for you. It's just like having a business partner. The fact is that they've got that ability to charge the higher rent and therefore become your pseudo business partner, purely and simply because they have been able to win a planning approval in an area where there's a monopoly, hence the differential between 2 and 12 per cent rentals occurring.

I suppose that's one of the factors we're a little bit concerned about. If it's only a five-year lease you can build up a business and you actually have no ownership after five years of that goodwill, and at the same time there are no alternatives to move to a competitive other position to keep your goodwill because there's nothing available by state law and planning approval law.¹⁸

¹⁷ Transcript p.306

¹⁸ Transcript p.67-8

WAY FORWARD PROPOSITION 3

CHANGING THE CONCEPT OF UNCONSCIONABLE CONDUCT

- 8.19 As discussed earlier, the application of the concept of “unconscionable conduct” has a meaning at law of requiring the presence of a high level of moral obloquy.
- 8.20 This does not capture the intended mischief of preventing “hard bargaining” by landlords turning into “unfairness”.
- 8.21 The *Independent Contractors Act 2006* contains a model provision that better captures the mischief that retail tenancy legislation is designed to capture.
- 8.22 It is contained in **attachment 5**.
- 8.23 It is a statutory design clearly broader in ambit than “unconscionable conduct”.
- 8.24 The desirability of this option is that should retail tenancy legislation mirror the independent contractors scheme, each can pick up the jurisprudence developed in the other, so that the concept of “fairness” when dealing with inequality of bargaining power between big and small business can be developed in the same way that the concept of “unconscionable conduct” has developed for the purposes of other areas of the law.

9. Conclusion

DR BYRON: In which case what we're seeing now is a situation where the very small family business - especially retailers - are in trouble; is it because they're basically on the way to extinction? I'm sorry, I don't mean that in a biological sense, but the concept. I mean, the suburban butcher shop seems to have almost faded because people buy their meat at the big supermarkets. That may well be regrettable but it seems to be the way that the society is going.¹⁹

- 9.1 The gist of the Guild's final submission is that there is a need for remedial retail tenancy legislation along the lines recommended because the theoretical concepts of supply and demand that presume that (particularly) a sitting tenant can simply move to cheaper accommodation if a shopping centre proposes uncommercial terms is vitiated because of the presence of planning laws that restrict the capacity of pharmacies and other retail tenants to move to alternative premises.
- 9.2 The Commission must be careful not to make recommendations that have, perhaps the unintended consequence, of reducing the consumer choice of retailer by recommending laws that effectively freeze out small retailers simply because the managers of an increasingly scarce resource (retail space) offer terms that prevent businesses with limited access to capital to adequately recover fitout and other costs over a standard tenancy period.
- 9.3 The result of this will be an Australian shopping space constituting only major retailers and franchises.
- 9.4 Variety will be lost. The consumer will be the ultimate loser.

March 2008

¹⁹ Transcript p.177

ATTACHMENT 3

Terminal Gate Prices

[Terminal Access Procedures](#)

[Q & A](#)

Caltex Terminal Gate Prices for Declared Petroleum Products

Caltex's terminal gate price is a wholesale price for the bulk supply of a declared petroleum product (as defined in the Oilcode) from a fuels terminal that is a shipping facility or a facility connected by product transfer pipeline to a shipping facility.

Current effective from Saturday, 9 February 2008

Previous effective from Friday, 8 February 2008

New South Wales

	Unleaded		Premium Unleaded		Bio E10 Unleaded		Diesel	
	Previous	Current	Previous	Current	Previous	Current	Previous	Current
Sydney*	131.63	131.21	138.83	138.41	129.13	128.71	136.25	136.03
Newcastle	133.40	132.97	140.60	140.17	130.90	130.47	137.41	137.19

Queensland

	Unleaded		Premium Unleaded		Bio E10 Unleaded		Diesel	
	Previous	Current	Previous	Current	Previous	Current	Previous	Current
Brisbane	131.01	130.59	138.21	137.79	128.52	128.09	135.55	135.33
Cairns	131.25	130.83	138.45	138.03	128.75	128.33	135.93	135.71
Gladstone	132.94	132.51	140.14	139.71	N/A	N/A	136.68	136.46
Townsville	131.11	130.69	138.31	137.89	N/A	N/A	136.16	135.94
Mackay	131.23	130.81	138.43	138.01	128.73	128.31	136.22	136

Tasmania

	Unleaded		Premium Unleaded		Bio E10 Unleaded		Diesel	
	Previous	Current	Previous	Current	Previous	Current	Previous	Current
Devonport	130.91	130.5	138.11	137.7	N/A	N/A	138.14	137.91
Hobart	131.83	131.42	139.03	138.62	N/A	N/A	137.76	137.54

South Australia

	Unleaded		Premium Unleaded		Bio E10 Unleaded		Diesel	
	Previous	Current	Previous	Current	Previous	Current	Previous	Current
Port Lincoln	132.23	131.8	139.43	139	N/A	N/A	138.01	137.79
Adelaide	132.74	132.09	139.94	139.29	N/A	N/A	135.97	135.75

Northern Territory

	Unleaded		Premium Unleaded		Bio E10 Unleaded		Diesel	
	Previous	Current	Previous	Current	Previous	Current	Previous	Current
Darwin	135.78	135.37	142.98	142.57	N/A	N/A	139.44	139.23

State Regulated Prices
Current effective from today
Previous effective from Friday, 8 February 2008

Victoria

Location	Unleaded		Premium Unleaded		Bio E10 Unleaded		Diesel	
	Previous	Current	Previous	Current	Previous	Current	Previous	Current
Melbourne**	131.43	131.01	136.17	135.75	N/A	N/A	135.75	135.53
Corio	131.73	131.31	136.47	136.05	N/A	N/A	136.05	135.83

Western Australia

Location	Unleaded		Premium Unleaded		Bio E10 Unleaded		Diesel	
	Previous	Current	Previous	Current	Previous	Current	Previous	Current
Albany	133.89	133.89	141.07	141.07	N/A	N/A	138.78	138.78
Esperance	135.25	135.25	142.45	142.45	N/A	N/A	139.60	139.6
Fremantle***	131.44	131.44	138.64	138.64	N/A	N/A	135.24	135.24
Geraldton	133.23	133.23	N/A	N/A	N/A	N/A	137.04	137.04
Port Hedland	134.83	134.83	142.01	142.01	N/A	N/A	139.49	139.49

**Terminal Gate prices for Melbourne apply at Caltex Newport Terminal and may from time to time and for certain products apply to Caltex supply Ex-Mobil Yarraville Terminal and Ex-Shell Newport Terminal

*** Terminal Gate prices for Fremantle apply at Caltex Fremantle Terminal and may from time to time and for certain products apply to Caltex supply Ex-Mobil Coogee Terminal and Ex-BP Kewdale Terminal

Please note: (for Terminal Gate Prices and State Regulated Prices above)

1. All prices are inclusive of GST
2. All prices quoted are at L15
3. All prices are for:
 - Spot purchasers who pick up at the applicable terminal, in tanker loads of not less than 35,000 litres and where payment in full (funds cleared) is to be made before pickup. This can be any form of approved prepayment or Telegraphic Transfer (TT). Any other payment arrangement will be by negotiation
 - Customers with a current term supply contract with Caltex under which the purchase price is derived from the TGP ("TGP based supply contract").
 - Do not apply to customers (including franchisees) with a current term supply contract with Caltex that is not a TGP based supply contract.

Note: customers with a term supply contract with Caltex in force as at 1 March 2007 that is not a TGP based supply contract may, before 30 April 2007, make a request to Caltex to offer a purchase price that is derived from the TGP.
4. All vehicles and drivers entering Caltex terminals must be accredited to meet Caltex operational and safety requirements.
5. All products are subject to availability.
6. All prices exclude any charges for additional services that may be available or discounts that may be granted.

For more information on and the conditions of Caltex's Terminal Access Procedures, please see [Terminal Access Procedures](#).

ATTACHMENT 4

Extract from the *Leases (Commercial and Retail) Act 2001* (ACT)

Part 12 Extension, renewal and termination of leases

Division 12.1 Extension

104 Minimum 5 year lease

- (1) This section applies if—
 - (a) the total term for which a lease is entered into is less than 5 years; and
 - (b) the tenant was not, before entering into the lease, independently advised about the effect of this section; and
 - (c) an extension of the term of the lease would not be—
 - (i) inconsistent with the head lease under which the lessor holds the lease; or
 - (ii) unlawful.
- (2) The tenant has the right to the extension of the lease so that the total term of the lease is 5 years, subject to this section.
- (3) The tenant may, not later than 90 days before the end of the term of the lease—
 - (a) exercise the right of extension by written notice to the lessor; and
 - (b) either—
 - (i) ask the lessor to take reasonable steps to register the extended lease with the registrar-general; or
 - (ii) lodge a caveat on the title of the land that contains the premises under the *Land Titles Act 1925*, section 104 (Lodging caveats).
- (4) The lessor must take all reasonable steps to register the extended lease if asked to under subsection (3).
- (5) The extension of a lease under this section has no effect until the tenant has made a request or lodged a caveat under subsection (3).
- (6) For this section—
 - (a) a tenant is taken to have been independently advised about the effect of this section if, before entering into the lease, the tenant was so advised by a lawyer who was not acting for, or nominated by, the lessor; and
 - (b) in the absence of evidence to the contrary, a written statement by a lawyer certifying that the lawyer has, at the request of the tenant, explained the effect of this section to the tenant and, in particular, that the giving of the certificate will result in the tenant being unable to use this section to increase the total term of the lease to 5 years, is conclusive evidence of the facts in the statement.
- (7) This section does not apply to—
 - (a) a lease granted under an option to extend a previous lease if—

- (i) there was no break in the entitlement of the tenant to possession of the premises; and
- (ii) the option was granted by the earlier lease or by an agreement entered into before or at the same time as the earlier lease was entered into; or
- (b) a change of use lease; or
- (c) a continuous occupation lease.
- (8) In this section:
total term, for a lease, means the length of the term of the lease and—
 - (a) any further term provided for by an agreement if the agreement was entered into before or at the same time the lease was entered into; and
 - (b) any further term to which the tenant is entitled by an extension of the lease, if the option was given before or at the same time the lease was entered into.

105 Terms of extended leases

- (1) This section applies if a lease is extended under section 104.
- (2) The lease has the same provisions as it had before the extension, subject to any change necessary because the lease has been extended, unless—
 - (a) the lessor and tenant agree otherwise; or
 - (b) the Magistrates Court orders otherwise.
- (3) The Magistrates Court may make an order varying the terms of the extension on application by a party to the lease made within 14 days after the tenant exercises the right to extend the lease.
- (4) The applicant must tell the other party about the application.
- (5) If the Magistrates Court makes an order varying the provisions of the extension, the variation takes effect on the day stated in the order or, if no day is stated, when the order is made.

Division 12.2 Renewal

106 Objects of div 12.2

- (1) The Legislative Assembly recognises that conflicts sometimes happen between a lessor's expectation that the lessor will be able to deal with the leased premises subject only to the terms of the lease and a tenant's expectations of reasonable security of tenure.
- (2) The objects of this division are to achieve an appropriate balance between reasonable but conflicting expectations and to ensure fair dealing, as far as practicable, between lessor and tenant in relation to the renewal or extension of premises.

107 Lessor's intentions about renewal

- (1) This section applies to all leases.
- (2) The tenant may, in writing, ask the lessor to tell the tenant whether the lessor intends to renew the lease if—
 - (a) for a lease for longer than 1 year—the lease is due to end in not less than 6 months and not longer than 1 year; or

- (b) in any other case—the lease is due to end in not less than 3 months and not longer than 6 months.
- (3) If the lessor receives a request under subsection (2) on a day (the *request day*), the lessor must tell the tenant, in writing within 1 month after the request day, either that—
 - (a) the lessor proposes to renew the lease; or
 - (b) the lessor does not propose to renew the lease.
- (4) If the lessor fails to notify the tenant under subsection (3), the lease is extended by a period equal to the period starting 1 month after the request day and ending when the lessor gives the tenant a notice that, apart from being late, complies with subsection (3).

108 Rules of conduct at end of lease term for shopping centre leases

- (1) This section applies to a lease for premises in the retail area of a shopping centre if the lessor proposes to re-lease the premises and the tenant wants to renew or extend the lease.
- (2) The lessor must allow the tenant to renew or extend the lease in preference to allowing other possible tenants to lease the premises.
- (3) The lessor must assume that the tenant wants to renew or extend the lease unless the tenant has told the lessor, in writing within 12 months before the end of the lease, that the tenant does not want to renew or extend the lease.
- (4) The lessor may offer to lease the premises to someone other than the tenant only if it would be substantially more advantageous to the lessor to lease the premises to the other person rather than renew or extend the term of the lease.
- (5) However, the lessor is not obliged to prefer the tenant under this section if—
 - (a) the lessor reasonably wants to change the tenancy mix within the shopping centre; or
 - (b) the tenant has breached the lease substantially or persistently; or
 - (c) the lessor—
 - (i) does not propose to re-lease the premises within a period of at least 6 months after the end of the term of the lease; and
 - (ii) needs vacant possession of the premises during that period for the lessor's own purposes (but not to carry on a business of the same kind as the business carried on by the tenant at the premises).
- (6) Also, this section does not apply in relation to the lease if—
 - (a) section 111 applies in relation to the lease; or
 - (b) if the lease is a sublease—the sublease is as long as the term of the head lease allows; or
 - (c) the lease arises when the tenant holds over after the end of an earlier lease with the consent of the lessor and the holding over is for 6 months or less; or
 - (d) the lease is excluded from this section by regulation.

Note This Act does not apply to leases with a term of less than 6 months unless they are continuous occupation leases (see s 12 (2) (c)).

109 Implementation of preferential right

- (1) If the tenant has a right of preference, the lessor must, at least 6 months (but not more than 12 months) before the end of the term of the lease, begin negotiations with the tenant for a renewal of the lease.

Note Renewal of a lease includes extension of the lease (see dict).

- (2) In particular, before agreeing to enter into a lease with someone else, the lessor must—
 - (a) make a written offer, expressed to be made under this section, to renew the lease with the tenant on terms no less favourable to the tenant than those of the lease proposed to be entered into with the other person; and
 - (b) provide the tenant with a copy of the proposed lease (as renewed or extended) and the disclosure statement or proposed disclosure statement required in relation to it.
- (3) If the lessor offers to renew the lease under this section—
 - (a) the offer remains open for the period stated in the offer (the *acceptance period*) or until its earlier acceptance; and
 - (b) the tenant must tell the lessor in writing within the acceptance period whether the tenant accepts the offer; and
 - (c) if the tenant does not tell the lessor in writing within the acceptance period that the tenant accepts the offer—the offer lapses.
- (4) The acceptance period must be a reasonable period (at least 10 business days) after the offer is made.
- (5) The negotiations must continue until—
 - (a) the tenant rejects an offer under this section (or the offer lapses); or
 - (b) the tenant tells the lessor in writing that the tenant does not want to continue negotiations for a renewal of the lease.
- (6) The negotiations must be conducted honestly.

110 Notice of absence of right of preference

- (1) If the tenant does not have a right of preference, the lessor must, by written notice—
 - (a) tell the tenant that the tenant does not have a right of preference; and
 - (b) explain why the tenant does not have a right of preference.

Note Section 108 (5) and (6) sets out the circumstances in which the tenant does not have a right to a preference.

- (2) The lessor must give the notice to the tenant—
 - (a) at least 6 months, but not more than 12 months, before the end of the term of the lease; or
 - (b) if the term of the lease is 12 months or less—at least 3 months, but not more than 6 months, before the end of the term.

111 Certified exclusionary clauses

- (1) Section 108 may be excluded in relation to a lease by a certified exclusionary clause.
- (2) A *certified exclusionary clause* is a provision of a lease in relation to which a certificate signed by an independent lawyer is endorsed on the lease to the effect that—

- (a) before the lease was signed and at the tenant's request, the lawyer explained the effect of the provision and how section 108 would apply in relation to the lease if the lease did not include the provision; and
- (b) the tenant told the lawyer that the tenant was not acting under coercion or undue influence in asking for or agreeing to the inclusion of the provision in the lease.
- (3) For this section, an independent lawyer is a lawyer who is not acting for the lessor.

112 Fair dealing between lessor and tenant about renewal of shopping centre lease

- (1) If the lessor fails to comply with section 108 (Rules of conduct at end of lease term for shopping centre leases) in relation to premises in the retail area of a shopping centre and the tenant is prejudiced by the failure, the tenant may apply to the Magistrates Court.

Note Under s 52 (Market rent—rent reviews, options and renewals) the lessor or tenant may ask the Magistrates Court to refer a dispute about the rent to be paid under a renewal to mediation.

- (2) On application under this section, the Magistrates Court may make any order it considers appropriate.
- (3) Without limiting subsection (2), the Magistrates Court may—
 - (a) order the lessor to renew or extend the lease, or to enter into a new lease with the tenant, on terms approved by the court (but not to the prejudice of the rights of a third-party who has honestly acquired an interest in the premises); or
 - (b) order the lessor to pay compensation (not more than 6 months rent under the lease) to the tenant.

Division 12.3 Termination generally

113 Other rights etc unaffected by termination

- (1) The termination of a lease under division 12.4 (Termination by tenant) or division 12.5 (Termination by lessor) does not affect a right, privilege or liability existing under, or because of, the lease immediately before its termination.
- (2) Unless the parties otherwise agree (otherwise than by a provision of the lease), subsection (1) is not affected by—
 - (a) the lessor not contesting a termination notice under division 12.4; or
 - (b) the tenant agreeing to a termination under division 12.5 or not contesting a termination under that division; or
 - (c) the termination of the lease by agreement between the parties (otherwise than by a provision of the lease).

114 Termination by agreement

Division 12.4 and division 12.5 do not prevent the termination of the lease by agreement between the parties (otherwise than by a provision of the lease).

115 Abandonment

- (1) If the tenant abandons the premises, the lease terminates on abandonment.
- (2) If the tenant abandons the premises before the end of the lease, the lessor may apply to the Magistrates Court for—

- (a) an order declaring the lessor's right to enter the premises to recover possession of them; and
 - (b) compensation for any damage caused to the lessor because of the abandonment, including the reasonable costs of advertising the premises for lease and of giving a right to occupy the premises to someone else.
- (3) In working out the amount of compensation that may be awarded under this section in relation to costs, the Magistrates Court must have regard to—
- (a) when, apart from the abandonment, the lease would have ended; and
 - (b) whether the lessor would have incurred the costs at the end of the lease.
- (4) The lessor is not entitled to be compensated under this section for a loss that could reasonably have been avoided by the lessor.
- (5) This section does not limit any right of the lessor to enter abandoned premises without a declaration under subsection (2) (a).

Example of when lessor may enter abandoned premises without declaration.

as a reasonable response to an emergency situation

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Division 12.4 Termination by tenant

116 Tenant's right to terminate extended lease

- (1) If a lease is extended because of section 107, the tenant may terminate the lease by giving the lessor at least 1 month's written notice of termination at any time after the day the lease would have expired if it had not been extended.

Note For how documents may be given, see the Legislation Act, pt 19.5.

- (2) Subsection (1) does not prevent a tenant from terminating a lease by giving less than 1 month's written notice of termination if the lessor agrees to accept less notice.

117 Right to terminate—no disclosure statement etc

In addition to any other right the tenant has, the tenant may, within 3 months after the day the lease is entered into, terminate the lease by giving the lessor at least 14 days written notice of termination if the lessor—

- (a) fails to provide a disclosure statement; or
- (b) provides a disclosure statement that is false or misleading in a material particular; or
- (c) omits a material particular from a disclosure statement.

118 Failure to notify material change in disclosure statement

In addition to any other right the tenant has, the tenant may, within 3 months after a lease is entered into, terminate the lease by giving the lessor 14 days written notice of termination if the lessor—

- (a) failed to tell the tenant under section 34 (Notice of material changes) of a material change in information provided in a disclosure statement relating to the lease; or
- (b) provided notice under that section that omitted a material particular or contained information that the lessor knew, or should reasonably have known, was false or misleading in a material particular.

119 Lessor may contest termination

- (1) The lessor may, within 14 days after being served with a termination notice, contest the termination by application to the Magistrates Court.
- (2) The only ground for contesting a termination under this section is that—
 - (a) the lessor acted honestly and reasonably and ought reasonably to be excused for doing the thing that constituted the ground for termination under section 117 (Right to terminate—no disclosure statement etc) or section 118 (Failure to notify material change in disclosure statement); and
 - (b) the tenant is substantially in as good a position as the tenant would have been in had the lessor not done the thing.

120 Effect of uncontested termination notice

If the lessor does not contest a termination notice within 14 days after the notice was served on the lessor, the notice takes effect 15 days after service.

121 Effect of contested termination notice

Despite section 117 (Right to terminate—no disclosure statement etc) and section 118 (Failure to notify material change in disclosure statement), if a termination notice is contested under this part—

- (a) the notice does not have effect unless it is confirmed by the Magistrates Court; and
- (b) if the notice is confirmed—the notice has effect on the day stated by the court or, if no day is stated, on confirmation.

Division 12.5 Termination by lessor

122 Procedure for termination of lease by lessor etc

- (1) If the lessor has a right to terminate the lease, the lessor may give written notice of termination to the tenant (the *termination notice*).

Note For how documents may be given, see the Legislation Act, pt 19.5.
- (2) Within 14 days after being given the termination notice (the *allowed period*), the tenant may—
 - (a) contest the termination by application to the Magistrates Court; or
 - (b) agree to the termination by written notice to the lessor.
- (3) The termination takes effect in accordance with the terms of the termination notice if, within the allowed period, the tenant—
 - (a) does not contest the termination by application to the Magistrates Court; or
 - (b) agrees to the termination by written notice to the lessor.
- (4) If the tenant contests the termination by application to the Magistrates Court within the allowed period—
 - (a) the termination does not have effect unless it is confirmed by the Magistrates Court; and
 - (b) if the termination is confirmed—it has effect on the day ordered by the court.
- (5) The lease may be terminated by the lessor only in accordance with this section.

- (6) If the tenant is in possession of the premises, the lessor may enter the premises to recover possession of the premises only—
 - (a) under a court order or warrant; or
 - (b) if the lease has been terminated in accordance with this section.

123 Confirmation of contested termination

- (1) If the tenant applies to the Magistrates Court under section 122 to contest the termination of the lease by the lessor, the court may confirm the termination if satisfied that—
 - (a) a ground (the *termination ground*) exists for the lessor to terminate the lease; and
 - (b) the act or omission that gave rise to the termination ground (the *breach*) is an act or omission of the tenant or a subtenant; and
 - (c) the lessor had given the tenant notice of the breach and a reasonable opportunity to remedy it; and
 - (d) the termination ground justifies confirming the termination.
- (2) Without limiting what is a reasonable opportunity under subsection (1) (c), the tenant is taken to have been given a reasonable opportunity to remedy the breach of an obligation to pay an amount if the tenant is allowed 14 days to pay the amount.
- (3) However, the Magistrates Court may refuse to confirm the termination even if satisfied about the matters mentioned in subsection (1) if—
 - (a) the breach has been remedied; or
 - (b) the tenant gives an undertaking that the tenant will remedy the breach within 14 days.
- (4) The Magistrates Court may suspend the order confirming the termination for not longer than 21 days if satisfied that—
 - (a) the immediate operation of the order would cause significant hardship to the tenant; and
 - (b) the hardship to the tenant would be greater than the hardship that the suspension would cause to the lessor.
- (5) The Magistrates Court may suspend the order under subsection (4) only once.

124 Confirmation of uncontested termination

- (1) This section applies if—
 - (a) the lessor has given the tenant a termination notice under section 122 (1) (Procedure for termination of lease by lessor etc); and
 - (b) the tenant has not contested the termination, or agreed to the termination, under section 122 (2).
- (2) The lessor may apply to the Magistrates Court for confirmation of the termination.
- (3) The Magistrates Court may confirm the termination if it considers that the termination is reasonable in the circumstances.

125 Content of termination orders

- (1) An order under section 123 (Confirmation of contested termination) or section 124 (Confirmation of uncontested termination) confirming the termination of the lease must state—
 - (a) the day the lease is or was terminated; and
 - (b) that, if the tenant has not already vacated the premises, the tenant must vacate the premises on or before that day; and
 - (c) that, if the tenant has not already vacated the premises and does not vacate the premises on or before that day, either—
 - (i) the lessor may apply to the Magistrates Court for the issue of a warrant for the eviction of the tenant; or
 - (ii) the order will have effect as if it were a warrant for eviction.
- (2) If the order states that it will have effect as if it were a warrant for eviction, the order must comply with section 126 as if it were a warrant for eviction under this division.

126 Content of warrants for eviction

- (1) A warrant for eviction under this division in relation to a lease must—
 - (a) authorise a designated officer to take appropriate action to evict the tenant within the time stated in the warrant; and
 - (b) require the designated officer to give the tenant at least 2 days notice of the proposed eviction.
- (2) The designated officer may ask a police officer to take action, or help the designated officer, to enforce the warrant.
- (3) For this section:
designated officer means someone responsible for taking action on warrants issued by the Magistrates Court.

127 Issue of warrants for eviction

On application by the lessor, the Magistrates Court must issue a warrant for eviction in relation to the lease if—

- (a) the court has made an order under section 123 (Confirmation of contested termination) or section 124 (Confirmation of uncontested termination) confirming termination of the lease; and
- (b) the order stated that, if the tenant did not vacate the premises as required, the lessor could apply to the Magistrates Court for the issue of a warrant for the eviction of the tenant; and
- (c) the tenant did not vacate the premises as required and continues to occupy the premises in contravention of the order.

ATTACHMENT 5

Extract from the *Independent Contractors Act 2006*

9 What is an unfairness ground

- (1) Subject to subsection (2), each of the following grounds is an **unfairness ground** in relation to a services contract:
 - (a) the contract is unfair;
 - (b) the contract is harsh or unconscionable;
 - (c) the contract is unjust;
 - (d) the contract is against the public interest;
 - (e) the contract is designed to, or does, avoid the provisions of:
 - (i) the *Workplace Relations Act 1996*; or
 - (ii) a State or Territory industrial law; or
 - (iii) an award, agreement or other instrument made under a law referred to in subparagraph (i) or (ii);
 - (f) the contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work;
 - (g) any other ground that is substantially the same as a ground specified in any of paragraphs (a) to (f);
 - (h) any other ground specified in regulations made for the purposes of this paragraph.
- (2) A ground specified in subsection (1) is not an **unfairness ground** in relation to a services contract to the extent that the ground relates to matters that, because of subsection 8(2), are not workplace relations matters.

12 Court may review services contract

- (1) An application may be made to the Court to review a services contract on either or both of the following grounds:
 - (a) the contract is unfair;
 - (b) the contract is harsh.

Note: A proceeding pending in the Federal Magistrates Court may be transferred to the Federal Court of Australia: see Part 5 of the *Federal Magistrates Act 1999*.

- (2) An application under subsection (1) may be made only by a party to the services contract.
- (3) In reviewing a services contract, the Court must only have regard to:
 - (a) the terms of the contract when it was made; and
 - (b) to the extent that this Part allows the Court to consider other matters—other matters as existing at the time when the contract was made.

- (4) For the purposes of this Part, **services contract** includes a contract to vary a services contract.

Note: The effect of subsection (4) is that a contract to vary a services contract can be reviewed under this Part, as the contract to vary will itself be a services contract

ATTACHMENT 1

Daily Telegraph Article

Sim City – the real life version is here

By VIKKI CAMPION

WELCOME to the future of Sydney living — a shopping centre you never have to leave.

The Rouse Hill Town Centre, in Sydney's northwest, is a corporate-designed dream town, combining a massive retail space with apartment living and community facilities.

And it is being hailed as the way of the future in town planning, with facilities for residents built before the people move in — instead of the other way around.

Adding to the retail shops, cinemas and banks are a purpose-built town square, main street, alfresco dining, library, community centre, office space, and even a pub.

The \$1 billion project opens on March 6, with the first occupants to move in a week later. Already open are cafes, stores and playgrounds.

It only took 18 months for developer GPT to turn a golf course into the futuristic micro city that Rouse Hill residents can work, play and live in.

Within 12 years there will be 1800 homes, more than 3000 jobs and the northwest rail link at the front door.

The town centre was built with recycled materials, uses water captured from the site in a 150,000 litre rainwater tank for toilets, gardens and washing and has a filtered drainage system to help rejuvenate nearby Caddies Creek.

Passive solar design is utilised to warm and light buildings and streets.

This slashes water use by 60 per cent and energy use by 40 per cent.

Most plants on the site are native to Australia and the development holds a secret garden for people to relax in.

For frustrated motorists, the high-light may be the state-of-the-art car park that directs drivers to free spaces.

Baulkham Hills Shire Council mayor Sonya Phillips said the 4500 residents of The New Rouse Hill would be the avant garde of a new generation.

"They are our modern pioneers," Ms Phillips said.

General manager Martin Ollis said the development was unique as the community played a large role in shaping its design.

The centre is proving already proving popular — even before its opening.

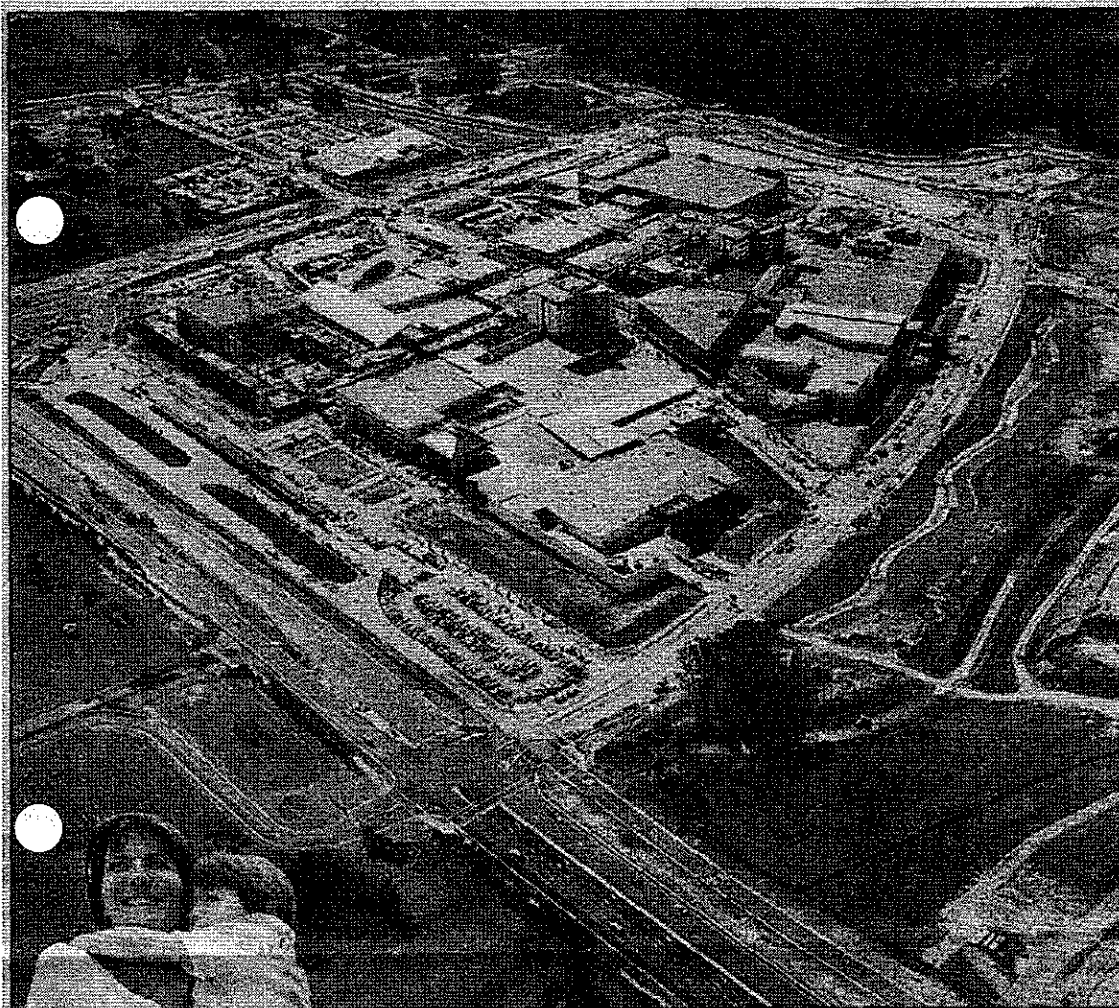
Katherine Vucicevic, of Kenthurst, drives her 15-month-old twins boys Alexander and Christopher to Rouse Hill just to have fun at the playground.

"I love this place, I make a point of coming here because it is so safe," she said. "And the boys love it too."

Daily Telegraph

For the latest real estate news, check out our Property section

www.dailytelegraph.com.au



Future scape... an aerial view of Rouse Hill town centre (above), Annangrove resident Jane Misk with her son Angus and the new town's car park which directs drivers to available car spaces.

Picture: TROY BENDEICH



ATTACHMENT 2

Pharmacy Business Models and Viability

Pharmacy Business Models and Viability

Pharmacy has evolved whereby retail departments within the pharmacy business have become crucial to supporting diminishing returns from Government PBS remuneration. A compensating factor in the past has been the significant growth in volume of prescription numbers and the attractive trading terms for certain sub-categories within prescription medicines. However, recent PBS reform and market changes have seen the following trends emerge:

- » Flattening of PBS growth
- » Declining overall turnover growth
- » New regulatory measures to claw back trading terms
- » Declining gross margins
- » Escalating operating costs

All of this is occurring in an increasingly competitive market environment, which requires pharmacies to commit to significant capital investment in systems, equipment, and fitout.

In many centres, the fitout and its standards are mandated by both the landlord and the Pharmacy Board of each state/territory.

The Guild enters into a five year Agreement with the Commonwealth Government on PBS remuneration and structure. The current Agreement is worth a staggering \$32 billion. Such Agreements are unique, because they extend beyond the one election term. However, for individual pharmacy owners, longer rental lease periods are critical to not only enable the establishment of the business, but also to pay back the substantial capital investment required to establish and operate a viable modern pharmacy in a major shopping centre.

Pharmacy profitability

Based on figures across their whole client base, Johnston Rorke have observed the following:

- » about 4% sales growth between 2003 and 2004
- » about 10% sales growth between 2004 and 2005
- » flat growth of about 2% – less than inflation – between 2005 and 2006
- » in general, rents have increased at a faster rate than 2% over 2006
- » Rents are under pressure to increase

In the negotiation process for the transfer of a business, pharmacy tenants require ease of transfer of the business, subject to normal approval processes. In addition, pharmacies require the ability to provide banks with a suitable right of entry. This has been an issue of concern in the past, but a reasonable right of entry as well as transfer of leases are critical to pharmacy tenants.

Location rules exist for the provision of pharmacy approval numbers to dispense PBS medicines. These rules remain an important element of the community pharmacy landscape, and a major review was undertaken prior to the Fourth Community Pharmacy Agreement. Those rules are regularly reviewed with the view of ensuring that there is an even distribution of approved pharmacies throughout Australia. Specific rules apply to shopping centres.

Table 7 shows that pharmacists have worked hard to retain their margins. However, this has not translated to the bottom line.

Additionally, shorter lease periods are affecting finance decisions, signifying that unfortunately, the worst may yet be to come.

Whether in a strip or shopping centre, pharmacies have reported a declining bottom line over the past three years, and this is supported by data elsewhere in this report (See *Chart 3: Trends in Australian Pharmacy Average Net Profit/Loss*). High wages, occupancy and finance costs are eating into gross margins and reducing the bottom line to owners.

The reported table indicates that the future viability of pharmacy in shopping centres is becoming questionable. With the trend in pharmacy towards larger space, the share of profit to the landlord under such models (where they operate in shopping centres), would be significant. As noted above, the percentage of turnover to landlords is the same as, or more than the percentage share, to the business owner.

By comparison, the results for strip pharmacies tell a different story. The 2006 numbers show a favourable profit and expense ratio result to strip pharmacies over shopping centre pharmacies. The difference is almost entirely the result of rent costs.

It should also be noted that there are impacts on pharmacy businesses arising from other areas of the premises' occupancy equation, such as: the lack of option periods; presence of demolition clauses, and; frequency of refit requirements.

Landlord's share of income

Pharmacy rent and occupancy expenses are a significant and increasing cost. Generally, occupancy costs are the third highest expense (after the cost of goods and salaries). In some locations, they may be the second highest expense.

Pharmacy often pays the highest rent in a centre!

Based on Medici Capital data, the 2006 Australian average rent and outgoings per square metre (per annum) was \$522.54 (95% confidence interval ranges from \$479 to \$566). The average rent as a percentage of turnover was 3.97% (95% confidence interval ranges from 3.61% to 4.33%)².

Rent and outgoings per square metre

The distribution of rents is highly skewed, with a few pharmacies paying well above the average rent and outgoings of \$523. Any industry benchmark analysis is highly misleading, as the median (50% mark \$406) is significantly lower than the average.

2 Source Medici Capital Pty. Ltd. – sample size 594 relating to year ended June 30, 2006

TABLE 06: SHOPPING CENTRE PHARMACY TRENDS						
	Shopping Centres 2006		Shopping Centres 2005		Shopping Centres 2004	
	Proportion Sales	GP%	Proportion Sales	GP%	Proportion Sales	GP%
Dispensary	59.79%	30.59%	65.83%	29.76%	61.82%	29.24%
Retail	40.21%	35.43%	34.17%	36.11%	38.18%	35.74%
	100.00%	32.54%	100.00%	31.93%	100.00%	31.72%
Average Sale per SQM (note: incl. Dispensary)	\$ 13,477		\$ 14,527		\$ 13,611	
Other Overheads to Sales	25.90%		25.70%		26.22%	
Wages + On costs to Sales	15.63%		15.16%		15.01%	
Marketing to Sales	1.38%		1.22%		1.21%	
Occupancy: Rent & Outgoings to Sales	6.28%		5.81%		5.65%	
Depreciation to Sales	1.08%		0.97%			
Repairs & Maintenance to Sales	0.15%		0.11%			
Lease to Sales	0.23%		0.27%			
Electricity to Sales	0.35%		0.32%			
Total Occupancy Costs to Sales	8.09%		7.48%		8.79%	
EBIT	6.64%		6.09%		6.71%	

Source: JR Pharmacy Services - Johnston Rorke Chartered Accountants

TABLE 07: SUMMARY OF OPERATING AVERAGES 2004 - 2006 FINANCIAL YEARS						
	Strip Pharmacies			Shopping Centre Pharmacies		
CALCULATIONS	2004 Average	2005 Average	2006 Average	2004 Average	2005 Average	2006 Average
Turnover	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Gross Margin	34.0%	30.1%	30.6%	31.7%	30.7%	32.1%
Wages	9.7%	9.8%	10.7%	11.8%	11.3%	11.4%
Other Staff Costs	1.1%	1.3%	1.6%	1.3%	1.4%	1.3%
Rent & Outgoings	2.4%	2.5%	2.4%	6.9%	5.9%	7.4%
Other Occupancy Costs	3.2%	1.3%	1.0%	1.0%	0.9%	0.8%
Leasing, Depn & HP	1.0%	1.1%	1.1%	1.4%	0.9%	0.8%
Interest	1.7%	1.9%	2.3%	2.3%	1.9%	2.1%
Other Overheads	2.7%	4.5%	4.0%	4.1%	3.7%	4.4%
Total Expenses	21.7%	22.4%	23.1%	28.7%	26.1%	28.3%
EBIT/Turnover	14.0%	9.6%	9.8%	5.3%	6.5%	5.8%
Net Profit (BOS) / Turnover	12.3%	7.7%	7.5%	3.0%	4.6%	3.7%
Size in sqm (total)	194	179	218	226	226	221
Rent / sqm	305	338	369	990	998	1,355

Source: Saccasan Bailey Business and Tax Advisors

Chart 7 illustrates the rent and outgoings per square metre. In simple terms, the vast majority of pharmacies pay less than the average, and the average is skewed by a number of pharmacists that pay extraordinarily high rates of occupancy costs – up to six times the average.

Any effort to bring pharmacy rents up to the technical average is misguided. Landlords should be examining industry median levels as well as averages to make a fairer assessment. Any alternative approach places enormous pressure on the viability of such businesses.

Rent as percentage of sales

As Chart 8 demonstrates, rent as a percentage of sales also varies dramatically. This chart alone does not indicate the viability of a pharmacy business. To determine the viability, the mix of the three categories – prescription medicines, scheduled non-prescription medicines, and general retail – needs to be further analysed. One factor is certain, however, that those businesses, highly dependent on the PBS, are unable to meet the demands of a high rental percentage of turnover. The analysis provided in the previous section of this report demonstrates that over time, while a percentage rate may have been sustainable at the commencement of a long lease, Government regulation and control now places that same previously viable pharmacy in jeopardy.

Table 8 summarises the distribution of costs by listing the upper and lower quartiles as well as the median. That is, 75% of the sample pay less than \$656 per square metre whereas 25% pay more. Similarly, 75% pay less than 5.16% rent as a percentage of turnover.

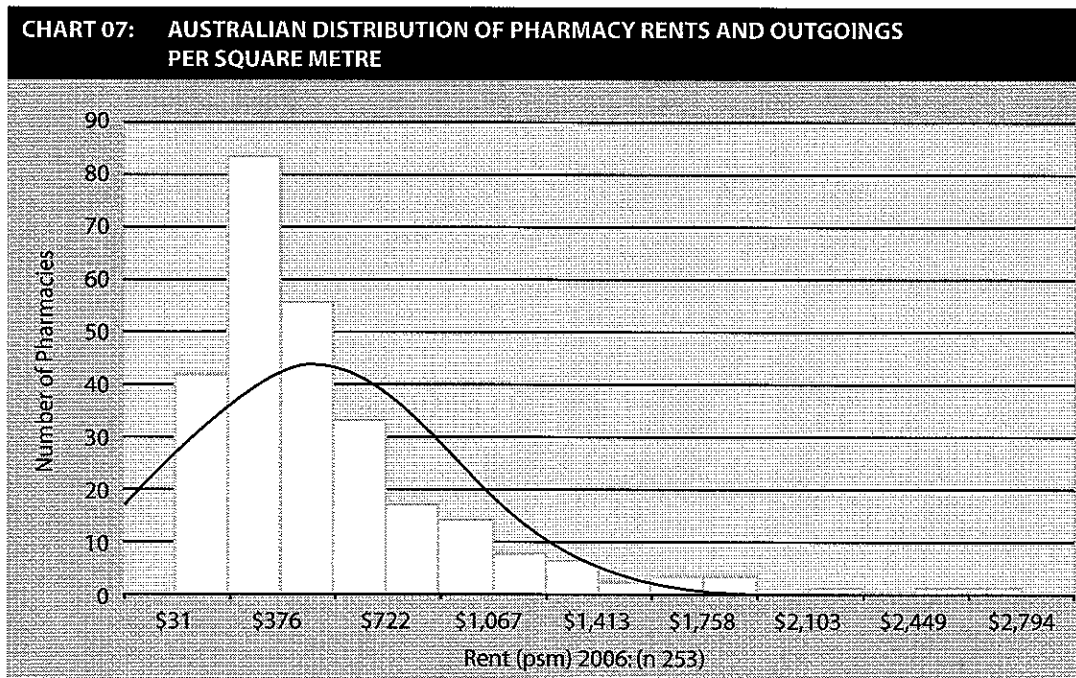
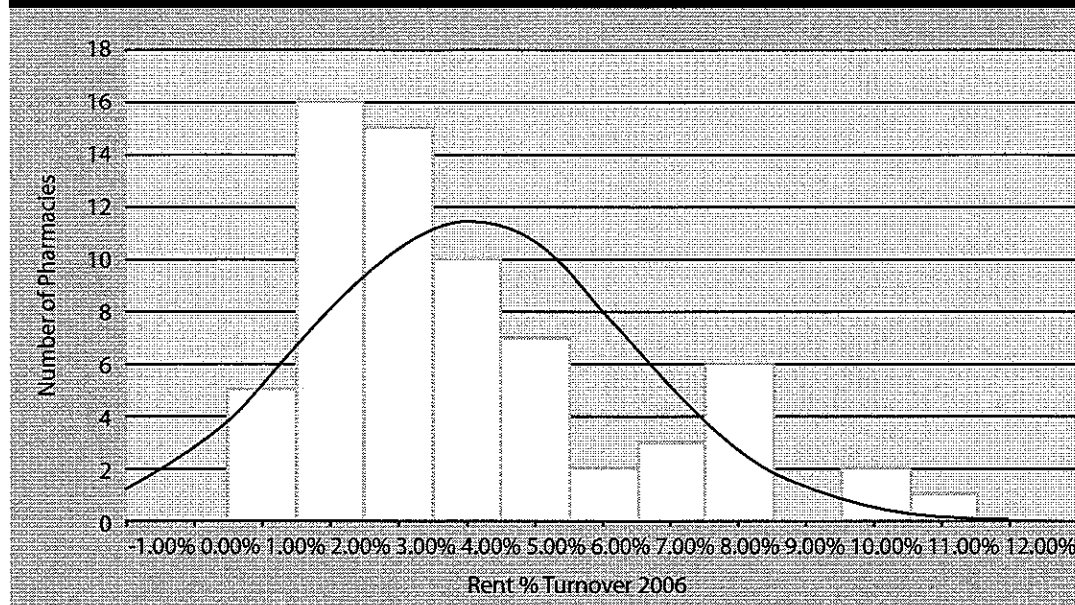


CHART 08: AUSTRALIAN DISTRIBUTION OF PHARMACY RENTS AND OUTGOINGS AS A PERCENTAGE OF ANNUAL TURNOVER



Source: Medici Capital Pty. Ltd.

Rental Distribution

TABLE 08: AUSTRALIAN PHARMACY RENTS AND OUTGOINGS - QUARTILE ANALYSIS

% of Sample	25%	50%	75%
\$ Rent & Outgoings per sq.mt. p.a.	\$254.11	\$405.90	\$656.25
Rent % Turnover	1.77%	3.19%	5.16%

Rent and outgoings per square metre by shopping centre type

Table 9 highlights the dramatic variation in rents by shopping centre type throughout Australia. The Guild seeks more comprehensive disclosure from advisers and industry consultants to landlords as tools to determine fair market rentals. The differentiation between the type of shopping centre, the median and the average, are all factors which should be taken into consideration.

It should also be noted that the circumstances leading to a particular rent being paid may include centre exclusivity.

TABLE 09: AUSTRALIAN PHARMACY RENTS AND OUTGOINGS BY SHOPPING CENTRE TYPE

Centre Type	Mean	Median	-95%	+95%
Strip	\$356.84	\$287.00	\$323.46	\$390.22
Medical Centre	\$667.68	\$482.20	\$433.67	\$901.69
Regional	\$683.44	\$595.67	\$607.08	\$759.80
Major Regional	\$1,317.27	\$990.22	\$965.67	\$1,668.87
All Groups	\$522.54	\$405.90	\$479.13	\$565.96

Note: Rents also vary by state.

Landlord's share of income

Traditionally the argument has been, 'you pay for what you get'. That is, higher rents relate to more productive sites and locations. Better sites attract a higher cost.

An alternative view of rent could be considered whereby the landlord and tenant join together to share the rewards. The *landlord* seeks a return from the capital and recurrent expenses associated with operating the site or providing suitable premises; the *tenant* seeks a return from the capital and recurrent expenses associated with operating on the site.

To examine this further, Medici Capital re-examined pharmacy profit to measure the landlord's share of income.

To determine the landlord's share, the following calculation was made:

TABLE 10: CALCULATION OF LANDLORD'S SHARE		
Step	Calculation	Resulting in
Net Profit before interest	As reported after an owner's salary	Starting point
+ Rent and Outgoings	As paid by the tenant	Net income available to be shared between the landlord and tenant
Landlord's share	Rent ÷ Profit available to Share = Landlord's Share	

How much is the landlord's share?

TABLE 11: LANDLORD'S SHARE - AUSTRALIAN PHARMACY AVERAGE AND QUARTILE ANALYSIS						
	Mean	25%	50%	75%	-95%	+95%
Rent % of Business Profit before Rent - 2006	26.4%	11.7%	21.0%	34.3%	22.1%	30.7%

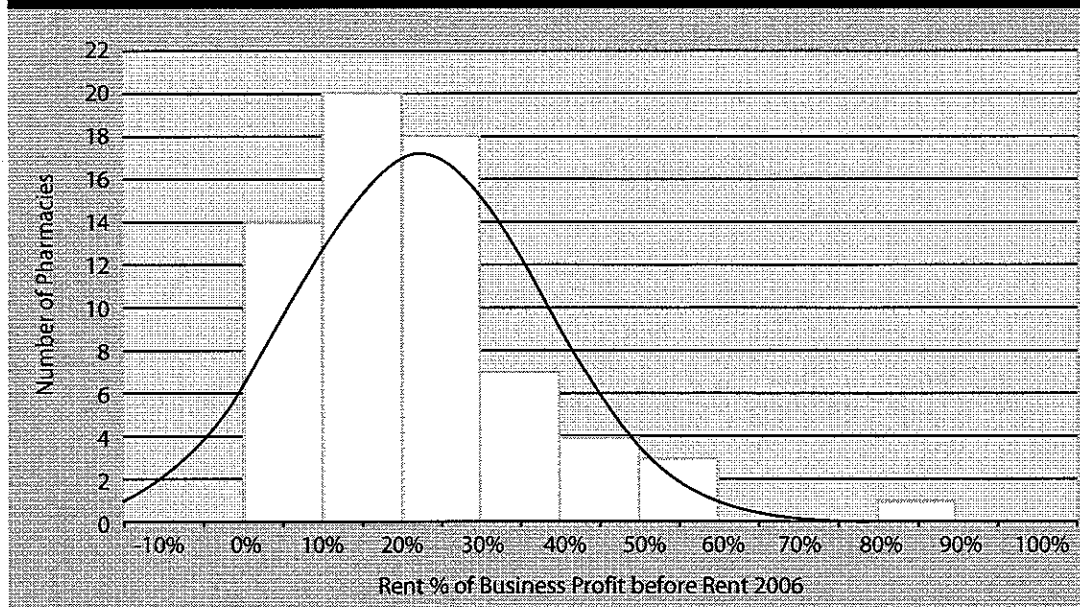
On average, the landlord received approximately 26% of the net income before rent and outgoings. However, the landlord's share varied dramatically by shopping centre type:

TABLE 12: LANDLORD'S SHARE - AUSTRALIAN PHARMACY AVERAGE BY SHOPPING CENTRE TYPE				
Centre Type	Mean Rent % of Business Profit before Rent - 2006	Median	-95%	+95%
Strip	19.6%	15.3%	17.6%	21.6%
Medical Centre	21.1%	16.8%	16.4%	25.8%
Regional	36.0%	32.8%	23.8%	48.3%
Major Regional	63.0%	41.8%	20.8%	105.3%
All Groups	26.4%	21.0%	22.1%	30.7%

While the average was approximately 26%, in major regional shopping centres, the average landlord's share exceeded 63% in 2006.

However, this share also varied dramatically by location. In some locations, pharmacies are paying up to 105% to the landlords.

CHART 09: AUSTRALIAN PHARMACY DISTRIBUTION OF LANDLORD'S SHARE



Source - Medici Capital Pty.Ltd.

Amortisation of fitout costs

A final issue of relevance to pharmacy occupancy costs and leases is the capital investment required to operate and maintain a community pharmacy.

Pharmacy fitouts cost between \$1,250 and \$1,750 per square metre. On this basis, the average pharmacy of 135 square metres would invest between \$168,750 and \$236,250 on a shop refit. In a community setting (ie. strip shopping centre), this would be updated approximately every 10 years.

On the other hand, in major regional shopping centres, the average pharmacy size is approximately 335 square metres and a pharmacy would invest between \$418,750 and \$586,250. It is not unusual for larger pharmacies to spend in excess of \$1,000,000 on shop fitouts. However, shopping centres normally require the fitout to be updated every three to five years.

This is a further cost which must be considered as part of the occupancy costs of a pharmacy.