Business School

Department of Real Estate & Planning

University of Reading

Working Papers in Real Estate & Planning 03/07

Small Business Tenant Legislation in Australia: Does it Provide a Solution to Part of the UK Lease Reform Debate?[1]

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Keywords : small business, commercial leases, Australia, UK

Abstract

This paper addresses the commercial leases policy issue of how to deal with small business tenants. The UK has adopted a voluntary solution to commercial lease reform by using Codes of Practice which is in contrast to the legislative approach adopted by Australia to attempt to solve its perceived problems with small business retail tenancies. The major aim of the research was to examine the perceptions of the effectiveness of the legislation in Australia and discuss any implications for the UK policy debate but the results of the research also raise questions for the Australian regime.

The research used a combination of literature and legislation review and a semi structured interview survey to investigate the policy aims and objectives of Australian Federal and State Governments, identify the nature and scope of the Australian legislation and examine perceptions of effectiveness of the legislation in informing small business tenants. The situation is complicated in Australia due to leases being a State rather than Federal responsibility therefore the main fieldwork was carried out in one case study State, Victoria.

The paper concludes that some aspects of the Australian system can inform the UK policy debate including mandatory information provision at the commencement of negotiations and the use of lease registrars/commissioners. However, there are a number of issues that the Australian legislation does not appear to have successfully addressed including the difficulties of legislating across partial segments of the commercial property market and the collection of data for enforcement purposes.

[1] This paper is based on the findings from a larger research report which can be accessed at www.rdg.ac.uk/rep/ausleaserpt.pdf and www.rdg.ac.uk/rep/ausleaseapp.pdf .

Introduction

The UK commercial lease reform debate was started in the early 1990s as a direct result of the recession in UK commercial and industrial property markets which commenced in 1990.

There had been one other serious recession in the early 1970s but rents recovered to previous levels within a normal rent revision period, which had just fallen to around 5 to 7 years. Both landlords and tenants respectively received and paid higher rents at the next rent review. However, despite having escaped falls in rent, institutional landlords protected themselves from future recessions by introducing the ratcheted upwards only rent revision clause into leases (normally every 5 years) and by 1990 this had become a standard clause, along with 20-25 year terms, few break options and tenant responsibility for all repairs and insurances. Crosby, *et al* (2000) record that in 1990 around 90% of commercial leases by value within the Investment Property Databank (IPD) (comprising property held by the major landlords; both financial institutions and property companies) were let on this sort of lease which became known as the "institutional" lease in the UK.

Having risen significantly in the mid to late 980s, rents fell by equally significant amounts in the early 1990s. The all property estimated rental value index of Investment Property Databank[2] rose by 10% in 1986, 19% in 1987, 23% in 1988 and 15% in 1989. Unfortunately it fell by 9% in 1991, 12% in 1992 and 8% in 1993. It fell again by 1% in 1994 before a stuttering recovery began in 1995 and 1996. It was only in 1997 and 1998 that rental values recovered more strongly (IPD, 2005).

Due to the economic recession in the early 1990s, tenants were faced with falls in the earning potential of their businesses, hence the fall in property market rental values flowing through from the business downturn. They hoped to get reductions in rent at the rent review to compensate but the ratchet clause came into operation to maintain previous levels. Tenants responded by allegedly filling the UK Government postbag with complaints about their inability to occupy at market rents and the unfairness of landlords being protected from the effects of economic recession. Given that many of them commenced occupation during the building and letting boom of the late 1980s and would have occupied under institutional leases, tenants were faced with the prospect of paying late 1980 rental levels for a long term into the future.

In 1993, the UK Government published a consultation paper and suggested that it was minded to intervene in the market. It isolated three main issues: upwards only rent reviews, confidentiality agreements (where landlords attempted to restrict the free flow of market information about rent agreements) and dispute resolution where they might legislate.

Property industry responses to the consultation convinced Government to try a voluntary Code of Practice launched in 1995 (RICS, 1995). The operation and effectiveness of the Code was monitored by the University of Reading (Crosby, *et al* 2000) and they suggested that the Code was not working. However, they also found that some of the changes the Government wanted had taken place because of the changing balance of market power between landlord and tenant. This was because of the poor state of the lettings market in the early 1990s.

[2] Investment Property Databank is the largest set of performance data from the commercial property market in the UK and includes individual lease details of all properties in the dataset. At the end of 2005 this included over 11,000 properties worth nearly £150 billion.

A revised Code of Practice, still voluntary, was launched in 2002 (RICS, 2002) and the University of Reading was again asked by Government to monitor it (Crosby *et al* 2005). After receiving the monitoring report, the UK Government issued a policy statement which followed the monitoring report recommendations. It moved assignment and subletting provisions to the top of its policy agenda relegating upwards only rent reviews to second place. In addition to assignment and subletting and upwards only reviews, Crosby, *et al* (2005) re-iterated their 2000 Report concerns about the lack of awareness of small business tenants about leasing issues. So in the UK Government statement of 2005, it identified the lack of awareness of small business tenants as its third major concern.

To summarise, throughout the extended period since 1993 when the UK Government first put commercial lease reform onto its policy agenda, they have not taken the legislative option, preferring to persuade the parties to pursue voluntary reform through the mechanism of voluntary codes of practice. They have also not indicated that they are open to a partial market solution, preferring to discuss issues relating to the whole of the commercial leasing market. However the special situation of small business tenants has been isolated as a particular concern.

The present position is that a third voluntary industry code has been launched in March 2007. In the run up to the launch, the dissemination of this code has taken centre stage, especially to those whom it is perceived have most to gain by a successful Code, Small Business Tenants. This is as a result of Crosby et al (2000; 2005) findings that the code had not reached tenants at any time during negotiations. Only 14% of tenants were aware of the first code when the monitoring surveys took place and this had risen to 22% for the second code. For small business tenants this fell to 12% and 18% respectively. Only 18% of tenants knew about the second Code when negotiating their lease.

This paper therefore concentrates on the third policy issue, the awareness of small business tenants and the dissemination of the Code to those tenants.

In some other countries, legislation to control the landlord and tenant process has been the option adopted and that legislation has been aimed at small business. One such country is Australia. It may be that many of the issues concerning small business tenancies are shared between the UK and Australia and this research therefore examines the nature of the legislation in Australia and market context in which it operates. Much of the legislation in Australia dates back to the early to middle 1980s and has had a 20-year gestation period in which to develop. It gives ample time and opportunity for more difficult policy and practice issues to be isolated and examined with alternative solutions tried and tested.

Due the federal system in Australia, the individual States have significant powers in certain areas and leasing is primarily a State rather than a Federal issue. This complicates the issue with different legislation enacted in different States leading to different processes in the different States. However, they all have the common factor that the legislation is partial across the market and not all tenants are included; and individual tenants can be included in one State's legislation but not included in another's legislation. Therefore, in addition to a general overview of the legislation in each State, the main fieldwork has been carried out in one case study State, Victoria.

Aims and Objectives

The aim of this paper is to examine the effectiveness of the Australian small business tenant legislation in meeting policy expectations for the legislation. However, as the primary motivation for the research was to provide evidence of an alternative approach to the control of the commercial landlord and tenant relationship than the mainly voluntary process adopted by the UK, a secondary aim of the paper is to evaluate its potential application in the UK.

The specific objectives of the research are to:

- Identify the policy aims and objectives of small business tenant legislation in Australia and examine how that legislation has evolved.
- Determine the nature and scope of small business tenant legislation in the Australian States in terms of the identification and classification of small business tenants and premises and examine the different strands to the legislation and how they are perceived to impact on the landlord and small business tenant relationship.
- Identify the perceptions of stakeholders in the Australian leasing market and evaluate the perceived effectiveness of the legislation in the context of the policy aims and objectives.
- Examine policy and practice issues for Australia raised by the review of their legislation and discuss the application of aspects of the Australian approach to the UK.

Research Methods

First, the aims and objectives of the research have been addressed by reviewing the relevant literature and legislation in Australia in general and in Victoria in particular. The legislation in Australia has been the subject of a significant amount of comment and review and generated a substantial literature. Given that the objectives and time frame of this research are relatively confined, this paper primarily addresses literature which relates to small business tenant awareness and protection policy questions.

Second, the issues identified in the overview of the literature and legislation were developed within a set of semi-structured interviews carried out mainly in Victoria with representatives of State Government, law and agency/valuation firms, landlords and tenants. In total 28 individual interviews were carried out in March and early April of 2006 with 36 interviewees (a number of firms and organisations fielded two or more individuals. The interviewees included 9 lawyer representatives of professional law firms and 16 representatives of letting agency practices and property valuers, operating for both landlords and tenants. Two representatives of the retailers' organisations for Victoria and New South Wales and a representative of the Australian Council for Shopping Centres were interviewed along with a major shopping centre owner, a major financial institution and a major retailer. Government interviewees included the Government official responsible for organising the drafting of the 2003 Victorian legislation, the Small Business Commissioner and 2 representatives of his office who organise the mediation of disputes under the legislation and the Valuer-General for the State of Victoria.

In addition to the main Government and industry stakeholders in the subject, around half of the professional interviewees were selected due to their seniority in this field. They included the author of the first two reports for Government prior to the first legislation, the senior barrister and author of the main reference text for the Victorian legislation and the head of the Commercial Leases group of the Law Institute of Victoria. All three were involved in drafting the legislation. Representatives of the Australian Property Institute were included in the commercial agent and

valuation interviews and they also included valuation advisors recommended by the three lawyers above. The interviewee list includes all of the major stakeholders and advisors associated with the Victorian legislation as well as a group of active professionals in the market.

In addition, a meeting with the Commercial Leases Committee of the Law Institute of Victoria was arranged to discuss the issues and the researcher also spoke and invited questions at two continuing professional development seminars, one for valuers arranged by the Australian Property Institute and the other for lawyers arranged by Legalwise, a law CPD institute.

Finally, empirical lease data on rents, lease term, rent review, repairs and renewal rights was sought but it was found that the data did not exist in a similar form to that in the UK. In some States lease data is registered but is only accessible individually for a fee. The Investment Property Databank exists in Australia but its performance measurement dataset does not include leases. However, Property Investment Research, a private firm, collects property market data and had a small sample of leases which has been analysed for lease terms. One anonymous source did release a case study of a Victorian shopping centre with full lease schedules and these are also analysed to give some context to the discussion on leases and lease terms.

The Evolution of the Australian Legislation

In Australia, the catalyst for Government interest in commercial leases occurred much earlier than in the UK. In the 1970s the growth of retailing within major shopping centres centralised retail property ownership within a few major developer/investors and small business tenants operating shops in these centres began to complain of a misuse of power by these owners. There was, and still is, no statutory right to a renewal of the old lease or to a new lease and the vast majority of interviewees agreed that shopping centre managers were guilty of aggressive treatment of tenants at renewal negotiations. They also failed to disclose charges which were subsequently included after the lease was signed. Small retailers were often obliged to pay for inappropriate items in service charges, complete refits at renewal, design fees for the fit out and, where major anchor stores refused to pay for certain items in service charges, these were spread around the remaining tenants.

Responsibility for tenancy matters in Australia lies with the eight States or Territories of the Commonwealth (Federation) of Australia. Calls for intervention were answered in a number of States by retail tenancy legislation, commencing in Queensland in 1984, Western Australia in 1985 and Victoria in 1986. Now all States and Territories have legislation or a mandatory code. Despite continuing calls for a national uniform tenancy code and a number of Federal committee reports on fair trading and small business (Beddall, 1990: Davies, 1991: Baird, 1999: Reid, 1997), the Federal Government has so far refused on the grounds that it is outside their jurisdiction and there is no sign of a common approach (Cameron and Blom, 2004; Webb, 2006). Table 1 sets out the current legislation in each State.

Table 1 : Australian State/Territory Current Legislation

State	Name of Act	Date of Commencement	Last Amended
Australian Capital Territory (ACT)	Leases (Commercial and Retail) Act 2001	1st July 2002	4th March 2003
New South Wales (NSW)	Retail Leases Act 1994	1st August 1994	1st January 2006
Northern Territory (NT)	Business Tenancies (Fair Dealings) Act 2003	1st July 2004	
Queensland (QLD)	Retail Shop Leases Act 1994	28th October 1994	April 3rd 2006
South Australia (SA)	Retail and Commercial Leases Act 1995	30th June 1995	6th December 2001
Tasmania (TAS)	Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998	1st September 1998	
Victoria (VIC)	Retail Leases Act 2003	1st May 2003	23rd November 2005
Western Australia (WA)	Commercial Tenancy (Retail Shops) Agreements Act 1985 incorporating the Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998 Retail Shops and Fair Trading Legislation Amendment Act (2006)	1st September 1985 1st July 1999	CTA 1985 28th June 2001 RSFTLA Act 2006 passed October 4th 2006 but commencement date not proclaimed as at January 2007.

Sources: Compiled from primarily Philips Fox (2006), Clayton Utz (2005), Minter Ellison (2006)

The legislation across the States has many similar features as each of the eight States has used it to address similar policy concerns.

The UK policy issue is whether small businesses are aware of the future implications of signing leases and whether any steps can be taken to protect them by their improving their understanding before they sign. In Victoria, the five policy objectives of the State Government are explicitly stated as:

1. Government regulation of retail tenancies should focus on addressing information imbalances and the misuse of market power.

2. Retail tenancies legislation should only protect small and medium sized retail businesses.

3. Government involvement in retail tenancy matters should aim at ensuring that prospective tenants have sufficient knowledge to make an informed business decision.

4. While a landlord has a fundamental right of control over the use of its property, this right does not extend to engaging in unfair business practices.

5. Landlords and tenants should be able to access a low-cost informal dispute resolution forum prior to any grievances proceeding to formal litigation.

(DSRD, 2001b)

Policy objective 3 links closely with the UK problem identified by Crosby, *et al* (2000; 2005). However, the UK policy debate has not identified retail in particular as the only property type where tenants may need some support and the UK Government has not indicated that it might solve its small business tenant awareness concerns via partial legislation. In addition, the language of abuse of power and unfair business practices has not been prominent in the UK discussions and the UK government does not appear to have dispute resolution on its current list of lease concerns. This paper will therefore concentrate on awareness and protection issues.

Voluntary Codes or Government Intervention

While the UK has relied on a voluntary solution with two lease codes (with a third one in course of preparation due out in January 2007), it is interesting to note that all Australian States have resorted to legislation to solve their small retail business tenant issue. Virtually all States ignored the voluntary solution although New South Wales (NSW) first produced a voluntary code even though this was only because its attempt to produce a mandatory code by agreement initially failed. In the event, even though landlord and tenant organisations backed the code, individual landlords and tenants did not comply and the parties would not agree to it becoming mandatory. Having decided that voluntary codes were ineffective, the NSW Government legislated in 1994. In a seminar in January 2007 in Melbourne, the head of the Shopping Centre Council suggested that the Code could have worked had it been given time to develop and that other industry codes had been successfully implemented.

However, most interviewees in the research expressed surprise that the UK had persevered with voluntary codes and thought that individuals will not adhere to them unless they are mandatory. They seemed comfortable with Government intervention in the process and the debates in Australia concern the detail of the legislation rather than its existence. This may of course be because of the fact that it has been around so long. There did seem to be a universal feeling that the 1980s shopping centre landlords had behaved badly and they still have a reputation for being aggressive in their present dealings with tenants (being the subject of an Australian Broadcasting Corporation debate as recently as 5th September 2006). However, the existence of legislation may play its part in this process. As it exists, landlords may feel that, as long as they comply with it, any aggressive behaviour within the legislation is perfectly fair, given the protection that tenants now have. In addition, the unconscionable conduct legislation may also lay down some guidelines concerning behaviour which can be construed as hard but fair. This research did not investigate the motivations or behaviour of landlords but it remains an interesting potential area of study. However, whatever the motivation, the Australians have rejected the voluntary route as a vehicle for informing and protecting small business tenants, in this case retail, and implemented a legislative regime which can be observed for any evidence of whether a legislative solution could solve some or all of the UK policy objectives set out in the introduction.

The Scope of the Legislation

As the catalyst for intervention was the perceived behaviour of shopping centre managers, the Australian focus is on retail, but there are a number of interviewees who feel that this is now inappropriate and that all commercial tenants should be included in the legislation. Defining the scope of the legislation has been a major problem and in the majority of States it is the premises rather than the tenant which are defined. In 6 States any retail unit under 1000 square metres is

included. In two States they use a rent criterion; in South Australia it is $250,000 pa but in Victoria it is $1,000,000 pa. The Victorian limit is so high it includes most shops in most centres. Victoria also has criteria related to the tenant, the question being whether the company is listed on the Stock Exchange. As the rent limit is so high, the listing criteria basically controls which tenants are included.

Although the basic indicators used by most Governments for classifying small businesses are number of employees and business turnover, no State utilises this for its retail tenancy legislation, relying on floorspace, listing and/or rent limits to identify tenancies within the Act. In some States the definition of retail is drawn quite wide so retail service occupiers are included and in one State commercial premises of less than 300 square metres are also included.

The scope of the legislation therefore varies between States and some companies are included in the Act in some States and not in others. In addition the definition of retail is not always consistent. The concentration on indicators related to the premises rather than the tenants suggests that in many States the legislation is in fact a smaller retail premises Act rather than a small business tenant Act, with some small commercial premises included in some States. Table 2 below sets out very broadly the main criteria for deciding which leases are included within the legislation in each State. For a more definitive set of criteria see Minter Ellison (2006) and for detailed discussion of the Victorian legislation see Croft (2006).

Table 2 : Leases Included in the Legislation in the Different States

State	Regulated Leases / Definition of Retail Premises or Shop
Australian Capital Territory (ACT)	Retail premises (except those of over 1000 square metres let to a listed company), commercial premises of less than 300 square metres not in a shopping centre and some specified premises let to concerns such as charities and child care centres. Retail premises means sale or hire of goods or services and commercial premises means not for the hire of goods or services.
New South Wales (NSW)	All retail shop premises except those with lease term not exceeding 6 months with no right to extend beyond 6 months and a lease term of 25 years or more or extension rights which extend beyond 25years or more. Retail premises include those in use for an extensive list scheduled within the Act or proposed to be used for any business within a shopping centre. The Act excludes premises of 1000 square metres or more and four other categories of specified premises including leisure facilities and shops within them..
Northern Territory (NT)	All retail shop leases excluding shops of 1000 square metres or more, those let to a listed corporation and those let to leisure uses similar to NSW. Retail shop includes those for the sale or hire of goods or the retail provision of services and any business in a retail shopping centre. Exclusions include leases of less than 6 months and leases of 25 years or more
Queensland (QLD)	All retail shop leases in a shopping centre or used for a specified retail business. It excludes premises with a floor area above 1000 square metres and let to a listed company, all premises with a floor area of over 10,000 square metres and certain specified premises such as premises in a theme park, amusement arcade, carnival store, etc and premises let on long leases by the South Bank Corporation.
South Australia (SA)	All retail shop leases excluding leases with rents of $250,000 pa or more, leases of less than 1 month, or where premises occupied by a public company, insurance company, local authority or the Crown. Retail premises means where goods are sold to the public by retail or where services supplied to the public or public invited to negotiate for the supply of services.
Tasmania (TAS)	Applies to retail premises not exceeding 1000 square metres. Retail premises are those used for any use on a specified list or any business in a shopping centre but the legislation does not apply to leisure facilities similar to NSW and NT
Victoria (VIC)	The current legislation applies to all retail premises defined as for the retail sale or hire of goods or services. The main exclusions are where rent and occupancy costs exceed $1m pa, where premises are leased to a listed company, where leases are for less than a year including any renewal, where premises are used for the retail provision of services and are either located on any 1 or more of the first 3 storeys or are within a shopping centre, where premises are barristers' chambers or where lease terms exceed 15 years. Previous acts still operate and have different definitions.
Western Australia (WA)	All retail shop premises. Retail shop means either all business premises in a shopping centre or premises outside centres used fore the sale or hire of goods by retail or used for a specified business under the Act. The major exclusions are premises of more than 1000 square metres and those let to a corporation.

Although no legislation exists in the UK for small business leases, there is a small business relief for occupier land tax (Business Rates). The Government use a property value based indicator (Rateable Value) coupled with the number of premises occupied by the business to identify eligible small businesses; in effect, a combination of value of premises and size of operation

similar to Victoria for their Retail Leases Act. This could be utilised for any small business tenant legislation.

Issues covered by Legislation

Table 3 sets out the issues that are covered in the various Acts across Australia. Not all issues are covered in all Acts but in addition to defining who or what is included, the Acts generally cover issues of information and disclosure prior to leases being signed, what can and cannot be written into individual lease clauses, a dispute resolution mechanism prior to court proceedings and the incorporation of Australian fair trading legislation into the Acts. The legislation is substantial. In Victoria, the current Retail Leases Act is 138 pages and two previous Acts remain in force for leases signed prior to 2003. Most States have founded some form of lease registrar or commissioner and in Victoria it is the Small Business Commissioner (SBC). He estimates that 70% of his workload comes from retail tenancy matters. His role is education, investigation and dispute resolution under the Act but also provides input to Government on small business tenant policy debates

Table 3. - Major Issues Covered by the Retail Leases Legislation

Major Category or Issue	Issues within Category
Premises or tenants within the Acts	Definition of premises Definition of tenants Definition of who or what are not included
Provision of information during and after negotiations	Provision of draft leases and other information Disclosure statements by landlords and tenants Termination rights from failures to deliver information and disclosure statements Notification/registration of leases
Terms of the lease	Implied terms Regulation of actual terms such as rent review, outgoings, sinking funds, assignment, subletting, minimum term, refurbishment, renewal rights where they exist, etc.
Dispute resolution	Role of Courts Mediation systems Role of registrars and small business commissioners Valuations Confidentiality of proceedings and evidence
Unconscionable conduct	Incorporation of unconscionable conduct into Retail Leases Lists of behaviour that might be construed unconscionable.
Other issues	Key money, compensation to tenants, trading hours, security deposits, personal guarantees, land and sales tax provisions, payment of rent during fit out, management fees, advertising and promotion.

An extended discussion of the legislation is set out in the main report for this research (Crosby, 2006) which includes as an appendix a compendium of the legislation in the different States by Minter Ellison (2006).

Information and Disclosure

Perhaps the most relevant parts of the legislation for the UK policy debate are the provisions concerning information to tenants at the commencement of negotiations and a detailed disclosure statement just before the lease is signed.

The information required in Victoria at the commencement of negotiations is a draft copy of the lease plus the provision of an information brochure published by the SBC. Penalties for non-compliance range from a fine ($5000 in Victoria) to the opportunity to terminate the lease. Interviewees for the research were convinced that small business tenants would read the information and be more informed or, more likely, be seriously worried by it and seek professional advice earlier than they would in the absence of the information.

In the UK, the Government monitoring report (Crosby, *et al* 2005) found that the initial information given to tenants was usually the rent plus other terms by negotiation. The unaware tenant then went on to agree a short set of heads of terms, often on less than one side of paper, before instructing a solicitor (although it was found that heads of terms were getting more detailed for larger, better located properties) (Crosby, *et al* 2005). As they were often entering a lease for the first time, did not take professional advice at the commercial negotiation stage of the process and sometimes not even legal advice after heads of terms had been agreed and were more likely to take the first lease offered, interviewees in the UK research concluded that generally small business tenants did not get the best deal that could be on offer.

In order to inform all tenants including small business at the beginning of negotiations, the UK Government hoped that landlords and their agents would provide copies of the voluntary Code of Practice to tenants but this was found to happen only occasionally and was certainly far from universal. As indicated earlier, in the UK tenants' survey only 18% of small business tenants who had recently negotiated a new lease were aware of the Code of Practice (Crosby, *et al* 2005).

The issues are the same in both countries with the objective to make small business tenants more aware of the implications of signing a lease. Getting advice late in the negotiation is not ideal and a number of Australian lawyer interviewees suggested that advice to a small business tenant not to sign a lease, when they have spent weeks, and maybe months, setting up a small business and are about to go into occupation, is often refused.

The second element of information is disclosure and again there are rights to terminate leases and fines as penalties for non-compliance. In Victoria, the disclosure statement must be given to the tenant by the landlord at least 7 days before the lease is signed. The disclosure statement includes all financial items including service charges and also prospective issues that might disrupt the tenant during the lease, for example, planned refurbishment of a shopping centre. In NSW and Queensland the form runs to 6 pages of questions/issues. In some States the tenant must also give a disclosure statement but often this is purely a declaration that they have received the landlord's statement and have read it. However, in the past in some States, the tenant's disclosure statement included a business plan and this was thought by some interviewees to be a very good discipline for tenants starting a business.

The application of the Australian information and disclosure provisions to the UK is obvious. Given the major problem with the education of small business tenants and the lack of penetration of the two Codes of Practice at the negotiation stage, the mandatory regime is perceived in Australia to improve the awareness of tenants and at very least persuade then to take advice earlier. The lease registrars or commissioners have the power to investigate breaches of the

legislation and impose fines and the tenant may in some cases be able to withhold rent and/or terminate the lease. If the voluntary education and dissemination programme does not show significant improvement in the UK, the study of the Australian legislation has provided a model for using regulation to achieve the policy objective of informing small business tenants early in the process of the implications of the lease.

The third element of information provision is notification of leases and data transparency. Leases under the Victorian Act must be notified to the SBC and these could be used to give some indication of lease terms and also be used as part of a regime of compliance. But at present they are not used for this or any other purpose and the waste of time and expense of this process has been heavily criticised by the Shopping Centre Council of Australia (Cockburn, 2007).

At present information on lease terms in a form which can be easily analysed is not available and therefore some policy debates take place in a vacuum of information about lease terms and lease outcomes. For example, the incidence of lease renewals is not available and the Victorian Government relied on information provided by one side of the industry (landlords) when debating changes to their Retail Leases Act including the right to renew.

In contrast, in the UK, lease information is collected by the Valuation Office Agency for taxation purposes and by Investment Property Databank for performance measurement purposes and this data is analysed periodically and the results are in the public domain via BPF (2006) and Crosby, *et al* (2000; 2005). This data can be used not only to identify the incidence and trends of individual elements of the lease such as length, repair liabilities, review type and frequency and breaks in the lease, but can also identify incidence of the operation of breaks and incidence of leases actually renewed across different segments of the market (IPD/Strutt and Parker, 2006). The same study also reports tenant default rates and void periods experienced after breaks are operated or after leases are not renewed.

Terms of the Lease

The legislation in all States has detailed provisions prescribing terms of the lease. These provisions have a large number of similarities in that the same types of issue are addressed across all States, even if the detail sometimes differs. Total costs of occupation figure prominently in the legislation due to their role as one of the most controversial aspects of the relationship in the 1980s. These costs can be categorised within rent determination, rent review and other costs of occupation such as outgoings. All of the legislation, except for the code in Tasmania, defines outgoings and they normally include annual maintenance and repair of the building as well as rates, taxes, levies and premiums. The legislation also addresses liability and apportionment and outgoing information exchange. It also usually addresses issues of liability for letting fees and management costs, land tax and promotion and advertising fees. Because of the concentration on retail in shopping centres, the legislation also focuses on key money, turnover rent and rent determination at review and renewal. The Minter Ellison (2006) compendium lists 60 different issues present in the legislation but only the main issues are discussed in this paper.

The legislation in virtually all States prescribes a minimum term of 5 years although in some States, such as Victoria, this can be contracted out of (in the case of Victoria with a certificate from the SBC). Analysis of lease terms in Australia indicates that in shopping centres all but the anchor tenants get the minimum term with no right to renew. One major regional shopping centre in Victoria had 7 leases out of 250 with terms of around 20 years but these were for the major and more minor anchor stores. The standard or speciality shop units all had 5, 6 or 7 year leases or leases of less than 5 years, presumably under the contracting out provisions. Reviews

are often annual with fixed increases or increases based on the consumer price index, sometimes with a rate above the CPI. Rents on renewal are controversial; with research elsewhere in the world (for example, Fisher and Lentz, 1990) suggesting that tenants' renewal rents, where there is no right to renew, are significantly higher than new letting rents. This implies that tenants are paying some of their business value over to landlords to secure the location. This may in part reflect that existing tenants are more aware of actual rather than potential turnover and are therefore taking less business risk than new tenants, who require a higher target rate of return and can therefore pay less. However increasing ratios of rent to turnover within shopping centres suggests that is not the whole answer (See, for example, the annual reports of shopping centre REITs)

The lack of a statutory right to renew is part of this controversy. Lawyer and agent/valuer interviewees with a landlord bias suggested that the right to renew takes away the landlord's right to manage dynamically while interviewees with a tenant bias suggested that retailers were quite capable of adapting to changing retail phases and formats and needed the right to renew to stop landlords abusing their market power at lease expiry. In two States there are preferential rights awarded to tenants; i.e. the right of first refusal, but there are grounds by which landlords can refuse. It would appear from Victorian Government discussion papers (DSRB, 2001a; 2001b) concerning their legislation that, while accepting that there are occasions where tenants are treated badly at lease expiry, they do not feel it appropriate to constrain the landlord's right to manage. It would appear that the majority of other State Governments agree judging by the lack of renewal rights in their legislation. In the UK, while England and Wales have a statutory right to renew, this does not exist under Scottish Law and there is little anecdotal evidence that landlords abuse this relative advantage. However, there as yet is no specific research aimed at this particular comparison.

Rent reviews also attract detailed consideration inside the Australian Legislation. In many States the basis of review must be specified and reviews cannot be more frequent than every 12 months. The allowable bases of the review are usually specified and in many States no more than one basis can be adopted (for example, a clause suggesting the higher of 2 bases is void). All States have effectively banned an upwards-only rent review or a review where the fall is capped. They have all defined market rent and the rent determination process to obtain market rent and that normally requires a specialist retail valuer to be appointed, that appointment being made independently if the parties cannot agree. In some States that is by retail or business commissioners in others by the Australian Property Institute, the largest valuer's professional body in Australia.

Virtually all interviewees operating at the time before the legislation was enacted confirmed that before the lease legislation market reviews with upwards-only provisions were common. As a result of the legislation, which banned upwards-only reviews, the landlords moved swiftly to indexation and fixed increases. Even within the context of UK longer leases, a ban on upwards-only reviews by the UK government, similar to the ban imposed by Australian lease legislation, may give some impetus to the use of these alternative forms of review; so far little used in the UK.

Assignment and subletting is also controlled in all of the Australian legislation. An absolute right to refuse a subletting appears to be allowed in most States, but not an absolute right to refuse an assignment. The assignment process is controlled through the legislation in all of the States and usually landlords must give consent unless certain grounds for refusal are met, usually based around a non-permitted use or the proposed assignee being not of a sufficient financial standing.

Disclosure statements from landlords, assignors and assignees are an issue at assignment as well as at the granting of new leases in some States.

Before the 2003 Act in Victoria, subletting was similar to assignment in that an absolute right to refuse was not allowed but in the 2003 Act landlords were given the right to refuse for, it appears, no other reason than to align with some other States. It is slightly ironic that, at precisely the time flexibility in subletting rose to the top of the UK commercial lease reform agenda, Australian legislation aimed at small tenants reduced tenants' rights to sublet significantly.

Repairs and outgoings are defined and regulated under the Acts. In all States, leases must specify how the amounts are to be calculated, how they are to be shared out between different tenants and when they are to be recovered. All States have a list of prohibited items and the kinds of item which appear regularly in those lists include depreciation (sinking funds) and any item which is not specifically related to the tenant's unit.

Dispute Resolution and the Role of Lease Registrars/Commissioners

Across the Australian State legislation there is a common theme and that is the use of a process which tries to provide a cheaper and easier route to a settlement than the escalation of the dispute straight from negotiation to courtroom. Although the States have different processes the common theme is the use of registrars or commissioners and mediation. This occurs in VIC, QLD, TAS, SA, WA, NSW and NT.

The Victorian legislation requires that parties go through a process of mediation before the case is allowed be heard by the court. Around 75% of all cases are resolved during mediation, including cases decided before formal mediation by informal discussion. The service is run by the Victorian Small Business Commissioner and is subsidised heavily so that the parties pay their own costs and they are charged only $95 (around £40) each for the mediation. Mediators are paid $590 and an average mediation takes 3-4 hours. In the UK alternative dispute resolution is available voluntarily through the RICS dispute resolution service but arbitration and courts, with their associated costs, still dominate the resolution of UK tenancy disputes.

There was virtually universal praise from interviewees concerning mediation as an initial attempt to resolve disputes before court hearing and for the role of the SBC in Victoria, which includes dispute resolution.

The annual report of the SBC (2005) sets out the activities of the office of the SBC including a number of illustrative cases of relating to his 3 major roles of education, investigation of non-compliances with the Act and dispute resolution. The enforcement procedures have been used lightly by the SBC as, in most cases, the non-compliance has been out of ignorance rather than attempts to mislead or circumnavigate the Acts.

On the surface, the success rate of the SBC mediation service is excellent but there is no further monitoring of the outcome of the landlord and tenant relationship. Given the debate concerning the treatment of tenants at lease expiry, it may be seen as surprising that the SBC has not implemented a regime of checking on the outcomes of lease expiries. Despite the fact that the SBC has only been established for 3 years and most leases under the new Act will not be expiring until after 2008, the notification procedure gives the SBC a powerful tool to start collecting information on the incidence of lease renewals and could then research the reasons for renewal and non-renewal. In particular, cases which have been the subject of as dispute could be monitored for the lease expiry outcome to see whether the dispute influenced the subsequent

lease expiry outcome. At present, as indicated previously, the policy debate is underpinned by evidence supplied by one of the protagonists in the debate. However, there is a resource issue underpinning this debate as collecting analysing and acting on the information requires additional financial support.

According to interviewees, one of the more powerful and influential tools concerning the compliance issue is unconscionable conduct incorporated from fair trading legislation (Duncan and Christensen, 1999; Webb, 2006). Landlords are nervous about being found guilty of acting unconscionably in negotiations with tenants as they feel it affects their reputation far more adversely than being found to have made a mistake in complying with the legislation. Unconscionable conduct is where one party has taken advantage of its superior market power in negotiations, although case precedent suggests it is difficult to successfully bring an action. It is still an interesting concept not fully investigated in this research but worthy of further consideration in a wider context than just commercial leases.

Conclusions

The study of the mandatory approach to controlling both the process and the outcome raises a number of questions for the Australian policy debate as well as providing evidence of the alternative to the voluntary approach adopted by the UK.

One of the main practical problems for the Australian approach is the simple issue of scope of the legislation. Despite the longevity of the legislation, the initial concentration on retail has been maintained despite the fact that all small business tenants could benefit from the educational and awareness aspects of the legislation and the mediation service offered by the lease commissioners. If the UK government were to consider partial legislation for small business tenants, nothing in the policy and application of the Australian legislation would suggest a change to the current UK emphasis on all small business tenants, not just retail. The concentration on retail in Australia appears to be a legacy of the past and a number of interviewees expressed a view that it was time to include all small business tenants in the benefits to be obtained from increased information and disclosure.

However, whether it is decided to legislate for just retail or for all small business tenants, the difficulties of implementing legislation across part of the market still remains. In Australia, defining the scope of the Act has caused numerous difficulties over the past 20 years with a major problem being the definition of either the tenant or the premises. There is no evidence that it would be any easier to implement in the UK if partial legislation were considered. Due to difficulties in this respect with a range of different approaches in different States, some national tenants are inside the Act in some States and outside in others. The advantages of full disclosure were discussed by one national tenant who still had difficulty getting full disclosure from some shopping centre landlords prior to signing the lease where they were outside the Act, suggesting that even major tenants benefited from full disclosure provisions.

Education and information are two important initiatives in informing tenants and the use of information brochures is universal in Australia at the commencement of the lease. There is at very least a perception from virtually all interviewees and seminar responses that it has a positive effect on the awareness of tenants and that they take professional advice earlier. The contrast between the UK and the Australian leasing process is probably most observable in this respect. The failure of landlords and professionals in the UK to disseminate the Code of Practice, despite some improvement in the situation between the first and second code, and the success of the Australian approach raises the question of a more regulated approach in the UK. The Victorian

legislation imposes fines for non-compliance and gives termination rights to tenants. In the UK, the Code of Practice could act as the information brochure, indeed the new code has been organised in such a way, and it would not be onerous to ask landlords to have a draft copy of a lease drawn up before putting the property on the market.

If the UK government is serious about the awareness of small business tenants then the same goes for disclosure statements and notification of leases. Notification could be limited to certificates of compliance, although the advantages of having basic lease information for policy discussions, especially those related to lease expiries, should not be underestimated. At present, the UK has much more objective and systematic lease information and this plays an important part in lease policy discussions. The issue of lease expiries is controversial in Australia and surveys of lease expiry outcomes collected and researched by an independent source could investigate the claims of both parties.

Disclosure provisions could be by both landlords and tenants with tenants confirming receipt of the statement. A business plan would also be compatible with the UK Government's desire for a more informed business community although that raises questions of why only include business tenants, and not all businesses, in compulsory business plans. The information and disclosure provisions seem to be one of the major benefits of the Australian approach with few interviewees indicating any disadvantages.

On the same theme of education, the role of the lease registrars and commissioners has generated significant approval ratings from the interviewees in Australia. Despite some arguments about the best system, a focus for education, investigation and alternative dispute resolution, giving a one-stop shop for all commercial tenancy matters, has some merit. The comparison with the UK Small Business Service website (www.sbs.gov.uk) and the Victorian Small Business Commissioner website (www.sbc.vic.gov.au) is very stark with virtually no property matters highlighted in the UK. Mediation of disputes, regardless of the administrative arrangements, received universal praise, with the dispute being about which system was the best, not about the overall concept of low-cost mediation and alternative dispute resolution.

The aspects of information, disclosure, mediation and the introduction of lease registrars/commissioners have been well received in Australia and could be addressed in the UK in isolation from the issues of legislation across the whole market or part of a market. They could also be isolated from the discussion of individual lease terms. However, there is a certain irony in the fact that sub-letting rises to the top of the lease clause flexibility debate in the UK at a similar time to when it gets made more difficult for tenants to sublet in Victoria.

There is one aspect of lease terms that is very interesting for the UK. Obviously there are significant differences between the lease structures in the UK and Australia, not least the length of leases, but when upwards-only reviews were banned by legislation, interviewees operating at the time of the ban suggested that market reviews in leases disappeared very quickly, to be replaced with fixed increases or indexation. There has been some comment about a similar move in the UK if they were banned there although there is a different scenario between fixed increases or index linked increases in a long lease of over 5 years than for a short lease of 5 years or less.

Finally, a wider issue than small business tenancies is the fair trading legislation incorporated into retail leases legislation in Australia. It has not been possible in this research to do more than scratch the surface of this issue so no conclusions are made concerning this aspect. However, it is apparent from the interviews that landlords attach some importance to it and they are aware of the effect on brand image of a determination concerning unconscionable conduct.

Overall, there are significant differences between Australian leasing practices and the UK but these have been isolated to put the differences processes examined in this research into context. Despite these differences, both jurisdictions appear to have similar if not identical issues concerning the education and protection of small business tenants. In Australia the emphasis is on retail and this research questions whether that is a sustainable policy position for the Australians. However, as a result of their retail issues in the 1980s, they have developed legislation that goes far beyond the UK apart from one major respect, the statutory right to renew. The information, disclosure, unconscionable conduct and dispute resolution provisions, and the Government input into administering these provisions through lease registrars/commissioners, could be the basis of solving at least one of the UK's major commercial lease policy issues, the protection and awareness of small business tenants. However, in contrast, the UK experience may suggest that the Australian landlord and tenant relationship may not require such detailed regulation and legislative intervention, especially if rights to renew leases are strengthened. The attempt to legislate a part of the commercial lettings market has caused major operational difficulties and some might suggest that the extensive legislation is a sledgehammer to crack a nut. In contrast, the UK reliance on voluntary Codes has lead to a situation where over 80% of small business tenants do not know about the documents designed to increase their awareness. At what point does this lack of dissemination constitute a failure of the voluntary route and would it be possible to introduce a mandatory process to make sure that tenants have the necessary information with appropriate policing and fines for non compliance?

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