

# **The University of Reading Business School**

## Department of Real Estate & Planning

### Working Papers in Real Estate & Planning 14/06

The copyright of each working paper remains with the author.  
If you wish to quote from or cite any paper please contact the appropriate author.  
In some cases a more recent version of the paper may have been published elsewhere.



---

The University of Reading

## **Small Business Lease Reform – Can the UK Learn from the Australian Experience?<sup>1</sup>**

**Neil Crosby  
University of Reading Business School  
PO Box 219  
Whiteknights  
Reading  
RG6 6AW  
UK**

**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 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.

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.

---

<sup>1</sup> This paper is a summary of the findings from a larger research report which can be accessed at [www.rdg.ac.uk/rep/ausleaserpt.pdf](http://www.rdg.ac.uk/rep/ausleaserpt.pdf) and [www.rdg.ac.uk/rep/ausleaseapp.pdf](http://www.rdg.ac.uk/rep/ausleaseapp.pdf) .

## **Introduction**

At the end of the 1980s, the UK commercial and industrial property market entered the longest bear market since the end of the Second World War. 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.

In 1990 rents fell by significant amounts. The all property estimated rental value index of Investment Property Databank<sup>2</sup> 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 grew significantly (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.

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

---

<sup>2</sup> 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.

receiving the monitoring report, the UK Government issued a policy statement which followed its recommendations. It moved assignment and subletting provisions to the top of its policy agenda relegating upwards only rent reviews to second place.

Crosby *et al* (2000) had identified the lack of awareness of small business tenants concerning leasing issues as an area of concern and these concerns were reiterated in the second monitoring report (Crosby *et al*, 2005). 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. During 2006, a working group has been devising a third voluntary code and the Government has pledged to continue to monitor the situation after that is published.

This research concentrates on the third policy issue, the awareness of small business 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, rather than study Australia as a whole, the main fieldwork has been carried out in one State, Victoria.

### **Aims and Objectives**

The aim of the research is to examine perceptions of the effectiveness of the legislation in Australia and to provide a preliminary evaluation of its potential application in the UK.

The objectives are to:

- Identify the UK and Australian policy aims and objectives of small business tenant legislation.
- 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 will only address the main issues from that literature as they relate to the UK small business awareness policy research question.

Second, the issues identified in the overview of the literature and legislation were developed within a set of semi-structured interviews 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, 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, the Federal Government has so far refused and there is no sign of a common approach. Table 1 sets out the current legislation in each State.

**Table 1 : Australian State/Territory Current Legislation**

<b>State</b>	<b>Name of Act</b>	<b>Date of Commencement</b>	<b>Last Amended</b>
Australian Capital Territory (ACT)	Leases (Commercial and Retail) Act 2001	1 <sup>st</sup> July 2002	4 <sup>th</sup> March 2003
New South Wales (NSW)	Retail Leases Act 1994	1 <sup>st</sup> August 1994	1 <sup>st</sup> January 2006
Northern Territory (NT)	Business Tenancies (Fair Dealings) Act 2003	1 <sup>st</sup> July 2004	
Queensland (QLD)	Retail Shop Leases Act 1994	28 <sup>th</sup> October 1994	April 3 <sup>rd</sup> 2006
South Australia (SA)	Retail and Commercial Leases Act 1995	30 <sup>th</sup> June 1995	6 <sup>th</sup> December 2001
Tasmania (TAS)	Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998	1 <sup>st</sup> September 1998	
Victoria (VIC)	Retail Leases Act 2003	1 <sup>st</sup> May 2003	23 <sup>rd</sup> November 2005
Western Australia (WA)	Commercial Tenancy (Retail Shops) Agreements Act 1985 incorporating the Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998	1 <sup>st</sup> September 1985 1 <sup>st</sup> July 1999	28 <sup>th</sup> June 2001 Presently under further review

Sources: Compiled from primarily Philips Fox (2004), Clayton Utz (2005), Minter Ellison (2006)

The legislation across the States has many similar features and this research aimed to investigate this legislation to see if there were any findings which have implications for the UK policy debate on commercial leases.

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 problem identified by Crosby et al, (2000; 2005) in the UK.

### **Voluntary Codes or Government Intervention**

While the UK has relied on a voluntary solution, 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 attempted to produce a mandatory code. This was not agreed so a voluntary code was put in place with the support of all sides of the industry, with the hope that it would become agreed as a mandatory code in time. In the event, 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.

Most interviewees in the research expressed surprise that the UK had persevered with a voluntary solution and thought that they were not adhered too by individuals. 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 5<sup>th</sup> 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. The 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 protecting small business tenants, in this case retail.

### **The Scope of the Legislation**

As the catalyst for intervention was the 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 many States it is purely small premises legislation, as any retail unit under 1000 square metres is included. In two States they use a rent criteria; 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 a criteria related to the tenant,

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.

### **Issues covered by Legislation**

Table 2 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.



**Table.2 - Major Issues Covered by the Retail Leases Legislation**

<b>Major Category or Issue</b>	<b>Issues within Category</b>
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.

The detail 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 either read the information and be more informed or, more likely, 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. 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 late in the process 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 them 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. 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. 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 Government relies on information provided by one side of the industry (landlords) when debating changes to the Acts.

## **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.

Rent reviews also attract detailed consideration. 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 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**

Unlike the UK, where alternative dispute resolution is available voluntary through the RICS dispute resolution service, the legislation requires that parties go through a process of mediation before the case will be heard by the court. The success rate at, or before, mediation is around 75% in Victoria; with some 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.

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.

Given the debate concerning the treatment of tenants at lease expiry, it may be seen as surprising that the SBC has not as yet implemented a regime of checking on the outcomes of lease expiries. Identification of lease expiries could be easily undertaken through the use of the notification procedure. However, as the SBC has only been established for 3 years most leases under the new Act will not be expiring until after 2008.

One of the more powerful and influential tools concerning the compliance issue is unconscionable conduct incorporated from Fair Trading legislation. 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**

There are obvious policy implications for the UK but there are also a number of policy issues for the Australian market. If the UK government were to consider partial legislation for small business tenants, nothing in the policy and application of the Australian legislation should change the current emphasis from all small business tenants to retail tenants only. 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.

The study of Australia identifies the difficulties of implementing legislation across part of the market and defining the scope of the Act has caused numerous difficulties over the past 20 years. There is no evidence that it would be any easier to implement in the UK if partial legislation were considered. A number of interviewees also expressed the view that it was time all tenants were included in the legislation. Due to the range of legislation in the 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.

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 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. 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.

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](http://www.sbs.gov.uk)) and the Victorian Small Business Commissioner website ([www.sbc.vic.gov.au](http://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 a fixed increase or an index linked increase 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. Although there might be some suggestion that the attempt to isolate parts of the commercial lettings market has caused major operational difficulties, and some might suggest that the hundreds of pages of legislation is a sledgehammer to crack a nut, 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.

## References and Bibliography

- Baird Report (1999). *Fair Market or Market Failure*. Report of the Joint Select Committee on the Retailing Sector. Parliament of the Commonwealth of Australia: Canberra.
- Beddall Report (1990). *Small Business in Australia – Challenges, Problems and Opportunities*. Report by the House of Representatives Standing Committee on Industry, Science and Technology, Parliament of the Commonwealth of Australia: Canberra.
- Cameron, M. and Blom, J. (2004). The Case for National Retail Tenancies Laws. *Australian Property Law Bulletin*, Vol 19, No 1: 1-4.
- Carkagis, P. (1997). *The Law of Retail Leasing in New South Wales*. Prospect Publishing: Sydney.
- Clayton Utz (2005). *Retail Tenancies Comparative Analysis*. Clayton Utz: Sydney
- Cockburn, M. (2005). National Legislation. *Shopping Centre News*, 23(3) 14-16.
- Croft, C (2000a). Application of the Retail Tenancies Reform Act 1998, in Croft, C (ed) *Retail and Commercial Leases Update*. Leo Cussen Institute: Melbourne
- Croft, C. (2000b). Preface, in Croft, C (ed) *Retail and Commercial Leases Update*. Leo Cussen Institute: Melbourne
- Croft, C. (2006). *Retail Leases Victoria*. Lexis Nexis: Chatswood NSW.
- Crosby, N. S. Murdoch and C. Hughes (2005). *Monitoring the 2002 Code of Practice for Commercial Leases*. Office of the Deputy Prime Minister: London. [www.rdg.ac.uk/crer/publications/leasefinal..pdf](http://www.rdg.ac.uk/crer/publications/leasefinal..pdf).
- Crosby, N. S. Murdoch and S. Markwell (2000). *Monitoring the Code of Practice for Commercial Leases*. Department of Transport and the Regions, HMSO : London.
- Crosby, N. (2006). *An Evaluation of the Policy Implications for the UK of the Approach to Small Business Tenant Legislation in Australia*. University of Reading Research Report. [www.rdg.ac.uk/rep/ausleaserpt.pdf](http://www.rdg.ac.uk/rep/ausleaserpt.pdf) and [www.rdg.ac.uk/rep/ausleaseapp.pdf](http://www.rdg.ac.uk/rep/ausleaseapp.pdf)
- Davies, L. (1991). *Final Report on a Consultancy Study of Common National Commercial and Retail Tenancy Issues*. For Dept of Industry, Technology and Commerce, Commonwealth of Australia. Australian Government Publishing Service: Canberra.
- DMID (1991). *Retail Tenancies Act Review*. Department of Manufacturing and Industry Development, State Government of Victoria: Melbourne
- DSRD (2001a). *The Review of Victorian Retail Tenancies Legislation : Issues Paper*. Department of State and Regional Development: State Government of Victoria: Melbourne
- DSRD (2001b). *The Review of Victorian Retail Tenancies Legislation : Discussion Paper*. Department of State and Regional Development, State Government of Victoria: Melbourne.
- Duncan, W.D. and S. Christensen (1999). Section 51AC of the Trade Practices Act 1974 : An “Exocet” in Retail Leasing. *Australian Business Law Review*, Vol 27, August, 280-99.
- Fisher, JD and GH Lentz (1990). Business Enterprise Value in Shopping Malls: An Empirical Test. *Journal of Real Estate Research*, 5(1): 167-75
- IPD (2005). *Property Investor’s Digest*. Investment Property Databank: London.
- IPD (2006). *UK Annual Index 2005*. Investment Property Databank: London.



Minter Ellison (2006). *Retail tenancy legislation compendium – July 2006*. Minter Ellison: Melbourne. [www.minterellison.com.au](http://www.minterellison.com.au)

Minter Ellison (2006). *Retail tenancy legislation compendium (4e) - August 2006*. Minter Ellison: Melbourne.

Murdoch, S. P Rowland and N. Crosby (2001). *Looking after small business tenants with voluntary codes or statutory intervention; a comparison of Australian and UK experiences*. Paper to 7<sup>th</sup> Pacific Rim Real Estate Society Conference, January, Adelaide.

ORR (2002). *Retail Tenancies Legislation : Exposure Draft*. Office of Regulation Reform, Department of State and Regional Development: Melbourne

Phillips Fox (2004). *Australian Retail Tenancy Legislation – A Comprehensive Guide to Retail Leasing*. Phillips Fox: Melbourne

Phillips Fox (2004). *Australian Retail Tenancy Legislation – A Comprehensive Guide to Retail Leasing*. Phillips Fox: Melbourne

Redfern, M (1993). *Review of the Retail Tenancies Act 1986*. Committee Report for the Minister of Small Business, State Government of Victoria: Melbourne

Redfern, M. (2000). Disclosure, in Croft, C (ed). *Retail and Commercial Leases Update*. Leo Cussen Institute: Melbourne

Reid Report (1997). *Finding a balance towards fair trading in Australia*. Joint Select Committee Report on Retailing, Parliament of the Commonwealth of Australia : Canberra

RICS (1995). *Code of Practice for Commercial Leases*. Royal Institution of Chartered Surveyors: London

RICS (2002). *Code of Practice for Commercial Leases (2e)*. Royal Institution of Chartered Surveyors: London

RICS (2006). *Service Charges in Commercial Property: RICS Code of Practice*. Royal Institution of Chartered Surveyors: London. [www.rics.org.uk](http://www.rics.org.uk)

SBC (2005). *Victorian Small Business Commissioner Annual Report 2004-05*. Office of the Victorian Small Business Commissioner: Melbourne. [www.sbc.vic.gov.au](http://www.sbc.vic.gov.au)

Webb, E. (2006). *Almost a Decade on – a (Reid) Report Card on Retail Leasing*. Unpublished paper, University of Western Australia