

The role of industry bodies in changing market practices through self-regulation: commercial property leasing in the UK

Thesis submitted for the degree of PhD

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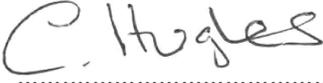
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Declaration

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

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Abstract

The UK government has sought to make changes to commercial property leasing practices. This has been the case since the recession of the 1990s. Industry self-regulation using an industry code of practice has been the vehicle for these changes. However, the code has had little direct success in changing practices. This is despite repeated threats of legislation as a constant backdrop to this initiative.

The focus for this research is on the role of the industry bodies in the code initiative. They have been central to self-regulation in commercial leasing. Thus, the aim is to investigate the role of industry bodies in the process of institutional change. The context is industry self-regulation. The specific setting is commercial leasing. The main industry bodies in focus are the British Property Federation and Royal Institution of Chartered Surveyors.

An existing model of institutional change forms the framework for the research. A chronological narrative is constructed from secondary data. This is analysed, identifying the actions of the industry bodies within the conceptual stages of the model. The analysis shows that the industry bodies had not acted as convincing agents of change for commercial leasing. In particular there was a lack of theorisation, a key stage in the process. The industry bodies did not develop a framework necessary to guide their members through the change process.

These shortcomings of the industry bodies are likely to have contributed to the failure of the Code. However, the main conclusion is that, if industry self-regulation is led by government, then the state must work with industry bodies to harness their potential as champions and drivers of institutional change. This is particularly important in achieving change in institutionalised environments.

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Abbreviations

ABI	Association of British Insurers
AGA	Authorised Guarantee Agreement
BCO	British Council for Offices
BPF	British Property Federation
BRC	British Retail Consortium
CSW	Chartered Surveyor Weekly
DETR	Department of the Environment, Transport and the Regions
DOE	Department of the Environment
DTLR	Department of the Transport, Local Government and the Regions
EG	Estates Gazette
FRI	Full repairing and insuring lease
HC	House of Commons
IPD	Investment Property Databank
ISVA	Incorporated Society of Valuers and Auctioneers
LTA	Landlord and Tenant Act
MCL	Model Commercial Lease
RICS	Royal Institution of Chartered Surveyors
SBT	Small business tenant
UORR	Upward only rent review
VOA	Valuation Office Agency

Chapter 1 Problems in the commercial leasing market

1.1 Introduction

Many businesses in the UK lease their premises rather than owning them; just over half of UK commercial property (by value) is estimated to be owned by investors (Mitchell 2014). Owners and occupiers of leased property come together as lessors and lessees in the commercial leasing market. Therefore this is a market that encompasses, and has an impact on, many organisations. The most visible feature of the leasing transaction within this market is the rent that organisations agree to pay. This is an aspect of leasing that can cause disquiet for businesses, particularly during periods of recession when profits are poor, yet rents may remain high.

However, the issues around commercial leasing are more complicated than this. A lease creates a business relationship between an owner (landlord) and an occupier (tenant) which often extends over several years. This can be seen in the current average lease length of 6.8 years (Investment Property Databank 2014). However some leases are much longer. As Investment Property Databank show, when this calculation is weighted by rent, the average lease length is 11.1 years; properties of higher rental value tend to be let for longer periods.

The formal lease agreement is usually a long and detailed document. This sets out the terms of the lease including the length (duration) along with the rights and responsibilities of each party in areas such as the payment of rent, repairs and insurance. It puts in place systems to cover future events such as provisions to review (change) the rent or the possible need to assign (transfer) the lease from the tenant to a new occupier. It also specifies the actions to be taken in respect of a breach of contract by either party. These obligations mean that the lease contract is important to an occupying organisation in terms of its ability to respond to changing circumstances and possibly even in terms of its ability to survive.

Since the recession of the early 1990s, when many occupiers felt trapped in onerous leases, the UK government has tried to get landlords and their advisors to make changes to market practices. The objective has been to encourage landlords to offer choice and to be flexible in negotiating the terms of leases. In this way, the

government has aimed to make leases more closely aligned with the business needs and time horizons of occupiers.

Government has chosen to try and achieve these objectives through an industry code of practice, generally known as the Lease Code, i.e. through industry self-regulation. The government commissioned research from the University of Reading to monitor the operation of each version of the Lease Code (Department of the Environment Transport and the Regions 2000, Crosby, Hughes and Murdoch 2005, Crosby and Hughes 2009).¹ This research revealed that, even though it has had twenty years in operation, the Code has had little direct success in changing practices nor has it achieved the government's ambition of becoming a 'handbook' for leasing for small business occupiers. This is despite government oversight and pressure, the involvement of a wide range of interested parties in creating the Code, and two fundamental revisions to the original document.² While the research revealed broad failure in the ambitions of the Code, the remit of the research did not permit investigation into the causes of this failure. My motivation for this thesis is a desire to understand some of the reasons, and to provide at least a partial explanation for what went wrong.

In this introductory chapter the key problems of the commercial leasing market are set out, along with an outline of the approach taken by policy makers to resolve these issues. From this discussion comes the focus for this thesis on industry bodies. They have been central to self-regulation in commercial leasing and my broad aim for this research is to examine their role in this initiative. The first step in this argument is to outline the process of agreeing a lease of commercial premises, as this is central to understanding the working of the market and the problems within it.

1.2 The leasing process

Premises are let by means of a lease from the owner (landlord) to the occupier (tenant). This creates both a contract and an interest in land. The process of negotiating the terms of a lease can be protracted and, as identified by Crosby *et al.*

¹ I was a researcher on the latter two of these monitoring exercises.

² Commercial Leases Group (1995), Commercial Leases Working Group (2002) and Joint Working Group on Commercial Leases (2007).

(2005), it is often split into two distinct parts. First there is the negotiation of the 'commercial terms'. This is usually undertaken by the landlord's letting agent in discussion with the prospective lessee or the lessee's property agent. Letting/property agents are likely to be members of the Royal Institution of Chartered Surveyors (RICS), or at least to work for organisations which are regulated by the RICS. At this stage the key terms are agreed. There is no set list of these terms, but those likely to be agreed are rent, lease length, inclusion of any rent reviews, and if (and when) the tenant will have the option to break (bring the lease to an end) during the lease. Usually there then follows a negotiation between lawyers representing the two parties, during which the detail of the lease will be agreed leading to the final document.

1.3 Uncertainty and imperfect information

In order to achieve a lease that suits their needs, the prospective landlord and tenant need to have and make choices. Theoretically at least, the lease is created as a result of negotiation. To reach an agreement that does reflect the needs of both parties, this must be a genuine and open process. In order for this to occur, both parties need to know the options and consequences of the various choices. Because a lease extends over time, this means predicting the future, or at least incorporating mechanisms that are able to deal with future uncertainties and change. These aspects of leases distinguishes such contracts from those where the entire nature of the transaction is determined at its formation, such as the purchase of a cup of coffee, or even much larger consumer purchases such as a car or house. Macneil, the leading exponent of relational contract theory, describes long-term contracts as having gaps in planning and having processes in place to create flexibility (Macneil 1978). More fundamentally, as Simon set out in his concept of bounded rationality (Simon 1947, 1955), it is often too costly or simply not possible to acquire all of the knowledge needed at the time decisions have to be made. Therefore the parties to a lease need to seek, estimate or guess the relevant information to enable them to agree the most suitable lease structures and clauses.

1.4 Market problems

One of the defining features of the commercial property market is the difficulty that potential occupiers face in assembling information to make these informed choices. In

addition, an accusation often made is that potential tenants have little real choice anyway as the landlords dictate terms and are often loathe to consider alternatives. Addressing these issues of information asymmetry and monopolistic control by landlords is central to the Lease Code initiative. These two enduring problems of the leasing market are discussed below.

1.4.1 Information asymmetry

In their work on economics as applied to property, Harvey and Jowsey (2004) note that it is difficult for buyers to acquire knowledge in the property market because of the infrequency of transactions, the local nature of knowledge and the heterogeneity of property. This means that, when transacting in the property market, it is difficult to find exact comparables or to acquire the information necessary to analyse transactions and inform purchase decisions. Additionally, the buyer and seller in commercial leasing often come to negotiations with different levels of knowledge as well as differing expectations and understanding. This may be because one party is inexperienced in leasing. This is often the case with small business tenants (SBTs).

Potential tenants, particularly small ones, may not have all of the information needed to make an informed choice, but they may not be aware of this shortfall. Crosby *et al.* (2005) surveyed a cross section of tenants who had recently taken leases. The researchers found that only 25% of tenants had taken professional advice. There was a strong correlation between those not taking advice and a lack of knowledge about the lease terms agreed, and these tended to be in the lower value properties (generally SBTs). Hughes (2007) analysed the information sources used by SBTs who had recently taken leases; although this was a small-scale survey it again suggested that SBTs did not take professional advice at the initial stages of the leasing process, they relied on the advice of friends, family or colleagues. In any event, their focus was generally elsewhere as the leasing process was only part of a business set-up or development. Yet, while these entrepreneurs did not consider that they were lacking information, the interviews revealed that many interviewees had only a basic understanding of lease terms and the implications of what had been agreed.

1.4.2 Lack of competition

At a general 'market' level, there are many buyers and sellers in commercial property. However Harvey and Jowsey (2004) identify three conditions which lead to sellers (i.e. property owners) having a degree of monopolistic control:

1. Geographical division of the market leading to imperfect competition between local markets.
2. Imperfection of the capital markets preventing potential buyers from borrowing the money required for purchasing large lots.
3. The spatially fixed nature of property putting landowners in strong position relative to buyers who, are often focussed on a particular location.

This is pertinent to the leasing context where, for example, retailers have requirements to be located in particular town centres and often in very specific locations within a town centre to attract customers. This narrows down the choice of landlord from whom they can buy, i.e. take a lease. While other occupiers, such as those in offices may be more footloose, there are often geographical constraints or requirements emanating from the occupier's business. Therefore, in the leasing market there is evidence of monopolistic control by landlords who have traditionally had the upper hand in commercial property leasing over their tenants; lease terms and practices have reflected their requirements, such as that of providing long-term security of income. So, for example, it is common for landlords to insist on rent reviews in leases that can only stay the same or ratchet the rent upwards; these are known as upward only rent reviews (UORRs). All of this may lead to a sense by tenants that they have no real choices.

1.4.3 Wider impact of these issues

There are wider social implications of particular leasing practices and terms being imposed by landlords. An example of this is the UORR. This form of rent review was cited by the New Economics Foundation (Simms *et al.* 2005) as particularly impacting on small and independent businesses. The UORR was argued to be unfair to all tenants as landlords benefit from increasing rental values but tenants are prevented from benefitting from any falls in the property market. However, Simms *et al.* contended that small businesses suffered more than their larger counterparts as they have less

leverage in their negotiations on leases with landlords. Hence UORRs were said to contribute to the creation of clone towns which look exactly like any other due to the presence of the same global and national chains. Such towns were identified as providing a poorer range of shops for local people than non-clone towns (Simms *et al.* 2005). Similarly, the Greater London Authority identified UORRs as a lease term which contributed to the problem of empty shops in the city (GLA Economy Committee 2013). This was because high rents were found to be a common cause of shop closures. The report argued that the weak position of small businesses meant that they were unable to negotiate revised terms and so continued to pay rents under UORRs that did not reflect current market conditions.

1.5 Public policy and intervention

Many types of contract are regulated in the UK. As Brownsword (2006) noted in his review of contemporary contract themes, specific contexts such as housing and employment have attracted a profusion of legislation. He also identified the split between consumer and business contracts as the former become ever more regulated, to such an extent that modern consumer contracts have little to do with “the ideals of voluntary contractual obligation” (Brownsword 2006:11). By contrast, business contracts tend to have remained rooted in free-market principles, commercial leasing being a good example. Commercial leases have historically been negotiated with relatively little interference from the state. There are statutory limits on certain lease provisions, and statute provides and governs the right to renew leases, but, on the whole, the UK law has not directly controlled the terms that the parties to a commercial lease are able to negotiate. Largely, leases have been governed by contract law with parties free to agree their lease terms.

However, the issues outlined above were harnessed and articulated by various people in such a way that this created the impetus for change in the recession of the early 1990s. Burton’s report on the plight of retailers in rented shops (Burton 1992) highlighted the problems arising from the landlords’ monopolistic position. In particular he identified the ability of landlords to insist on UORRs in leases. He saw these rent review clauses as distorting rents and creating an inefficient market. He also found that it was very difficult for prospective tenants to access the information they

needed when agreeing the terms of their leases. The concerns of retailers were brought to Parliament by various MPs and the government of the day consequently proposed legislation in the specific areas of UORRs, confidentiality clauses and the rent determination processes at rent review and lease renewal (Department of the Environment 1993).

The property industry responded with a vigorous defence of current practices. They also defended market forces and the ability of these forces to respond to changing circumstances and so meet occupier needs. The prevailing political ideology at a time was neo-liberalism (see Chapter 2). Consistent with this, the government decided not to legislate and steered the property industry towards a system of self-regulation (Department of the Environment 1994). This led to the first Code of Practice for Commercial Leases (Commercial Leases Group 1995), developed by a group of stakeholders in the leasing process including organisations representing landlords, tenants and their legal and property advisors, but monitored by government.

The government's hope was that the commercial leasing industry would change its long-standing practices through the use of a code of practice. This can be seen in comments such as this from the Department of the Environment Under-Secretary of State (Tony Baldry) prior to initial discussions on a code:

We consider the best way forward would be for the industry to adopt a code of practice which not only draws attention to the implications of upward rent review clauses but encourages flexibility in other terms.

Hansard: HC Debate 19 July 1994 Vol 247 c111W

It was envisaged that a leasing market would emerge that was characterised by choice and flexibility and that the Code would be a document that could be used in negotiations, so creating informed 'customers' i.e. potential tenants (especially SBTs).

1.5.1 Limited success of Code

There have been some changes in commercial leasing practices since the early 1990s that appear to be in line with government ambitions. This can be seen in the increased diversity of lease lengths, including short leases without rent reviews, increased incidence of break clauses and changes to the approach to repairing liabilities (the

division of responsibilities between landlord and tenant). There have also been changes to subletting clauses (that control the tenant's ability to lease all or part of the property to another party during the lease) that are more subtle but significant. These changes are documented by Crosby *et al.* (2005) and acknowledged by various stakeholders in the process, including government.

Nevertheless, the government report on the operation of the 1995 Code identified that these changes were essentially market driven with poor dissemination and little direct use of the Code itself (Department of the Environment Transport and the Regions 2000). Consequently, the Code was revised, and a second edition was published in 2002 (Commercial Leases Working Group 2002). The government report on this edition (Crosby *et al.* 2005) found limited progress in achieving the objectives of choice and flexibility in lease terms, the continued use of UORRs and also low awareness of the Code particularly among smaller landlords and SBTs. A third edition of the Code was produced in 2007 (Joint Working Group on Commercial Leases 2007), which was structured to create an information source and guide to leasing for occupiers (particularly SBTs) but this was also not well disseminated (Crosby and Hughes 2009).

Because of the limited impact of the Code, there have been repeated threats of legislation from various government ministers since the introduction of the Code in 1995. There was a proposal to legislate (Office of the Deputy Prime Minister 2004) although this was withdrawn. The grounds for threatened intervention have largely been linked to arguments about economic efficiency, and have been particularly concerned with achieving flexibility in the lease terms offered by landlords. However, twenty years since the first edition of the Code, self-regulation is still the means by which governments hope to reform leasing practices; the third edition of the Code is still in operation. While the Code itself does not appear to have had a direct influence on practices, the pressure from government that is behind the Code initiative may have had, and may continue to have, an indirect effect.

1.5.2 Enduring problems

Despite an indirect influence on practice, the introduction of the Code has not removed government concerns regarding the lease terms offered by landlords and the processes

by which leases are agreed. In launching the 3rd edition of the Code, the government minister (Yvette Cooper) expressed disquiet about:

continuing elements of inflexibility, particularly the predominant use of upward only provisions in rent review clauses and inflexible provisions for tenants exiting property they no longer need.

Hansard, HC 28 March 2007 Col 87WS

Asymmetry of information remains an issue, particularly following the report to government identifying that the 3rd edition of the Code was not being disseminated (Crosby and Hughes 2009). In 2009 the relevant minister (Ian Austin) expressed disappointment that small business tenants were not being told about the code and that it was “not a primary tool for the negotiation of new leases” except for a few large tenants. He saw this as being fundamental to providing information to prospective tenants, continuing that:

A professional, modern industry will surely have an interest in ensuring that its customers are fully and properly informed about the leasing choices they are making.

Hansard, HC Written Ministerial Statements 3 July 2009 Col 29WS

Portas (2011) pointed to the prevalence of UORRs and the need to find alternatives in her report to government on the future of Britain’s high streets. She also advocated promotion of the Code as a way of improving landlord and tenant relations. The government responded that change must be encouraged. The government response also recognised that dissemination of the Code was still an issue, setting out a plan to publicise it through professional bodies and other agencies (Department of Communities and Local Government 2012).

However, since the reports on the operation of the Code, there has been no further research on lease structures³ or the leasing process in the UK. There is an annual survey of occupiers undertaken by the Property Industry Alliance which aims to measure commercial occupiers’ overall satisfaction with their landlord as well as

³ Apart from the annual review of lease events from Investment Property Databank. This tracks lease length and break clauses.

satisfaction on a range of measure. The latest report (GVA 2012) gives a 61% satisfaction score for leasing and highlights that SBTs are less satisfied than their larger counterparts with their landlords. However, this is an open online survey so it is not necessarily a representative sample; it is also very small scale, the last available report (2012) was based on the responses of 182 occupiers.

Essentially this means that currently there are policy statements from government which show a belief that more change is needed but any evidence on current practices is largely anecdotal. However, it remains that self-regulation of commercial leasing does not appear to have had the anticipated effects.

1.6 Research area

The phenomenon at the heart of this research is the process of changing institutionalised practices in markets that are monopolistic and characterised by asymmetric information. The market within which this is examined is that of leasing commercial property, with a focus on the UK market which exhibits a tension between free-market ideals and government regulation. These issues are especially important because leases in the commercial sector typically form the context within which economic activity takes place (and, hence, economic growth).

Leasing takes place in a market with vocal and influential industry bodies. Two key bodies are the Royal Institution of Chartered Surveyors (RICS), which is the professional association representing property professionals, and the British Property Federation (BPF), a trade association whose members include the main organisations that own and let commercial space. These industry bodies have been instrumental in writing and promoting the various editions of the Lease Code. The research investigates their role at the centre of industry self-regulation in commercial leasing and the largely ineffective attempts to change industry practices via a Lease Code.

The overall aim for this research is to investigate the role of industry bodies in the process of institutional change, particularly in the context of industry self-regulation. Shedding some light on this requires engagement with different theoretical discourses. The literatures on governance and regulation are relevant to understanding the use of industry self-regulation as a policy tool. The literatures on professional bodies and

trade associations help to identify the capability of these two types of industry body in governance and in relation to public policy agendas. The work on institutional change enables a discussion on their potential to steer an industry in changing and to identify the process of change. This results in a process-based model of change which can then be used to analyse commercial leasing in the light of these various dimensions. These are explored in the next two chapters and used to then develop the specific research questions for the study.

Chapter 2 Self-regulation and the role of industry bodies

This chapter first examines self-regulation as a policy tool and governance mechanism. The nature of industry bodies and their role in creating a normative framework is then explored. This provides the basis for considering the ways in which industry bodies can enable institutional change through self-regulation.

2.1 Defining self-regulation

In his account of contemporary regulatory developments in Britain, Moran (2003) noted that self-regulation is a difficult term to explain, not least because it is used to describe a wide variety of institutional arrangements. Baggott studied the nature of self-regulation and its capacity to provide effective regulation in the context of the public interest; he suggested a definition of “an institutional arrangement whereby an organization regulates the standards of behaviour of its members” (Baggott 1989:436). However, this is a very broad definition. As Gunningham and Rees (1997) noted in their examination of self-regulatory regimes, arrangements described as self-regulation can be found at the level of an individual entity such as a club or corporation which regulates itself with no reference to anyone else, or alternatively it may refer to the self-regulation of a group. The problem of the lease relationship calls for a more articulate reference to the context in relation to groups. In this sense, Huyse and Parmentier (1990:259) offer a conception that seems more useful as self-regulation is conceived as “the normative orders of professional communities and business networks”. Industry self-regulation is a form of this type of self-regulation and is at the centre of the argument about changing leasing practices.

Within industry self-regulation there are important differences in terms of formality (Baggott 1989). In an informal system, regulation is simply part of daily business, with trust and implicit understandings underpinning transactions (Moran 2003). Such arrangements have been found since the industrialisation of the 19th century in the ‘club markets’ described by Collins (1999) in his study of contractual relationships and their relationship with the legal system.⁴ The range of industries with such

⁴ A club market is described as a group of people regularly doing business with each other who rely largely on trust and non-legal sanctions to underpin their transactions (Collins 1999: 212).

arrangements is diverse. It includes, for example, the diamond and cotton industries and the systems of private governance described in detail by Bernstein (1992 2001). Private governance systems and informal mechanisms of control, including peer pressure and the fear of being ostracised, were also found in the futures market studied by Gunningham (1991).

These inward-looking systems of self-regulation can be contrasted with industry self-regulation undertaken in a more explicit, outward facing and formal manner with codified rules, as in commercial leasing with the Lease Code. There are many examples of formal schemes, such as that within the advertising industry examined by Boddewyn (1985). UK Advertising Codes are operated by the industry through its own (but independent) regulator, the Advertising Standards Authority. Likewise there are many prominent formal environmental self-regulatory schemes, such as the chemical industry's Responsible Care scheme run by the International Council of Chemical Associations and studied by Gunningham (1995).

Another dimension to the use of the concept of self-regulation concerns the distinction between economic and social industry self-regulation. Gunningham and Rees (1997) describe controlling the market as economic self-regulation, such as by rate-setting and control over market entry. By contrast, social self-regulation aims to minimise any adverse consequences of business activities for others such as customers or the public. The territory of social self-regulation is wide and encompasses product and service standards as well as addressing environmental issues. While these initiatives benefit the members of these organisations by, for example, boosting consumer confidence and potentially increasing demand, their primary aim is to minimise the negative consequences of business activities for the workforce, customers or clients, or more widely for the environment.

In summary, the kind of self-regulation that appears most relevant to the study of the UK leasing market is defined as being a formal scheme of industry social self-regulation. The Lease Code is such a scheme. It is codified and is concerned with the effects of industry practices on tenants i.e. the customers of the property industry. It attempts to counter the monopolistic position of landlords and information asymmetry and to change practices that include inflexibility in the leases being offered and offering

inappropriate lease structures. Indirectly it may also address the wider social implications of commercial leasing practices such as the development of clone towns as discussed in Chapter 1.

2.2 The increasing use of self-regulation as a policy instrument

2.2.1 Changing ideology

The move by the UK government to bring commercial leasing into the regulatory sphere in the 1990s is, in many ways, not surprising. Neither is it surprising that industry self-regulation, rather than legislation, has been used in an attempt to change industry practices and to achieve policy objectives. These actions are consistent with broader contemporary changes taking place in governance. These changes were driven by a rise in neoliberalism in many western democracies, including the UK, which had started in the 1970s. Governance is a concept with many aspects and interpretations but is here defined as the “regimes, laws, rules, judicial decisions, and administrative practices that constrain, prescribe, and enable the provision of publicly supported goals and services,” (Lynn, Henrich and Hill 2001:7).

At the centre of the neoliberal ideology is “the necessity and desirability of transferring economic power and control from government to private markets” a feature noted by Centeno and Cohen (2012:318) in their study of the development of neoliberalism. The UK was a leader in the withdrawal of the state from large-scale direct intervention and the liberalisation and privatisation of markets (Moran 2003). So, for example, the UK government spearheaded the privatisation of publicly-owned organisations such as telephone services and utilities during the 1980s and 1990s.

However this has not led to an absence of regulation by the state. Quite the contrary, as many scholars of governance and regulation have observed, it has led to a state which has extended its reach. Moran (2003) observed an increase in the scope of economic life that is subject to some kind of public oversight and contended that, in many ways, what has emerged is more control although it is less direct. Mayntz (2003), writing on modern governance structures, also argued that a delegation of regulatory functions has not weakened the state but it has changed the form of state control. The result of these changes and the extension to the state’s reach was most notably

described as the “regulatory state” in the analysis of government expansion by Anderson (1962). Braithwaite (2000:223) studied crime control in various jurisdictions, including the UK. From this he observed that “the most important feature of this new regulatory state is that most of the regulation is neither undertaken nor controlled by the state”. Similarly Moran (2003:6) commented that the state has created “frameworks of rules that are then implemented elsewhere.” So, for example, the newly privatised industries of the UK were not left to operate unchecked. They were (and still are) subject to elaborate regulatory systems with government regulators being introduced such as such as Ofgem (for gas and electricity markets) and Ofwat (for water and sewerage). A commonly used metaphor in the governance literature is that the state is now ‘steering’ but other actors are doing the ‘rowing’. This was originally presented as an ideal by Osborne and Gaebler (1992); the title of their book *Reinventing government: how the entrepreneurial spirit is transforming the public sector* captures their enthusiasm for the new forms of governance.

In the West, including the UK, there has plainly been a drawing back from direct control and intervention, by government in particular, and the state in general. The contributors to *The Oxford Handbook of Governance* identify key aspects of the changes. For example, Lynn (2012) noted that, as we have entered an era of ‘new governance’, there have emerged forms of governing that include both governmental and non-governmental actors. Similarly, Rhodes (2012:33) observed that these forms of governance capture “the changing boundaries between public, private and voluntary sectors, and the changing role of the state.” As part of this there has been a diversification of the instruments of regulation (Levi-Faur 2012).

Self-regulation is part of this mix within the regulatory state, not just for previously public sector organisations but also within the private sphere, by virtue of a wealth of “compliance systems, codes of practice and other self-regulatory strategies.” (Braithwaite 2000:225). Indeed, Gunningham and Rees (1997) described a surge in the use of self-regulation as a policy instrument in western economies since the 1970s. The environmental arena provides support for this point. As Koehler (2007) noted in her review of voluntary environmental programmes, industry self-regulation via these programmes is becoming common-place in the US, and is actively encouraged by the

regulators. Meanwhile Khanna (2001) observed such a trend towards voluntary environmental schemes within OECD countries, hence her study of the effectiveness of non-mandatory schemes on environmental performance.

Therefore, returning to the specific case of UK commercial leases, when business occupiers demanded action from the politicians to address perceived problems in the early 1990s, legislation was clearly an option. However, given the ideological context at the time, it was never really likely. Rather, the pressure from occupiers and the prevailing ideology provided the conditions to introduce a scheme of industry self-regulation.

2.2.2 Interaction with the state

From the discussion above, it is clear that the state often has a strong involvement in self-regulation. This can be seen in UK commercial leasing where the impetus for self-regulation came from government and the Lease Code was written at the government's behest following an initial threat to legislate.

Yet, one definition of industry self-regulation is "a regulatory process whereby an industry-level, as opposed to a governmental- or firm-level, organization (such as a trade association or professional society) sets and enforces rules and standards relating to the conduct of firms in the industry" set out by Gupta and Lad (1983:417) in their analysis of it as an alternative to regulation. This definition places the primary responsibility for setting up and operating the regime with an industry body. However, it does not preclude the involvement of government or the state in the process and there are many examples of strong state involvement in industry self-regulation, not least the voluntary environmental programmes already mentioned or even commercial leasing. However, there is variation to such an extent that Baggott (1989) identified the level of state involvement as a variable in his classification system for self-regulation; similarly Ogus (1995) used the degree of autonomy from the state as a key variable in his typology.

At one extreme, self-regulation may sometimes be seen as an alternative to regulation and a means for an industry to avoid state involvement. King and Lenox (2000), in their examination of the operation and effectiveness of the chemical industry's Responsible

Care scheme, noted that the original purpose of the US Chemical Manufacturers Association (now American Chemistry Council) was to protect firms from government regulation. However, Gupta and Lad (1983) recognised that industry self-regulation is frequently operated with the oversight of government agencies. So, for example, the UK Advertising Standards Authority operates its Codes in conjunction with Trading Standards Authorities and Ofcom (the regulator for the UK communications industries). Koehler, following her review of voluntary environmental programmes, went as far as to say that voluntary environmental programmes are often designed to “improve the efficacy and scope of existing regulations” (Koehler 2007:691), the connection between state and industry self-regulation being therefore very strong.

Gupta and Lad (1983) also observed that, while the state may not be directly involved, schemes of self-regulation often operate under the threat of direct regulation. It may be contended that such a threat is a necessity, a research question raised by Gupta and Lad from their analysis of the nature of the literature. From a governance perspective, there is a view that a strong state presence in some form is required and there is a need for ‘procedural control’ of these new forms of governance (Mayntz 1983). Even those writing from a neo-corporatist perspective on governance accept that private interest governments are kept responsive to wider societal needs through the threat of the state to intervene (Streeck and Schmitter 1985).

The significance of the watchful eye and threat of a regulator as an important part of industry self-regulation has indeed been demonstrated in different industries and countries. For example Short and Toffel (2008) found that a proactive stance of the regulator made a positive difference to disclosures of violations of environmental laws in the USA. Looking at a range of countries, Boddewyn (1985) concluded that the interaction of the regulator and industry was needed to control advertising behaviour.

Such examples show that there is often a hybrid approach to regulation. Gunningham and Rees (1997), finding evidence of close links between self-regulation and government regulation in sectors as diverse as the chemical industry and healthcare, concluded that industry co-regulation was a better way of thinking of this form of governance than simply industry self-regulation.

For UK commercial leasing, the Lease Code was written, and is run, by industry bodies and other stakeholders. However, government has had a high level of involvement in this self-regulation. The initial threat to legislate led to the government instigating industry discussions on self-regulation. The government then took on the role of monitoring the success of the scheme to assess the extent to which practices change. Therefore, on the face of it, government participation and oversight has remained strong. Although government interest has to some extent waned, there remains a continuing threat of legislation if the required change in practices does not take place and if policy objectives are not met.

2.3 Role of industry bodies

The growth in self-regulation as a mode of governance and the associated extension of state involvement into previously unregulated spheres are relatively recent phenomena. This brings a new role in governance to industry bodies such as trade associations and professional bodies. However, as Moran (2003) noted, since the 19th century it has been quite common for private institutions to take responsibility for running markets in the UK, whether for labour, goods or services. The club markets identified by Collins (1999) have already been mentioned. Alongside this has been the emergence of 'new' professions, such as accountants, surveyors and actuaries, during industrialisation. These professions were built on self-regulation, with the state conferring authority on the professional associations, then stepping back and giving the associations control (Moran 2003).

The ability of occupational associations to provide a contemporary alternative to state regulation has been promoted by neo-corporatism (for example Schmitter 1974, Streeck and Schmitter 1985). These scholars regard organised interest groups such as industry or professional bodies as well placed to achieve public policy objectives. Certainly, these groups are increasingly drawn into the public policy arena. This is linked to the rise of neo-liberalism and the focus of governance on the role of non-state actors in both the creation and implementation of public policy (Mayntz 2003). In particular they are drawn in through the use of self-regulation by policy-makers.

2.4 Trade associations and professional bodies

There are two types of industry organisation typically involved in industry self-regulation; industry associations and professional bodies. They are very different types of organisation. Within UK commercial leasing, the British Property Federation (BPF) and the Royal Institution of Chartered Surveyors (RICS) are the main organisations of each type respectively. They represent the supply-side in the self-regulation of commercial leasing and have been instrumental in writing and promoting the various editions of the Lease Code. In order to understand the perspective each may bring to self-regulation and to leadership in changing industry practices, these two organisations are considered in turn. The focus is on their capability for governance and their connection to agendas of public policy.

2.4.1 Trade Associations

Trade associations are a form of business association. Nash (2002) studied the emergence of trade associations as agents of improved environmental performance. In this she observed that membership of associations is voluntary and typically open to organisations with certain specified characteristics. In his guide to trade and business associations, Mack (1991) similarly distinguished trade associations as bodies representing specific industries or lines of business in contrast with wider umbrella groups, such as chambers of commerce, that represent business interests irrespective of industry. While his focus was primarily on associations within the USA, these distinctions can be seen in UK groups. Hence, within the property industry, the British Property Federation (BPF) opens its membership to “any person, firm, partnership, company or association or any combination or association thereof directly or indirectly interested in United Kingdom real estate” (British Property Federation 2013a:4). Mack (1991) also noted that the members of trade associations are usually competitors in their own markets; certainly the membership list of the BPF includes the major land owners and their advisors who compete for business on an everyday basis. Trade associations are reliant on support and funding from their members. Nash (2002) observed this and linked it to a preoccupation with recruiting and maintaining members. The level of reliance on members for funding can be seen in recent accounts

for the BPF which show subscription income of £2,059,200 and other income of just £306,584 (British Property Federation 2013b).

These various characteristics might suggest that a trade association like the BPF would be rather inward looking and focused entirely on the challenges of satisfying their membership. While concerns of their membership are clearly paramount, this is rather a partial view of their standpoint as a trade association, as the next section shows.

Involvement in public policy

The nature of trade associations has changed over time. Galambos (1966) charted their development in the USA where, in the 19th century, they were largely “dinner club associations” with no real purpose beyond providing a place to meet and chat. In the early 20th century they became “service associations” and began to work with, and lobby, government to achieve their aims of creating a stable environment for business. In the 1920s emerged the “policy-shaping association” which aimed to establish “an industry-wide viewpoint” (Galambos 1966:112) and so established their own identity and became influencers of their membership rather than simply reflectors of views:

This particular form of trade association was distinguished by outstanding leaders, a well-defined and carefully articulated ideology, and formidable cooperative programs. It was a semi-autonomous economic institution with an identity clearly distinguished from its members. In seeking to implement associative values, it impinged forcefully upon individual manufacturers, members, and non-members alike.

Galambos (1966:292)

Nash saw modern trade associations as serving two functions; they provide the “organizational vehicle for political or economic collective action by their members” (Nash 2002:6) but they also perform a more prosaic function of offering services, such as insurance and training, to their members. The role as a collective body is key, as they are in a position to provide the industry’s collective voice but also to be the industry’s rule-maker and to be the organisation tasked with improving the perception of an industry amongst the public, (Nash 2002:6). This was particularly apposite to the environmental field Nash was studying, but is also relevant to commercial leasing. In

particular, the BPF can play a part in dispelling the negative perceptions arising from the sense of monopolistic control of the market by landlords.

The Objects of the BPF show its role as a collective body. These are set out in the BPF's Articles of Association and are shown below:

Objects

4. The objects for which the Federation is established are to promote the interests of its Members and other persons, firms, partnerships, companies and associations (including combinations thereof) which are directly or indirectly interested in real estate and would qualify for membership of the Federation under these Articles, by:

(a) engaging with government and other policymakers within the United Kingdom and overseas and with the media and general public to improve awareness and understanding of the real estate industry and the social and economic contribution it can make;

(b) seeking to secure, across all relevant policy areas, legislative, regulatory and fiscal conditions which are most conducive to the success of its Members and other interested persons and best suited to enabling the real estate industry to make that contribution;

(c) acting as a forum for the real estate industry to come together, debate issues of common interest, pool expertise and, insofar as it is possible and desirable to do so, speak with one voice;

(d) providing its Members with access to information and an understanding of the policymaking process, its drivers and context, and promoting best practice within the industry; and

(e) liaising as appropriate with other industry and business bodies, political, academic and social stakeholders.

British Property Federation (2013a)

The BPF includes engaging with policymakers and influencing policy in its remit (objects a and b), and liaising with other bodies and stakeholders (object e). It also aims to be the voice of the industry (object c). Influencing policy embraces the stabilising function mentioned by Galambos (1966) whereby the BPF seeks to maintain favourable

conditions for the business of its members. Relevant to the aim of changing industry practices through the Lease Code, the BPF has an objective of the promotion of best practice in the industry (object d).

In commercial leasing, the BPF has played a role in devising (and revising) the Lease Code. This shows an engagement with policy by the BPF and promotion of best practice that goes along with this. However, in doing this, the BPF also has to achieve the aim of maintaining favourable business conditions for members and so achieve its overall objective (set out in its Objects) to promote the interests of its members. This raises a question on the extent to which self-interest may have impacted on the BPF's role in promoting change in leasing.

2.4.2 Professional associations

Mack (1991) contrasted professional with trade associations in terms of their membership; he noted that the former represent individual practitioners while the trade bodies tend to mainly comprise organisations. Therefore, to understand professional associations, it is first necessary to consider the notion of a professional. The literature on the sociology of the professions is useful here. Key defining characteristics that are identified in this literature include: exclusive ownership of a distinct body of knowledge and area of expertise; control over access to the profession; working for the public good; the mutual recognition and support of the professional community (see the seminal studies of professionalism by Elliot 1972; Freidson 2001; Evetts 2003).

It is the professional association that has the function of maintaining and nurturing these characteristics. For example, the regulations of the RICS provide for the establishment of professional groups in the different areas of specialism. The remit of these groups includes "recommending routes to attaining Professional Competence" as well as publishing "the requirements for competency in its own specialism, including any necessary qualification or experience" (Royal Institution of Chartered Surveyors 2010:R7.5).

Professional associations have long been responsible for what Streeck and Schmitter (1985:32) call "regulated self-regulation" in that they have effectively negotiated the

terms of regulation of its members (with the state) and then had responsibility for enforcing it. In her examination of the rise of professionalism in England and the US, Larson (1977:15) noted that “the attitude of the state toward education and towards monopolies of competence is thus a crucial variable in the development of the professional project”. In the UK, the state-protected monopoly is manifest by the granting of a royal charter to the professional association by the Privy Council. This is only granted where the association represents “a field of activity which is unique and not covered by other professional bodies” (Privy Council 2015). Professional bodies in the UK have therefore determined their own rules governing entry, standards of behaviour and professional development. Alongside this, the study of contemporary British professions by Spada (2009) observed that they also have to ensure that these rules are not broken, that service levels are maintained, and they must have mechanisms to deal with members who do not conform.

The Royal Institution of Chartered Surveyors (RICS) is the association for property professionals involved in commercial leasing. It has a Royal Charter dating back to 1881 which, among other things, sets out the institution’s Objects. These Objects are set out below:

3. The objects of the Institution shall be to secure the advancement and facilitate the acquisition of that knowledge which constitutes the profession of a surveyor, namely, the arts, sciences and practice of:

(a) determining the value of all descriptions of landed and house property and of the various interests therein and advising on direct and indirect investment therein;

(b) managing and developing estates and other business concerned with the management of landed property;

(c) securing the optimal use of land and its associated resources to meet social and economic needs;

(d) surveying the fabric of buildings and their services and advising on their condition, maintenance, alteration, improvement and design;

(e) measuring and delineating the physical features of the Earth;

(f) managing, developing and surveying mineral property;

(g) determining the economic use of resources of the construction industry, and the financial appraisal, management and measurement of construction work;
(h) selling (whether by auction or otherwise) buying or letting, as an agent, real or personal property or any interest therein
and to maintain and promote the usefulness of the profession for the public advantage in the United Kingdom and in any other part of the world.

Royal Institution of Chartered Surveyors (2009)

The Objects show the professional and geographical territory that is claimed for members of the RICS. The role of the RICS as a learned society asserting ownership of, and promoting, an area of expertise and body of knowledge can be seen in the objects. The final sentence of the Objects sets out the public interest focus of the organisation. These Objects can be contrasted with those of the BPF. The RICS has the overall objective of “the advancement and facilitate the acquisition of that knowledge which constitutes the profession of a surveyor” rather than, as with the BPF, promoting the interests of its members.

Professional associations have governance mechanisms to control how members behave. These are standards of professional practice and codes of ethical conduct. The RICS has five professional and ethical standards which are part of their regulations and so are binding on all members. Thus members have to demonstrate that they:

- 1. Take responsibility;*
- 2. Treat others with respect;*
- 3. Always provide a high standard of service;*
- 4. Act with integrity;*
- 5. Act in a way that promotes trust in the profession.*

Royal Institution of Chartered Surveyors (2013)

These five standards are supported with information and guidance for members. Beyond this, the RICS publishes a wealth of guidance in the form of practice statements, codes of practice, guidance notes and information papers. While some of these are mandatory and others voluntary, the aim is always to enable members to remain “professionally competent” and to adopt “best practice” (Royal Institution of

Chartered Surveyors 2014c). As with the BPF, such a commitment is central to the objective of the Lease Code to change current practices.

Public interest and public policy

One of the defining characteristic of professionals noted above is that of serving the public interest. The study by Hill and Lorenz (2011) of the professional institutions in the built environment found that the institutions include this commitment in their charters or constitutions. The primacy of the public interest can be seen in the Objects of the RICS through the use of the words “for the public advantage” (RICS 2009). The public interest perspective distinguishes professional associations from trade associations; this was acknowledged by a recent incoming president of the RICS who commented that “since 1881 our Royal Charter has required us to act in the public interest. This is what separates the RICS from a trade association.” (Brooke-Smith 2014). Theoretically this shapes the behaviour of a professional body. Brooke-Smith continued to say that a professional association has to consider the long-term public interest even if it means “difficult choices in the short term.” This commitment to the public interest has implications for self-regulation and the approach taken to promoting change to meet public policy objectives.

This assurance of best practice allied with public interest can be seen in the RICS leading in various initiatives such as the Lease Code or the Private Rented Sector Code of Practice (Royal Institution of Chartered Surveyors 2014b), the latter aiming to improve the experience of tenants renting residential property.

As with trade associations, professional associations also have a role in influencing policy. They may respond to government agendas. In their review of British professions, Spada identified two ways that professional bodies are involved in such policy-making:

- 1. In a responsive manner when advice is sought by government on a specific policy issue.*
- 2. In a proactive way when a professional body goes to government with advice on policy which may be on the agenda sometime in the future.*

Beyond this professional bodies are keen to get involved in setting the agenda. The Spada researchers interviewed a representative of the RICS who referred to the organisation interacting with government when it believes something *should* be on the government agenda; the Law Society interviewee spoke of being involved in agenda setting “before ideas develop (into more inflexible) policy proposals”(Spada 2009:28).

On its website, the RICS makes clear its desire to influence:

RICS seeks to influence governments, international organisations and key stakeholder organisations around the world with the aim of developing and embedding truly international standards and creating a vibrant and sustainable land, property and construction sector.

Royal Institution of Chartered Surveyors (2014a)

The RICS, along with other professional associations in the built environment, is involved in promoting issues of public policy such as sustainability (Hughes and Hughes 2013). This is through a range of activities, for example the promotion of environmental assessment tools for buildings such as the Building Research Establishment Environmental Assessment Method (BREEAM). It is also through engagement in high level debate and initiatives. So, for example the CEO of the RICS was invited to attend a UN Climate Summit in September 2014 with a view to contributing to a global climate change agreement.

2.4.3 Moral authority

Thus far, this examination of trade associations and professional bodies suggests that these bodies have the functions and structures needed for a role in governance through self-regulation. Beyond this however, such responsibilities require these bodies to exert moral authority over their members, and to create a normative framework through which they can lead the industry in adopting good practices.

There is a strong strand within the regulation literature which supports the view that industry bodies are capable of doing this. Gunningham and Rees (1997:371) describe industry bodies as mediating institutions which can provide “an effective industrial morality that brings the behaviour of industry members within a normative ordering.”

In saying this, they reference the views of Weber and Durkheim who recognised the importance of these groups during 19th century industrialisation. Durkheim saw these associations as being *the* social groups that could bring individuals together and exert moral authority in a secular society (Aron 1965). Weber saw the potential of industry associations to be more successful regulators than the state because of their direct relationships with their members (Gunningham and Rees 1997). Likewise, Durkheim believed that the state was too remote from individuals and in contact with them too intermittently, to be able to “socialise them within” ([1893]1933:28). He identified a need for groups that occupied the space between individual and state, ones that were close enough to individuals to draw them into social life; this was seen as a role for an occupational group because “an occupational activity can be efficaciously regulated only by a group intimate enough with it to know its functioning, feel its needs, and able to follow all their variations.”(Durkheim, [1893]1933:5).

The closer relationship of associations, rather than the state, to the regulated group is recognised by Streeck and Schmitter (1985). They noted that this tends to help acceptance of regulation by those affected. They also point out that associations can use tangible group-specific norms and perceptions to encourage compliance (rather than trying to appeal to the issues of wider society as the state would have to do).

Similar points come through the self-regulation literature. Gunningham and Rees, referencing Durkheim’s idea of moralising industrial life, argued that “an industry association must establish a normative framework for its members and, equally important, develop ways to ensure its efficacy.” (Gunningham and Rees 1997:372). The development of an industry morality and the associated normative framework is, according to Gunningham and Rees (1997) an important first step in industry self-regulation.

They identified key features of such a framework:

- It provides a shared basis for challenging, questioning and guiding industry practices.
- It is a product of reflection and conscious deliberation
- It recognises multiple values and commitments.

- It takes a critical standpoint
- It defines and upholds a special organisational competence
- There is an expectation of willing obedience but not grudging acquiescence from the companies involved.
- It provides a legitimate account of the industry's activities to the public

Gunningham and Rees argued that these principles and practices must be institutionalised through the development of industry-wide policies and procedures to ensure the commitment of firms. They were not alone in arguing that industry associations are best placed to steer good practices. For example, from his study of the advertising industry, Boddewyn (1985) contended that because an industry has a sense of ownership of the rules on behaviour, they are accepted and enforced from within the industry without the hostile response that often accompanies legal solutions. Braithwaite (1993) argued that this sense of commitment can achieve better results than government.

This all suggests that industry bodies should be more successful in calling their members to order than the state would be. However there can be a tension for members between responding to the requirements of the association and meeting the needs of their businesses. This raises the question of why an individual practitioner or business might acquiesce to the demands of the association, even if business drivers might suggest otherwise. This brings the concept of legitimacy into play.

2.4.4 Industry bodies as sources of legitimacy

Commercial leasing operates in an institutional environment, i.e. one characterised by rules and requirements. These requirements (and the associated approval) often come from the state, but can originate from professional or trade associations, increasingly so with the new modes of governance. From an institutional perspective it may be argued that organisations conform to these rules to gain approval, i.e. legitimacy. Legitimacy was analysed by Suchman (1995:574) and defined as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.” Legitimacy is crucial for the success of an organisation to such an extent that Meyer and Rowan (1977) argued that organisational structures are created to gain

legitimacy rather than being created to meet the technical needs of the organisation; these structures may even be to the detriment of the technical needs. D'Aunno, Sutton and Price (1991) studied drug abuse treatment, finding that community centres fitted in with traditional practices of the sector, rather than adopting new ways of working, and so gained external support. They summarised: "When organizations face environments characterized by strong belief systems and rules, survival and effectiveness depend more on the legitimacy acquired from conforming to widely held expectations than on efficient production" (D'Aunno *et al.* 1991:636). So, for example, in Oliver's study of the Canadian house-building industry, she concluded that responding to institutional pressures and developing good relations with rule makers (building inspectors, government agencies and professional associations) was central to the success of individual companies (Oliver 1997).

The importance of external legitimacy to organisations, and the variety of sources, can be seen in studies in very different contexts. For example Singh, Tucker and House (1986) found that voluntary social services agencies in Toronto were keen to be listed in the community directory and to get a charitable registration number; those that gained this external legitimacy were more likely to survive than those that did not.

In commercial leasing, professional and trade associations are in a strong position to confer legitimacy on the practices of their members. In particular, professionals need the approval of their associations to survive and to gain resources; therefore the badge of the RICS or Law Society will enable a firm to attract workers, clients and funding. Consequently property professionals and their firms are driven not just by their own organisational requirements, but also by the need for external approval by the associations. This raises questions for the analysis of the role of industry bodies in the Lease Code, particularly the extent to which conforming to the Code is seen as required for legitimacy.

2.4.5 Split personalities

There is some evidence in the literature of the ability of industry bodies to regulate and provide an industry morality, and that members will follow their lead to gain legitimacy. These ideas are fundamental to industry self-regulation as a governance mechanism. However, these notions are countered by a view in the economic and political science

literature that industry associations are largely there to serve their own ends suggesting that they are not concerned with providing normative frameworks at all. This is summed up by Gunningham and Rees:

For some they are a source of great mischief where price-fixing and other anti-competitive behaviors hide behind the veil of industry self-rule; for others they are driven by interest group bargaining where companies conspire against the public good (and seek to avoid government regulation) by producing self-serving, lowest-common-denominator standards.

Gunningham and Rees (1997:372).

It has already been noted that the primary aim of the BPF, as set out in its Objects, is to promote the interest of its members. Even the incoming RICS president of 2014 recognised that professional institutions can appear to be self-serving in the way that they seek to control practices and entry into professions (Brooke-Smith 2014). Alongside this, the tensions that occur between serving the client's interests and that of the public have been noted by several writers. Hill and Lorenz (2011) observed this in the field of property valuation. Interviews conducted during the monitoring of the Lease Code suggest that members and officials of the RICS and Law Society see the client's interest as paramount (Crosby and Hughes 2009).

This resonates with the power paradigm that emerged in the sociological literature on the professions in the 1970s which saw them as a means of controlling and organising an occupation. So, for example, Larson (1977) described the 'professional project' as one of monopolistic control, usually endorsed by the state, and standardisation of services through definition and demonstration of claimed knowledge. As Muzio *et al.* (2013) noted in their study of the role of professions in processes of institutional change, this perspective sees professions leveraging "their superior technical, political and organizational resources to retain control over their own occupational labour markets"

However these authors also refer to recent calls to move beyond an obsession with monopoly and, rather, to consider how the professions "retain their normative value beyond their privileged market position" (Muzio *et al.* 2013:704). They noted the lack

of attention in the sociological literature to the role of the professions in “building and transforming political, social and economic institutions”.

The split personalities of the professionals and their associations are, perhaps, to be expected. Gunningham and Rees argue that industry associations are complex and which “like persons, have multiple selves” (Gunningham and Rees 1997:372). This is a complexity found in business organisations more generally. Ayres and Braithwaite investigated some of the issues around involving business in the regulatory process and remarked:

[M]ost business actors are bundles of contradictory commitments to values of economic rationality, law abidingness, and business responsibility. Business executives have profit-maximizing selves and law-abiding selves; at different moments, in different contexts, the different selves prevail.

Ayres and Braithwaite (1992:31)

Gunningham and Rees recognise these contrary tendencies in associations and argued that “industry associations are both economic and normative institutions, and that the market model of institutions enriches and supplements, but does not supplant, the normative model” (Gunningham and Rees 1997:373). In considering the roles of industry bodies in self-regulation of commercial leasing, recognition of these two dimensions can perhaps add explanatory power.

2.5 Chapter summary

Self-regulation is a broad term but the kind of self-regulation that appears most relevant to the study of the UK leasing market is defined as being a formal scheme of industry social self-regulation. The Lease Code is such a scheme. Self-regulation was introduced into commercial leasing in response to the pressures from disgruntled business occupiers in the 1990s. While legislation was an option, the decision by government to use self-regulation is consistent with contemporary neo-liberal ideology pervading western democracies.

Self-regulation in leasing has a strong relationship with the state as the latter initiated the scheme and then oversaw the creation and operation of the Lease Code. It is not unusual for state and non-state actors to work together; this is a common feature of

new forms of governance in general and self-regulation in particular. However, industry bodies have responsibility for running such schemes. Trade associations and, particularly, professional bodies have been operating self-regulation amongst their membership since the industrialisation of the 19th Century. They have the mechanisms in place and have the moral authority to lead industry by providing a normative framework within which self-regulation can take place. In an institutionalised environment, the legitimacy gained by conforming to these frameworks is critical for the success of individuals and firms and can therefore drive behaviours of organisations and individuals. In commercial leasing, professional and trade associations are in a strong position to give such approval and from this can flow workers, clients and funding.

However these bodies are operating in a market environment and pressures of the market may conflict with this normative dimension. Therefore it is recognised that the BPF and RICS, as the dominant industry bodies in commercial leasing, may have conflicts to resolve as they take on this role leading self-regulation yet must attend to their members' interests.

For the public policy objectives of self-regulation of commercial leasing to be achieved, this means steering an industry through institutional change; the capacity for an industry body to do this is the subject of the next Chapter.

Chapter 3 Industry change

In Chapter 2 it was suggested that industry bodies such as the RICS and BPF are well placed to regulate their membership, perhaps more so than the state. Their members are likely to require legitimacy from their associations and so seek to conform to their rules and requirements. However these bodies are operating in a market environment and self-interest may impact on this normative dimension. Nonetheless, industry bodies have the potential to lead their industries in adopting good practices through self-regulation. However, in commercial leasing the anticipated change in industry practices through the introduction of the Lease Code did not happen, despite the involvement of the industry bodies. The question arises whether these industry bodies use their position in conferring legitimacy to encourage change or whether they tend to reinforce a status quo.

The first part of this chapter considers the role of industry bodies in reinforcing existing practices or driving change. In the second part of the chapter the process of industry change is discussed, highlighting the role that industry bodies can play in this. This leads to a model of institutional change which provides a framework for the analysis of the role of industry bodies in the self-regulation of commercial leasing.

3.1 Agents of change?

One of the main functions of professional associations is to reinforce collective beliefs and associated practices through training and enforcement. By adopting these practices a professional can gain legitimacy. DiMaggio and Powell (1983) used existing industry studies to show that an organisational field (broadly, an area of economic activity) dominated by professionals will lead to the individuals and organisations behaving the same way in a process called normative isomorphism. They saw this being because of the education and training of professionals, and also because of the highly developed professional networks spreading similar ideas. Professional and trade associations are vehicles “for the definition and promulgation of normative rules about organizational and professional behaviour”; these mechanisms create a pool of “almost interchangeable individuals” who share similar views throughout an organisational field regardless of the organisation they work for (DiMaggio and Powell 1983:152). Building

on this work, (D'Aunno *et al.* 1991) observed external support from professionals leading to isomorphism in the mental health sector.

Isomorphism does not of itself imply stasis, but it does imply organisations in a field all moving towards homogeneity of structure and culture. Thus, in their study of change in the professional business services sector in Alberta, Canada, Greenwood *et al.* (2002:62) saw professional associations as often being "part of the explanation for the sustained resilience of institutionalized practices" and so may be seen as means by which practices are reproduced rather than agents of change, a central argument in the work of D'Aunno *et al.* (1991). Abel (1989), in his study of the legal professions, also found legal associations to be reactionary and dedicated to preservation rather than being progressive.

All of this might lead to the view that industry associations are not natural agents for change. Yet there are plenty of examples in the literature to support the notion of these bodies driving change and granting legitimacy to new practices in a range of industries. The study of Norwegian fisheries undertaken by Holm (1995) is one such case. He observed that trade associations are guided by established practices and so are inherently conservative structures which aim to perpetuate the existing practices and procedures but that they also aim to create new institutions and amend old ones; new institutional practices are built on old ones. Greenwood *et al.* (2002) studied changes in the provision of business services (centred on the accountancy profession) and observed a central role for professional associations who, whilst not initiating the change, were critical in its legitimisation. They also suggested that change isn't necessarily isomorphic as several ideas for replacement practices may emerge but only some of them will be accepted and themselves become established. The chemical manufacturing industry's global Responsible Care Program and the American Institute of Nuclear Power Operations show the success of trade groups in achieving a shift in industrial morality and practices in response to particular events and social change (see Rees 1997 and Gunningham and Rees 1997).

Other examples are not so clearly linked to industry bodies but they show the power of external legitimacy to drive change in professionalised fields. Tolbert and Zucker (1983) studied the adoption of civil service reforms in the USA which originally was

strongly related to city characteristics. However, adoption then became related to institutional definitions of the legitimate structural form for municipal administration that were becoming established during the process. Similarly Meyer, Stevenson and Webster (1985) studied urban fiscal agencies, finding strong relationships between organisational attributes and city characteristics in early years but none later. In these cases the initial drivers for action were the improvement of the task at hand, but, as with the study by Tolbert and Zucker, once the models are established the desire to conform and gain legitimacy becomes the paramount driver.

Change was at the centre of DiMaggio's study of the development of art museums in the US in the late 19th and early 20th centuries (DiMaggio 1991). He observed that museum professionals were working with others from different organisations to create this new organisational field. Yet these professionals were not in opposition to their employers in their organisational contexts; they followed their organisation's operating procedures by day. So, while relatively little conflict occurred within the organisations, professionals had stimulated change "by mobilising to construct an environment they could control at the level of the organizational field" (DiMaggio 1991:287). DiMaggio makes the general observation that "most professional activists compartmentalize their organizational and environmental roles and activities" (DiMaggio 1991:288). A key conclusion of his study was that change was not driven at a local level, but rather by the emergence of field wide structures at a national level, in this case professional associations were key. As the art museum form became established, this provided openings for change, conferring legitimacy on the movement.

The interplay between the organisational level and the field level can also be seen in the study of financial reporting within the top 200 US firms as listed by Fortune magazine (Mezias 1990). Mezias looked at specific changes in accounting practices within these firms and considered what had driven them to adopt such practices. He concluded that the wider changes were driven by the accounting profession, the nation-state and (powerful) organisations. But, the move to change to particular reporting procedures began at the interorganisational level as the interest of these groups coincided.

It is not clear whether there was any mismatch of interests in DiMaggio's study, however the findings from Mezias suggest that change is more likely to happen when these interests coincide. Likewise, in their study of clinical guidelines used in institutional change for the medical profession, Adler and Kwon (2013) observed the relationships between field, organisations and individuals inherent in the role of the professional associations. The authors argued that the associations are simultaneously "vehicles by which the broader field affects professionals and professional organizations, and vehicles that afford individual professionals and professional organizations bottom-up influence in the evolution of the institution of professionalism and the surrounding field" (Adler and Kwon 2013:949). In commercial leasing, there is a relationship between property- owning companies and advisors, and their respective associations which are comprised of individuals who work in these organisations. The nature of the interplay between these on the attempts to change well-established practices remains to be seen.

Within the property sphere there is little literature on the role of industry bodies in changing practices although Hill and Lorenz (2011) and Hill *et al.* (2012) make the case for them to grasp the nettle of change. They question how property valuation professionals frame and address the issues within their domain, arguing that they have a duty to challenge what the client is asking them to do, specifically to bring in considerations of sustainability. They contend that the professional bodies must show leadership, setting this in the context of the development of professionalism and the public interest remit. Hughes and Hughes (2013:30) looked at the professions in the built environment and noted that: "if a profession and its institution are to have continuing validity, then its members must surely be able to demonstrate the on-going relevance of their knowledge, their right to define it and all that flows from this, including the normative systems they set up around it."

It may be that the industry bodies themselves need a sponsor of change to spur them on. An important aspect of DiMaggio's 1991 study was the attitude of the museums' patron Carnegie and his financial support of the professionals (rather than individual organisations). There are perhaps parallels here with commercial property leasing; the emphasis of government 'patronage' has been to support the movement for change via

the activities of professional and trade groups. In this case it is more than support though. It is strong pressure to change and to achieve policy objectives, as the government sees the industry bodies as the vehicle to deliver it via self-regulation.

So far the discussion in this chapter has suggested that industry bodies have a central role to play in establishing and maintaining collective beliefs and practices, but also they have the potential to enable change and are often under pressure to do this. Sometimes they may drive change (Mezias 1990); in other cases they do not lead, but by endorsing change they legitimise it (Greenwood *et al.* 2002). However, they may resist change, being more reactionary than progressive (D'Aunno *et al.* 1991). The associations cannot be seen in isolation from their members or member organisations, and the interplay between them can be significant in driving change.

In order to study the role of the industry bodies in promoting change in commercial leasing, the process by which the Lease Code was introduced and operated will be examined. The next section considers the process of industry change in an institutionalised environment, with a view to creating a framework with which to analyse this process in leasing.

3.2 The process of industry change

The process of industry change has not been the focus of a wealth of research in relative terms. Greenwood *et al.* (2002) described a lack of knowledge on how and why institutionalised practices within an industry wither or change, with most accounts focusing on the effects (such as isomorphism). They formulated a model of the process which builds on earlier work by Tolbert and Zucker (1996). The latter is therefore discussed first. Tolbert and Zucker created a model of the way that practices become institutionalised within an industry. They identified three stages: Pre-institutionalisation; semi-institutionalisation; full institutionalisation.

The first stage occurs as a response to specific stimuli or problems; new structural arrangements are generated by different organisations for the problems they face. Some may imitate others within their networks if they perceive that the solutions will address their own problems. But largely there is independence of ideas and there may be many of them.

The second stage occurs as structures become 'objectified'. Tolbert and Zucker saw this as being a process by which a consensus develops between organizations on workable and useful new structures; the more organisations that have used a particular solution then the more likely it is that others will follow suit. "Industry champions" have a role here (Tolbert and Zucker 1996:183) as they can be instrumental in the process of theorising. This is where a general problem is identified and a diagnosis made of the source of the problem, to which proposed structures are the solution (and can be demonstrated to be the solution). Industry champions can be instrumental in diffusing these structures across organisations.

At this stage of semi-institutionalisation, structures may still fall by the wayside; they remain relatively untested and those using them are likely to be still evaluating them. It is only when the final process of what Tolbert and Zucker call 'sedimentation' occurs that structures can be seen as fully institutionalised. At this point structures are adopted across organisations and over a sustained period of time. However, for this to happen several criteria must be met; Tolbert and Zucker see this final stage as being dependent on "relatively low resistance by opposing groups, continuing cultural support and promotion by advocacy groups, and positive correlation with desired outcomes."(1996:184).

Greenwood *et al.* (2002) built upon this work and that of others, adapting it to deal specifically with institutional change i.e. the breakdown of existing structures as well as the creation of new ones. In the same vein as Tolbert and Zucker, they suggested that identification and analysis of the process, when focussing on the role of the various actors within it, can help explain the course of institutional change within the organisational field. They reviewed the literature on the change process observing that, although organisational fields are often highly institutionalised, they can change. This happens through a process of deinstitutionalisation, with new ideas and practices emerging in a non-isomorphic fashion and eventually taking hold, so becoming themselves the new ways of doing things i.e. the new institutions. They distilled this into a six step model of institutional change which clearly draws on that of Tolbert and Zucker. This is set out in Figure 1. The evidence for each stage from the literature is discussed below.

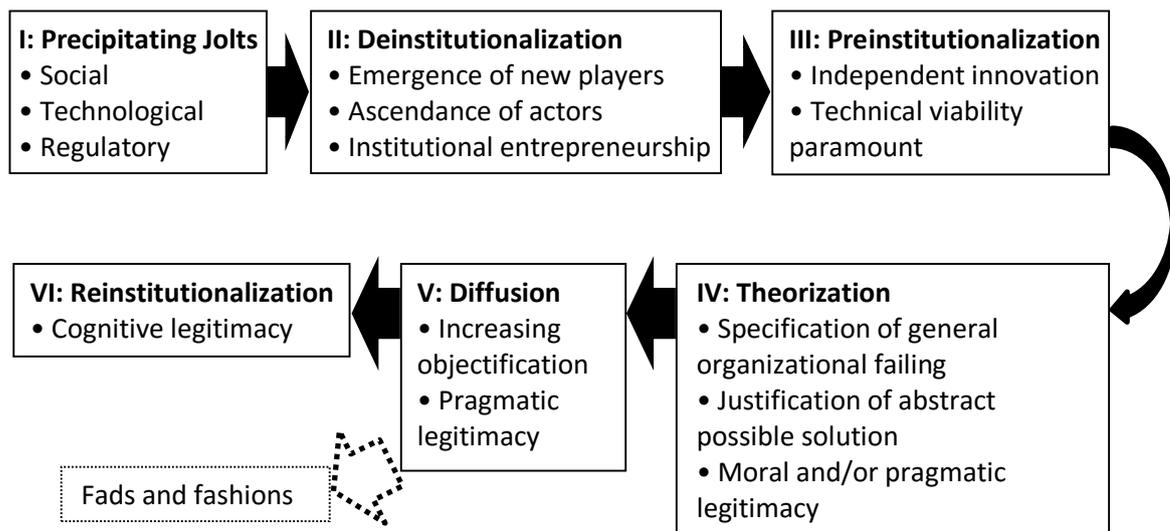


Figure 1: Stages of institutional change
(Source: Greenwood, Suddaby and Hinings 2002)

3.2.1 Stages of change

Precipitating jolts

The initial stimulus for change can come from a variety of sources. For example, Meyer, Brooks and Goes (1990) observed the incremental changes and sudden jolts that can lead to industry revolution in their study of the hospital sector. Here, technological change, the removal of established barriers to entry and the increase in competitive forces were the triggers. Lounsbury (2002) charted the new ideas and practices in the field of finance that arose from deregulation and the rise of financial experts and professionals. Such jolts can be seen in the profound social changes that occurred during the industrialisation of Britain in the 19th Century and which led to the rise of the use of contract (Atiyah 1979). Legal changes can also precipitate change, even if the legislation is somewhat uncertain; Edelman (1992) observed organisations creating their own structures to show compliance with ambiguous equal opportunities legislation, while Kelly and Dobbin (1999) observed companies changing their maternity leave practices in response to very weak legislation which was subject to challenge. In her study of the erosion of institutionalised practices, Oliver (1992) described these various stimuli as “pressures for deinstitutionalization” and categorised them as political, functional and social pressures (Oliver 1992:567). Greenwood *et al.* (2002) adopted a similar interpretation but refer to them as sources of precipitating jolts, using (similar) categories of regulatory, technological and social.

Deinstitutionalisation and preinstitutionalisation

These pressures or jolts kick start the process of questioning existing practices, firstly by deinstitutionalisation. This is a stage absent from Tolbert and Zucker's model as they were not dealing with change; however they recognised that a reversal of institutionalisation was possible as a response to major environmental shifts and this would allow opposition to existing structures (Tolbert and Zucker 1996). Oliver described this stage as "the process by which the legitimacy of an established organizational practice erodes or discontinues" (Oliver 1992:564). Erosion reflects a gradual decline in practices (such as a dress code if no longer enforced), while discontinuation results from a more proactive rejection of practices (such as challenges to job classifications that are based on stereotypical gender roles).

Greenwood *et al.* saw this stage taking place through the entry of new players into the field, the ascendance of existing actors or by local entrepreneurship. In their own case study of the changing business of accountants, this phase saw the questioning of the remit of accountants; this came from existing actors, largely from the president of the Institute of Chartered Accountants of Alberta who was himself a partner in a major accounting firm. A strong example of local entrepreneurship comes from the study of the radio broadcasting industry by Leblebici *et al.* (1991). Part of their analysis documented the innovation coming from independent stations during the 1950s as a response to the loss of audience and advertisers to television; these included the emphasis on the personality of the 'DJ' (rather than having anonymous announcers) and the agreement with record companies to provide records for free in return for airtime publicity. Similarly Meyer *et al.* (1990) saw initial differentiation as hospitals innovated and adapted independently, prior to what they described as a full scale industry-wide revolution.

These ideas serve to rock the institutional boat disturbing "the socially constructed field-level consensus by introducing new ideas and thus the possibility of change" (Greenwood *et al.* 2002:60). These initial responses to the problems will create several possible new institutional structures as actors acting independently of each other perceive the problems they are addressing as local phenomena. This can be seen in the stage called preinstitutionalisation by Tolbert and Zucker (1996) described above.

Greenwood *et al.* presented deinstitutionalisation as a different stage to preinstitutionalisation in their model. However, it is difficult to see how these two stages can be distinguished in practice or how their subheadings support such a distinction; the rejection of ideas seems to be inextricably bound with the suggestion of solutions or replacement practices.

Theorisation

The phase identified by Greenwood *et al.* (2002) as critical to changing practices in an institutionalised environment is that of theorisation. Strang and Meyer (1993:492) defined this as “the development of abstract categories and the formation of patterned relationships such as cause and effect”. In this context industry bodies can be seen as ‘champions’ which Tolbert and Zucker (1996) saw as interest groups who promote structural change and who spearhead change through the theorisation process. Tolbert and Zucker divided this into a two stage phase leading up to objectification, and described the importance of industry’ champions’ in each; to be successful, first they must identify a general problem and this must be widely recognised and accepted. In their study of accountancy, Greenwood *et al.* found that initially this was not the case; rather there was simply a general interest in new ideas within the accounting profession. They commented that “the failure of the initial theorists to provide a convincing problem probably influenced the indifference to the idea” (Greenwood *et al.* 2002:72). The focus did eventually change to defining a problem which was generalised to a need for transformation in the profession as it was under threat. Change was subsequently presented by the professional bodies as progressive, inevitable and normal. However, it took almost 20 years for the need for such change to be endorsed within the accountancy profession: “Theorizing is thus not a momentary act but, at least in the present case, one that required sustained repetition to elicit a shared understanding of the problem.” (Greenwood *et al.* 2002:73)

The second stage of theorisation identified by Tolbert and Zucker (1996) is a process whereby principles are developed which support and justify the solutions being proposed. In this way previously independent deviations from established practices can become abstracted and so made available for wider adoption. Greenwood *et al.* contended that these solutions may be adopted because they fit well within the

prevailing normative frameworks (so having moral legitimacy) or because they have functional superiority i.e. a pragmatic legitimacy. They argued that, while changes that result in economic benefits may gain legitimacy by results and so others will copy, in normative settings ideas have to be justified in this way prior to diffusion. This is where the industry bodies are key due to their role in defining and reinforcing beliefs and practices and so conferring legitimacy, as discussed above. The question is whether, in any particular situation, they follow the path noted by Holm (1995) in his study of the Norwegian fishing industry; that is do they seek to create new institutions and amend old ones, or do they reinforce existing ones?

Diffusion

This is the process whereby the newly legitimated ideas spread through organisational communities. Tolbert and Zucker (1996) described the objectification of new structures which requires social consensus as to their value and this leads to their increasing adoption. Greenwood *et al.* identified this as a common theme in the literature saying that “as innovations diffuse they become ‘objectified’ gaining social consensus concerning their pragmatic value ... and thus they diffuse even further” (Greenwood *et al.* 2002:61). Diffusion of new ideas and practices can happen peer to peer (horizontally) both within and between organisations and vertically through hierarchical relationships within organisations. However, in many organisational fields, professional associations and other industry bodies have an important role to play. Tolbert and Zucker (1996) saw the role of the champion continuing through into this part of the process, drawing on evidence from studies across a broad range of industries. They referred to the post-war spread of formal selection procedures and performance evaluation promoted by members of the emerging personnel management profession (as found by Baron, Dobbin and Jennings 1986); also the role of consultants in adopting total quality management practice taking place at the time Tolbert and Zucker were writing.

As Adler and Kwon (2013:949) noted, in highly professionalised occupations, the associations are “a key vector of normative and mimetic diffusion”. Their research was of the diffusion of guidelines in US health sector. They found that the support or

opposition given to this by the professional associations very much depended on the predicted consequences:

...some guidelines are fully compatible with traditional professional norms, and indeed medical associations have long played a role in sponsoring such guidelines' development and diffusion. Many other guidelines, however, are corrosive of those norms, and we should expect associations to play a more complex role in regard to these. While we would expect associations initially to oppose such guidelines and refuse to support their development or diffusion, external forces that are bearing down on doctors, healthcare organizations, and the associations themselves may force associations to soften this opposition.

Adler and Kwon (2013:950)

Reinstitutionalisation

This is the final stage of the change process identified by Greenwood *et al.* It occurs when ideas and practices become taken for granted and the natural ways to behave- i.e. they have cognitive legitimacy (Suchman 1995). This chimes with the process described by Tolbert and Zucker (1996) as 'sedimentation' whereby new structures or practices spread across different organisations and also survive over time. However, Greenwood *et al.* noted that some ideas and practices almost get there but fail to become fully institutionalised. They acquire some normative acceptance but are the 'fads and fashions' identified by Abrahamson (1991). As Greenwood *et al.* note, they "recede with the rhythms of transient fashions" (Greenwood *et al.* 2002:61).

3.2.2 Discussion of the model

The model set out by Greenwood *et al.* (2002) is supported by the literature and is persuasive as a representation of the process of institutional change. However, while it seems logical that the stages of deinstitutionalisation and preinstitutionalisation occur, the observable aspects that Greenwood *et al.* describe under these headings appear to be predominantly the process of innovation. Nevertheless, the literature on deinstitutionalisation makes a strong case for this as a part of the model.

The stages set out by Greenwood *et al.* (2002) and discussed above are presented as a linear sequence. Figure 1 shows the model as U shape but examination of the stages as

discussed by Greenwood *et al.* reveals no apparent reason for this curve. For example, there is no loop suggested (which perhaps the curve might indicate). Hence the relationship between the stages can be redrawn in a more accurate linear representation as shown in Figure 2.

3.2.3 A model for analysis

Industry bodies have played a role in the largely unsuccessful attempt at institutional change in commercial leasing. The model by Greenwood *et al.* appears to be an appropriate framework to use in examining the process by which the Lease Code was introduced and operated. The model focusses on the processes of change including the challenging of existing practices, which makes it useful for mapping what actually happened (or did not) in the attempt to shift the industry norms and practices. It makes it possible to track and analyse the role of the various actors, including individuals and organisations. This is particularly useful for tracking the behaviour of the industry bodies in the various stages of institutional change as they have unfolded. In this way the part which these bodies have played in each of the stages can be examined. This thesis is concerned with leasing practices that are well-entrenched and it is important to see how opposition to these arises and the role of the industry bodies in that opposition. Therefore the linear model is adopted with the headings as they stand and will be used to examine the attempt to change practices in commercial leasing.

3.3 Chapter summary

Professional associations and industry bodies can drive change and create new frameworks of rules and requirements and there are many examples of this occurring in different industries. However, there is also a danger that industry bodies may seek to reinforce existing beliefs and practices rather than being the agents of change. There is also an interplay between organisational field, organisations and individuals which can impact on how or whether an industry changes.

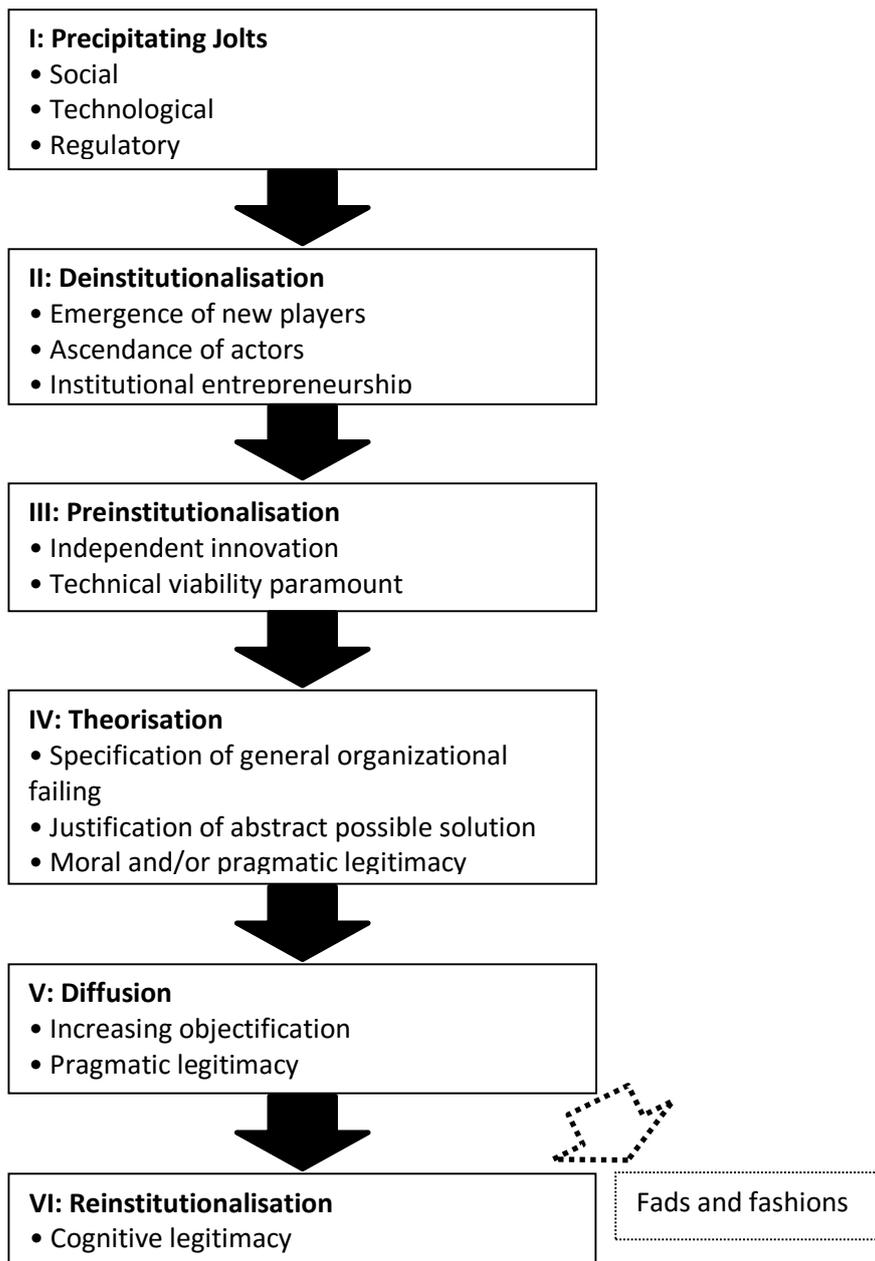


Figure 2: Linear model of institutional change
(adapted from Greenwood *et al.* 2002)

The process of industry change in an institutionalised environment is captured in the work of Greenwood *et al.* (2002). This work shifts the focus from earlier work to reflect institutional change within an organisational field, rather than just the creation of new structures. From an initial ‘jolt’ to precipitate change, they move to a stage dealing with the breakdown of existing structures (deinstitutionalisation). The next stage is preinstitutionalisation as new ideas by individuals or organisations emerge. Their framework highlights that without clear articulation of a ‘convincing problem’ in the subsequent, critical stage of theorisation, it is unlikely that change will be seen as

necessary. This is where industry bodies can play an important role as champions of change at the level of the organisational field. Only then can solutions become established and diffuse through the organisational field. They can become the new 'taken for granted' solutions in a stage of reinstitutionalisation. Or, if theorisation is unsuccessful, solutions can go by the wayside as 'fads and fashions'.

In order to study the role of the industry bodies in promoting change in commercial leasing, the process by which the Lease Code was introduced and operated will be examined. This is in the context of there being no change in practices that could be attributed directly to the Code, despite industry bodies developing the scheme and being in a position to provide legitimacy to new practices. The linear model developed by Greenwood *et al.* (2002) is an appropriate framework to use in this study as it can be used to map what actually happened (or did not) in the attempt to change the leasing industry norms and practices. The operationalisation of the model is set out in the next chapter which sets out the research questions and addresses research method.

Chapter 4 Research question and methods

The overall aim for this research is to investigate the role of industry bodies in the process of institutional change, particularly where that process is driven by industry self-regulation. Specifically the focus is on the UK commercial leasing market, a market that has features of monopolistic control and is characterised by asymmetric information. The research sets out to address the role of industry bodies in the self-regulation of commercial leasing and their role in attempting to change industry practices via a Lease Code. This is of interest given that the Code has had limited impact. There is little evidence that it has led to the changes in practices that were anticipated.

4.1 Theoretical context

To contextualise the research question, it may be helpful to summarise the arguments in Chapters 2 and 3. Neoliberalism shaped the political context within which self-regulation was introduced into commercial leasing. Despite a withdrawal from direct regulation, there has been an extension of the state's reach into new areas of economic life through the use of a diverse range of regulatory instruments, including self-regulation. Thus, while legislation was an option for achieving policy objectives in commercial leasing, the decision by government to use self-regulation is consistent with the prevailing neo-liberal ideology.

The state often has a strong involvement in industry self-regulation but as might be expected it relies heavily on industry bodies, particularly trade bodies and professional associations; both types feature in the self-regulation of commercial leasing. However there are differences between the nature and purpose of trade bodies and professional associations and such differences may impact on their approaches to self-regulation. Despite the differences of approach, these industry bodies are in a position to exert moral authority over their members and create a normative framework to steer good practices. Through this framework they are in a position to confer legitimacy on the practices of their members. This raises questions for the analysis around the role of industry bodies in the Lease Code, particularly the extent to which conforming to the Code is presented as required for legitimacy.

There is a view from the economic and political science literature that industry associations are largely there to serve their members' own ends. This might suggest that industry bodies are not concerned with providing normative frameworks. Alternatively, perhaps they have split personalities, which is not unusual in business. However, at the very least, they may have conflicts to resolve as they take on self-regulation aimed at achieving public policy objectives.

The changes that are being targeted with the Lease Code go to the heart of the leasing industry practices; the continuing use, and defence, of the Upward Only Rent Review is a prime example of a lease term that is proving difficult to displace. Therefore, for the Lease Code initiative to be successful requires achieving change in practices which have become institutionalised. Chapter 3 explored the role of industry bodies in reinforcing existing practices or driving change. There is a body of work on industry bodies, particularly professional associations, which suggests that they maintain and enforce existing practices rather than facilitating change. Conversely there are examples to support the notion of industry bodies driving change.

Key aspects that emerge regarding industry bodies and the self-regulation of commercial leasing are: the political context; the degree of state involvement; the provision of a normative framework with which to steer the membership; conflicts between this normative dimension and market pressures; the extent that industry bodies drive change; the differences between the industry bodies. These may be investigated by examining the process of institutional change within the industry. Greenwood *et al.* (2002) created a model of institutional change that provides for the breakdown of existing institutionalised practices as well as the creation of new ones. This model provides a framework within which to examine the introduction and operation of the Lease Code. In particular it enables the analysis of the role of the industry bodies in the various stages of institutional change.

4.2 Research question

While the focus of the research is on commercial leasing, the research aim and the theoretical context set out above shows that the problem connects to broader questions of the role played by industry bodies in the process of institutional change

and of their role in self-regulation. However, bringing this back to the commercial leasing industry and the attempts to change leasing practice since 1992 through the Lease Code initiative, a more specific research question can be framed to drive the research design: **What role have the industry bodies played in the attempt to achieve institutional change in commercial leasing through self-regulation?**

4.3 The industry bodies

This research question focusses on the bodies that represent the supply-side of the commercial leasing industry. These bodies are in a position within the organisational field to influence the industry norms and practices. The two dominant industry bodies in this context are the Royal Institution of Chartered Surveyors (RICS) and the British Property Federation (BPF). The RICS is the professional institution which counts amongst its 118,000 members those individuals who are involved in the owning, managing or letting of commercial property. While there is no legal requirement for membership, the RICS has wide recognition as the primary professional body in property. This means that it is usual for someone working in the property side of commercial leasing to be either a member, or from an RICS-regulated firm. The significance of the RICS in the field is demonstrated in its holding the secretariat of the various Code working groups throughout the period of self-regulation.

The BPF is a trade association that represents property interests. It was formed in 1974. Their website describes the association as “the membership organisation for the UK real estate industry. We represent all those involved in real estate ownership and investment.”⁵ The BPF invites membership from “any organisation that owns, invests in or manages real estate, or provides professional services to companies that do.”⁶ It has around 400 member organisations who are predominantly real estate companies and professional firms like lawyers, agents, planners and accountants.

There are other organisations that represent landlord interests such as the British Council for Offices (BCO) and the Association of British Insurers (ABI) and these have been involved in the development of self-regulation in leasing. However, while

⁵ <http://www.bpf.org.uk/about-bpf> accessed 8th September 2015.

⁶ <http://www.bpf.org.uk/membership/join-us> accessed 8th September 2015.

important, they tend to have a different focus and so are not the leading bodies where leasing is concerned. BCO was formed in 1990 and has a membership list that includes those involved in construction as well as the investors and landlords; so, while having an interest in leasing, the organisation has a wider interest in the design and creation as well as the acquisition and occupation of office space. The investor/landlord members are also largely members of BPF. The ABI is a members' group formed in 1985 which represents the insurance companies predominantly in terms of their own industry i.e. insurance. Like the BCO, they represent owners of property and so they have an interest in the property industry and have been involved in the self-regulation process. But, as with BCO, their property owning members tend to be members of the BPF and it is the latter organisation that takes the lead on property matters.

While the RICS is the predominant professional institution, the Law Society also has members who are involved in leasing as commercial property lawyers. Lawyers have certainly been centrally involved in the development of the codes of practice through the period of self-regulation. However it is the practices of their clients, i.e. the property owners and their agents, which are under investigation in this particular study, hence the focus on the RICS.

Therefore, while recognising that there may be an argument to examine the parts played by these other various organisations in the commercial leasing story, the particular position that the BPF and RICS have within the organisational field suggest that it is valid to focus on their roles in addressing the research questions.

4.4 Research methodology

The research is concerned with the commercial leasing market which immediately gives it an economic context. However, the research question places the study in the realms of governance and institutional change.

The focus is on the dynamics and actions of actors at the level of the organisational field, such as industry bodies and the government. The research question is concerned with how, and why, activities at this level may have resulted in the lack of change in institutionalised practices. This requires an exploration of what has happened in

leading to identify theories and patterns in an inductive way. However, it is possible that the findings may, in turn, drive other more deductive studies.

Following from this, the epistemological stance is interpretive as the research questions are concerned with understanding what happens in the change processes. However, a degree of explanation is sought, much in the way that Weber saw sociology as “science which attempts the interpretive understanding of social action in order to arrive at a causal explanation of its course and effects” (Weber 1947:88). As Bryman notes, in this approach the causal explanation comes from an interpretive understanding rather than looking for forces external to the social action (Bryman 2004). In this study of commercial leasing, the research question focuses on the interplay between actors such as government and industry bodies, looking to that social interaction for both understanding and explanation.

Fundamental to the approach taken to the underlying problems in commercial leasing is the principle that the behaviours of actors are shaped by the rules and requirements that are institutionalised in their environment. However, allied to this is the constructivist view that these institutions are also shaped by actors; it is the attempts at shaping and reshaping of these that is central to addressing the research question.

This inductive approach, interpretivist paradigm and constructivist orientation can be seen in the research question for this thesis. As Bryman notes, qualitative research strategies tend to be most appropriate for questions built on such philosophical foundations (2004). Therefore, a qualitative approach has been taken.

In his work on the use of records in research, Scott summarises the problems of designing an appropriate research method for a study such as this: “The aim of social research is to describe and explain the actions of agents and the structures that they produce and reproduce in the course of their lives. But neither ‘actions’ nor ‘structures’ are actually observable: they are inferred from the behavioural and other observational evidence through which they are manifested” (Scott 1990:2).

The issue is what manifestations are to be studied and by what method. Although the model in Chapter 3 provides a useful framework for examining change, it does not define the method to be used. Suddaby and Greenwood (2009) identify interpretive

and historical approaches as relevant and well-used qualitative methods of studying institutional change. Similarly Van de Ven and Poole (2005) see ethnographic and observational studies as appropriate to studying the change processes, along with archival or case studies. The analysis of Suddaby and Greenwood suggests that a historical method is most in accord with the processual view being taken in this thesis, particularly as it recognises the complexity and messiness of causal patterns in change.

There is certainly a necessity to look backwards as the relevant actions and behaviours span a period of 23 years from 1992, when the need for change in commercial leasing was first mooted, to the present day. This in itself precludes a contemporary ethnographic or direct observation type of study and makes a historical method more applicable.

There are many advantages to taking a historical approach to studying institutional change. As Suddaby and Greenwood noted: “Historical methods focus systematically on past events, using archival documents and retrospective interpretations of actors in an effort to understand the processes by which institutions emerge, self- maintain, and erode” (Suddaby and Greenwood 2009:183).

Suddaby and Greenwood also point to the advantage that historical methods have by lending themselves to the identification of phases in change processes; an example of this is the study of the stages of change in the radio broadcasting industry by Leblebici *et al.* (1991). The political, social and economic dynamics at different points in time are critical in understanding the prevailing institutional arrangements in leasing as well as the emergence and decline of potential alternatives; this suggests the use of phases in a historical analysis. Historical methods also recognise that institutional arrangements are the result of social construction. As Suddaby and Greenwood (2009) note, an examination of historical documents is usually central to such studies, and this brings with it an understanding that these are the products of particular dominant groups. As with leasing, hearing the voices of these groups may be important aspects of the research.

Such a study may also produce a changed understanding of how the current institutional arrangements were formed, as the received wisdom is put aside. An

example of this is in the historical analysis of Rowlinson and Hassard (1993) which revealed that Cadbury's labour management policies were the result of practical requirements. The much vaunted idea that they were inspired by the family's Quaker beliefs was deliberately created much later.

Inevitably over a period as long as 23 years, people change and memories fade. This makes the use of interviews difficult; for example Golden (1992) found that retrospective accounts of business strategy were often inaccurate, suggesting that this may be because of faulty memory or efforts to cast past actions in a more positive light. Because of such issues, the focus is on secondary data in the form of archival documents. Therefore, in attempting to describe and explain what has happened in commercial leasing in a manner that can answer the research questions, a broadly historical analysis of the process has been made using an analysis of existing documentary records over the relevant period. This analysis uses the model set out in Chapter 3.

Such a study is not without its challenges. Van de Ven and Poole (2005) noted that the complexity of processes can make it difficult to see the patterns and generate explanations. Suddaby and Greenwood (2009) highlighted the difficulties in identifying appropriate periods of analysis; this is discussed further in the analysis section below. They also note that it is easy to become fixed on the detail of the narrative at the expense of theoretical coherence. There are also issues to consider regarding the documents used in such an analysis; these are addressed in the next section.

4.5 Data sources

In presenting an account of the commercial leasing story the aim is to give an interpretation that is credible and plausible. This requires careful choice of data sources and subsequent analysis; the role of the industry bodies in change must be represented as accurately and objectively as possible. Different data sources can be used to establish and triangulate the chronology and actions of actors, which are important aspects of the story. However, the actors in these events will have different perspectives, and this is central to the narrative. Documents which are written from these perspectives are more difficult to triangulate, but of paramount importance is

that such documents are sincere in their viewpoint and attempt to be accurate from that viewpoint (Scott 1990:22). The open recognition of the sources in presenting findings of opinions and views, should enable the credibility of the account to be established; the latter being noted by Guba and Lincoln (1994) and Hammersley (1992) as particularly important in such research. The setting of the narrative within the model of institutional change should enable an assessment of the generalisability/transferability to other situations to be envisaged.

The sources used can be categorised using Scott's typology of sources (Scott 1990). In terms of authorship, those relevant to this study were all official (rather than personal) and within this some were state sources and some private. In terms of accessibility, the sources were largely available in open archives or published, with few being of a more restricted nature. However, that did not mean that all the relevant material had necessarily been retained over the years. This study spanned a period where documents were typically being transferred to electronic media for archiving. In such processes, not all documents are transferred and decisions to cull mean that some material from a pre-electronic era was lost. This raises questions of whether the surviving material is representative (Scott 1990:25).

A key source of information used, which conforms to Scott's official -state category, was Hansard.⁷ This is the official edited record of proceedings in the UK Parliament, including verbatim reports from both the House of Commons and the House of Lords; edited hard copies have always been produced the day following the one being reported, but now the transcripts also appear online during the day in question. Debates, statements, petitions, oral and written questions and answers from both the House of Commons and House of Lords are available online from 1803 onwards. The database was searched for all references to commercial property leasing since 1990. In this way, the verbatim account of the initial debate in the House of Commons in 1992 was retrieved along with the ministerial response and the subsequent announcement of a consultation on legislation. Hansard then records a ministerial statement that there would be no regulation and that changing leasing practices would be industry-

⁷ Up to 2005: <http://hansard.millbanksystems.com/>
post-2005: <http://www.parliament.uk/business/publications/hansard/>

led. From then on Hansard provides the government statement of objectives for industry codes, details of monitoring programmes, accounts of progress and disappointment, regulatory threats and industry cajoling throughout the research period. This archive measures well against Scott's criteria (Scott 1990) for assessing the quality of evidence, it is a comprehensive and authentic database; the meaning is always clear and is accurate in representing the stated views of politicians.

Another long-term archive that proved useful was the Estates Gazette (EG), one of two weekly property industry magazines; this source is classified as official- private in Scott's typology. EG has been in print since 1858 and is now also available digitally on a subscription basis, so ascribing it an open-archival status (in Scott's terms), with a searchable archive of full length articles and news items going back to 1986.⁸ This database was used to find contemporary accounts of the Lease Code story from the first relevant article of 1994. This includes reports and commentary on events such as government statements, publication of editions of the Codes and reports as well as the reporting of comments and views from various actors. This produced an extensive collection of relevant material which helped to fix the chronology of events and also provided references to other material that may add insights. The contents of a magazine like EG have to be treated with caution. While the archive is complete and so is representative, the journalistic viewpoint and desire for an interesting story must always be borne in mind. For example, there is more reporting of BPF activities and views than of the RICS on commercial leasing; but this may be for purely journalistic reasons or the BPF may be more adept at getting into print. Nevertheless this reporting can give some insight into the actions of the industry bodies and can be used in conjunction with other sources so triangulating the evidence.

To complement the picture of BPF activities emerging through the EG, their various publications and on their website, it was important to try to gain a more complete representation of the activities and expressed views of the RICS. For example, EG articles mentioned an RICS internal code-monitoring group; however the records of this group are restricted material. A meeting with a senior RICS executive established that

⁸ www.egi.co.uk

the institution did not archive such records centrally and therefore it was necessary to find the relevant individuals that had been responsible for the original records (if they still worked there); ultimately this did not yield any further data. One resource that did prove useful was the in-house RICS magazine, the title of which has been subject to change, as a continuous series of these is held hard-copy in the RICS library. This source was mined for relevant articles but a question mark hangs over the representativeness of this material. The RICS communicates with its members in many different ways, including emailed newsletters, letters and meetings. Therefore while it may be considered that the views expressed in the in-house magazines are authentic and credible, any apparent gaps cannot be given any significance.

There are certain documents which are central to the leasing story and which have been used as documentary sources. Alongside Hansard, various other official-state documents provided information on government thinking and action. Twice during the research period, the government threatened to legislate and issued consultation documents on this; these documents and the associated responses by RICS, BPF and other interested groups formed useful data. These are no longer available as the various organisations (including government) have rationalised their tangible and electronic archives and largely culled them. Fortunately, most of these were already in the author's possession because of previous research projects. However the RICS response to consultation in 2004 could not be located.

There have been three versions of the Code of Practice for Commercial Leasing which show how the framing of the issues evolved over the period (Commercial Leases Group 1995; Commercial Leases Working Group 2002; Joint Working Group on Commercial Leases 2007). These documents are co-written by a group with a range of landlord and tenant representatives and so do not directly represent the view of the BPF or the RICS, nevertheless read in conjunction with the EG reports of the code group discussions they provide a useful insight. The government commissioned the University of Reading to monitor the success of the first two editions of the Code and then to report specifically on the dissemination of the third code; these reports have been published

Table 1: Data sources

Date	Source
From 1992	Up to 2005: http://hansard.millbanksystems.com/ post-2005: http://www.parliament.uk/business/publications/hansard/
From 1994	www.egi.co.uk
1992-1995	Royal Institution of Chartered Surveyors, <i>Chartered Surveyor Weekly</i> RICS
1996-2001	Royal Institution of Chartered Surveyors, <i>Chartered Surveyor Monthly</i> RICS
2002-2009	Royal Institution of Chartered Surveyors, <i>RICS Business</i> RICS
2010-	Royal Institution of Chartered Surveyors, <i>Modus</i> RICS
1992	Burton, J. (1992) <i>Retail rents: Fair and free market?</i> London: Adam Smith Institute.
1993	Department of the Environment (1993) <i>Consultation paper on commercial property leases</i> . London: DOE.
1993	Royal Institution of Chartered Surveyors. (1993). <i>Commercial property leases: comments by the RICS</i> . London: RICS.
1993	British Property Federation (1993) <i>DOE Consultation paper Commercial Leases: Response by the British Property Federation</i> . London: BPF
1994	Department of the Environment (1994) <i>Government proposes code of practice on upward only rent reviews</i> . London: DOE.
1995	Commercial Leases Group (1995) <i>Commercial property leases in England & Wales: Code of practice</i> . London: RICS.
2000	Department of the Environment Transport and the Regions (2000) <i>Monitoring the Code of Practice for Commercial Leases</i> . London: DETR
2002	Commercial Leases Working Group (2002) <i>A code of practice for commercial leases in England and Wales</i> . London: RICS.
2003	British Property Federation and British Council for offices (2003), <i>BPF & BCO Model clauses for a full repairing and insuring office lease of a whole building</i> . London: BPF & BCO
2003	HM Treasury (2003), <i>Budget Report: Building a Britain of economic strength and social justice</i> . London: HMSO.
2004	Crosby, N., C. Hughes, and S. Murdoch (2005) <i>Monitoring the 2002 code of practice for commercial leases: interim report</i> . London: ODPM
2004	Office of the Deputy Prime Minister (2004), <i>Commercial property leases: Options for deterring or outlawing the upward only rent review clauses</i> . London: ODPM.
2004	British Property Federation (2004) <i>A BPF response to the ODPM's consultative paper on: Commercial Property Leases; Options for deterring or outlawing the use of Upward Only Rent Review clauses</i> . London: BPF
2004	British Retail Consortium (2004) <i>Commercial property leases: options for deterring or outlawing the use of upward only rent review clauses</i> . London: BRC.
2005	Crosby, N., C. Hughes, and S. Murdoch (2005) <i>Monitoring the 2002 code of practice for commercial leases</i> . London: ODPM.
2007	Joint working group on commercial leases (2007) <i>The Code for Leasing Business Premises in England and Wales 2007</i> . London: JWGL.
2007	British Property Federation (2007) <i>Commercial landlords' accreditation scheme</i> . London: BPF.
2009	Crosby, N. and C. Hughes (2009) <i>Monitoring the 2007 Code for Leasing Business Premises</i> . London: CLG.
2011	Portas, M. (2011) <i>The Portas Review: An independent review into the future of our high streets</i> . London: BIS.
2012	Department of Communities and Local Government (2012) <i>High Streets at the Heart of our Communities: the Government's Response to the Mary Portas Review</i> . London: CLG.
2012	Royal Institution of Chartered Surveyors. 2012. <i>Small business lease</i> . RICS.

(Department of the Environment, Transport and the Regions 2000; Crosby *et al.* 2005; Crosby and Hughes 2009). The research for the first two reports included interview surveys of property agents and lawyers as well as questionnaire surveys of landlords, tenants and their property and legal advisors; the reported results of these surveys provide insights into the attitudes and actions of the members of the industry bodies at

various points. The research for the third code included interviews with representatives of the BPF and RICS and shed light onto their views and actions post-2007. The websites of RICS⁹ and BPF¹⁰ were also used as a resource, particularly to find the details of specific relevant initiatives such as the RICS small business lease and the BPF commercial landlord accreditation scheme.

These sources and additional material used as data are listed in Table 1 with archives first and then other source material in chronological order. Individual documents are also referenced in the bibliography.

4.5.1 Data analysis

The model of institutional change set out in Chapter 3 is central to the analysis. The change process in leasing has been framed by government as a test of the ability of the industry to self-regulate and it is clear from the literature that industry bodies are central to this. Using this model for examining the leasing story will firstly enable the role of the industry bodies in institutional change to be analysed but secondly, by focussing on the industry bodies it will generate the data to enable the question on self-regulation to be addressed.

In order to use this model, it had to be operationalised and this is set out in Table 2. The first two columns identify the stages of change and their meanings and a third column outlines the data that will be sought within the documents as evidence of the stage, the nature of activity and expressed views of the actors.

From the documentary evidence, a chronological narrative was constructed of the period since 1992 during which attempts have been made to change leasing practices. As is common with historical methods the material was organised and analysed into distinct phases. Suddaby and Greenwood (2009) noted that periods are useful analytical devices for separating out influences at particular points in time. So for example, Leblebici *et al.* (1991) identified distinct stages in the story of change in the US radio broadcasting industry; these changes were demarcated by the actor taking the leading role in the organisational field at the time. The time period of the commercial

⁹ www.rics.org.uk

¹⁰ www.bpf.org.uk

Table 2: Operationalised model

Stage	Meaning	Operationalisation
Precipitating jolt	Pressures for change	Evidence of pressures for change which could be: social (including economic), regulatory or technological.
Deinstitutionalisation	The removing of legitimacy from existing practices	Evidence that any of the actors in the organisational field: Ask questions about leasing practices Gradually stop doing something Proactively challenge/reject leasing practices Areas that might be questioned include key aspects of leases eg: UORR Long leases Rent review system Confidentiality and transparency Privity of contract Lack of information (for tenants) Flexibility in leases Choice for tenants Assignment and subletting
Preinstitutionalisation	Introduction of new ideas and replacement practices	Evidence that actors: Suggest ideas of new practices (in areas such as set out above) Independently adopt different practices
Theorisation (part 1)	Recognition and specification of general problem	Evidence that supply-side actors, particularly RICS & BPF: Recognise that there is a problem with leasing practices (in areas such as set out above) Believe that there is no problem in these areas
Theorisation (part 2)	Development of principles to support solutions for general adoption	Evidence that actors: See Code/do not see Code as an industry solution See regulation as industry solution Take the lead in shaping Code Evidence that the Code is gaining legitimacy
Diffusion	Legitimated ideas spread through communities and are adopted	Evidence of: Dissemination efforts by actors (particularly BPF and RICS) Solutions seen to be spreading/being adopted Solutions not seen to be spreading Policing the implementation of the Code
Reinstitutionalisation	Ideas and practices are accepted as the natural ways of doing things.	Evidence that different practices: Have become taken for granted/natural way to behave Have not become natural way to behave

leasing study encompassed the negotiation and creation of three editions of the Lease Code, the implementation phases, the government's assessment of success and failure to each edition and then the reactions to this. The narrative follows these activities through each edition. There are several ways of dividing up the narrative, but the

production of a new edition of the code produces a fairly natural end of a phase. However, the response to the 2nd edition was a particularly intense and active period, and it seemed most logical to end this period with the monitoring report, i.e. prior to the production of the 3rd edition.

Therefore the narrative is divided into five phases:

1. From the events that provided the stimulus for change in 1992 leading up to the production of the first code of practice during 1994;
2. The reaction to the first code in 1995 through to its apparent failure identified in 2000 and the production of a second edition;
3. The reaction to the second code through to government pressure to produce a more effective code following their monitoring report in 2005;
4. The work to produce a third code starting in 2005, through to its lack of impact identified in 2009;
5. 2010 onwards.

The material listed in Table 1 was coded against the framework in Table 2. This then enabled the evidence to be analysed to show which stages of institutional change were happening within each time period and particularly the actions of the industry bodies within these stages. As the periods were analysed separately it enabled a picture to be built up of progression within and through the stages and how they related to the periods. So, for example, it became apparent whether theorisation by the industry bodies became more evident in later periods. This made it possible to determine the extent to which the stages overlap and are revisited through the process.

In this way the analysis sought to establish the extent to which the RICS and BPF behaved as agents of change. As this was all within the various and clear phases of self-regulation, this historical analysis can shed light on this as a method of achieving industry change in leasing.

4.6 Chapter summary

The theoretical context of this research is multi-faceted. It includes the dimension of governance which has led to the use of self-regulation by policy-makers as a route to changing commercial leasing practices. This requires consideration of the nature of

self-regulation and the role of industry bodies within it. The activity is at the level of the organisational field, and therefore the theoretical context includes the process of institutional change at that level.

The overall aim for this research is to investigate the role of industry bodies in the process of institutional change, particularly where that process is driven by self-regulation. A more specific research question has been framed to drive the research design: What role have the industry bodies played in the attempt to achieve institutional change in commercial leasing through self-regulation?

This question focusses on the supply-side bodies of the industry, the two key ones being the professional body, the Royal Institution of Chartered Surveyors (RICS) and the other being the landlords' association, the British Property Federation (BPF).

The model set out in Chapter 4 provides a useful framework for the research, but it doesn't define the method to be used. Given the largely historical nature of the research, and the focus on the process of change, a historical method is the most appropriate approach. Retrospective interviews were considered but are not likely to generate the data needed for this study and therefore a secondary analysis of archival documents is considered the most suitable method.

The data sources used include Hansard, Estates Gazette, RICS magazines, Code monitoring reports, government consultation documents and responses. From this data a chronological narrative can be constructed and divided into phases. This can then be analysed to show which stages of institutional change were happening within each time period and particularly the actions of the industry bodies within these stages. The next chapter sets out this narrative and analysis of each period.

Chapter 5 Self-regulation in commercial leasing

In this chapter the historical narrative of the commercial leasing study is set out. This is done using the documentary sources identified in Chapter 4. The narrative is organised into phases and is constructed using the stages of the model of institutional change set out in Chapter 3. The operationalised model is then used to analyse the evidence and so ascertain the stages of the process being undertaken in each phase. The analysis is related to the research questions in the discussion in Chapter 6. The narrative starts in 1992 however, for the actions and behaviours of the actors to be understood, this narrative has to be set in context. Current commercial leasing practices have their roots in the 19th Century and are the product of political, economic and social influences. The next section gives this background.

5.1 Historical context

5.1.1 The rise of the landlord

According to Moore (1966:19), in his analysis of the development of democracies, the English Civil War paved the way for the rise to power in the 18th century of a “committee of Landlords”; the Civil War and the Enclosure Acts led to a Parliament made up of landed aristocrats. As Atiyah (1979) noted in his study of contract, the concept of property certainly changed with the Civil War as aristocrats went from being tenants to owners of their property. It was this “propertied class who now held the political power and who made the rules, [but] at least they did abide by the rule, and not by arbitrary fiat.” (Atiyah 1979:15). So, while the land and power was clearly concentrated in few hands, there were now laws and rights that could potentially be used by anyone. Atiyah noted that even the Enclosure Acts did not allow property to be simply taken away from peasants; there was at least respect for the rights of property and compensation was paid.

Land was typically kept within the aristocratic families by a process of strict settlement, whereby each generation becomes a life tenant, an interest which came with many restrictions. As Atiyah observed, in the 19th Century this had an effect on urban and industrial development. Under the Settled Land Acts (1882-1890) life tenants could grant building leases for up to 99 years, which meant that they retained control over

the use of the land. So, right from the start, landlords maintained a high degree of control over their land and property. As contemporary jurist, Sir Frederick Pollock noted:

Desirable building ground near towns, and still more the ground of towns and cities already long occupied, and eminently those districts and sites which are favoured by business or fashion, are a monopoly in the hands of the landowner. The landowner dictates his terms to the building lessee, who in turn dictates them to an occupier, making the occupier's obligations, for his own protection, exactly follow those of the original lease. In this way the population of whole cities may be said to live at the will of a few great landlords. Over whole square miles of what is commonly called London, the Duke of Westminster or the Duke of Bedford may without appeal or control forbid any given kind of business to be carried on.

Pollock (1896:157-158).

5.1.2 State intervention in commercial property leasing

As the social and economic issues around land and property occupation and ownership grew in the 19th Century, so there was an acknowledgement that state intervention in the commercial leasing market was perhaps necessary. In 1886 a Select Committee was set up to investigate land tenure systems in the British Isles including the leasehold system (Haley 1999). The report on business tenancies recognised that legislation was needed to protect tenants who, having no right of renewal, were being asked to pay very high rents or forced to leave their premises; this also meant forfeiting any improvements they had made to the properties. The Committee's recommendation was financial compensation rather than right of renewal, working on the basis that this would encourage landlords to grant renewal.

However, the first piece of permanent legislation covering all business tenants did not come until quite some time later in the form of the Landlord and Tenant Act 1927. Haley (1999) discussed the reasons for this delay and the various obstacles to reform in the late 19th and early 20th centuries. Initially, it was partly due to the power and influence of the landed gentry in parliament (particularly among the Conservative members). But even after this had waned after World War One and landlords no

longer had the political power, there was a reluctance to interfere in the market and potentially discourage investment, at least until it became politically expedient to acquiesce to the wishes of the vocal business community in the run-up to the 1929 election. Any discussions around legislation were framed as being intended to bring the unscrupulous landlords up to the standards of the reasonable landlords (so the latter had nothing to fear).

One of the key elements of the 1927 Act was the system for compensating tenants at the end of their tenancies for the loss of goodwill and for the value of improvements. Haley (1999) criticised these systems of financial compensation as not being robust and so largely ineffectual. However as he noted, the principle of legislating business tenancies was established. Along with the financial compensation for tenants' improvements, the 1927 Act imposed a statutory requirement that landlords could not unreasonably withhold consent to an assignment or subletting, with the courts deciding on what is reasonable.¹¹ This could only reliably be avoided by an absolute prohibition on such disposals. The 1927 Act also made it difficult for a landlord to prevent a tenant carrying out improvements to the demised premises.¹² Despite its limitations, this Act defined the areas in which the state would intervene in the commercial landlord and tenant relationship. It introduced several key interventions into the terms of the bargain struck between landlord and business tenant; these have been amended since but their scope has not been expanded.

The next, and more significant, piece of legislation regulating business tenancies was the Landlord and Tenant Act 1954. Again the stated intention seems to have been to improve the behaviour of the unusual rogue landlords (Haley 1999: 223) but nevertheless this legislation provides a general right of renewal of leases for business tenants.¹³ Haley remarked that it was "designed to redress the inequality of bargaining power which traditionally pervades the relationship of landlord and tenant" (Haley 1999: 224). However, it did not aim to regulate the content of leases agreed between landlord and tenant, its reach being very limited. Limiting its impact even further, the

¹¹ Imposed by the Landlord and Tenant Act 1927, s 19(1)

¹² As a result of the combined effect of the Landlord and Tenant Act 1927, section 19(2) and the compensation provisions contained in Part 1 of the same Act.

¹³ Through Part II of the Landlord and Tenant Act 1954

1954 Act provided a mechanism to allow incoming tenants to consent to 'opt out' of the right of renewal which, until 2004, involved an application to court. Crosby *et al.* (2005) noted the dramatic increases in applications in the recessionary conditions of the late 1990s and early 2000s speculating that the reason for this was that landlords did not want the perpetuation of the 'favourable' lease terms then being granted to entice tenants in a period of recession. Subsequent legislation¹⁴ has made it even easier to exclude this right. So, while the right of renewal established in the 1954 Act endures, it certainly has never been universally enjoyed by tenants.

The other key intervention into commercial leasing began to be contemplated in the 1980s by a Law Commission Working Group but eventually came to fruition in 1995 with the Landlord and Tenant (Covenants) Act 1995 (LTA 1995). This removed the long-standing principle of privity of contract¹⁵ with the intention of releasing tenants from all liabilities following a lawful assignment. This intervention came about because of various reported cases in the 1980s where (former) tenants were held liable for large sums of money following the failure of their assignees to pay their rent. What was particularly galling to tenants was the fact that, in some of these cases, assignees had made agreements with the landlord that affected rent and it was this level of rent that was reverting to the original tenant for payment. It had always been possible for tenants to negotiate for post-assignment liabilities to be excluded within the lease, although as Bridge remarked in his discussion of the reforms, it would be "rare for the tenant to be in a sufficiently strong negotiating position to compel the landlord to accept such terms" (Bridge 1996:318).

The initial recommendation of the Law Commission Working Group (1986) was that privity of contract should simply be abolished. However the final legislation was a far cry from this. Davey (1996) and Bridge (1996) provide informative narratives charting the progress and changes from this initial idea and highlight the problems in legislating in this field. They noted the influence of the powerful landlord lobby groups such as the British Property Federation (BPF) but Davey also highlighted the apparent desire of

¹⁴ Regulatory Reform (Business Tenancies)(England and Wales) Order 2003 which came into effect on 1 June 2004.

¹⁵ This is the legal principle under which the original tenant remains liable on all of the lease covenants (including rent) for the whole of the lease term even after a disposal of the lease by way of assignment.

MPs to protect the small business tenants and to ensure that any reforms had their blessing. The landlords' arguments were that, with the increased risks that abolition of privity of contract caused, the value of their investments would be damaged. It was said that this would lead to less investment in new development, therefore less property to let. A further objection was that the assignment process itself would be affected to the detriment of tenants as landlords would have to be more careful who they allowed to take assignments of the leases.

Once again, parliament faced the pressure of competing interests as it considered legislation on commercial leasing issues. The pressures regarding privity of contract were described by Davey (1996). On the one hand, the recession in the early 1990s brought a high volume of business failures and so pressure from the business lobby to finally take some action; on the other hand the landlord lobby remained a powerful force. As Davey remarked, the Conservative government "felt compelled to tread a fine line between the demands of two broadly conflicting interest groups, both of whom might reasonably be considered to comprise its own natural supporters" (Davey 1996: 85). It is perhaps not surprising that procrastination always seems to dog attempts to legislate in this field. Because of the strong conflicting lobby groups, another feature of legislation in this area (described by Davey) is the need to have the support of the key stakeholders before bringing measures forward. This was even more apparent in the legislation on privity of contract which was finally the subject of a Private Member's Bill; such a bill can only be enacted if there is no opposition from the house. Thus consultations were held, deals were done, particularly between the BPF and the British Retail Consortium (representing retail tenants), and amendments were agreed. It took nine years from the initial recommendation of the Working Group to the enactment of the legislation.

The resulting Landlord and Tenant (Covenants) Act 1995 abolished privity of contract (for new leases only) but allowed landlords to require the assigning tenant to enter into an authorised guarantee agreement (AGA) guaranteeing the performance of the assignee; this holds until (and if) the assignee themselves assign. The 1995 Act also amends section 19(1) of the 1927 Act enabling a landlord to pre-specify conditions and circumstances that must be satisfied before the tenant is free to assign. The

requirement within the 1927 Act that these conditions and circumstances be reasonable was removed. Clearly the landlords won some important concessions.

5.1.3 Review of context

Commercial leasing has evolved as a market with relatively little intervention by the state. From the 1886 Select Committee through to the introduction of the LTA 1995, legislating in commercial leases had proved to be anything but straightforward. Landlords have traditionally had a powerful voice although increasingly governments have recognised and listened to the opinions of the business community i.e. the tenants. To date there have been only limited, but significant, direct interventions by the state in commercial leasing; these have proved controversial and brought out some fundamental differences between landlords and tenants. This is the context into which the more recent attempts to change commercial leasing practices are set.

5.2 The study of the self-regulation of commercial leasing

This context and particularly the fraught negotiations around the introduction of the LTA 1995 set the scene for the parallel push for changes in other key aspects of commercial property leasing practices. The narrative of this attempt to change leasing practices is set out in the rest of this chapter. As noted in Chapter 5, there are several ways of dividing up the narrative. However the aim is to create phases that capture the dynamics at particular times and which enable the move through stages of institutional change to be best captured. The production of a new edition of the Code produces a natural end of a phase, as each time this happened it marked a point at which the industry had created a potential mechanism for change following a period of discussion. However, the period following the production of the 2nd edition of the Code was a particularly intense and active period, and it seemed most logical to have a phase which focussed entirely on the reactions to this edition and the change processes that were happening. This created a phase which ended with the monitoring report, i.e. prior to the production of the 3rd edition.

This meant that the narrative is divided into five phases:

1. From the events that provided the stimulus for change in 1992 leading up to the production of the first code of practice during 1994;

Table 3: Changes in Key Economic Indicators

	GDP (%)	Unemployment (%)	Retail Sales Volume (%)	Manufacturing Output (%)
1985	3.6	3.7	4.5	2.4
1986	4.0	0.5	5.3	1.1
1987	4.6	-10.7	5.2	5.2
1988	5.0	-20.2	6.4	7.4
1989	2.2	-24.9	2.0	3.6
1990	0.8	-7.4	0.7	0.0
1991	-1.4	39.8	-1.3	-5.5
1992	0.2	21.9	0.8	-0.2
1993	2.3	5.3	3.0	1.5
1994	4.4	-9.8	3.7	4.5

Source: Crosby *et al.* (2005) using data from Office of National Statistics, Small Business Service of the Department of Trade and Industry.

2. The reaction to the first Code in 1995, its apparent failure identified in 2000 and the production of a second edition.
3. Reaction to the second edition through to government pressure to produce a more effective code following their monitoring report in 2005;
4. The work to produce a third code starting in 2005, through to its lack of impact identified in 2009;
5. 2010 onwards.

5.3 Period One: From jolt to code

Greenwood *et al.* (2002) categorised the initial stimuli for change as social, regulatory or technical sources. While the legislation on privity of contract was being deliberated, the UK suffered the recession and associated property crash of 1989/90 which caused widespread hardship. This essentially social event led to the threat of legislation in commercial leasing. These events served to rock the institutional boat and started the process of attempting to change leasing practices.

5.3.1 Recession

Table 3 shows the change in the country's fortunes from the boom times of the 1980s into the recessionary period of the early 1990s. Growth in Gross Domestic Product slowed and then turned negative, while similar patterns could be seen in retail sales and manufacturing output. Meanwhile unemployment, which had been falling in the late 1980s, showed a sharp increase.

Table 4: Estimated Rental Value Change (%)

Year	All Property	Retail	Office	Industrial
1985	6.5	9.5	6.0	2.6
1986	9.9	9.9	11.7	4.3
1987	19.3	15.5	24.6	11.7
1988	22.8	19.6	25.2	22.5
1989	15.1	14.1	14.4	21.8
1990	2.8	4.4	0.5	6.8
1991	-8.5	-2.2	-14.9	-1.9
1992	-11.9	-3.3	-20.4	-8.9
1993	-7.9	-1.9	-13.7	-8.9
1994	-0.9	0.1	-1.3	-3.1

Source: Crosby *et al.* (2005) using IPD data¹⁶

As commercial property is a derived demand, it was to be expected that the property market would suffer as a consequence of the recession. A key indicator of the strength of the market is rental value growth and, after a period of strong growth in the late 1980s, commercial property rental value levels duly began to slow down and then fall, quite dramatically in the case of offices, as shown in Table 4.

The upward only rent review

However, businesses that already leased premises did not necessarily see their own rents fall to market levels and this was because of one particular institutionalised practice, the use of the upward only rent review (UORR).

Businesses occupying premises under leases were usually committed to long-term arrangements. In 1990, 86% of leases (weighted by rent) within the IPD dataset were for 20 years or more; the shorter leases that existed tended to be for properties with lower rents (Department of the Environment Transport and the Regions 2000). Leases of this length invariably include provision for the rent to be reviewed. Rent reviews are a well-established feature of UK leases which aim to prevent the erosion of the value of the rent during the course of a lease. It was the inflationary pressures of the 1950s that led to their introduction (Scott and Judge 2000). Through the 1960s and 70s the

¹⁶ The Investment Property Databank (IPD) provides business intelligence to the real estate industry. Central to this are the detailed records on individual investment properties which are supplied to IPD by the landlords. Crosby, Hughes and Murdoch (2005) reported that the database was believed to represent 75% of the commercial investment stock in the UK at the time.

intervals between rent reviews gradually fell from 21 years to 5 years (Department of the Environment Transport and the Regions 2000) and this remains the norm.

It was also during this period that the UORR became established as the dominant type of rent review. The basis of the UORR is that the review rent will be the higher of the current rent or the prevailing market rent at date of review. Although called an upward only rent review this is technically inaccurate as of course the rent can stay the same. However, in a lease with several reviews, this type of review has a ratchet-effect as the rent can never go back down, even to a figure previously paid under the lease.

The UK economy, and its property tenants, went through a recession in the early 1970s at the time that UORRs were becoming established yet, as the Department of the Environment Transport and the Regions (2000) noted, there was no obvious resistance to them at the time. The authors of that report suggested that this may have been because rents that fell during the recession had risen back to at least the same level by the time of the next review, or alternatively tenants were agreeing to UORRs as they accepted the post-war mantra that rents never went down.

However, the situation was quite different in the recession of the early 1990s when the impact of this clause was felt by occupiers due to the timing of their leases and reviews. Many businesses had taken leases in the booming economic conditions of 1987 and 1988 when rents were also at their highest and, as the recession hit, they found themselves paying more than businesses taking new leases because of the UORR provisions in their leases; they were not able to rely on rent reviews in 1992 or 1993 to bring their rents to market levels. Businesses were therefore stuck in long-term arrangements with high rents and no contractual way of avoiding this; they could not assign their leases as no one wanted to take on such liabilities when a new lease could be agreed at much lower rents. There was no legislation in the commercial leasing market to help the tenants, and although the implications may not have been foreseen, UORRs had been apparently freely agreed by business tenants and their landlords in the negotiations at the start of the lease.

5.3.2 The pressure for change

Voices of disquiet

There is anecdotal evidence that the effects of the UORR led to MPs receiving a stream of letters from disgruntled tenants (Crosby, Hughes and Murdoch 2006) and if true then this is likely to have had an impact on the politicians in Westminster. Certainly Burton's report on retail leases for the Adam Smith Institute (Burton 1992) was influential on government thinking. The report was commissioned by the Property Market Reform Group which represented major occupiers, although Professor Burton was an academic and not directly connected with the property industry. Burton highlighted the plight of retailers facing high rents, agreed in boom times and persisting through the recession due to the institutional framework of commercial leases. As a free-market economist he was deeply critical of the UK leasing system referring to "the legal and institutional factors causing the market-defying behaviour of shop rents in the UK" (Burton 1992:2). He identified monopoly, spill over effects, imperfect information and ill-defined property rights as failings of the market.

Burton lambasted the system of rent reviews for focussing only on rental comparables and, in his view, ignoring economic variables saying they are "conducted generally on a basis that bears no relation to the criteria indicated by economic analysis for homeostatic efficiency to obtain in any degree" (Burton 1992:53). In particular the prevalence of upward only rent review clauses led to a distortion in rents and inefficiency in the market; Burton argued that UORRs are "not compatible with market-economic logic" (1992:56). Further he argued for a correction of "contract failure" which arises when forms of contract have evolved and are no longer appropriate to the economic environment in which they exist, therefore he called for the "immediate voiding of all upward-only rent review clauses" (1992:83).

He also found a lack of transparency in the market, with transaction data not being freely available, and concluded that severe information asymmetry in the market resulted in tenants being unable to make informed decisions when agreeing the terms of their leases. This, added to the distortion of the normal market forces of supply and demand at rent review, led Burton to advocate government intervention in order to

“make the commercial property leasing market work more efficiently according to market principles” (1992:82).

The perceived problems of the commercial leasing market were then raised in the House of Commons in November 1992. There was apparently an earlier mention of commercial rents, although no record of this was found in Hansard; the Burton Report refers to Notice of a motion put before the House of Commons on 15th October 1990 by David Steel and others which expressed concern about “increases in commercial rents significantly above inflation’ making it ‘extremely difficult for independent and specialist traders to survive...’”. However Burton noted that this did not spark any public policy debate at the time (1992:2).

It was the MP for Tiverton, Angela Browning that, on 10th November 1992, brought to Parliament similar concerns to those voiced in Burton’s report (HC Debate 10 November 1992 vol 213 cc851-8). The MP set out the hardship that the recession had brought to her constituents, which had been grossly exacerbated by prevailing commercial leasing practices. She provided the parliamentary catalyst to examine the accepted industry practices in an impassioned speech of some 1500 words which opened a debate on business rents. In the speech she described the escalation in rents through 1980s with demand outstripping supply especially in prime shopping pitches, while retail sales did not increase at the same rate. Once recession hit, demand for units and shop sales fell away. Her main targets for criticism were:

1. The “the iniquitous upwards-only clause” (*Ibid* col 852);
2. The 20-25 year lease which made it difficult for tenants to escape the high rents and also prevented businesses responding to market conditions;
3. The rent review process which relies on transactions on comparable properties (however few they may be) and so means that the high rental levels are replicated;
4. Original tenant liability.

She was forceful in her view that the market was failing:

While the market mechanism has responded in boom conditions, it has completely failed to respond to recession. In a free and fair market, rents for leasehold premises should have taken account of all the relevant economic

factors and fallen accordingly. Instead, they have defied the laws of economic gravity, remaining on top of the outrageously high plateau they had reached in 1990, while the spending power of their customers has been gutted. The market, it appears, is neither free nor fair.

Ibid Col 851

The MP gave a first insight into the attitude of the main industry bodies, or at least her perception of their attitude, commenting that: “To date, the Royal Institute of Chartered Surveyors and the various other landlord interests have shown no interest in reforming the system” (*Ibid* Col 854).

While she did not elaborate on this, she did comment that she had had discussions with the Property Market Reform Group (the same occupiers’ organisation that commissioned the Burton Report) and also with a business group led by Sir Desmond Pitcher to try and find solutions (*Ibid* Col 853).

Government response

The minister who responded to Mrs Browning’s speech was the Parliamentary Under-Secretary of State for the Environment, Tony Baldry.¹⁷ He recognised the plight of business tenants in the prevailing market conditions where leases are concerned. He referred to the Burton report, saying that he:

.... fully appreciate the concerns of business tenants facing problems with rents and other aspects of their tenancy agreements. The recent report, “Retail Rents : Fair and Free Market?” by Professor Burton, which the Property Market Reform Group commissioned, criticises the so- called institutional leasing system and proposes radical reforms to the operation of the letting market.

Ibid Col 854

By this time the Law Commission had already reported and recommended changes to original tenant liability. Baldry dealt with the other issues but, referring to the Landlord and Tenant Act 1954 as the foundation for business leases, made it clear that the

¹⁷ Still within HC Debate 10 November 1992 vol 213 cc851-8

government were mindful of keeping a balance between legislation and the freedom of the parties to negotiate their contracts. He emphasised that clauses such as UORR were agreed under contractual negotiation and that it was quite possible for terms such as this to be varied by the parties:

it may well be in the best interests of the landlord to agree to other rental levels in the light of current difficult market conditions in order to avert the risk of a vacancy arising if business pressures on the tenant become unsustainable. That is an important point, of which all involved should be well aware.

Ibid Col 855

Similarly the 25 year lease:

...is a contract term which the parties have freely and voluntarily agreed. There is no statutory obligation to agree this length of lease.

Ibid Col 855

So, ministerial sympathy was peppered with reminders that such contracts had been entered into voluntarily; while terms might have become common, they had been freely agreed between the parties. The minister was also very wary of regulation as a solution to the problems so was very reluctant to consider regulating the length of leases, banning UORRs or prescribing arbitration clauses saying:

Successive Governments' policy of non-intervention in business tenancies gives tenants and landlords freedom to negotiate the terms of the lease including the length of lease, rent levels, rent reviews and dispute terms, in the light of current market circumstances, thus avoiding the distortions that invariably result from statutory controls....

....The Government take the straightforward view that landlords and tenants should be free to negotiate agreements in the open market on whatever terms they decide. It is in both their interests that they should have flexibility to agree terms in the light of particular circumstances and not be constrained by statutory provisions.

Ibid Col 855

Thus the debate ended with an acknowledgement by the minister that many businesses faced difficulties relating to commercial leases and an assurance that the government would consider the various issues raised, while recognising the need to keep a balanced approach to the landlord and tenant relationship.

At this stage the government was apparently reluctant to regulate. However, from this point onwards, a stated willingness to legislate was central to the jolt given to the industry.

5.3.3 Threat of legislation

In March 1993 Sir George Young (Minister in the Department for the Environment) informed the House of Commons that:

They (the Government) have no intention of legislating in any way that would alter the terms in existing contracts. However, the Government will shortly produce a consultation paper inviting views on three aspects of commercial leasing which have been causing concern: Upward Only Rent Reviews; Confidentiality clauses; and dispute resolution procedures. We will consult widely with interested bodies and will carefully consider the outcome before deciding.

HC Debate 31 March 1993 Vol 222 Col292

Pressure on the government to act was increased by a 10-minute rule bill in May 1993 in which a backbench MP (Richard Ottoway) introduced “a Bill to abolish upwards-only rent review clauses in commercial leases; and for connected purposes.” (HC Debate 18 May 1993 Vol 225 Col 158). Mr Ottoway made similar points to Angela Browning, referring to her speech of November 1992. His bill was not successful.

The government duly consulted on legislating in the specific areas of upward only rent reviews, confidentiality clauses (which mean that agreed lease terms are not disclosed by the parties) and rent determination processes at rent review and lease renewal (Department of the Environment 1993). The proposals for legislation were to:

1. Prohibit the use of UORRs in new leases, with the rent at rent review being determined in line with the current open market value.

2. Address confidentiality clauses. Suggestions in the consultation document were: prohibiting their use; make information available by compulsory registration of leases at the Land Registry; limit the effect of clauses by requiring registration of lease details after a specified time period.
3. Address rent determination processes by: regulating the content of rent review clauses; allowing the reference of disputed rent reviews to a Tribunal.

It did not however pursue the proposals from Professor Burton and Angela Browning MP for restrictions on lease length or changes to the use of comparables to determine rents at review. The government spoke to the RICS before issuing the consultation document¹⁸ but, despite this dialogue, the RICS was rather surprised at the extent of the consultation document when it was published in June 1993. In May 1993 the RICS in-house magazine reported on a speech by Tony Baldry in which he was said to have “stressed the benefits of non-intervention in business tenancies “(CSW 27 May 1993) and appeared to justify UORRs and long leases. The RICS interpreted this as meaning no intervention was likely. However, when the consultation document was published, the leader article of the magazine reported that “those close to the department” indicated that there had been a shift in opinion within government (CSW 3 June 1993 p.3). The article suggested that the recent introduction of two 10-minute bills on related matters had had an impact.¹⁹

5.3.4 The response of the industry bodies

The responses to the consultation document by the two main industry bodies give an insight into the extent to which they recognised that there were general problems to address; this is part of theorisation, a key stage in the process of change identified by (Strang and Meyer 1993) and (Greenwood *et al.* 2002). The sequence of stages identified by Greenwood *et al.* suggests that theorisation should come later, however the trigger of legislative consultation forced the industry bodies to consider the extent of industry failings and to respond. Their responses show an initial resistance to change and a belief that the market mechanisms were working.

¹⁸ Documented in Hansard HC 15/12/93 Col 725

¹⁹ The two bills were on abolishing UORRs (as mentioned above) and on retrospective abolition of privity of contract.

Reported comments by the RICS reveal this attitude. Chief Executive Michael Pattison expressed his view on the consultation:

I believe this is a serious effort by the government to hear from all sides of the industry, so it can decide if there is a need for legislation. I don't believe ministers are keen to legislate because they believe in the workings of the market." He believed that changes could happen "if enough noise is made in behalf of users.

CSW 3 June 1993 p5.

Senior RICS member Richard Lay was quoted in the same article as saying that:

the property market is a free market that operates very efficiently and that no legislation is required.

The BPF and RICS submitted written responses to the consultation document which make clear their views.

BPF written response

The BPF saw no reason to intervene in the market in any of the areas; it did not recognise that there were problems which needed to be resolved outside of market mechanisms (British Property Federation 1993).

In its response, the BPF argued against banning UORRs pointing out that this would be against the government's policy of deregulation. In addition, it contended that the market had adjusted by itself in response to market circumstances and so now offered flexibility in lease terms (shorter leases and break clauses) along with financial benefits such as rent free periods. Negative consequences from banning UORRs were set out: increased risks for investors would mean increased returns needed; property values would fall as would investment including that from abroad attracted by UK lease structures. The BPF disputed the argument given in the consultation document that contracted rent should always equal open market rent or that UORRs are a cause of inflation.

Notably the response drew on research commissioned from IPD. This was submitted to show that UORRs did not cause inflation and that tenants over the last 22 years were

better off under UORRs than leases that incorporated RPI rental increases (except for lettings in 1989 and 1990).

The argument against banning confidentiality clauses was based on the premise that, in a free society, parties should be entitled to privacy unless there were compelling reasons to do otherwise. The BPF did not appear to accept the argument that there should be more transparency saying:

Generally, evidence is freely available and there are no cases to our knowledge which have been materially affected by non-disclosure because of confidentiality clauses

British Property Federation (1993:18).

There was no perceived problem with dispute resolution; the view expressed was that there was no evidence of bias in current system and that a tribunal system would be expensive. It was felt that “Professions are capable of ironing out any imperfections of the present system” (British Property Federation 1993:3).

RICS written response

The response of the RICS was also that state intervention was not needed although, unlike the BPF, there was acceptance that current practices may be causing some problems for tenants (Royal Institution of Chartered Surveyors 1993).

In respect of UORRs, the RICS expressed an understanding of the “sense of unfairness felt by some tenants ‘locked into’ leases at a rent which is higher than current levels.” (Royal Institution of Chartered Surveyors 1993:1) However, it believed that only retrospective legislation would deal with this issue for current tenants and neither government nor RICS were recommending this. As with the BPF, the RICS argued that the market was responding by itself; it saw the current market as being “flexible enough to adapt to changing circumstances and has done so in a number of ways” (Royal Institution of Chartered Surveyors 1993:1).

Shorter leases and break clauses are given as examples of this. The negative effects of banning UORRs cited were: deterrence for development; the potential move away from property as an asset class; difficulties in the ability to borrow money (as property prices

would fall); a two tier market while some properties have UORRs.

The recognition that tenants may currently be facing difficulties because of the UORR led to a comment that landlords should find ways to help tenants such as by paying rent on easier terms, and that this would be prudent in a depressed market anyway (Royal Institution of Chartered Surveyors 1993:8). However, the RICS does not suggest a way of making this happen.

Primarily the argument made by the RICS was for market forces and the freedom to negotiate to prevail.

We believe instead that market forces, which have already changed the shape of the commercial property market, should continue to be allowed to operate, adjusting the terms landlords and tenants are able to negotiate according to supply and demand.

Royal Institution of Chartered Surveyors (1993:8).

On the issue of confidentiality clauses, there was stated support for more openness. This contrasts with the BPF response. However, like the BPF, the RICS argued against legislating for disclosure saying that sometimes confidentiality was needed for good reason. Rent reviews and renewals were highlighted as areas where confidentiality had the most impact but the RICS believed that:

sufficient information finds its way out to the market for competent advisers to take a responsible view as to what is happening given that valuation at the best of times is an imperfect art. We also feel that the particular difficulties in the review/renewal market are not in themselves of sufficient detriment to justify statutory intervention.

Royal Institution of Chartered Surveyors (1993:18).

So again there is no sense that there is a significant problem.

As the government's criticisms of dispute resolution processes were essentially an attack on the RICS arbitration system, this was defended in great detail in the RICS response. The criticisms of bias were said to be misguided; the accusation that arbitrators did not take into account economic factors were said to be misconceived as

comparable rents reflect economic circumstances. Much of the pressure for change was believed to come from small business tenants (SBTs) whose main problem was perceived to be unfamiliarity with the system, therefore the RICS reported that it had produced a simple guide to rent review. Delay was said to be thing of past and the RICS service represented best available value. Again the argument was made for freedom of choice, this time in the method of resolving disputes to be incorporated in leases.

However the RICS reported that it was taking the lead on a simpler dispute resolution service for rents, a voluntary mediation service. It expressed support for an alternative, optional tribunal if it was expert, efficient and independently funded, so again some acceptance that there are problems in the current system.

5.3.5 After the jolt

The second phase of the model of institutional change (Greenwood *et al.* 2002) is one of deinstitutionalisation. In this phase the jolts lead to ideas being put forward by any of the existing actors within the organisational field or even new entrants. “Their effect is to disturb the socially constructed field-level consensus by introducing new ideas and thus the possibility of change” (Greenwood *et al.* 2002:60). Ideas may then emerge from any of the players in the field as “technically viable solutions to locally perceived problems” in a stage of preinstitutionalisation. In this particular case, it was the government that was the leading actor, both in identifying the areas of change and proposing the code as a framework to provide a solution.

As discussed in Chapter Two, the prevailing neoliberal ideology did not favour direct intervention in markets. It was in this context that, following the consultation period, the government withdrew the threat to legislate and the minister, Tony Baldry, set out a proposed course of action (HC Debate 19 July 1994 Vol 247 cc111-113W). Evidence of variety on lease terms was acknowledged but there were problems to address, and practices did need to change. They therefore put it back to the property industry to develop a system of self-regulation, although the industry was not going to be given free rein on this. It was to be done in partnership with tenant groups and government. The latter made clear the problems as they saw them and the outcomes that they expected to see. The Department of the Environment Under-Secretary of State (Tony Baldry) reported to the House of Commons:

(On UORRs) We consider the best way forward would be for the industry to adopt a code of practice which not only draws attention to the implications of upward rent review clauses but encourages flexibility on other terms. On the assumption that a satisfactory code of practice can be developed and accepted by all sectors of the property industry in consultation with occupiers' representatives and put into effect, we consider that statutory intervention to regulate rent review clauses would not be appropriate.

(On Confidentiality) We envisage that the code of practice should encourage greater openness, unless there are compelling reasons to the contrary. We shall consult with interested parties on how this could be achieved.

(On Dispute resolution) We therefore look to discussions about a code of practice to stimulate greater awareness of current procedures. More generally the competitiveness White Paper refers to other work being taken forward to simplify the law on arbitration and encouraging other forms of dispute resolution. We also intend to review with interested organisations options for providing a quick, cheap and cost-effective method of resolving disputes for small tenants.

(Overall)... the Government will work with representatives of both landlords and tenants and other interested parties with the aim of producing a code of practice within the next twelve months. The Government will appraise the operation of the code after three years when it should have had reasonable time to influence commercial practices. In particular, we will review the impact on the flexibility and transparency of the market.

HC Debate 19 July 1994 Vol 247 cc111-113W.

5.3.6 Developing a code

While the government had identified some specific practices to be addressed within a code, this was associated with a requirement to improve flexibility and transparency in the market. It required a fundamental and wide-ranging review of leasing practices. The government made clear that this was to be undertaken by representatives from the industry and occupiers, therefore problems and potential solutions were immediately being aired at the level of the organisational field and the generalisation of

the problems (theorisation) had to occur alongside the stages of deinstitutionalisation and preinstitutionalisation. The industry was being pushed towards revolution rather than evolution, much as Meyer *et al.* (1990) found that the “fusillade of regulatory actions” added to prior economic, social and political pressures triggering revolutionary change in US hospitals.

Over the next few months there were fundamental disagreements within the industry on the nature of the problems, alongside disagreements on the nature of any code and who would draw up such a document. There are many comments made by industry players in the Estates Gazette which reveal the extent to which the property industry still did not believe there was a problem with institutional practices(such as the dominant UORR).

The BPF saw no need for change referring to the normal ebb and flow that happened during negotiations; the market was self-correcting:

“British Property Federation director-general William McKee declared: “We are quite clear that the code cannot become a substitute for the operation of the market, or for negotiations between owners and tenants on lease terms”... McKee said: “This is an open market, free negotiation. At times the landlord will hold a better negotiating position - and at other times the tenant will. But the code cannot regulate an open and free market.” “

EG 17-09-1994.

However, it seems to have been the BPF that, publicly at least, took the lead in shaping the code and, in so doing, took the lead in identifying the problems to be addressed. BPF homed in on the educational role of a code and took the lead in steering it toward this, organising a conference in October 1994 and producing a draft code:

“BPF director-general William McKee expressed concern that the Government had not made clear what the code, which is intended to give guidance on upward-only rent reviews, confidentiality issues and the resolution of disputes between landlords and tenants, should actually seek to achieve.”

EG 22-10-1994

McKee was reported as commenting that Baldry's July 1994 speech showed the government:

...appeared to want a code of the "health warning" kind. "Flexibility is to be achieved through greater awareness and understanding of the options open to landlords and tenants, rather than through prescriptive measures," he said.

EG 22-10-1994.

In May 1995 the new BPF president (Trevor Moross) reiterated the BPF view that there was no real problem with practices, and that the issue was informing and educating:

"He also rejected legal and fiscal intervention in the commercial operation of the property market and welcomed the recent government decision not to legislate on leases, but commented that the content of the proposed Code of Practice remains an issue: the code "can only - and should only - be to inform, educate and warn the parties, particularly small tenants, of the implications and obligations of entering into a commercial lease ... there is no place in a voluntary code for prescriptive interference" he said."

EG 13-05-1995.

The RICS was less prominent in the EG than the BPF. Indeed, the RICS seems to have come in for some criticism at this time for inactivity with delegates at a BPF conference on commercial leasing reportedly questioning why "the RICS and tenant organisations were not playing a more active part in shaping the code" (EG 22-10-1994)

However, the circumstances of the comments perhaps suggest a rivalry between the two organisations rather than objective statements. RICS Assistant Secretary General Barrie Clarke claimed that the Institution was taking an active role saying "We are taking soundings all the time, and in November we will be holding talks with interested parties at a meeting called by the DOE" (EG 22-10-1994)

The RICS saw itself as being central and in a non-partisan role: Richard Lay, DTZ chairman and the RICS' spokesman, said that "The RICS has a particular role, because not only does it represent both the landlord and the tenant but it also acts as an arbitrator" (EG 12-11-1994).

Nevertheless, even the RICS saw BPF in a central role with Richard Lay saying that “the draft code put together by the BPF and launched at a seminar last month could form a useful starting point for future discussion” (EG 12-11-1994).

However the RICS did not seem to have much faith in the success of the code concept or of its own ability to ensure its dissemination and use:

According to RICS chief executive Michael Pattison: “It will work only if the key industry parties believe that such a code will work ... I do not see that the basics have been established yet.”

EG 17-09-1994

Similarly Richard Lay commented that “Whether landlords promote this code to tenants remains to be seen. I think it’s about as likely as an estate agent recommending a structural survey,” (EG 12-11-1994)

5.3.7 The first code of practice

Despite the problems, the *Commercial Property Leases in England & Wales: Code of Practice* (Commercial Leases Group 1995) was eventually launched in December 1995. The authoring group included representatives of the various stakeholders: landlord bodies were the BPF, Association of British Insurers and British Council for Offices; tenant bodies included the British Retail Consortium, Confederation of British Industry, Federation of Small Businesses and the Property Market Reform Group; professional advisers associations represented were the RICS, ISVA and the Law Society. The Code was an attempt to steer the property industry into different practices, a first attempt at the pre-institutionalisation phase. The stated aims of the Code were to:

- a) Improve practice in the business relationships between landlords, tenants and their advisers particularly when the grant of a lease is being negotiated and at a rent review;*
- b) Encourage greater flexibility and choice through improved awareness of the alternatives and terms and conditions which may be negotiable;*
- c) Promote greater openness and disclosure in the property market so that negotiations and the resolution of disputes, particularly concerning rent*

review, are conducted with the benefit of more complete and accurate information;

- d) *Ensure that businesses know more about how the market in commercial leases operates.*

Commercial Leases Group (1995:5).

Much of the document was devoted to the explanation of various aspects of leasing such as rent review, alienation and repairing liabilities along with advice on these various issues. However, the use and distribution of the Code was stated to be voluntary rather than mandatory, therefore any attempts to change the leasing practices of landlords were limited to exhortations; for example where flexibility in lease terms is concerned: “Landlords are urged to consider a potential tenant’s requests to vary the terms quoted” (Commercial Leases Group 1995:8). Likewise on confidentiality:

For commercial reasons, sometimes the landlord or tenant will wish to keep the details of their transaction confidential. Generally however, parties and their advisers should avoid unnecessary secrecy in transactions. This will help the availability of market data.

Commercial Leases Group (1995:10).

5.3.8 Summary of the first period

The recession of the early 1990s provided the jolt which sparked a revolt against some long-standing industry practices. The main arguments for government intervention in commercial leasing were articulated by Professor Burton and the MP for South Devon, Angela Browning, who both called for reform in industry practices such as the UORR on the grounds that they worked against a free and fair market. Mrs Browning bemoaned the lack of interest shown by RICS and landlord interest groups, suggesting that she had pursued the issues with them prior to her speech. Her speech was aimed at the relevant minister and was a clear call to action for government which echoed the call for intervention made by Burton.

While the government’s initial position was to support the notion of freely agreed contracts in leasing, legislative solutions which challenged key industry practices were

soon presented in a consultation document. The issues identified in 1993 for consultation on potential legislation were: abolition of upward only rent reviews; removal of confidentiality clauses; changes to rent review/renewal dispute resolution procedures. The responses of the BPF and RICS to these proposals show that these two industry bodies did not at this point agree with the government, Professor Burton or Mrs Browning that there were fundamental problems in the commercial property leasing market. A strong defence of UORRs was made along with arguments that the property market was responding to changing demands on lease structures. The sacrosanct nature of the freedom to negotiate leases was strongly argued by both organisations. However, there were differences between them. The BPF were unswerving and forceful in defending the operation of market forces and disputing the existence of the alleged market failings. While the RICS similarly argued against legislation in any of the areas, there was recognition that practices like the UORR may be causing problems, particularly for smaller tenants and that more openness in transactions would be beneficial.

The government responded to the submissions from industry and stepped back from legislation. This was also commensurate with the prevailing neoliberal ideology. It subsequently handed over the same issues to industry to address through self-regulation and to produce a code of practice in conjunction with tenant groups. This forced the industry into questioning and proposing solutions within the framework of a code i.e. the stages of deinstitutionalisation and preinstitutionalisation. However, as the nature of this initiative required the recognition of a general problem (theorisation). The published views of the BPF and RICS during the discussions on a code confirmed their views as expressed in the responses to the consultation document. This suggests that this initiative for creating institutional change was immediately floundering because they did not agree there was a problem to solve; that first crucial stage of theorisation was not evident. Although the RICS was showing some willingness to change through a code, it was very vague. The Code was therefore developed with the BPF in particular arguing for an educational document believing that tenants simply needed to understand the system better rather than any changes being needed.

Table 5: Period One

Stage	Meaning	Operationalisation	Evidence found in first period
Precipitating jolt	Pressures for change	Evidence of pressures for change which could be: social (including economic), regulatory or technological.	Social/economic pressures from recession of early 1990s. Report by academic (Burton) and action by MP (Browning) on behalf of constituents leading to threat of legislation.
Deinstitutionalisation	The removing of legitimacy from existing practices	Evidence that any of the actors in the organisational field: Ask questions about leasing practices Gradually stop doing something Proactively challenge/reject leasing practices	Government questions leasing practices and compels Industry to do the same in association with occupiers. Key industry players largely focus on information asymmetry, questioning tenants' awareness
Preinstitutionalisation	Introduction of new ideas and replacement practices	Evidence that actors: Suggest new practices (in areas such as set out above) Independently adopt different practices	Government propose framework for changing practices i.e. code of practice. One is produced, which encouraged flexibility, choice and openness. Explained, and gave advice on, lease terms
Theorisation (part 1)	Recognition and specification of general problem	Evidence that supply-side actors, particularly RICS & BPF: Recognise that there is a problem with leasing practices (in areas such as set out above) Believe that there is no problem in these areas	Almost no acceptance by industry bodies that there are problems beyond tenants having a lack of information.
Theorisation (part 2)	Development of principles to support solutions for general adoption	Evidence that actors: See Code/do not see Code as an industry solution See regulation as industry solution Take the lead in shaping the Code Propose other industry-wide solutions Evidence that the Code is gaining legitimacy	The idea of the Code is accepted by the supply-side although there are clear disagreements over purpose. Industry bodies take the lead (especially the BPF) Published Code represents an attempt to provide general underpinning principles for practices.
Diffusion	Legitimated ideas spread through communities and are adopted	Evidence of: Dissemination efforts by actors (particularly BPF and RICS) Solutions seen to be spreading/being adopted Solutions not seen to be spreading Policing the implementation of the Code	Not yet applicable
Reinstitutionalisation	Ideas and practices are accepted as the natural ways of doing things.	Evidence that different practices: Have become taken for granted/natural way to behave Have not become natural way to behave	Not yet applicable

The resulting code seemed to shift the focus quite a long way from the initial desire to change practices to information provision, with only general recommendations for landlords to offer choice and flexibility. Nevertheless, at first sight the development of the Code by a broad group of interests is part of the theorisation stage in terms of developing general principles.

During this period several stages of the model of institutional change can be observed. The evidence found during this first period for the different stages of the model has been summarised and added to the operationalised model as set out in Table 5.

The threat of legislation and the initiation of industry self-regulation by the government required industry theorisation alongside the questioning and discussion of ideas required to establish a code. This immediately suggests a less linear sequence of stages in these circumstances to that set out in the model. Following the jolt, the deinstitutionalisation and preinstitutionalisation of one actor (government) initiates the same stages and the need for concurrent initial theorisation by industry. The second part of theorisation occurs together with preinstitutionalisation as the ideas being developed by actors are the same as the general principles; all are concerned with the development of an industry Code. The movement between the initial stages is shown by the arrows in an amended diagram of the model at Figure 3. The later stages are shown in grey as they have not been found to be part of this stage.

5.4 Period Two: Reaction to the Code through to second edition

On the face of it, the production of a code of practice, co-created by the major industry bodies, represents a significant step in terms of theorisation. It suggests some agreement as to the problems and the practices that need to be change. To encourage changed practices, the industry bodies could show continuing support for the need for change, conferring legitimacy on the Code as the way to achieve this and could ensure its diffusion and adoption.

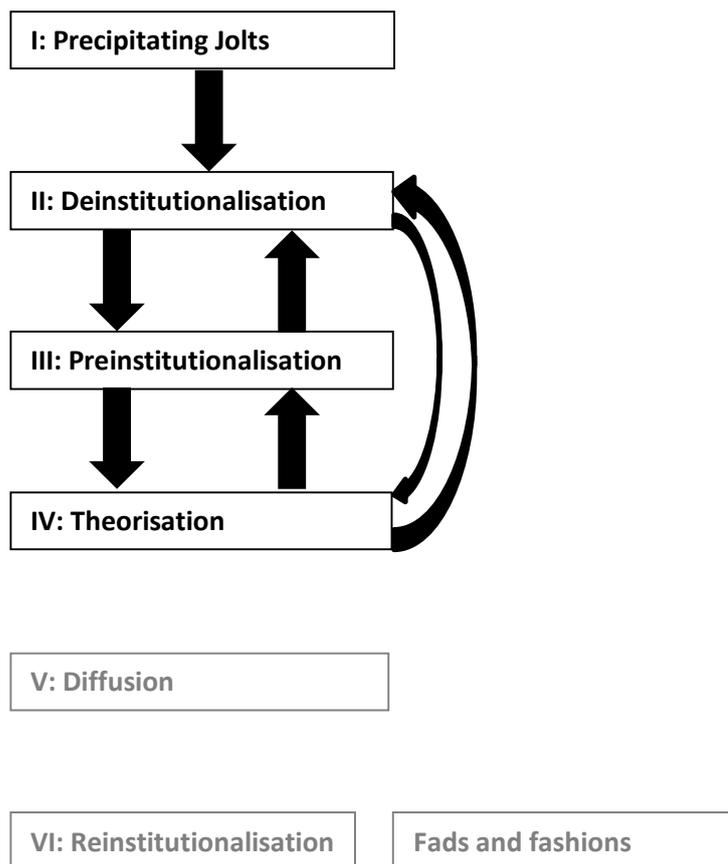


Figure 3: Model of Period One

5.4.1 Legitimation and diffusion of the Code

The vice president of the RICS, Richard Lay, who was also one of the authors of the Code, expressed a belief that the Code was important and also that there was a need for change saying that the Code “tackles the criticism that the industry is still too often inflexible and secretive in landlord and tenant matters by pushing for a change in attitude and practice.” (CSM Nov/Dec 1995 p3)

However, the BPF saw the introduction of a code, rather than state intervention, as vindication of the efficient working of the property market indicating that there was still no acceptance of problems in leasing practices by them:

Director-general of the British Property Federation, Will McKee, said: “This debate arose out of fear that the property market was acting inefficiently, and an implied proposition that this was due to landlords’ inflexibility. The fact that the government decided not to intervene shows that this was not the case.”

Nevertheless he conferred some legitimacy on the code, seeing the creation of it as evidence of a cooperative industry:

... a new spirit of co-operation has developed between the various industry representatives bodies, he says, best illustrated by the publication of the Code of Practice for Commercial Property Leases last year.

EG 05-10-1996.

Reported reactions to the Code from tenant groups suggested that the spirit of co-operation was a positive step but that, despite their involvement in developing the Code, it did not go far enough in terms of change. The director general of the British Retail Consortium (BRC) commented:

“The code marks a distinct improvement in the approach between landlords and tenants as it shows they can work together with a common interest and for the common good”..... Despite this, May says that many retailers are still disappointed with the government’s decision not to intervene, particularly on the issue of upward-only rent reviews. “Ideally, the code could have had more teeth and been backed up with sanctions. What we have is a negotiated compromise,”

EG 06-01-1996.

Later that same year, the Assistant Director of the BRC said that “the code, designed to smooth landlord and tenant relations, was of limited use and has had no significant effect” (EG 05-10-1996).

Despite authorship by a broad range of interest groups, there was very little evidence of the code gaining legitimacy and its recommendations becoming widely adopted.

However the BPF made clear that they wanted the Code to take hold and that they were a leading organisation for the property industry. In January 1998 the launch of a policy agenda was announced:

Partnership in Property - a manifesto of legislative reforms which the federation wants the government to implement over the next five years...The 35-page document pledges that the BPF will continue to seek close liaison with

government on all relevant policy and actively promote the property industry's value to the economy.

EG 24-01-1998.

One of the priorities within this document was reported to be the introduction of measures to improve the effectiveness of the Commercial Leases Code of Practice.

5.4.2 Independent initiatives

Meanwhile the RICS introduced an independent initiative in conjunction with another professional group, the Incorporated Society of Valuers and Auctioneers (ISVA),²⁰ and also DETR. During 1999 their Small Business Scheme was launched²¹ which aimed to make the rent review process more understandable for small businesses and which provided for the appointment of an independent expert at rent review for a fixed maximum fee.

5.4.3 Assessment of Code impact

As announced at the launch of the Code, the government conducted its own assessment of its success. The University of Reading was commissioned to monitor the first three years of the operation of the Code. The report (Department of the Environment Transport and the Regions 2000) considered whether the Code was in regular use in the market, whether the changes required by government had happened and if so whether the Code was responsible. The Code itself was found to have had almost no impact, not least because it had been poorly disseminated; professional advisors were largely aware of it but were not bringing it to the attention of their clients. Diffusion of the Code had not happened.

However the report found that there had been changes in the market. The Government threats to legislate underlying the Code may have contributed to the changes, although it was not possible to establish the extent of this. The changes were established by analysis of data from Investment Property Databank (IPD) and the Valuation Office Agency (VOA), which showed lease lengths getting generally shorter and also more diverse. Figure 4 shows the diversity in the IPD dataset in 1998. These

²⁰ The ISVA merged into the RICS in 1999.

²¹ Reported in CSM May 1999.

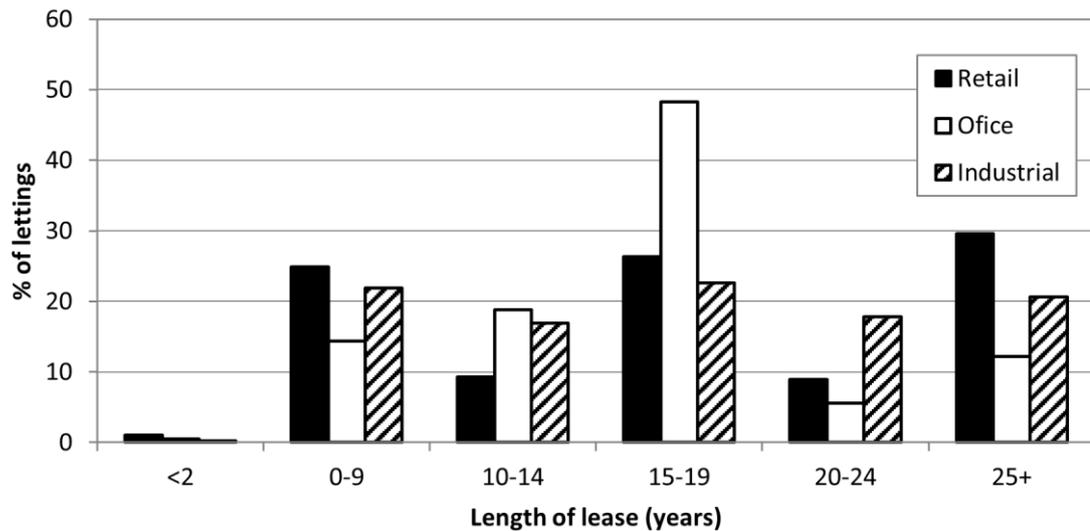


Figure 4 Distribution of different lease lengths in 1998 (rent weighted)

Source: Department of the Environment Transport and the Regions (2000) (IPD data)

can be compared with the 25 year lease that was prevalent and uniform in 1990. It was not clear whether tenants were benefitting more from break clauses in their leases than in the past, as there were differences between data sources.

Confidentiality clauses were found to be few and far between, although the report suggested that this had always been the case. The report did not probe the experience of tenants in dispute resolution processes but did identify a lack of knowledge on provisions for this within their leases. However the key lease clause that was always going to provide the acid test was the UORR and the report found that remained intact and was the dominant form of rent review.

In summary, the first code was little known and was, in any event, considered by tenants to lack the required sanctions to ensure compliance. Even the BPF had set out the need for strengthening the Code to make it more effective. Despite this and the RICS introduction of its simplified dispute resolution service, there was no sign that the RICS and BPF were leading a charge to ensure the Code changed industry behaviour.

5.4.4 Government response to failure of first code

Nick Raynsford, Secretary of State for the Environment, Transport and the Regions, announced the publication of the government's report on the operation of the Code in April 2000 (HC Debate 19 April 2000 vol 348 cc494-5). His statement made clear that the Government was continuing to highlight practices that needed to change.

Raynsford emphasised that the issue was not simply about providing information to prospective tenants, but about enabling appropriate choices to be made (the implication being therefore that landlords should be offering a choice):

We need to consider how Government, industry and the professions can be more proactive. It is not just a matter of providing information: we need to prompt those setting up in business to ask the right questions at the outset, to help them make the right choices, thus ensuring that their form of property occupation assists rather than hinders their business development.

Ibid Col 494-495.

Raynsford also commented on flexibility; the move to shorter leases was welcomed unlike the continuing predominance of UORRs in longer leases:

I am concerned that upward-only rent reviews still predominate in longer leases, and while I welcome the report's evidence of greater flexibility, I am disappointed that the Code of Practice has not had a greater influence.

Ibid Col 495.

Despite the apparent failure of the Code to have any real impact, there was still no appetite from the politicians for regulation and the government was apparently intent on making a code work. However there was a reminder of the 'jolt' as the threat of regulation was maintained; Mr Raynsford pressed the industry to rethink the Code and its dissemination, and to sit around the table with him to take this further:

To see if we can avoid regulating lease terms, I invite the industry and property professions to consider: the scope and contents of the Code of Practice; the arrangements for disseminating the Code and other forms of advice for tenants; how the market could promote alternatives to upward-only rent review

clauses, ensuring that they are presented attractively while bearing the appropriate price tag; and how to promote a better understanding of the workings of dispute mechanisms; in particular, to encourage wider take-up of the special disputes resolution scheme for small businesses which the RICS introduced last year.

I will be asking the industry and professions to consider these points, as they digest the Reading University report, and I will invite them to discuss them with me at a forthcoming meeting of my Department's Property Industry Forum

Ibid Col 495.

After the production of the report and the associated ministerial comment, the industry was again defensive about existing practices, showing support for the UORR and vehement opposition to any suggestion of regulation. Will McKee (Director-General of BPF) said that the Reading University report showed “few complaints about the existing code of practice for commercial leases” (EG 26-04-2000) and he reiterated the argument that abolition of UORRs would drive up rents and be harmful to the interests of landlords:

Investment in property has to be profitable for the landlord as well as profitable for the tenant. The profitability of commercial property is less than the profitability of the retail. The poor relation is property not retail.

EG 26-04-2000.

Similarly the RICS director of policy Michael Chambers reportedly argued that

further regulation of commercial leases would not help the small firms it is intended to benefit...Standard institutional leases tend to be on properties in the most desirable locations...“Small firms are less likely to be in prime areas.”

EG 31-05-2000.

5.4.5 Producing the second edition of the Code

The minister's threat of legislation on UORRs in early 2000 was quickly withdrawn to the relief of the BPF and RICS:

Minister Nick Raynsford's backing down from banning upward-only rent reviews has met with approval from the British Property Federation.

BPF director general Will McKee said he was "very pleased" with the outcome of Tuesday's Property Industry Forum meeting, when Raynsford held off from his threat to introduce legislation to ban the reviews.

Michael Chambers, head of policy at the RICS, was also relieved. "Nick Raynsford's threat to legislate had set the cat among the pigeons, but this is a sensible outcome" he said.

EG 09-09-2000.

This again put the commercial leases group in the deinstitutionalisation, preinstitutionalisation, theorisation loop, with a wide review of the 1995 code and so questioning existing practices and specifying the general problems. This was alongside the specific task of suggesting alternatives to UORRs. The group found it difficult to agree a revised version of the code and to meet the various deadlines set for it by government. The difficulties were probably exacerbated by the re-formation of the disbanded Property Market Reform Group with the stated aim of lobbying for the abolition of UORRs (EG 06-01-2001); this organisation had been part of the original code group and now would play a part in reviewing it.

The government imposed a deadline for the group to produce their proposals for the Code (end of March 2001); as this date arrived, the group had not reached a consensus and the threat of legislation seemed to be in the air again (EG 24-03-2001). The RICS was perhaps getting a little exasperated with landlords' representatives:

RICS policy chief Michael Chambers said that tenants and landlords remain on opposite sides of the battlefield, with landlords opposed to anything other than a revision of the discredited voluntary code on commercial leases, produced by the industry five years ago.

EG 24-03-2001.

Meanwhile the government continued to frame the problems and encourage industry solutions, while reserving the legislative option:

Referring to the review of the property industry's Code of Practice on Commercial Leases, the Minister looked forward to the industry's proposals for more choice and flexibility in the property markets and for better property guidance for small business. His preference was for a voluntary solution, but he could not rule out legislative options in the absence of effective measures to promote alternatives to upward only rent reviews.

EG 28-03-2001.

The difficulties in theorisation by the working group can be seen in this anonymous comment from a member of the group:

It's not looking good. We do not want to present a document that is so vague as to be meaningless, and the only other alternative is to present a list of the arguments posed by each group. Each side is thinking in terms of gain, not give and take.

EG 31-3-2001.

Eventually the group did come up with some fairly radical proposals for three alternative lease structures, set out in Table 6, although it is not clear that these had the support of all sat around the table.

Whatever the views of those individuals on the working group, these ideas were roundly rejected by the members of the representative groups on both sides, the terms and trade-offs being proposed being considered unacceptable. At this point there appeared to be no meeting of minds in terms of theorisation:

Working party chairman and Law Society representative Philip Freedman of Mishcon de Reya wrote to Raynsford last week saying: "These ideas have met with varying degrees of opposition from both sides, leading to an impasse.".... Freedman said: "I am not confident that we will find a middle ground between the two vastly opposed sides. My guess is that the BPF will come up with something that NACORE will agree with, but other tenant groups will reject. "Raynsford will publish a consultation paper, the landlord and tenant groups will offer comments, and the minister will then decide on legislation."

EG 07-04-2001.

Table 6: The options

Option 1- short term: Five year period; no security of tenure; rent fixed; assignment subject to reasonableness and Authorised Guarantee Agreement

Option 2 - medium term with conditional occupier break and security of tenure: 10 year period; review at end of year five to market rent, but at a minimum of the initial rent; occupier may terminate on giving six months' notice if rent is to go up at review, but owner may agree to continue the passing rent instead of accepting; if break is exercised, six months' rent compensation paid to owner

Option 3 - medium term with unconditional occupier break and no security of tenure: 10 year period; review at end of year five to market rent, but with minimum of the initial rent; at the end of year five, occupier may terminate on giving six months' notice and compensation to be paid to owner equal to six months rent

Source: EG 07-04-2001.

Legislation was once more considered very likely but, paradoxically the uncertainty over whether this would happen may have hampered negotiations:

Chairman of the Commercial Leases Joint Working Group Philip Freedman of Mishcon de Reya accepts that lengthy consultation between landlords and occupiers has resulted in a stalemate, and that legislation to outlaw upward-only rent reviews now looks likely. But he says that the government's equivocation has hindered negotiations: "If retailers believe Raynsford is seriously considering legislation, it might be in their interest to not reach a consensus. If landlords believe he is not serious, they have every reason not to act."

EG 14-04-2001.

The continuing uncertainty whether regulation was imminent proved difficult to deal with. Even the BPF put it back to the government to decide on a regulatory framework for the leasing industry. Once again they made clear their view that the leasing market was already operating efficiently:

In a letter to the minister, BPF president Chris Bartram claims that the market is already delivering leasehold flexibility and urges the government to clarify its position on the future of leasehold reform.

"Since the players in the industry have reached an impasse, it is our view that it now falls to government to decide upon the regulatory framework within which the market should function. We hope you will accept our view that the market should continue to provide the flexibility you seek within the present framework

but if this is not the case, we will respond constructively to any proposals which you bring forward.”

EG 18-04-2001.

Later in April 2001 Beverley Hughes MP was asked in the Commons about the property market and small businesses, and was forced to admit the extent of disagreement in the lease group:

The issue of advice for small businesses arose in the course of our review of the property industry’s Code of Practice on Commercial Property Leases, along with more general issues about the degree of choice and flexibility in the commercial property market. Representatives of landlords, occupiers and the professional bodies undertook to address these concerns, but have failed to reach consensus on the key issues. We are disappointed at this lack of agreement, and my right hon. Friend the Minister for Housing and Planning is now considering future options.

HC Deb 23 April 2001 Vol 367 cc5-6W.

Later in 2001 the group did manage to come to an agreement on a draft code which based on landlords giving prospective tenants priced alternatives to UORRs on request, but the rent would never fall below the initial rent (to safeguard funding). Comments made by BPF and RICS at this point show the clearest acceptance so far that some practices need to change.

The British Property Federation (BPF) has welcomed the agreement. President Jeremy Newsum, Group CEO of Grosvenor, said: “This is a very good result both for property owners and occupiers. I do not believe that legislation would have been helpful to anyone.

The revisions will reinforce the clear market trend towards greater lease flexibility and choice to match differing circumstances. I think we will find the days of the ‘standard institutional lease’ are numbered.”

EG 31-10-2001.

The group's main advice is: "Rent reviews should generally be to open-market rent. Wherever possible, landlords should offer alternatives that are priced on a risk-adjusted basis including alternatives to upward-only reviews."

EG 03-11-2001.

Early the next year, the RICS reported the imminent launch of the Code saying "It is clear that the ministers have been persuaded that the adversarial nature of the leases industry is not in the long-term interest of the property industry" (CSM Mar 2002 p4).

5.4.6 The second Code

The second edition of the Code (Commercial Leases Working Group 2002) was launched by the Regeneration Minister in April 2002 at the RICS headquarters (who again provide the secretariat). The RICS was keen to be seen to be central to the Code remarking that the Code was "again brokered by the RICS at the government's request" (CSM April 2002 editorial). The minister showed support for the Code but also reiterated threats of legislation.

Speaking at the launch of the code at the RICS, Keeble said: "The code of practice is a major step forward for the property industry and its tenants. But self-regulation is not a soft option.

"I would be very disappointed if after all we had to resort to legislation."

EG 22-04-2002.

The themes running through the second edition of the Code were choice and flexibility and tenant awareness. It was much more specific than its predecessor in providing guidance to the parties. The first part of the Code was a set of 23 recommendations. There were 10 recommendations for landlords and tenants negotiating new leases (set out in Table 7); a central idea here was that of offering different lease terms and pricing the rent accordingly. This was quite innovative as specific pricing of alternatives in this way was not something that landlords and their agent would typically do in leasing; a rent was normally agreed simply as a single figure. The hope was that that by enabling landlords to price terms that they would be prepared to offer choice, not only in rent review but also in respect of repairing liabilities. In this way the industry might be moved away from the default terms that the government believed still predominated.

Table 7: Ten recommendations for landlords and tenants negotiating new leases

Recommendation	Explanation
Renting premises	Both landlords and tenants should negotiate the terms of a lease openly, constructively and considering each other's views.
Obtaining professional advice	Parties intending to enter into leases should seek early advice from property professionals or lawyers.
Financial matters	Landlords should provide estimates of any service charges and other outgoings in addition to the rent. Parties should be open about their financial standing to each other....
Duration of lease	Landlords should consider offering tenants a choice of length of term, including break clauses where appropriate and with or without the protection of the Landlord and Tenant Act 1954. Those funding property should make every effort to avoid imposing restrictions on the length of lease that landlords, developers and/or investors may offer.
Rent and VAT	Where alternative lease terms are offered, different rents should be appropriately priced for each set of terms. The landlord should disclose the VAT status of the property and the tenant should take professional advice as to whether any VAT charged on rent and other charges is recoverable.
Rent review	The basis of rent review should generally be to open market rent. Wherever possible, landlords should offer alternatives which are priced on a risk-adjusted basis, including alternatives to upwards only rent reviews; these might include up/down reviews to open market rent with a minimum of the initial rent, or another basis such as annual indexation. Those funding property should make every effort to avoid imposing restrictions on the type of rent review that landlords, developers and/or investors may offer.
Repairs and services	The tenant's repairing obligations, and any repair costs included in service charges, should be appropriate to the length of the term and the condition and age of the property at the start of the lease. Where appropriate the landlord should consider appropriately priced alternatives to full repairing terms.
Insurance	Where the landlord is responsible for insuring the property, the policy terms should be competitive. The tenant of an entire building should, in appropriate cases, be given the opportunity to influence the choice of insurer. If the premises are so damaged by an uninsured risk as to prevent occupation, the tenant should be allowed to terminate the lease unless the landlord agrees to rebuild at his own cost.
Assignment and subletting	Unless the particular circumstances of the letting justify greater control, the only restriction on assignment of the whole premises should be obtaining the landlord's consent which is not to be unreasonably withheld. Landlords are urged to consider requiring Authorised Guarantee Agreements only where the assignee is of lower financial standing than the assignor at the date of the assignment.
Alterations and changes of use	Landlord's control over alterations and changes of use should not be more restrictive than is necessary to protect the value of the premises and any adjoining or neighbouring premises of the landlord. At the end of the lease the tenant should not be required to remove and make good permitted alterations unless this is reasonably required.

Source: Commercial Leases Working Group (2002)

Another key aspect of the recommendations was control; the accepted practice was for landlords to keep tight control of aspects such as alienation and alterations. The Code attempted to move landlords to a less restrictive and more flexible position.

A further 13 recommendations in the code covered conduct during the lease and included matters such as a tenant's request for consent to make alterations to the property, rent review negotiations, repairs, service charges and dispute resolution. These recommendations encouraged landlords and tenants to be open and prompt in their dealings with each other, as well as flagging up some key issues for tenants such as repairs/dilapidations at the end of a lease. The second part of the code was an explanatory guide which supplemented each recommendation and was largely aimed at the smaller business tenant operating without property knowledge or advice.

5.4.7 Summary of the second period

The differing reactions to the 1995 Code highlight the difficulties in developing principles for an industry group (part 2 of theorisation) without agreed identification and acceptance of the nature of the problem. There were only sporadic calls to action from the BPF which were at least partially negated by the repeated comments of the director-general that there were no problems anyway and that the property market was operating well. While the RICS had expressed some acceptance of the need to change, the government's report (Department of the Environment Transport and the Regions 2000) found that this had not translated into their members using or disseminating the Code. Tenant groups were not happy with the Code either. The report showed that the UORR remained a common lease term and there was no recognition within the property industry that this should change; confidentiality clauses were (it appears) rare anyway and the rent dispute resolution process was unchanged. There were continuing reductions in lease lengths but these could not be attributed to a code that was poorly disseminated.

The main impetus for changing lease practices was still coming from the government who maintained the pressure by reintroducing the threat of regulation in the light of an apparently failed initial attempt at achieving change through a code of practice.

The period of reviewing the first Code and producing a second was characterised by frustration and lack of agreement within the working group. The failure of theorisation by the leading industry bodies is evident; the BPF showed a continuing disbelief that there were any real problems to address. Both the BPF and the RICS were clearly keen to avoid legislation and this seems to have been a motivation to ensure some form of agreement was reached. However, the use of threatened legislation as a jolt to the industry looked like it might backfire at one point as negotiations stalled while the parties waited to see what the government would do.

Even after a code had been agreed, disputes over who should pay for the production and dissemination of the document showed the degree to which the industry clearly still felt it was being dragged in a direction not of its own making:

An inside source said: "After the DTLR's insistence that the property industry should compromise on this, we were extremely angry when they offered such a meagre sum and have made this clear to them."

EG 18-04-2002

Nevertheless the second edition of the Code showed a marked shift from generalities to more specific recommendations across a range of issues. It pushed landlords to overtly consider offering different lease terms and to move away from default terms such as the UORR. It also encouraged landlords to price lease terms in determining the rent. So, some eight years from the government's initial threat to legislate it looked like the industry might be beginning to change and the process of theorisation starting to take place. It was launched with high expectations and again accompanied by the threat of legislation if it failed. The evidence found during this period of the different stages of the model has been summarised and is set out in Table 8.

The loop identified in Period One continued in to Period Two. With the failure of theorisation (and so a lack of diffusion) after the introduction of the Code, there was a further precipitating jolt (i.e. threat of legislation) which then fed back into the loop culminating in the 2nd edition of the Code as a result of preinstitutionalisation and apparent theorisation. The cumulative movement between the stages of the model by the end of Period Two is shown by the arrows in Figure 5.

Table 8: Period Two

Stage	Meaning	Operationalisation	Evidence found in second period
Precipitating jolt	Pressures for change	Evidence of pressures for change which could be: social (including economic), regulatory or technological.	Government frequently reiterating threat to legislate
Deinstitutionalisation	The removing of legitimacy from existing practices	Evidence that any actors in the organisational field: Ask questions about leasing practices Gradually stop doing something Proactively challenge/reject leasing practices	At beginning of period, tenant groups are a little more vocal about questioning UORR. Government criticises practices following failure of Code to have impact.
Preinstitutionalisation	Introduction of new ideas and replacement practices	Evidence that actors: Suggest new practices (in areas such as set out above) Independently adopt different practices	Code monitoring report shows changes and diversity in lease length. RICS introduces Small Business Scheme to help SBTs deal with rent reviews. 2nd ed of Code produced.
Theorisation (part 1)	Recognition and specification of general problem	Evidence that supply-side actors, particularly RICS & BPF: Recognise that there is a problem with leasing practices (in areas as above) Believe that there is no problem in these areas	Initially BPF defending market mechanisms. RICS show some acceptance of criticisms. Prior to launch of 2nd edition of Code BPF and RICS show some acceptance of problems.
Theorisation (part 2)	Development of principles to support solutions for general adoption	Evidence that actors: See Code/do not see Code as an industry solution See regulation as industry solution Take lead in shaping the Code Propose other industry-wide solutions	First code had limited acceptance by supply-side. Regulation becoming accepted as a solution due to lack of agreement on revising Code. Second Code shows development of a more detailed set of principles.
Diffusion	Legitimated ideas spread through communities and are adopted	Evidence that the Code is gaining legitimacy Evidence of: Dissemination efforts by actors (particularly BPF and RICS) Solutions seen to be spreading/being adopted Solutions not seen to be spreading Policing the implementation of the Code	Stage not yet reached
Reinstitutionalisation	Ideas and practices are accepted as the natural ways of doing things.	Evidence that different practices: Have become taken for granted/natural way to behave Have not become natural way to behave	Not yet applicable

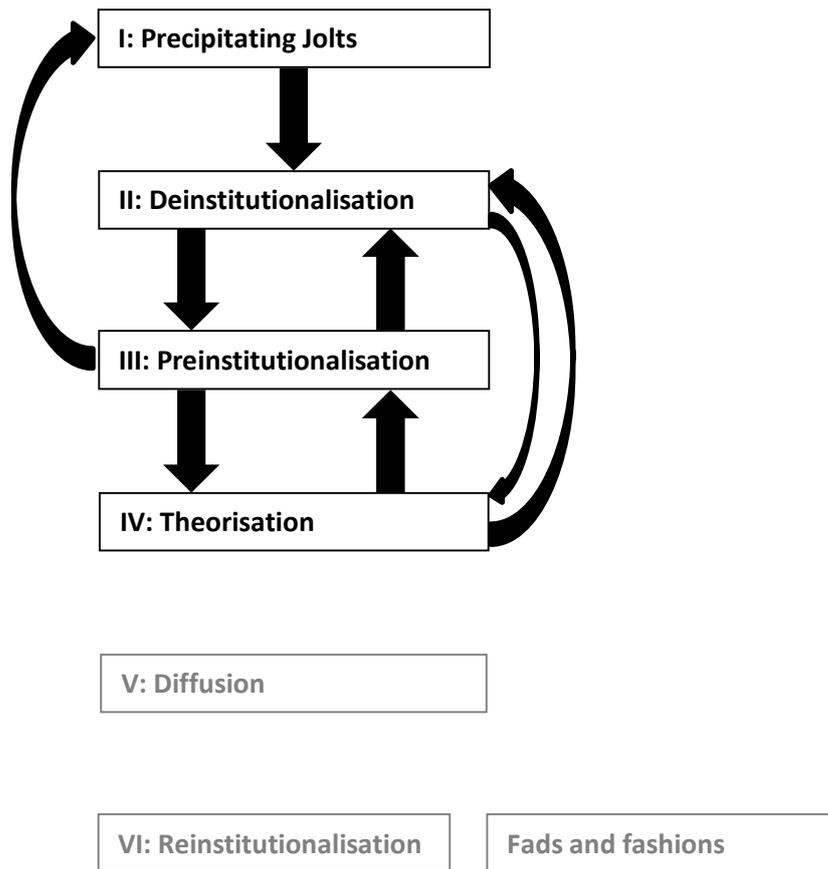


Figure 5: Cumulative model after Period Two

5.5 Period Three: The response to the second edition of the Code

Once the 2nd edition of the Code was launched, the government once again commissioned Reading University to monitor its success, asking for an interim report by the end of 2003 and a final report at the end of 2004. The industry was aware of this monitoring activity.

5.5.1 Industry reaction

In 2002 the process of theorisation within the industry, and particularly the BPF and RICS, appeared to be finally underway. These industry bodies also actively promoted diffusion. They spoke positively about the Code and enthused about the principles and practice of offering priced alternatives (choice), being flexible and ensuring that prospective tenants are fully informed. However, this was usually tinged with the reminder that legislation will follow if the Code is not seen by government to be having an effect, suggesting that avoiding legislation was still a key driver of behaviour.

RICS activity

In the same month that the Code was launched, the RICS published *Property Solutions*, a free guide to leasing for small businesses that provided practical help on issues which included acquiring a lease. It was endorsed by CBI, FSB and British Chamber of Commerce (Reported in CSM April 2002). Meanwhile the RICS reported that the intention of the new Code was:

to underline the importance of professional advice when taking commercial leases and of the need for greater flexibility and choice in the commercial leases market.

CSM April 2002 p11.

The focus on small businesses was emphasised by the RICS:

RICS spokesman David Melhuish says "This new code will make them (small businesses) better informed, providing an essential document setting out the issues they need to consider. It will also enable the industry to regulate itself and allow a more flexible commercial property market to develop."

CSM June 2002 p4.

The RICS was proactive in monitoring their members and encouraging compliance, and had a more visible leadership role than previously. Graham Chase (Chair of RICS commercial property faculty) encouraged the industry to adopt lease pricing and so follow the Code. He urged the industry to do this and avoid legislation:

Option pricing is a process that should not hold any fear for landlords, tenants, their advisers or valuers. This approach is adopted by those who operate in the property market on an almost daily basis. ...

...there is of course a real need to ensure that in promoting flexibility the costs and returns can be accurately assessed so that both landlords and tenants can fully identify and negotiate what is best. Flexibility does have its price. But, the above said, there is only one option - follow the code and avoid legislation.

EG 28-09-2002.

Likewise Duncan Preston, the Chair of RICS Valuation Faculty remarked that if a free market based on open negotiation was wanted “we must encompass the concepts of flexibility and choice” (CSM July 2002 p9). He argued that tenants must be offered fairly priced options: “If we want to keep a free market we must learn to offer and price choice and engage in the spirit of the new code.” (CSM July 2002 p9).

Other high profile RICS members articulated a more general problem in the Estates Gazette and argued that the industry has to respond or face legislation. Richard Lay (former RICS president) argued that practices must be adapted and that the industry could not hide behind the flexibility brought about by changing balance of supply and demand in current market:

Little will be achieved by our merely asking what is the minimum we need to do to avoid legislation. Let us recognise what others see is wrong in our market and respond positively...Our lease structures have more to do with what the landlord wants than what is required by the tenant.

EG 14-09-2002.

He went on to argue for the Code to be given, and explained, to all prospective tenants and for the industry to get to grips with pricing.

The RICS also set up a group to monitor the second code chaired by Richard Lay. Alan White, a member of this group and Chair of the RICS Corporate group, publicly encouraged the industry to be proactive and to see it from the perspective of occupiers. In an EG article of some 1500 words he articulated the problems primarily from the perspective of a small business tenant, unadvised and with inappropriate lease terms. He reiterated the point that the industry had to demonstrate that it had changed its ways and was offering alternatives to the longer-term, full repairing and insuring lease with upward-only rent reviews and with restrictive alienation and service charge arrangements (EG 21-09-2002) otherwise legislation would follow.

By the end of 2002 the RICS was promoting the Code quite strongly to the membership:

The awareness campaign led by RICS’s code monitoring group chairman Richard Lay, and commercial property faculty chairman, Graham Chase, has included

letters urging members firms to draw attention to the code and help monitor its effectiveness. Reminding members of the threat of legislation, including a ban on 'upwards only' rent reviews, should the code fail to create greater flexibility in the market, the letter states: "This is the last chance for the industry to prove it can self-regulate."

CSM November 2002.

Graham Chase also exhorted members to use the Code through the in-house magazine saying that the Code:

...is not about a set of rules but is a thought piece which should help the property industry operate more effectively and reflect a modern marketplace-adapting to the needs of business while creating value for landlord and tenant businesses.

CSM November 2002.

In the same article Chase argued that although it was a challenge to get the Code adopted, it was worth it as it would promote the "perception and reality" of lease flexibility and prevent legislation. He set out the negative consequences of legislation for tenants and so argued for the need to "push more rigorously a strong landlord-tenant relationship" to avoid legislation. Finally he said that during the Code monitoring period, all in commercial property "must demonstrate that flexibility already exists".

BPF activity

The BPF also mounted a concerted campaign to encourage its members to comply with the code. Liz Peace, the CEO of BPF, commented: "The code merely sets out good practice. It is not trying to strait-jacket landlords into particular terms. It simply asks for a degree of negotiation and choice" (EG 05-10-2002). She saw raising awareness of the Code to small businesses as the main target saying that "educated and questioning customers are an essential part of a well-functioning market" (EG 05-10-2002)

In November 2002 the BPF set out a range of measures to this end:

The code merely sets out good practice. It is not trying to strait-jacket landlords into particular terms. It simply asks for a degree of negotiation and choice. To

facilitate this and guide our own efforts at promoting awareness and compliance, we have established a working party chaired by John Bywater of Hammerson, which counts a number of leading industry players among its membership.

The working party is pulling together a toolkit of 10 measures to aid the industry's compliance. There are simple things that any of our members can do, such as establishing a link from their website to the code website (www.commercialleasecodeew.co.uk). We are also raising awareness of the code by introducing a logo for use in property advertisements, and we hope to have soon a proactive list of code supporters.

We are also encouraging landlords to advertise that they support the code in their letting particulars and in covering letters sent out by their lawyers with draft leases to potential tenants. This builds on the practice that some in the industry are already following, such as Hermes (see box) and Prudential.

EG 05-10-2002.

By November the BPF had produced *a checklist and logo for use on company literature, a series of standard letter clauses to be sent to clients and advice to members on how to make standard leases code-compliant.* The BPF also urged members to have a single person responsible for compliance within their organisations (EG 09-11-2002).

The BPF continued to be proactive into 2003 and to give the Code with a high profile. They publicly announced that they were considering asking the Government to legislate to enforce the Code for small businesses (EG 01-02-2003) whilst also developing model clauses for office leases with the British Council for Offices (BCO); these clauses were said to be designed to complement the Code(EG 07-02-2003). However, observers such as lawyer Alan Riley (EG 17-05-2003) noted that the clauses are not all code compliant as, for example, a UORR is included.²²

²² *The BPF and BCO model clauses for an office lease for FRI office lease of whole* is available on the BPF website: <http://www.bpf.org.uk/info-landlords>. Accessed 19 August 2015.

5.5.2 Threats of legislation increase

Meanwhile, the government maintained the pressure, reminding the industry that legislation was a distinct possibility. The Minister for housing, planning and regeneration, Tony McNulty, gave a reply to a point made by another MP on the ineffectiveness of the Code, the problems with UORRs and the need for legislation. The Minister believed that the new Code was much better than the previous edition and had more chance of success. He also appeared to put the RICS in a central role of responsibility. :

When speaking to RICS, I said that we were loath to go down the legislative route, not least because of the regulatory burdens that my hon. Friend suggested. However, if we need to go down that route, we will.

We are being ever so slightly precipitate. The code was published in April, it has extensive support from a range of key players in the property industry and we need to give it time to bed in....

Finally, I am pleased to have had the opportunity to reiterate what I said about the strength of the new code of practice. We are keeping a watchful eye on that. When I said that to RICS at its conference in June—my first ministerial speaking engagement—there was an open ear and a will and desire to move forward. Perhaps it knows that if the code of practice is not successful, the legislative option stands behind it. Nevertheless, I think that there is a good deal of equanimity and support for the notion that, in terms of the commercial property world, things have moved on significantly compared with how they stood when upward-only rent reviews first became the norm. That being the case, it is, perhaps, in the interest of RICS to consider relevant matters seriously in terms of supply and demand, and the regulation and efficacy of the market.

HC Deb 29 October 2002 vol 391 Col 242WH.

The pressure increased in March 2003 when things took a twist with the mention of the Code of Practice in the Chancellor's budget report (HM Treasury 2003). Until this point the commercial leasing issues had been the domain of the Office of the Deputy Prime Minister (and its predecessors).

*3.130 Commercial property is an important factor of production, contributing directly to economic growth and regeneration in towns and cities. However, inflexible lease terms can restrain business growth and expose them to undue risk. The Government is working with all parts of the industry to promote a voluntary Code of Conduct on Commercial Leases to improve lease flexibility. **The effectiveness of the Code is being independently evaluated. Should the interim independent evaluation of the Code show that there has been little progress in the commercial lease market towards greater flexibility, the Government will consult later this year on possible legislative options to ameliorate the situation.***

HM Treasury (2003).

This meant that the Treasury were now taking an active interest in the commercial property leasing market; the economic arguments against lease terms (such as UORR) which had first been made in 1992, and which were seen to restrict business, were once again brought to the fore.

5.5.3 Indications that the Code was not effective

This renewed pressure came at a time when there was once again evidence of an attitude that the market would determine lease structures (rather than any code) and that tenants did not want to pay more for flexibility. This meant that the industry bodies would have to continue to work hard to convince their members to use the Code, and even try to convince tenants that it was to their benefit. This can be seen in several articles in Estates Gazette. When Grosvenor opened their new shopping centre in Basingstoke, the reporter commented:

It is clear that it was market conditions, rather than introducing the code of practice for commercial leases last spring, which got Grosvenor and the retailers the deals they wanted. After having its arm twisted by government to provide more flexible lease terms, the property industry finally signed up to a new code which demanded that developers offer tenants a variety of options, including shorter leases and an alternative to upward-only rent reviews. Interestingly, not a single retailer mentioned the code...

...Arcadia's Constantine supports this view: "The code of practice is positive. But, at the end of the day, if you can get what you want without actually using the code and paying for the extra flexibility then you don't mention it. The code is going to be more important for small retailers."

EG 26-10-2002.

And similarly from an article on arbitration:

Q Is it likely that upwards/downwards reviews could be more commonly secured by tenants as a result of government concerns over upward-only rent reviews, and the resulting new commercial lease code?

A There has not been any evidence of this yet. Over recent years there has been a move towards shorter leases and more flexible lease terms, but this reflects actual market changes rather than initiatives such as the commercial lease code.

EG 02-11-2002.

Towards the end of 2003 there were stronger hints that the Code was not having the effects desired by government. The BPF were reported to be asking the government for more time in the face of little change on key leasing practices:

Research from the British Property Federation (BPF) on a voluntary code designed to limit the use of upward-only rent review clauses shows it is not working. The BPF studied 1,334 leases signed since the introduction of the code in April last year. This could mean the commercial property industry will face legislation to ban the clauses. The BPF will argue today in a submission to Keith Hill, planning minister, there is no precedent in any other commercial sphere for the government interfering with the terms of a transaction between two consenting parties. It will call for the government to give the code more time to work. The Times says ministers could make a statement on commercial property leases as soon as the Pre-Budget report on 10 December.

EG 24-11-2003.

The government's interim report from the University of Reading on the success of the code was not made publicly available until April 2004 (University of Reading 2004). However, the government had received the first draft in December 2003 and key

figures within the property industry had seen it; the word soon spread that the news was bad and that the government was considering legislation.

The industry fears legislation on commercial leases may be imminent, following a damning report by Reading University. The interim report, compiled by Neil Crosby, Reading University's professor of real estate, concludes that the voluntary code of commercial leases introduced in 2002 has been followed by big landlords such as Land Securities, Hammerson and Slough Estates, but ignored by smaller ones. The code promotes more flexible leases and discourages upward-only rent reviews, but the report concludes that landlords across the board do not offer significantly more flexibility in leases to tenants than they did three years ago.

Speaking at the EG/RICS Five Counties conference in High Wycombe on Thursday, Slough chief executive Ian Coull urged landlords to work closely with occupiers to avoid legislation.

"The report does not make good reading and I think we are going to face legislation. This will be as catastrophic for occupiers as for landlords. We need to understand our customers' needs and remedy any problems," he warned.

EG 07-02-2004.

The prospect of legislation angered the BPF who believed that this was rather precipitate given the monitoring period was only at an interim stage and that the industry was working hard to make the Code work.

The BPF has responded angrily to a fresh commitment from the Treasury to enforcing commercial lease reform. The Treasury move comes ahead of the publication of a Reading University report on the success of voluntary measures. BPF chief executive Liz Peace criticised the move, saying: "There is no basis on which to launch such an important consultation exercise." She added: "In such inauspicious circumstances this will not leave the industry with a great deal of confidence in the process." The Reading report is an interim review of the industry's attempt to provide alternatives to upward-only rent reviews without regulation. Peace said: "The property industry is rightly very disappointed. "Many companies have put a lot of work into making the [voluntary] lease code

work and its success is being judged on just 46 interviews with surveyors and lawyers in three towns and without any input at this stage from occupiers, landlords or financiers of property.”

EG 05-04-2004.

The government published the interim report from Reading and at the same time announced the intention to consult on legislation on lease terms (HC 23 April 2004 Column 32WS). The report showed that the Code was having little direct effect on the market and that knowledge of it was limited. Diffusion was not happening, and this was clear in the piece by the report's authors, Crosby, Murdoch and Hughes, in EG:

The 2002 Code has been more effectively disseminated than its predecessor, but is having little direct effect upon lease negotiations. Knowledge of the code appears to be limited to property professionals and large landlords and tenants. But knowledge does not translate into effect; the code is having little direct impact on lease negotiations one year after its introduction. The present code, unlike its forerunner, contains a number of specific recommendations on lease terms. Implementing these in the first year of the code's operation would indicate that the code is influencing the market. The evidence so far is that the recommended lease terms are not reaching the marketplace.

EG 01-05-2004.

The involvement of, and pressure from, the Treasury again became clear with reports of a speech by Ruth Kelly (Financial Secretary at the Treasury) speaking at the annual BPF conference and commenting that there is “a feeling that there has not been much progress made” on the adoption of voluntary guidelines to provide flexible leases, and so “clearly there is a need to consider legislation” (EG 23-04-2004).

Immediately the EG carried reports from landlords upset by the prospect of legislation and proclaiming the changes that had been made. The CEO of Slough Estates commented:

Some of the changes we have seen over the past couple of years have come about because of the difficult market conditions, but some have undoubtedly

arisen following the application of the code during that period. My company has seen average lease lengths for new leases, during 2003, fall from 10.5 to 9.3 years. This is not a huge change, but it is a trend that I expect will continue.

EG 08-05-2004.

However, alongside these came articles from tenant representatives which suggested that theorisation and diffusion had not really happened within the property industry; they argued that there had been little change in leasing practices. The BRC welcomed the prospect of legislation to ban UORRs and made clear that retailers still found other lease terms very restrictive:

The British Retail Consortium (BRC) has again clashed with the property industry by welcoming hints from the Treasury that it is considering banning upward-only rent reviews.

The BRC has urged the government to begin consultation on commercial property lease legislation following the publication of a long-awaited report by Reading University...

Kevin Hawkins, BRC director general, said: "There is no merit in further delaying the consultation process. It is clear that the code is not working - the interim report has confirmed this.

"Many commercial tenants are suffering. Long lease lengths, upward-only rent reviews and restrictive provisions prevent retailers from reacting swiftly to changes in the business cycle...

"Retailing is a fast-paced industry and retailers often find it difficult to obtain leases that meet their operational needs."

EG 23-04-2004.

There were reports of even more outspoken comments from the head of property at the Dixon Group, Martin Meech:

"The property industry does not see its occupiers as customers," says Meech. "If we behaved like that towards our customers we'd have empty shops." He points out that where flexible alternatives are offered, retailers are expected to pay for

them – and to get rid of an upward-only rent clause, some landlords demand up to 30% more than the market rent.

Meech finds this ridiculous. “If something’s inequitable, why should you have to pay to make it fair?” He believes that if upward-only rent reviews were banned, the market would change, but landlords would probably not find themselves worse off. Rather, asset management would become more important. “It would certainly limit the market for investors who see retail boxes as a bond-style income stream you can buy into then sit around collecting the cheques.”

EG 22-05-2004

5.5.4 Another consultation on legislation

A consultation document entitled *Commercial property leases: Options for deterring or outlawing the upward only rent review clauses* was produced in June 2004 (Office of the Deputy Prime Minister 2004). As the title suggests, the consultation was entirely focussed on UORRs. The government presented a range of options, with comment on the advantages and disadvantages of each, as well as the likelihood of being able to enforce the options. The options were:

1. *Do nothing*
2. *Ban upward only rent review clauses*
3. *Ban upward only rent reviews subject to a floor of the initial rent*
4. *Give tenants a right to break if the UORR produced a rent above open market levels*
5. *Limit lease length*
6. *Require landlords to give prospective tenants priced options*

The report concluded with the statement that:

If the final report from the University of Reading at the end of 2004, including the further study mentioned at paragraph 13 above,²³ indicates that use of UORR provisions continues on a significant scale, in cases where tenants do not

²³ This further study was an additional section for the final report commissioned by the Government to investigate the reasons for the continued use of UORRs in more detail.

have a genuine or informed choice of alternatives, the Government proposes to consider introducing statutory controls.

Office of the Deputy Prime Minister (2004:10).

In the RICS in-house magazine, Brian Berry (Deputy Director of Public Affairs at RICS) expressed disappointment that ODPM had gone to consultation at this point, noting the influence of the Treasury (RICS Business July/August 2004). He also objected to the focus being on one aspect of leasing arguing that a more fundamental view of commercial leasing as a whole should be taken by government. He argued that the evidence was that UORRs are not the main concern of tenants and that they preferred the lowest rent even if it means having a UORR. In relation to the Code, he pointed to two membership surveys which in which “RICS members have made clear that they see the Code as primarily an information tool, while the market itself is controlled by the forces of supply and demand” (*ibid*).

Michael Chambers (RICS Director of Policy) likewise expressed scepticism on legislation but noted that it may be attractive for a government wanting to be seen to support small businesses and so saw it as a realistic prospect (RICS Business January 2005).

Alongside such comments, more formal responses were given to the government. The overall responses of the key bodies were as may be expected with bodies representing landlords and investors opposed to legislation and those representing occupiers being in favour, according to the summary provided by the ODPM (Office of the Deputy Prime Minister 2005).

BPF response

Alongside the arguments for UORRs, the BPF argued that the industry had changed (British Property Federation 2004); as in its response to the 1993 proposals for legislation, it argued that the market was functioning efficiently and that it did not recognise a situation of market failure. This is the opening paragraph of the Executive Summary:

The property industry supports change in the lettings market and has been delivering it over the past decade. Occupiers now have a better range and choice of leases than is found in many other European countries with a preponderance

of short leases (5 years or less) and a lot of leases of 6 to 15 years duration with tenants' break clauses. Such changes will continue, driven by market forces (e.g. globalisation, new competitors) and other external factors (introduction of lease duty, changes to international accounting standards, far greater transparency in lease terms as a result of new land registration rules). Upwards only rent reviews (UORRs), however, are a strength of the UK market, they assist the sector to access cheaper capital, which is ultimately reflected in greater investment and lower rents. UORRs are also critical to major development and regeneration projects. Canary Wharf or the redevelopment of the Bull Ring would have been nigh impossible to fund with private money on short leases or upward/downward rent reviews.

British Property Federation (2004).

The BPF had commissioned four different pieces of research which underpinned their response. This was used to show that UORRs were no longer important because of shorter lease lengths and also that there would be negative impacts on development and investment, including regeneration, if UORRs were banned. The BPF argued that UORRs were not the result of market failure, rather they were an integral part of a well-functioning UK leasing market and brought benefits for all parties. Essentially the BPF saw no real problems.

RICS response

As noted in Chapter Four, the RICS response to the consultation document has proved elusive and so could not be located. The summary of responses from the ODPM (Office of the Deputy Prime Minister 2005) simply notes that the RICS was opposed to legislation.

Occupier response

At this point it is worth noting the occupier response as it again gives an insight in to the perceived progress made by the industry. The BRC, representing a large part of the retail industry said this in its response to the consultation (British Retail Consortium 2004):

As businesses, we support the principle of self-regulation but are disappointed by the property industry's lack of progress in addressing their leasing practices. It is clear that continuing with a voluntary approach, however well-intentioned, will do nothing to deliver more flexible leases for tenants.

British Retail Consortium (2004:1).

The BRC cites its own survey of 2004 to make the point that landlords are not being flexible. It is not clear what is meant by flexible here, although it appears to mean offering a lease without a UORR:

During the past 12 months, only 22% of retailers have successfully negotiated a lease with flexible terms in line with the Code of Practice for Commercial Leases. For smaller and medium size retailers this proportion was even lower with only 9% successfully negotiating flexible leases. Landlord's refusal is the most common reason why retailers are unable to negotiate flexible lease terms while almost a fifth of respondents claimed they could not afford the additional cost. For 14% of retailers, landlords' ignorance of the Code was the main reason for failing to negotiate more flexible lease terms.

Furthermore, retailers' experience of the code to date suggests that landlords when pricing alternatives over compensate for the perceived risks associated with flexibility in higher premium rents. This deters the tenant from actively seeking alternatives to upwards only rent reviews and undermines the credibility of the code by fuelling the perception that upwards only reviews are inevitable. The issue of pricing is an important one, as real choice cannot exist unless tenants are offered flexibility at a price they can afford.

British Retail Consortium (2004:3).

The various interests seemed as polarised as ever and the extent to which there had been real and sustainable change in the property market (Code-driven or otherwise) was disputed.

5.5.5 Final assessment of the 2nd edition of the Code

The government's final assessment of the Code's success was published in February 2005 (Crosby *et al.* 2005). The report identified some significant changes in lease

terms. The average length of lease within the IPD dataset had continued to gradually reduce over the years and there was variety in lease lengths; Figure 6 shows a further marked change from the situation in 1990 as reported by Department of Environment Transport and the Regions (1990).

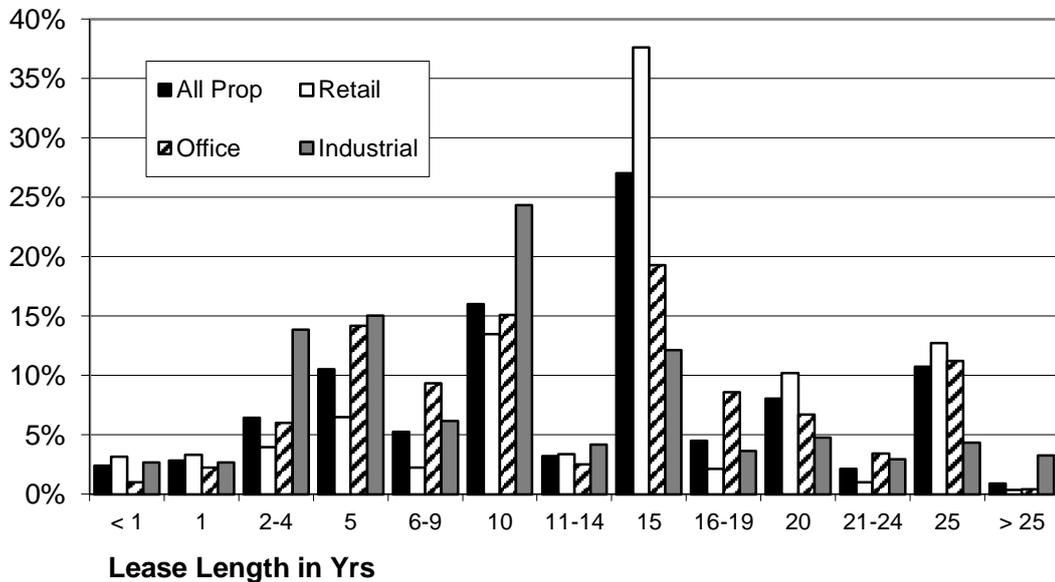


Figure 6 Distribution of different lease lengths in 2003 (rent weighted)
 (Source: Crosby *et al.* 2005, from IPD data)

This report also showed that there were significantly more, and earlier, break clauses now included in leases. Repairing liabilities on second hand property were now often tempered by the use of a schedule of conditions to establish the starting position. However, for rent reviews, UORRs continued to predominate. This appeared to be because tenants had other priorities, such as the ability to assign without difficulty; this was the finding from a series of case studies in the report, which aimed to find out why major tenants had agreed to UORRs in recent lease negotiations. These case studies revealed a perception that rents would not go down in the near future (and so they would not pay extra for the benefit of a different review clause) and a belief that landlords would not, in any event, agree to anything other than a UORR. The report included surveys which showed that major landlords and their advisors were very aware of the second edition of the Code, in marked contrast to that found with the first edition. However around half of the landlords surveyed thought that it was rare for the Code to influence negotiations directly. Where it did have an influence, this seemed to

be general rather than impacting on specific terms. The surveys of tenants highlighted the continuing lack of awareness that SBTs had of the Code and leasing matters more widely.

The RICS interpreted these findings as showing changes in lease terms. In their in-house magazine, the RICS summarised the findings, highlighting as the main conclusions: *“that fewer than half of all commercial leases included upwards only rent reviews and that most tenants are aware that term are negotiable.”* (RICS Business April 2005 p4). In the same article, the RICS argued that the report supported a non-interventionist approach by government and once again argued for a holistic approach to leases, quoting David Melhuish (senior policy officer at RICS):

RICS believes that the report has not made the case for legislation. “We remain of the view that to focus on one aspect of commercial leases- the rent review provision- is wrong and that if the government is to consider commercial lease reform then it should do it from a more holistic perspective.”

RICS Business April 2005 p4.

However, the report’s findings did not dampen the BRC’s argument for abolition of the UORR:

The report also reveals that most tenants are reluctant to negotiate with landlords on rent reviews, as they know that it is not negotiable, says the BRC. Kevin Hawkins, BRC director general, said: “Upward-only rent reviews are an iniquitous system found only in the UK and have no place in an open and competitive economy

EG 24-02-2005.

5.5.6 Government drops plans to legislate and initiates review of Code

Even as late as the Budget Statement of 16 March 2005, the government were keeping the pressure on and the threat of legislation alive:

While the Government welcomes the recent trend towards greater market flexibility, it believes much more can be done to strengthen the impact of the code of practice on the market. It will continue to work with the industry on

strengthening the code, but remains willing to pursue legislation if further movements towards greater market flexibility are not forthcoming.

HM Treasury (2005:76).

Nevertheless the report on the Code (Crosby *et al.* 2005) provided the rationale for the government to once again drop their plans for legislation and, to some extent, also shifted the government's focus away from UORR as the key lease term that offended. Yvette Cooper (Parliamentary Under-Secretary of State, ODPM) announced to the House of Commons:

We continue to have concerns about the prevalence of upward only rent review clauses in longer leases. The Reading report shows that their impact has been diminishing, as fewer leases contain any form of rent review provisions, and that tenants are currently more concerned about inflexible assignment and subletting provisions than they are about upward only rent reviews. We do however believe that further progress in this area is necessary to improve the flexibility of the market. We will therefore continue to monitor the situation and retain the option to legislate in future if necessary. But we do not propose to legislate against upward only rent review clauses at present.

HC Written Ministerial Statements 15 March 2005 Column 12WS.

The minister also promised a review of the law recognising the problems brought about by inflexible assignment and subletting provisions in leases with a possibility of legislation in these areas.

In terms of bringing about changes in institutional practices, the minister made clear that the government once again intended to put pressure on the industry to do this by means of self-regulation, using the industry code as the main vehicle:

We are asking the property industry to undertake a joint review of the code of practice, to carry out a renewed campaign to disseminate the code and provide an effective mechanism for dealing with complaints. We want to make sure that everyone negotiating a lease adopts the code.

HC Written Ministerial Statements 15 March 2005 Column 12WS.

5.5.7 Summary of Period 3

Once the second version of the Code was in place, the industry bodies were proactive in promoting it to their members and the wider industry. They encouraged members to adopt the Code, including overt lease pricing. Therefore, the theorisation process appeared to be much stronger at this point, with no dissenting voices reported. The general problem that appeared to be accepted by the industry bodies was one of landlords not offering choice or being flexible. The BPF reassured members that adoption of the Code would not 'straitjacket' landlords but would help to solve the perceived problems. The language used by the BPF and RICS conferred moral legitimacy to the adoption of the Code, fitting it into a normative framework as something that the industry should be doing. They championed and encouraged diffusion, making it easy for members to adopt the Code by use of standard letters, checklists, logos, model lease clauses etc.

The commitment to change was less clear when the BPF introduced a model lease with clauses that were not Code compliant. Alongside this, the impact of the Code began to be questioned. The government intensified the pressure and, when it became clear that the main target lease term, the UORR, had not been displaced, the threat of legislation once more loomed with the consultation on banning UORRs. This was welcomed by tenant groups who again argued that the industry was not really changing at all.

However, the government once more pulled back from legislating when their own review of the Code suggested that the UORR was not as important to tenants as had been thought. While this was rather at odds with the proclaimed view of the BRC and others in the press, it did mean that the practices to be questioned through deinstitutionalisation had to be revisited and issues like alienation given more thought. Once more the government's intention was that this would be done through a review of the Code and its dissemination; it was still not in use during lease negotiations and the government retained its ambition for this to be rectified.

Table 9: Period Three

Stage	Meaning	Operationalisation	Evidence found in third period
Precipitating jolt	Pressures for change	Evidence of pressures for change which could be: social (including economic), regulatory or technological.	Threat to legislate maintained- consultation on banning UORRs after report shows still dominant.
Deinstitutionalisation	The removing of legitimacy from existing practices	Evidence that any of the actors in the organisational field: Ask questions about leasing practices. Gradually stop doing something Proactively challenge/reject leasing practices.	Issues to be addressed seem settled, until end of period when government report shows alienation clauses proving problematic to tenants.
Preinstitutionalisation	Introduction of new ideas and replacement practices	Evidence that actors: Suggest new practices (in areas such as set out above). Independently adopt different practices.	Lease structures continuing to change with reduced lengths, diversity, break clauses and changes in repairing liabilities. Many activities channelled to supporting Code. BPF and BCO produce model lease clauses.
Theorisation (part 1)	Recognition and specification of general problem	Evidence that supply-side actors, particularly RICS & BPF: Recognise that there is a problem with leasing practices (in areas such as set out above). Believe that there is no problem in these areas.	Stronger statements from industry bodies showing recognition of problems- identified as lack of choice and inflexibility.
Theorisation (part 2)	Development of principles to support solutions for general adoption	Evidence that actors: See Code/do not see Code as an industry solution. See regulation as industry solution. Take the lead in shaping the Code. Propose other industry-wide solutions. Evidence that the Code is gaining legitimacy.	Clear statements from industry bodies that Code is the solution and is given moral legitimacy. BPF/BCO model lease clauses launched which partially support Code.
Diffusion	Legitimated ideas spread through communities and are adopted	Evidence of: Dissemination efforts by actors (particularly BPF and RICS). Solutions seen to be spreading/being adopted. Solutions not seen to be spreading. Policing the implementation of the Code.	Despite efforts to ensure diffusion, second edition of Code not being used in lease negotiations or being disseminated to potential tenants.
Reinstitutionalisation	Ideas and practices are accepted as the natural ways of doing things.	Evidence that different practices: Have become taken for granted/natural way to behave. Have not become natural way to behave.	No evidence.

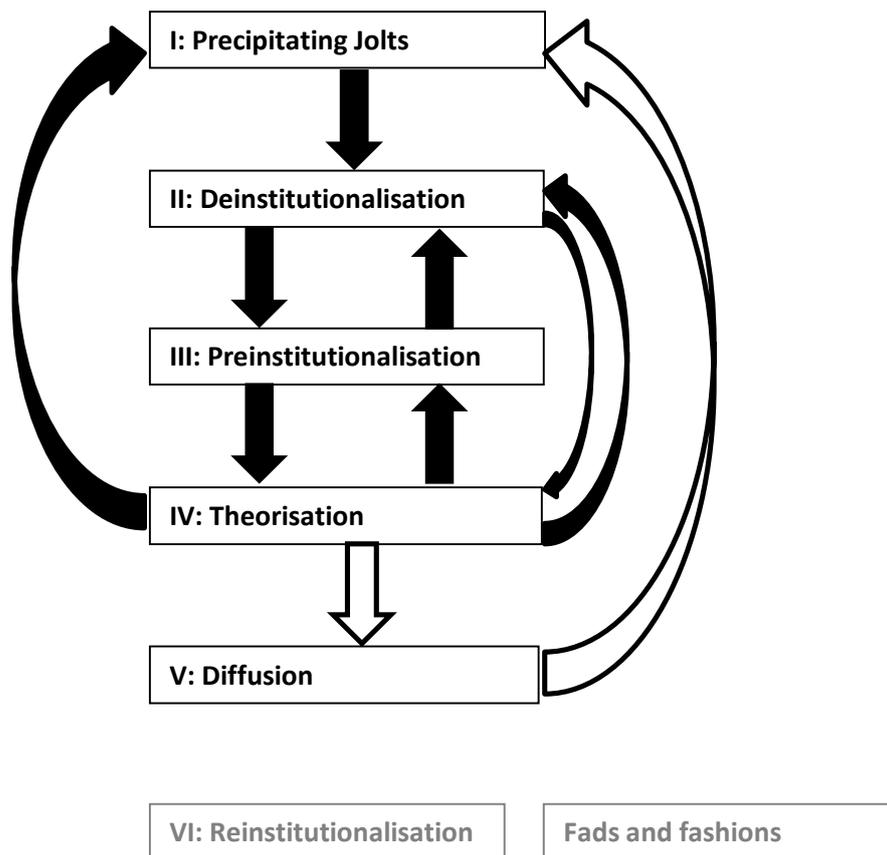


Figure 7: Cumulative model at end of Period Three

The evidence found during this period of the different stages of the model has been summarised and is set out in Table 9. The loop identified in Periods One and Two can be seen in Period Three. Despite apparent theorisation by the industry bodies and efforts to ensure diffusion, the evidence of little change in some lease terms and lack of reference to the Code in negotiations led to a further precipitating jolt (i.e. threat of legislation) which then fed back into the loop for reconsidering the problem practices with the prospect of revising the Code once more through preinstitutionalisation and theorisation. The cumulative movement between the stages of the model is represented in Figure 7. The black arrows represent the main flows, with the white arrows indicating some limited evidence of these flows.

5.6 Period Four: More initiatives and a third edition of the Code

In the immediate aftermath of the minister’s statement there was a renewed enthusiasm by landlords and occupiers to try and move things forwards.

Property Week (15 July 2005) announced the creation of a 'property owners and occupiers forum', set up by a group of major landlords, large real estate occupiers, BPF and BRC along with firms of lawyers and property agents under an independent chairman, Sir Bryan Carsberg. The aim of the group was reported to be driving forward a review of the code and improving landlord and tenant relations more widely, particularly through an accreditation scheme for good landlord practice. Meanwhile the RICS launched a CD-ROM guide "Getting serious about your business premises" for businesses looking to move, improve, sublet or run their premises more efficiently. It *"promotes chartered surveyors as best placed to provide business property advice."* (RICS Business June 2005)

Despite the vociferous calls for legislation, even the BRC seem to support the government in its pursuit of a self-regulatory route:

Dr Kevin Hawkins, BRC director general, said: "The BRC has always said that its preferred outcome was an effective voluntary code, which delivers much-needed flexibility in commercial leases.

...The BRC added that it would "support any practical initiative, which will promote awareness of the Code, particularly on the part of smaller retailers."

EG 15-03-2005.

Later that year, the chairman of the BRC made clear to a meeting of BPF members that there were still fundamental issues to address:

Michael Wemms said retailers "need to get more predictability into rent reviews, possibly through some form of index linking". Wemms, who is also the chairman of House of Fraser, warned that retailers were suffering from inflexible lease terms.

EG 21-10-2005.

5.6.1 Producing a third version of the Code

In July 2006, it was reported in the Estates Gazette that the code working group was reconvening and focussing on the issues of most concern to government. The

government had reconsidered the practices it believed required change and now included alienation in this. Philip Freedman, chair of the code group wrote:

The government clearly believes that the property industry provides inadequate flexibility for tenants and that it is time to reconsider the rights given to landlords by the 1995 Act with regard to assignment and AGAs. Although legislation amending the Act or banning upward-only rent reviews has not been ruled out, the government has signalled its desire for change to be achieved voluntarily and for the code to be updated and its dissemination to be improved, particularly to small businesses. It appears to be giving the property industry one further chance to put its house in order.

The joint working group that produces the code has therefore been reconvened. It is looking at the possibility of producing a stronger and more concise code for landlords to follow, a plain English, easily disseminated guide for tenants and model heads of terms to be used by landlords and letting agents, reflecting both the code and the guidance. Particular attention is being given to the areas of most concern to the government.

EG 01-07-2006.

The new RICS chairman, Graham Chase, was interviewed in the same edition of the Estates Gazette and surprisingly seemed to want the Code to be used to remove security of tenure from tenants.

...he hopes that the new code, due to be published later this year, will address, alongside assignment and subletting, the issues of guarantees and security of tenure...

Chase feels that the government has refused to look at security of tenure. He claims that smaller tenants may still need protection from landlords, but that larger businesses will not. "I find it difficult to believe that companies such as Marks & Spencer need protection," he says. "Many of those companies are landlords in their own right."

But he is "not on a crusade" about security of tenure, which he feels has been simplified by the reform of the Landlord and Tenant Act 1954. "This isn't a

generic matter of scrapping security of tenure... more debate is needed to determine the areas in which it would still be appropriate.”...

“Does the government want to encourage best practice and allow flexibility in the true sense, or does it want to dictate and lead on a political agenda?” he asks. “In order to legislate, the government must fully understand the political implications for the economy from both sides of the equation.

“Property is about one thing - occupation. Landlords and developers recognise that occupiers are vital. But the former should also be considered because they provide the opportunity.”

EG 01-07-2006.

By September 2006 a draft code had been produced, just two months after the code group had reconvened. The speed of agreement may have been because, according to a spokesperson for the BRC, the draft addressed the same issues as the 2002 Code but used more forceful language: “We’ve tried to move away from ‘consider’ to much more forceful language, such as ‘must’ and ‘will’” (EG 01-09-2006).

5.6.2 The third Code

The publication of the third edition of the Code (Joint working group on commercial leases 2007) was announced by Yvette Cooper (now the Minister for Housing and Planning) in the House of Commons on March 2007. She noted that there had been positive developments in the property industry and that this had led to a strengthened code:

We have had a positive and collaborative response from all sides of the industry - owners, occupiers, small business organisations and the professional bodies. The industry has developed new ways of working, setting up the Owner and Occupiers’ Forum and the Property Industry Alliance. Alongside this, Government have been working with business to bring about change.

The outcome has been agreement on a new Code, which I am launching today. This comprises three documents: a Landlord’s Code of Practice, an Occupier Guide and Model Heads of Terms. The Landlord’s Code is significantly stronger in tone and content than the previous Code, while the occupier guide and model

heads of terms are designed to improve business understanding of lease terms, helping them to get more suitable lease terms.

She still had concerns over the leasing practices and the threat of legislation remained:

I recognise the considerable changes in commercial leasing practices over recent years, especially the trends towards shorter leases. But I am concerned about continuing elements of inflexibility, particularly the predominant use of upward only provisions in rent review clauses and inflexible provisions for tenants exiting property they no longer need.

We will want to keep a close eye on market practice in these areas. If the market does not deliver, we have identified legislative options. Communities and Local Government will shortly be consulting the bodies that drew up the Code about suitable monitoring arrangements.

HC 28 Mar 2007 Column 87WS.

This version of the code (which is currently in force) is markedly different from its predecessors; it is stronger in tone and aims to be a more practical tool than the first two editions.

This is the introduction to the 3rd edition of the Code:

This revised lease code is the result of pan-industry discussion between representatives of landlords, tenants and government. The objective is to create a document which is clear, concise and authoritative.

However, our aims are wider. We want the lease code to be used as a checklist for negotiations before the grant of a lease and lease renewals. Landlords should be transparent about any departures from the code in a particular case and the reasons for them.

We have provided model heads of terms and whilst we recognise the code will apply to leases in England and Wales, we believe its intent should apply to the whole of the UK.

Most importantly, we are launching the code with an objective to ensure that parties to a lease have easy access to information explaining the commitments they are making in clear English. We will encourage trade and professional

bodies, lenders and government (at all levels) to ensure small businesses are made aware of the code and the advisory pages which accompany it. Although the code applies to new leases, please also see the British Property Federation declaration, which applies to existing leases, in relation to applications for consent to sublet where there is an existing lease covenant requiring subleases to be at the higher of the passing rent and the market rent. We hope the code will help the industry in its quest to promote efficiency and fairness in landlord and tenant relationships.

Joint working group on commercial leases (2007).

It consists of three parts:

1. A guide for landlords with 10 specific requirements in order for their lease to be Code-compliant covering
 - a. Lease negotiations
 - b. Rent deposits and guarantees
 - c. Length of term, break clauses and renewal rights- clear lease term and no onerous pre-conditions for operating the break clause.
 - d. Rent review- instructing landlords to be clear and offer priced alternatives to UORR **on request**.
 - e. Assignment and subletting - allowing assignment and not asking for automatic AGAs, subletting at market rent (not passing rent).
 - f. Service charges
 - g. Alterations and changes of use- not to be more restrictive than necessary preferably with no requirement to remove alterations at the end of the lease.
 - h. Insurance- landlords to ensure policy terms fair and reasonable and value for money.
 - i. Ongoing management- prompt, open and constructive. Specific on timing for dilapidations and dealing with applications for consents.
2. A guide for occupiers, explaining terms and providing helpful tips; and
3. A model Heads of Terms (which can be completed on line and downloaded).

The issues covered by the landlords' guide included those that had appeared in previous versions of the code and were perhaps proving somewhat intractable: these include the UORR, restrictions on alienation and on alterations, as well as onerous break clauses. Alongside guidance on these specific lease clauses were more general exhortations for openness and prompt action.

5.6.3 Industry reaction

The RICS was enthusiastic about the new edition saying that it is "a vast improvement on the previous version and has the potential to deliver market change for the better if the recommendations are followed and used in practice." (RICS Business February 2007 p22). In the same article, it noted that the previous two editions of the Code "have been largely by-passed by the industry and swept under the carpet despite its importance to business occupiers." The Institution went as far as to issue a warning to members who did not use it saying it "is representative of best practice in the industry, and where landlords are non-compliant they could end up in court justifying their departure from it." The commentary continued in very positive vein about how user-friendly the Code is, and how clarity and transparency should "eliminate potential conflicts"; compliance with code will "build confidence between landlords and tenants."

In the weeks that followed the launch of this edition of the Code, the issue of dissemination quickly became seen by the industry as key to its success:

Ian Fletcher, BPF director of commercial policy, said: "The job is only half done and the far harder task of ensuring the documents are disseminated by all players in the industry is a challenge we must all rise to. The challenge of getting it into the right hands is not one we underestimate."

EG 28-03-2007.

The RICS said that it "has a marketing plan to ensure the dissemination continues through the year and beyond by organising road shows, sending e-briefs, newsletters and updates." (RICS Business February 2007 p22)

A significant initiative to encourage use of the Code was taken by the property owners and occupiers forum. They devised an accreditation scheme for landlords which was

subsequently adopted by the BPF (British Property Federation 2007). It was primarily designed to encourage small landlords to adopt best practice (the view being that the large landlords were already adopting the Code); best practice included providing SBTs with the occupier guide and model heads of terms from the Lease Code, abiding by the landlord guide within the Code and explaining any departures from this. Its launch was announced in the Estates Gazette:

The British Property Federation has launched an accreditation scheme to encourage tenant-friendly leasing. The Commercial Landlords Accreditation Scheme will guide businesses towards landlords who offer a wider range of flexible, manageable leases, who understand business needs and who deal with their customers' complaints fairly and quickly, says the BPF.

EG 23-07-2007.

However the success of this scheme appears to be limited. There are 44 members on the website (at 8th December 2014), including occupiers and advisors, some large landlords but few smaller ones; the list also appears to be out of date and includes companies that no longer exist or have changed names.

Nevertheless, from 2007 through to the early part of 2009 there is some evidence of professionals adopting the Code, legitimising it and seeing it as a useable tool, for example:

With the introduction of the code, the property industry has available, for the first time, a standard form set of heads of terms. This should encourage a revised approach to the negotiation of leases. The MHT provide a workable checklist for certain lease transactions, but they will need to be supplemented for higher value or more complex lettings.

Claire Hughes, chartered surveyor and lawyer, Pinsent Masons EG 24-05-2008.

In 2008 the Law Society revised its standard forms of business leases for leases to be compliant with the 2007 Code; these standard forms are concise leases aimed at use in shorter leases i.e. less than 10 years.

5.6.4 Assessment of the 3rd edition of the Code

During this period the University of Reading had been monitoring the dissemination, use and impact of the Code on behalf of the government. In July 2009 the latest report was published (Crosby and Hughes 2009). The specific objectives of the research were to identify:

- How far the Code has been disseminated into the market as demonstrated by awareness of it among landlords and tenants and their advisors
- The extent to which the Code is being used in negotiations
- Sources of advice to tenants on the Code
- The perceptions of landlords, tenants and their advisors on the impact of the Code on leasing.

Crosby and Hughes (2009:8).

Surveys of landlords, tenants and their advisors led the researchers to conclude that awareness of the 2007 Code was no better than for the 2002 edition. In fact small business tenants and small landlords seemed to be even less aware of the most recent Code than the previous one; only limited advice on the Code was getting through to tenants from any source. The Code was not being widely referred to in negotiating leases. The authors noted that the research was undertaken in a relatively poor letting market so many letting agents had remarked that the Code wasn't necessary for tenants to negotiate good terms with landlords.

The report noted that the lack of awareness was despite the efforts of industry bodies. There had been a range of activities undertaken by BPF to promote the code, including the landlord accreditation scheme; RICS and the Law Society had been publicising the Code to their members through newsletters, seminars etc. and the Law Society had produced a Code-compliant business lease for short term lettings. However, in interviews both professional bodies had emphasised the over-riding obligations that their members had to their clients:

However, the interviewees from both of these organisations referred to the obligations on their members to act in the best interests of their clients. This was given as the reason why the RICS will not make the use of the code, or its

dissemination to other parties, mandatory. Nevertheless, their stated position is that agents should pass on the code to other parties unless the client says otherwise and the RICS website states that all members should “fully adopt it as part of day to day business”.

The Law Society publicises the code but stops short of telling members to adopt or promote it. The interviewee made it clear that their rules oblige members to place the interests of their clients first. It is left up to the individual solicitor to decide whether even giving information on the code of practice breaks that rule.

Crosby and Hughes (2009:26).

The reaction to the report from government was one of extreme disappointment with the industry. The Parliamentary Under-Secretary of State for Communities and Local Government (Mr. Ian Austin) announced the report and spoke about the findings in the House of Commons:

This report about dissemination and use of the 2007 Code paints a very disappointing picture. It suggests that small business tenants are not receiving any substantive information on the code from any source. Except for some well-advised major tenants, the code is not a primary tool for the negotiation of new leases.

If parties do not know about the code and do not use it, it will have no impact.

The property industry has asked us not to legislate in this area, and we have held back to give the 2007 Code a chance to work. But if the more substantive research shows that the market has not responded, legislation is bound to come back on to the agenda.

HC 3 July 2009 Written Ministerial Statements: Column 29WS.

In response the BPF focussed on the importance, and difficulty, of getting information to prospective tenants.

Ian Fletcher, director for commercial policy, said: “We would like to see every small business receiving a copy of the code at the right time, but I don’t think we should underestimate the challenge that represents and hard work it requires

from all parties concerned. What is also important is that businesses are getting the best lease for their needs and a flexible approach when things get tough.

EG 10-07-2009.

5.6.5 Summary of Period 4

The pressure from government was maintained, with practices concerning alienation being added to the list of issues to be addressed. Despite an outburst from the RICS president that was rather defensive of landlords, the Code group quietly and quickly put together the third version of the Code. This version was a practical three part document with clear guidance for landlords and tenants. The relative ease with which it was achieved suggests there was engagement with theorisation by the industry bodies; recognition of the problems and the solutions appears to have been much clearer. Alongside the Code there were various initiatives from BPF, RICS and others which again supported this and seemed to take the process a step further towards diffusion.

RICS and BPF expressed views that that dissemination was key and publicised the Code to their members. However, the professional bodies (RICS and Law Society) did not mandate their members to use or refer it to it. The awareness of the new version of the Code in the industry and among tenants was found to be poor, in fact worse than for the previous version of the Code. The diffusion process did not seem to be happening. Therefore the threat of legislation continued to loom large at the end of this period. Table 10 summarises the evidence found during the fourth period for the different stages of the model.

Period Four started with government revisiting the deinstitutionalisation stage to restate and add practices to be questioned. From then the revision to the Code took the process through preinstitutionalisation (with additional associated initiatives from the industry bodies) and concurrently theorisation. This appears to have been a more straightforward process than for previous editions of the Code, with less of a sense of a loop. However once again, despite apparent theorisation by the industry bodies and efforts to ensure diffusion, the lack of dissemination and use of the Code led to a further precipitating jolt (i.e. threat of legislation) at the end of the period. The cumulative movement between the stages of the model is unchanged from the end of

Table 10: Period Four

Stage	Meaning	Operationalisation	Evidence found in third period
Precipitating jolt	Pressures for change	Evidence of pressures for change which could be: social (including economic), regulatory or technological.	Threat to legislate maintained through launch of 3 rd edition of Code and reiterated after report on (lack of) dissemination.
Deinstitutionalisation	The removing of legitimacy from existing practices	Evidence that any of the actors in the organisational field: Ask questions about leasing practices. Gradually stop doing something Proactively challenge/reject leasing practices.	UORRs and also alienation presented by Code chairman as most important areas on government agenda.
Preinstitutionalisation	Introduction of new ideas and replacement practices	Evidence that actors: Suggest new practices (in areas such as set out above). Independently adopt different practices.	Various initiatives form BPF, RICS and others during this period- e.g. RICS guide to leases and BPF accreditation scheme.
Theorisation (part 1)	Recognition and specification of general problem	Evidence that supply-side actors, particularly RICS & BPF: Recognise that there is a problem with leasing practices (in areas such as set out above). Believe that there is no problem in these areas.	Speedy work on Code suggests agreement on issues. Comment from RICS chairman on security of tenure indicates still question on accepting nature of problems.
Theorisation (part 2)	Development of principles to support solutions for general adoption	Evidence that actors: See Code/do not see Code as an industry solution. See regulation as industry solution. Take the lead in shaping the Code. Propose other industry-wide solutions. Evidence that the Code is gaining legitimacy.	Third edition of Code produced - a three part practical document with clear principles. Clear statements that Code is solution and is given moral legitimacy by BPF (particularly through accreditation scheme) and RICS through statements of support
Diffusion	Legitimated ideas spread through communities and are adopted	Evidence of: Dissemination efforts by actors (particularly BPF and RICS.) Solutions seen to be spreading/being adopted. Solutions not seen to be spreading. Policing the implementation of the Code.	RICS and BPF state that dissemination paramount. RICS and Law Society publicise through newsletters, seminars etc. However, government report found Code not being used in lease negotiations or being disseminated to potential tenants.
Reinstitutionalisation	Ideas and practices are accepted as the natural ways of doing things.	Evidence that different practices: Have become taken for granted/natural way to behave. Have not become natural way to behave.	No evidence.

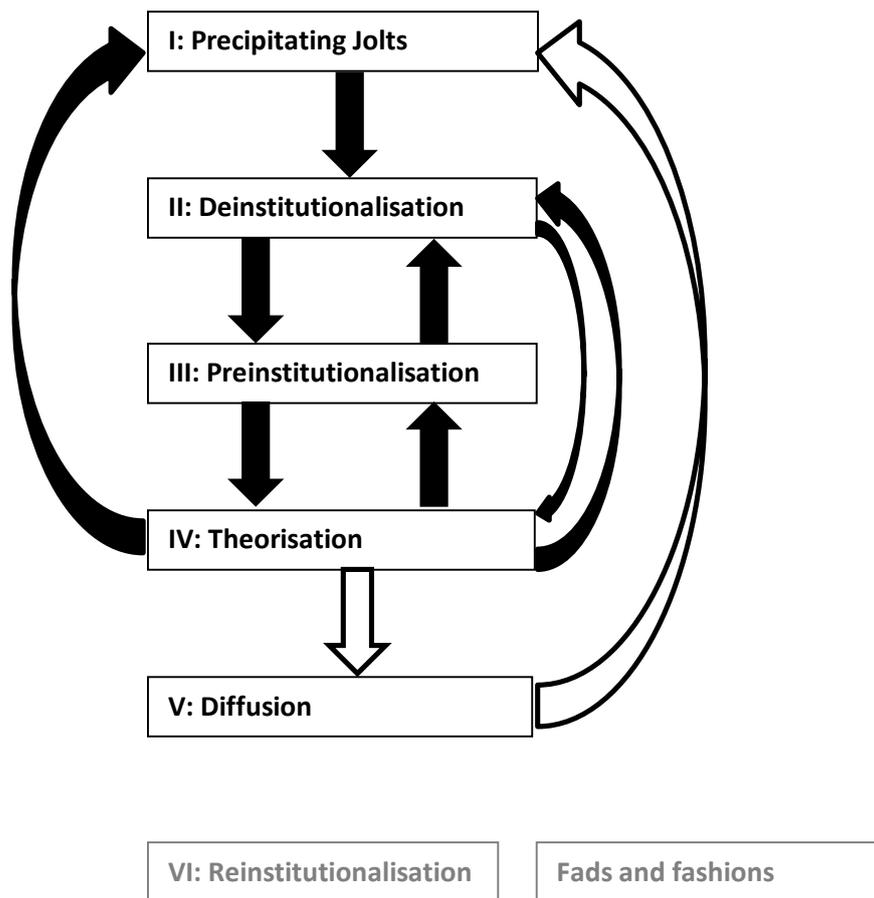


Figure 8: Cumulative model at end of Period Four

Period Three, as shown below in Figure 8. Again the black arrows represent the main flows, with the white arrows indicating some very limited evidence of these flows.

5.7 Period Five: after the 2010 election

With the general election of May 2010 and the formation of the coalition government, commercial leasing largely slipped off the political agenda. Although the 2007 Code remains in force; there has not been the substantive research promised by the previous administration.

5.7.1 Limited government engagement

In 2011 the government commissioned retail consultant and broadcaster Mary Portas to undertake an independent review of the future of Britain's high streets. Her report (Portas 2011) brought the Code to the attention of the coalition government:

Recommendation 18: Encourage a contract of care between landlords and their commercial tenants by promoting the leasing code and supporting the use of lease structures other than upward only rent reviews, especially for small businesses

Portas (2011:34).

The government's response to Portas (Department of Communities and Local Government 2012) showed an aspiration to continue promoting change and to help embed practices that had changed:

The Code advocates the provision of alternatives to Upward Only Rent Reviews. We recognise the market has moved to shorter, more flexible lease arrangements, but we will continue to work with the industry to ensure these progressive measures become firmly embedded across the market...

Department of Communities and Local Government (2012:18).

However the government's focus was entirely centred on dissemination of the code:

We are currently working on various options for disseminating the Code, targeting small businesses and landlords who could benefit most from the guidance offered by the Code. We have written to key industry players such as the British Property Federation, Royal Institute of Chartered Surveyors and the Law Society, to urge greater promotion of the Code. We are already discussing a dedicated awareness-raising event with the British Property Federation and The Royal Institute of Chartered Surveyors. The Royal Institute of Chartered Surveyors will also undertake a campaign to communicate the Code, and the need to abide by it, to its 60,000 members. And we will be working with the "Rightmove" property search website to provide information on the Code and Code related events through their commercial property pages.²⁴

Department of Communities and Local Government (2012:18).

²⁴ As at 1st October 2015 there is no reference to the Code on Rightmove.

5.7.2 Industry initiatives

The RICS has taken various steps to embed the change in practices required by the Code within its membership. In November 2011 it introduced a set of standards for commercial real estate agents (Royal Institution of Chartered Surveyors 2011). In this agents are asked to “encourage their (landlord) clients to promote flexibility, such as stating whether alternative lease terms are available and proposing rents for different lease terms” (Royal Institution of Chartered Surveyors 2011:74). Agents are also told to refer to the Code for guidance. The standards paraphrase the requirements of the landlord guide within the Code, setting these out as good practice. However, somewhat inconsistently, while there is a checklist for heads of terms, the Code template for this is not mentioned or used.

More recently a small business retail lease was launched by RICS and BRC (RICS 2012) with direct reference to the recommendation by Portas (Portas 2011). This is a template for a short lease of up to 5 years with no rent review. It is a much simpler document than traditional leases which conforms to the introduction to the Code in its use of clear English. It also conforms in aspects such as assignment and the state of repair required on exit. However it is less compliant with the Code in that it is an FRI lease (with no options to amend this) and requires all lease obligations to be met on exit by the tenant, including at a break clause. It is also counter to the Code in that it also only allows limited alterations, which must be removed at the end of the lease. The short duration of the lease may perhaps be put forward as justification for some of these clauses. The short duration also means that the issue of the type of rent review is avoided; one is not provided for. Its launch was reported in the Estates Gazette:

The lease, developed in collaboration with the British Retail Consortium and authored by Nick Darby at SNR Denton UK, has been devised to simplify commercial property leases.

RICS said that the freely available contract will enable quicker occupation of retail premises by SMEs, helping to support the independent retail sector and stimulate the British high street.

Paul Bagust, associate director in RICS’s professional groups and forums division, said: “In simplifying the leasing process for landlords and small business tenants,

we hope to support SMEs and provide a boost to the British high street in a time of decline, thereby contributing to overall UK economic productivity. Moreover, by offering mutually beneficial terms to landlords and tenants in a flexible lease, we are directly addressing the principles of the Code for Leasing Business Premises - identified in the Portas Review as a key tool in tackling the high street's decline."

EG 04-07-2012.

The BPF continues to promote the Code on its website and through CLAS. It has been instrumental in creating a suite of model commercial leases, which are free to download and use from the Model Commercial Lease (MCL) website (Anon, 2014). The suite of documents covers retail, office and industrial property as well as buildings for food and drink use. The website makes clear that the BPF commissioned the leases but states that:

A large number of well-known law firms, clients and trade organisations have been represented on the working group that produced the documents, or taken part in extensive informal consultations.

Anon (2014).

These parties are not named and there is no apparent ownership of the site or the model leases set out. The website sets out the compliance of the MCL with the various provisions of the current Code.²⁵ This makes clear that the MCL departs from the Code in many important aspects using the words "Not appropriate for inclusion in the lease" to indicate noncompliance with individual requirements in the Code. These are examples of noncompliance listed: The MCL does not include the right to renew under LTA 1954 as a default position; the rent review is UORR with no provision for alternatives; the requirement for an AGA on assignment is not limited as suggested in the Code. Despite the anonymity of the website, given that the BPF commissioned the MCL these departures would appear to be indicative of the BPF's stance on lease terms, more so than the Code.

²⁵ <http://goo.gl/rZyo6O>. Accessed 15 October 2015.

5.7.3 Current position

The recent evidence on lease lengths and break clauses shows increased diversity, although average lease lengths have started to rise again (Investment Property Databank 2014). The IPD note that recession, alongside structural factors caused the lease length to fall and interpret the recent rise as largely attributable to growing occupier confidence; even SBTs are recorded as taking longer leases. This report shows that influence of market factors on lease structures. Alongside these changes, there is better information available for SBTs in the form of the 3rd edition of the code. However, it is not clear if the information is getting to tenants. There is no recent evidence collected on the use of UORRs in longer leases or whether AGAs are still automatically used. Nor is it possible to tell if landlords are still adopting default positions or being more flexible and responsive to individual circumstances on repairing liabilities or control over alterations. This means that the extent to which the industry has embraced theorisation and moved beyond it is not clear after 23 years.

5.7.4 Summary of Period 5

Much of the momentum for change within the Code project disappeared with the change of government in 2010. However, there is some ongoing impetus for change coming from RICS and BPF, who continue to promote the Code to their members. This has been encouraged by the small jolt from government following the Portas recommendation. However, there is no longer the apparent threat to legislate as the focus of this jolt was entirely about encouraging dissemination of the current version of the Code. The RICS and BPF together produced simplified lease forms for shorter leases aimed at SBTs wanting short leases. While this initiative for smaller tenants conforms to the Code, the wider suite of leases commissioned by the BPF as a Model Commercial Lease departs from the Code in many key respects. Table 11 summarises the evidence found during the fourth period for the different stages of the model.

Period Five adds initiatives from the RICS that incorporate the Code, therefore strengthening the theorisation stage. However the most recent BPF initiative, the MCL shows clear departures from the Code, reinforcing existing practices and suggests a weakening in the acceptance of the general problems which were identified in the Code. While there has been no recent formal study of the change in practices or the

Table 11: Period Five

Stage	Meaning	Operationalisation	Evidence found in third period
Precipitating jolt	Pressures for change	Evidence of pressures for change which could be: social (including economic), regulatory or technological.	Portas report leads to push from government, but this is specifically on dissemination of existing Code
Deinstitutionalisation	The removing of legitimacy from existing practices	Evidence that any of the actors in the organisational field: Ask questions about leasing practices. Gradually stop doing something Proactively challenge/reject leasing practices.	No new action found.
Preinstitutionalisation	Introduction of new ideas and replacement practices	Evidence that actors: Suggest new practices (in areas such as set out above). Independently adopt different practices.	RICS initiatives include standards for commercial agents and a retail lease for small businesses (with BRC). BPF commission Model Commercial Lease.
Theorisation (part 1)	Recognition and specification of general problem	Evidence that supply-side actors, particularly RICS & BPF: Recognise that there is a problem with leasing practices (in areas such as set out above). Believe that there is no problem in these areas.	The MCL suggests that the BPF do not recognise the problems in some lease areas articulated in the Code.
Theorisation (part 2)	Development of principles to support solutions for general adoption	Evidence that actors: See Code/do not see Code as an industry solution. See regulation as industry solution. Take the lead in shaping the Code. Propose other industry-wide solutions. Evidence that the Code is gaining legitimacy.	Code is given moral legitimacy by RICS references in their initiatives (above). BPF continues to promote on its website and through accreditation scheme. The BPF-commissioned MCL is an alternative solution as it does not conform to Code in key respects.
Diffusion	Legitimated ideas spread through communities and are adopted	Evidence of: Dissemination efforts by actors (particularly BPF and RICS). Solutions seen to be spreading/being adopted. Solutions not seen to be spreading. Policing the implementation of the Code.	No evidence of specific dissemination efforts by industry bodies. Inclusion in initiatives (above) may encourage adoption.
Reinstitutionalisation	Ideas and practices are accepted as the natural ways of doing things.	Evidence that different practices: Have become taken for granted/natural way to behave. Have not become natural way to behave.	No evidence.

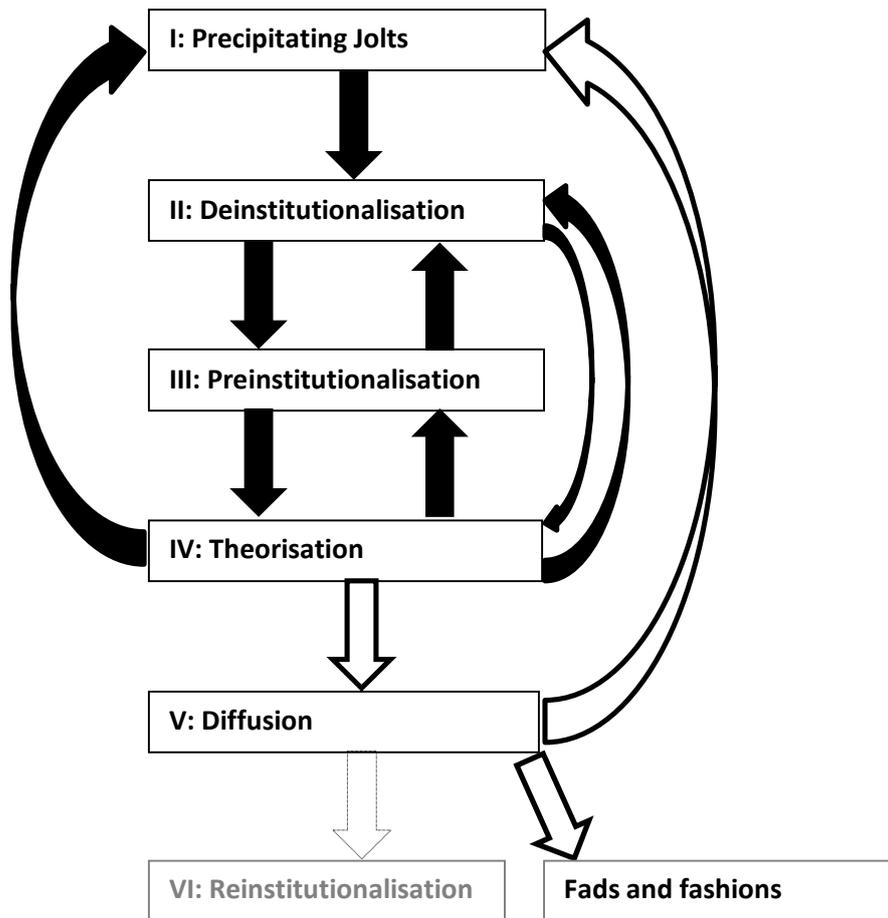


Figure 9: Cumulative model at end of Period Five

impact of the Code, diffusion still appears to be limited. It seems that the Code itself may have become consigned to ‘Fads and fashions’ although with some changes of practices being potentially adopted. This is represented in Figure 9 showing the cumulative model. The black arrows represent the main flows, with the white arrows indicating some evidence of these flows. The dotted line indicates very minimal evidence of this flow. The findings of the analysis using the model are discussed further in Chapter Six.

5.8 Chapter summary

State intervention in commercial leasing was first considered at the end of the 19th Century as tenants coming to the end of their leases were seen as requiring protection from their more powerful landlords. Since then, there have been limited, but significant direct interventions such as the Law of Property Act 1927, the Landlord and Tenant Act (LTA) 1954 and the LTA 1995. It was as the latter was being finalised that

the government's drive to change commercial leasing practices through self-regulation started. The stimulus for change came in 1992 with the recession and some high profile criticism of commercial leasing. Since then there have been three editions of a code of practice, created and then revised by a group of stakeholders representing both supply and demand sides of the market. There have been three reports commissioned by the government to assess the impact and dissemination of these reports. There have also been two formal proposals to legislate to outlaw certain practices and many threats to legislate. However, there is no evidence that the Code has significantly changed practices over this time or that it has become a tool used in negotiation. The most recent initiatives by the RICS and BPF present mixed messages; the most recent BPF initiative, the Model Commercial Lease, departs from the Code in many key respects.

The process of attempted change has been mapped against the model of institutional change developed by Greenwood *et al.* (2002), with a particular focus on the actions of the industry bodies. The findings are summarised and discussed in Chapter 6.

Chapter 6 Findings and discussion

The UK government has used industry self-regulation to try and achieve fundamental changes in commercial leasing practices. Using self-regulation is consistent with the neoliberal ideology that has underpinned the approach to the governance of markets in western democracies since the 1970s. However, the choice of self-regulation rather than legislation in any particular field of economic life does not necessarily result in a government that is disengaged from the regulatory process. The discussion in Chapter 2 shows that disengagement is often far from the case and that there is a range of ways in which the state can be involved in self-regulation. The particular part that the government played in the Lease Code initiative is central to the discussion below and to the conclusions in Chapter 7.

Whatever the role of the state, trade and professional bodies are at the heart of self-regulation. These bodies have a long history of governing their memberships and providing leadership for them. However, as the discussion in Chapters 2 and 3 shows, while these organisations have the potential to promote and legitimise change, they may alternatively reinforce existing practices. One reason for this is because they operate in a market environment which brings pressures which may conflict with a more normative desire for change.

Industry change can be viewed as a process. The model of institutional change developed by Greenwood *et al.* (2002), as set out in Chapter 3, provides a framework for examining change from this perspective. This model has been used to analyse the role played by industry bodies in the self-regulation of commercial leasing. In Chapter 5, the activity at the various stages within the model was identified and analysed. In the first section of the current chapter the findings from the research are summarised using this framework. The discussion that follows evaluates the use of the model as a framework and relates the findings to the research aims and the literature.

6.1 Summary of findings

The findings from the analysis are summarised below under the headings of the model.

Jolt

The stimulus for change or initial 'jolt' can come from a variety of sources, categorised by Greenwood *et al.* (2002) as regulatory, social and technological. Within commercial leasing the jolt was regulatory as it was a threat of legislation. This threat arose as government responded to calls from business occupiers, or those arguing on their behalf, for changes to commercial leasing practices in the recession of the early 1990s. The arguments for radical changes were well-articulated by Professor Burton (1992) and also by MPs within parliament in 1992. They argued that institutionalised leasing practices hampered tenants' businesses and contributed to their failure in the recession. In response, the government, while making arguments for the free market, recognised that there were problems within commercial leasing practices and so began to apply pressure on the property industry. This was in the form of proposed legislation. There was a consultation on legislating within three key areas of leasing: UORRs, confidentiality clauses and dispute resolution procedures (Department of the Environment 1993). The withdrawal from this in favour of self-regulation has always been presented by government as provisional. The threat of state intervention by legislation has hung over the industry since then and it has formed a continuing 'jolt'. For example, the government consulted on proposals to ban UORRs in 2004 (Office of the Deputy Prime Minister 2004). The pressure has been most apparent with the publication of the four reports commissioned by the government to monitor the impact of the various editions of the Code (Department of the Environment Transport and the Regions 2000, University of Reading 2004, Crosby *et al.* 2005, Crosby and Hughes 2009). Following each report the threat has been reiterated. The government has accepted that there has been market-driven change but has not considered this to be enough in terms of pace or nature of change and so, while allowing the industry to change through self-regulation, has kept the pressure on. This has continued through governments of different hues; it started under a Conservative government and continued through the Labour administration of 1997-2010. However the threat to

legislate has not been reiterated since the election of the coalition government of 2010.

Deinstitutionalisation

Existing practices are questioned in this stage, usually by those within an industry. Greenwood *et al.* (2002) described such a phenomenon in their study of change in the accountancy profession. However in commercial leasing, the government has led the questioning of practices; it has not emerged from the industry. Therefore it is pertinent to identify the government's objectives for the Code from the analysis as these have set the agenda for change and, to a limited extent, identified specific practices that the government believed needed to change. In turn, this agenda has determined those practices which the industry believed needed to change to satisfy the government.

The government's objectives were not specifically articulated at the outset. The analysis indicates that they have evolved over time, largely in the light of the reports commissioned by government to monitor the progress of the Code (Department of the Environment Transport and the Regions 2000, University of Reading 2004, Crosby *et al.* 2005, Crosby and Hughes 2009). Therefore, deinstitutionalisation is a stage that has been revisited several times. Although not clearly stated, the first allusion to the nature of the objectives came from the Department of Environment Under-Secretary of State as he announced the intention to produce an industry-wide code in the House of Commons in 1994. The minister said that the government would assess the impact of the Code on "the flexibility and transparency of the market".²⁶ Achieving flexibility remained a central theme. An essential part of this was the objective of making the UORR less prevalent. The response by the Minister of State for the Environment, Transport and the Regions to the failure of the 1st edition of the Code recognised that there was greater flexibility in the market but he rued that the UORR still predominated.²⁷ In the same debate he also made clear that ensuring prospective tenants had the information to make informed choices was a government objective.

²⁶ HC Debate 19 July 1994 vol 247 col 113W

²⁷ HC Debate 19 April 2000 vol 348 col 495

As the Code group worked towards a 2nd edition, the Minister articulated his hope for the Code providing “more choice and flexibility in the property markets and for better property guidance for small business”.²⁸ These three aspects then remained the government’s objectives for the Code. Lessening the prevalence of the UORR remained at the heart of the objective of increased flexibility as could be seen in the threat to ban them in 2004. The consultation document started with these statements:

The Government is committed to promoting more choice and flexibility in the commercial property leasing market. The Labour Party 2001 Business Manifesto said:

“Upward-only rent reviews are a source of grievance to many in the business community. We will promote greater flexibility in the commercial property market.”

Office of the Deputy Prime Minister (2004:3).

The objective of improving flexibility has been expressed generally, but also specifically in respect of lease terms such as the UORR and, more recently, assignment and subletting terms. These latter terms were referred to as key areas of concern for tenants as the government dropped its plans to legislate on the UORR.²⁹ Therefore, as a 3rd edition of the Code was announced in the House of Commons, the relevant minister spoke of her concerns over “continuing elements of inflexibility particularly the predominant use of upwards only provisions in rent review clauses and inflexible provisions for tenants exiting property they no longer need”.³⁰ Alongside this the new Code was said to “improve business understanding of lease terms”.³¹

The government’s main objectives for the self-regulation of commercial leasing can be summarised as improving choice and flexibility in lease terms, particularly with regard to rent review provisions and alienation. A further objective has been to improve the information flow to prospective tenants (particularly SBTs) in order that they could make informed choices on lease terms. Under these headings, the industry has had to

²⁸ EG 28 March 2001

²⁹ HC 15 March 2005 Col 12WS

³⁰ HC 28 March 2007 col 87WS

³¹ *Ibid*

identify the specific practices that required attention and to produce/refine a code of practice. The government has also determined the parties that would do the questioning, insisting that tenant representatives were part of these discussions. The issues that were included in this questioning became wider as more data was gathered through the various reports monitoring the Code (Department of the Environment Transport and the Regions 2000; University of Reading 2004; Crosby *et al.* 2005; Crosby and Hughes 2009) and the areas of concern became clearer. While much of this was about lease terms and landlord practices, the issue of information asymmetry creating uninformed small business tenants became increasingly apparent with successive code monitoring reports. This then became an area for the Code to tackle. However, the UORR remained central to the drive for change. Signs of movement by landlords towards agreeing other forms of rent review became a benchmark against which institutional change could be measured by the government.

Preinstitutionalisation

This is the stage in the model for new ideas and innovation. In the examples of industry change set out in Chapter 3, different players had their own ideas of how to respond to the jolt and the circumstances that precipitated the need for change. These were generally local innovations and addressed apparently local problems as, at this stage, there is not typically a perception of an industry-wide need for change. However, in commercial leasing, the government compelled the property industry and its advisors to address the issues in a way that was industry-wide and to include organisations representing customers i.e. tenants alongside supply-side bodies. The government also determined that the response to the jolt would be new practices embodied in a code of practice. This meant that the process did not allow for a plethora of independent initiatives preceding the realisation that there was an industry-wide problem to be resolved. However, there were initiatives from the various bodies running alongside, and related to the Code, as part of the theorisation stage.

During the period under study, changes in lease structures took place that were independent of the Code initiative. The research undertaken for the two main government Code monitoring reports found that average lease lengths got progressively shorter; there was increased diversity in lease lengths; tenants' break

clauses became more common and at earlier points in leases; repairing liabilities became less onerous on second hand properties (Department of the Environment Transport and the Regions 2000; Crosby *et al.* 2005). Changing lease lengths and prevalence of break clause have also been documented in the annual Lease Events Reports³² from Investment Property Databank. These changes are local in that they are not part of co-ordinated industry action; the data is simply the aggregate of negotiations between individual landlords and tenants. Evidence of these changes influenced the industry bodies in the theorisation phase but also influenced the government's objectives for future change i.e. this was an input into the revisiting of the deinstitutionalisation phase.

Theorisation

This stage is identified by Greenwood *et al.* (2002) as critical to changing practices, as it is where problems are identified and accepted as being industry-wide. Tolbert and Zucker (1996) saw a central role for industry groups as champions of change in this phase. Therefore the extent to which the BPF and RICS appeared to have engaged with theorisation was critical. In the early days, when legislation was threatened and then a Code proposed, the BPF gave out a strong message that the market was operating efficiently and responding to demand through the normal processes of negotiation; practices did not need to change in any fundamental way and all that was needed was better provision of information to prospective small tenants. While the BPF took a leading part in developing the first Code, this rather negative attitude continued into the 2000s and into the efforts to revise the Code. Eventually there was some recognition that the Code would 'reinforce market trends',³³ showing little in the way of theorisation. Nevertheless the BPF did show more consistent support for the principles set out within the 2nd Code. In reinforcing the suggested changes in practices (such as providing priced alternatives) it showed an attempt to legitimise the Code. However, this was somewhat undermined by the production of the BPF model lease in 2003 which was apparently designed to complement the Code yet the clauses were not

³² This series began in 2014 and was a merger of two previously annual publications: Lease Events Report and Lease Report

³³ EG 31 October 2001

compliant with the Code in key aspects such as rent reviews.³⁴ Nevertheless the stated support for the Code remained strong and commitment to it contributed to the BPF's angry response to the renewed threat of legislation in 2004. As the Code moved into its third edition, the BPF maintained support for the Code but once again focused on it as an information document rather than changing practices, giving legitimacy to the notion of more openness by landlords. The Model Commercial Lease (Anon, 2015) commissioned by the BPF departs from the Code in several key respects not least as it includes a UORR. This suggests that some of the problems apparently recognised by the BPF in co-authoring the Code were not actually accepted.

As a professional body with clients on both the supply and demand side of property the RICS might be expected to have a different perspective to that of the BPF. Certainly, its response to the 1994 consultation on legislation did recognise that some institutionalised practices (such as UORRs) might cause problems for tenants but nevertheless it defended the self-correcting operation of market forces in leasing (Royal Institution of Chartered Surveyors 1993). While the RICS was a central player in developing the first Code, it did not seem to have much faith in the concept as a mechanism for change. However, the RICS endorsed the use of the Code by its members, recognising that it addressed criticisms of inflexibility and secrecy and also encouraged change in attitude and practice.³⁵ During the life of the first Code the RICS introduced its own initiative, the Small Business Scheme for rent reviews. This demonstrated that the RICS was recognising and acting on the problems of small businesses in this aspect of commercial leasing, an area that was included in the initial proposals for legislation (Department of the Environment 1993). With the failure of the first Code and the move towards a second edition, the RICS appeared to remain very quiet through this turbulent period. Nevertheless the RICS saw itself as brokering the Code; the fact that the RICS provided the secretariat and the launch venue for the new version may be seen as legitimising the Code.

As with the BPF, the RICS seemed to become galvanised into action following the publication of the second edition of the Code; there was a clearer recognition of the

³⁴ Available at: <http://www.bpf.org.uk/info-landlords>. Accessed 15 September 2015.

³⁵ RICS vice president quoted in CSM Nov/Dec 1995.

need to change, efforts made to give the Code legitimacy alongside other initiatives such as a guide to leasing for small businesses. The flexibility and solutions offered by the Code (such as the pricing of alternative lease terms) were promoted and justified to members. It was reinforced and legitimised by key RICS figures, for example the chair of the commercial property faculty said that option pricing should not “hold any fear for landlords, tenants, their advisers or valuers. This approach is adopted by those who operate on the property market on an almost daily basis”.³⁶ The Code was presented to members as a way to ensure the market remained free but also responded to the needs of occupiers, and so the industry could avoid legislation. The RICS did become defensive of current practices in the face of the further threat of legislation, however the third edition of the Code brought with it renewed enthusiasm. Its efforts at supporting use of the Code at that time included warnings that a surveyor who did not use the document might have to defend their actions in court.

The RICS introduced a short retail lease (RICS 2012) in response to issues raised by the Portas report (Portas, 2011), referencing the Code. However, by this time any wider discussion by the RICS of changing leasing practices seemed to have all but disappeared.

For both the RICS and BPF it is difficult to find evidence of theorisation with the general election in 2010 and the more limited engagement of the new government with the Code. The evidence of the Model Commercial Lease (Anon 2015) suggests that the BPF had not actually accepted many of the problems or solutions set out in the Code despite being a co-author; theorisation for the BPF appears to have been very limited.

Diffusion

This is the stage where newly legitimated ideas spread and become adopted. Tolbert and Zucker (1996) identified the importance of industry bodies in this stage of the change process. However, this stage is dependent on the earlier stages of the process having created legitimated ideas and practices. This was not found to have happened in commercial leasing to any significant extent. Nevertheless evidence of dissemination and adoption of the Code as the mechanism for introducing new practices was looked

³⁶ Graham Chase reported in EG 28 September 2002.

for in the historical analysis. The monitoring reports for the government provided some insights into the lack of diffusion. The reports on the first two versions of the Code did show that property advisors were largely aware of these specific versions of the Codes (Department of the Environment Transport and the Regions 2000; Crosby *et al.* 2005). However, by the third edition this became diluted to a general awareness of the code concept but not specifically of the detail (Crosby and Hughes 2009). Even where there was awareness, these monitoring reports found that property advisors were not bringing the Code to the attention of their clients or (when acting for the landlord) to the attention of prospective tenants. Awareness of the Code improved for larger landlords and tenants with the second Code; however the property advisor was not a key source of information. In any event, there was very little evidence of the Code being referred to in lease negotiations.

The development of the Code shows a growing focus on small tenants and landlords with the Code including increasingly detailed advice for them on a range of lease terms and practices. However this advice did not get disseminated through the professional advisors, who were not promoting adoption of these practices. Throughout, small landlords and tenants remained largely unaware of the Code project, as noted in all the monitoring reports.

There is evidence that the RICS made strong attempts to increase the Code awareness of members, through newsletters, seminars etc. There seems little doubt that, at some level, RICS members were aware of the 2nd and 3rd editions of the Code. However, despite the threats that members who did not adopt the Code might be flouting best practice and so be liable to negligence claims, the institution stopped short of mandating members to use the Code. The RICS exhorted its members to use the Code at various points, but refused to instruct them to use it. Likewise, when acting for the landlord in a lease negotiation, RICS members have not been compelled to give the Code to unrepresented tenants.

After the failure of the first edition of the Code to reach those negotiating leases, the BPF mounted a strong campaign to ensure its members knew about and complied with the second version. It produced marketing material for them to show code compliance. A significant initiative by the BPF to encourage diffusion, particularly to

the smaller landlords, has been its landlord accreditation scheme; a condition of membership is adoption of the Code. There is a mechanism for complaints if scheme members don't abide by its conditions. However, as noted in Chapter 5, the membership list is short and there are few small landlords on the list; its impact on diffusion is unlikely to be great.

Reinstitutionalisation

The final stage of the process is where the new ideas and practices become the accepted ways to behave. Alternatively ideas may not become institutionalised and go by the wayside as a 'fad or fashion'. There was no evidence found of the Code project having created new practices. There has been no recent study of the change in practices or the impact of the Code; however the lack of any continuing impetus suggests that the Code itself may have become consigned to 'fads and fashions'. The reports for the government have found a resistance to change in key areas identified by the Code. This can be seen in the continued default use of the UORR, and the resistance to providing information to prospective tenants. The changes in lease structures that have taken place have been noted, and offering a choice of lengths and a break clause may now be accepted practice. However there is no evidence that the Code has been responsible for this. The recent increases in lease lengths being taken, including those agreed by SBTs (Investment Property Databank 2014), as the UK moves away from recession, would suggest market forces are the main driver.

6.2 Discussion

The overall aim for this research is to investigate the role of industry bodies in the process of institutional change, particularly in the context of industry self-regulation. The specific concern is with the governance of the commercial leasing market and the role of the key industry bodies (RICS and BPF) in changing leasing practices. The research question asked is: **What role have the industry bodies played in the attempt to achieve institutional change in commercial leasing through self-regulation?**

The discussion of the findings is structured around the key elements of the research aims. These elements are the degree of institutional change, industry bodies as agents of change and the part played by industry bodies in self-regulation. These aspects have

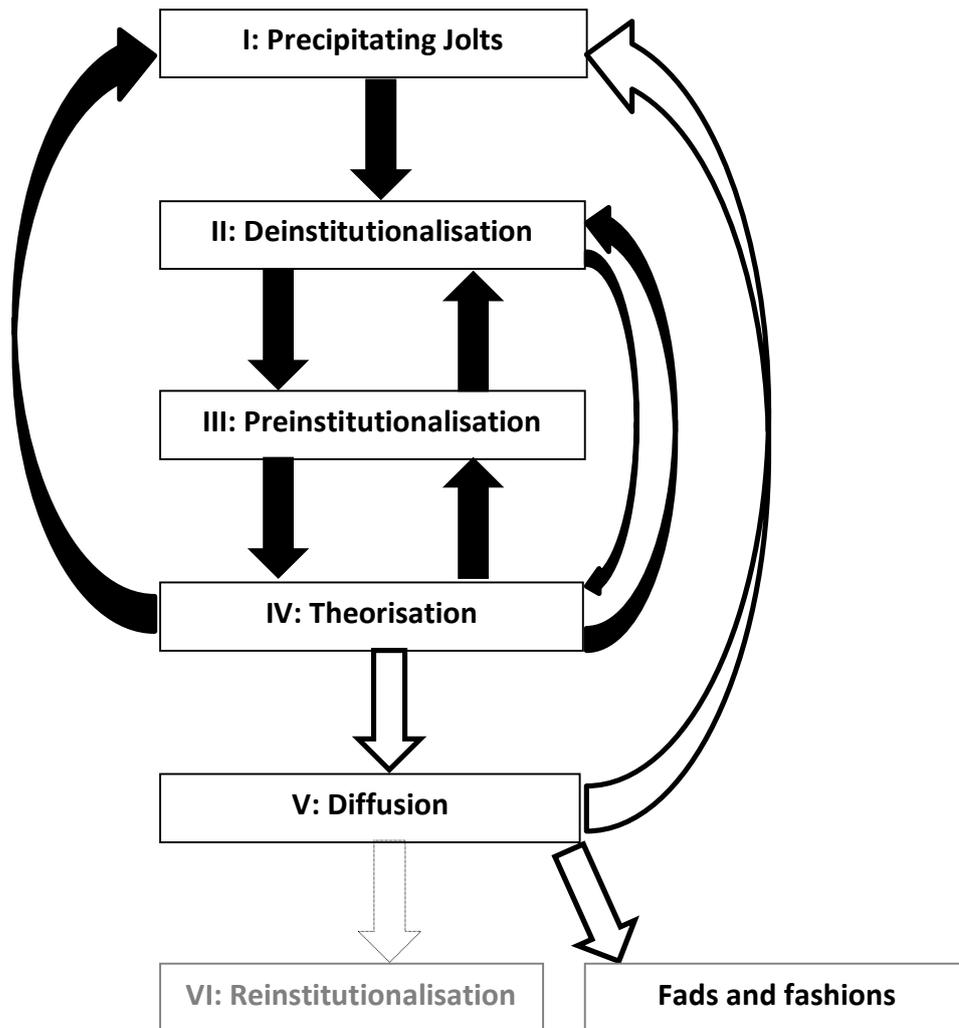


Figure 10 Model as applied to commercial leasing

been investigated by taking a process view of change. The historical analysis using the model of institutional change developed by Greenwood *et al.* (2002) was used to provide the data to address the research question and also the broader aim. The next section considers the findings on the process of change in commercial leasing and the use of the model as a framework for analysis.

6.2.1 The process of institutional change

The progress of an industry as it sheds institutionalised practices and establishes new ones can be followed through the stages of the model by Greenwood *et al.* (2002). Evidence of the early stages was found in the study of commercial leasing but there was little or no evidence of the later stages, as neither the Code nor associated activities have led to the reinstitutionalisation of new practices as envisaged. The

evidence of the stages that did occur showed that, in this particular case, the process did not have the linear flow set out in the model. Earlier stages were returned to and it was essentially an iterative process. Additionally, several stages occurred concurrently, as the distinctions between the stages of de-institutionalisation, pre-institutionalisation and theorisation become increasingly blurred. The sequence that was found is shown in Figure 10.

This does not suggest that the model is wrong or that it is inappropriate to use in this study; rather these differences are useful in understanding what happened in commercial leasing. The model was developed from studies of change in industries where the initial jolt led to the questioning of existing practices by those within the industry leading to local innovation. This then came together in the process of theorisation by industry bodies. This is a bottom-up process and this is what is described by the model. The process of change attempted in commercial leasing has not been driven by independent actors questioning practices and local innovation. Instead, it was driven by government objectives for changed practices across the industry. This meant that innovation was not local; it was immediately industry-wide. Further, it was at the level of the organisational field as the government insisted that tenant groups were part of the discussions to agree a code of practice. This means that the nature of the change process was fundamentally different from that in the industries discussed in Chapter 3.

This government-led approach could not ensure that the theorisation stage was successful and, on the contrary, it may have hampered it. Greenwood *et al.* (2002) echo Tolbert and Zucker (1996) in arguing that theorisation is a crucial stage in the process without which change is likely to flounder. Under the threat of legislation, the government was in a position to compel the industry bodies to work together with other stakeholders and to produce a Code. However it could not ensure that industry bodies *believed* that there were problems to address (through theorisation), or alter their views that all practices would in any event change as necessary in response to market forces. These underlying views, combined with unclear government objectives, made it difficult for the bodies to agree the purpose and content of the Code. Despite being central to the development and revision of the Code, there was no clear

recognition of general problems by the industry bodies. There was only some acceptance of problems and solutions once the focus had narrowed to information provision to small landlords and tenants. Consequently there was no sense that the RICS and BPF were spearheading change as industry bodies in the role of 'champions' identified by Tolbert and Zucker (1996).

The circularity in the process may also be attributable to the government-led approach to change in commercial leasing. The initial 'jolt' can be seen as regulatory, within the categories of the model. It could also be classed as political in terms of the categories identified by Oliver (1992), which perhaps seems more accurate as a classification in this instance. In any event, far from being simply the spark that ignited the process, this was a stage that was revisited many times as the government's approach relied on regular 'jolts' in the form of threats of legislation. This was necessary because, as just discussed, the industry bodies were charged with effecting change despite being unsure quite what was wanted or believing change was needed. This led to an ineffective Code which drew further government threats, leading to further revisions of the Code. This approach did not create the conditions for the stages of the process to happen linearly and fully. The sequence of the stages may be significant and may have impacted on the result. Greenwood *et al.* (2002) noted that gaining a shared understanding of a problem can take a long time. If the government had managed a period of deinstitutionalisation and then theorisation, this may have reduced the need to go round the circle several times and potentially increased the chance of achieving a shared understanding.

The use of the model has therefore enabled the process to be identified and exposed the difficulties of the various stages. Use of this framework has also highlighted the departure from the model in commercial leasing. This raises questions regarding the significance of this departure to success in achieving change.

6.2.2 Industry bodies as agents of change

The literature discussed in Chapter 3 shows that industry bodies have the potential to drive change but also to reinforce current practices. The work of D'Aunno *et al.*, (1991) and Suchman (1995), suggests that this degree of influence arises because industry bodies are in a position to confer legitimacy on the behaviours of individuals and

organisations within their membership. The BPF and RICS do not represent all property advisors or all landlords, nevertheless these are bodies with large memberships and a strong presence in leasing. Therefore it is primarily to them that government turned with an expectation that they would be agents of change who could influence their members.

Given the government's threat-led process, and the difficulties around theorisation already discussed, it is not surprising that the BPF and RICS attempted to legitimate change but frequently could be seen to reinforce existing practices. They initially pushed back against the 'jolt' i.e. the threat of legislation in 1993 by making responses that justified current practices and which supported the market as an efficient mechanism responding to changing circumstances. At this time, the RICS extolled the virtues of competent advisors to deal with any problems within the existing institutional framework. However, having gained a reprieve from legislation, from this point they were expected by government to be central to the drive for change via a code of practice.

The BPF had difficulties in coming to terms with the use of a code in preference to negotiation and the unfettered operation of market forces. Therefore the theorisation needed to legitimate change and so aid diffusion was a long time coming. When it came it was largely by focussing on the Code as a means of providing information to prospective tenants. This focus removed any requirement for the BPF to encourage its members to change practices on lease terms. It has also focused on educating smaller landlords through its scheme for accrediting landlords. This makes it less surprising that the BPF model lease clauses (2003) included terms that did not accord with the Code's wider aims. Similarly as the political pressure was largely removed in 2010, it is of little surprise that the BPF-commissioned Model Commercial Lease (2014) does not conform to the Code in key respects.

Nevertheless, whilst not overtly accepting the problems as defined by others, or spearheading major changes in specific lease terms or practices, the continuing engagement of the BPF with the Code and its associated initiatives has perhaps combined to confer legitimacy to, and aided the diffusion of, the notion of a 'tenant-friendly' landlord.

RICS members advise landlords and tenants on the leases they agree. As an institution it also has an obligation to serve the public interest within its charter. Nevertheless its starting position prior to the first edition of the Code was one of defending the market and current practices. Since then it has promoted change to some extent. At the peak of activity on the second edition, senior RICS members were extolling the virtues of the Code as a means to help the market be more efficient³⁷ as well as admitting that current practices were designed to meet the landlord's needs rather than the tenants.³⁸ Later, the RICS proclaimed that the third edition of the Code embodied best practice and that a non-compliant landlord might have to justify this departure in court.³⁹ Yet, crucially it stopped short of mandating members to either use it or to ensure tenants were aware of its contents, arguing that clients' interests might preclude this.⁴⁰ This is particularly significant given the RICS's public interest obligation and could be interpreted as a strong signal against legitimating change.

Recent RICS initiatives have, like those of the BPF, been ambiguous. The inclusion of the current Code within the set of RICS standards for commercial real estate agents is partial as it does not contain the Code's heads of terms (Royal Institution of Chartered Surveyors 2011). While the RICS small retail lease⁴¹ is in accordance with Code principles, there is no attempt to deal with issues such as UORRs which occur in longer leases. These initiatives do not suggest the RICS is pushing for a sea change in attitudes.

The RICS and BPF have been put in the spotlight to spearhead change within a process driven by the government. The analysis shows these bodies struggling with the deinstitutionalisation, preinstitutionalisation and theorisation stages. For both organisations the emphasis has been on disseminating the information on the various Codes to their members and exhorting them to use and further disseminate, particularly to small business tenants. However, the initiatives running alongside the Code show omissions or errors in lease terms and guidelines. There has also been no

³⁷ Graham Chase CSM November 2002

³⁸ Richard Lay EG 14 September 2002

³⁹ RICS Business February 2007

⁴⁰ Crosby, N. and C. Hughes. 2009a. "Monitoring the 2007 Code for Leasing Business Premises." London: CLG.

⁴¹ <http://goo.gl/SzYvrc> accessed 15 September 2015

attempt by either body to mandate use or monitor compliance. The role of these bodies has been more reactionary than progressive. Certainly where the RICS is concerned this supports findings of Abel (1989) and even Greenwood *et al.* (2002) who saw professional associations as contributing to the resilience of existing practices. This all suggests that the industry bodies have not acted as convincing agents of institutional change for commercial leasing.

6.2.3 Industry bodies in self-regulation

Industry bodies are central to self-regulation. Gunningham and Rees (1997) identified that a key role for them in this context is the creation of a normative framework. For commercial leasing it fell to the BPF and RICS, as key industry bodies, to develop this normative framework with which to guide their members through the period of questioning and into changed practices i.e. through the stages of the institutional change from deinstitutionalisation to re-institutionalisation.

There is little evidence of a framework being established, particularly when considered against the requirements for such a framework articulated by Gunningham and Rees (1997), as set out in Chapter 2. The circumstances surrounding the introduction of the Code in 1995 meant that there was little opportunity for the industry reflection needed to bring about change. However as the Code project developed, the industry bodies took more ownership of the Code and its aspirations. Therefore, for the second and third editions of the Code both organisations could be seen to be engaging in reflection to some extent. They were also assuming some responsibility for other stakeholders in the leasing process, particularly small business tenants, although this was largely through attempts to redefine the aims of the Code.

There were a few statements to indicate that embracing the Code would enable members to develop valuable competences, such as creating more effective and responsive relationships with tenants, which would add value and so improve organisational performance. However, the constant references by the industry bodies to the threat of legislation undermined the extent to which they showed that they had developed a real critical standpoint regarding industry practices. It suggested that the motivation for change was largely about escaping the regulation of lease terms. This may have encouraged 'grudging acquiescence' rather than 'willing obedience' by their

members. A normative framework should enable the industry to provide a legitimate account of the industry's activities to the public (Gunningham and Rees 1997). This was made harder by the insistence by the RICS that members would not be mandated to comply with the Code as this may be against the client's interests; given the overriding commitment to the public interest within the institution's charter, this makes it difficult to give a satisfactory account.

Once in place, Gunningham and Rees (1997) also argued that industry bodies must develop ways of regulating their members to ensure that the framework functions properly. However, within the commercial leasing industry, the industry bodies do not take on this regulatory role in any significant way. Attempts at getting organisations to comply have largely been by exhortation. Not until 2007 did the BPF attempt to introduce a system to encourage participation.⁴² Landlords joining this (no-cost) accreditation scheme commit to using the Code and this gave it the potential to have a regulatory function. Where self-regulation is concerned, Lennox (2006) noted that one of the main roles of an industry body is to ensure that its members join and then that they actually take part. He identified benefits that can act as incentives to firms; certainly the BPF scheme aims to encourage adoption of the Code by offering the benefits of being distinguished as a 'good firm' and gaining legitimacy i.e. being attractive to potential tenants. However this has not been backed up by any proactive monitoring. The scheme relies on others to file a complaint if it is believed that a member landlord is not complying. The sanctions are not set out in the handbook, but it appears that the most severe sanction is to expel the offending party from the scheme. In any event, the scheme has not attracted the range of landlords and appears to be fairly dormant. As far as the RICS is concerned, it was reported to have set up a Code monitoring committee in 2002⁴³ yet it does not seem that any monitoring of a regulatory nature actually took place, rather the group appears to have focussed on dissemination. Certainly nothing suggesting any regulatory activities was reported and the group was short-lived. The RICS consciously stopped short of mandating compliance as discussed above. Therefore it appears that neither of these

⁴² The Commercial Landlord Accreditation Scheme

⁴³ EG 21st September 2002

bodies has developed a regulatory regime to monitor performance. The only monitoring of compliance that has been done has been by government through its commissioned reports.

Moran (2003) observed that industry bodies have a long history of running markets and regulating their membership. However, they are also used to determining their own standards of behaviour and leading their own questioning. This is unlike the situation in commercial leasing where the BPF and RICS were not driving the deinstitutionalisation of practices. These bodies struggled to theorise and so did not champion major changes in specific lease terms or practices. Therefore it is perhaps no surprise that the industry bodies have largely failed to create a comprehensive normative framework or a regime to ensure and monitor compliance by their members.

The split personalities of industry bodies recognised by Gunningham and Rees (1997) and Muzio *et al.* (2013) may be relevant here as the industry bodies have wrestled with supporting existing practices that appear to benefit their members (for the BPF) or their members' clients (for the RICS) yet recognising that they are being asked to promote change.

The industry bodies in commercial leasing have largely been focussed on fending off the 'jolts' of threatened legislation rather than achieving change within a process under their own control. Perhaps because of these factors they have not developed the normative framework or taken on the regulatory role needed for success in self-regulation.

Chapter 7 Conclusions

The aim of this research has been to shed some light on the role of industry bodies in the process of institutional change. The intention has been to gain an improved understanding of this in the context of self-regulation, a mechanism of market governance that is favoured by neoliberal governments.

Commercial property leasing is a market that is monopolistic and characterised by asymmetric information. Consequently customers (tenants) have expressed dissatisfaction and frustration with the market, not least their inability to get the leases that they feel they need for their organisations. The Lease Code initiative that was initiated by government has largely failed to address these market characteristics or to change industry practices. This failure to achieve substantive changes was recognised at the outset of the research. What was less clear was why it had failed. There have been no studies to try and understand what has gone wrong with the process. This research comprised such a study and aimed to make a contribution to this understanding. In so doing, the intention has been to also make a contribution to existing research in the fields of self-regulation and institutional change.

7.1 Research aim and question

Conclusions can be drawn in terms of the specific research question and also the broader aims set out in Chapter 1. The research question for this study set out in Chapter 4 asked: **What role have the industry bodies played in the attempt to achieve institutional change in commercial leasing through self-regulation?**

Several key issues emerged from the findings and discussion set out in Chapter 6. Commercial leasing operates in an institutionalised environment in which industry bodies have an important role in setting rules and grant legitimacy to behaviour. Yet neither the BPF nor the RICS championed change or fully legitimised the Code project, giving mixed messages to their members about the value of the Code. These bodies struggled to accept that change was needed and so to theorise. Therefore they did not create the normative framework that is central to self-regulation by guiding members through a process of change. They did not ensure that their members adopt the Code;

there has been no attempt to mandate use or monitor compliance. Overall, the attitude of the industry bodies has been more reactionary than progressive.

This evidence points to a conclusion that the industry bodies have not played a role as convincing agents of institutional change for commercial leasing. This is likely to have contributed to the failure of the Code. However, such a conclusion is tempered by questions raised in Chapter 6 regarding the role of the state in the Lease Code initiative.

These questions emanate from the finding that the process of self-regulation commercial leasing was instigated and steered by government rather than by the industry itself. Therefore, despite being essentially a scheme of self-regulation, the industry bodies did not have the control that this might imply. The industry bodies were expected to co-develop a Code to address the government's objectives and then to implement it, under the ever present threat of legislation if the government's monitoring reports were not favourable. The objectives set out by government were initially very vague, largely asking for choice and flexibility in leases but leaving it to the industry (including tenant groups) to determine what this meant and creating an appropriate Code.

Any conclusion on the role of the industry bodies therefore invites the question of whether the government did all they could to enable the industry bodies charged with task of developing and implementing the Code to succeed.

These questions can be related back to the overall aim for the research set out in Chapter 1 which is **to investigate the role of industry bodies in the process of institutional change, particularly in the context of industry self-regulation.**

The Lease Code is an example of a process of institutional change by self-regulation that did not work; it did not lead to significant changes in industry practices, and specifically did not lead to the industry change anticipated by government.

Observations have been made on the extent to which the role of the industry bodies in this instance was aligned to that anticipated from the literature review. From these, wider conclusions may be drawn.

The analysis showed the difficulties in moving the Lease Code project forward. It also showed the circularity of the process rather than the linear one set out in the model by Greenwood *et al.* (2002). The revisions of the Code, and repeated jolts from government, led the industry bodies to revisit all of the stages from deinstitutionalisation to theorisation with stages sometimes running concurrently (see Figure 10). Greenwood *et al.* (2002) highlighted the protracted time that it took for stages to take place, particularly theorisation, but they did not discuss the extent to which stages were revisited or ran concurrently, nor did any other author writing about this process. The discussion in Chapter 6 suggested that the lack of conformance to the model may be indicative of the problems with the Lease Code initiative.

The failure to theorise by both industry bodies has been a fundamental problem. This might support the argument by Tolbert and Zucker (1996) and Greenwood *et al.* (2002) that theorisation is a key stage of the process of change and the imperative that industry bodies take on the role of champions of change. While there was the beginnings of a normative framework, neither body created the structure suggested by Gunningham and Rees (1997) through policies and procedures to actively promote or steer their members through a process of questioning and change. The study of the Lease Code initiative suggests that these are needed.

One major point of difference with the studies of institutional change discussed in Chapter 3 is the 'top down' nature of the process of change attempted in commercial leasing with government managing the process from the beginning; the questioning process that results from a jolt has, in other studies, organically developed through the actors in the organisational field. Government involvement in the self-regulation of commercial leasing featured prominently in the conclusions regarding the Lease Code study. This aspect may provide a wider conclusion regarding the role of industry bodies within the process of change by self-regulation. The findings for commercial leasing may be symptomatic of: a process taken out of the hands of the industry and its professional and trade bodies; a process which has ill-defined aims; an initiative which addresses problems that the industry bodies do not necessarily recognise. These characteristics of the Lease Code initiative made it very difficult for the industry bodies to take on the role of champions of change.

This may be indicative of the interaction of self-regulation with the state and the mechanisms that need to be put in place to enable industry bodies to take on their anticipated roles. It suggests that it is not effective for input by government to consist largely of threats of legislation. This approach creates an uncertain environment for all participants. If government want to drive the process from such a jolt, their intervention must be designed to convert the initial jolt into substantive change and to enable industry bodies to perform their necessary role. Government ambition is not enough.

Therefore the main conclusion suggested regarding the broader research aim is that if industry self-regulation is led by government then the state must work with industry bodies to harness their potential as champions of institutional change.

7.2 Limitations

There are limitations of the study that arise from the approach used and also from the specificity of the market under scrutiny.

The methods used in this study relied on existing data. The data sources had particular perspectives which are important to the story but can make it difficult to construct the narrative of the process. Given the passage of time, not all the sources were still available. All of these issues mean that there is a danger that events may have been misinterpreted or misconstrued. Nevertheless, the range of sources used means that this risk has been minimised.

This study is set in a specific market and a specific context and this will impact on its generalisability. The Lease Code was borne of recession and neoliberalism. This provided the setting for taking action within a market that is monopolistic and has issues of information asymmetry. These two key features of the market are fundamental to the reason for the Lease Code project and to the issues that the initiative attempted to address. However, this does not detract from the ability of the study to contribute to the understanding of fundamental issues around self-regulation and industry change.

7.3 Implications

7.3.1 State involvement in self-regulation

Industry self-regulation is a mechanism popular with neoliberal governments. It is used to achieve policy objectives and to have influence within markets by indirect means. Within commercial leasing the government used self-regulation in an attempt to change practices; it seemed to believe that this could be done by threatening legislation but then largely leaving the industry bodies to lead the industry through change. However the conclusions of this study suggest that this belief was misplaced. The implications of this research for governments are that this approach will not work as a means of achieving change in institutionalised environments. More needs to be done to harness the potential of industry bodies to drive change.

The (repeated) threat of legislation was a main input of the government into the process. Gupta and Lad (1983) pointed to the value of the threat of legislation, however the experience of commercial leasing calls into question the extent to which it can achieve real change. Certainly the threat was enough to get the attention of the industry bodies and it led them to contribute to the creation of the Code. There have been changes in leasing practices which may be partly attributable to the Code. However there has also been resistance to change by the industry bodies and substantial change has not been achieved in some key aspects of leases.

The political landscape has changed since Gupta and Lad were writing. Threats of legislation may be perceived as empty in the current political context, and so less effective. Certainly the behaviour of successive governments would support these perceptions where commercial leasing was concerned; there have been repeated threats of legislation that have not been acted upon. It may have been apparent to some within the industry bodies that the government was never going to legislate. While the industry bodies clearly responded to the threats with action, the lack of real theorisation and support for some existing practices became apparent once the government pressure was eventually removed. The threats had not been enough to ensure acceptance that change was needed.

One consequence of these repeated threats was that there was a sense of uncertainty which made it difficult for the various parties to agree on a course of action. During the negotiations to produce a 2nd edition of the Code, the chairman of the commercial leases working group, Philip Freedman, remarked

“If retailers believe Raynsford is seriously considering legislation, it may be in their interests to not reach a consensus. If landlords believe he is not serious, they have every reason not to act on it”.⁴⁴

Therefore the threat hanging over the negotiations was to some extent counterproductive. It also soured the working relationship between state and industry bodies, with anger and frustration shown by the industry bodies towards government on several occasions. There was little sense of a partnership between government and industry bodies.

This may show a need for a more proactive regulator, such as found by Short and Toffel (2008). There are many possible ways that state and industry can work together as discussed in Chapter 2. These involve industry bodies but with different expectations of, and support for, their role by the state. Self-regulation can be bolstered with a degree of regulation or the state could take on a more formal role monitoring compliance. But of course such courses of action have ideological dimensions and practical consequences.

The lack of real connection that the industry bodies had with the process within commercial leasing is very clear from the analysis. The engagement of industry bodies in the process of change, particularly the stage of theorisation has been highlighted. The findings from the Lease Code study support the importance of this engagement. Therefore government must incorporate mechanisms to ensure proper engagement. This may mean working more closely with the industry bodies to establish common ground in the pre-institutionalisation stage from which to move forward.

⁴⁴ Reported in EG 14 April 2001

7.3.2 Small businesses

Ideology has been suggested as a reason why industry self-regulation was a likely choice for government, and it may be why it was pursued over such a long period in commercial leasing (rather than resorting to legislation) despite its failings. However, as Brownsword (2006) noted, governments have been very willing to legislate in areas such as housing and employment and in consumer contracts. They have been less willing to legislate in business contracts. There is an apparent ideological resistance to ‘interfering’ in business contracts by regulating.⁴⁵ Politicians are keen to be seen to ‘cut red tape for business’⁴⁶ which generally means reducing regulation. Consequently they aim to reduce rather than add to the ‘regulatory burden’. These views further underpin the decision to promote self-regulation rather than legislation in commercial leasing.

It is apparent from the Lease Code study that, while those taking commercial premises are business occupiers, many of them are SBTs i.e. individuals or very small companies. These SBTs have been found to be frequently ill-informed and usually not advised; they sign leases without understanding the detail of their agreements or the implications of component clauses (Crosby *et al.* 2005 and Hughes 2007). The government increasingly recognised the issues around SBTs during the active life of the Code project, as did the industry bodies. At one point the BPF was apparently set to ask the government to legislate to enforce the Code for small businesses.⁴⁷ The issues were once again set in a retail context by Portas (2012) as she recommended support for SBTs and flexibility in their lease terms.

The implications are that perhaps a more interventionist approach is needed to small businesses in contexts where they are operating much like consumers. The distinctive feature seems to be that small businesses are often in situations where there is information asymmetry, as is the case in commercial leasing. In Australia there has long been legislation which aims to protect small retail tenants. According to Crosby (2006) this legislation deals with matters such as prescribing the provision of

⁴⁵ As shown in the initial debate on commercial leasing in the HoC by the minister’s comment that “The Government are very conscious of the dangers in regulating and interfering with well-established market practices for determining commercial rent levels” HC Deb 10 November 1992 vol 213 col 856.

⁴⁶ The current UK government has a website devoted entirely to this issue: <https://cutting-red-tape.cabinetoffice.gov.uk/>. Accessed 15 October 2015.

⁴⁷ Reported in EG 01 February 2003

information during and after lease negotiations, regulating and implying terms into leases, providing mechanisms for dispute resolution and outlawing behaviour seen as unconscionable conduct (defined as taking advantage of superior market power). The legislation varies from state to state and Crosby observes that is not without its problems regarding scope, definition and implementation. The political and economic context in Australia is of course somewhat different to the UK. Nevertheless, it provides an example of targeted intervention which recognises that business occupiers are not a homogenous group. It is an illustration of an approach to small businesses that is more akin to consumer legislation.

7.3.3 Industry bodies and public policy

Successive governments can be criticised for their handling of the attempt at self-regulation in commercial leasing and their approach to the industry bodies. Notwithstanding this, the Lease Code study raises questions regarding the approach of industry bodies, particularly professional institutions where the interests of the public and public policy differ from those of their members. It is recognised that industry bodies have split personalities and can be seen as economic and normative institutions (Gunningham and Rees 2002). The BPF has clear purpose as a collective body which promotes best practice but with the overall aim to promote the interest of its members. However, the RICS, as a professional body, has the public interest at its core through its charter. This remit to serve the public interest is, according to a recent RICS president, “what lifts us above being a trade body” (Brooke-Smith 2014). Therefore, regardless of the issues regarding the government’s approach, perhaps the RICS could have been expected to take a more active role and even to mandate its members to use the Lease Code. Yet a reason given for not mandating its use was the over-riding obligations of members to their clients (Crosby and Hughes 2009); even the more general instructions to members to disseminate the Code to tenants (when acting for the landlord) were tempered with a proviso that the client could veto this. Notwithstanding the circumstances surrounding the Lease Code initiative, the inability of the RICS to drive change may be a reflection of the modern professional institution and raise a question as to whether it can be said to really have the public interest at its core.

7.4 Directions for future work

The focus of this study has been on the role of industry bodies in the process of change, but in one specific market. There are many aspects within the broader sphere of property and the built environment where the process of change is underway and where industry bodies, particularly professional institutions are involved. These are areas that could be explored. For example, the property industry has begun to recognise the lack of diversity of those working in this field. There is increasing activity to try and address this. Initiatives have come from many sources, including the professions. Additional studies such as this would bring further evidence of whether industry bodies in the built environment were acting as agents of change, leading the way and legitimating new practices or conversely reinforcing existing practices. Such change can be investigated while it happens, creating opportunities for different data sources to be used.

Within such studies there can be further investigation of professional bodies, particularly with regard to their public interest obligations and change. The Lease Code experience has highlighted potential issues here which may raise the question of whether the nature of the professional body is changing to such an extent that it no longer can be said to serve the public interest (if it ever did)?

There is also the opportunity to take the same approach to studies in other industries with a different set of industry bodies. Useful comparisons may be made from such studies.

It has been suggested in the current study that the approach taken by government has had a significant effect on the outcome of the Lease Code initiative and on the industry bodies' ability to perform their roles within it. Future work could include studies of other schemes of self-regulation which are government-led. It may be that commercial leasing is a special case; additional studies of other schemes are needed to determine if the ideas regarding government involvement have wider explanatory power.

The model of institutional change was shown to be a framework capable of revealing fundamental problems within the commercial leasing change process. Using it raised questions regarding the time taken to get through the process and the linearity of it.

Undertaking further studies such as this will enable the model of institutional change to be further tested, including the sequencing and the importance of the various stages particularly theorisation. It may then be perhaps refined as a framework for understanding the nature of the process in different change situations.

Through such a range of further work, the process in institutional change in an industry, and the role of industry bodies within this, may be better understood.

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