Business Tenant Protection – For whom? For what? How?

*Security of tenure within UK, Swedish and Australian law**

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Abstract

Business tenants in many countries are seen to be in need of tenant protection with respect to unfair lease terms and other exploitations by landlords.[1] Small business tenants are particularly vulnerable at the end of a lease term. Harsh and oppressive behaviour by unscrupulous landlords demanding excessive rent increases or substantial one-off fee payments as conditions for renewing business leases has historically forced many tenants to submit to landlord demands even at the risk of business failure.[2] The purpose of providing tenants with statutory protection at the end of a lease term primarily is to balance the bargaining powers of the parties. Providing tenants with such protection reduces their risks for economic losses, affecting the balance of the parties' bargaining powers throughout the entire lease term.

A comparative perspective is used here to explore the different legal approaches and solutions to business tenant protection at the end of a lease

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1 On the historical enactment of statutory codes for tenant protection in most European countries by the end of WWI, see Michael Haley, 'The statutory regulation of business tenancies: private property, public interest and political compromise' (1999) 19 Legal Studies 207, 208 and therein stated sources.

2 See Michael Haley, *The Statutory Regulation of Business Leases* (Oxford University Press, 2000) para. 1.02, note 5; Hyman Tarlo, 'Pioneering in the Deep North: Tinkering with Shop Leases' (1987) 8 The Queensland Lawyer, 67, 77 and 81–82; Fritjof Lejman, *Den nya hyresrätten efter hyresregleringens avskaffande* (Norstedt, 1976) para. 1.2.

term as found in the United Kingdom (UK), Sweden and Australia. The complexity of regulating and balancing the parties' interests, rights and responsibilities at the end of a lease term in the diverse business tenancy market is examined and analysed. Whether it is possible, feasible or even desirable to legislate tenant protection that fits all interests and purposes is a main theme in this work. A form of tenant protection is sought that at the same time is efficient and flexible. It must be efficient enough to provide protection for tenants, such as the small barber shop on the street corner, and also flexible enough to allow tenants to negotiate at arm's length to create and formulate the lease that they want, for example, an international retail company holding a tenancy of large prime location premises.

Balancing interests through tenant protection at the end of a lease term

Business leases are commercial contracts, and as such, are governed by general contract law and principles. In essence they can be regarded as any other commercial contract. In the countries examined here, business leases are also governed by property law and specific landlord-tenant regulations as adopted in all three countries. The extensive and diverse mass of rules and principles governing business leases in the examined countries are reasons to categorize business leases as a specific type of commercial contracts. A core issue in landlord-tenant law is striking a balance between the competing interests of landlords, tenants and the public. The interests of landlords include managing and using the property in a suitable manner and to be able to fully exercise ownership rights in accordance with the principle of freedom of contract. The interests of tenants include being able to conduct business in the premises on reasonable terms for as long as it wishes to do so. The public interest is in an economically efficient use of land, which in actuality is not simply an interest. Efficient land use is also a fundamental aim, creating and maintaining functional business lease markets. Such markets are essential for economic growth, creating and maintaining work opportunities and providing local communities with needed services.[3]

This article compares and analyses different ways of balancing these interests at the end of a lease term. The purpose is to provide a better under-

[3] See Michael Haley, 'Section 30(1)(g) of the Landlord and Tenant Act 1954: the unjust relegation of renewal rights' (2012) Cambridge Law Journal 118, 146.

standing as to the legislative challenges and effects resulting from certain approaches to tenant protection at the end of a lease term. Even though the solutions to tenant protection in the chosen countries currently differ, historically the regulative debates and discussions on how to formulate tenant protection at the end of a lease term in these three countries have focused more or less on the same fundamental problems. For example, business tenant protection in Australia explicitly aims at small business retail tenancies. Categorizing business leases ensures that protection is only provided for certain categories of tenants who are in an inferior bargaining position and at risk of suffering economically. In the UK and Sweden, although tenant protection in these countries also aims at protecting those tenants in an inferior bargaining position, landlord-tenant acts are applicable to all business tenancies. Even though tenant protection is applicable to all business tenancies in the UK and Sweden, this does not, however, mean that including only a certain category of business tenants under tenant protection has not been considered in these countries. A categorization of business leases to provide tenant protection exclusively for those business tenants perceived in need of protection has also been present in earlier regulation and discussions in the UK and Sweden. The division of tenants into different categories however in both countries was rejected in favour of creating a more easily applicable and foreseeable system.[4]

Another example of similarities with regard to previous regulations in the different countries is the form of tenant protection at the end of a lease term. According to previous regulations in Sweden during the WWII era, certain business tenants had a right of renewal in its true sense, similar to the current UK form of security of tenure.[5] The right of renewal, however, was removed in favour of the solution of compensation, as the right of renewal was found to be detrimental to landlords and public interests. In the late 1920's, the primary UK business tenant protection was in the form of right

[4] In both the UK and Sweden, earlier regulation of tenant protection at the end of a lease term was only provided for business tenants capable of producing goodwill. Charitable institutions, manufacturers etc., that did not attract good will were not covered by the protection. See the cat, rat and dog, metaphor by Scrutton LJ in *Whiteman Smith Motor Co v Chaplin* [1934] 2 KB 35, 42; Haley (1999) (n 1), 219; See also SOU 1938:22, 133.

[5] See Lagen (1942:429) om hyresreglering m.m.; Lagen (1956:568) om rätt i vissa fall för hyresgäst till nytt hyresavtal; Prop. 1939:166, 138–139. In 1969 the temporary solution of right of security of tenure for business tenants was transformed into a right to compensation, Prop. 1968:91 Supp. A, 33, which with a few adjustments is still in force today, see Prop. 1970:20 A, 1; See further SOU 1966:14, 300.

to compensation, similar to the current Swedish form of protection, which was later removed because it was found to be an insufficient and administratively burdensome form of protection.[6]

The identified similarities as to historical discussions and debates, as well as with regards to earlier proposed and attempted solutions, combined with the current differences in legislation and chosen approaches, makes the comparison between UK, Swedish and Australian legal approaches interesting both academically and practically. General issues related to business tenant protection at the end of a lease term can be traced, identified and analysed, and the comparison used to explain and explore those particular problems and effects that might follow from a certain approach to tenant protection.

Even though the discussion here is based on UK, Swedish and Australian law, the underlying issue of finding an efficient and fair balance between the interests of landlords, tenants and the public is an issue that is of a general nature, and the discussion and conclusions regarding the different approaches can be useful for countries other than those examined here. They are relevant for the development of a wider knowledge of the implications following from the different approaches to tenant protection at the end of a lease term, whether based on mandatory rules, information or general principals of fairness.

This article is structured around three fundamental issues: For whom should tenant protection be provided? What should be the aim of the protection? In what form should tenant protection be provided? These questions highlight the principal issues relating to business tenant protection at the end of a lease term in the respective countries. The different approaches, debates and concerns in the UK, Sweden and Australia are used here to explain and analyse particular problems and effects that might follow from the different approaches to tenant protection.

The following examination illuminates and analyses different ways of balancing the interests of landlords, tenants and the public by implementing tenant protection at the end of a lease term. Some general issues of tenant protection at the end of a lease term are first described and compared. This is to provide an outline of the general concerns, more or less similar in all

[6] The only way of enhancing the protection under a right to compensation scheme was found to be an increase in compensation from the current form, similar to the current Swedish form. Such an increase was, however, found to be as intrusive for landlords as security of tenure, with the disadvantage of it being less effective than a right of renewal, a second best option. See Haley (1999) (note 1), 218 and therein stated sources.

three countries, of formulating tenant protection at the end of a lease term. Core issues of the chosen approaches in the three examined countries are then analysed in separate sections; the possibility to opt-out of tenant protection, compensation following eviction, application of tenant protection only to small businesses and the form of tenant protection provided either by landlord-tenant laws or by application of general principles of fairness. Concluding remarks and evaluations of the different approaches are provided in the final section, including that the different issues experienced in the examined countries could be reduced by using a combination of the three different approaches.

General issues as to tenant protection at the end of a lease term

Tenant protection at the end of a lease term as provided by landlord-tenant law

The underlying principle for tenant protection at the end of a lease term in the UK is security of tenure. Security of tenure in essence is a right for the tenant to stay in the premises with a new grant or a renewal of the lease after the end of a lease term.[7] The principle underlying the right of security of tenure is to give a tenant who has established its business in the leased premises an indefinite possibility to pursue the business in the premises for as long as it wishes to do so.[8] The principle of security of tenure was enacted to protect the interests of vulnerable small business tenants in the difficult post-World War II era. The existing extreme market conditions at that time, with acute shortages of available premises, made tenant protection at the end of a lease term a question of national interest.[9] The tenant-friendly principle of security of tenure since the 2004 reform has been diminished by the possibility to contract out of the statutory protection. The effects and issues with regard to the possibility to contract out of the statutory protection are discussed further below.

[7] A request for a new tenancy has to be made in statutory form, LTA 1954 s. 26(2); SI 2004/1005 Sch.1 Form 3. A new tenancy is then granted by the court by application, unless the landlord establishes at least one statutory ground of opposition.

[8] See Lord Wilberforce in *O'May v City of London Real Property Co Ltd.* [1983] 2 AC. 726, 747, and Megarry & Wade, *The Law of Real Property* (Sweet & Maxwell, 8th ed, 2012) para. 022-023.

[9] See Haley (1999) (n 1), 212.

The UK approach to balancing the interests at the end of a lease term according to a principle of security of tenure differs from the Swedish approach. In Sweden, the balance of interests with regard to the chosen form of tenant protection at the end of a lease term leans more towards protecting the landlords' interests of freedom of ownership and freedom of contract.[10] According to the provisions of chapter 12 in the Land Code (LC), landlords are always free to end non-residential leases at the end of a lease term at will. The non-residential tenant has no right of renewal. The interest of the tenant to be able to pursue its business for as long as it wishes to do so is indirectly met by a right to compensation for unjust termination.[11] If a landlord terminates a lease without just cause, or if a landlord has offered a tenant renewal but on unreasonable terms, the landlord will have to compensate the tenant for any, and all, economic losses that it suffers because of the termination.[12]

The Swedish right to compensation aims at protecting the tenants' economic interests and in contrast to the UK security of tenure, does not offer tenants any real relief from the risk of having to vacate the premises. The purpose of this solution is partly to uphold the landlords' interests of managing and making use of property according to their wishes, partly to promote the general interest of an economically efficient land use. The assumed position of the legislator is that inherent for an economically efficient land use is that landlords are able to change the use of the premises if it is economically viable to do so, and that the interests of tenants to remain in premises to pursue business cannot supersede this general interest.[13]

The Australian approach to tenant protection and balancing of interests at the end of a lease term differs from both the UK and Swedish approaches. One significant difference is that the regulation of business tenancies in Australia is divided into three segments with varying statutory tenant protection. These three segments are retail leases, small business leases and other commercial leases, regulated in different ways and at different levels. To begin

[10] As to the principle of freedom of land ownership, that the owner of the property is free to use, let or sell the property in any way that she or he sees fit, see Richard Hager, 'Jordägandets frihet och jordabalken' (2013) Svensk Juristtidning 686, 686–708.

[11] The right to compensation is generally applicable to business leases. Short leases under nine months are exempted from and not covered by the right to compensation. A tenant that is in substantial breach of contract, leading to forfeiture under ch. 12 § 42 LC, is also excluded from the protection, see ch. 12 § 56 p. 1–2 LC.

[12] See ch 12 § 57 LC.

[13] On the purpose of the right to compensation, *indirekt besittningsskydd*, see, for example, SOU 1961:47, 47.

with, common law is applicable to all leases.[14] On the federal level, since November 2016 by the extension of the Australian Consumer Law (ACL), there is also protection for small business leases against unfair terms.[15] On the state and territory level, retail legislation is applicable to retail leases, specifically to retail leases in shopping centres.[16]

The effect of the multi-level legislation is that there is no legislative homogeny, no 'Australian approach' in a literal sense as there is in the UK and Sweden. However, even though all Australian states and territories have adopted their own legislation on retail tenancies, the legislations of all eight Australian states share some fundamental similarities making it possible, for the discussion and conclusions drawn in this article, to take all states and territories legislation in consideration for the purpose of comparison.[17]

Of the three above-mentioned segments of regulation of business leases, tenant protection at the end of the lease is only explicitly formulated in the state retail legislation.[18] The Australian approach as expressed in the retail legislation as to tenant protection at the end of a lease term has a slightly different aim than the UK and Swedish approaches. Most Australian states have adopted a particular form of protection at the end of a lease term for certain

14 See Anthony Moore (ed.), *Commercial and Residential Tenancies: The Laws of Australia*, 1 December 2014, Westlaw, paras. 28.7.150–28.7.500.

15 See The ACL, in Schedule 2 of the Competition and Consumer Act. As amended in November 2015 by the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (the 2015 Bill) This amendment extended the unfair contract terms protections of the ACL (Part 2–3 of Schedule 2), previously applying only to 'consumer contracts', to also include 'small business contracts'.

16 See: Australian Capital Territory (ACT), Leases (Commercial and Retail) Act 2001; New South Wales (NSW) Retail Leases Act 1994; the Northern Territory (NT) Business Tenancies (Fair Dealings) Act 2003; Queensland (Qld) Retail Shop Leases Act 1994 (Qld); South Australia (SA) Retail and Commercial Leases Act 1995 (SA); Victoria (Vic) Retail Leases Act 2003; Western Australia (WA) Commercial Tenancy (Retail Shops) Agreements Act 1985; and Tasmania (Tas) Code of Practice for Retail Tenancies, The Code of Practice is given legislative force in Tasmania by the Australian Consumer Law (Tasmania) Act 2010, s. 49 and Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas), Sch 1.

17 See, for example, Duncan, who argues that there is a general agreement on basic principles between all the states, specifically on the right of five years, William D Duncan, 'Towards a uniform retail tenancy code for Australia – punching at shadows?' (2000) 28 Australian Business Law Review 246, 248–249; see also William D Duncan, 'The regulation of Commercial Tenancies: Heading for the sunset?' (1990) 12 Bond Law Review 28, 37–38.

18 Tenant protection in state retail legislation is augmented by general provisions regarding unconscionable conduct, the Trade Practices Act 1974 (Cth), Part IV of the Trade Practices Act 1974 (Cth) (as amended in 1998 to include small businesses).

categories of tenants, primarily retail tenants in shopping centres. The protection chosen in six out of eight Australian states is a right of a minimum five-year term.[19] The underlying purpose of the right of a minimum five-year term is primarily to protect the tenant from not being able to amortise costs during the first most uncertain period of a new business.[20] The statutory right to a minimum five-year term is based on the economic reality that it is often difficult for small business retail tenants to successfully negotiate provisions with landlords that ensure tenants a possibility to recoup initial investments that they might have had to make when starting a business in new premises.[21]

In the two Australian states that have not adopted a right of five years, tenants instead have a right of preference.[22] The right of preference requires landlords to make written offers to tenants in possession before entering a new tenancy agreement with another possible tenant.[23] The right of preference does not give the tenant any right of renewal per se, but if the landlord has not respected and followed the procedure of making a written offer in time, the tenant has a right to a six-month extension of the term and might also be entitled to compensation.[24]

[19] A lease term that is less than five years is either to be extended to five years, or optionally extended by the tenant with an option to renew for a period that brings the total term to five years. Leases (Commercial and Retail) Act 2001 (ACT), s. 104; Business Tenancies (Fair Dealings) Act 2003 (NT), s. 26; Retail and Commercial Leases Act 1995 (SA), s. 20B(1); Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas), Sch. 1 Pt. 2 cl 10(3); Retail Leases Act 2003 (Vic), s. 21; Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA), s. 13(1).

[20] See William D Duncan et al, *Commercial Leases in Australia* (Thomson Reuters Australia, 7th ed, 2014), 406, and Tarlo (1985) (n 2), 82.

[21] The aim of the right of five years is presumed to give small business tenants sufficient time to establish new businesses and goodwill, see Adrian Bradbrook, 'The new era of tenancy protection' (1987) 61 Australian Law Journal, 593, 606; and Tarlo (1985) (n 2), 83.

[22] See Retail and Commercial Leases Act 1995 (SA), from s. 20D, and the Leases (Commercial and Retail) Act 2001(ACT) from s. 108.

[23] Under the ACT, the landlord must no later than six months but no earlier than 12 months before the expiry of the lease begin negotiations with the tenant for the renewal of the lease, Leases (Commercial and Retail) Act 2001 (ACT), s. 109(1); See also Retail and Commercial Leases Act 1995 (SA), s. 20D(1).

[24] Retail and Commercial Leases Act 1995 (SA), s. 20G, and Leases (Commercial and Retail) Act 2001 (ACT), s. 112.

Tenant protection at the end of a lease term by general provisions of fair terms in consumer contracts

Tenant protection at the end of a lease term might be available also on the Australian federal level since November 2016 and the extension of the application of the ACL to small businesses. The ACL is applicable to small business tenancies if one of the parties, at the time when the contract was entered into, employed fewer than 20 persons, and if either the upfront price payable does not exceed AUS $ 300,000 or the contract has a duration of more than 12 months and the upfront price payable does not exceed AUS $ 1 million.[25] An unfair term is void under the ACL.[26] The primary definition of an unfair term is if it causes a significant imbalance in the parties' rights and obligations under the contract, and if it is not reasonably necessary to protect the legitimate interests of the landlord, and if reliance on the term would cause detriment to the tenant.[27]

Whether tenant protection at the end of a lease term can be provided for small business tenants by the application of the ACL is not clear. This ultimately depends on how the courts interpret and apply 'unfair' to small business leases.[28] Until a sufficient amount of case law has been established regarding the issue of tenant protection at the end of the term, it remains uncertain as to what extent, for example, refusing to renew or only offering to renew under certain conditions, might be considered unfair.[29] Courts according to the ACL are generally free to take the matters they find relevant into account when determining whether a condition is unfair. The courts, however, must always take the contract as a whole and the extent to which

[25] Competition and Consumer Act 2010 – Schedule 2 The Australian Consumer Law, (ACL) part 2–3, s. 23(4).

[26] ACL, s. 23(1).

[27] See ACL s. 24(1)a–c, and also ACL s. 26, certain key terms cannot be deemed unfair, such as the upfront price payable.

[28] Webb is cautiously positive about the possible effect of an extension of the application of general provisions of fairness on business leases, arguing that there might be a difference as to fairness in business leases if the courts are prepared to leave the common law principles of the sanctity of contract and move towards a general protection against unfair conduct in small business dealings, Eileen Webb, 'Considering unfairness in retail leases – A bridge too far or justifiable extension?' (2010) 19 Australian Property Law Journal 58, 102.

[29] As the Economics Legislation Committee formulated in the legislative bill, "the determination of a contract as 'unfair' is a holistic exercise", see The Economics Legislation Committee, Treasury Legislation Amendment (small Business and Unfair Contract Terms) Bill 2015, September 2015, para. 2.6.

the provision is transparent into account.[30] An example of a term that might be unfair is whether the existing tenant was compelled to agree to pay a significant sum for renewal of the lease when the same condition was not included for other tenants.[31]

Even though the impact of the amendment of the ACL for the moment is uncertain, a few remarks can be made as to its possible outcomes on small business leases and whether its application on small business leases may lead to changes regards tenant protection at the end of the lease. Examples of problems that small business tenants might encounter at the end of tenancies include that the landlord refuses to renew the lease or only offers to renew the lease if the tenant agrees to certain conditions such as paying a substantially higher rent. Conditions such as these might, in comparison to some of the examples of unfair terms given in the ACL,[32] be determined unfair by a court.[33]

Terms of a new tenancy

Regardless of the approach chosen, any form of tenant protection at the end of a lease term will fail if there are no restrictions as to the terms landlords can demand for renewal. For example, the UK right to security of tenure and the Australian right to a minimum of five years would not provide tenants with sufficient protection if tenants were not entitled to renewal on reasonable terms. The Swedish approach, based on compensation following eviction, would also be rather 'toothless' without the supplement of the above-mentioned requirement for landlords to economically compensate a tenant who

30 See The ACL s. 24(2).

31 See Neil Crosby, Sandi Murdoch and Eileen Webb, 'Landlords and Tenants Behaving badly? The application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom' (2007) 33 University of Western Australia Law Review 207, 221.

32 The ACL lists terms that can be viewed as unfair. See The ACL s. 25(1) a–n. Of interest for the determination of unfair contract terms regarding the parties' rights and obligations at the end of the lease for small business leases are terms that permit, or have the effect of permitting, one party to unilaterally terminate the contract, renew or not renew the contract, and terms that penalise or has the effect of penalising, only one of the parties for a breach or termination of the contract, see The ACL s. 25(1) b, c and e.

33 See Webb (2010) (n 28), 62–67; See also the discussion by Crosby et al about which effect an extension of the application of the Fair trading Act (1999)(Vic) to leases might have on the parties' rights and obligations at the end of the term, see Crosby et al (2007) (n 31), 242–243.

has been given an offer to renew the lease but on unfair or unreasonable terms.

In the UK, the terms of a new tenancy are determined by the court with respect to the lease terms requested for renewal and all other relevant circumstances, such as break clauses, rent review clauses or guaranty provisions.[34] The new terms are determined with respect to what the court deems reasonable. For example, the duration of the tenancy is to be determined to what the court find reasonable with a maximum length of fifteen years. Further, the rent is to be determined at a market rent equivalent, disregarding any goodwill or other improvements made by the tenant that might be reflected on the rent level for the premises on an open market.[35]

In Sweden, since there is no right of renewal for business tenancies, there are no legal requirements as to the terms that are to apply on a new tenancy. However, if the parties have in fact negotiated for a new lease, then the tenant's right to compensation, if the tenant does not agree to the landlord's terms, is dependent on whether the landlord has offered to grant a new lease on reasonable terms.[36] Even though the landlord cannot be forced to enter into a new lease on any terms, the landlord might be compelled to pay damages if it fails to offer a new lease on reasonable terms. One of the most important provisions in the assessment of fairness is the offered rent. The rent is fair if it is equivalent to the rent that the premises might reasonably be expected to be let for on the open market, and is calculated in a predictable and precise manner.[37] The rent level of the offered lease, however, is not the only term that has to be reasonable and fair. The whole agreement is measured as against fairness and a tenancy that is not consistent with the provisions of chapter 12 LC is per definition not fair, and such provisions

[34] LTA 1954 part II s. 35; See also Megarry & Wade (2012) (n 8) para. 22-023.

[35] See Megarry & Wade (2012) (n 8) para. 22-023.

[36] Ch 12 § 57 p. 5 LC.

[37] See ch 12 § 57a LC, Rent can only be based on the calculations methods mentioned in ch. 12 § 19 LC, these are rents determined by negotiations between landlord and tenant organisations, turnover-based rent, and for agreements longer than three years, index-based rent (normally based on CPI); See further Prop. 1973:23, 62 and 160; SOU 1978:8, 95; SOU 1987:47, 112 ff.; Prop. 1987/88:146, 38–40; Prop. 2001/02:41, 62–64; The Swedish Supreme Court Case NJA 1986 p. 503 regarding unforeseen costs as part of the rent calculation; See also, generally regarding rent calculation, Lejman (1976) (n 2), 181 and Jan Hellner et al, *Speciell avtalsrätt II Kontraktsrätt – Särskilda avtal* (Norstedts, 5th ed, 2010), 316.

cannot be invoked against the tenant and would not be considered fair if offered to the tenant.[38]

In Australia, a lease that is extended pursuant to the statutory right to five years is in principle extended on the same terms as the lease before the extension.[39] Changes of the terms might be necessary, for instance, if the agreement does not entail provisions that ensure that the rent can vary during the term.[40] New terms or adjustments of terms might also be agreed upon by the parties, or by court order if either party has applied for a judicial order varying the terms.[41]

In the two Australian states that have adopted a right of preference, the requirements for new terms are that the terms of the offer to the tenant in possession have to be on terms comparable to and not less favourable than the terms offered to the other party.[42] Thus the right of preference does not include a right to 'fair terms' or even the same terms as the previous lease, only the same terms or at least not less preferable than the terms offered to the other possible tenant. Following the offer of renewal or extension, negotiations are to be continued during an acceptance period that has to be at least 10 business days.[43]

Statutory grounds for opposition

In all the examined countries, tenant protection at the end of a lease term is to some extent limited by statutory grounds for opposition.[44] The statutory grounds for opposition are certain conditions under which landlords in the UK are not obliged to agree to renew the tenant's lease, and Sweden are not

[38] Provisions that are in breach of the mandatory provisions in ch. 12 LC are void, see ch. 12 § 1 s. 5 LC.

[39] Leases (Commercial and Retail) Act 2001 (ACT), s. 105(2).

[40] In Victoria, it is possible to include a provision to the effect that the rent will be reviewed to current market rent at the commencement of the extended period. Retail Leases Act 2003 (Vic), s. 21(7) and s. 37.

[41] See Leases (Commercial and Retail) Act 2001 (ACT), s. 105(3) – (5).

[42] The landlord has to provide the tenant in possession with a copy of the proposed lease (as renewed or extended) and the disclosure statement or proposed disclosure statement, Leases (Commercial and Retail) Act 2001 (ACT), s. 109(2). The landlord's offer must also specifically state it is being made in accordance with s. 109.

[43] Leases (Commercial and Retail) Act 2001 (ACT), s. 109(4) and Retail and Commercial Leases Act 1995 (SA), s. 20E(3).

[44] Tenant protection at the end of a lease term in both countries is also limited by the rules of forfeiture; see LTA 1954 part II s. 24(2) and ch. 12 § 42 LC.

required to pay compensation.[45] In Australia, retail legislation that offers tenant protection by way of a right of five years does not provide statutory grounds for opposition for landlords. However, the two states that have chosen a right of preference as the primary protection, South Australia (SA) and the Australian Capital Territory (ACT), have also adopted provisions providing statutory relief under which landlords are allowed to refrain from giving a sitting tenant a right of preference.

The statutory grounds for opposition demonstrate the fundamental issue of balancing landlord ownership rights, tenant protection and the public interest of maintaining a functional and economically effective leasing market.[46] The statutory grounds for opposition also demonstrate the general aim of landlord-tenant acts as to promoting procedural economy as the clearly defined examples of when landlords are entitled to oppose renewal are partly aimed at reducing conflicts.

There are seven grounds for opposition in the UK.[47] The first three grounds hold that protection is only provided for tenants that are well-behaved and not in substantial breach of contract. The fourth ground holds that protection is not given to a tenant that has had the opportunity, but failed to utilize, its possibility to reduce losses by accepting an offer of other premises on reasonable terms. The fifth, sixth and seventh grounds for opposition uphold the landlord's interest of managing the property in any way that it sees fit and the societal interest of well-maintained properties. The fifth ground holds that the landlord is entitled to oppose renewal if it wishes to make a profitable change of the use of the property, if the let premises are part of larger premises and the landlord can obtain a substantially greater rent by letting the premises as a whole. The sixth and seventh grounds are dependent on the landlord's intent to demolish or reconstruct the premises, and intent to occupy the premises for its own use of the premises for either business or residential purposes.

[45] According to ch. 12 LC, the right to compensation is limited by the statutory grounds of opposition as laid down in ch. 12 § 57 LC. If the tenant due to the rules of § 57 is no longer entitled to the statutory protection at the end of the lease, the tenant has no right to compensation.

[46] Regarding the explicit aims and considerations underlying the Swedish statutory grounds for opposition, see, for example, Prop. 1967:141, 65; Elisabeth Ahlinder, 'Har hyreslagens besittningsskyddsbrytande grunder ett inbördes hierarkiskt förhållande?' (2011/12) Juridisk Tidskrift 576, 576–583.

[47] Pt II of the LTA 1954 s. 30(1) (a–g); See further Megarry & Wade (2012) (n 8) paras. 22-014–22-021.

The five statutory grounds for opposition in Sweden are largely similar to the UK grounds and display a similar weighing of interests. The first statutory ground for opposition is that the tenant is in breach of contract and the landlord cannot reasonably be forced to settle with the tenant as a contracting party. The next two concern where the landlord intends to demolish or renovate the premises. The fourth is where the landlord has other justified reasons for terminating the lease (a general clause). The last concerns those cases where the tenant does not accept the landlord's offer to grant a new lease, though the landlord's terms and conditions are fair and reasonable.[48]

The statutory grounds for opposition in Australia are similar to those in the UK and Sweden.[49] For example, as in the UK and Sweden, the right is only given to tenants that are not in breach of the lease, substantially or persistently, and there is a possibility for the landlord to refrain from giving preference if the landlord requires vacant possession of the premises in order to demolish or renovate it. The landlord is also allowed to make an offer to another possible tenant if it would be substantially more advantageous to the landlord to do so than to renew or extend the current tenant's lease. The landlord may also refrain from giving the current tenant preference if the landlord reasonably wishes to change the tenancy mix within the shopping centre. This ground for opposition relates to the limitation of the application of retail tenancy laws to shopping centres, and therefore is not seen in either the Swedish or UK grounds for opposition. Further in SA, the landlord does not have to give preference if it does not propose to re-let the premises for six months following the end of the existing term and requires vacant possession of the premises during this six-month period.

Core issues in the UK, Sweden and Australia – Problems, proposals and reforms

The general outline above provides an overview of the different approaches to tenant protection in the chosen countries. The following focuses on core issues and experienced problems in these respective countries. The core issues are of a different character. The UK form of tenant protection by security of tenure, in place since 1954, is neither perceived to be a problem or ques-

[48] Ch. 12 § 57 LC; See further Anders Victorin et al, *Kommersiell hyresrätt* (Norstedts, 4th ed, 2017), para. 4.3.

[49] See Leases (Commercial and Retail) Act 2001 (ACT), s. 108 and Retail and Commercial Leases Act 1995 (SA), s. 20D(3).

tioned per se. Security of tenure is regarded as the most efficient form of tenant protection at the end of a lease term, as it protects the tenant's primary interest, the possibility to be able to pursue its business in the premises for as long as it wishes to do so.[50] The main issue in the UK instead is the fact that it is possible to opt out from the statutory protection by lease provisions, leaving a majority of those small business tenants contracting such without any protection.[51]

The Swedish form for tenant protection is also not questioned as to its form. The right to compensation is perceived overall as an effective and balanced approach to tenant protection. The main issue instead is the calculation of reasonable compensation. The basis for such a calculation in Sweden is complex and can result in unexpectedly high compensation to tenants for unjust termination of contracts. In Australia, the efficiency of the chosen form, the right to five years, has in contrast been discussed and criticised repeatedly over the last twenty years.[52] Perceived problems with the current tenant protection under retail legislations include, for example, the amount of legislation, which is perceived as an encumbrance, and the definition of the applicable tenancies as to tenant protection.

Opting out of statutory protection

Flexibility, informed decisions and balancing the parties' bargaining positions

In all the examined countries, the landlord-tenant acts include possibilities for the parties to opt out of the statutory protection at the end of a lease term.

50 See Haley (1999) (n 4), 227.

51 See, for example, Michael Haley, 'Reforming business tenancies: a critique of the current proposals' (2003) Journal of Business Law 252, 253–254 and 266.

52 There have been a number of reports and reviews since the early 1990's on retail legislation, emphasizing the need to balance the competing interests of the retail tenancy market, on both state and federal levels. Proposals for enhancement of tenant protection at the end of the lease were first made in 1997 in the Reid report. See for example: House Standing Committee on Industry, Science and Technology, Small business in Australia: Challenges, problems and opportunities, January 1990; House Standing Committee on Industry, Science and Resources, Finding a Balance: Towards Fair Trading in Australia, May 1997; Joint Select Committee on the Retailing Sector, Fair Market or Market Failure, A review of Australia's retailing sector, August 1999; The Market for Retail Tenancy Leases in Australia (August 2008); Economic Structure and Performance of the Australian Retail Industry (December 2011); and Relative Costs of Doing Business in Australia: Retail Trade (September 2014).

The form for opting out, however, differs substantially, as do the effects the opt out has on the general tenant protection.

In Sweden, the right to compensation for an unjust termination of a business lease is perceived as a fundamental part of the tenant protections provided by chapter 12 LC.[53] The importance of the rule's general application is emphasised by the legislator by the fact that it is formulated as a mandatory rule instead of a default rule. However, that there are reasons for making exemptions from the general application of the right to compensation in certain circumstances is recognized. To ensure that the possibility to opt out does not shift the intended balancing of the bargaining powers that the right to compensation encompasses, the fundamental rule is that only a tenant that already has a right to compensation for non-renewal without just cause is allowed the right to waive the protection. According to chapter 12 § 56 LC, the parties can choose to opt out from the protection if this is agreed to nine months after entering into the lease. At this time, the tenant is automatically covered by the protection of the act, and the landlord is no longer perceived as being in a superior bargaining position.[54]

It is, however, also possible for landlords and tenants under certain circumstances to opt out from the provisions in chapter 12 §§ 57–60 LC at an earlier point than nine months. The possibilities to opt out earlier from the right to compensation are limited to only either under certain circumstances, for example, if the tenancy is sub-let and the landlord's own agreement is to expire,[55] or if the parties apply for and are granted approval by the rent tribunal.[56] The exemptions are formulated to ensure that there is no misuse.

The UK and Australian approaches are primarily based on an requirement that the landlord properly inform the tenant about the statutory protection at the end of a lease term, and the effects that will follow if the tenant chooses to waive this right. This is in contrast to the Swedish approach based

[53] See Victorin et al (2017) (n 48) para. 4.1.

[54] Prop. 1967:141, 59.

[55] The exemptions are: if the agreement is for a duration of a maximum five years and only if the contents of the agreement include that §§ 57–60 are not to be applicable between the parties since the landlord intends to use the premises for conducting its own business in the premises, or if the tenancy is sublet and the landlord's own agreement is to expire. For such an agreement to be binding upon the parties according to ch. 12 § 56 LC, the opting out has to be stated in a separate agreement and it can only be restricted to allowing for the parties to agree on terms that are in contradiction to §§ 57–60.

[56] The parties' are allowed to apply for tribunal approval even before entering into the contract. See ch. 12 § 56 LC, if tribunal approval is granted, the lease will not be covered by §§ 57–60 for the reminder of the lease period and any further lease period.

on the fundamental principle that only a tenant who has a statutory right to compensation can be allowed to waive this right. In the UK, it is possible for the tenant to opt out of the statutory protection by agreement alone. There are legal requirements of statutory notice that need to be met. The 1954 Landlord and Tenant Act (LTA) entails formal requirements regarding acknowledgment that the landlord has informed the tenant that it is waiving its rights and that it fully understands the effects that this will have on the lease.[57] But there is no corresponding obligation to get a written certification from a certified lawyer, as the Australian requirements of a certified exclusionary clause. The main objective of the requirement is to ensure that the tenant is aware of its rights and what effect waiving them will have on the lease. In Australia, the right of a minimum of five years and the right of preference can be opted out from in several states by a certified exclusionary clause. This can be the case only where the lease expressly excludes the five-year minimum term, and provides, for example, that a lawyer or a licensed conveyancer who is not acting for the landlord certifies in writing that the tenant has been informed about the effects of waiving the right of five years or of preference.[58] A certified exclusionary clause endorses that the tenant signed the agreement and agreed to the exclusion without any coercion, and that the tenant before signing the lease has been informed of the effect of the provision and of the right that is being waived.

Flexibility and administrative relief versus tenant protection

The different approaches in the UK, Sweden and Australia cause different kinds of problems for landlords and tenants. The following examines the problems associated with creating an effective form of protection that is easy to administer and also offers the parties the flexibility to opt out from the protection when it is not needed. The main issues regarding the legislative form of a possibility to opt out are outlined first by a description of the UK parliamentary discussions and decisions from the initiating of security of tenure in pt II of the 1954 LTA leading up to the 2004 reform. A comparison of the national different approaches is then made.

[57] See LTA 1954 s. 38A(1). Another option is that the parties can agree a surrender LTA 1954 s. 38A(2).

[58] Business Tenancies (Fair Dealings) Act 2003 (NT), s. 26(4); Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas), Sch. 1 P.t 2 cl 10(4); Retail Leases Act 2003 (Vic), s. 21(5). Leases (Commercial and Retail) Act 2001 (ACT), s. 111; Retail and Commercial Leases Act 1995 (SA), s. 20D(d).

The UK possibility to opt out from the statutory protection of security of tenure by way of agreement is a relatively new reform. The reform, effective 2004 through the amendment to the 1954 part II LTA, marked the end of a seemingly well-functioning system of security of tenure. The amendment and shift towards an effectively voluntary protection at the end of a lease term was to uphold the fundamental principle of freedom of contract and to reduce administrative burden and cost for both the parties and the Courts. The 2004 reform was initiated in 1969 by an alteration of the provisions of Pt II LTA 1954 by which parties where given the possibility to opt out of the security of tenure if they had obtained the sanction of the court before the tenancy was executed.[59] The Law Commission acknowledged in 1992 that the possibility to opt out from the protection was widely used. The conclusion drawn by the Law Commission, from the fact that opting out from the protection had become the norm and not the exception, was that the requirement of applying for permission was perceived as an unnecessary administrative burden. This conclusion was based on the fact that the courts, which were unable to interfere with a contract executed by business people who were properly advised by lawyers, almost invariably granted the request.[60]

The Law Commission's conclusion is surprising since in its 1992 report, it emphasised that the 1954 Act was not in need of any fundamental changes and that the tenant protection formulated in part II of the 1954 LTA was generally deemed successful and well balanced.[61] Making it possible for the parties to opt out of the protection by agreement would naturally eradicate the protection altogether. The conclusion is also inconsistent with the intention with the earlier amendment in 1969, which was to allow a little more flexibility to the otherwise fixed form. It was meant to be used as a way to encourage landlords to grant short-lets of properties that otherwise would be empty.[62] It was not meant to be used as an option to be used widely. The result of the amendments of part II 1954 LTA is that the primary form of protection for business tenants are the requirements that tenants, before waiving their rights, have been properly advised and informed of the rights

[59] See The Law of Property Act 1969, and The Law Commission, Landlord and tenant. Report on the Landlord and Tenant Act 1954 part II (Law Com. No. 17).

[60] See Haley (2000) (n 2) para. 1.44.

[61] See, for example, The Law Commission (1992) Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 (Law Comm. No. 208, 1992).

[62] See Haley (2000) (n 2) para. 1.42.

they are waiving and the effect waiving them will have on the tenant's rights and responsibilities.

Because of the reform, the UK approach offers the most flexible protection of the three countries examined. In theory, it is up to the parties to decide whether the statutory protection of security of tenure should be applicable to the lease. In effect, the flexibility and possibility to choose whether to opt out from the protection is only an available option for larger business tenants. Small business tenants often have to agree to the terms of a lease on a take-it or leave-it basis. Normally this means that tenants neither have the option to renew nor a right to compensation should the landlord refuse to grant the tenant renewal at the end of the term.[63] The measure that has been taken to ensure that tenants are properly informed of the right they are about to waive, before signing the agreement, has proven to be insufficient. The main reason for this is that even if the tenant is informed about the effect of waiving the right of security of tenure, it does not provide the extra negotiation power they need to be able to convert this information into actual rights in their agreements.[64] Hence, the result of the reform has been that a large number of tenants do not stand under the protection provided by Pt II of the 1954 Act,[65] nor do they have the bargaining strength to include equivalent protection based on their respective individual preferences and needs.

The same situation is at hand in Australia. Although the requirements for consent are higher, the result is similar. Tenants in Australia are not given an extra bargaining strength, to be able to choose whether to opt out from the statutory protection of five years. Since the Australian approach to protection of the tenant is similar to the UK form, in that it is based on information, the protection that is given by the requirement of certified exclusionary clauses is limited. The requirement might prevent a tenant from entering a lease unaware of the risks associated with opting out, but it will not in effect enhance the tenant's possibility to negotiate the terms.

In comparison, the less flexible Swedish form of opting out does not seem to eradicate the protection of business tenants by the right to compen-

63 See, for example, Susan Bright, 'Protecting the small business tenant' (2006) Conveyancer and Property Lawyer 137, 140–143.

64 The problem with inequality of bargaining powers is discussed by Michael Haley, 'Contracting out and the Landlord and Tenant Act 1954: the ascendancy of market forces' (2008) Conveyancer and Property Lawyer 284, 282–283 and 293.

65 See Megarry & Wade (2012) (n 8) para. 22-007.

sation.[66] The main reason for this is the fundamental approach that only a tenant who has the right to compensation can waive the right. The positive effect of the more strict requirements for opting out, which enhance tenant bargaining positions, is that tenants are effectively given the opportunity to choose whether to waive the protection. The stronger protection achieved by the Swedish approach of stricter limitations on the possibility to opt out does, however, cause problems in larger business tenancies. The perceived problems of the right to compensation are described and discussed in further detail below. In short, the protection is perceived as unforeseeable and can sometimes result in requirements of the landlord paying high compensation to the tenant. Even though it might be expected that the opt out possibility would frequently be used in larger commercial tenancy agreements, this is not always the case. The reason for this is that neither of the two options, to either wait for nine months after signing the lease to amend the lease accordingly, or to apply to the tenant Tribunal before signing the lease to get approval, is perceived as preferable for the parties.

Opting out after nine months, given that both parties have agreed that this should be done, could be expected to be a minor obstacle for the parties. However, commercial contracts are normally negotiated and finalised at signing. The extra trouble of having to go back to the contract and revise the provisions after nine months, combined with the risk that the tenant after nine months does not agree to waive its right, is normally not perceived as a preferable option. The other available option, to apply for tribunal approval, adds cost and time to the negotiation and signing of a contract. It further is not clear whether the tenant might be able to refuse to agree to opt out of the protection upon renewal of term.[67]

Hence, one downside of the more strict requirements for opting out in Sweden is that it prevents larger business tenants and landlords from negotiating the terms of the contract freely. The stronger protection has a clear impact on the flexibility for larger business tenants. The parties may, for example, prefer to draft a five-year term with two options to renew the contract of five years respectively, before a strict application of the right to compensation according to ch 12 § 57 and 58b LC. The parties may also want to formulate terms for future renewals, for example, that the terms of the renewed agreement are to be the same as the original lease, that terms are

[66] Bertil Bengtsson et al, *Hyra och annan nyttjanderätt till fast egendom* (Norstedts, 8th ed, 2013), para 6.1.

[67] See Victorin et al (2017) (n 48) para. 4.4.

to be changed accordingly with a plan, or if the parties cannot come to a common ground on this after negotiations, the dispute is to be arbitrated for resolution. All of which are not possible according to the protection provided under ch 12 LC. Such provisions are at risk of being void in a dispute resolution.[68]

The comparison of the different approaches to the possibility of opting out demonstrates the difficulty in finding a legislative balance between sufficient flexibility for large business tenants and effective protection for small business tenants. Whether the one form can be held to be more efficient than the other naturally depends on how efficiency is measured; with regards to protection of small business tenants, flexibility for larger tenants, societal and procedural cost etc.

With regard to tenant protection, the most efficient form of protection examined here is undoubtedly that provided in Pt II of the Landlord and Tenant Act before the 2004 'opting out-reform', a right of renewal with no possibility for the tenant to waive this right.[69] Not offering tenants and landlords any possibility to opt out from statutory protection however does not create a reasonable balance between the different interests. The possibility to opt out from statutory protection is, for example, in all three countries perceived as justifiable under certain circumstances. For instance, if the landlord intends to use the premises itself in the near future, or renovate the building within a few years, and the possibility to opt out would make it reasonable for the landlord to lease the premises in the meantime. Not offering tenants any flexibility regarding the application of the statutory protection on the contract is also problematic in tenancies of high value entered into by parties with equal bargaining strength. The interference with the principle of freedom of contract, by the application of mandatory provisions on the tenancy, are in such circumstances not justified by the aim of balancing the bargaining powers of the parties.

Formulating a rule that enhances flexibility without having a negative impact on tenants who are in need of protection is a complicated task. One observation that can discerned from the above is that if the possibility to opt out is unrestricted, and can be made more or less at the behest of the parties, the risk of eliminating the protection altogether is too palpable. Another observation is that extensive administrative requirements are not only nega-

[68] See Elisabeth Ahlinder, *Finansiering med fastigheter som säkerhetsunderlag – Köp, pant, hyra och jordabalkens gränser* (Jure, 2013) diss. para. 8.3.4.8.

[69] Haley (2000) (n 2) para. 1.37.

tive in the sense that they add extra cost and time for the parties and courts, administrative burdens can also have negative impacts on the flexibility that larger business tenants and landlords seek.

Compensation following eviction

Compensation as a primary or secondary form of protection

The right to compensation following eviction is used in different ways in the three countries examined. In the UK and Australia, the right to compensation is used mainly as a secondary measure to the primary protection of security of tenure in the UK and the right of preference in Australia. Whereas in Sweden, the right to compensation is the primary protection for business tenants and a fundamental part of the landlord-tenant act.

In Australia, a right to compensation is only available for business tenants in one state, ACT, for the failure to comply with the rules regarding the right of preference. Since a right to compensation has only been adopted in ACT, it cannot be perceived as a part of a more general Australian approach to tenant protection, and only will be briefly explained here. According to the ACT Leases Act, if a landlord fails to comply with the rules as to the right of preference as laid down in the legislation, and the tenant is prejudiced by that failure, the tenant is entitled to apply to the Magistrates Court and seek a compensation order or an order that the landlord renew, extend or enter into a new lease with the tenant on terms approved by the court.[70] If the Court also orders that the landlord pay the tenant compensation for not complying, compensation may not be ordered for more than six months' rent under the lease.

In the UK, the need for a right to compensation follows from the fact that security of tenure is not an absolute right. The balancing of interests at the end of a lease term by way of allowing the landlord to oppose renewal under certain circumstances means that some tenants with a statutory right of security of tenure will not be able to remain in the premises. Even though the fundamental principle in the UK is that business tenants are to be allowed to continue their business in the premises for as long as they wish, the reality is that the tenant will only be able to remain in the event that the landlord does not terminate the lease due to any statutory ground for opposition. To prevent that tenants not granted a new lease are left without protection,

[70] Leases (Commercial and Retail) Act 2001 (ACT), s. 112.

the security of tenure also consists of a right to compensation for the loss of renewal rights. The tenant is only entitled to compensation if a new tenancy is not granted because of the landlord's intentions to demolish, reconstruct or use the premises him- or herself, or because of the landlord's wish to earn more money from the letting of the premises as a whole.[71] Thus, compensation is only available for the 'well-behaved' tenant that has not neglected its duties under the agreement. The landlord also does not have to pay compensation to a tenant who has been given the choice to commence its business in another letting offered by the landlord on reasonable terms.

In Sweden, the right to compensation depends on whether the district court finds that the landlord has just cause to terminate the lease. To establish whether the landlord has such just cause, the court balances the interests of the parties according to the provisions of chapter 12 § 57 LC. The first test is to establish whether the landlord has just cause for ending the agreement. When it has been established that the landlord has just cause and thereby a formally acceptable ground for opposing renewal of the lease, this cause is weighed against the tenant's interest in renewing the lease and continuing its business in the premises. If the tenant's interest is found to outweigh the landlord's ground for opposition, the tenant is entitled to compensation for any losses it is caused by the termination of the lease, for example, by obstruction or termination of the tenant's business and all other costs that the tenant may suffer because of having to leave the premises. However, if the tenant's interest in renewing the lease does not outweigh the landlord's just cause for termination, the tenant will receive no compensation for the termination of the lease.

The calculation basis for compensation – Efficiency and foreseeability

Regardless of whether a right to compensation is used as a primary or secondary form of tenant protection, the effect of the protection depends to a large extent on the chosen basis for calculation of the compensation. The following focuses on two issues that are raised by the chosen forms of calculation bases for compensation in the UK and Sweden: efficiency of the remedy with regards to providing tenants protection at the end of a lease term, and

[71] Pt II of the LTA 1954 s. 30(1), the right to compensation only applies when the grounds on which the landlord opposed granting a new tenancy are one or more of grounds (e), (f) or (g): if the premises are more valuable let as a whole, if the landlord intends to start demolition or reconstruction work on the premises or the landlord intent to occupy the premises him or herself.

foreseeability regarding the amount of compensation that the landlord might have to pay for terminating a lease.

A tenant in Sweden that has been denied renewal at the end of a lease term, without the landlord being able to show just cause that outweighs the tenants' interest of staying in the premises, is entitled to a minimum compensation of the equivalent of one year's rent and compensation for other costs.[72] The fundamental principle for compensation is that the tenant's financial situation is to remain unchanged after the termination, as if the lease had not been terminated.[73] Costs that the tenant can be compensated for include: moving costs, loss that might occur because of the move, for example, branding items or fittings that can no longer be utilised, and compensation for interference or hindrance of the business the tenant is operating in the premises.[74]

The calculation basis for compensation for other costs can be determined in different ways. The tenant chooses the basis for calculation and is free to choose the most profitable way of calculating losses. This means that the tenant is free to choose any basis for calculation that reasonably can be used to calculate the tenant's loss: for example, net present value or liquidation value, if the tenant has to close down the business because of the unjust termination.[75]

One problem with the Swedish basis for calculation of compensation is that it is unforeseeable. One aspect of this lack of foreseeability is that the landlord is only required to pay compensation if the court finds the termination unjust. If the landlord has objectively reasonable grounds for terminating the lease, the landlord is not required to pay any compensation. Another is that if the termination is considered unjust by the court, and compensation payable, the level of compensation can be difficult to predict. Since the landlord is required to cover the tenant's losses whatever they may be, and the tenant is free to choose the evaluation method, the parties have little way of knowing beforehand what the actual compensation for termination of the lease will be. In some cases, the compensation can be very high, for example, in a judgment by the High Court, the landlord was required

[72] Ch. 12 § 58b LC.

[73] Richard Hager, 'Ännu en ohållbar position?' (2017) Svensk Juristtidning 631, 663.

[74] See Prop. 1967:141, 237; Prop. 1968:91 Supp. A, 129 and 236; Bengtsson et al (2013) (n 67) para. 6.4 b.

[75] See Victorin et al (2017) (n 48) para. 4.5.2.

to pay compensation amounting to a little over SEK 136 million.[76] In other cases, it can be unexpectedly low, for example, in another case by the same High Court,[77] the landlord was only required to compensate the tenant for the equivalence of one year rent, although the tenant, a restaurant owner, claimed that the loss amounted to SEK 3.4 million.

Even though the effects of the potentially high compensation costs and the uncertainty for the parties might be regarded as substantially negative effects, the potential high level of compensation and the risk and burden that thereby is laid on the landlord, are intended effects. The chosen basis for calculation has two aims: to accurately compensate the tenant for actual costs and losses, and to ensure that the compensation is high enough to have an actual preventive effect against unjust terminations.[78] Naturally, the kind of uncertainty that follows from the potential risk of having to pay high levels of compensation is not desirable in any contractual relationship, especially not in commercial transactions of a certain size and volume where the compensation can be considerable.

There is no corresponding problem with the calculation basis and the foreseeability of how much compensation the landlord might have to pay in the UK. The compensation is more or less a flat rate that is set to compensate the tenant for its loss of right of renewal.[79] The compensation is calculated on the value of the premises, regardless of the value of the actual business the tenant is running in the premises; by the product of the appropriate multiplier and the rateable value of the holding.[80] The rateable value of a holding is normally found in a rating list,[81] published by the Valuation Office Agency, and the appropriate multiplier since the 1990's is -1.[82]

[76] See Svea HovR:s dom 2015-03-31 in case T 1621-14; Svea HovR:s dom 2016-04-14 in case T 481-15.

[77] See Svea HovR:s dom 2016-06-21 in case T 6510-15. In the case, the tenant, Atrium, was only entitled to one year of rent because the court did not find it shown that the value of the restaurant was higher than that. The landlord claimed that the value was 0 SEK and the tenant claimed, by valuation certificate, that the value was SEK 3,400,000.

[78] Prop. 1968:91 Supp. A, 129.

[79] See Haley (2000) (n 2) para. 1.37.

[80] Part II Landlord and Tenant Act 1954 s. 37(2)(a and b). If the same business had been conducted for more than fourteen years in the premises, the compensation is calculated by the appropriate multiplier and twice the rateable value of the holding, see s. 37(3)(a,b).

[81] The 'rateable value' to be determined for the holding in accordance with s. 37(5) of the 1954 LTA [and Sch. 6(2)(1) (as amended) of the Local Government Finance Act 1988].

[82] The 'appropriate multiplier' for the purposes of s. 37(2) is -1. For a more thorough explanation of the calculation basis for compensation, for example, how to calculate the rate-

A fundamental problem with the chosen form of calculation in Part II of the 1954 LTA is that it renders the right to compensation a bleak protection for those tenants who are not granted a new tenancy.[83] The calculation basis for compensation in Pt II of the 1954 LTA has been criticised for being arbitrary and not sufficient to financially compensate tenants for actual losses. A tenant, for example, is not compensated for those costs that the tenant may incurred for having to leave the premises, such as finding and relocating to new premises, or for other losses such as loss of goodwill or costs that occur if the tenant is forced to go out of business because of the loss of renewal right. The relatively low compensation that landlords have to pay for terminating a tenancy has been criticised for making it possible and economically viable to use it as a way for landlords to buy themselves out.[84] Further, the possibility for landlords to end leases for their own possession, without any requirement of compensating the tenant for loss of goodwill, might even conflict with the tenants' right to peaceful enjoyment of property, according to Article 1, protocol No. 1, of the European Convention on Human Rights.[85]

However, even though the calculation basis for the loss of a right of renewal might be perceived as an inefficient form of protection for the tenant, it should not be perceived as a legislative failure or fundamental issue with regards to the legislative aim. The compensation does not, but is also not intended to, reflect the tenant's actual loss if evicted. The main purpose of the chosen calculation form is to create a foreseeable and precise basis for compensation. When the calculation basis was chosen, it was important that the compensation scheme be easy to administer and use, and it was chosen mainly because it would be easy to operate.[86] It was not considered an optimal calculation model, but the efficacy of a flat rate was found preferable to the other options.[87] The aim to a large extent was not to end up in the same

able value when there is no value in a rating list, see the VOA Rating Manual – Volume 2 – Section 13: Landlord and Tenant Act 1954 (Amended) Determination of Rateable Value of Business Premises, available at the VOA's webpage at voa.gov.uk.

83 See, for example, Haley, M (2012) (n 3), 125, with comments on *Gatwick Parking Service Ltd v Sargent*, where the tenant was compensated for the loss of a successful parking business with £13,750.

84 See Haley (2012) (n 3), 120 and the therein mentioned sources.

85 If, for example, the landlord intends to run a business that gains from the goodwill established by the former tenant, see Haley (2012) (n 3), 125–127.

86 Compare Haley (2000) (n 2) para. 1.30.

87 See Haley (2012) (n 3), 120.

problems that were sought to move away from, namely the complicated and hard to prove compensation scheme of the 1927 Act.[88]

At the time when the calculation basis was formulated, other forms of protection for tenants were also suggested. In the Final Report of the Leasehold Committee, for example, it was proposed that the landlord should always be able to end the lease regardless of intention and motive. The tenant protection would be full protection of the tenant's financial interest instead of security of tenure. The tenant was to be fully compensated for all losses and expenses that incurred.[89] This proposal, which in essence is equivalent to the Swedish approach, was not implemented because it was considered too hard to administer and not preferable with regards to the sought form of tenant protection. A right to compensation, calculated to fully compensate tenants for their losses, was considered as intrusive for the landlords as a right of renewal. It was also considered less efficient than a right of renewal since it did not provide the tenants with the protection that they truly need, a right to pursue their business in the premises.

The expressed apprehension in the white papers in the UK in the 1920's, that such a calculation basis would be hard to administer and in effect almost as intrusive for the landlords as an actual right of renewal, can to some extent be confirmed with regards to the Swedish experience of a calculation bases set to correspond to the tenant's actual loss. The Swedish approach is, however, justifiable with regards to the economic positive net effect. First, given that the compensation the landlord is required to pay the tenant corresponds to the tenant's actual loss, the tenant has not suffered any financial loss because of the termination. Further, given that it can be assumed that a landlord would not choose to terminate a lease, with the risk of having to pay a substantial compensation unless it ultimately would gain economically from the termination, then the total net effect of the termination of the lease is presumably positive. However, for it to be possible for a landlord to make such an economic consideration, the landlord has to be able to make a reasonably valid estimation of the potential level of compensation, which is not always the case.

With regards to the aim of precision and efficacy, the UK compensation scheme is very successful. It is easy to operate and provides the parties with certainty and foreseeability with regards to the compensation, a precision

88 See Megarry & Wade (2012) (n 8) para. 22-004; Haley (2000) (n 2) para. 1.21.

89 See Haley (2012) (n 3), 124 and therein stated sources.

that the Swedish system is lacking. The efficacy as regards to foreseeability and certainty however is weighed down by the lack of connection between the sum the landlord has to pay and the tenant's actual loss. It can be criticised as an insufficient form of protection against abusive behaviour and creating a wide gap between the full protection given to tenants who are granted a right of renewal and the meagre economical compensation given to those who are not. The Swedish system does not have the same problem with this lack of correlation to the tenant's actual losses. It can, however, be questioned whether full coverage of costs, in the way that is sometimes calculated according to the Swedish calculation basis, creates a reasonable balance between the parties.

Application to all businesses or only smaller businesses

Protection for the weaker party or protection for the presumed weaker party

Tenant protection at the end of a lease term in all three countries examined here is aimed at protecting the assumed weaker party, the tenant. Even though it is not possible to state that the 'tenant' is always the weaker party as tenants are far from a homogeneous group, the Australian retail and consumer acts are the only acts within this comparison that are not generally applicable to all business tenancies.

In the UK, the security of tenure in part II of the 1954 LTA applies to any tenancy of premises that are occupied by the tenant for business purposes.[90] The definitions of 'business' and 'premises' are broad: 'business' can in essence be described as a use of the premises that is other than for residential purposes,[91] and 'premises' include not only buildings or parts of buildings but also, for example, undeveloped land and tracks for training horses.[92] In Sweden, the statutory protection of business leases at the end of a lease term is applicable to all tenancies not leased for residential purposes.[93] The legislation makes no distinction, for example, between retail and industrial tenancies or between small or large businesses.

[90] LTA 1954 s. 23(1); See further Megarry & Wade (2012) (n 8) paras. 22-005–22-006.

[91] 'Business' includes shops, offices, schools, laboratories and exclude tenancies that are primarily residential, for example, a residential lease in which the tenant runs a voluntary Sunday school. See further Megarry & Wade (2012) (n 8) para. 22-005.

[92] See Megarry & Wade (2012) para. 22-005, notes 30 and 31.

[93] See ch. 12 § 1 s. 3 LC.

In Australia, business tenancies are divided according to different criteria set out to limit the application of the protection so that it applies only to those tenants who are presumed to be in need of protection, primarily small business retail tenancies. The retail tenancy legislation in the different states are predominantly applicable to leases of premises that are used for different types of retail[94] purposes. Even though the retail legislation is predominately formulated to protect retail tenants, the retail tenancy legislation in many states also applies to a wider range of businesses than just retail. For example, most states include all premises used for business of any sort that are located in a retail shopping centre.[95] Further, in some states the legislation applies to 'small commercial premises' and premises used, for example, as child care centres, sports centres, art galleries and gardening supply centres.[96]

The application of the retail tenant acts is further defined and narrowed through detailed exemptions of leases to which the legislation does not apply. The legislation, for example, may not apply to leases: for a term of less than six months, of premises in which the annual rental exceeds AUS $ 250,000 per annum, of premises which have a lettable area of more than a specified area, for example, 1,000 m^2, that are let to public companies and their subsidiaries, or have a term of 25 years or more.[97] The limitation of the application of the retail legislation, for example, with regards to shop floor area or whether the premises are held by a corporation or subsidiary, are both aimed

[94] A 'retail tenancy' is a lease of premises used wholly, or in part, for the retail sale, hire or provision of goods or services, see *Plummer v Needham* (1954) 56 WALR 1 (FC); *Provident Life Assurance Co Ltd v Official Assignee* [1963] NZLR 961 (CA); *FP Shine (Vic) Pty Ltd v Gothic Lodge Pty Ltd* [1994] 1 VR 194; [1993] V ConvR 54-472; and *Woolworths Ltd v Campbells Cash & Carry Pty Ltd* (1996) 92 LGERA 244 (NSWCA).

[95] See, for example, Leases (Commercial and Retail) Act 2001 (ACT), s. 8; Retail Leases Act 1994 (NSW), s. 3; Business Tenancies (Fair Dealings) Act 2003 (NT), s. 5(1); Retail Shop Leases Act 1994 (Qld), s. 8(1); Retail and Commercial Leases Act 1995 (SA), s. 3(1); Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas), Sch. 1 Pt. 1 cl 1; Retail Leases Act 2003 (Vic), s. 3; and Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA), s. 3(1).

[96] See, for example, Leases (Commercial and Retail) Act 2001 (ACT), s. 4, 12(1)(c, g, h, i, j).

[97] See, for example, Leases (Commercial and Retail) Act 2001 (ACT), s. 12(2)(c); Business Tenancies (Fair Dealings) Act 2003 (NT), s. 6(a, d) s. 7(1)(a,b) and 7(3); Retail Shop Leases Act 1994 (Qld), s. 13(8) – (9); Retail and Commercial Leases Act 1995 (SA), s. 4(2)(a–c); Retail Leases Act 2003 (Vic), s. 4(2)(a,c,d); Retail and Commercial Leases Act 1995 (SA), s. 4(2)(a,c); Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas), Sch. 1 Pt. 1 cl 2(3)(b); and Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA), s. 3(1).

at excluding national retail chains from the application of the legislation. The exclusion is justified by the presumption that the national retail chains are on an equal bargaining foot with landlords and not in need of the protection of the retail legislation.[98]

Defining small business tenant

In Australia, the issue of aiming the protection of retail tenancy legislation only to tenants who are in need of the protection has from the first discussions of tenant protection in retail lease legislation in the late 1980's been fundamental. This approach is in stark contrast to both the UK and the Swedish approaches. The question of how to aim the protection has not been completely absent from the legal debate and discussion regarding tenancy regulations in the UK and Sweden. The question has, however, not been nearly as thoroughly considered as it has in Australia, both with regards to retail legislation and to the recent application of the ACL on small businesses.

The purpose of including certain businesses and excluding others is to fulfil the overarching aim of the retail tenancy legislation, to provide protection to small business tenants that are in an inferior bargaining position to landlords. However, the task of formulating the perfect definition that does not encompass tenants not needing protection and at the same time does not exclude any tenant in need of protection is a complex balancing act.[99] The following overview of some of the arguments and discussions that have been submitted both in regards to definition of 'retail tenancies' in retail tenancy legislation and with regards to the definition of 'small business' for the purpose of extending the ACL to small businesses, displays the difficulty in finding a fair and effective definition of small business tenant.

Whether to include small business tenants or exclude large business tenants from the application of retail regulations was one of the first issues considered in Australia. The now nationwide adopted approach of primarily including small business retail tenants under the protection is motivated by the underlying aim of interfering as little as possible with the market. It is intended to make sure that the protection does not go further than the

[98] See Adrian Bradbrook, 'The new era of tenancy protection' (1987) 61 Australian Law Journal 593, 605.

[99] See, for example, the recent reform of the ACL where the definition of 'small business' was one of the questions most widely commented, see The Economics Legislation Committee, Treasury Legislation Amendment (small Business and Unfair Contract Terms) Bill 2015, September 2015, para. 2.15.

aim of the legislation. This approach has though been criticised for being overly restrictive.[100] It has been argued that an exclusion of larger companies and their subsidiaries would not necessarily go further than the intention of the protection.[101] Reports have shown remarkable similarities in negotiation problems and hardships for both small and medium sized businesses.[102] It has further been argued that excluding larger companies, for example, publicly-listed companies, large proprietary companies and their subsidiaries, would minimise the risk of excluding companies that are vulnerable to unfair terms but fall just outside the threshold.[103]

Definitions of 'small business tenants' in retail legislation and of a 'small business contract' in the ACL, can be divided into two subsections: definitions based on the actual size of the business and definitions based on the tenancy agreement. In most states, and also in the recent ACL reform, a combination of the two definitions are used. Regardless whether the chosen threshold is, for example, the lettable area, the annual turnover, the rental value, the upfront price payable or the number of employees, the efficiency and functionality of any definition are dependent on choosing an accurate number. The chosen number has to be well-thought through to accurately correspond to the purpose of the definition, including small business tenancies and excluding any tenant perceived not to be in need of protection. A definition might, for example, be found to be too narrow and unnecessarily

[100] Bradbrook finds that the exclusive protection of retail tenancies in shopping centres only can be motivated at a political level, that the reason why protection only has been created for these tenants is because this group of tenants had a strong lobby group at the time when the retail legislation was enacted. He argues that the same kind of protection should be applicable to all commercial tenancies, see Adrian Bradbrook, 'The Retail Tenancies Legislation: Stage two in the landlord- tenant Law reform saga' (1989) 15 Monash University Law Review 2, 28.

[101] See Tarlo (1985) (n 2), 72.

[102] See The Commonwealth Treasury, on behalf of CAANZ, undertook a survey from 23 May 2014 to 1 August 2014 on business contracting practices and unfair contract terms, in the Explanatory memorandum Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015, para. 3.213.

[103] Tarlo (1985) (n 2), 73; See The South Australian Small Business Commissioner, Review of the Retail and Commercial Leases Act 1995 (SA), April 14 2016, para. 36; The South Australian Small Business Commissioner, Review of the Retail and Commercial Leases Act 1995 (SA), April 14 2016, para. 35; Compare The Explanatory memorandum, Bill 2015, para. 3.125.

restrictive,[104] or too wide and therefor include too many companies under the legislative protection,[105] be unsystematic and inconsistent with other legal definitions of small business,[106] or simply an inadequate measure of bargaining strength,[107] for example, if the number of employees are used as threshold on large building companies whose number of employees can be low, regardless of their actual size of business, due to the fact that they hire independent subcontractors.[108]

In addition, even if the 'perfect' threshold for annual turnover is found, it inevitably has to be revised and adjusted at regular intervals, for example, to prevent that inflation changes the function of the threshold and erodes the protection.[109] Regular adjustments of the thresholds, however, do mean that leases as a result might be going in and out of the retail legislation during the tenancy. Uncertainty with regards to the application of retail tenancy regulation because of regulatory adjustments are, however, not the only issue regarding thresholds of this kind. Uncertainty can also be caused by normal changes in businesses organisation and structure. Businesses grow and decline, the number of employees can change from year to year and corporations can restructure.

[104] See the Housing Industry Association, Submission 16, the Australian Bankers' Association, submission 2, and submission 23, to The South Australian Small Business Commissioner, April 14 2016.

[105] See the Australian Finance Conference, Submission 28, 2, to The South Australian Small Business Commissioner, April 14 2016.

[106] The recent reform of the ACL, the Bill adopts the definition of small business that is used by the Australian Bureau of Statistics (ABS). The use of the definition given in the ABS was motivated as being commonly used and that it had been found to provide a good proxy of small business. See the Explanatory Memorandum, Bill 2015, para. 3.127; See also The South Australian Small Business Commissioner, April 14 2016, Submission 24, 1; Submission 5, 3; and submission 4, 3.

[107] Using the upfront payable amount as a part of the grounds for determining whether a contract is to be determined as applicable under the Bill was also criticised on the ground that "the value of a contract does not necessarily equate to bargaining power". See the Explanatory memorandum, Bill 2015, the Queensland Law Society, submission 27, 1. However, it should be noted that it was not the intention of the definition to create a measure for bargaining power. The use of an upfront payable price threshold aims at ensuring that even small businesses obtain legal advice when they enter into contracts of a more significant economic value.

[108] The South Australian Small Business Commissioner, April 14 2016, Housing Industry Association, submission 16, 7.

[109] See Victorian Small Business Commissioner, The South Australian Small Business Commissioner, April 14 2016, Submission 25, 2.

One way to address the issue of uncertainty that might follow from using the business size as a threshold is to determine at the beginning of the lease whether the tenancy should be under the protection of the act.[110] The gained certainty of this approach is thought to some extent to be weighed down by the fact that it will then have an inbuilt unfairness. If the application of the act is to be decided at the entry of the lease, a change of threshold in the act will create a situation where tenants with similar annual turnovers can either be outside the protection of the act, if the lease was entered into before an adjustment, or under the protection of the act if the lease was entered into after an adjustment.[111]

Other issues, for example, with using the upfront price payable or the number of employees as thresholds are that it is not always obvious how these calculations, of upfront price payable or even the number of employees, should be done.[112] Possible issues that have been mentioned are, for example, if a part of the staff is not hired full-time or if the headcount changes under the contract period.[113] Regarding the upfront price payable, it is not always easy to calculate the value of a lease since they often entail non-fixed calculation provisions such as percentage-based or Consumer Price Index-based rents, or provisions allowing adjustment to market rent at certain points.[114] In shopping centres, there might also be operating expenses and

[110] See Senate Economics Legislation Committee, Report: Need for a national approach to retail leasing arrangements, 18 March 2015, (the National Approach Report) paras. 3.17–3.18.

[111] A recommendation given to address this problem is that the threshold amount in rent levels should be the same but an adjustment of the threshold in the act should be regularly adjusted every 2 years to correspond to the current market increases at any given time, see The South Australian Small Business Commissioner, April 14 2016, para. 32.

[112] Other concerns regarded feared problems for businesses and contracting partners to accurately count the employees, see, for example, The South Australian Small Business Commissioner, April 14 2016, the Victorian Small Business Commissioner, Submission 25, 1; The Shopping Centre Council of Australia, Submission 9, 8, and the Insurance Council of Australia, Submission 22, 2.

[113] This was perceived of as a costly and time-consuming reform, foremost for the contracting party that would have to determine the number of employees of the business. There were also concerns as to the time for determining the size of the business, whether the size of the business at the point of entry of the contract or at any later point, see The Australian Finance Conference, The South Australian Small Business Commissioner, April 14 2016, submission 28, 2.

[114] Defining the value of the contract was feared to cause particular problems with regard to business leases in shopping centres. The question of how to determine those contracts to which the act applies was presumed to be difficult without a thorough definition of 'gross net price'. See The Australian Consumer Law Review, May 2016, 16, submission 16.

costs, for example, of promotion and marketing levies, included or added to the rent.[115] The uncertainty of how to calculate, for example, the rent value or the upfront price payable can be remedied by detailed definitions. However, detailed definitions might not be preferable as they add to an already complex and detailed regulation.

A further issue that has been mentioned regarding the use of company size as a basis for a definition of small business tenancy is that definitions not based on the let premises can create a kind of two-tier market competing for the same space. The problem that might arise for small business tenants as a result is that landlords, when given a choice, might prefer letting their premises to large business tenants in order to avoid the application of the retail tenancy legislation on the agreement. If the definition instead is based on the let premises, either by the lettable area or payable rent, landlords will not in the same way be given the possibility to 'opt out' from the protection by choosing a stronger negotiation party.

The solution of excluding premises of a certain lettable area has been considered to have one particular advantage, it is a precise and easily applied criterion for both parties.[116] The main benefit of using the lettable area as a threshold is certainty. The lettable area of the premises is easily identified and the result is that the tenancy will either be under the protection of the act or not. In comparison with definitions based, for example, on the annual company revenue or rent level, which potentially cause tenancies to come into and out of the act during the tenancy, floor area is a constant measure that will not change during the lease term.[117]

Using the lettable area as a determining factor has been criticised, as it may both include tenants that are not small business tenants but capable of comfortably operating in small premises, such as IT-businesses or groups of medical professionals with substantial earnings, and exclude genuinely small businesses operating in large scale premises such as boat yards or agricultural

[115] The Australian Consumer Law Review, May 2016, submission 16, 14.

[116] In a recent reform, the size of the lettable area as of 10th of May 2016 has been inserted as the main defining factor in the Retail Shop Leases Amendment Bill 2015 that amends the 1994 retail Act, Queensland; se Mr Trevor Evans, National Retail Association (NRA), the National Approach Report, March 2015, para. 3.10.

[117] In the latest review of the Retail and Commercial Leases Act 1995 (SA), published in April 2016, the South Australian Small Business Commissioner (SBC) discussed the advantages and disadvantages of choosing the lettable area or a certain rent level threshold for the application of the Act. The South Australian Small Business Commissioner, Review of the Retail and Commercial Leases Act 1995 (SA), April 14 2016, para. 32.

businesses. The certainty of using the lettable area as a threshold arguably does not outweigh the fact that the threshold in every other sense is less suitable for the purpose of retail tenancy legislation, to protect small businesses and to redress the imbalances of bargaining power that often exist between landlords and tenants in retail tenancy agreements.[118]

A more suitable threshold for accomplishing the aim of the act is argued to be the rental value. The amount a tenant is willing and prepared to pay in rent for the premises is thought to be a better reflection of the tenant's resources, and also has the benefit that it includes both small premises in the heart of a city and larger premises in the suburbs.[119] Using the rental value as the threshold though can cause the same issues as mentioned above regarding using annual turnover as a basis for definition. That the threshold amount will have to be adjusted regularly to be in accordance with the current market rent, and this will either cause leases to go in and out of the protection of the act or result in different protections for leases with similar rents depending on when the lease was executed.

The examples of different forms of basis for a definition of small business tenant above outlines some of the issues that emerge when an accurate and efficient threshold for the application of regulatory tenant protection is sought. Restricting the application of retail tenancy legislation only to tenants who are in need of the protection by defining small business tenants is arguably a complex task. The obvious benefit of a precise and accurate definition is the fulfilment of the fundamental aim of the legislation, to provide protection for the tenants who need it. With regards to the issues that have been discussed above, for example, regarding the problem of formulating a form of protection that is suitable for both small and large business tenants or creating a form for opting out that does not eradicate tenant protection but at the same time is flexible, defining small business tenants and making

[118] The South Australian Small Business Commissioner, April 14, 2016, para. 32.

[119] See The South Australian Small Business Commissioner, April 14, 2016, para. 32. The SBC also did not find that a combination of extending the act to either premises of a certain area or premises let for a rent below a certain threshold was suitable. The either or form would presumably, for the same reasons stated above, make the act applicable to companies that were not in need of protection. It was seen as "unfair to landlords that the Act should apply in those situations"; SA has rent level as a deciding factor for defining the tenancies that fall within the Ambit of the Act, S 4(2)(a) the act applies to leases that do not exceed $400,000 per annum, amended on the 4th of April 2011 from previous level of $ 250,000.

the legislation applicable only to small business leases seem like a suitable and effective solution.

However, whether it is possible to find a suitable threshold can be questioned. A definition is needed that provides protection for all tenants that need it and excludes those tenants who do not. Another problem with definitions that exclude or include different tenants under the application of tenant protection legislation is that it is less clear for both tenants and landlords whether the protection under a certain act is applicable to the parties' contract.[120] This might also create a situation where landlords prefer letting their premises to larger business tenants, since this gives them a larger amount of freedom in formulating the lease terms and at the same time, reduces any risk of having a lease term deemed void by a court.

An alternative solution – Treating small business tenants as consumers

From the outline above of the three different approaches to tenant protection at the end of a lease term, the formulation of an efficient yet flexible form of protection is evidently a complex task. The issues raised vary from whether and how landlords should be able to opt out from statutory protection, to whether tenant protection at the end of a lease term should be a bespoke solution only for small business tenants. Any kind of statutory protection for tenants at the end of a lease term inevitably requires detailed regulations regarding other provisions of leases as well, for example, terms of a new tenancy, possibility to opt out from the statutory protection, and basis for calculation of compensation.

The core issue of how to formulate the tenant protection at the end of a lease term is the efficiency of the chosen form. With regards to the core problem of landlord-tenant law, the fundamental balancing of interests of landlords, tenants and the public, efficiency is in a general sense measured against how well this balance is struck. As to the different approaches and historical aims in the chosen countries, the measurement of efficiency differs according to the legislative aims regarding how these three different interests reasonably should be balanced.

As mentioned, the UK and Swedish forms of tenant protection, although fundamentally different from each other, are in both countries essentially

[120] See Neil Crosby, 'Australian and UK Small Business Leases – What can we learn from each other?' (2007) 13th Pacific-Rim Real Estate Conference, 11–12, available at researchgate.net.

regarded as functional and efficient. The Australian form of tenant protection at the end of a lease term on the other hand, in the last twenty years has regularly been debated and criticized. This section examines two recent reforms and alternatives to the right of five years, recently implemented in New South Wales (NSW) and on federal level in Australia, as a result of the perceived lack of protection for small business tenants; removal of the right of five years and tenant protection by general provisions of fairness by extension of the ACL to small business tenants.

In the Australian debate and discussions regarding tenant protection, the right to five years is often perceived as inefficient and that the purpose of the protection is not achieved. The purpose of the right of five years, however, is not to make it possible for the tenant to stay in the premises for as long as it wishes, as it is in the UK, nor is it to compensate the tenant fully for losses occurring because of a termination of a lease term, as it is in Sweden. The efficiency of tenant protection in retail legislation in Australia is mainly measured against the purpose of making it possible for the tenant to write off fit-outs and to amortise business costs during the lease term.[121] The debate on tenant protection in retail leases in Australia has to a large extent focused on the average length of retail leases,[122] and whether the right of five years has had a positive effect on the length of term for tenants.[123]

The concerns of tenant protection at the end of a lease term and the perceived efficacy problems with the right of five years, has recently resulted

[121] The balancing of interests, discussion of perceived problems with tenant protection at the end of a lease term and measurement of efficiency in retail legislation in Australia differs from the discussion that has historically been held in the UK and Sweden. One reason for this is that the Australian approach to retail tenant protection primarily has been based on one particular situation, the small retail business operating in shopping centres. The specific circumstances and needs of landlords who manage shopping centres and the specific needs of the tenants operating in shopping centres, as a collective, differ to some extent to the circumstances that have been the main focus in the UK and Sweden. One effect of this is that the principle of freedom of contract and respect of landlords' ownership rights and the possibility to operate and manage shopping centres efficiently has been emphasized as vital in the balancing of interests.

[122] See, for example, the Reid Report (1997) paras. 2.68–2.70, and the National Approach Report, March 2015, paras. 3.30–3.32.

[123] See, for example, Sandi Murdoch et al, 'Looking after small business tenants with voluntary codes or statutory intervention: A comparison of Australian and UK experiences' (2001) 7th Pacific Rim Real Estate Society Conference, 34.

in regulatory reform in NSW.[124] The solution to the problem with the inefficient right of five years was simply to remove the right of five years from the legislation.[125] Removing the inefficient form of protection is though only one approach to the problem. Another approach recommended in a recent Government response to the Senate Economics Committee Report, Need for a National Approach to Retail Leasing,[126] has been the strengthening of tenant protection through a national approach to a right of renewal.[127]

The removal of the right of five years in NSW was partly motivated by increasing efficiency. It was, however, also motivated by another important outstanding issue in Australia, the overarching aim of reducing the amount of legislation and red tape costs in general.[128] The aim of reducing the amount of legislation is not unique for Australia, but this ambition and the perceived

[124] The right of five years was found to not produce any difference in actual lease duration. The obligation to seek professional advice and obtain a certificate that states that the tenant is aware of the rights it is waiving to be able to opt out from the protection was perceived as an unnecessary cost and burden for the tenant, see Discussion paper 2013 review of the Retail Leases Act 1994 NSW Small Business Commissioner, para. 7.1. In the published submissions to the review, only a few responded to the question of whether the minimum of five years was still needed to provide security of tenure, see Retail Leases Act Review submission: 4, 11,13, 14, 17, 21–22, 25–26, 28, 31, 35–37, 39, 41, 43–46, 50–52, and 54–55, available at the website of the Australian Small Business Commissioner at www.smallbusiness.nsw.gov.au/solving-problems/retail-leases-act-review.

[125] The removal of the right of five years in NSW, without providing any other kind of protection for the tenant, is slightly surprising since the problem with lack of security for business tenants was highlighted by the Commissioner as a major and long outstanding issue for business tenants. In comparison, in Queensland the right of five years was removed in 1994, and replaced with a right of preference (the changes that where made are discussed in Stephen E Jones, 'The retail shop leases act 1994: A new beginning?' (1995) 15 The Queensland Lawyer 221, 230). The Commissioner was though concerned that stronger tenant protection might have detrimental effects on landlords, the viability of shopping centres and also have a negative impact on other tenants. See, Discussion paper 2013 review of the Retail Leases Act 1994 NSW Small Business Commissioner, paras. 3.5, and 7.1.

[126] On 25 June 2014 the Senate referred an inquiry into the need for a national approach to retail leasing arrangements to the Senate Economics References Committee for inquiry and report: The Economics References Committee Need for a national approach to retail leasing arrangements.

[127] See the Australian Government response to the Senate Economics Committee Report: Need for a National Approach to Retail Leasing Arrangements, February 2016, Recommendation 8, response to Senator Xenophon's dissenting report.

[128] Regarding the Australian Government's commitment to reducing the regulatory burden and cost of regulatory compliance, see, for example, The Australian Government Annual Red Tape Reduction Report 2015, March 15, 2016.

need to actively work towards this aim is more prominent with regards to small business retail legislation in Australia than it is in the UK and Sweden.

The reform of the Australian Consumer Act of unfair contract terms, which since 12 Nov 2016 is also applicable to small businesses tenancies,[129] is a recent example of how the aim to reduce legislation is pursued in Australia.[130] The conception of treating small business tenants as comparable to consumers by extending consumer protection laws to small business tenancies, has also been discussed in the UK. However, the UK government so far has not decided to include small business tenancies under general consumer protection.[131]

The aim of the Bill is to achieve a more efficient allocation of risk in small business dealings and thereby enhance small businesses' confidence when agreeing to standard form contracts. This aim is to be achieved by the possibility to declare unfair terms void and unenforceable. The risk of having certain terms declared void is presumed to promote fairer dealings by reducing incentives to include unfair terms in small business contracts, which when they are enforced can cause significant business detriment.[132] The extension of the ACL to small businesses is generally motivated by the importance of

[129] Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015, see Vol. 3 of the Australian Competition and Consumer Act, ACL, under Sch. 2, Ch. 2 (general protections), part 2–3 (unfair contract terms). See further Explanatory memorandum Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015, 3.

[130] General provisions were implemented earlier. In the early 1970's, general rules as to unconscionable conduct were implemented also to be applicable on small business leases. General provisions of unconscionable conduct have also been incorporated in some state retail legislation, for example, Leases (Commercial and Retail) Act 2001 (ACT), s. 22(1), Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas), Sch. 1 Pt. 2 cl 3, Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas), Sch. 1 Pt. 2 cl 23(1)(e), (f).(Retail Leases Act 1994 (NSW), Pt 7A; Business Tenancies (Fair Dealings) Act 2003 (NT), ss. 79(1), 80(1); Retail Shop Leases Act 1994 (Qld), s. 46A; Retail Leases Act 2003 (Vic), ss. 76–78; and Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA), Pt IIA.) The application of the rules of unconscionable conduct, to address the problems of landlords exploiting their superior bargaining position to the detriment of small business tenants, has though been perceived as a failure, see The House of Representatives Standing Committee on Industry, Science and Technology, Finding a Balance – Towards Fair Trading in Australia, Canberra May 1997 (The Reid Report) Recommendation [1].

[131] See the Law Commission (2005) Unfair Terms in Contracts: Report on a reference under s. 3(1)(e) of the Law Commissions Act 1965, Report No 292, February 2005 (Law Com No.292, 2005) para. 5.76.

[132] Explanatory memorandum, Bill 2015, paras. 3.11 and 3.63.

small businesses for the economy as to creating job opportunities, innovation and productivity.[133]

The reason for extending the unfair contract term protections under the ACL to small businesses is that the Commission found that the bargaining situations of small businesses to a large extent can be compared to the vulnerable situation of consumers. Small businesses, like consumers, often lack the bargaining resources and legal understanding of a contract to be able to successfully negotiate terms. Just like consumers, small businesses can also be particularly vulnerable to the detriments arising when an unfair contract term is relied upon. However, small businesses, unlike consumers, also often engage in high value commercial contracts that are essential to their business. To ensure that small businesses seek proper legal advice to commence negotiations for such contracts, the extension of the protection has been limited to contracts to a certain threshold value.[134] The aim is that small businesses will be confident that the terms of standard form contracts that they are offered are fair and reasonable.[135]

Since the Act was only recently extended to small businesses, it is still uncertain how and whether the reform will change the bargaining positions of landlords and tenants. During the submission period, several concerns regarding the inclusion of small businesses retail tenancies under consumer protection were raised. For example, it was questioned whether the Government should impede the fundamental principle of freedom of contract, and it was considered unclear how the definition of 'small business contracts' was to be applied to retail tenancies. The problem with applying the definition of small business contracts to tenancies was twofold. One part of the discussion regarded concerns about the definition and thresholds to determine whether one of the parties is a small business, which concerns are discussed below under the heading 'division of small business leases'. The other regarded the problem of defining whether a tenancy agreement is a standard contract or a negotiated contract. For example, how many terms are needed to be altered for it to be conceived as negotiated? The anticipated problem to follow from this uncertainty is that it will be difficult for the parties to foresee whether their contract is under the protection of the act and hence at risk of being interpreted and certain terms being deemed void.[136]

[133] Explanatory memorandum, Bill 2015, para. 3.8.
[134] Explanatory memorandum, Bill 2015, paras. 7–8.
[135] Explanatory memorandum, Bill 2015, para. 3.66.
[136] See The Australian Consumer Law Review, May 2016, under the executive summary.

One of the major concerns raised against the reform, however, is the uncertainty of how principles and provisions on consumer protection against unfair terms will be applied on small business tenancies in the case law. The use of 'unfair' has been criticised as giving room for too wide a judicial discretion that might be exercised differently by different judges.[137] There is no previous case law on how to apply the consumer regulation on small businesses neither in general or to small business tenancies. It is unclear how long it will take until certainty and foreseeability as a result of the reform will prevail. The formulation of protection in the ACL is deliberately general and undetailed. With regards to tenant protection at the end of the lease term, there are several possible outcomes of an application of the principles and provisions of the ACL. The question whether enhanced tenant protection is needed is thus left to the Courts to decide – on a case by case basis. The fact that the application of the ACL will be judged from case to case also creates risks of a lack of clarity. Since unfairness is measured against all the circumstances of the contract, a provision that is deemed unfair in one contract does not necessarily need to be unfair in another.

Concluding remarks: How should business tenant protection at the end of a lease term be formulated?

This article has highlighted and analysed issues related to statutory protection of business tenants at the end of a lease term in the UK, Sweden and Australia. The aim has been to discuss whether it is possible to formulate statutory tenant protection that fits all interests and purposes, a form that at the same time is efficient enough to provide protection for the tenants who need it, and flexible enough to also allow tenants who are capable of negotiating at arm's length to create and formulate the lease that they want. One conclusion that can be drawn from the discussions and experiences of the chosen countries is that there is no one perfectly balanced solution. Certain solutions are preferable for small business tenants and others benefit larger business tenants. The following presents an overall assessment of the different approaches to tenant protection at the end of a lease term. The efficiency of the different approaches is measured against the common aim of

[137] See, for example, the Australian Consumer Law Review, May 2016, p. 11. Regarding the interpretation and application of unfair, see the Explanatory memorandum, Bill 2015, para. 2.16.

balancing the interests of landlords, tenants and the public, and the creation of a functional business lease market.

To whom should tenant protection at the end of a lease term be addressed?

The experiences of the UK and Sweden show that there are reasons to distinguish between tenants who are capable of negotiating their leases satisfactorily and those who are not. Making landlord-tenant legislation applicable to all business tenancies, regardless of the business tenant's actual bargaining position, causes different kinds of problems in the two countries. In Sweden, it creates problems for larger business tenants who cannot negotiate their leases freely because of the statutory protection. In the UK, the problem is the converse and causes problems for small business tenants who are not eligible for statutory protection. A reasonable solution to the experienced problems occurring as a result of landlord-tenant acts applicable to all business leases would seem to be to identify and define the tenants who need protection and aim the protection exclusively at those tenants.

However, as seen by the Australian experience, defining small businesses and making the protection applicable only to small businesses might still not be a preferable solution. The fundamental problem with defining small business is that regardless of how well-thought through a definition is, it will never be absolutely correct in the sense that it creates a limit that accurately and precisely divides the tenants who need protection from those who do not. And even if it did, it could still be questioned whether the amount of work that would need to be done in order to accurately define small business is justified, whether the benefit of an accurate definition outweighs the problems that it, for example, can cause with regards to uncertainty of the application of the act.

Given that the primary benefit of a definition is that it reduces the risk that tenant protection is provided for tenants who objectively do not need it, it is questionable whether the benefits outweigh the disadvantages. The problem if no distinction is made between the application of tenant protection on small, medium sized, and large business tenancies, is that the chosen form of protection most likely will not fit every tenant's purposes.

Against what should tenants be protected?

All the examined countries share the same fundamental view that tenant protection at the end of a lease term is needed. However, they do not share the same view on what it is against which the tenant needs protection. In one sense, they do share the same view in that the underlying purpose of tenant protection is in all countries to protect tenants against landlords' harsh and oppressive behaviour. However, apart from that shared view on the fundamental aim of the protection, the views then differ. In the UK, tenants are to be protected against the risk of losing the right to use the premises. In Sweden, tenants are to be protected against the financial losses that might occur as a result of a termination of the lease. In Australia, tenants are to be protected against the risks of not being able to recoup and amortise investments.

When the question of what it is tenants should be protected against is approached from a tenant protection perspective, it would seem, from the experiences of the examined countries, that tenant protection that is aimed at protecting the tenants' business and possibilities to continue running it, or at least be financially compensated if the tenant is prevented from running the business, is preferable. Tenant protection aimed at protecting tenants from the risks of not being able to recoup and amortise investments does not provide sufficient protection for tenants. With regards to the fact that goodwill is property according to art. 1 prot. 1 ECHR, tenants should, at least in countries that are members of the Council of Europe, be reasonably protected against the risk of being denied the right to compensation for created goodwill.

In what form should tenant protection at the end of a lease term be?

The traditional approach to tenant protection in all the examined countries is to regulate it by specialized landlord-tenant acts. These landlord-tenant acts provide rules and provisions that are set out to balance the parties' bargaining positions and thereby implement a lowest threshold for what can be deemed as reasonable and fair in a business lease. Landlord-tenant acts formulate 'bans', particular provisions and behaviour that is 'forbidden' in a lease. The purpose of statutory detailed regulation is to prevent conflict and costly court proceedings.[138] However, as shown by the examination in this article, the landlord-tenant acts in the examined countries give rise to some

[138] See, for example, Hyman Tarlo, 'The Great Shop Controversy' (1983–1984) 13 The University of Queensland Law Journal 7, 12.

concerns regarding, for example, flexibility, sufficient protection and also the amount of legislation necessary for there to be any reasonable level of protection for the tenant.

The creation of tenant protection by landlord-tenant acts, however, is not the only way that tenant protection can be provided. The recent Australian approach to tenant protection by the extension of the ACL to be applicable also to small business tenancies, might be a reasonable and effective solution to some of the problems that have been discussed here with relation to landlord-tenant acts. In theory at least, tenant protection built on a conception of fairness measured against the particular circumstances of a certain case, has the potential to create a flexible and fair form of protection for business tenants of all sizes. The formulation of tenant protection by general provisions of fairness has the further advantage that it does not create a need for extensive detailed regulation of the parties' rights and responsibilities, as does the traditional form of protection by specific landlord-tenant acts and regulations.

The idea of basing business tenant protection on a general set of rules of fairness is appealing for several reasons. Such could eradicate issues with mandatory provisions creating problems for large business tenants, as experienced in Sweden. It could reinstate protection for small business tenants who have been forced to agree to unfavourable terms. It could also produce systematic relief as business leases would be governed primarily by general principles of contract (and property) law as opposed to being governed by general principles of law and by landlord-tenant acts.

However, with regards to all the outstanding issues and uncertainties of whether the adopting of general principles of fairness on small business leases will be an efficient form of tenant protection, it cannot be concluded that this approach is preferable to the traditional tenant protection as it is formulated in the different landlord-tenant acts. The efficiency of an approach built on protection for small business tenancies by adoption of principles of fairness is dependent on several things. These include whether it is possible to accurately define 'small business' or whether tenant protection is only needed for certain small businesses. It also needs to be clear to the parties what 'fair' means with regards to the validity of the provisions of their negotiated tenancy agreement, and whether the definition and application of 'fair' by the courts efficiently and reasonably balances the interests of landlords, tenants and the public. It is not certain that the application of general provisions of fairness in consumer contracts effectively creates tenant protection at the

end of a lease term. The problem is simply that general principles of fairness are not built on the special contractual situation that characterizes business leases, and that it therefore is uncertain to what extent the particular circumstances will be taken into account in an assessment of what is fair.

Another problem with this approach in Australia is that the adopting of general principles of fairness actually does not reduce the amount of legislation, it rather adds to an already immense amount of state retail legislation. This problem should not be taken as an argument not to formulate tenant protection on general principles of fairness in general. For example, if the adopting of general principles is implemented as a replacement of detailed landlord and tenant legislation, the issue of there being an immense amount of different provisions and principles simultaneously applicable is resolved.

The perfect solution?

The perfect solution to tenant protection at the end of a lease term would presumably be a solution that ultimately evens out the parties' bargaining positions. Tenant protection at the end of a lease term would not be needed if landlords did not have a superior bargaining position. One way of levelling the parties' bargaining positions, which has not been discussed in this article but has been mentioned in Australia, is to focus legislative measures on making the market more balanced, for example, by reducing planning and zoning constraints on the supply of retail space. In the past decade, several reports have concluded that planning and zoning constraints on the supply of retail space can be held to be the 'root' of the problem of the unbalanced retail tenancy market.[139] The reports propose relief in planning and zoning control to enhance availability of retail space and promote competition. The enhanced availability of retail space could increase the possibility for tenants to relocate after end of a lease term, making the bargaining situation more level.[140]

A less than perfect solution, but presumably more easily obtainable solution than creating a balanced market, could be achieved by using a com-

[139] See The Productivity Commission, Economic Structure and Performance of the Australian Retail Industry, Inquiry report No. 56, November 2011, 259; the Productivity Commission, Relative Costs of Doing Business in Australia: Retail Trade, September 2014, 138; see also the Productivity Commission, The Market for Retail Tenancy Leases in Australia, Inquiry report No. 43, 31 March 2008, 258 and 269.

[140] Productivity Commission, Economic Structure and Performance of the Australian Retail Industry, Inquiry report No. 56, November 2011, 259.

bination of the examined approaches to tenant protection. The following final concluding remarks give suggestions regarding how such a combination could be articulated. Based on the experienced problems in the different countries, and the discussions and comparisons in this article, there are reasons to formulate tenant protection at the end of a lease term in landlord-tenant acts that generally is applicable to all business tenancies. The positive effect of this solution is that it is systematically coherent and easy to apply as all business leases are covered by the same act. Landlord-tenant acts are also preferable for providing clarity for landlords and particularly for tenants. Regulating business tenancies by general provisions of fair terms offers a flexible and bespoke kind of protection, but it also requires that the parties know the law and can apply it to their own situation. In time, case law based general guidelines will be put in place to assist landlords and tenants. However, guidelines cannot offer the same kind of clarity as is provided by statutory rules. The concept of fairness with regards to all the circumstances not only offers flexibility, it also inserts uncertainty with regards to the outcome of a potential conflict, an uncertainty that might prevent tenants from seeking justice and claiming rights.

To prevent that the tenant protection causes problems for those parties who are capable of successfully negotiating the contract terms at arms' length, it should also be possible to opt out of the protection. The possibility to opt out by contract, similar to the UK form, is a flexible solution suitable for large business tenants and their subsidiaries. The possibility to opt out by contract is not suitable though for all business tenants. There are reasons to be more restrictive with the possibility for the parties to opt out of the protections for small and medium sized tenants. A solution for these tenants instead can be based on an approach similar to the Swedish form, to only to allow tenants to waive protection once they have protection to waive, or by court approval.

Further, tenant protection should focus on the tenant's possibilities to continue to run its business in the premises, and provide financial compensation following lease termination. For the protection to be efficient, the fundamental basis for calculation of any compensation should be the tenant's actual losses. The basis for calculation should also have an explicit minimum and maximum level to prevent that tenants without calculable losses, for example, non-profit organizations, are left without protection, and also to prevent that the landlord has the risk of paying unforeseeable and excessive compensation to tenants following termination.