

## A REASSESSMENT OF THE LAWS RELATING TO THE DETERMINATION OF TENANCIES

"Very little is happening in the law of landlord-tenant. Quite literally this body of law is static, and the few concerned, far from being buoyed up by hope, are oppressed by the apparent futility of efforts at reform"<sup>1</sup>.

In no aspect of landlord-tenant law in Australia is this statement more true than in the case of the laws relating to the determination of tenancies. Although certain piecemeal studies and suggestions for reform of landlord-tenant law have been made in recent years, these have concentrated on the rights and duties of the parties during the term of the lease rather than at its termination. Most of the attention has been focussed on the issues of rent control and security deposits: the Western Australian Law Reform Commission completed in 1975 a study on security deposits<sup>2</sup>, the South Australian Attorney-General has recently issued a press statement indicating that legislation would be introduced shortly regulating the collection and use of security deposits, and the New South Wales Government established in 1961 a Royal Commission to investigate the desirability of reforming its rent control legislation<sup>3</sup>.

The only studies undertaken in Australia relating specifically to the subject matter of this article were two written in 1970 and 1973 by the Queensland Law Reform Commission<sup>4</sup>. Unfortunately, the 1970 report was limited to a discussion of the law of forfeiture, which is only one of several aspects of the law relating to the determination of tenancies. An additional problem is that this report was never tabled before the Queensland Parliament and consequently remains confidential.

This article is designed to rectify the past lack of attention to the laws relating to the determination of tenancies. The advantages and disadvantages of possible reforms in four areas of law will be discussed: first, the law relating to the regular determination of a tenancy at the end of the appropriate period of the lease; secondly, the law relating to forfeiture; thirdly, the law relating to a determination due to the breach by the tenant of one or more of his covenants in the lease; and fourthly, the availability of the right of self-help in the recovery of possession.

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1. Quinn and Phillips, "The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future", (1969-70) 38 *Fordham L.R.* 225, 250.
2. Law Reform Commission of Western Australia, *Report on Tenancy Bonds* (Project No. 41: 1975).
3. *Royal Commission of Inquiry on the Landlord and Tenant (Amendment) Act 1948*.
4. Queensland Law Reform Commission, *Report on the Law Relating to Relief from Forfeiture of Leases and to Relief from Forfeiture of an Option to Renew* (Q.L.R.C. 1: 1970); and *Report on a Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* (Q.L.R.C. 16: 1973). A very brief discussion of the law relating to forfeiture and the recovery of possession in the Australian Capital Territory appears in the *Report on Landlord and Tenant Law in the Australian Capital Territory*, produced in 1973 by the Law Reform Commission of the Australian Capital Territory.

### 1. The Regular Determination of a Tenancy at the End of a Lease

Two questions should be considered under this sub-heading: first, whether the amount of notice which the party who wishes to determine the lease must give the other party should be increased; and secondly, whether the right of the landlord to refuse to renew a lease should be restricted.

#### (A) THE AMOUNT OF NOTICE REQUIRED OF THE PARTIES.

No notice to quit is required by either party in the case of a lease for a fixed term which either the landlord or the tenant does not wish to renew, as such a lease expires automatically at the end of the term<sup>5</sup>. As for periodic tenancies, at common law it appears to be generally settled today that the notice to quit must be equal to the length of the period, that is, a week's notice in the case of a weekly tenancy and a month's notice in the case of a monthly tenancy<sup>6</sup>. However, in Victoria, the common law position has been modified by s.4, Landlord and Tenant (Amendment) Act 1971, which created a new s.32(4), Landlord and Tenant Act, 1958:

"(4) A notice to quit given by a landlord in respect of premises, being a dwelling-house, held on a periodic tenancy the recurring period of which does not exceed one month, shall be in writing and shall, subject to the following provisions of this section, be given not less than—

(a) where the tenant is in arrears of rent for at least four weeks, seven days; or

(b) in a case other than a case referred to in paragraph (a), fourteen days—

before the date specified therein for the quitting and delivering up of the premises, but nothing in this sub-section shall in any case operate to authorize a shorter period of notice than would be required apart from the provisions of this sub-section".

Thus, in Victoria a weekly tenant is now entitled to two weeks' notice. The rule has also been modified in New South Wales in the case of prescribed premises. Section 62, Landlord and Tenant (Amendment) Act, 1948-

5. *Halsbury's Laws of England* (3rd ed., 1958), 534. See *Cobb v. Stokes* (1807) 8 East 358; 103 E.R. 380.

6. This is the view of the authors of *Halsbury's Laws of England* (3rd ed., 1958), 530. However, according to Brooking and Chernov, *Tenancy Law and Practice—Victoria* (1972), 227, in Victoria there is a good deal of authority for the proposition that a week's notice, while always sufficient, is not always necessary to determine a weekly tenancy. The cases of *Calvert v. Turner* (1865) 2 W.W. & a'B. (L) 174; *Kurrle v. Heide* (1898) 20 A.L.J. 171; *Fitzgerald v. Button* (1891) 17 V.L.R. 52; *Carter v. Aldous* [1921] V.L.R. 234; *Mornane v. All Red Carrying Co. Pty. Ltd.* [1935] V.L.R. 341, 346-7, and *Dikstein v. Kanevsky* [1947] V.L.R. 216, 224-5, are cited by Brooking and Chernov in support of this proposition. However, as the authors later admit, in the more recent Victorian cases of *Fink v. McIntosh* [1946] V.L.R. 290, 292, and *Gleeson v. Richey* [1959] V.R. 258, 261, the view has been expressed that a week's notice is necessary. Brooking and Chernov conclude their discussion of this matter with the following remark:

"... it is perhaps unlikely that less than one week would in any circumstances be held nowadays to be reasonable notice having regard to the statutory restrictions on eviction which have been in force for so long, to the shortage of accommodation which caused such restrictions to be thought desirable . . ."

(*Tenancy Law and Practice—Victoria* (1972), 229).

The case of *Precious v. Reddie* [1924] 2 K.B. 149 is authority for the proposition that a month's notice is sufficient for a monthly tenancy.

1969, provides that, with certain exceptions<sup>7</sup>, the period of notice to quit shall be at least seven days, together with an additional seven days for each completed period of six months occupation<sup>8</sup>.

A case can be made for increasing the amount of notice required of a landlord in a notice to quit at the end of a lease. Although it would be unreasonable to delay unduly the right of the landlord to regain possession of his premises, it must be remembered that the purpose behind the requirement of a notice to quit is to enable the tenant to find alternative accommodation. Opinions may differ as to what is a reasonable period for a notice to quit, but it is clear that the time taken by a tenant to find alternative accommodation is not going to depend on the nature of his existing tenancy. Thus, the different periods of notice to quit allowed the tenant at present according to the nature of his periodic tenancy ought to be abolished and a standard period of notice established.

Some writers have argued the case for an increase in the amount of notice to quit from the standpoint of the human rights and social needs of the tenant:

“... in most countries the farmer, factory owner, restaurateur, and many other tenants cannot be turned out at a month's notice. And an increasing range of employers now assume that people must be given security in their jobs, possibly until retirement and certainly for a considerable period ahead. You simply cannot ride people out of their jobs any time you want. For a family with children, whose education depends on continuing in the same school and whose welfare may depend upon preserving links between family and community, security in the home is just as important as job security. People are going to demand such rights in dealing with their landlord . . . and to brush the issue aside is, I believe, to neglect very powerful social trends and the political pressures that will ultimately carry these trends forward . . . To say that property can be managed only on the assumption that a landlord can get rid of a tenant at a month's notice whenever he wants is to disregard human rights”<sup>9</sup>.

The writer originally favoured the creation of a standard period of three months' notice to quit regardless of the type of tenancy, but after discussing this matter with senior officials of the Real Estate and Stock Institute of Victoria (R.E.S.I.)<sup>10</sup> reverted to a two-month period in the light of strong

7. These exceptions are enumerated in s.63(2), which states:

“(2) Nothing in subsection one of this section shall

(a) require the giving of notice to quit—

(i) a period exceeding fourteen days if the notice is given on any ground specified in paragraph (c), (d), (e) or (f) of subsection five of section sixty-two of this Act and not on any other ground;

(ii) a period exceeding thirty days if the notice is given on any other ground; or

(iii) in the case of shared accommodation—a period exceeding fourteen days . . .”

8. S.63(2)(b) adds that nothing in this section shall allow the giving of a notice to quit for a period shorter than the period which, but for this section, would be required.

9. Comment by Mr. D. Donnison in a seminar on rent control held in Toronto in 1973. See Canadian Council on Social Development, *Is there a Case for Rent Control?* (Background papers and proceedings of a seminar on rent policy, 1973), 107-8.

10. Interview with Mr. L. E. Evans, Secretary, and Mr. M. Gray, President, Real Estate and Stock Institute of Victoria, 9 April 1974.

objections that three months would be unreasonable on the landlord as some tenants refuse to pay any further rent once they have been served with a notice to quit.

If a standard period of two months' notice is required of a landlord regardless of the nature of the tenancy, the question arises whether this increased period of notice should also be required of a tenant in the event that he wishes to give notice of intention to quit the premises. Longer periods of notice to quit by landlords than of notice of intention to quit by tenants have recently been enacted by some Canadian Provinces. For example, in Newfoundland s.15(1), Landlord and Tenant (Residential Tenancies) Act, 1973, states:

"Except where the landlord and tenant agree in writing upon a longer period of notice, notice to quit residential premises shall . . . be given, . . .

- (b) if the residential premises are let from month to month,
  - (i) by the landlord at least three months, and
  - (ii) by the tenant at least one month;
- (c) if the residential premises are let from week to week,
  - (i) by the landlord at least four weeks, and
  - (ii) by the tenant at least one week,
 before the expiration of any such month or week."

However, bearing in mind that if the tenant gives notice the landlord will be faced with the problem of finding a new tenant for the premises and that this may well take as long as for the tenant to find alternative accommodation, it would seem unreasonable to alter the length of notice required of the landlord without making the revised notice requirement apply also to the tenant.

As this suggested two months' period of notice would apply to leases for a fixed term as well as to periodic tenancies, this would mean that the party in a lease for a fixed term desiring to terminate the agreement would be required to give notice in writing to the other party at least two months prior to the termination date of the lease; failing this, the lease would be renewed by implication of law.

Although the requirement of a notice to quit in the case of a lease for a fixed term is alien to the common law tradition, the necessity for such a notice was recognized by the Francis Committee, which found a precedent for this proposed reform in Scotland. The Committee wrote<sup>12</sup>:

"Under Scots law, a fixed term tenancy for a year or more does not automatically come to an end at the expiry of the term but continues by tacit relocation, unless a notice of termination is given; and even where the term is for less than a year, a notice of removal must be given before an action for removing can be launched . . .

We think that the English law might with advantage be brought into line with Scots law in this respect . . .".

A precedent for the requirement of a period of notice to quit in respect of a lease for a fixed term exists in Manitoba, where in 1971 the Provincial

11. Nova Scotia also has similar legislation: Residential Tenancies Act, Stats. N.S. 1970, c.13, s.7(1).

12. *Report of the Committee on Rent Acts*, H.M.S.O. Cmnd. 4609 (1971), 161.

legislature enacted legislation requiring one month's notice from both parties in the case of a lease under twelve months<sup>13</sup> and two months' notice where the lease is for twelve months or more<sup>14</sup>.

If legislation is introduced making a notice to quit in respect of a lease for a fixed term compulsory, a final issue that should be considered is whether the landlord should be placed under a statutory obligation to remind the tenant of the requirement for him to give notice if he wishes to vacate the premises when the lease expires. This requirement was introduced in Manitoba in the case of leases for a fixed period of at least twelve months. The Manitoban legislation reads<sup>15</sup>:

"Where the term of a tenancy agreement is twelve months or more the landlord shall in writing advise the tenant at least three months prior to the expiry date of the tenancy agreement of the tenant's responsibility to give notice if the tenant wishes to terminate the tenancy agreement and where a landlord fails to comply with this subsection the tenant may at his option

- (a) terminate the tenancy agreement on the expiry date of the tenancy agreement without notice; or
- (b) continue the tenancy upon notice to the landlord".

The reason for this requirement is that the tenant may forget that his lease is about to expire and may not give the requisite amount of notice in the event that he wishes to terminate his occupancy.

The writer is of the opinion that this requirement is unnecessary. It is thought that the landlord would be just as likely as the tenant to forget to give the requisite notice to quit, and it would clearly be inappropriate for the tenant to be placed under an obligation to remind the landlord of the need for a period of notice. Instead, the problem should be solved by ensuring that the tenant receives sufficient instruction about the notice requirement. To achieve this result, it is suggested that the notice requirements be included as a clause in any statutory standard form of lease introduced in Australia<sup>16</sup>.

#### **(B) RESTRICTIONS ON THE RIGHT OF THE LANDLORD TO REFUSE TO CONTINUE A TENANCY**

Under the existing law, although a lease for a fixed term expires automatically, a weekly or monthly tenancy will continue indefinitely until either the landlord or the tenant gives the requisite notice to the other<sup>17</sup>. The law fixes the length of the notice but does not require that any reason be given. Thus, the landlord can give a notice to quit to the tenant (and *vice versa*) for any reason or no reason at all, and it is not possible for the sufficiency of the reason to be challenged in court.

13. Landlord and Tenant (Amendment) Act, Stats. Man. 1971, c.35, s.103(3).

14. *Id.*, s.103(4).

15. *Id.*, s.103(5).

16. The desirability of introducing a statutory standard form of residential lease in Australia is discussed in Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (A.G.P.S., Canberra, 1975), ch.10. See also Ontario Law Reform Commission, *Working Paper on the Standard Form of Residential Property Lease in Perspective* (1971); Mueller, "Residential Tenants and their Leases: An Empirical Study", (1970-71) 69 *Mich. L.R.* 247; Arbittier, "The Form 50 Lease: Judicial Treatment of an Adhesion Contract", (1963) 111 *U. Pa. L.R.* 1197; and Bell, "Standard Form Leases in Wisconsin", [1966] *Wis. L.R.* 583.

17. *Amad v. Grant* (1947) 74 *C.L.R.* 327, 336; *Gleeson v. Richey* [1959] *V.R.* 258, 261.

The writer believes that the law should not permit the tenant to be deprived of his accommodation for arbitrary or improper reasons. Two types of reform can be considered here. First, we can preserve the right of the landlord to give the tenant a notice to quit without specifying a reason, but permit the tenant to challenge the validity of the notice if he believes that it was given in retaliation for a complaint made by the tenant to a governmental agency or an exercise by the tenant of a remedy provided by statute (this can be referred to as the problem of "retaliatory eviction"). Secondly, we can insist that the landlord specify a reason, and enact legislation specifying a complete list of acceptable reasons (this can be referred to as the problem of "discretionary termination").

(i) *Retaliatory Eviction*

It is pointless for the law to provide remedies for the tenant against a landlord unless adequate protection against a notice to quit in retaliation is provided. It is submitted that the absence of any legislation in Australia outlawing retaliatory eviction is one of the major weaknesses of the present law<sup>18</sup>. A simple illustration will make the point. In Victoria, where the Rental Investigation Bureau has the power to investigate allegations of excessive rent, to recommend to the Governor-in-Council that premises be prescribed, and, once the premises are prescribed, to bring applications on behalf of tenants before the Fair Rents Board for a reduction in rents, the effectiveness of the procedure is drastically reduced because the tenant is vulnerable to a notice to quit in the period between the time when the Rental Investigation Bureau advises the landlord that complaint of excessive rent has been made against him and the time when the Governor-in-Council prescribes the premises<sup>19</sup>. Thus, in many cases, the result of a valid complaint of excessive rent will be the speedy eviction of the tenant.

Even in the absence of legislation, it is always open to the courts to declare void any notices to quit given in retaliation. A useful precedent for this exists in the United States, where in *Edwards v. Habib*<sup>20</sup> protection against retaliatory eviction was given the tenant without the assistance of legislation. In this case a monthly periodic tenant reported a number of housing code violations in her apartment to the appropriate government authority. An inspection revealed 40 violations and following the inspection the landlord gave the tenant a month's notice to quit. The U.S. Court of Appeals for the D.C. Circuit refused to grant an order for possession, holding that in enacting the D.C. housing code the government impliedly effected a change in the parties' rights in that proof of a retaliatory notice now constituted a defence to an action of eviction:

"The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself"<sup>21</sup>.

The Court justified its decision on social grounds:

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18. Tasmania has recently introduced a legislative ban against retaliatory eviction in cases where premises are declared by the Director of Housing either undesirable or unfit for human habitation. See the Substandard Housing Control Act, 1973 (Tas.), s.17.
  19. The Victorian rent control legislation is contained in Part V, Landlord and Tenant Act, 1958.
  20. (1968) 397 F.2d 687.
  21. *Id.*, 701-2.

“. . . as a court of equity we have the responsibility to consider the social context in which our decision will have operational effect. In the light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated”<sup>22</sup>.

While most of these social justifications could also be validly asserted in Australia, it should be realized that *Edwards v. Habib* is an isolated decision. In addition, it could well be argued that *Edwards v. Habib* involves an unjustified extension of the role of judicial law-making and is a step that Australian courts would be unlikely to take of their own initiative. Thus, if retaliatory eviction is to be prevented, legislation would seem essential.

Legislation designed to prevent retaliatory eviction is widespread in the United States, Canada, New Zealand and the United Kingdom. The form of the legislation varies. For example, Michigan and Rhode Island statutes provide that the tenant may defend an action for possession on the ground that the alleged termination was intended as a penalty against the tenant for taking any justified, lawful act<sup>23</sup>. The relevant New Jersey statute prohibits retaliation against a tenant who has sought to secure or enforce any rights under a lease, or under the laws of the State or the United States.<sup>24</sup> Statutes in force in Ontario, Manitoba and Nova Scotia declare void any notice to quit given to the tenant in retaliation for any complaint made to any governmental authority or any attempt by him to secure or enforce his legal rights<sup>25</sup>. In New Zealand, the Rent Appeal Act, 1973, declares that any notice to quit given by the landlord to the tenant because of an application by the tenant to a Rent Appeal Board for an assessment fixing the equitable rent or for the recovery of any excess rent paid over and above the fixed equitable rent is void and constitutes an offence punishable by fine.<sup>26</sup> Finally, in the United Kingdom, if a tenant (or his local authority) applies to a Rent Tribunal for the fixing of a rent, any notice to quit later served on him by his landlord, either before the tribunal gives its decision or within six months following that decision, is automatically extended for six months from that decision, unless the Tribunal, taking all considerations into account on both sides, concludes that the landlord should be allowed to terminate the contract earlier and therefore directs that the extension should be for a shorter period:<sup>27</sup> if a notice to quit is served on the tenant at any other time, the tenant can apply to the Tribunal for an extension of the notice to quit<sup>28</sup>.

One unfortunate weakness in the retaliatory eviction statutes of many overseas jurisdictions is that no provision is made for shifting the burden of proof from the tenant to the landlord. It is extremely difficult for a tenant to prove on a balance of probabilities that a notice to quit from his landlord

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22. *Id.*, 701.

23. Mich. Comp. Laws Ann., s.600.5646(4)(c) (Supp. 1971); R.I. Gen. Laws Ann., s.32-20-10(c) (1969).

24. N.J. Stat. Ann., s.2A:42-10.10 (Supp. 1971).

25. Landlord and Tenant Act, R.S.O. 1970, c.236, s.107(2); Landlord and Tenant (Amendment) Act, Stats. Man. 1970, c.106, s.113(2); Residential Tenancies Act, Stats. N.S. 1970, c.13, s.7(4).

26. Rent Appeal Act, 1973 (N.Z.), ss.20(1)(3), 27.

27. Rent Act, 1968 (U.K.), s.77.

28. *Id.*, s.78.

was given for retaliatory motives. Thus, the enactment of a section of a statute simply outlawing retaliatory eviction is not enough; the legislature should go further and establish a rebuttable presumption in certain circumstances that a notice to quit is retaliatory. A period of time must be fixed after a complaint made or action taken by a tenant during which any notice to quit is presumed to be given in retaliation, unless the landlord can prove otherwise.

The following legislation is suggested for adoption in Australia:

"(1) In any proceeding by a landlord for possession, if it appears to the court that the notice to quit was given in retaliation, because of a complaint by a tenant against the landlord to any governmental authority or because of an attempt by a tenant to secure or enforce his legal rights, the court may refuse to grant an order for possession and may declare the notice to quit invalid and the notice to quit shall be deemed not to have been given.

(2) For the purposes of subsection (1), any notice to quit served on the tenant within six months of a complaint by him against the landlord to any governmental authority or within six months of any attempt made by the tenant to secure or enforce his legal rights shall be presumed to have been given in retaliation, unless the contrary is proved."

This form of legislation would appear to be fairer to the landlord than that recently proposed in California, whereby some notices to quit are always presumed to have been given in retaliation:

"The receipt of any notice of termination of tenancy, except for nonpayment of rent . . . shall create a rebuttable presumption that such notice is a reprisal against the [tenant]"<sup>29</sup>.

The writer believes that it is sufficient to declare void any notice to quit given in retaliation. The giving of such a notice need not constitute an offence. In particular, the unique law in New Jersey whereby any retaliatory action taken by a landlord is deemed to be disorderly conduct, punishable by a \$250 fine and/or imprisonment for a period not exceeding six months is considered inappropriate<sup>30</sup>.

#### (ii) *Discretionary Termination*

Although the necessity for legislative intervention in this area is not as fundamental as in the case of retaliatory eviction, the fact that a landlord can legally give a tenant a notice to quit at any time without reason seems unfair to the tenant as the law fails to recognize the importance to the tenant and his family of the premises as their home. While the right of the landlord to regain vacant possession of his property must not be unduly circumscribed, the writer believes that the introduction of a comprehensive list of acceptable reasons for the notice to quit would be desirable for the tenant while still being fair to the landlord.

29. See Note, "The Community and the Park Owner Versus the Mobile Home Park Resident: Reforming the Landlord-Tenant Relationship", (1972) 52 *Boston U.L. R.* 810, 829-30.

Although this legislation was originally prepared to protect mobile home park residents, there seems to be no reason why it could not be used to protect tenants generally.

30. N.J. Rev. Stats., s.2A: 170-92.1 (Supp. 1971). While the statute only provides criminal enforcement, it also has been construed to preclude a court from granting an eviction that is retaliatory: *Alexander Hamilton Savings and Loan Association v. Whaley* (1969) 107 N.J. Supp. 89; 257 A.2d 7 (Dist. Ct.).

Precedent for the introduction of such legislation exists in Australia, as Victoria, New South Wales and South Australia already have lists of acceptable reasons for the giving of a notice to quit included in their legislation covering premises subject to rent control<sup>31</sup>. The operation of such legislation could well be extended to cover all private tenancies, not only those subject to rent control. If this proposal is acted upon, the main problem is to determine which reasons should be acceptable for the serving of a notice to quit. To this end, it is instructive to examine the reasons listed in existing Australian and overseas statutes as justifying a notice to quit.

The Victorian Landlord and Tenant Act, 1958, provides a total of twenty-five grounds, the most significant and most often used being the following: (a) that the tenant is a minimum of four weeks in arrears of rent; (b) that the tenant has failed to perform or observe a term of the lease; (c) that the tenant has failed to take reasonable care of the premises; (d) that the lessee or any other person residing with him or visiting the premises has been guilty of conduct which is a nuisance to neighbours; (e) that the lessee has used the premises for some illegal purpose; (f) that the lessee has indicated his willingness or intention to vacate, as a result of which the landlord has agreed to sell or let the premises; (g) that the premises within twelve months will be reasonably required by the landlord for his own occupation or that of his immediate family; (n) that the landlord has sold the premises and the purchaser reasonably requires the premises within twelve months for his own occupation or that of his immediate family; (o) that the premises are reasonably required by the lessor for reconstruction, demolition, or removal; (q) that the lessee has sublet the premises in part or whole without the express or implied consent of the landlord; (x) that the financial circumstances of the lessee are such that he could without undue financial hardship purchase or lease other uncontrolled premises; and (y) that the lessee has other adequate and suitable premises presently available for his occupation.

The court is obliged by s.92 to consider in all applications for possession under s.82(6) any hardship that would result to the landlord or tenant by making or refusing to make an order for possession. In addition, if the application is brought under grounds (g) or (o) of s.82(6) the court must consider the availability of reasonably suitable alternative accommodation and may, in its discretion, refuse to make the order for possession if such accommodation is not available.

In New South Wales, the list of acceptable reasons for the recovery of possession by the landlord are very similar to those in effect in Victoria. The only significant difference between the two States' legislation is that whereas Victoria permits eviction in all cases where the tenant is at least 28 days in arrears of rent, New South Wales specifies a minimum period of 14 days' arrears where the tenant's period of occupation does not exceed twelve months<sup>32</sup>.

In South Australia, s.15(3), Excessive Rents Act, 1962-1966, stipulates six grounds for the termination of a tenancy subject to the Act. These grounds are:

31. Landlord and Tenant Act, 1958 (Vic.), s.82(6); Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), s.62(5); Excessive Rents Act, 1962-1966 (S.A.), s.15(3).

Lists of acceptable reasons for the giving of a notice to quit are also to be found in the Tasmanian and South Australian legislation regulating maximum rents of premises declared substandard: Substandard Housing Control Act, 1973 (Tas.), s.17, and Housing Improvement Act, 1940-1973 (S.A.), s.61.

32. Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), s.62(5)(a)(i).

failure to pay rent; breach of a term of the lease; that the tenant has failed to take reasonable care of the premises; that the tenant has been guilty of conduct annoying to his neighbours; that the tenant has used the premises for some illegal purpose; and finally, that there are special reasons deemed by the court to be sufficient to justify the termination.

These grounds are far fewer than those in the equivalent New South Wales and Victorian legislation, yet it is doubtful whether the landlord is subject to greater restriction as to the recovery of his premises in South Australia than in the other States. In particular, it should be noted that clause (f) of s.15(3), Excessive Rents Act, "that there are special reasons deemed by the court to be sufficient to justify the grant of leave", is so broad that it could cover all the twenty-five grounds to be found in the Victorian and New South Wales legislation. In addition, it must be remembered that s.15, Excessive Rents Act, applies only to premises subject to the Act, and that the premises are only subject to the Act for a period of one year following an order by the local court fixing the order: in the other States the rules against discretionary termination apply indefinitely as long as the premises are prescribed.

One major difference between the South Australian legislation and that of the other States is that under s.15(1), Excessive Rents Act, the landlord must first obtain the leave of the local court before he can give the tenant a notice to quit. In the other States, a notice to quit can be given by the landlord on one of the twenty-five permitted grounds without the need for court approval; the issue will only come before the Fair Rents Board if the tenant challenges the validity of the notice.

The approach of the Rent Act, 1968 (U.K.), is slightly different. Section 10 gives the court a discretion whether or not to make an order for possession even if one of the nine prescribed grounds is proved.<sup>33</sup> The major grounds are as follows: failure to pay the rent or breach of a requirement of the Rent Act; that the tenant is guilty of conduct which is a nuisance or annoying to adjoining occupiers; that the premises have deteriorated owing to acts of waste or the neglect or default of the tenant; that the tenant has given notice to quit and the landlord has taken steps as a result of which he would be seriously prejudiced if he could not obtain possession; that the tenant has sublet or assigned the premises without the consent of the landlord; and that the dwelling-house is reasonably required for occupation as a residence for himself, his children, his parents or parents-in-law. In addition to the existence of one of the recognized grounds, the court must be satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order in question takes effect<sup>34</sup>.

Finally, the relevant Manitoban legislation should be considered<sup>35</sup>. This statute is by far the shortest of all those examined and simply states that a tenant shall have the right to renew a tenancy agreement where a tenant is not in default of any of his obligations under the tenancy agreement or the existing landlord-tenant legislation and where the landlord or owner does not require the premises for his own occupancy. The statute is also the most widely-embracing of those examined in that at present it is the only one which applies to all rented premises throughout the jurisdiction, the sole exception to its application being government housing<sup>36</sup>.

33. These nine grounds are listed in Schedule 3, Part I of the Rent Act, 1968 (U.K.).

34. *Id.*, s.10(1)(a).

35. Landlord and Tenant (Amendment) Act, Stats. Man. 1971, c.35, s.103(6).

36. *Id.*, s.103(6)(c).

When determining which of the multitude of reasons listed above should be drafted into any new Australian legislation, the writer believes that three aims should be kept in mind. First, although the object of the legislation is to ensure that the tenant is not deprived of his accommodation for arbitrary or improper reasons, it should not be made difficult or impossible for the landlord to obtain possession if he has a fair reason. Thus, any proposed legislation should ensure that the interest of the landlord is protected. Secondly, the legislation should be clear and concise. The ground in the South Australian statute "that there are special reasons deemed by the court to be sufficient to justify the grant of leave" is far too imprecise and invites litigation.<sup>37</sup> Thirdly, to be fair to the landlord, if a ground is proved by the landlord he should be entitled as of right to possession: the order for possession should not be discretionary, as under the Rent Act, 1968 (U.K.). Finally, the statute should be drafted as simply as possible so as to be readily intelligible to all interested parties.

In order that the right of the landlord to regain possession is not unduly restricted, the writer is of the opinion that all of the 25 reasons for possession as listed under the Victorian Landlord and Tenant Act, 1958, s.82(6), should be adopted in each State. The only exceptions would be the final two grounds, (x) and (y), which are only appropriate in the light of the existing legislation on prescribed premises.<sup>38</sup>

In order to simplify the existing Victorian and New South Wales Acts in any new legislation extending to all premises, many of the existing clauses could well be amalgamated under the clause entitling the landlord to possession "where a tenant is in default of any of his obligations under this Act or his tenancy agreement". This would effectively cover grounds (a) (b) (c) (d) (e) and (g) of the existing Victorian legislation.

Thus, the form of legislation suggested by the writer would encompass the widely-embracing ground for possession suggested above, and four additional grounds, which would be reproductions of clauses (f) (g) (n) and (o) of the existing Victorian Act. The writer considers that this legislation would produce the fairest result for the landlord and would also be relatively simple to understand. Although the present Manitoban legislation has even greater simplicity, it would appear to restrict unduly the right of the landlord to regain possession of his premises.

## 2. Forfeiture

### (A) RIGHT OF RE-ENTRY

Common law did not give the landlord a right to forfeit a lease in the event of a breach of covenant by the tenant unless such a right was expressly reserved in the lease<sup>39</sup>. However, today a right of forfeiture is invariably

37. Excessive Rents Act, 1962-1966 (S.A.), s.15(3)(f).

38. The notion of "prescribed premises" appears only in the Victorian and New South Wales legislation. In both States, premises must be declared "prescribed premises" by the Governor-in-Council before the tenant can make an application before a Fair Rents Board for a determination of the maximum rent: Landlord and Tenant Act, 1958 (Vic.), ss.43, 44, 57; Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), ss.5A, 6, 8, 18.

The writer has advocated in previous articles that the notion of prescribed premises should be abolished. See Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (1975), ch.12, and Bradbrook, "The Law Relating to the Residential Landlord-Tenant Relationship: An Initial Study of the Need for Reform". (1974) 9 *Melb. U.L.R.* 589, 624-5.

39. See *Bashir v. Commissioner of Lands* [1960] A.C. 44, 51; *Sanders v. Wadham* (1870) 4 S.A.L.R. 73.

included in all standard forms of lease, and in any event may be implied by statute<sup>40</sup>.

It should be noted that the time period which must elapse after the rent falls into arrears before a right of forfeiture accrues varies from lease to lease. The writer has examined the forfeiture clauses of four standard forms of residential lease and tenancy agreement currently in use in Victoria. Fourteen days' arrears is stipulated by the 1958 Copyright lease and seven days by the W. B. Simpson & Son tenancy agreement as necessary before a forfeiture can be claimed. No period is stipulated at all in the R.E.S.I. and L. R. Reed & Co. Pty. Ltd. tenancy agreements, which means that the landlord could claim a forfeiture the day after the rent falls due.

The writer believes that in the case of forfeiture for breach of covenant to pay rent there should be a standard period of arrears which must elapse before the landlord should be entitled to bring proceedings for an order for possession. The aim should be to provide a short period of grace for the tenant without unduly delaying the right of the landlord to take legal steps to regain possession. It might be thought that such a period of grace is unnecessary inasmuch as under the existing law the tenant has the right to apply to the court for relief from forfeiture, but as this would involve obtaining legal representation it is not likely that it would be used by a residential tenant with only a short-term interest in the premises<sup>41</sup>.

The following draft form of legislation is considered appropriate to remedy this problem:

"In every lease, whether by parol or in writing, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, remains unpaid for fourteen days after any of the days on which it ought to have been paid, it shall be lawful for the landlord at any time thereafter to take action for the recovery of possession".

Another common law rule in this area is that in the case of forfeiture for non-payment of rent, before the landlord can exercise his right of re-entry he must make a formal demand of payment. Under this doctrine,

". . . the landlord or his authorized agent must demand the exact sum due on the day when it falls due at such convenient hour before sunset as will give time to count out the money, the demand being made upon the demised premises and continuing until sunset"<sup>42</sup>.

This common law rule has been modified by statute in Australia, as all States have introduced legislation stipulating that re-entry may be effected without formal demand where one-half year's rent is in arrears<sup>43</sup>. In New

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40. See, e.g., Conveyancing Act, 1919-1972 (N.S.W.), s.84.

41. A study of 242 tenants in private rental accommodation in the inner Melbourne suburbs of Fitzroy and Collingwood was undertaken in 1973 jointly by the writer and the Fitzroy Ecumenical Centre for the Australian Government Commission of Enquiry into Poverty. One of the findings was that only 8 tenants (3.3 per cent.) had leases exceeding one year in duration. See Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (1975), App.I.

42. Megarry and Wade, *Law of Real Property* (3rd ed., 1966), 665; referring to 1 Wms. Saund. (1871) 434, being notes to *Duppa v. Mayo* (1669).

43. Landlord and Tenant Act, 1899-1973 (N.S.W.), s.9; Supreme Court Act, 1958 (Vic.), s.114; Landlord and Tenant Act, 1936 (S.A.), s.4; Common Law Procedure Act, 1854 (Tas.), s.183; and Property Law Act, 1974 (Qld.), s.108.

South Wales no demand is necessary where the rent is more than one month in arrears<sup>44</sup>.

There would seem to be little point in retaining this ancient doctrine. The doctrine serves no useful purpose at present as all current standard forms of lease and tenancy agreement expressly exempt its operation by including the words "whether formally demanded or not" in the proviso for re-entry. The change could either be effected in a separate section of any new legislation or by adding the words "whether formally demanded or not" in the draft form of legislation quoted above immediately following the clause "on which it ought to have been paid".

#### (B) WAIVER OF FORFEITURE

On learning of the occurrence of an event entitling him to re-enter, the landlord has a choice whether he will exercise his right of forfeiture<sup>45</sup>. At common law the forfeiture is said to be waived and cannot be revived once the landlord has chosen not to exercise it. The election by the landlord can be express or implied. Although there would seem to be no reason to question the existing law on express waiver, the law on implied waiver is still a major cause of concern to landlords in New South Wales and South Australia. The common law, which still applies in this area of law in these States (except in the case of prescribed premises in New South Wales), provides that the landlord is deemed to waive a breach of covenant when, after he has learned of the breach, he demands, accepts, or sues for rent falling due after the breach. The landlord cannot avoid a waiver by demanding the rent "without prejudice" to his right of forfeiture<sup>46</sup>. Although it has been decided that once the landlord has shown his determination to exercise his right of forfeiture, for example, by serving a writ in ejectment, no subsequent act will operate as a waiver<sup>47</sup>, it is unclear whether this would apply if the landlord accepted rent due after the breach<sup>48</sup>.

The present law would seem to be unfair to both parties. It is unfair to the landlord because it effectively prevents him from accepting money owed by the tenant for the period of occupation after the breach has occurred, for fear of losing his right of forfeiture. Although at the hearing of the issue the court is empowered to order the tenant to pay occupation rent for the time after the lease terminated, the landlord has to suffer a considerable delay before he can receive the money and, in many cases, by the time the case reaches trial the tenant will have vacated the premises without paying and without notifying the landlord of his whereabouts. The law also works to the detriment of the tenant in that, according to the R.E.S.I. (Vic.), landlords are reluctant to grant extensions of time to pay the rent lest if they do, and the tenant fails to pay, the right of forfeiture will be deemed to have been waived.

44. Conveyancing Act, 1919-1972 (N.S.W.), ss.85(1)(d), 85(2).

45. The landlord must have knowledge of the cause of forfeiture before the doctrine of waiver can come into operation. See *Carson v. Wood* (1884) 10 V.L.R. (L) 223; *Majala Pty. Ltd. v. Ellas* [1949] V.L.R. 104; *Campbell v. Payne* (1953) 53 S.R. (N.S.W.) 537.

46. *Segal Securities Ltd. v. Thoseby* [1963] 1 All E.R. 500; *Croft v. Lumley* (1858) 6 H.L. Cas. 672; [1843-60] All E.R. 162; *Oak Property Co. Ltd. v. Chapman* [1947] 2 All E.R. 1.

47. *Hinton v. Fawcett* [1957] S.A.S.R. 213; *Wintergarden Theatre Ltd. v. Baxter & Webb* [1929] Q.W.N. 6.

48. See *Evans v. Wyatt* (1880) 43 L.T. 176.

A useful method of remedying the inadequacies of the present law on implied waiver would be to introduce legislation stating that the acceptance of rent after the giving of a notice to quit shall not invalidate any notice previously given. Strangely, this was acknowledged in the post-war legislation relating to prescribed premises in Victoria<sup>49</sup> and New South Wales<sup>50</sup>, but the law has never been altered with respect to non-prescribed premises in New South Wales and has only recently been altered in Victoria by virtue of s.4, Landlord and Tenant (Amendment) Act, 1971.

The present universally applicable Victorian legislation and the New South Wales legislation applicable only to prescribed premises could well be extended to cover all premises in every State. The Victorian and New South Wales sections state identically:

'Where notice to quit any [prescribed] premises has been given, whether before or after the commencement of this Act—

- (a) any demand by the lessor for payment of rent, or of any sum of money as rent, in respect of any period within six months after the giving of the notice;
- (b) the commencement of proceedings by the lessor to recover rent, or any sum of money as rent, in respect of any such period; or
- (c) the acceptance of rent, or of any sum of money as rent, by the lessor in respect of any such period—

shall not of itself constitute evidence of a new tenancy or operate as a waiver of the notice”.

#### (C) RELIEF AGAINST FORFEITURE

Another major concern of landlords in all States is the existing law on the time limit for the granting of relief against forfeiture to the tenant by the courts.

The present law has established different rules where forfeiture for a breach of the covenant to pay rent is claimed as opposed to forfeiture for a breach of any other covenant. In the case of forfeiture for a breach of the covenant to pay rent, the present State legislation provides that any claim to relief which a tenant desires to make must be made within six months after execution of the judgment in respect of which relief is sought<sup>51</sup>. This legislation copies the Common Law Procedure Act, 1852 (U.K.), s.210, which itself was a copy of the Landlord and Tenant Act, 1730 (U.K.).

In the case of forfeiture for other breaches, the present legislation, identical for each State, reads<sup>52</sup>:

“Where a lessor is proceeding, by action or otherwise, to enforce or has enforced without the aid of the Court or the County Court such a right of re-entry or forfeiture, the lessee may . . . apply to the Court or a judge thereof for relief; . . .”

49. Landlord and Tenant Act, 1958, s.103.

50. Landlord and Tenant (Amendment) Act, 1948-1969, s.80.

51. *E.g.*, Supreme Court Act, 1958 (Vic.), s.114; Landlord and Tenant Act, 1899-1973 (N.S.W.), s.8; and Landlord and Tenant Act, 1936 (S.A.), s.4(2).

52. Property Law Act, 1958 (Vic.), s.146(2); Conveyancing Act, 1919-1972 (N.S.W.), s.129(2); Landlord and Tenant Act, 1936 (S.A.), s.11(1); Property Law Act, 1969-1973 (W.A.), s.81(2); Conveyancing and Law of Property Act, 1884 (Tas.), s.15(2); and Property Law Act, 1974 (Qld.), s.124(2).

Thus, there is no fixed time period, but the application for relief must be made prior to the landlord's obtaining possession of the premises by way of execution of the court order.

The view of the R.E.S.I. (Vic.) is that the present discretionary court powers to grant the tenant relief are both undesirable and unnecessary and should be abolished by statute<sup>53</sup>. They are alleged to be undesirable in that the present discretion leads to uncertainty of result in an area of law which, according to the Institute, should be clearly defined and subject to no ambiguity. They are alleged to be unnecessary in that no landlord would want to exercise a right of forfeiture against a "good" tenant for fear of having a period of vacancy during which no rent would be received: forfeiture is only used as a means of last resort against an irresponsible tenant. However, it should be remembered that relief from forfeiture was designed by the Court of Chancery to be a discretionary remedy<sup>54</sup>, and it would be impossible to introduce detailed legislation in an area where judicial discretion is involved. In addition, the argument that a landlord would not want to exercise a right of forfeiture against a "good" tenant implies that the landlord rather than the court should decide when relief should be allowed the tenant, a concept that would seem undesirable from the standpoint of the tenant.

Instead of a total abolition of the present relief from forfeiture, the writer believes that the law could do justice to both parties if the existing time limits for the granting of relief were restricted. It is advocated that the power of the courts to grant relief, whether for breach of the covenant to pay rent or any other covenant, should not apply once the landlord has obtained an order for possession. Thus, under this proposal the tenant would have to seek relief at the time of the trial, or else he would be too late.

Three reasons would seem to support the need for this suggested reform. First, the present law is based on an historical rather than a logical foundation: there is no need to distinguish the right to relief according to whether the tenant has breached his covenant to pay rent rather than any other covenant. Next, although the tenant should be allowed to apply for relief after the landlord has gained possession in the event that the landlord is permitted by law to use self-help methods of gaining re-entry, if self-help is abolished as suggested by the writer later in this article, it is submitted that a sufficient opportunity exists at the court hearing for the tenant to plead his case for relief. In addition, if the landlord obtains an order for possession it would seem unreasonable to subject him to uncertainty about whether the tenant could be reinstated in the premises by a later court order.

Finally, the writer believes that the present statutory right of the tenant to have an action for possession for non-payment of rent discontinued by paying all arrears of rent and costs at any time before trial should be re-examined. The present legislation in each State follows the Common Law Procedure Act, 1852 (U.K.), s.12<sup>55</sup>. The Victorian section reads:

"If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord . . . or pay into court . . . , all the rent and arrears together with the

53. *Supra*, n.10.

54. See Cheshire, *Modern Law of Real Property* (11th ed., 1972), 427-8.

55. *E.g.*, Supreme Court Act, 1958 (Vic.), s.116; Landlord and Tenant Act, 1899-1973 (N.S.W.), s.10; and Landlord and Tenant Act, 1936 (S.A.), s.5.

costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued”.

The aim of the law should be to strike a fair balance between the interest of the tenant in maintaining his home and that of the landlord in obtaining prompt payment of rent. When the tenant defaults for the first or even the second time, it is considered that he should be allowed relief against forfeiture, but if further defaults occur, it is unreasonable to expect the landlord to endure further inconvenience and hardship<sup>56</sup>. Further, the law should not be seen to condone the late payment of rent in all cases. Accordingly, it is suggested that the present legislation should be qualified by the proviso that it should not apply in cases where the tenant has on at least two occasions previously during the tenancy been at least fourteen days in arrears. The onus of proof in this matter would be on the landlord.

### **3. The Recovery of Possession from Defaulting or Overholding Tenants**

The most vehement complaint made by landlords and estate agents against the present landlord-tenant laws is that the existing means of recovering possession of the premises from defaulting or overholding tenants take too long. According to the R.E.S.I. (Vic.), the position of the landlord is especially vulnerable in the case of a tenant who fails to comply with his covenant to pay rent<sup>57</sup>. It was stressed to the writer that the time taken to eject a tenant who defaults in the payment of rent and refuses to comply voluntarily with a notice to quit is at least ten weeks from the date of the first default. During this time the tenant continues to occupy the premises without paying rent, and in many instances this rent is irrecoverable by the landlord as the tenant either leaves without notifying the landlord of his whereabouts and cannot be traced or is effectively judgment-proof through lack of funds. In addition, the landlord has to pay the legal costs involved in the action for possession. It will be appreciated that all this involves a considerable financial loss to the landlord. It is alleged by the R.E.S.I. (Vic.) that there are a number of “professional defaulters” who change premises frequently and deliberately take advantage of the slow procedure for gaining re-entry by occupying the premises rent free for a considerable period.

It is important to consider the steps that must be taken during the procedure for re-entry in order to understand the causes of the present delays and to devise a more speedy procedure to solve the problem.

A landlord or his agent does not take action to terminate a tenancy on the day on which default is made as some days' grace is invariably granted. This can range from a considerable number of weeks or months to what is considered in practice an absolute minimum of two weeks. However, a month would probably be a more practical minimum period during which requests for payment are made by the agent and promises are made and broken by the tenant. Assuming that the owner or his agent takes immediate action after this period, fourteen days is the practical minimum time for the service of a Notice to Quit. Assuming that there is no delay after the expiry of the Notice to Quit in issuing a Summons to apply to the court for the issue of a

56. For an example of the inconvenience and hardship that a landlord can suffer under the present law, see *Gill v. Lewis* [1956] 2 Q.B. 1 (C.A.).

57. *Supra*, n.10.

Warrant of Possession, a further fortnight must be viewed as the minimum within which the Summons could be heard by the court. Again assuming that an order has been made and the Warrant is issued forthwith, a further period of four weeks must elapse before the police, in normal practice, will execute the Warrant<sup>58</sup>.

It will be seen therefore that an absolute minimum period of ten weeks expires between the time when the tenant makes default until the owner can obtain possession. It is stressed by the R.E.S.I. (Vic.) that this is the minimum period, and that in practice the more likely period would be three to four months. A considerably longer period than two weeks normally elapses from the time when the tenant makes default until the time when the owner realises that the tenant will neither pay nor vacate and it is necessary to take legal proceedings. Normally it is closer to four weeks than two weeks from the time when the owner decides to issue a Summons to the hearing by the court. This would be considered a more normal time to allow for the landlord and his agent to instruct the landlord's solicitor to prepare and issue a Summons, for its service, and for any delay in the hearing by the court.

The above assessments of time apply to cases where the tenant is residing on the premises and is available for service of the Notice to Quit and Summons. There can be very considerable extra delays where the tenant either deliberately avoids service or where neither the tenant nor any other person is available on the premises. This is particularly so where the tenant has actually ceased to reside on the premises although his furniture still remains, as the presence of the furniture may lead the landlord to assume that the tenant has not moved and may lead him to seek to serve the tenant with the requisite notices for many days before realizing his mistake.

This account reveals the need for a streamlining of the legal steps involved in seeking re-entry, and also for the introduction of an adequate system of substituted service of notices.

#### (A) THE LEGAL PROCEDURES FOR RE-ENTRY

In order to streamline the existing procedure the writer believes that only one document should be necessary to determine the tenancy and to enable the matter to be brought before the court if the tenant refuses to comply with the notice. This document would give formal notice to the tenant requiring vacant possession to be given to the owner on a certain date, and would be equivalent to the present Notice to Quit. The Notice, which for the purpose of identification will be called a "Notice for Possession", would also embody a notice to the tenant that if he failed to vacate, the owner would apply to the court for an Order of Possession. This document would take the place of the present Notice to Quit and Summons for Ejectment, and would save the duplication required by the present procedure and the time and expense involved in taking the separate steps. The tenant would have the alternatives of vacating as required or attending the court to give reasons why relief against forfeiture should be granted. If the notice is given pursuant

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58. This estimate of the time necessary to comply with the necessary requirement is that of the Real Estate and Stock Institute of Victoria. These estimates were explained orally to the writer by the President of the R.E.S.I. (Vic.). The writer was also shown a letter dated 12 October, 1967, written by the ex-General Secretary of the R.E.S.I. (Vic.), Mr. F. Foy, to the Hon. G. O. Reid, M.P., who was the Attorney-General of Victoria at that time, in which these estimates were stated in writing.

to a right of forfeiture vested in the landlord on a breach of covenant by the tenant the notice could be given at any time after the breach. However, if there is no breach of covenant and the landlord simply wishes to terminate a periodic tenancy or prevent the renewal of a lease for a fixed term, then if the writer's previous proposal for a minimum period of two months' notice to quit regardless of the nature of the tenancy were acted upon, the landlord would have to serve the notice in time to satisfy this requirement.

#### (B) SERVICE OF NOTICES

The present rules as to service of notices in Supreme Court actions are regarded by the R.E.S.I. (Vic.) as vague and unsatisfactory for the landlord, and appear to be in urgent need of reform. The best statement of the requirements at common law was provided by Lord Cranworth L.C. in 1854<sup>59</sup>:

"The object of all service is, of course, only to give notice to the party on whom it is made, so he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done that is required".

Thus, personal service was not strictly necessary at common law. However, the court had to be satisfied on the facts that the service had reached its intended recipient. For example, it was held at common law that the mere leaving of a notice to quit at the tenant's home, without further proof of its being delivered to a servant and explained, is not sufficient<sup>60</sup>. Also, the delivery of the notice to the last known address of the tenant in cases where the tenant disappears has been held to be insufficient<sup>61</sup>. In short, in view of Lord Cranworth's *dictum* no litigant could feel certain that he had satisfied the legal requirements unless personal service was effected.

In Victoria this common law rule has been replaced in actions before the magistrates' court by the Justices (Landlord and Tenant) Rules, 1962, made pursuant to s.4, Justices Act, 1958. Rule 1 permits a lessor of any premises, whether prescribed premises or not, to apply in writing to a magistrates' court for substituted service of a notice to quit. Under Rule 4, the court may make such order for substituted service as seems just to it.

A recent amendment to s.32, Landlord and Tenant Act, 1958, created by s.3, Landlord and Tenant (Amendment) Act, 1971, allows landlords to effect service by delivering the notice to quit to some person apparently over sixteen years of age and apparently residing in the premises, or by delivering the notice to the person by whom the rent is customarily paid.

In New South Wales, in the case of prescribed premises, s.62(4), Landlord and Tenant (Amendment) Act, 1948-1969, provides:

"Service of the notice to quit may, without prejudice to any other mode of service, be effected—

(i) by delivering the notice to—

(a) some person apparently over the age of sixteen years and apparently residing in or in occupation of the premises; or

59. *Hope v. Hope* (1854) 4 De G.M. & G. 328, 342; [1843-60] All E.R. 441.

60. *Doe d. Buross v. Lucas* (1804) 5 Esp. 153; *Ex parte Smith*; *Re Robertson* (1947) 48 S.R. (N.S.W.) 29.

61. *Jones d. Griffiths v. March* (1791) 4 Term Rep. 464; 100 E.R. 1121.

- (b) the person by whom the rent of the premises is customarily paid;
- (ii) with the leave of the court, by affixing the same to the premises and by sending copies thereof by prepaid post addressed to the lessee at the premises and at his address to the lessor”.

No provision exists in the Rules of the Supreme Court in either State, however, for obtaining an order for the substituted service of a notice to quit.

Although these legislative provisions in Victoria and New South Wales are more favourable to the landlord than the common law rule, the writer believes that they are still far from satisfactory. In particular, the need in Victoria to apply to the magistrates' court for an order for substituted service, and in New South Wales to seek leave of the court is time-consuming, creates additional legal expenses for the landlord, and, it is submitted, is unnecessary. The writer believes that substituted service should be allowed as of right, and the manner in which substituted service may be effected should be phrased as broadly as possible.

It is interesting to note that substituted service is already allowed as of right by s.37(1), Hire Purchase Act, 1959 (Vic.):

- “Any notice or document required or authorized to be served on or given to an owner or hirer under this Act may be so served or given—
- (a) by delivering it to him personally;
  - (b) by leaving it at his place of abode or business with some other person apparently an inmate thereof or employed thereat and apparently of or over the age of sixteen years; or
  - (c) by posting it addressed to him at his last known place of abode or business”.

One method of achieving the desired change would be to introduce legislation identical to s.37, Hire Purchase Act, 1959 (Vic.), into the appropriate State landlord-tenant statutes, merely substituting the words “a landlord or tenant” in place of “an owner or hirer”. However, the recent legislative reform introduced in Queensland is phrased even more broadly than the above-quoted Victorian legislation<sup>62</sup>. The relevant section reads:

- “19(1) A notice to quit shall be sufficiently given if —
- (a) it is delivered personally to the tenant or, as the case requires, to the landlord or his agent;
  - (b) it is delivered personally to some person apparently over the age of 18 years and apparently residing in or in occupation of the dwelling house;
  - (c) it is delivered personally to the person by whom the rent is usually paid, if that person is apparently over the age of 18 years;
  - (d) it is affixed to a conspicuous place upon some part of the dwelling-house;
  - (e) it is sent by post to the tenant at the place of his residence or business last known to the landlord or his agent”.

Notwithstanding the unnecessary restriction of this section to residential premises and possible doubts as to the adoption of the age of eighteen years

62. Residential Tenancies Act, 1975 (Qld.), s.19. Cf. Landlord and Tenant Act, R.S.O. 1970, c.236, s.109; Landlord and Tenant (Amendment) Act, Stats. Man. 1970, c.106, s.102.

rather than sixteen years in clauses (b) and (c), this would seem to be the most satisfactory form of legislation and should be considered for adoption by the remaining States and Territories.

#### (C) DOUBLE RENT AND DOUBLE VALUE PENALTIES

In order to safeguard the position of landlords, the writer believes that in addition to the reforms mentioned above a suitable deterrent should be established by legislation against the continuous or "professional" defaulter: such a deterrent would also act as an incentive to tenants not to make default in the payment of rent.

A double rent penalty, payable where a tenant gives a notice to quit but does not deliver up possession at the time contained in the notice, and a double value penalty, payable where a tenant wilfully holds over the premises after the determination of a lease and refuses to comply with a written request of the landlord demanding possession, would appear to constitute a suitable deterrent. Both these penalties would be payable in the discretion of the courts. Precedent for this suggestion already exists in the United Kingdom by virtue of two ancient statutes, the Landlord and Tenant Act, 1730, s.1, and the Distress for Rent Act, 1737, s.18<sup>63</sup>. The action for double rent applies in respect of all types of tenancies, but s.1, Landlord and Tenant Act, 1730, limits the operation of the action for double value to tenants for any term of life, lives or years, thus excluding weekly or monthly periodic tenants, tenants at will and tenants at sufferance<sup>64</sup>.

It should be noted that Victoria and Queensland have copied the wording of the 1730 and 1737 U.K. Acts in ss.9 and 10, Landlord and Tenant Act, 1958, and ss.138 and 139, Property Law Act, 1974, respectively. No mention of the British legislation exists in any South Australian legislation, but presumably the British legislation is in force by virtue of the legislation on the reception of imperial laws<sup>65</sup>. It appears that the Imperial Acts Application Act, 1969 (N.S.W.), abolished both the action for double rent and the action for double value in New South Wales<sup>66</sup>.

It will thus be seen that the only changes proposed by the writer are the restoration of the double rent and double value penalties in New South Wales and the extension of the double value penalty to all categories of tenancies in all States. Possibly the introduction of amended legislation into each of the relevant State Acts would have the effect of increasing the use of these remedies for the landlord. In view of the likely effectiveness of such a deterrent, it is surprising that the number of reported Australian decisions is very few. Despite the observation of Stephen C. J. in 1886 in *Glasson v.*

63. Those sections of the Distress for Rent Act, 1737 (U.K.), which relate to the landlord's common law right of distress were abolished in New South Wales by the Landlord and Tenant Amendment (Distress Abolition) Act, 1930 (N.S.W.), s.2. In Victoria, the remedy of distress was abolished as from 1948: Landlord and Tenant Act, 1958, s.12. In South Australia, the remedy of distress has been abolished in the case of dwelling houses: Excessive Rents Act, 1962-1966, s.16.

64. As to quarterly tenancies, see *Wilkinson v. Hall* (1837) 3 Bing. N.C. 508; 132 E.R. 506.

65. Acts Interpretation Act, 1915-1936 (S.A.), s.48.

66. Section 8(1), Imperial Acts Application Act, 1969 (N.S.W.), states:

"In addition to the repeals effected by subsection two of section five of this Act all other Imperial enactments (commencing with the Statute of Merton, 20 Henry III A.D. 1235-6) in force in England at the time of the passing of the Imperial Act 9 George IV Chapter 83 are so far as they are in force in New South Wales hereby repealed."

Both the Landlord and Tenant Act, 1730 (U.K.), and the Distress for Rent Act, 1737 (U.K.), fall under the operation of s.8(1).

*Egan* that in New South Wales the action for double rent under s.18, Distress for Rent Act, 1737 (U.K.), had been acted upon in a great number of cases during the previous thirty years<sup>67</sup>, there are few other reported cases in Australia concerning either the action for double value or the action for double rent<sup>68</sup>.

#### 4. The Availability of the Right of Self-Help in the Recovery of Possession

At present, a landlord can enforce his right to re-enter the premises in three ways: first, by obtaining an order for possession from a magistrates' court (in Victoria), a Court of Petty Sessions (in New South Wales), or a Local Court (in South Australia)<sup>69</sup>; secondly, by obtaining a writ of possession from the Supreme Court; or thirdly, by entering peacefully without a court order<sup>70</sup>. The writer believes that the right of the landlord to enforce his right of re-entry by making peaceful entry should be abolished. According to the R.E.S.I. (Vic.), this change is unnecessary as in practice today a landlord or estate agent will invariably re-enter only after obtaining a court order<sup>71</sup>. However, this would seem to be contradicted by a recent letter published in the *Sydney Morning Herald* in which a local estate agent admitted that he had made more than 100 acts of peaceful entry without obtaining a court order, and justified it on the ground of the lengthy delays in obtaining and enforcing a court order for possession during which time the tenant would usually continue to occupy the premises without paying rent<sup>72</sup>.

The availability of the self-help remedy was recognized in England at common law from earliest times. The only check placed on the use of the procedure by legislation was the introduction of various Forcible Entry Acts, dated 1381<sup>73</sup>, 1391<sup>74</sup>, 1429<sup>75</sup>, and 1623<sup>76</sup>. The 1381 Act declared it an offence for someone entitled to entry by law to enforce their right otherwise than in a peaceable and easy manner. The 1391 Act provided additional remedies for the enforcement of the earlier statute and extended its provisions to the forcible detention of land. The Forcible Entry Act, 1429, provided a remedy of treble damages to the party forcibly expelled<sup>77</sup>, and the 1623 Act enabled

67. (1866) 6 S.C.R. (N.S.W.) 85.

68. See *Trivett v. Hurst* [1937] Q.S.R. 265; and *Public Curator v. L. A. Wilkinson (Northern) Ltd.* [1933] Q.W.N. 28.

69. See Landlord and Tenant Act, 1958 (Vic.), s.32(1); Part IV, Landlord and Tenant Act, 1899-1973 (N.S.W.); Part I, Landlord and Tenant Act, 1936 (S.A.); and the Local and District Criminal Courts Act, 1926-1969 (S.A.), s.216(1).

In New South Wales, jurisdiction also vests in the District Court under Part III, Landlord and Tenant Act, 1899-1973 (N.S.W.).

In Victoria, the County Court has jurisdiction provided that the value of the land does not exceed \$500 by the year or where the rent exclusive of ground rent (if any) payable in respect thereof does not exceed \$500 by the year: County Court Act, 1958, s.40. It should be noted, however, that this jurisdiction has fallen into desuetude.

70. *Hemmings v. Stoke Poges Golf Club* [1920] 1 K.B. 720 decided that if a tenancy has been determined, the landlord is entitled to take physical possession of the premises and to evict the tenant; if the tenant refuses to depart, the landlord may use such force as is necessary to expel him without becoming liable to an action for damages for trespass or assault.

71. *Supra*, n.10.

72. *Sydney Morning Herald*, 4th June, 1973: letter to the Editor.

73. 5 Rich. II, Stat. 1, c.7.

74. 15 Rich. II, c.2.

75. 8 Henry VI, c.9.

76. 21 Jac. I, c.15.

77. However, this remedy was limited to freeholders: *Cole v. Eagle* (1828) 8 B. & C. 409; 108 E.R. 1094.

judges to restore possession to all categories of tenants who had been dispossessed by force.

The 1381 and 1429 British statutes are still in force in New South Wales<sup>78</sup>. In the other States, all the British Forcible Entry Acts have been replaced by equivalent legislation in the criminal law statutes<sup>79</sup>. For example, the Crimes Act, 1958 (Vic.), s.207 states:

“(1) No person except where entry is given by the law shall make an entry upon land in a manner likely to cause a breach of the peace or reasonable apprehension of breach of the peace. Except as aforesaid, it is immaterial whether he is entitled to enter upon the land or not”<sup>80</sup>.

Three reasons can be advanced in favour of the abolition of the landlord's right of re-entry by self-help measures. First, despite the existing safeguard against violence contained in the Crimes Act, it is difficult for the landlord to predict whether his manner of entry is likely to produce a breach of the peace, and further, it can be validly argued that any self-help measures will likely lead to frayed tempers and a breach of the peace. Thus, the relevant section of the Crimes Act (or, in New South Wales, the Forcible Entry Acts) is thought to be inappropriate.

Secondly, under the writer's proposed reforms of the legal steps for gaining re-entry, the length of the delay incurred by a landlord when he seeks an order for possession will be greatly reduced. The delay under the existing procedure has been a prime factor in causing some landlords to seek speedier relief by making peaceful re-entry, but a reduction in the period of delay should eliminate the necessity for self-help measures.

Thirdly, the writer is of the opinion that self-help is incompatible with his suggestion that the tenant should be unable to seek relief from forfeiture once he has lost possession of the premises. It would seem unfair to the tenant if this proposal were adopted without the abolition of self-help, as otherwise if the landlord adopted self-help measures the tenant would be unable to argue in court that he should be granted relief against forfeiture of his lease. This suggestion, that there should be no relief against forfeiture once the tenant has lost possession, was formulated in order to improve the position of the landlord, and from the landlord's point of view the loss of the right of self-help would seem of small weight when compared with the overall improvement in his position.

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78. The 1381 and 1429 U.K. Acts are expressly preserved by the Imperial Acts Application Act, 1969 (N.S.W.), ss.18, 19. The 1391 and 1623 U.K. Acts have been abolished by the Imperial Acts Application Act, 1969, s.8(1), quoted above in n.66.

79. The relevant South Australian legislation, Criminal Law Consolidation Act, 1935-1972, s.243 reads:

“Any person who, by force or threats, or by collecting together an unusual number of people, enters upon any land, or tenements, in order to take possession thereof, whether he has a legal right to enter thereon or not, shall be guilty of a misdemeanour and liable to imprisonment for any term not exceeding three years.”

See also Criminal Code of Queensland, ss.70, 71; Criminal Code Compilation Act, 1913-1972 (W.A.), s.69; and Criminal Code Act, 1924 (Tas.), s.79. The legislation in Queensland, Tasmania and Western Australia provides in addition that it is lawful for a person in peaceable possession of land with a claim of right to use such force as he reasonably believes to be necessary to defend his possession against any person whether entitled by law to possession of the property or not, provided bodily harm is not caused: Qld., s.278; W.A., s.255; Tas., s.42.

80. Under sub-s. (3), conviction of a breach of sub-s. (1) entails a maximum penalty of one year's imprisonment and/or \$1,000 fine.

The right of the landlord to use self-help to gain re-entry has already been abolished in the United Kingdom in cases where the tenant is residing in the premises, and this legislation could serve as a useful precedent for the introduction of a similar law in each Australian State. The Rent Act, 1965, s.31 reads:

“Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them”.

Consideration could also be given to the creation of a penalty for breach of the above-quoted legislation. Section 2-408 of the U.S. Model Residential Landlord-Tenant Code<sup>81</sup> proposed that the tenant should be given the choice of recovering possession or terminating the lease as well as three months' rent or triple damages, but the writer would favour the establishment of a maximum penalty (say \$1,000), the exact penalty in each case to be left to judicial discretion. Not only can the Code be criticized for the inflexibility of the monetary penalty, but also it may be impractical as by the time the tenant brings an action for possession the landlord may have entered into a valid lease with another tenant who may be unaware that the previous tenant had been evicted illegally. It would be harsh to allow a second tenant who had entered into a lease in good faith to be ousted at the instance of the first tenant.

Finally, it should be noted that several recent Canadian landlord-tenant statutes have made the act of changing the locks on the premises, except by mutual consent of the parties, an offence. The unilateral changing of locks is now illegal in British Columbia, Ontario, Manitoba, Nova Scotia and Newfoundland, and all of these Provinces except Nova Scotia and Newfoundland stipulate a maximum penalty of \$1,000<sup>82</sup>. This change was effected because one of the most common methods of securing an eviction is for the landlord to change the locks on the premises while the tenant is out. While this practice is undesirable, the enactment of similar legislation in Australia would seem unnecessary if legislation similar to the above-quoted Rent Act, 1965 (U.K.), s.31 is introduced.

### *The Chances of Achieving Reform*

The past record of reform in landlord-tenant law in Australia has been extremely poor. With few exceptions, our law in this area is still based on English common law supplemented by State legislation adopted in the nineteenth century from statutes enacted in the United Kingdom.

Although little attention in the past has been given to reforming the law relating to the determination of tenancies, previous articles have pressed for the reform of many inequities favouring the landlord contained in the laws

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81. The Model Code was drafted by Julian H. Levi, Philip Hablutzel, Louis Rosenberg and James White under a grant from the U.S. Office of Economic Opportunity to the American Bar Association, which published the draft in 1969. It consists of 76 pages of draft legislation and comments, preceded by a 15-page introduction.
82. Landlord and Tenant (Amendment) Act, Stats. B.C. 1970, c.18, s.48; Landlord and Tenant Act, R.S.O. 1970, c.236, s.95; Landlord and Tenant (Amendment) Act, Stats. Man., 1970, s.106, s.97(1); Residential Tenancies Act, Stats. N.S. 1970, c.13, s.6(1), statutory condition 7; Landlord and Tenant (Residential Tenancies) Act, Stats. Nfld. 1973, No. 54, s.7(1) statutory condition 6.

governing the rights and duties of the parties during the term of the lease<sup>83</sup>. For example, it has been shown that a landlord has no duty to mitigate his damages in the event that a tenant abandons the premises<sup>84</sup>, there is no legislation guaranteeing the tenant's right of privacy<sup>85</sup>, there is no automatic right vested in the tenant to assign or sublet the premises to a respectable and responsible person<sup>86</sup>, and there is no legal obligation on a landlord to let the premises in a good state of repair or to keep the premises in repair during the term of the lease<sup>87</sup>. However, despite the obvious need for reform, few changes have been made. On the rare occasions when remedial legislation has been advanced, it has usually floundered<sup>88</sup>.

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83. See, for example, Note, "The Fitness and Control of Leased Premises In Victoria", (1969) 7 *Melb. U.L.R.* 258; and Bradbrook, "The Law Relating to the Residential Landlord-Tenant Relationship: An Initial Study of the Need for Reform", (1974) 9 *Melb. U.L.R.* 589.
84. The non-applicability of the principle of mitigation of damages to landlord-tenant law was affirmed most recently by the Supreme Court of the Northern Territory in *Maridakis v. Kouvaris* (1975) 5 A.L.R. 197. However, mitigation of damages now applies to landlord-tenant law in Queensland by virtue of a recent statutory amendment: see Residential Tenancies Act, 1975, s.16. Other contractual principles, e.g., frustration and mutuality of covenants, have also been held to be inapplicable to landlord-tenant law. For relevant cases on frustration, see *Minister of State for the Army v. Dalziel* (1944), 68 C.L.R. 261, and *Thearle v. Keeley* (1958) 76 W.N. (N.S.W.) 48. For relevant cases on mutuality of covenants, see *Roberts v. Ghulam Nabie* (1911) 13 W.A.L.R. 156; and *In Re De Garis and Rowe's Lease* [1924] V.L.R. 38.
85. Common law adopted a laissez-faire approach in this matter. In the exercise of the principle of freedom of contract it is left to the tenant and the landlord to negotiate what rights of entry (if any) should be allowed the landlord. The use of standard forms of lease has resulted in an invariable right being given to the landlord to inspect the premises, but the leases contain no remedy for a tenant in the case of unauthorized entry by the landlord.
86. Although at common law, in the absence of a special agreement to the contrary a tenant has the right to dispose of his interest to a third party without the consent of the landlord, either by assigning his term or by creating a sublease, special agreements to the contrary are invariably included in covenants in the standard forms of residential lease currently in use. It is only in New South Wales and Queensland that the interests of the tenant are adequately protected. The Conveyancing Act, 1919-1972 (N.S.W.), s.133B, provides:  
 "(1) In all leases . . . containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant, condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—  
 (a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent; . . ."  
 See also Property Law Act, 1974-1975 (Qld.), s.121(1), and Residential Tenancies Act, 1975 (Qld.), s.15.
87. See *Cruse v. Mount* [1933] Ch. 278. Common law was only prepared to place the landlord under an obligation to repair in two situations. First, a warranty of fitness is implied where a lease is entered into before the building of the premises is complete (*Miller v. Cannon Hill Estates Ltd.* [1931] 2 K.B. 113). Secondly, there is the anomalous implied condition, established in *Smith v. Marrable* (1843) 11 M. & W. 5; 152 E.R. 693 that in the case of furnished premises the premises are fit for human habitation at the commencement of the lease. Even here, however, there is no implied condition that the premises remain fit for human habitation; thus, if the defect rendering the premises unfit occurs during the term of the lease the tenant has no remedy (*Pampris v. Thanos* [1968] 1 N.S.W.R. 56). A legal obligation to repair has recently been imposed on the landlord in Queensland: Property Law Act, 1974-1975, s.106, and Residential Tenancies Act, 1975, s.7.
88. An illustration of this is the Victorian Landlord and Tenant (Security Deposits) Bill, 1973, which, *inter alia*, would have regulated the collection and use of security deposits. The Bill failed to get a second reading.

One reason for the poor record of reform is that while landlords and estate agents have been in a position to form pressure groups and lobby parliamentarians to protect their interests, tenants have been unable to take similar action. It should be noted that the tenant population of Australia contains a larger percentage of disadvantaged persons than the community at large. The Interim Report of the Australian Government Commission of Enquiry into Poverty found that compared with the community figure of 21.4 per cent<sup>89</sup>, 35.5 per cent of all migrants and aborigines, 25.7 per cent of all single parent families, 27.4 per cent of all single females, and 25.4 per cent of the sick, unemployed and invalids are private tenants<sup>90</sup>. In addition, statistics of the R.E.S.I. (Vic.) showing that on average one-fifth of all rented residential premises incur a change of tenants each year indicate that tenants as a group are too transient to form political pressure<sup>91</sup>.

In these circumstances, it might be thought that any attempt to introduce the reforms to the law relating to the determination of tenancies suggested in this article would be an exercise in futility. However, there is one ground for optimism. Unlike the laws governing the rights and duties of the parties during the term of the lease, it has been seen that the laws relating to the determination of tenancies contain inequities to both parties. The reforms suggested in this article can thus be said to be more even-handed than the one-sided nature of reforms previously suggested to landlord-tenant law. Although it would be naive to suggest that no political pressure will be used against any of the proposed reforms by groups representing the interests of landowners, the even-handedness of the reforms may cause the pressure to be less intense than on previous occasions.

As a tactical matter, it is submitted that the best method of achieving reform would be to advance all the proposals suggested above as a "package deal". If the proposals are advanced separately, partisanship will doubtless once again prevent the enactment of remedial legislation.

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89. Interim Report of the Australian Government Commission of Enquiry into Poverty, *Poverty in Australia* (1974), Chapter 8, Table 2.

90. *Id.*, Chapter 3, Table 8, and Chapter 8, Table 3.

91. Information supplied by Mr. M. Gray, President, R.E.S.I. (Vic.).