# THE ROLE OF THE JUDICIARY IN REFORMING LANDLORD AND TENANT LAW

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[*In this article, Dr Bradbrook considers the possibilities for landlord and tenant law reform in Australia. He compares Australian law with that of Canada and the United States of America. His major contention is that it is possible for the courts to play a considerable role in reforming tenancy law by judicial* fiat *in the absence of legislation.*]

> Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life — particularly old common law doctrines which the courts themselves created and developed. The continued vitality of the common law . . . depends upon its ability to reflect contemporary community values and ethics.[1]

## A. INTRODUCTION

After decades of neglect, the question of landlord and tenant law reform has assumed an increasing importance in Australia in recent years as many law reform bodies have turned their attention to various aspects of the legal relationship. For example, the Law Reform Commission of Western Australia completed in 1975 a study on security deposits,[2] the New South Wales government established in 1961 a Royal Commission to investigate the desirability of reforming its rent control legislation,[3] and in 1970 the Queensland Law Commission issued a report on the law of forfeiture.[4] In addition, a study of the operation of the landlord-tenant law in the Australian Capital Territory was undertaken in 1973 by the Australian Capital Territory Law Reform Commission.[5] Despite the proven need for reform, however, few changes have been made. On the rare occasions when remedial legislation has been advanced, it has usually floundered.[6] The result is that, with few exceptions, our landlord-tenant law is still based on

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[1] *Javins v. First National Realty Corporation* (1970) 428 F.2d 1071, 1074.

[2] Law Reform Commission of Western Australia, *Report on Tenancy Bonds* (Project No. 41: 1975).

[3] Royal Commission of Enquiry on the Landlord and Tenant (Amendment) Act 1948 (N.S.W.).

[4] Queensland Law Commission, *Report on the Law Relating to Relief from Forfeiture of Leases and to Relief from Forfeiture of an Option to Renew* (1970).

[5] Law Reform Commission of the Australian Capital Territory, *Report on Landlord and Tenant Law in the Australian Capital Territory* (1973).

[6] 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.

English common law supplemented by State legislation adopted in the nineteenth century from statutes enacted in the United Kingdom.

Although the reasons for the failure to update the existing landlord-tenant law are unclear, a number of explanations can be offered. Firstly, it can be speculated that the high incidence of home ownership in Australia coupled with the low incidence of renting residential premises compared with many overseas countries is responsible for the neglect of landlord-tenant law reform. It is interesting to note that most of the recent legislative reforms have taken place in Canada and the United States, both of which have a much higher incidence of renting than Australia.[7]

Secondly, there is a high turnover-rate of residential tenancies. The Real Estate and Stock Institute of Victoria reports an average annual turnover-rate of 20 per cent.[8] The result is that tenants as a body tend to be transitory and unorganized, and are ill-equipped to exert constant pressure against landlords, or to lobby for legislation protecting their interests. Apart from isolated instances where tenants of a block of flats have rallied together to form a Tenants' Association to exert pressure on the landlord, there is no organization that purports to represent the interests of tenants in private accommodation.[9] Due to the high incidence of home ownership, one can speculate that many tenants regard their tenancy as a very short-term measure prior to purchasing their own house or flat, and because of the short-term nature of their interest are prepared to tolerate almost any terms and conditions without complaint.

Thirdly, there is a general ignorance in society in general and tenants in particular of the present law. 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 Inquiry into Poverty found that compared with the community figure of 21.4 per cent, 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.[10] A study undertaken by the Institute of Economic Affairs of the University of Melbourne in 1966 of 2086 migrants showed that a large percentage of migrants during their first ten years of residence in Australia are tenants. The study revealed that of the adult householders who had arrived in the previous eighteen months 100 per cent of the Greeks and over 90 per cent of the

[7] The 1971 Canadian census found that 39.7 per cent of dwellings were occupied by tenants. See Canada, *Is there a Case for Rent Control*? Background papers and proceedings of a Canadian Council on Social Development Seminar on Rent Policy (1973) 39. *Cf.* the Interim Report of the Australian Government Commission of Inquiry into Poverty, which found that 21.4 per cent of the Australian community are private tenants: *Poverty in Australia* (1974) ch. 8, table 2.

[8] Information supplied by Mr M. Gray, President, Real Estate and Stock Institute of Victoria. Interview: 9 April 1974.

[9] Except for the newly-formed Victorian Tenants' Advice Service.

[10] Australian Government Commission of Inquiry into Poverty, *Poverty in Australia* (1974) ch. 3, table 8; ch. 8, table 3.

British and Italians were tenants.[11] It was also reported by the Immigration Planning Council that 85 per cent of people leaving migrant hostels go into rented accommodation.[12] Thus a significant though unknown percentage of residential tenants are recently arrived migrants, and this group could not be expected to have any understanding of our landlord-tenant laws.

Discounting the special problems incurred by migrants, empirical evidence exists in the United States to show that a sizeable proportion of tenants have no understanding of their legal position. A study of 100 tenants in a high-rise block of flats in Ann Arbor, Michigan, showed, *inter alia*, that tenant comprehension of their rights under their written lease and the general statutory landlord-tenant law was low.[13] In reply to three questions designed to test their understanding of the law, wrong answers or no answers were given by 46 per cent, 48 per cent, and 64 per cent of the sample.[14]

A final explanation for the poor record of reform is that political pressure groups representing the interests of estate agents and landlords have effectively lobbied to prevent the enactment of legislation primarily benefiting tenants.[15] As most of the landlord-tenant law reforms proposed in recent years would have altered the present balance of the legal rights and duties of landlords and tenants in favour of the latter, the blocking of reforms has resulted in the preservation of the *status quo*.

It is easy to see from these circumstances that comprehensive legislative reform of landlord-tenant law is unlikely to occur. However, it would be wrong to suppose that no reform is possible. Although the primary role in reform vests in the legislature, it seems to have been forgotten in the past in Australia that it is possible for the courts to play a considerable role in reforming the landlord-tenant law by judicial *fiat* in the absence of legislation.

It is not suggested that all the existing problems and deficiencies could be removed by judicial innovation without the need for statutory reform. Clearly, many needed reforms (for example, the introduction of a government advisory bureau to disseminate information on landlord-tenant matters)[16] could only be achieved by legislation. However, many of the existing anomalies are caused by the present adherence to the common law rule that a lease is an estate in land and that normal contractual remedies are inapplicable to the landlord-tenant relationship, and it is here that a more positive judicial approach could remove the necessity for legislation.

[11] Henderson R. F. *et al., People in Poverty — a Melbourne Survey* (1970) 135.
[12] *Ibid.* 135.
[13] Mueller W., 'Residential Tenants and their Leases: An Empirical Study' (1970) 69 *Michigan Law Review* 247.
[14] *Ibid.* 260-2.
[15] The Real Estate Institute of Australia and the Real Estate and Stock Institute of each State have applied strong pressure in the past in this area of possible law reform.
[16] For a discussion of this possible reform, see Bradbrook A. J., *Poverty and the Residential Landlord-Tenant Relationship* (1975) ch. 2.

The antiquity and present-day irrelevance of this common law rule should not be underestimated. The first stage in the transformation of a tenancy for a term of years into a property right occurred as early as 1235.[17] In that year, a new action was formulated, *quare ejecit infra terminum*, which was designed to restore a tenant who had been ejected by a purchaser of the land.[18] Later, in the fifteenth century, the remedy of ejectment became available to the tenant in all situations of ouster by the formulation at law of the action of trespass *de ejectione firmae*.[19] The universal availability of an action for ejectment enabled the possessory interest of the tenant to be protected as effectively as that of a freeholder, who from the thirteenth century had available to him the action of trespass *quare clausum fregit*. Once the lessee's right of possession was afforded legal protection, the lessee became regarded as the holder of an interest in land.

The impetus that led to the legal protection of the possessory interest of the tenant was the fact that by the fifteenth century mortgages rather than leases were used as the method of securing land in return for a debt,[20] and the fact that leases were commonly being used of agricultural land.[21] The land leased at that time seldom contained any buildings, and the common law rule emerged that the rent issued out of the land. Provided that the tenant remained in possession of the land, he could not repudiate the lease, and any breach by the landlord of the terms of a lease not resulting in the dispossession of the tenant, although giving the tenant a right to sue in damages, was not considered sufficiently serious to enable the tenant to quit the premises. If he did quit, the landlord could sue him for the rent as it became due.

In the rural society of that era, the notion that a lease was an estate in land and that the right of possession and the duty to pay rent were coextensive made sense. The average tenant was a handyman and would expect to do any repairs himself to any building that was erected on the land. He would also expect to provide any amenities, such as the supply of heat or water, for himself. Thus, a tenant would seldom have any complaints unless his possession of the land was interfered with. However, the notion of a lease being an estate in land is far removed from reality today. The modern

[17] The beginning of protection by the King's courts for a tenant can be traced to the twelfth-century practice of landowners granting leases for terms of years to moneylenders in order to circumvent the church's prohibition of usury. At this stage the interests of a tenant were regarded as merely contractual, and the possessory remedy of freeholders, the assize of *novel disseisin*, was not given to the tenant for a term of years. For a useful discussion of this point, see Hicks J. F. 'The Contractual Nature of Real Property Leases' (1972) 24 *Baylor Law Review* 443, 446-52.

[18] Pollock F. and Maitland F. W., *History of English Law* (2nd ed. 1952) Book II, 107-8.

[19] Plucknett T. F. T., *A Concise History of the Common Law* (5th ed. 1956) 373.

[20] Hicks J. F., *op. cit.* 449.

[21] Lesar H. H., 'Landlord and Tenant Reform' (1960) 35 *New York University Law Review* 1279, 1280.

urban tenant, especially if he is living in a flat, is far more concerned with the condition of the building and the provision of services than he is with the land itself. In addition, the modern tenant does not expect and is unable to do the sort of repairs that his fifteenth century counterpart used to undertake. Indeed, in a multi-unit dwelling it would often be impossible for a tenant to make structural repairs without trespassing upon the premises of other tenants. The failure of the law is that it has failed to change sufficiently to encompass changing patterns of life-style by altering the status of a lease from an estate in land to a combination of proprietary and contractual interests.

There would seem to be two methods available to the courts to solve this problem. Firstly, and more radically, the courts could declare on their own initiative that henceforth a lease is not merely an estate in land but is subject to normal contractual principles and remedies. Secondly, and more conservatively, the courts could extend the operation of the existing proprietary principles and remedies in order to provide more realistic and effective legal protection to tenants.

The past record of the Australian judiciary in promoting landlord-tenant law reform stands in stark contrast with that of the United States' judiciary, which in recent years has been very active in moulding the common law principles to meet the changing times. It is instructive to compare the attitudes of the Australian and United States' courts and in so doing to examine possible avenues of approach for the Australian courts to adopt in the future.

## B. THE ATTITUDES OF THE UNITED STATES' JUDICIARY

Various courts in the United States have attempted to adapt the landlord-tenant law to meet the needs of the twentieth century both by applying normal contractual principles which previously have been declared inapplicable, by implying covenants where equity seems to demand it, and by extending the established principles of real property law by applying the fiction of constructive eviction. The various avenues of judicial reform will be examined individually.[22]

### 1. *Interdependence of Covenants*

One principle of contract law established by Lord Mansfield in 1773 in the case of *Kingston* v. *Preston*[23] provides that if a material covenant is breached by one party the other party is relieved of his obligations under the contract. However, this principle does not apply to the landlord-tenant relationship. Thus, if the landlord fails to perform his covenants, for example, by breaching his covenant of quiet enjoyment by cutting off the

[22] For a more general study of the role of the courts in the United States in landlord-tenant law reform, see Hicks J. F., *op. cit.* 449.
[23] Cited in *Jones v. Barkley* (1773) 2 Doug. 684, 690; 99 E.R. 434, 437 (K.B.).

supply of gas and electricity to the premises or by failing to make structural repairs (if he has agreed in advance to do so), the tenant is not entitled to withhold his rent in order to bring pressure to bear on the landlord. The only remedy is for the tenant to sue for damages, which in most cases he is unlikely to do in view of the legal expenses involved. If he withholds his rent, it is open to the landlord to sue him for the arrears and bring proceedings for eviction. The reason for the inapplicability of this doctrine is historical: the principle of interdependence of covenants in contracts was established after the rule that a lease is an estate in land came into operation.[24]

A sense of logic and equity would seem to demand the application of this principle.

> The idea that covenants in a lease are not reciprocal is an ancient legal axiom whose repetition serves little purpose, and does very great harm. Initially, the idea had theoretical justification to commend it but it is doubtful that even its most ardent present admirer could defend it rationally on grounds other than a predilection for the landlord's cause. Moreover, it is a sport in the law inconsistent with the more rational recognition in other areas of the law that reciprocity of promises and performances is an apparent first principle.[25]

Some American courts have flouted the common law rule by holding that express covenants contained in a lease which run to the entire consideration of the lease are interdependent.[26] In *Berman v. Shelby*,[27] a residential lease of a house contained a covenant by the landlord to repair the bathroom and leave certain furniture in the house. The tenant quit the premises shortly after the commencement of the lease alleging a breach of both covenants. The Arkansas Supreme Court held the tenant not liable for the rent on the basis that the failure of the landlord to adhere to the terms of the lease relieved the tenant of his duty to pay the rent.

The New Jersey courts reached a similar conclusion in the later cases of *Higgins* v. *Whiting*[28] and *Stevenson Stanoyevitch Fund v. Steinacher*.[29] In the former case, the lease of an apartment contained a covenant by the landlord to provide heat during the winter. The tenant vacated the premises during the month of February because of a lack of heat and was sued by the landlord for the rent owing from then until the termination of the lease. The tenant was held not liable for the rent because of the failure by the landlord to perform his covenant. In the latter case, the landlord

[24] Lesar H. H., 'Landlord and Tenant Reform' (1960) 35 *New York University Law Review* 1279, 1281 .

[25] Quinn T. M. and Phillips E., 'The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future' (1969) 38 *Fordham Law Review* 225, 252.

[26] It is important to note that the American courts which recognize the applicability of the doctrine of the interdependence of covenants in leases have stressed that the covenant allegedly breached must be sufficiently important to run to the entire consideration of the lease before the doctrine will be applied. See, *e.g., Medico-Dental Building Co. v. Horton and Converse* (1942) 21 Cal. 2d. 411; 132 P.2d 457.

[27] (1910) 93 Ark. 472; 125 S.W. 124.

[28] (1926) 102 N.J.L. 279, 131 A41 879.

[29] (1940) 125 N.J.L. 326; 15 A.2d 772.

covenanted that the heating system was in good working order and that he would make any necessary repairs to it. The tenant vacated the premises when the temperature reached 90°F (32°C) and the furnace gave off foul smells. The tenant was held not liable for the rent, the Court stating that the breach by the landlord of his covenants was sufficient to justify the tenant breaching his covenant to pay the rent.

It should be noted that it is not always the tenant that will gain from the operation of this principle. In *Silken v. Farrell*[30] a landlord was sued by a tenant for a breach of the covenant for quiet enjoyment. The landlord was declared not liable for damages as he was able to prove that the tenant had failed to perform his covenant to pay land taxes. The Court held that the performance of the tenant's covenant to pay taxes was a condition precedent to his recovering damages from the landlord for breach of the covenant of quiet enjoyment.[31]

Since 1961, a few of the more progressive American courts have furthered the application of the principle of interdependence by extending it to implied covenants. The rationale for this is that because of the universal application of standard form leases favouring the landlord, many rights and guarantees needed by tenants, such as the provision of heat and hot water, repairs, and a guarantee that the premises are free from rat infestation, are not bargained for and are not contained in residential leases. In these cases, the more progressive courts will imply covenants on the part of the landlord and will apply the principle of interdependence to them.

*Pines v. Perssion*[32] was the first case to apply the principle of interdependence to an implied covenant. Several law students leased a furnished house which they later proved was in a filthy and uninhabitable condition at the commencement of the lease. The students moved out and sued for the return of the rent paid in advance. The argument advanced by the landlord, that there was no covenant in the lease that the premises were fit for habitation, was dismissed by the Supreme Court of Wisconsin, which stated that public policy demanded that a covenant of habitability be implied. The Court then held that the express covenant to pay rent and the implied covenant of fitness for habitation were interdependent.[33]

[30] (1952) 281 App. Div. 718; 118 N.Y.S.2d 16; *affirmed* (1958) 4 N.Y.2d 117; 172 N.Y.S.2d 808.

[31] The doctrine of interdependence of covenants has frequently been applied by United States courts in the case of commercial leases. See, *e.g., Tedstrom v. Puddephat* (1911) 99 Ark. 193; 137 S.W. 816; *Felder v. Hall Bros Co.* (1921) 151 Ark. 182; 235 S.W. 789; *University Club of Chicago v. Deakin* (1914) 265 Ill. 157; 106 N.E. 790; *Ingraham v. Fred* (1918) 210 S.W. 298 (Tex. Civ. App.); *Stifter v. Hartman* (1923) 225 Mich. 101; 195 N.W. 673; and *Hiatt Investment Co. v. Buehler* (1929) 225 Mo. App. 151; 16 S.W.2d 219.

[32] (1961) 14 Wis.2d 590; 111 N.W.2d 409. See Recent Decisions, 'Landlord and Tenant — Application of Implied Warranty' (1962) 45 *Marquette Law Review* 630.

[33] *Marini v. Ireland* (1970) 56 N.J. 130, 265 A.2d 526, is further authority for the applicability of the principle of interdependence to implied covenants. Here, the tenant leased an apartment and on taking possession found that the toilet leaked. The

In *Javins v. First National Realty Corporation*[34] the Court again applied the principle of interdependence in a case where the premises were unfit for habitation, but used the existence of housing standards as stipulated in a housing code rather than public policy to justify the implication of an implied covenant. In this case the landlord sued for possession because of the failure of the tenant to pay the rent. The tenant defended the action by proving several violations of the District of Columbia Housing Regulations. The Circuit Court held this evidence admissible, implied a covenant of fitness for habitation commensurate with the standards in the Housing Regulations, and declared that the tenant's obligation to pay rent is dependent upon the premises being maintained in a habitable condition.[35]

2. *Constructive Eviction*[36]

The origin of the doctrine of constructive eviction as a remedy for a breach by the landlord of the covenant of quiet enjoyment dates back to the New York case of *Dyett v. Pendleton* in 1826.[37] The doctrine has been defined as

> . . . an intentional act or omission of the landlord, or by those acting under his authority or with his permission, that permanently deprives the tenant without his consent of the use and beneficial enjoyment of the demised premises or any substantial part thereof, in consequence of which he abandons the premises . . .[38]

Constructive eviction eliminates the need for physical eviction as it regards any serious interference by the landlord as having the same effect at law as a physical eviction. Like the contractual doctrine of interdependence of covenants, its effect is to terminate the duty of the tenant to pay

landlord refused to repair the defect, whereupon the tenant had the repairs done himself and deducted the cost from the rent due. The landlord then claimed a forfeiture based on a breach of the covenant to pay rent. The Court used the argument of public policy to imply a covenant of fitness for habitation at the commencement of the lease, stated that the covenant to pay rent was dependent upon it, and held that any breach of the implied covenant entitled the tenant to vacate the premises without liability for future rent or to repair the defect and deduct cost from the rent.

[34] (1970) 428 F.2d 1071, *cert. denied* (1970) 400 U.S. 925. For a discussion of this case, see Margolis S., 'Plotting the Long-Overdue Death of Caveat Emptor in Leased Housing' (1971) 6 *University of San Francisco Law Review* 147; Note, 'Implied Warranty of Habitability in Housing Leases' (1972) 21 *Drake Law Review* 300; and Recent Cases, 'Landlord and Tenant Law — Warranty of Habitability Implied by Law in Leases of Urban Dwellings' (1971) 24 *Vanderbilt Law Review* 425.

[35] A similar result was reached in the later case of *Amanuensis Ltd v. Brown* (1971) 65 Misc. 2d 15; 318 N.Y. S.2d 11 (N.Y. City Civ. Ct.).

[36] For a general discussion of the doctrine of constructive eviction, see Rapacz M. P., 'Origin and Evolution of Constructive Eviction in the United States' (1951) 1 *De Paul Law Review* 69; Quinn T. M. and Phillips E., 'The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future' (1969) 38 *Fordham Law Review* 225; Comment, 'Constructive Eviction of a Tenant' (1961) 13 *Baylor Law Review* 62; Note, 'Contract Principles and Leases of Realty' (1970) 50 *Boston University Law Review* 24; Note, 'Partial Constructive Eviction: The Common Law Answer in the Tenant's Struggle for Habitability' (1970) 21 *Hastings Law Journal* 417.

[37] (1826) 8 Con. (N.Y.) 727.

[38] *Stillman v. Youmans* (1954) 266 S.W.2d 913, 916.

the rent. Unlike the contractual doctrine, however, the remedy of constructive eviction is based on property law: it is simply an extension of the common law rule that a physical eviction will terminate the obligation to pay rent as the obligation to pay rent is commensurate with possession.[39]

Despite the theoretical difference between the doctrines of constructive eviction and interdependence of covenants, it is clear that there is an overlap in their application. In many instances an American court has a choice whether to apply one doctrine or the other, or both, in the resolution of the same factual problem. A good example of this is the case of *Reste Realty Corporation v. Cooper*.[40] Here, the lease contained a covenant of quiet enjoyment and a covenant stating that the tenant had inspected the premises, took them as they were, and agreed to keep them in repair. Flooding occurred in the premises during each rainfall, which led the tenant to vacate after repeated requests to the landlord for repairs had produced no results. The tenant defended the landlord's action for unpaid rent on the ground that the flooding constituted a breach of the covenant of quiet enjoyment which amounted to constructive eviction. The New Jersey Supreme Court found for the tenant both on the basis of constructive eviction and on the basis that the covenant of quiet enjoyment and the covenant to pay were interdependent. The Court felt that an identical result would be produced by the application of either doctrine. It stated:

> In our view, therefore, at the present time whenever a tenant's right to vacate leased premises comes into existence because he is deprived of their beneficial enjoyment and use on account of acts chargeable to the landlord, it is immaterial whether the right is expressed in terms of breach of a covenant of quiet enjoyment, or material failure of consideration or material breach of an implied warranty against latent defects.[41]

One may wonder why the doctrine of constructive eviction has not been completely superseded by the contractual doctrine of interdependence of covenants in view of the identical results. The reason appears to be that as the theory of constructive eviction does not involve the application of contractual principles, many of the more conservative American courts have preferred to apply this doctrine in preference to that of the interdependence of covenants. According to one commentator, there are ten constructive eviction cases for every one relying on the contractual theory.[42]

### 3. *The Implied Condition of Fitness for Human Habitation*

One of the major areas of difficulty frequently encountered by tenants at the commencement and during the term of the lease is that of ensuring that the premises are in a satisfactory state of repair and fit for human habitation. Unfortunately, the English common law has been remarkably unhelpful in this regard.

[39] Hicks J. F., *op. cit.* 461.
[40] (1969) 53 N.J. 444; 251 A.2d 268.
[41] *Ibid.* 251 A.2d 268, 276.
[42] Hicks J. F., *op. cit.* 461.

The prevailing principle adopted by the common law is that of *caveat emptor*. Under this principle it is conclusively presumed that the tenant has examined the premises, has noted any defects, and has agreed to accept the premises in spite of the defects. The fact that the tenant may not have inspected the premises or may not have noticed any less obvious defects is regarded as irrelevant.[43] Thus, in the absence of an express agreement to the contrary, there is no implied covenant at common law that the premises are in good repair at the commencement of the tenancy or even that they are fit for human habitation. As Erle C.J. said in an oft quoted *dictum* in *Robbins v. Jones*: 'There is no law against letting a tumbledown house.'[44]

Several American courts in recent years, however, have ignored the doctrine of *caveat emptor* and have implied a warranty of habitability, both at the commencement of and during the term of a lease. Various justifications for this change have been advanced by the courts. In *Pines v. Perssion*, the Court stated:

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.[45]

The fact that the landlord usually has a greater knowledge of the condition of the premises than the tenant and the inequality of bargaining power between the two parties were the reasons given by the New Jersey Supreme Court in *Reste Realty Corporation v. Cooper* for implying a warranty of habitability.

In addition to these arguments based on policy considerations, some courts have used the existence of a local housing code to justify the implication of a warranty of habitability commensurate with the standards specified in the code. In *Javins v. First National Realty Corporation*, already discussed in another context, the United States Court of Appeals for the District of Columbia Circuit stated that in its opinion the local housing code requires that a warranty of habitability be implied in the leases of all housing that it covers.[46] A similar result was reached in *Lund v. MacArthur*.[47] In this case the tenant vacated the premises soon after the commencement of the lease on the ground that violations of the city electrical code existed. He defended the action for unpaid rent on the basis that the violation constituted a breach of the implied warranty of habitability. The Hawaii Supreme Court upheld the existence of an implied warranty of habitability, stated that the code was the measure of the warranty, and instructed the trial court to determine on the facts if the violations of the code constituted a breach of the warranty.[48]

[43] See Note, 'The Fitness and Control of Leased Premises in Victoria' (1969) 7 *M.U.L.R.* 258.
[44] (1863) 15 C.B. (N.S.) 221, 240; 143 E.R. 768, 776.
[45] (1961) 111 N.W.2d 409, 412-3.
[46] (1970) 428 F.2d 1071, 1072-3.
[47] (1969) 462 P.2d 482.
[48] See also *Lemle v. Breeden* (1969) 462 P.2d 470.

4. *The Doctrine of Illegal Contract*

In addition or as an alternative to using the existence of housing codes to justify the implication of an implied warranty of habitability, some courts have declared that any lease of premises which substantially violates a housing code is an illegal contract and is thus void.

The major authority for this proposition is *Brown v. Southall Realty Co.*[49] In that case the tenant, who had vacated the premises, defended an action for rent on the ground that at the time of the letting the landlord knew that certain housing code violations existed. On reaching the conclusion that certain sections of the Housing Regulations had been violated, the Court held that, like any other contract made in violation of a statutory prohibition, the lease was void. In the later case of *Diamond Housing Corporation v. Robinson*,[50] the landlord attempted to distinguish *Brown v. Southall Realty Co.* on the ground that at the time of the signing of the lease he had not received an official notice of the existence of the violations from the housing inspectors. However, the District of Columbia Court of Appeals upheld the applicability of *Brown v. Southall Realty Co.* on the ground that violations of the code can exist whether or not the landlord has received an official notification from the housing inspectors.

5. *The Doctrine of Unconscionability*

In the United States some courts in recent years have been willing to utilize the doctrine of unconscionability in landlord-tenant litigation to declare unenforceable those clauses in the written form of lease which they consider harsh and oppressive to one of the parties, invariably in practice the tenant. Common law would never interfere with the terms of the lease on the ground that both parties were free to negotiate the terms they wished to include in the contract. However, the invariable use today of standard forms of lease in the case of residential premises has made a mockery of the notion of 'freedom of contract' and the courts have been prepared to protect the tenant, who has no real ability to negotiate, by striking out those clauses they consider harsh and oppressive.

Public policy is sometimes used to justify the application of the doctrine of unconscionability. For example, in *McCutcheon v. United Homes Corporation*,[51] the residential lease contained a clause relieving the landlord from all liability for injury incurred by the tenant on the premises. The clause was declared invalid by the Washington Supreme Court on the ground that there is a public interest today that prevents the recognition of exculpatory clauses. The Court cited statistics showing the rapid increase in the incidence of residential letting to justify its conclusion that such clauses are not simply a private matter between the two contracting parties.

[49] (1968) 237 A.2d 834 (D.C. Ct. App.), *cert. denied*, (1969) 393 U.S. 1018.
[50] (1969) 257 A.2d 492 (D.C. Ct. App.).
[51] (1971) 79 Wash.2d 443, 486 P.2d 1093.

A more commonly used justification for utilizing the doctrine of unconscionability is that the offending clause should be declared void due to an inequality of bargaining power between the parties. Two cases can be cited as illustrations of this principle. In *Kay v. Cain*,[52] the lease contained a clause relieving the landlord from liability for injuries caused by negligence. The Court stated *obiter* that it doubted whether a clause relieving the landlord from liability for negligence would be valid in view of the acute housing shortage in the city which gave the landlord a great bargaining advantage over the tenant. A similar fact situation occurred in *Kuzmiak v. Brookchester, Inc.*,[53] where the New Jersey Supreme Court took judicial notice of the housing shortage in the locality and declared the exculpatory clause void for lack of equal bargaining power.

6. *The Doctrine of Frustration*

Under normal principles of contract law, if a contract becomes incapable of performance because of unforeseen circumstances both parties are relieved from their obligations under the contract. According to Halsbury:

> The doctrine of frustration operates to excuse from further performance where (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist . . ., and (2) before breach, an event in relation to the matter stipulated in (1) renders performance impossible or only possible in a very different way from that contemplated, but without default of either party.[54]

Unfortunately, common law never applied this doctrine of frustration to the landlord-tenant relationship. The common law position is that rent issues out of the land and that the obligation to pay the rent continues as long as the land remains. Thus, at common law, if the premises are expropriated by a government authority during the term of a lease, the tenant remains bound by his covenant to pay the rent, although the premises are incapable of occupation. Similarly, if the leased premises are destroyed by fire, flood or storm the obligations imposed on both parties still remain despite the fact that the premises have become totally uninhabitable. Thus, in the absence of a clause in the lease relieving him from liability, the tenant is still obliged to pay full rent for premises that are incapable of occupation or do not even exist any longer. This is because the land upon which the premises are situated is, of course, still in existence, and it is this estate in the land with which the law is historically concerned.[55]

In many jurisdictions statutes have been adopted which either in whole

[52] (1946) 154 F.2d 305 (D.C. Cir.).
[53] (1955) 33 N.J. Super. 575, 111 A.2d 425 (App. Div.).
[54] *Halsbury's Laws of England* (4th ed. 1974) Ix, 314. See also Brooking R. and Chernov A., *Tenancy Law and Practice — Victoria* (1972) 86-7.
[55] For a general discussion of the doctrine of frustration in relation to landlord-tenant law, see Note, 'Condemnation and the Lease' (1958) 43 *Iowa Law Review* 279; and Note, 'Landlord and Tenant — Destruction of Building on Leasehold' (1953) 32 *Oregon Law Review* 336.

or in part apply the principle of frustration to landlord-tenant litigation.[56] Some courts have abolished the old common law rule by judicial *fiat*, however, either by expressly adopting the contractual rule or by regarding the building rather than the land itself as the subject matter of the lease. This principle of regarding the building as the subject matter of the lease was recognized in South Carolina as early as 1870. In *Coogan v. Parker*,[57] where a rented shop had to be closed and later partially destroyed as a result of the American Civil War, the Court held that substantial destruction of the building would be sufficient to entitle the tenant to rescind the lease. The Court summarily dismissed the argument that the land itself had to be destroyed before the tenant could rescind.

> If parties contract with reference to the occupation of a dwelling-house, the destruction of that dwelling-house is clearly the destruction of that which they had in view, and was the basis and consideration of their contract. To say that the few feet of barren land on which it stood, incapable of any production worthy of consideration, is sufficient to answer the intention of the parties, to satisfy the justice and equity of the contract, as well as its terms, is to say what no jurist has yet ventured broadly to affirm.[58]

Some other courts which have refused to go as far as overturning the common law rule, as in *Coogan v. Parker*, have taken the view that if only part of a building (for example, a flat) is leased, relief from further obligations under the lease after the destruction of the premises will be granted the tenant on the basis that it was never the intention of the lease to grant any interest in the land except for the express purpose of the flat leased. A case in point is *Womack v. McQuarry*.[59] In that case the tenant leased a sawmill and a room in a neighbouring building, both of which were destroyed by fire during the term of the lease. The tenant was held liable for rent for the sawmill but not the room in the neighbouring building. In relation to the room, the Court justified its decision by saying:

> . . . it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment demised, and when the enjoyment becomes impossible, by reason of the destruction of the building, there remains nothing upon which the demise can operate.[60]

### 7. *Mitigation of Damages*

Contract law provides that if one party to a contract breaches a material part of the agreement the injured party must take reasonable steps to minimize the damages resulting from the breach. However, common law refused to extend the application of this doctrine to the landlord-tenant law in the situation where the tenant abandons the premises. Thus, the common law rule is that if a tenant vacates the premises before the end of the lease

[56] See, *e.g.*, N.Y. Real Property Law (1939), s. 227, and N.C. Gen. Stat. 42-12 (1966).
[57] (1870) 2 S.C. 255, referred to in Note 'Landlord and Tenant — Destruction of Building on Leasehold' (1953) 32 *Oregon Law Review* 336.
[58] (1870) 2 S.C. 255, 274-5.
[59] (1867) 28 Ind. 103, referred to in Hicks J. F., *op. cit.* 535.
[60] (1867) 28 Ind. 103, 104, quoted in Hicks, *op. cit.* 535.

the landlord can sue him for the rent as it falls due and is under no obligation to mitigate his damages by looking for a new tenant. The justification for this rule is said to be that the tenant becomes the owner of the premises for a term and therefore the landlord need not concern himself with the tenant's abandonment of his own property.[61]

Many writers have challenged the wisdom of the continued application of the common law rule on a number of grounds. It has been argued that the welfare and prosperity of the community as a whole is advanced by encouraging the productive use of the property within the community. Under the common law rule, which allows the landlord to let his property stand idle after a wrongful abandonment and sue for the rent as it falls due, the tenant not only loses the benefit of offsetting rentals but may be charged as well with damage incurred by vandalism and accelerated deterioration. The common law rule tacitly encourages owners to neglect their property after abandonment by the tenant, thus increasing the likelihood of accidental fire, deterioration in appearance, and decline in value. This may result in a loss in desirability of the surrounding neighbourhood and a consequent fall in property values.[62]

A number of American courts have recognized the lack of logic in the common law position and now apply the contract rule of mitigation in landlord-tenant litigation. In *Roberts v. Watson*[63] the Iowa Supreme Court defined the duty to mitigate losses by holding that the landlord must exercise reasonable diligence to relet at the best obtainable rent. The extent of the landlord's duty was further defined in the most recent reported case in this area, *Vawter v. McKissick*.[64] In this case the Court held that the landlord must take affirmative action: the fact that the landlord had placed a 'For Rent' sign in the window and had spoken to two prospective tenants was held to be insufficient to satisfy the duty to mitigate as the Court felt that the two possibilities had not been fully explored.

## C. THE ATTITUDES OF THE AUSTRALIAN JUDICIARY

It must be stressed that not all the American State courts have adopted each of the various legal principles discussed above. Some State Supreme Courts (for example, New York and the District of Columbia) have shown themselves more willing than others to apply the various principles by

[61] See generally Comment, 'Landlord's Duty to Mitigate Damages Upon Tenant's Default' (1957) 24 *University of Chicago Law Review* 567; O'Neill D. R., 'The Landlord's Duty to Mitigate by Accepting a Proffered Acceptable Subtenant — Illinois and Missouri' (1966) 10 *St. Louis University Law Journal* 532; and Robison, 'Landlord-Tenant Legislation: Revising an Old Common Law Relationship' (1971) 2 *Pacific Law Journal* 259.

[62] See Note, 'Landlord and Tenant — Mitigation of Damages — Landlord Must Plead and Prove Actual Efforts to Relet . . .' (1970) 45 *Washington Law Review* 218, 224.

[63] (1923) 196 Iowa 816; 195 N.W. 211.

[64] (1968) 159 N.W.2d 538.

judicial *fiat*. Collectively, however, the courts have made substantial inroads into the archaic common law rules on the landlord-tenant relationship without the assistance of statute law.

The attitude of the Australian judiciary compares most unfavourably. The implied condition of fitness for human habitation is the only one of the seven principles discussed above which our courts have been prepared to employ and, as will be shown, even here the operation of the implied condition is very circumscribed. As for the other six principles, either the cases blindly adhere to the old common law rules or else no relevant Australian authority exists. This has occurred in spite of the admonition of Atkin L.J. that:

> When these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred.[65]

A direct comparison of the Australian and American authorities under each of the subject headings of possible reform by judicial *fiat* will best show the unwillingness of the Australian judiciary to change the landlord-tenant law to keep pace with the changing times. No further mention will be made of the doctrines of illegal contract or constructive eviction, however, as there is a complete dearth of Australian authorities on both of these doctrines in respect of their application to landlord-tenant law.

1. *Interdependence of Covenants*

The response in this area of law of the Australian courts to the idea of change by judicial *fiat* has been totally negative. In *Roberts v. Ghulam Nabie*,[66] the parties agreed that the tenant would erect a windmill on the demised land during the first year of the lease and that the landlord would purchase the windmill at cost price. The landlord also agreed to fence the land within six months of the commencement of the lease. Both parties failed to comply with the agreement, the landlord failing to fence the property, and the tenant failing to build the windmill until after the first year. The Full Court of the Western Australian Supreme Court held that the covenants were independent and that the fact that the landlord had failed to fence the property did not excuse the failure of the tenant to comply with his covenant.

A similar result was reached in *In Re De Garis and Rowe's Lease*.[67] In that case the lease contained a covenant by the tenant not to sublet without first obtaining the consent of the landlord, and a covenant by the landlord that he would repair or rebuild the premises within four months in the event of the premises being destroyed by fire. The Supreme Court of Victoria held that the covenants were independent and that the landlord could not use the fact of the tenant's breach of covenant as an excuse not to rebuild.

[65] *United Australia, Ltd v. Barclays Bank, Ltd* [1940] 4 All E.R. 20, 37.
[66] (1911) 13 W.A.L.R. 156 (W.A. Sup. Ct. F.C.).
[67] [1924] V.L.R. 38 (Vic. Sup. Ct.).

Despite the common law rule of the independence of covenants in leases, it should be remembered that based on the prevailing principle of freedom of contract it is possible for the parties to draft the lease in such a way as to indicate that the covenants are interdependent. However, *Bishop v. Moy*[68] is authority for the proposition that there is no presumption of interdependence. Here, in a ten-year lease of farm lands the landlord covenanted to reconstruct the boundary fences within two years of the commencement of the lease. The tenant covenanted to pay rent at the rate of £400 *per annum* for the first two years and then at the rate of £600 *per annum*. The landlord failed to fulfil his covenant within the specified two-year period, and the tenant refused to increase his rental payments according to the terms of the lease. In the ensuing proceedings for ejectment counsel for the tenant asked the Court to infer that the covenant to repair and the covenant to pay the higher rent were interdependent and that the lease should be interpreted as intending the lower rate of payment to continue until the landlord's covenant was performed. However, Ferguson J. of the Supreme Court of New South Wales held that the covenants were not interdependent and that the failure of the landlord to perform his covenant did not justify the tenant refusing to pay the agreed increase in rent. He refused to infer that the parties had intended to make the covenants interdependent despite the coincidence in the dates contained in each covenant.[69]

2. *The Doctrine of Frustration*

The Australian courts have consistently rejected the application of the contractual doctrine of frustration to the landlord-tenant relationship. The major authority is the decision of the High Court of Australia in *The Minister of State for the Army v. Dalziel.*[70] In that case the Commonwealth, acting under wartime powers conferred on it by the National Security (General) Regulations, requisitioned premises being rented by a weekly tenant. It was held that as the tenant was not evicted by title paramount he remained liable to pay rent according to the terms of the lease despite the fact that he was dispossessed. Williams J. stated that the doctrine of frustration does not apply to leases.[71] A similar conclusion was later reached in *Thearle v. Keeley*[72] where it was unsuccessfully argued that a closing order issued by a municipal council pursuant to public health legislation directing that premises should not after 90 days from the date of the order be occupied by any person had the effect of terminating a lease by virtue of the doctrine of frustration.

[68] [1963] N.S.W.R. 468.
[69] The British and Canadian courts have also refused to apply the doctrine of interdependence of covenants in leases. See *Kerr v. Maxfield* (1956) 18 W.W.R. 176, and *Taylor v. Webb* [1937] 2 K.B. 283 (C.A.).
[70] (1944) 68 C.L.R. 261.
[71] *Ibid.* 302.
[72] (1958) 76 W.N. (N.S.W.) 48 (N.S.W. Sup. Ct.).

In England there are signs that the House of Lords is beginning to question the wisdom of the continued application of the common law rule. In *obiter dicta* in *Cricklewood Property and Investment Trust Ltd v. Leighton's Investment Trust Ltd*[73] the House of Lords discussed whether the doctrine of frustration could ever apply to a lease. Lord Simon and Lord Wright stated that in their opinion the doctrine could apply to leases in some circumstances (although they failed to specify the circumstances), Lord Goddard and Lord Russell disagreed. Lord Porter took a neutral stand. In fairness to the High Court of Australia, however, it should be noted that, as this case was not reported until after the decision in *The Minister of State for the Army v. Dalziel* was handed down, the High Court judges had no opportunity to consider the views of Lord Simon and Lord Wright. No relevant case has reached the High Court since.

3. *Mitigation of Damages*

Until recently the Australian courts were silent on the question of the applicability of the principle of mitigation of damages to landlord-tenant law. However, in *Maridakis v. Kouvaris*,[74] Ward J. of the Supreme Court of the Northern Territory held that there is no duty on a landlord to do anything at all in mitigation of damages. In that case, the plaintiff had sublet the premises to the defendant for a two-year term at the weekly rental of $100. The defendant abandoned the premises one month after the commencement of the sublease, and the premises remained vacant for approximately fifteen months until they were relet at $70 per week. The defendant argued unsuccessfully that the plaintiff should have mitigated his damages by accepting another tenant at $70 per week much earlier than he did. Ward J. relied upon *Boyer v. Warbey*,[75] an English Court of Appeal decision, in which Romer L.J. stated:

> A tenant who goes out of possession without giving due notice has no right to dictate to his landlord how he shall deal with his property; and why the landlords here should have disposed of the flat in a manner disadvantageous to themselves merely in order to save the tenant from the full consequences of his wrongful act, I am at a loss to conceive.[76]

One could sympathize with the decision in *Maridakis v. Kouvaris* if in fact the landlord stood to lose financially by reletting at a lower rental in attempting to mitigate his damages. In fact, however, as Ward J. stated later in his judgment,[77] it has been settled in the past that in cases of wrongful abandonment by the tenant no surrender is incurred if the landlord, when reletting the premises, notifies the defaulting tenant that he is

[73] [1943] 1 K.B. 493. Later English cases reaching the Court of Appeal or at first instance have held that the doctrine of frustration is inapplicable to a lease: *Denman v. Brise* [1949] 1 K.B. 22 (C.A.), and *Cusack-Smith v. London Corporation* [1956] 1 W.L.R. 1368 (Q.B.).
[74] (1975) 5 A.L.R. 197.
[75] [1953] 1 Q.B. 234.
[76] *Ibid.* 247.
[77] (1975) 5 A.L.R. 197, 200.

reletting on the tenant's behalf.[78] By so doing the landlord retains the right to recoup as damages the difference (if any) between the amount the defaulting tenant contracted to pay and the rent paid by the new tenant.[79]

As the landlord would not lose financially from the principle of mitigation of damages, there would seem to be no valid justification for continuing to exclude its operation in landlord-tenant law, especially when it is remembered that all other contracting parties have a duty to mitigate. In the light of *Maridakis v. Kouvaris*, however, there would seem to be little likelihood of reform in this area in the absence of appropriate legislation or a contrary ruling by the High Court.

4. *The Implied Condition of Fitness for Human Habitation*

The implication of an implied condition of fitness for human habitation in residential leases is the one change in the common law that the Australian courts have been prepared to make without waiting for appropriate legislation. One should realize, however, that this change was first introduced by the English courts and that the Australian courts were merely adopting English precedent by implying the condition. One should also realize that the effect of the change is not as dramatic as might at first be thought: the condition only applies to furnished premises, and only when the premises are found to be unfit for human habitation at the commencement of the lease.

The origin of the implied condition is the English case of *Smith v. Marrable*.[80] This case involved a lease of a furnished summer house to one Sir Thomas Marrable for six weeks. After only one week's occupation, Sir Thomas vacated the premises on the ground that the premises were infested by bugs and refused to pay the balance of the rent owing. Parke B. held that authority existed for the proposition that although slight grounds would not suffice, serious reasons might exist that would justify a tenant's quitting at any time. *Hart v. Windsor*,[81] a case involving a similar fact situation, arose the following year. In this case Parke B. stated that he was now satisfied that the two cases he relied upon in reaching his decision in *Smith v. Marrable* could not be supported. However, instead of holding that

[78] This proposition was laid down in the Canadian case of *Goldhar v. Universal Sections & Mouldings Ltd* (1963) 36 D.L.R. (2d) 450, and is cited with approval in *Woodfall's Law of Landlord and Tenant* (27th ed. 1968) 869. Although *Highway Properties Ltd v. Kelly, Douglas & Co. Ltd* (1971) 17 D.L.R. (3d) 710 overruled *Goldhar*, the validity of the proposition under consideration here was unaffected.

[79] Note that according to *Maridakis v. Kouvaris*, no damages for loss of rent incurred by reletting at a lower rental can be claimed after a surrender by operation of law. A surrender will occur if the landlord does not clearly advise the defaulting tenant that the reletting is on the tenant's account. This aspect of the decision in *Maridakis v. Kouvaris* conflicts with the earlier case of *Hughes v. N.L.S. Pty Ltd* [1966] W.A.R. 100, in which the Western Australian Supreme Court held that damages are recoverable notwithstanding that a lease has been surrendered by operation of law. For a useful discussion of this point, see Note, '*Maridakis v. Kouvaris*' (1975) 2 *Monash University Law Review* 115.

[80] (1843) 11 M. & W. 5; 152 E.R. 693 (Exch.).

[81] (1843) 12 M. & W. 68; 152 E.R. 1114 (Exch.).

*Smith v. Marrable* was wrongly decided he distinguished the case on the ground that that case involved furnished premises while the premises in the case at bar were unfurnished.[82] Later cases limited the application of *Smith v. Marrable* to situations where the defect existed at the commencement of the tenancy.[83]

Thus, the origin and development of this doctrine can be traced to a decision by Parke B. in 1843 which he himself had come to regret by the following year. The usefulness of this doctrine as a vehicle for preserving health standards and providing justice for tenants has been recognized by many judges. McCardie J. once commented that 'it is a warranty to be extended rather than restricted'.[84] However, despite its usefulness, neither the Australian nor the English courts have attempted to enlarge the doctrine in *Smith v. Marrable* into an implied condition of habitability for all residential premises, as in the United States. This can be seen from an examination of the latest Australian authority on the point, *Pampris v. Thanos*.[85] In that case, the furniture in a lease of a furnished house contained a refrigerator. Seven months after the commencement of the lease, due to defective wiring the tenant's wife suffered an electric shock when she touched the refrigerator. The tenant claimed damages based on a breach of the implied condition that the premises were reasonably fit for habitation. The Court held that the rule as to fitness for habitation does not extend to furniture or appliances and reaffirmed that the doctrine only applies to furnished premises and only to defects occurring at the commencement of the lease.

5. *The Doctrine of Unconscionability*

No case has been reported in either Australia or England in which an onerous clause in a lease has been declared void because the inequality of bargaining power between the landlord and tenant was such as to make the contract unconscionable.

However, the application of this doctrine in other areas of law in England has been highlighted by Lord Denning in the recent case of *Lloyd's Bank Ltd v. Bundy*,[86] where a guarantee by a father of his son's debts was held to be invalid because of undue influence on the part of the Bank. Lord Denning observed that there are cases in which the court will set aside contracts when the parties are on grossly unequal terms, and stated that it is time that they were united under the principle of inequality of bargaining power.[87] If such a principle becomes generally recognized it seems only a small step towards judicial acceptance of the argument that in view of

[82] (1843) 12 M. & W. 68, 87; 152 E.R. 1114, 1122.
[83] *Collins v. Hopkins* [1923] 2 K.B. 617, and *Wilson v. Finch Hatton* (1877) 2 Ex. D. 336.
[84] *Collins v. Hopkins* [1923] 2 K.B. 617, 620.
[85] [1968] 1 N.S.W.R. 56 (N.S.W. Sup. Ct. C.A.).
[86] [1974] 3 W.L.R. 501 (C.A.).
[87] *Ibid.* 506-9.

the invariable use in Australia of standard form leases for residential premises, any onerous clauses contained within the lease should be struck down on the ground that a tenant does not have any effective bargaining power. Although Lord Denning expressly stated that the case of a tenant paying a high rent to a landlord just to get a roof over his head would not fall within the operation of the principle,[88] this case can be distinguished on the ground that the amount of rent is never one of the standard parts of a standard form of lease. It remains to be seen whether the Australian courts would be prepared to accept the general principle of voiding contracts where there is a gross inequality of bargaining power, and if so, whether they would be prepared to extend it to the landlord-tenant relationship.

## D. THE CHANCES OF ACHIEVING REFORM

It is clear that the Australian courts have ignored the caution of Douglas J. that 'continuity with the past is only a necessity and not a duty'.[89] Possibly a partial excuse is the sparsity of appellate cases in this area of the law:

> Little of the vast iceberg of residential landlord-tenant law is discernible from written court opinions because the cost of appeals has outweighed the amounts at stake in litigation. In the past, any appeals that were taken were usually 'grudge' suits, where emotions caused monetary values to be overlooked.[90]

However, as shown in *Minister of State for the Army v. Dalziel*, the High Court has failed to take advantage of such opportunities as have presented themselves to introduce contractual principles into landlord-tenant law.

The lack of success in the past in achieving reforms in landlord-tenant law in Australia by legislative change and by the case law process is particularly unfortunate in view of the extent of the proven deficiencies in the present law. If our landlord-tenant law is to keep pace with the changing times, the problem that must be solved is how to break the present impasse resulting from the blockage of legislative change by political pressure groups and the unwillingness of the courts to use their judicial law-making power in this area of law.

Possibly the best approach to this problem is to attempt to secure judicial and legislative acceptance of the proposition that a tenant is a consumer rather than merely the holder of an estate in land. Although on first glance it may seem strange to regard the residential tenant as a consumer, a more detailed consideration reveals that tenants share the same disability that has led the State governments to introduce consumer

[88] *Ibid.* 506.
[89] Cited by McCormick C.J., 'The Rights of the Landlord Upon Abandonment of the Premises by the Tenant' (1925) 23 *Michigan Law Review* 211, 221-2.
[90] Gibbons G. R., 'Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code' (1970) 21 *Hastings Law Journal* 369, 376.

protection legislation. It is generally recognized that some housewives can be trapped into making unwanted purchases by 'high-pressure salesmanship' on the part of door-to-door salesmen, and that it is unrealistic to argue that they are on an equal footing in the negotiation of the contract. However, it is not yet generally recognized that a tenant is at equal disadvantage: invariably he will be expected to sign a standard form of lease or else look for alternative accommodation. Thus in reality the terms of the lease are dictated by the landlord or estate agent, and the principle of freedom of contract is illusory and unrealistic in this context.

The analogy between the needs of residential tenants and consumers of personal property holds good in other respects. Although, as already stated, a tenancy has traditionally been regarded at law as an estate in land, the present-day tenant is primarily concerned with the provision and maintenance of services: for example, hot and cold water, heating and power supplies, and repairs.

If the validity of the analogy between tenants and consumers is accepted, the possibility of the introduction of statutory reform benefiting the tenant will be increased, as in recent years there has been a large volume of legislation introduced with a view to increasing the legal protection given to consumers against various forms of business activities. In Victoria, for example, in the past four years, consumer affairs have assumed a sufficient significance to warrant the establishment of a Ministry of Consumer Affairs,[91] and Small Claims Tribunals have been introduced to provide a quick and inexpensive means of access for the public when a dispute arises over the payment of an account or the performance of services in certain business transactions.[92] The Motor Car Traders Act 1973 was designed to give increased protection to purchasers of secondhand motor vehicles, and the Consumer Affairs Act 1972 regulates or prohibits a variety of miscellaneous trade practices: trading stamps or coupons have been outlawed, penalties have been attached to false or misleading advertising, and increased protection has been given to the public in the areas of door-to-door sales and unordered goods and services.

Even if continued political pressure prevents the enactment of statutory changes to our landlord-tenant law, however, the acceptance of the proposition that a tenant is a consumer could increase the chances of the Australian courts introducing on their own initiative similar reforms to those already adopted by many courts in the United States. It is interesting to note that in many cases the United States' judges admitted that it was the analogy between the needs of tenants and consumers of personal property and the realization that a lease involves a contract for space and services that led them to break with the established common law rule that a lease is an estate in land.

[91] See the Ministry of Consumer Affairs Act 1973 (Vic.).
[92] See the Small Claims Tribunals Act 1973 (Vic.).

The Australian courts might be strengthened in any possible resolve to amend the law by the recent enactment of the Small Claims Tribunals Act Amendment Act 1975 (W.A.).[93] This legislation, which was introduced on the recommendation of the Law Reform Commission of Western Australia,[94] was designed to give the Small Claims Tribunals jurisdiction over landlord-tenant disputes where the sum of money involved does not exceed $500. It is the method adopted by the legislation rather than its purpose which is important in this context, however: the legislation amended the principal Act to include residential tenants under the statutory definition of consumers.[95] Although the significance of this legislation must not be overestimated, as it was clearly not designed to effect a fundamental change to the nature of a lease, nevertheless, being the first occasion that a statute in Australia has declared that a tenant is anything other than the holder of an estate in land, it is submitted that it shows the beginnings of a realization of the changed social conditions which render the continued application of the old common law rule inappropriate. This Western Australian legislation could conceivably act as a spur for the Australian judiciary to adopt the contractual principles and remedies suggested earlier in this article.

In conclusion, it is submitted that even if the first major reforms in this area are undertaken by the legislature rather than the courts, this would not remove the need for a fundamental reappraisal by the judiciary of the rights and duties of landlords and tenants. As the courts have the power to influence the practical effect of any legislation by their interpretation, it can be argued that a change in the attitudes of the judiciary is the key to landlord-tenant law reform. As explained by one commentator:

> It may be peculiar . . . to say simply that it is necessary to have a change in judicial attitudes; yet this is the primary reason for the ineffectiveness of existing law and the disillusioned feelings of tenants . . .
>
> . . . Adequate response of the law to the needs of society depends on the willingness of judges to re-evaluate old answers to new problems and to be receptive to social realities. Only through judicial willingness to re-examine established rhetoric in light of harsh realities, and judicial amenability to necessary improvements, can really significant changes occur.[96]

[93] This Act amends the Small Claims Tribunals Act 1974 (W.A.).

[94] Law Reform Commission of Western Australia, *Report on Tenancy Bonds* (Project No. 41: 1975).

[95] Section 2(a) of the Small Claims Tribunals Act Amendment Act 1975 (W.A.) deletes the definition of 'consumer' contained in s. 4 of the principal Act and substitutes the following definition:

'consumer' means —

. . .

(b) a person who is or was the tenant of any premises let to him for the purposes of a dwelling and otherwise than for the purposes of assigning or sub-letting or for the purposes of a trade or business carried on by him.

The Queensland Small Claims Tribunals also have jurisdiction over security deposits under the Small Claims Tribunals Act 1973-1974 (Qld). However, the method used by the legislature to extend the jurisdiction of the Tribunals to security deposits was to amend the statutory definition of a 'small claim' rather than to classify tenants as consumers.

[96] Loeb D. N., 'The Low Income Tenant in California: A Study in Frustration' (1970) 21 *Hastings Law Journal* 287, 315-6.