THE ROLE OF STATE GOVERNMENT AGENCIES IN SECURING REPAIRS TO RENTED HOUSING

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The better the house is designed for the purpose of furnishing a location for a home, the greater the guarantee that there will actually be a home there. Clothes do not make the man, it is said, but they certainly do help. The king is more the king when he is dressed in the royal robes. A priest is a priest forever. Yet he has special robes for special priestly functions. So also the building does not make the home, but certainly it is an invaluable aid to that purpose.[1]

A. *Introduction*

There is no doubt that disputes over liability for effecting repairs represent a large proportion of the total number of disputes that arise between landlords and tenants. According to the Tenants Unions of Victoria and Tasmania[2] and the Secretary of the Victorian Rental Investigation Bureau,[3] disputes over repairs are the most common source of contention between the parties after security deposits. In view of the frequent application of this area of law, it is surprising that the common law rules on liability for repairs have survived without major statutory modification in all States except New South Wales and Queensland.[4]

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The problems associated with the role of the Housing Commission of Victoria and the South Australian Housing Trust in securing housing improvement were first discussed by the writer in *Poverty and the Residential Landlord—Tenant Relationship* (A.G.P.S.: Canberra, 1975), 27-31, and (in outline) in 'Methods of Improving the Effectiveness of Substandard Housing Control Legislation in Australia' (1976) 5 *University of Tasmania Law Review* 166. This article will update the information provided earlier, will discuss the issues in greater depth, and will include a critique of the role of the Tasmanian Director of Housing under the Substandard Housing Control Act 1973 (Tas.).

[1] E. Dirksen, *Economic Factors of Delinquency* (1948), 54-55.

[2] Information supplied by Mr M. Salvaris, Convenor, Tenants Union of Victoria, and Mr G. Steele, Organiser, Tenants Union of Tasmania.

[3] Information supplied by Mr A. H. Clark, Secretary, Rental Investigation Bureau.

[4] New South Wales and Queensland already have legislation to ensure that the premises are in a satisfactory state of repair at the commencement of the lease. The Landlord and Tenant (Amendment) Act 1948-1969, section 39 reads:

> A person shall not let a dwelling-house which to his knowledge is, at the date of letting, not in fair and tenantable repair.

Unfortunately, this section is limited both in scope, in that it does not provide a remedy where the premises fall into disrepair after the commencement of the lease, and in application, in that it applies only to the relatively few premises still subject to the Landlord and Tenant (Amendment) Act 1948-1969. See section 5A for the applicability of this legislation.

The Residential Tenancies Act 1975 (Qld), section 7, has avoided these limitations and is far more satisfactory from the standpoint of the tenant. The relevant part of this Queensland legislation reads:

The aim of the landlord and tenant law should be to strike a fair balance between the rights and duties of the parties. While it is reasonable to expect the tenant of residential premises to be placed under an obligation to repair damage caused wilfully or negligently by himself or his invitees, and to look after the premises in a tenantlike manner (which, under the existing law he is under an implied obligation so to do),[5] the writer believes that it is unreasonable to expect him to make structural repairs. It must be remembered that it is the landlord who will benefit primarily from any repairs on the reversion of the premises, and that as the vast majority of leases of residential premises are for a period of twelve months or less,[6] very little benefit will accrue to the tenant.

Strong objection to the existing law and practice in Australia relating to repair obligations can be made on the ground that it is weighted in favour of the landlord. In none of four standard forms of tenancy agreement currently in use in Victoria is the landlord placed under a duty to make repairs under any circumstances.[7] Instead, the obligation to repair is placed solely on the tenant. The extent of the obligation varies from agreement to agreement. While all the tenancy agreements exempt the tenant from liability for repairs where the damage is classed as fair

> Notwithstanding any agreement between a landlord and tenant, in every tenancy agreement entered into after the commencement of this Act there shall be implied obligations —
> (a) on the part of the landlord —
> . . .
> (ii) to provide and, during the tenancy, maintain the dwelling-house in good tenantable repair and in a condition fit for human habitation.

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[5] See, for example, *Warren v. Keen*, [1953] 2 All E.R. 1118. Some courts have described the obligation of the tenant as an implied covenant to make 'fair and tenantable repairs' and to 'keep the premises wind and watertight': *Leach v. Thomas* (1835), 7 C. & P. 327; *Wedd v. Porter*, [1916] 2 K.B. 91 (C.A.). Although it is generally assumed that these phrases are synonymous with 'tenantlike manner', this has not been settled.
In certain circumstances, tenants are also liable for waste. Although all tenants are liable under voluntary waste if they commit a positive act occasioning injury to the land (see, *e.g. Marsden v. Heyes Ltd*, [1927] 2 K.B. 1; *Regis Property Co. Ltd v. Dudley*, [1958] 3 All E.R. 491; *Warren v. Keen*, [1953] 3 All E.R. 521), their liability under permissive waste if they fail to keep the property in a satisfactory state of repair depends on whether they are tenants for a term of years or periodic tenants, and within this latter category whether they fall under the sub-category of weekly, monthly or yearly tenants. It is unclear from the authorities whether a tenant for a term of years or a tenant from year to year is liable for permissive waste (see *Yellowly v. Gower* (1855) 11 Exch. 274; *Davies v. Davies* (1888) 38 Ch.D. 499; *Reihana Terekuku v. Kidd* (1885) N.Z.L.R. 4 S.C. 140). However, it is settled law that monthly or weekly periodic tenants are not liable under that heading (*Regis Property Co. Ltd v. Dudley*, [1958] 3 All E.R. 491; *Warren v. Keen* [1953] 3 All E.R. 521).

[6] A survey of 242 tenants of private accommodation in the Melbourne suburbs of Fitzroy and Collingwood was undertaken jointly by the writer and the Fitzroy Ecumenical Centre in 1973 and was submitted to 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 A. J. Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (A.G.P.S.: Canberra, 1975), Appendix 1.

[7] The Real Estate and Stock Institute tenancy agreement; the L.R. Reed & Co. Pty Ltd tenancy agreement; the W.B. Simpson & Son tenancy agreement; and the 1958 Copyright Lease.

wear and tear or is caused by storm, accidental fire or flood,[8] only one document exempts the tenant from repairs of a structural nature.[9]

The tenant fares no better where the lease is silent on the issue of repair obligations or where there is no written lease. At common law the landlord has no liability towards the tenant to do repairs during the term of the lease or to put the premises into repair at the commencement of the lease, however poor the state of repair might be.[10] Common law was only prepared to place the landlord under an obligation to repair in two situations. Firstly, a warranty of fitness is implied where a lease is entered into before the building of the premises is complete.[11] Secondly, there is the anomalous implied condition, established in *Smith v. Marrable,*[12] 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.[13] Apart from the *Smith v. Marrable* exception, however poor the state of repair might be, a tenant has no recourse at common law against the landlord and has no alternative but to do the repairs at his own expense or continue to suffer the defective conditions. Similarly, if the premises become defective after the commencement of the tenancy, there is no implied obligation on the landlord to repair in the absence of an express agreement.

It seems to have been assumed in the past by legal commentators that there will be no relief for tenants until a statutory condition or covenant of habitability is placed on the landlord and the methods of enforcement are revised.[14] Various articles have suggested the need for a statute

[8] R.E.S.I. Tenancy Agreement, cl. 5; L.R. Reed & Co. Pty Ltd Tenancy Agreement, cl. 5; W.B. Simpson & Son Tenancy Agreement, cl. 2(a); The 1958 Copyright Lease, cl. 1(f).

[9] The 1958 Copyright Lease, cl. 1(f).

[10] *Cruse v. Mount,* [1933] Ch. 708.

[11] *Miller v. Cannon Hill Estates Ltd,* [1931] 2 K.B. 113.

[12] (1843), 11 M. & W. 5; 152 E.R. 693 (Exch.). See also *Collins v. Hopkins,* [1923] 2 K.B. 617; *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336; and *Pampris v. Thanos,* [1968] 1 N.S.W.R. 56.

[13] *Sarson v. Roberts,* [1895] 2 Q.B. 395; *Pampris v. Thanos,* [1968] 1 N.S.W.R. 56.

[14] See, for example, Note, 'The Fitness and Control of Leased Premises in Victoria' (1969), 7 *Melbourne University Law Review* 258; and Durnford, 'The Landlord's Obligation to Repair and the Recourses of the Tenant' (1966), 44 *Canadian Bar Review* 477.
New South Wales and Queensland already have legislation to ensure that the premises are in a satisfactory state of repair at the commencement of the lease: See *supra,* n. 5. A statutory covenant of habitability is contained in the legislation of a number of jurisdictions in Canada and the United States: see, for example, Ontario, Landlord and Tenant Act, R.S.O. 1970, c. 236, s. 96(1); Manitoba, Landlord and Tenant (Amendment) Act, Stats. Man. 1970, c. 106, s. 98(1); and Rhode Island, R.I. Gen. Laws Ann. s. 34-18-6(1) (1969).
The Housing Act 1957 (U.K.), s. 6, provides that in any contract made for letting a house or part of a house for human habitation at a rent not exceeding £80 a year in the administrative county of London and £52 elsewhere, there shall be implied a *condition* by the landlord notwithstanding any stipulation to the contrary that the house is fit for human habitation at the commencement of the tenancy, and that he will keep it so throughout the tenancy.

allowing the tenant in cases where the landlord refuses to repair the alternative remedies of quitting the premises without further liability for rent, deducting a portion of the rent according to the extent of the disrepair, withholding the whole rent, petitioning the court to permit or compel other tenants of the same landlord to withhold their rents, or doing the repairs himself and deducting the cost from the rent.[15] While the adoption of a statutory covenant of habitability and any one or a combination of these remedies would improve the position of the tenant, the writer believes that the remedies all suffer from one major defect, namely that they rely on the tenant to initiate action against the landlord. In the light of the short-term interest that a residential tenant has in the premises and the legal costs involved in initiating an action, in the vast majority of situations the tenant would be well advised to seek alternative accommodation rather than try to force the landlord to repair. Thus, the practical effects of improving the remedies of the tenant along the lines mentioned above are likely to be minimal.

One solution to this problem lies in an area of the law not traditionally considered to be a part of the law of landlord and tenant. Under State legislation, in addition to their function of providing housing for low-income earners, the Housing Commission of Victoria, the South Australian Housing Trust and the Tasmanian Director of Housing have the duty and the necessary backing legislation to upgrade the quality of the housing stock in their respective States.[16] Although these government agencies do not have the specific duty of improving tenant rights, it will be seen that the present legislation is capable of partially redressing the present imbalance between the rights and duties of landlords and tenants in the law relating to repairs.

This article will examine the existing role of the Housing Commission of Victoria, the South Australian Housing Trust and the Tasmanian Director of Housing in securing repairs to rented premises and will suggest appropriate methods of improving the effectiveness of the existing legislation with a view to devising new legislation that could be adopted in all States.

B. *The Existing Legislation*

1. *The Rent Control Sanction of the South Australian Housing Trust*

Part VII of the Housing Improvement Act 1940-1973 (S.A.) vests the

[15] See, for example, Note, 'Rent Strike Legislation — New York's Solution to Landlord-Tenant Conflicts' (1966), 40 *St. John's Law Review* 253; Clough, 'The Case Against the Doctrine of Independent Covenants' (1972), 52 *Oregon Law Review* 39; Dooley and Goldberg, 'A Model Tenants' Remedies Act' (1969-70), 7 *Harvard Journal of Legislation* 357; and Gibbons, 'Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the proposed Model Code' (1969-70), 21 *Hastings Law Journal* 369.

[16] Housing Act 1958 (Vic.); Housing Improvement Act 1940-1973 (S.A.); Substandard Housing Control Act 1973 (Tas.). There are no State government agencies in Western Australia, Queensland and New South Wales involved at present with the upgrading of private housing.

power in the South Australian Housing Trust to control the rent of substandard premises. This legislation is administered by the Housing Improvement Section of the Housing Trust and is a remnant of the broad powers over rent control of private housing vested in the Housing Trust during the Second World War. The Housing Trust originally had power under section 14 of the Landlord and Tenant (Control of Rents) Act 1942 (S.A.) to fix the rents of all residential premises in the State. Although section 7(1) declared that the Act would continue in operation only until six months after the termination of the war, in fact the operation of the Act was extended for a further twelve months each year until 1961. It was eventually replaced by the Excessive Rents Act 1962 (S.A.), which removed the power to determine rents from the South Australian Housing Trust and vested it in the Local Courts. The jurisdiction of the Housing Trust to impose rent control on substandard premises was left untouched, however. Thus, unlike the Housing Commissions of the other five States, the South Australian Housing Trust has had considerable experience in applying rent control.

Under section 52 of the Housing Improvement Act 1940-1973 (S.A.), where the Trust is satisfied that premises are undesirable or unfit for human habitation it may serve a notice on the owner stating that after the expiration of one month (to allow him time to make representations to the Trust) the premises will be declared substandard. The Trust may then publish the declaration in the *Gazette,* and after the expiration of a further month may fix the maximum rental per week which shall be lawfully payable in respect of the premises.[17] The owner is permitted a right of appeal to the nearest local court against a Trust declaration, in which case any fixed maximum rental is suspended until the appeal is heard.[18] In the event that some improvements to the premises are made by the owner, the Trust is empowered to increase the maximum rental,[19] and if satisfied that the premises have ceased to be undesirable or unfit for human habitation, it may by notice in the *Gazette* revoke the declaration made pursuant to section 52.[20]

The rent control sanction is frequently used by the Housing Trust. Table 1 shows that approximately 2,000 dwellings are inspected annually by the Housing Improvement Section. It will be noted that the figures for each year under the column 'maximum rents applied' are considerably lower than the figures under the column 'houses declared substandard'. Similarly, the total number of houses subject to maximum rents each year is less than the total number of houses subject to Trust control. These discrepancies are due to the inclusion in the figures for 'houses declared substandard' and 'total houses subject to Trust control' of a number of owner-occupied homes, where of course it would be pointless for the

[17] Housing Improvement Act 1940-1973 (S.A.), section 54.
[18] *Ibid.*, section 53(1), (3).
[19] *Ibid.*, section 55(1).
[20] *Ibid.*, section 55(2).

Trust to fix a maximum rent, and also a number of marginal houses containing several tenants where the Trust feels that the effect of the imposition of a maximum rent would result in the owner quitting the letting business rather than attempting to make the desired repairs.

TABLE 1

USE OF HOUSING IMPROVEMENT AND RENT CONTROL SANCTIONS SOUTH AUSTRALIAN HOUSING TRUST

	1972–73	1973–74	1974–75
Dwellings inspected	2,018	1,797	2,291
Proceedings commenced	504	640	723
Houses declared substandard	426	464	621
Maximum rents applied	308	346	436
Maximum rents varied because of improvement	180	241	332
Houses released from cotnrol	107	101	269
Houses subject to rent control removed from rental market	226	200	214
Total houses subject to Trust control	6,150	6,790	7,585
Total houses subject to Maximum Rents	3,647	3,993	4,429

Source: Information supplied by Mr M. L. O'Reilly, Officer-in-Charge, Housing Improvement Section, South Australian Housing Trust.

It is submitted that the legislation establishing the rent control sanction is inadequate. Firstly, the legal procedures take a minimum of two months to complete before the rent can be fixed. Section 52 of the Housing Improvement Act requires one month's notice to be given to the owner of the intention to declare the premises substandard, and once the declaration has been made section 54 insists that a further month elapse before rent control comes into effect. The Trust has a policy of allowing the owner two months in which to make the repairs if he asks for time to comply with the Trust requirements, and occasionally a further two months may be allowed if the owner can show good reason for his failure to complete the repairs (for example, if he was delayed because of material shortages). If the owner who has been given this extra time fails to repair, then there must still be a further two months' delay under sections 52 and 54. Finally, further delay can ensue under section 53 if the owner appeals against a Trust declaration. The Trust believes that the majority of appeals are made in order to obtain more time, rather than out of a genuine sense of grievance, although as relatively few appeals are made this source of delay is not a universal problem.[21]

During all these delays the tenant, of course, is still paying a high rent of substandard premises. Furthermore, even more significant than the problem of delays, many owners are prepared to tolerate the imposition of rent control because of the ever-increasing land values. Thus, rent control by itself without the effective power to make a repair order appears to be an inadequate sanction.

[21] During 1970-1975 inclusive, 14 appeals were filed against Housing Trust declarations, but only 6 were heard. Information supplied by Mr. F. H. Pybus, Clerk of the Adelaide Local Court.

The ineffectiveness of the rent control sanction can be seen from an analysis of Table 1. By combining the figures of 'houses released from control' and 'maximum rents varied because of improvement' we can obtain the total number of premises which were upgraded as a consequence of rent control. The relevant figures for 1972-73, 1973-74 and 1974-75 are 287, 342 and 601 respectively. Bearing in mind that the total houses subject to maximum rents for the three years specified were 3,647 (1972-73), 3,993 (1973-74) and 4,429 (1974-75), we can calculate that only 7.81 per cent (1972-73), 8.56 per cent (1973-74) and 13.54 per cent (1974-75) of the premises subject to maximum rents in the respective years were upgraded. In addition, it will be observed that in two of the three years the number of upgraded premises is below the number of premises which had maximum rents applied that year and in all three years is below the number of premises declared substandard. Thus, there has been a net increase over recent years in the total houses subject to Trust control and to maximum rents. Finally, the statistics show that the total number of premises subject to Trust control removed from the rental market is little lower than the total number of premises upgraded:[22] for example, in 1972-73, 226 houses were removed from the rental market compared with 287 upgraded.[23] The aim of the Trust in applying the rent control sanction, namely to secure the improvement of the housing stock, thus misfires badly when the effect of the sanction is to cause the owners to cease using the houses as dwellings.

2. *The Rent Control Sanction of the Tasmanian Director of Housing*

Unlike in South Australia, the Tasmanian rent control legislation enacted following the resumption of control by the States from the Commonwealth over this area of law after the defeat of the Constitution Alteration (Rents and Prices) Referendum 1948 was allowed to expire in 1955.[24] For eighteen years Tasmania had no form of rent control whatsoever, until the enactment of the Substandard Housing Control Act 1973. The aim of this legislation in using rent control as a sanction against substandard housing is identical to that of the Housing Improvement Act 1940-1973 (S.A.), but the actual provisions of the two Acts differ in some respects.

[22] The total number of premises upgraded is found in Table 1 by adding the figures for 'Maximum rents varied because of improvement' and 'Houses released from control'.

[23] Before 1972, it was very common for sub-standard houses in Adelaide to be converted into business premises. Especially in the inner suburbs, industry (*e.g.* SAFCOL) bought up the dwellings for storehouses and fish processing plants. However, in 1972 the City of Adelaide Development Committee prevented the use of buildings for other than their original use. Now many sub-standard houses lie vacant because new owners had bought them intending to convert them for industrial purposes, but were frustrated in this design. Information supplied by Mr M. L. O'Reilly, Officer-in-Charge Housing Improvement Section, South Australian Housing Trust.

[24] Landlord and Tenant Act 1949 (Tas.).

Under section 4 of the 1973 Tasmanian legislation, where the Director of Housing is satisfied that a house is undesirable or unfit for human habitation he may serve notices on the interested parties stating his intention to declare the house substandard and inviting them to submit representations to him on this matter. A minimum of thirty days must be allowed for these representations from the date of the service of the notices, after which the Director may declare by notice in the *Gazette* that the house is substandard. This declaration will continue in force until the Director, pursuant to section 7(1), publishes a further notice in the *Gazette* declaring that the house has ceased to be substandard. Under section 9, the Director may by publication in the *Gazette* fix a maximum rental for a declared substandard house, and by virtue of section 11(3), notwithstanding any agreement to the contrary any rent in excess of the maximum specified is irrecoverable.[25] When a notice of intention has been served under section 4(1), any notice to quit given by or on behalf of a landlord is ineffective unless either the tenant has failed to pay the rent or the notice to quit is confirmed by a magistrate as not having been served in retaliation for the initial complaint by the tenant.[26] Similarly, once the premises are controlled, the legislation prohibits recovery of possession by a landlord except under certain defined circumstances.[27]

The two major weaknesses in the effectiveness of the Substandard Housing Control Act 1973 are delays and possible eviction proceedings. Invariably, proceedings are only instituted against the owner of substandard premises on receipt of a complaint by a tenant, and in view of the fact that in the whole State there are only two inspectors (one each based in Hobart and Launceston), it will be realized that in many instances there can be considerable delays before the legislation is invoked. Even when it is invoked, however, further delays result from the wording of the legislation. A minimum of thirty days must be allowed for the owner to make representations as to the standard of the premises,[28] and a further thirty days must elapse before rent control can be applied in order to allow the owner the opportunity to appeal to a magistrate.[29] Thus, as in South Australia, an absolute minimum of two months must elapse after the Act is invoked but before rent control is applied, and during this time the tenant must continue to pay a high rent for substandard accommo-

[25] Section 12(1) makes it an offence for a person to demand or recover excess rent. A penalty of one hundred dollars is stipulated (section 25(1)).

[26] Substandard Housing Control Act 1973 (Tas.), section 17.

[27] *Ibid.*, section 18(1). A total of eleven grounds for possession are stipulated, the most important being: that the tenant has contravened any condition of the tenancy; that the tenant, by subletting or taking in lodgers, is making a profit that the court considers unreasonable; that the premises are required by the landlord for his own occupation or that of his immediate family; that a contract for sale of the house has been entered into under which the vendor is obliged to give vacant possession to the purchaser; and that possession of the house is reasonably required for its alteration or reconstruction to a substantial extent, or for its demolition.

[28] *Ibid.*, section 4(2)(a).

[29] *Ibid.*, section 4(4).

dation. The problem of eviction arises because, although the tenant is safeguarded during the preliminary proceedings and while the premises are controlled, once the premises are upgraded and the house is declared in the *Gazette* to be no longer substandard, the landlord is free to evict the tenant in retaliation for his initial complaint to the Housing Department.

The Tasmanian Parliament attempted to improve the effectiveness of the 1973 legislation by introducing by way of an amendment the Substandard Housing Control Act 1975. This later Act reduces the delays by amending section 4 so as to allow the Director to register with the Recorder to Titles a notice declaring the premises substandard thirty days after the service of the initial notice on the owner specifying necessary repairs.[30] There is no further delay to allow time for a possible appeal, and extra time is saved inasmuch as it is no longer necessary to publish the relevant notices in the *Gazette.* The Act tackles the problem of eviction by stating that the house remains controlled despite a declaration by the Director that it is no longer substandard until the tenant of his own volition quits the premises or until six months after the declaration.[31]

Thus, the 1975 amendment is a significant improvement over the original 1973 Act, although the tenant is still at risk against relatiatory eviction by the landlord six months after the premises have been declared no longer substandard. In addition, the problem of delay, although reduced, still exists especially because of the continued chronic shortage of inspectors. Unfortunately, however, section 18 of the 1975 amendment provides that the Act will expire 21 months after the date of its commencement, on 22 September 1977. After this date, the problems of delay and eviction will again be magnified as the 1973 Act will apply as if the 1975 amendment had never been enacted.

Unlike the Housing Improvement Act 1940-1973 (S.A.), as the Substandard Housing Control Act 1973 has only been in operation for just over three years, it is still too early to judge conclusively its effectiveness based on publicized statistics. However, the fact that as at 31 January 1977 only 42 premises had been declared substandard out of a total of 452 premises inspected[32] indicates that the Act is likely to become as ineffectual as its South Australian counterpart. According to the Tenants Union of Tasmania, the reasons for the small number of premises declared substandard are the over-generosity of the Director of Housing in allowing owners extra time to effect repairs and the problem that once tenants who have made an initial complaint to the Housing Department realize the inevitability of delays and the possibility of later eviction, they are

[30] Substandard Housing Control Act 1975 (Tas.), section 3.
[31] *Ibid.*, section 4.
[32] Information supplied by the Substandard Housing Section, Housing Department of Tasmania.

far more likely to search for alternative accommodation than to remain in the substandard premises and pursue their complaint.[33]

In view of their records of operation, it would seem desirable to abolish Part VII of the Housing Improvement Act and the Substandard Housing Control Act in their entirety. As rent control was not imposed by these two Acts as an end in itself, but only as a palliative against speculative investment in substandard housing,[34] and as it can be seen to have been a failure in this regard, there can be little justification for its continuance. While the threat of the imposition of rent control may in many cases act as an inducement for the owner to repair, the writer believes that the Victorian legislation provides a more appropriate and effective sanction against owners who fail to repair their rented premises.

3. *The Repair or Demolition Order Sanction of the Housing Commission of Victoria*

In contrast to the indirect method of rent control used in South Australia and Tasmania to secure repairs, the Housing Act 1958 (Vic.) is designed to enable the Housing Commission of Victoria to take direct action to improve substandard housing. Under section 56(1) and (2) of the Housing Act 1958, where the state of the premises is substandard, the Commission is empowered to declare the premises either unfit for human habitation or in a state of disrepair, and to order the premises to be demolished or repaired within a specified period of not less than fourteen days.[35] Under sub-section 5, the Commission may itself repair or demolish the premises in the event that the owner fails to comply with a Commission order to repair or demolish within the specified time, and may recover from the owner any expenses incurred. A right of appeal to a magistrates' court is allowed to the owner of any premises against a declaration of the premises by the Commission under section 56(1) within fourteen days after a copy of such declaration has been served on him.[36]

As in the case of the rent control sanction in South Australia and Tasmania, the major weakness of the legislation is the length of time it often takes for the legal machinery to work before the premises are repaired. Delays occur at a number of stages in the enforcement procedure.

[33] Information supplied by Mr G. Steele, Organiser, Tenants Union of Tasmania.

[34] According to Mr M. L. O'Reilly, Officer-in-Charge, Housing Improvement Section. Interview: 19 April 1974.

[35] Section 56(1) reads:

> Where the Commission after making due enquiries and obtaining all necessary reports is satisfied that any house or the land on which any house is situate does not comply with the regulations made under this section the Commission may declare the house to be—
> (a) unfit for human habitation; or
> (b) in a state of disrepair.

[36] Housing Act 1958 (Vic.), section 56(6). No appeal lies from the decision of the magistrates' court: *Achilleos v. Housing Commission*, [1960] V.R. 164.

If the Commission decides that repairs are necessary, it must serve notices on the owner and the occupier,[37] both of which must expire before the procedure can continue. Allowing for the time it takes to serve the notices, the Secretary of the Commission estimates that the legal procedures necessary to impose a repair or demolition order take at least one month to complete after the Commission inspects the premises.[38] At least a further month is lost if the owner decides to appeal. According to the Secretary, most appeals made against Commission declarations are only made as a tactical device to delay the imposition of a repair or demolition order rather than out of genuine sense of grievance. Table 2 would seem to confirm this contention.

TABLE 2

NOTICE OF APPEALS AGAINST HOUSING COMMISSION DECLARATIONS, VICTORIA

	1971–72	1972–73	1973–74	1974–75
Received	13	3	6	8
Withdrawn/Struck out	9	2	3	4
Dismissed	2	—	3	1
Upheld	—	—	—	—
Pending	2	1	—	3

Source: Housing Commission of Victoria, *Annual Reports*, 1971-72, 14; 1972-73, 8; 1973-74, 12; 1974-75, 14.

However, the most serious delays are caused by the Commission granting extra time to the owner to make the necessary repairs. Delays of up to nine years have been known.[39]

Statistics of the details of orders issued and complied with over the most recent three years for which statistics are available give a better picture of the extent of the delays. These figures are reproduced in Table 3.

TABLE 3

SECTION 56 ORDERS ISSUED AND COMPLIED WITH

1973–74	Orders Existing at 30/6/73	Orders Issued 1973–74	Orders Completed 1973–74	Orders Remaining at 30/6/74
Demolition	1,723	494	725	1,492
Repair	1,938	383	391	1,930
TOTAL	3,661	877	1,116	3,422
1974–75	**Orders Existing at 30/6/74**	**Orders Issued 1974–75**	**Orders Completed 1974–75**	**Orders Remaining at 30/6/75**
Demolition	1,492	505	407	1,590
Repair	1,930	493	583	1,840
TOTAL	3,422	998	990	3,430

[37] Housing Act 1958 (Vic.), section 56(2).
[38] Interview with Mr A. Bohn, Secretary, Housing Commission of Victoria: 10 April 1974.
[39] Note, 'The Fitness and Control of Leased Premises in Victoria' (1969), 7 *Melbourne University Law Review* 258, 264.

1975–76	Orders Existing at 30/6/75	Orders Issued 1975–76	Orders Completed 1975–76	Orders Remaining at 30/6/76
Demolition	1,590	408	324	1,674
Repair	1,840	405	376	1,869
TOTAL	3,430	813	700	3,543

Source: Housing Commission of Victoria, *Annual Reports*, 1973-74, 12; 1974-75, 14; 1975-76, 14.

It will be observed that although there was a small decline in the number of orders outstanding between June 1973 and June 1976 from 3,661 to 3,543, an improvement of 3.22 per cent, the number of orders completed over this three-year period only marginally exceeded the number of orders issued. Although some of the orders issued during each of the three years were undoubtedly completed within the same year, the smallness in the reduction of the 'orders existing' figures indicates that in a large number of cases compliance would have taken over one year, and in some it would have taken many years. In fact, in recent years the length of time for compliance has been increasing as before 1973-74 the number of orders outstanding had been declining far more rapidly.[40]

In view of the fact that the vast majority of residential tenants have leases of one year or less, and the fact that many Commission orders take over one year before they are complied with, it would seem that section 56 offers no realistic remedy for tenants living in substandard housing. However, two important points must be considered when analysing the figures in Table 3.

Firstly, the Commission has a policy of not enforcing section 56 orders when they are owned and occupied by pensioners. As pointed out by the Secretary,[41] many people live in the same premises all their lives and the premises deteriorate along with them: rather than evict these pensioners, the Commission makes an order for demolition on the premises and allows an indefinite deferment. Thus, in these cases the Commission does not make the order with the immediate expectation that it will be enforced, but rather so that action can be taken without delay in the event of the death of the pensioner or in the unlikely event of his moving. The Secretary was unable to estimate the total number of these deferred orders, but believes that they form a large percentage of the backlog of existing orders. If the figures in Table 3 are compensated to allow for the pensioner owner-occupier, the situation becomes more hopeful for a tenant trying to get his premises repaired within a reasonable period.

Secondly, although the backlog of orders looks formidable, the Secretary stresses that section 56 is nevertheless more effective than it might seem because of the very large number of owners who carry out desired repairs

[40] For example, between 30 June 1971 and 30 June 1973 the number of existing orders made under section 56 declined from 4,452 to 3,661.

[41] *Supra*, n. 38.

under the threat that if they delay a Commission order will be imposed. One can speculate that in many cases the owner would be far less diligent in carrying out early repairs than he would be if section 56 did not exist.

C. *Suggestions for Reform*

The rather negative conclusion that can be drawn from the above analysis of the existing legislation is that although the Victorian repair or demolition orders are more effective than the South Australian and Tasmanian rent control sanction in securing improvements to the housing stock, neither method is totally satisfactory. Nevertheless, it is submitted that if suitable amendments were made, the Victorian system of repair or demolition orders has the capacity to become highly effective and could provide a model for the other States to follow.

One method of improving the effectiveness of the legislation would be for the Housing Commission to make greater use of its power under the Housing Act 1958 (Vic.), section 56(5) to do the repair work itself and sue the owner for the recovery of expenses. Table 4 shows that the Commission has often invoked its power to demolish, but will seldom undertake repairs. According to the Secretary, the Commission does not wish to be involved in providing funds for repairs, and only does repairs when there are special reasons. For example, where there is a terrace of three units where the other two are well looked after but the middle one is substandard, the Commission might then undertake repairs in order to protect the other two units. However, repairs by the Commission to detached dwellings are extremely rare.

From the standpoint of the tenant, the demolition of the premises will achieve nothing, but greater use by the Commission of its power to repair would speed relief for the tenant and would in many instances act as an inducement to the owner to undertake the repairs himself without delay.

TABLE 4

CONTRACTS ARRANGED BY HOUSING COMMISSION FOR REPAIRS AND DEMOLITION

	1971–72	1972–73	1973–74	1974–75
Repair	3	4	—	—
Demolition	30	23	18	29

Source: Housing Commission of Victoria, *Annual Reports*, 1971-72, 14; 1972-73, 8; 1973-74, 12; 1974-75, 14.

As an alternative, or in addition to the power to do the repairs itself, the writer believes that the Victorian and all other Housing Commissions should be given the power to acquire compulsorily any substandard houses where the owner has failed to comply with a Commission order within a reasonable time and any rights of appeal have been exhausted. Under sections 67 and 68 of the Housing Act 1958 (Vic.), the Victorian Housing

Commission already has power to declare any area a reclamation area and may purchase or take compulsorily any land within it.[42] It is proposed that this legislation should be extended to allow compulsory acquisition of substandard dwellings in all cases, not just in clearance areas. Once a dwelling is acquired, the Commission would do the repairs and the tenant would remain in the premises with the Commission as his landlord. This proposal would overcome the objection sometimes voiced against the powers under section 56(5) that the owner can make a capital profit out of taxpayers' money: if the Commission does the repairs, the value of the premises increases and the landlord either raises the rent or sells at a considerable profit.[43] This argument is unconvincing as the landlord could make a profit by this means anyway if he did the repairs himself, and the taxpayers' money is adequately safeguarded by legislation;[44] in any case, this problem would not arise at all if the Commission acquired the premises.

A different approach, adopted widely in the United States, would be to focus on the use of certificates of compliance as a means of preventing houses from deteriorating to a substandard condition. Under this system, the issue of a certificate of compliance would become an essential condition precedent to the letting of premises.[45] Thus, Connecticut legislation provides that once a multi-unit building has been declared substandard, municipalities within the State may require a certificate of compliance before the building can be used again as a dwelling.[46] Once obtained, a certificate in Connecticut applies indefinitely. A slightly different system operates in the District of Columbia where landlords of buildings containing three or more apartment units must apply for a certificate each year and have their premises inspected annually.[47]

Although this latter system of annual licensing and pre-licensing inspection before an owner can let his premises would certainly help to alleviate the plight of the tenant, reason indicates that in Australia it

[42] The Housing Improvement Act 1940-1973 (S.A.), sections 33, 34 vests similar powers in the South Australian Housing Trust.

[43] This argument was made to the writer by Mr A. M. Ramsay, General Manager, South Australian Housing Trust.

[44] Housing Act 1958 (Vic.), section 56(5) states:

> If any owner fails to comply with any of the requirements of any direction under this section within the time specified for compliance therewith in the direction, the Commission —
>
> . . .
>
> (b) may recover from the owner any expenses thereby incurred by the Commission.

[45] For a detailed discussion of certificates of compliance, see Walsh, 'Slum Housing: The Legal Remedies of Connecticut Towns and Tenants' (1966), 40 *Connecticut Bar Journal* 539, 557 ff; and Garity, 'Redesigning Landlord-Tenant Concepts for an Urban Society' (1968-69), 46 *Journal of Urban Law* 695, 712-5. See also A. J. Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (A.G.P.S.: Canberra, 1975), Ch. 6.

[46] Conn. Gen. Stat. (Rev. 1968, Supp. 1965), section 47-24a.

[47] D.C. Code Ann., section 47-2305 (1967). See Daniels, 'Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia' (1971), 59 *Georgetown Law Journal* 909, 916.

would be rejected as being too costly. The total number of tenancies in each State and the high turnover rate of tenants would stretch the present resources of the Housing Commission to an impossible extent, and the systems could only operate after a massive increase in the number of housing inspectors. However, the more modest Connecticut system, whereby premises have to be licensed before they can be relet only after the premises have been declared unfit for human habitation, would seem possible within the existing Commission resources and would therefore seem to be a suitable approach to adopt.

A further possibility would be the use of criminal sanctions against owners of substandard accommodation. However, this approach has proved to be ineffective in the United States.[48] It was first introduced in New York in 1915 and has remained the dominant sanction there and in most other American cities until the present day. Although many cities provide maximum fines of $1,000 and gaol sentences, it is only rarely that a sizeable penalty is imposed. In the District of Columbia, the rare impositions of gaol sentences are usually suspended on condition that the landlord complies with the repair order. Fines imposed are usually derisory.[49] For example, in 1965 prosecutions in the District of Columbia resulted in only 58 convictions against landlords for letting substandard accommodation; sixteen were fined less than $100, with fourteen of these sixteen paying less than $25.[50] Not surprisingly, the criminal sanctions have thus failed to act as a deterrent, and some landlords apparently accept periodic convictions and fines as part of the cost of doing business.

In view of the obvious failing of the criminal sanction, this remedy would seem undesirable for Australia. Indeed, in the absence of precise housing regulations, as found in the Housing Codes of the majority of municipalities in the United States, it would be impracticable. However, if comprehensive housing regulations are adopted in any State[51] consider-

[48] For a discussion of the criminal sanction, see Gribetz and Grad, 'Housing Code Enforcement: Sanctions and Remedies' (1966), 66 *Columbia Law Review* 1254, 1262-3, 1275-6; Daniels, *op. cit.* n. 48, 913-6; Walsh, *op. cit.* n. 46, 549-50; Comment, 'Rent Withholding and the Improvement of Substandard Housing' (1965), 53 *California Law Review* 304, 318-9; Comment, 'Housing the Poor: A Study of the Landlord-Tenant Relationship' (1969), 41 *University of Colorado Law Review* 541, 545-7; and Levi, 'Focal Leverage Points in Problems Relating to Real Property' (1966), 66 *Columbia Law Review* 275, 279.

[49] According to L. Wald, *Law and Poverty* (New York, 1965), 12-20, fines in New York City in 1965 averaged $16 a case.

[50] Daniels, *op. cit.* n. 48, 915, n. 42.

[51] South Australia and Tasmania already have comprehensive sets of housing regulations: Housing (Standards of Habitation) Regulations 1969, under the Housing Improvement Act 1940-1973 (S.A.), and Housing (Standards of Habitation) Regulations 1974, under the Substandard Housing Control Act 1973 (Tas.). Basically the Tasmanian regulations copy those of South Australia except for some updating to enhance them towards a more modernised standard of housing. *E.g.* the Tasmanian regulations require that a house, including the electrical, gas and plumbing installations shall be maintained in a state of good repair by the owner, whereas the South Australian regulations rely on the word 'appurtenances' to include such factors in relation to a house.

ation could well be given to the legislative provision of a mandatory civil penalty of, say, three dollars per violation per day. This is the system operating in Seattle,[52] and would appear to be a fair and potentially far more effective remedy than the criminal sanction. The full cumulative amount would be recoverable by the Housing Commissions in a civil action against the landlord.

Another suggestion is that the number of housing inspectors employed by the Housing Commission of Victoria, the South Australian Housing Trust and the Tasmanian Director of Housing should be increased in order to allow them to carry out a more adequate enforcement programme. At present, inspections are only made in these three States when a complaint is received. It is argued that complaint-oriented inspections alone are generally ineffective for three reasons: firstly, they tend to focus only on the alleged violations; secondly, random enforcement results from the fact that many violations are never reported; and thirdly, this uneven enforcement creates a sense of injustice in some owners and reduces the likelihood that they will comply voluntarily.[53] Complaint-oriented inspections can be contrasted with area inspection programmes, in which all dwellings in a specified area are inspected and each violation is recorded. The advantages of such a programme are said to be as follows:

> Area inspections seem the most effective way to discover all violations and to gain information about the quality of a city's housing inventory, in addition to retarding neighbourhood deterioration. Detecting violations at earlier stages lowers repair costs. Competitive advantages of operating buildings at lower costs due to undetected violations is eliminated, and landlord responsiveness is improved. Supplementing complaint inspection with an efficient area inspection appears essential.[54]

This suggestion would seem ultimately to turn on the question of economics. While ideally it would be desirable for every area of each city to be subjected to an area inspection programme at least every two or three years, it is recognized that this would be impracticable owing to the large number of extra staff required. Possibly the best compromise solution would be to have sufficient staff to carry out periodic area inspection programmes for certain older city areas where an inspection would most likely find a high number of defects, and still retain the present complaint-oriented inspection programme for the other areas of the cities. The writer has been informed that this is the current situation in Houston, where fourteen out of twenty-one inspectors are designated to work on area inspection programmes within the older inner city areas while the remaining seven deal with complaints in relation to housing violations in other areas of the city, and that the system there is working efficiently.[55]

[52] Seattle Housing Code, section 27.36.050.

[53] These problems have arisen in the United States. See Note, 'Habitability in Slum Leases' (1968), 20 *South Carolina Law Review* 282, 288.

[54] *Ibid.*, 288-9.

[55] Letter to Dr A. J. Bradbrook from Mr D. M. Johnson, Chief, Housing Code Section, City of Houston.

The final issue that should be considered is whether the enforcement mechanism should be vested at the local government level rather than administered on a State-wide basis by a centralized State government agency.[56] In the United States, local government has assumed the primary function of improving the housing stock. The majority of municipalities[57] have introduced Housing Codes, which are designed to bring together under one law all problems relating to the carrying out of repairs, to establish precise minimum standards of repair, to determine who has the responsibility of effecting needed repairs, to establish a government agency responsible for securing the repairs, and to ensure that this agency is given the necessary powers to make it effective. It should not be forgotten that throughout Australia the local municipal boards of health have power to insist on improvements being made to housing where health hazards are found to exist.[58] It would arguably be only a small step to give the local municipalities complete control over housing standards.

Although there is no published material that can be used in order to determine the issue of local or State jurisdiction, the experience of the South Australian Housing Trust in applying Part III of the Housing Improvement Act 1940-1973 (S.A.) is instructive. Under section 23, the power to make repair and demolition orders in South Australia is vested at first instance in the various boards of health. However, in certain circumstances the Housing Trust can require the local boards of health to impose repair or demolition orders. Section 25 reads:

> (1) Where the housing authority, after making due enquiries and obtaining such reports as it deems necessary, is satisfied that any house is undesirable for human habitation or unfit for human habitation, the housing authority, after consulting with the local board of the district in which the house is situated, may by notice in writing require the local board . . . to make a declaration pursuant to section 23 . . . and to give any direction or notice or otherwise exercise any power under the said section in the manner required by the housing authority.
> (2) If the local board omits to comply with any notice given as aforesaid by the housing authority, the housing authority shall have and may exercise any of the powers given to local boards by section 23.

Thus, in theory, the Housing Trust does have the same power as its Victorian counterpart under the Housing Act 1958, section 56, to impose repair or demolition orders, except that it is first required to act through the local board of health. However, according to several senior officers of

[56] For a detailed discussion of this issue, see Bradbrook, 'Methods of Improving the Effectiveness of Substandard Housing Control Legislation in Australia' (1976) 5 *University of Tasmania Law Review* 166.

[57] A survey conducted in 1960 indicated that at least 229 cities with populations in excess of 10,000 had enacted Housing Codes by the end of 1959, See Comment, 'Rent Withholding and the Improvement of Substandard Housing' (1965), 53 *California Law Review* 304, 315.
A number of Canadian municipalities have also enacted Housing Codes in recent years.

[58] See, for example, Health Act 1958 (Vic.); Public Health Act 1902-1975 (N.S.W.); and Health Act 1935-1976 (S.A.). Note that in Western Australia the Local Government Act 1960, section 433 gives municipalities the power to act in all matters relating to the control of buildings; this includes structural provisions, health, safety, amenities, neglected and dilapidated buildings, etc.

the Housing Trust,[59] this requirement that the Housing Trust acts through the local board has rendered the system totally ineffective. There are 104 local government authorities in South Australia, and each one has its own policies and philosophies on imposing repair orders: the majority are very slow in taking action, and many are allegedly unwilling for political and other reasons to impose such orders. The Trust is extremely reluctant to order a local board to make an order against its will, as it is dependent on the goodwill of the local boards for the successful performance of its various duties. Thus, the Housing Trust has no effective power to impose a repair or demolition order, and the role of local government in this area has been a clear failure. Indeed, as long ago as 1940, a Committee of Enquiry to look into the adequacy of the Building Act 1923-1935 (S.A.) commented:

> It would appear, however, from the extent of the bad housing conditions disclosed by the survey that, whatever the reasons much has been omitted to be done by the local boards of health.[60]

The failure of Part III of the Housing Improvement Act 1940-1973 (S.A.) does not augur well for the bestowing of further powers in this area to the local governments. A further point is that if this power is vested at the local government level there is the danger that large discrepancies will arise between the standards imposed and their enforcement. The advantage here of leaving the power with State government agencies is that the standards and methods of enforcement will be constant across each State.

Thus, despite the inherent difficulties involved with a centralized administrative procedure, the writer believes that the responsibility for maintaining adequate housing standards should be vested at the State level, and that the American-style Housing Codes, based on complete local government jurisdiction in this area, should not be introduced in Australia.

D. *Summary*

In Victoria, even without the assistance of amendments to the Housing Act 1958 (Vic.), improvements could be made to the effectiveness of the present system of Commission repair orders by the Commission making greater use of its power under section 56(5) to make repairs at the expense of the owner and by an increase in the number of housing inspectors to enable area inspection programmes to be undertaken.

[59] Mr A. M. Ramsay, General Manager; Mr M. L. O'Reilly, Officer-in-Charge, Housing Improvement Section; Mr J. Crichton, Secretary; and Mr W. James, Officer-in-Charge, Letting Section.

[60] *Second Report of the Committee of Enquiry to look into the adequacy of the Building Act* (1940); referred to in a South Australian Housing Trust document, *A Case for a Rehabilitation Policy*, 2, prepared by Mr M. L. O'Reilly, Officer-in-Charge, Housing Improvement Section (June 1971).

In all other States, however, new legislation is required before any improvements in the quality of the existing private rented housing stock can be expected. In addition to being given powers equivalent to those vested in the Housing Commission of Victoria by virtue of section 56 of the Housing Act 1958 (Vic.), each State Housing Commission or Housing Department should be given the power to acquire compulsory any substandard houses where the owners have failed to comply with a repairs order, the power to impose a system of licensing whereby premises once declared substandard or unfit for human habitation would need to be licensed before being relet, and the power to sue for cumulative civil penalties imposed for violations of State housing regulations.

Failure by the State legislatures to respond to the need for reform in this area of law will not only result in the continuance of the present imbalance between the rights and duties of landlords and tenants concerning repairs, but more importantly may give rise to far-reaching social consequences. In the words of the United States' Supreme Court:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[61]

[61] *Berman v. Parker* (1954), 348 U.S. 26, 32-3.