EXTENDING THE SCOPE OF THE RESIDENTIAL TENANCIES ACT 1980 TO INCLUDE RESIDENTIAL LICENSEES

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[*The Residential Tenancies Act 1980 was intended to codify residential tenancy law in Victoria, but it was not intended to extend to residential licensees and does not do so. In this article, Mr Smith discusses the scope of the Act and the position of residential licensees. A detailed analysis of the types of occupancy not regulated by the Act, present statutory and common law regulation and possible reforms is undertaken. He identifies the most appropriate means of providing for residential licensees and concludes that amending the Act is the best alternative. Finally, significant amendments to the Act are proposed and issues which arise under them are discussed.*]

1. INTRODUCTION

Victoria,[1] like a number of Australian States and Territories,[2] has recently passed legislation regulating residential accommodation. Since being proclaimed,[3] the Residential Tenancies Act 1980[4] has already been subject to detailed examination and criticism,[5] as well as amendment to some of its provisions.[6] Bradbrook has suggested that the Act may be divided into three sections for the purpose of analysis:[7] the scope of the legislation; the rights and duties of the parties during the term of the tenancy; and the laws relating to the determination of tenancies. It is the objective of the present article to examine the first section dealing with the scope of the legislation and particularly how it affects residential licensees.

The Act was intended to provide an entire code with respect to residential tenancies law[8] and, indeed, applies to the vast majority of residential

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[1] The Residential Tenancies Act 1980 (Vic.) was passed by both Houses of Parliament on 17 December 1980, and received Royal assent on 23 December 1980.

[2] Residential Tenancies Act 1978-1981 (S.A.); Residential Tenancies Act 1975 (Qld); Tenancy Act 1979 (N.T.).

[3] On 3 November 1981.

[4] 'The Act'.

[5] Bradbrook A. J., 'The Rights and Duties of Landlords and Tenants under the Victorian Residential Tenancies Act' (1981) 13 *M.U.L.R.* 159; Bradbrook A. J., Gardam J. G. and MacCallum S. V., *A Manual of the Victorian Residential Tenancies Act* (1982); Teh G., *Residential Tenancies Handbook* (1982).

[6] Residential Tenancies (Amendment) Act 1982. See discussion of these amendments in: Victoria, *Parliament Debates*, Legislative Assembly, 6 October 1982, 695; 7 October 1982, 811-5; 19 October 1982, 1142-66; Legislative Council, 20 October 1982, 443, 450-4, 483-97; *Age* (Melbourne), 25 September 1982, 13 October 1982.

[7] Bradbrook A. J., 'The Rights and Duties of Landlords and Tenants under the Victorian Residential Tenancies Act' ((1981) 13 *M.U.L.R.* 159, 161.

[8] Victoria, *Parliamentary Debates*, Legislative Assembly, 23 October 1980, 1633, second reading speech, Mr Maclellan: 'the legislation embodies a totally innovative code of residential tenancies law for Victoria'.

tenancies throughout Victoria. However, the Act does not generally apply to a similarly large group of individuals who might be described as residential licensees. This group includes boarders, lodgers, apartment-house dwellers, employees, caravan dwellers, houseboat dwellers, and campers who all share the common legal status of not being tenants under tenancy agreements, and thus not subject to the provisions of the Act. In the opinion of the present writer, because the Act purports to regulate all residential accommodation in Victoria, it should equally apply to both tenants and residential licensees, subject to certain qualifications. If the scope of the Act was permitted to continue as it presently operates, there would arise a need for a multiplicity of statutes containing provisions similar to those already in force in order to regulate each of the individual categories of residential licence presently excluded from its operation. Such a duplication would be unnecessary and wasteful both in terms of legislation and administration.

The Victorian Parliament is to be commended for attempting to regulate residential accommodation in such a comprehensive manner but should allow the protections and safeguards which it has enacted to extend to other forms of accommodation not presently covered by the Act. Although research into the problems associated with residential licensees is not concluded yet, it is nevertheless submitted that the provisions of the Act should be extended to such individuals immediately so as to ameliorate their insecurity of housing tenure and allow for the just resolution of disputes which develop. Should future research findings warrant an alteration of the protections and safeguards afforded to residential licensees, then the Act could be suitably amended.

2. TYPES OF OCCUPANCY UNREGULATED BY THE ACT

By enacting the Residential Tenancies Act 1980 the government of the day expressly intended it to apply only to residential tenancies and not to licence agreements. The government was well aware of the problems faced by residential licensees, such as mobile home dwellers and boarders and lodgers, but considered that it was unable to include them within the ambit of the legislation until further research had been undertaken. For example, the then Attorney-General commented in the Legislative Council: 'this Bill is confined to tenancies, and the Government is conducting a review of the law relating to boarders and lodgers'.[9]

This decision, to exclude residential licensees, was subject to vehement criticism by the then opposition party in Parliament,[10] and was contrary to the recommendations of the Community Committee on Tenancy Law

[9] Victoria, *Parliamentary Debates*, Legislative Council, 11 December 1980, 4931 *per* The Hon. Haddon Storey, Attorney-General.

[10] *Ibid.* 4930 *per* The Hon. D. R. White. For the present government's view see: Legislative Council, 20 October 1982, 450 *per* The Hon. W. A. Landeryou.

Reform which recommended that 'the new Residential Tenancies Act should apply broadly to all agreements, express or implied, in which any person for valuable consideration grants to another the right to occupy residential premises for the purpose of residence whether or not that right is exclusive or not'.[11] It appears that the government was reluctant to extend the application of the Act to residential licensees without first having researched and examined the individual problems faced by boarders, lodgers, and mobile home dwellers more closely. This decision followed similar arguments expressed by the South Australian government in passing their Residential Tenancies Act 1978-1981[12] which also excludes lodgers and boarders[13] and possibly mobile home dwellers.[14]

The Victorian Act achieves its exclusion of residential licensees by employing the terminology of leases ('landlord', 'tenant', 'rent', 'let') in the interpretative provisions. In particular, section 2 of the Act provides the following definitions:

> 'Rented premises' in relation to a tenancy agreement means the premises let under the tenancy agreement.
> 'Tenancy agreement' means an agreement, whether or not in writing and whether express or implied, under which a person lets premises as a residence.

Whether this terminology, of itself, is sufficient to exclude licensees will be considered shortly, but it was clearly the intention of the legislature that the Act should not apply to boarders, lodgers, mobile home dwellers, and other licensees.

In addition to licensees being excluded from the operation of the Act, a number of other residential occupiers are also expressly exempted from its operation. Section 6(4) provides:

> This Act does not apply to a tenancy agreement —
> (a) where the rented premises form part of a building in which other premises are let by the landlord to the tenant for the purpose of a trade, profession or business carried on by the tenant;
> (b) where the rented premises are included in or on other premises let to the tenant by the landlord that are for the time being used, or are ordinarily used, as a grazing area, farm, orchard, market garden, dairy farm, poultry farm, pig farm or bee farm;
> (c) created or arising between the parties to a contract of sale or mortgage of the premises in accordance with a term of the contract or mortgage;
> (d) created or arising under the terms of a contract of employment or entered into in relation to such a contract;
> (e) that is a fixed term tenancy agreement where the term certain exceeds five years and the agreement does not include a provision enabling the landlord or the tenant to determine the agreement by notice (otherwise than on the grounds of a breach of the agreement) before the expiration of five years after the agreement is made;

[11] Community Committee on Tenancy Law Reform, *Reforming Victoria's Tenancy Laws* (1978) 19 ('Community Committee Report').
[12] South Australia, *Parliamentary Debates*, Legislative Assembly, 2 November 1977, 629 *per* The Hon. Peter Duncan.
[13] Residential Tenancies Act 1978-1981 (S.A.), s. 7(2)(d).
[14] See *infra* n. 73, 13.

(f) that is a fixed term tenancy agreement where —
  (i) the rented premises were, immediately before the agreement was entered into, the landlord's principal place of residence;
  (ii) the term certain is less than 60 days; and
  (iii) the agreement states that the rented premises were, immediately before the agreement was entered into, the landlord's principal place of residence and that the landlord intends to resume occupancy of the premises upon termination of the tenancy agreement;
(g) where the rented premises are situated in a hotel, motel, hostel, educational institution, or like institution;
(h) where the rented premises are situated in a hospital, nursing home, convalescent home, rehabilitation home, home for the aged or disabled or like institution;
(i) where the rented premises are ordinarily used for holiday purposes;
(j) where the rented premises are prescribed premises or are included in a class of prescribed premises; or
(k) where the agreement is a prescribed agreement or is included in a class of prescribed agreements.

These exemptions largely follow the recommendations expressed in the Community Committee Report[15] although some are more inclusive than originally recommended.

(a) Lease — licence distinction

Central to the exclusion of boarders, lodgers, mobile home dwellers, and other licensees from the application of the Act, is the proposition that these occupiers do not possess the necessary legal requirements to enable them to be described as tenants holding leasehold interests in the premises which they occupy. Apart from owners, persons in occupation of premises may be either leaseholders or licensees, and the precise delimitation of this distinction is presently a matter of some complexity. As the author of *Brooking and Chernov's Tenancy Law and Practice in Victoria* states: 'in the last 20 years the opposing currents of authority on the subject of licences have created a turbidity which makes difficult the framing of a definition of a lease'.[16]

It is not intended to provide a detailed review of the literature on the distinction between leases and licences, as others have recently and completely dealt with the subject at length.[17] It is, however, necessary to note the manner in which boarders, lodgers, mobile home dwellers and others hold their licence and are thus excluded from the operation of the Act in Victoria.

[15] Community Committee Report, *loc. cit.*

[16] Chernov A., *Brooking and Chernov's Tenancy Law and Practice in Victoria* (2nd ed. 1980) 6.

[17] *Ibid.* 6-10, 38-9; see *Cheshire's Modern law of Real Property* (12th ed. 1976) 384-6, 577-83; Dawson I. J. and Pearce R. A., *Licences Relating to the Occupation or Use of Land* (1979) 3-13; Lamont D. H. L., *Residential Tenancies* (3rd ed. 1978) 9-10; Klippert G. B., 'The Residential Licensee' (1979) 14 *University of British Columbia Law Review* 249; Gray K. J., 'Lease or Licence to Evade the Rent Act?' (1979) 38 *Cambridge Law Journal* 38; Briggs A., 'Licences: Back to Basics' [1981] *The Conveyancer and Property Lawyer* 212; *Woodfall's Law of Landlord and Tenant* (28th ed. 1978) i, 7-14; *Halsbury's Laws of England* (4th ed. 1980) xxvii, 13-26; Annand R., 'The Lease-Licence Distribution Resurrected' (1982) 132 *New Law Journal* 757.

At the present time, the authorities in Australia favour the view that it is the occupant's exclusive possession of the premises which is the touchstone of a tenancy,[18] while in England, the courts prefer to determine whether a lease or a licence exists by examining the intention of the parties at the time they entered into their agreement.[19]

Windeyer J. in *Radaich v. Smith* considered that the fundamental right which a tenant has that distinguishes his position from that of a licensee, is that a tenant has an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes, and that this may be ascertained by seeing whether the grantee was given a legal right of exclusive possession of the land.[20] Evidence of such exclusive possession will depend upon the facts of the particular case, and it is therefore appropriate to discuss the application of this test under the individual categories of licence to be dealt with *infra.*

Once it is established that the occupant is a licensee only in respect of the subject premises, the implications are far reaching, for the licensee takes no interest in the land and possesses no security of tenure being subject to eviction upon notice. Remedies of the licensee were traditionally restricted to an action for damages for breach of contract which, in times of acute housing shortage, were clearly inadequate. Recently, some decisions have suggested that equitable remedies might be available to contractual licensees[21] although the position in Australia is far from certain.

In the opinion of the present writer, the maintenance of this artificial distinction between leases and licences in relation to residential premises should be ceased, with all residential premises being governed by similar statutory provisions appropriate to the type of accommodation provided. Whether specific premises are to be included under the Residential Tenancies Act 1980 should be determined by express legislative intent rather than by applying an unnecessary test which is neither clear nor rational.

(b) General statutory regulations

Before considering the specific types of residential licence presently unregulated by the Act, it should be noted that all residential premises in Victoria are subject to a number of general legislative provisions.

[18] *Landale v. Menzies* (1909) 9 C.L.R. 89, 111; *Radio Theatres Pty Ltd v. City of Coburg* [1948] V.L.R. 84, 86; *Radaich v. Smith* (1959) 101 C.L.R. 209, 214 *per* McTiernan J., 220 *per* Menzies J., 222 *per* Windeyer J.; *Chelsea Investments Pty Ltd v. Federal Commissioner of Taxation* (1966) 115 C.L.R. 1; *ICI Alkali (Aust.) Pty Ltd [in vol. liq.] v. Federal Commissioner of Taxation* [1977] V.R. 393; see also *Willoughby v. Willoughby* (1960) 23 D.L.R. (2d) 312.

[19] *Errington v. Errington and Woods* [1952] 1 K.B. 290; *Crane v. Morris* [1965] 3 All E.R. 77, 78; *Issac v. Hotel de Paris Ltd* [1960] 1 All E.R. 348; see also *Maple Leaf Services v. Townships of Essa and Petawawa* (1963) 37 D.L.R. (2d) 657.

[20] *Radaich v. Smith* (1959) 101 C.L.R. 209, 222; see also *Wright v. Stavert* [1860] 2 E. & E. 721, 121 E.R. 270.

[21] On this issue generally see Briggs *loc. cit.*; Dawson and Pearce *loc. cit.*; and Gray *loc. cit.*

Regulations have been made pursuant to the Housing Act 1958[22] which regulate the conditions and structure of all houses throughout Victoria. 'House' is defined in regulation 3 as:

> any building (including any tent edifice structure or erection whether temporary or permanent) or any part thereof which or any part of which is used, has been used, or is intended to be used as a dwelling and includes out-buildings, fences, walls provision for lighting heating water supply drainage and sewerage and other appurtances of a house.

It should be noted that by reason of this definition, the regulations would apply to most of the types of accommodation presently occupied by residential licensees including boarding-houses,[23] apartment houses,[24] camps, caravans,[25] and employee residences, although houseboats would probably be excluded.[26]

These regulations provide specific requirements as to drainage, light and ventilation, cleanliness, repair, construction, situation, damp, water supply, bathing and laundry facilities, cooking and food storage, and vermin infestation.

In addition, in Victoria, houses are further subject to the Uniform Building Regulations 1961[27] made pursuant to the Local Government Act 1958. Regulation 102(a) defines 'house' as 'any building used or intended, adapted or designed for use as a separate dwelling but does not include a flat'. 'Flat' is defined in the same regulation as 'that portion of a building used or intended adapted or designed for use as a separate dwelling'.

The regulations provide a complete code for building construction which would apply to all buildings, other than tents, caravans, and houseboats.

By way of comparison, reference should be made to the Housing Improvement Act 1940-1978 of South Australia, which provides for improvement of sub-standard housing conditions, clearance of areas, and housing for persons of limited means. A scheme of controls of rentals of sub-standard houses is also provided. 'House' is defined in the Act[28]

(c) Boarders and lodgers

The position of boarders and lodgers in Victoria is quite well documented at present[29] and their problems and difficulties were specifically referred to

[22] Housing (Standard of Habitation) Regulations 1971 (Vic.).

[23] See the similar definition of 'boarding-house' and 'common lodging-house' in the Boarding and Lodging-house Regulations 1963 (Vic.), r. 3.

[24] Apartment House Regulations 1955 (Vic.), r. 8 as amended by Apartment House (Amendment) Regulations 1964 (Vic.), r. 3 which makes apartment houses expressly subject to the Housing (Standard of Habitation) Regulations 1939 as amended.

[25] See the definition of 'camper' in the *Camping Regulations* 1965 (Vic.), r. 3 which includes persons camping in 'tents, caravans or similar temporary accommodation'.

[26] In *West Mersea Urban District Council v. Fraser* [1950] 2 K.B. 119 the Court of King's Bench considered a similar enactment and decided that a houseboat was to be afforded a permanent supply of water.

[27] Victoria, *Government Gazette*, 26 April 1961 (No. 32).

[28] S. 4.

[29] Community Committee Report, *op. cit.* 63; Sackville R., *Law and Poverty in Australia* (1975) 59.

similarly to the Victorian Housing (Standard of Habitation) Regulations 1971.

during the parliamentary debates which preceded the passing of the Act.[30] Recently, the plight of a group of lodgers in an inner city suburb of Melbourne has achieved some notoriety in the daily press,[31] although this particular instance has been amicably resolved without litigation.

During the parliamentary debates concerning the Victorian Act, great play was made by the then opposition members of the plight of boarders and lodgers, certainly because of their necessitous circumstances, but more likely because the government had elected to exclude them from the protections provided by the new Act. The government was unable to deny the existence of difficulties faced by boarders and lodgers but maintained its ground that the Act would be confined to tenancies and that the government was undertaking a review of the law relating to boarders and lodgers.[32] To the present date a government report on this subject has not been forthcoming and it appears that review of the law relating to boarders and lodgers could be subject to considerable delay.

(i) Present regulation — statute

In Victoria, in addition to the regulation provided by the Housing (Standard of Habitation) Regulations 1971, and the Uniform Building Regulations 1961, boarding-houses and common lodging-houses are governed by the Boarding and Lodging House Regulations 1963,[33] regulation 3 of which provides the following definitions:

> 'Boarding-house' means any house tent or edifice building or other structure, permanent or otherwise, and any part of such premises (not being the licensed premises of a licensed victualler) in which more than five persons exclusive of the family of the proprietor thereof are lodged or boarded for hire or reward from week to week or for more than a week, but does not include a flat as defined herein.
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> 'Common lodging-house' means any house tent or edifice building or other structure, permanent or otherwise (not being the licensed premises of a licensed victualler), in which persons are harboured or lodged for hire for a single night or for less than a week at one time, or any part of which is let for any term less than a week at one time.
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> 'Flat' means a suite of rooms, being a portion or portions of a building and forming

[30] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3439 *per* Mr Miller; 3416 *per* Mr Ross-Edwards; 3423 *per* Mr Walsh; Legislative Council, 11 December 1980, 4931 *per* The Hon. D. R. White and The Hon. Haddon Storey; 5 December 1980, 4405-6 *per* The Hon. D. R. White. See also South Australia, *Parliamentary Debates*, Legislative Council, 24 February 1981, 3089-90 *per* The Hon. J. C. Burdett; Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 1975, 2242 *per* The Hon. W. E. Knox.

[31] *Age* (Melbourne), 21 May 1982; 27 May 1982.

[32] Victoria, *Parliamentary Debates*, Legislative Council, 11 December 1980, 4931 *per* The Hon. Haddon Storey. A similar view was expressed in South Australia, *Parliamentary Debates*, Legislative Assembly, 2 November 1977, 629 *per* The Hon. Peter Duncan; Legislative Council, 22 February 1978, 1707 *per* The Hon D. H. L. Banfield; 1 March 1978, 1861 *per* The Hon. J. C. Burdett.

[33] Victoria, made pursuant to the powers in ss 210-2, Health Act 1958.

> a complete residence, including bathroom and sanitary conveniences, under the exclusive control of the occupier.

As with the Housing (Standard of Habitation) Regulations 1971, these regulations provide a complete system of requirements for boarding-houses and common lodging-houses with respect to physical space, natural lighting, artificial lighting, ventilation, drainage, water supply, sanitation, maintenance, and fire precautions. In addition, a scheme of registration is established for the purpose of inspection and enforcement of the regulations.

It appears that the reason such accommodation was excluded from the scope of the Act was because of its allegedly transitory, short-term nature, rather than because of the type of premises involved. However, when it is recalled that under the Act periodic tenancies may be of any recurring period, be it weekly or otherwise, it may be concluded that boarding and lodging-house accommodation is not significantly different from some tenancies presently regulated by the Act. It is for this reason that the present writer believes that the provisions of the Act should be extended to such accommodation. It should be possible to maintain the registration and inspection provisions of the regulations as well as the other rules governing the physical standards of the premises while at the same time supplementing these with the protections provided by the Act.

By way of comparison, it is interesting to note that in both South Australia[34] and the Northern Territory[35] their recent tenancies legislation excludes boarders and lodgers, while in Canada, however, some provinces include boarders and lodgers within the scope of their residential tenancies acts.[36]

(ii) Present regulation — common law

Apart from the above statutory definitions which determine whether an occupier of premises is a boarder or lodger, the common law has addressed this definitional problem on a number of occasions. The issue generally arises in ascertaining whether or not the particular resident is a tenant for the purposes of some statute. Applying the exclusive possession test referred to above, it is generally the case that a boarder or lodger will not be a tenant but will be rather a mere licensee because of the absence of exclusive possession of that part of the premises in which he resides.[37]

The determinants of whether a tenancy is created were originally cited in

[34] Residential Tenancies Act 1978-1981 (S.A.), s. 7(2)(d).
[35] Tenancy Act 1979 (N.T.), s. 4(1) 'premises' para. (f).
[36] Landlord and Tenant Act 1964 (R.S.A.) c. 200, s. 16(1)(a); Residential Tenancy Act 1979 (R.S.B.C.) c. 365, s. 1; Landlord and Tenant Act 1970 (R.S.M.) c. L-70, s. 123; Landlord and Tenant (Residential Tenancies) Act 1973 (Stats Newfoundland) c. 54, s. 2(f); Residential Tenancies Act 1970 (Stats Nova Scotia) c. 13, s. 2(d); Residential Tenancies Act 1979 (R.S.O.) c. 78, s. 1(m); Landlord and Tenant Act 1974 (R.S.P.E.I.) c. L-7, s. 90(1)(d); Residential Tenancies Act 1979 (R.S.S.) c. R-22, s. 2(j). See also Lamont, *op. cit.* 9.
[37] Chernov, *op. cit.* 40.

Toms v. Luckett[38] and include whether the landlord retains the control of the outer door, and resides in part of the whole premises, but more particularly, whether the landlord reserves to himself the general control and dominion over the whole premises.

If the owner lives in the same house, there is a presumption that another occupier is a licensee rather than a tenant[39] which presumption may, however, be rebutted if conclusive evidence to the contrary is adduced.[40]

Generally, all that is required to create the relationship of licensor and lodger is some form of contract or agreement[41] by which the former agrees to accept the latter in that capacity.[42] As Gray comments, 'it is trite law that the difference does not rest upon the labels applied by the parties themselves',[43] but rather upon the substance and not the form of the transaction. For example, in *McCombe v. Smith*[44] the court gave effect to the express agreement of the parties that the relationship of landlord and tenant was not to be created. However, in *Danita Investments Pty Ltd v. Rockstrom*[45] a deed described as a licence was held to give rise to a tenancy on the basis of the parties' contrary intent.

In short, as the Community Committee on Tenancy Law Reform commented, 'the legal guidelines for making this critical distinction are so confused and contradictory that it is often almost impossible to say with certainty whether a person is one or the other'.[46]

(iii) Reform

The need for prompt reform of the law relating to boarders and lodgers is without challenge, but the precise manner in which these changes are to be implemented has been the subject of considerable debate. On the one hand, it has been argued that it is both unfair and irrational to make such a drastic distinction between two classes of residential occupiers who are so similar in their needs and requirements.[47]

On the other hand, it has been argued that the problem cannot be resolved simply by including boarders and lodgers within the scope of the

[38] [1847] 5 C.B. 23, 37, 136 E.R. 781, 787 *per* Wilde C.J.

[39] *Burnett v. Guice* [1946] V.L.R. 257; *Purbrick v. Rybar* [1951] V.L.R. 275; *Varella v. Marsicovetere* [1954] V.L.R. 550.

[40] *Torrisi v. Oliver* [1951] V.L.R. 380; *Downie v. Taylor* [1954] V.L.R. 603; *Helman v. Horsham & Worthing Assessment Committee* [1948] 2 All E.R. 588. See generally Chernov, *op. cit.* 41-2.

[41] See the form of agreement by lodger for occupation of room or apartment in *The Australian Encyclopaedia of Forms and Precedents* (2nd ed. 1980) viii, 500.

[42] *Porter v. Busch* [1974] 1 N.S.W.L.R. 593.

[43] Gray, *op. cit.* 41; *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 Q.B. 513, 518.

[44] (1950) 52 W.A.L.R. 12.

[45] [1963] N.S.W.R. 1275.

[46] Community Committee Report, *op. cit.* 63. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3439 *per* Mr Miller, 3416 *per* Mr Ross-Edwards; Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 1975, 2242 *per* The Hon. W. E. Knox.

[47] Community Committee Report, *op. cit.* 63.

Act because many of the Act's provisions would be unsuitable to accommodation in boarding and common lodging-houses.[48] Supporters of this latter view readily acknowledge that the regulation of boarders and lodgers is difficult but suggest that until a detailed analysis of the position has been concluded, the Act should not apply to these occupants.

Sackville, in the Report of the Commission of Inquiry into Poverty, noted that in bringing lodgers within the protection of tenancy law, 'parliamentary draftsmen will need to consider how far and in what way the legal status of these people should be the equivalent of tenants'.[49]

In the opinion of the present writer, the reforms implemented by the Act could wholly be made applicable to the occupants of boarding and common lodging-houses with only minor amendments to the provisions of the Act being required.[50] To enact separate legislation relating to boarders and lodgers would be time consuming, repetitive, and unnecessary and would lead to the continuation of the lease — licence distinction which is seen as an unnecessary complication of the law in this area. Should special provisions be required for boarders and lodgers, these could be provided as additional terms in the agreement entered into between the parties.

(d) Apartment-house dwellers

In Victoria, a distinction has been drawn legislatively between boarding-houses and common lodging-houses on the one hand, and apartment-houses on the other. Each is subject to separate regulations, the latter being governed by the Apartment House Regulations 1955,[51] regulation 2 of which provides the following definitions:

> 'Apartment' means any part of a building or any room or rooms in a building which part or room or rooms is or are used or intended to be used for the purpose of residence by any occupier or occupiers other than members of the family or employees of the proprietor having a right to the exclusive use thereof together with a right to use in common with others any kitchen, bathroom, laundry, or sanitary facilities in the building but does not include
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> (a) any part of a room or rooms in a boarding-house or a common lodging-house;
> (b) any part of a room or rooms in a licensed victualler's premises;
> (c) any suite of rooms being a portion or portions of a building and forming a complete residence including kitchen and bathroom and sanitary conveniences, under the exclusive control of the occupier.
>
> 'Apartment-house' means any house, tent or edifice building or other structure permanent or otherwise and any part of such premises which is used in whole or in part by more than three persons as apartments.

These definitions again invoke the distinction between leases and licences with apartment-house dwellers not being entitled to the exclusive possession

[48] Victoria, *Parliamentary Debates*, Legislative Council, 11 December 1980, 4931 *per* The Hon. Haddon Storey; South Australia, *Parliamentary Debates*, Legislative Council, 24 February 1981, 3089 *per* The Hon. J. C. Burdett.

[49] Sackville, *op. cit.* 59 and n. 9.

[50] See amendments, *infra* Part 4.

[51] Victoria, *Government Gazette*, 29 June 1955 (No. 409), 3289 as amended; made pursuant to Health Act 1958 s. 220.

of the whole premises, even though they might have the exclusive possession and use of a room therein, and thus, being mere licensees of the premises. The other common law considerations discussed *supra* with respect to boarders and lodgers similarly apply *mutatis mutandis* to apartment-house dwellers, and it is concluded that these occupiers too should be afforded the protections provided by the Act. The principal difficulty in this regard, relates to the facilities used in common with other occupiers, which aspect will be dealt with more fully hereunder. Generally, it ought to be possible for the scheme of regulations and registration adopted by the Apartment House Regulations 1955 to continue in conjunction with the substantive protections provided by the Act.

(e) Mobile homes

In both Australia and overseas, there has recently developed an awareness of the role which mobile homes might play in fulfilling housing needs in the modern community, and as a result, attention has been focused upon the outmoded legal regulation of this form of occupancy.[52] Evidence as to the extent of mobile home living tends to be unreliable[53] and, in Australia, as Boer comments, 'complitation of accurate Australian statistics on permanent living in caravan parks is difficult because it is illegal[54] in most jurisdictions to stay in a park beyond a stipulated time, usually ten weeks'.[55]

It should not be implied that mobile home accommodation is a recent phenomenon in Australia. Indeed, in 1853, some 6339 iron house kits were brought to Victoria[56] in addition to caravans and wagons. However, the appointments and conveniences of modern mobile homes, whether caravans or demountable buildings, are such as to enable families to live in them permanently with some measure of comfort.[57]

[52] Henderson R. F., *Poverty in Australia* (1975) i, 163-4; Peat Marwick Mitchell & Co., *Holiday Accommodation in Australia* (1977) 62-4; Community Committee Report, *op. cit.* 65; Centre for Urban Research and Action, *Long Term Caravan Residents in Melbourne: A Case study of Housing Marginality* (1978); Angus B. M., *Interim Report on Tenancy as it Relates to Mobile Housing* (1979); Boer B. W., 'From Caravans to Mobile Homes' (1978) 4 *Monash University Law Review* 267 and the references cited therein.

[53] Boer, *op. cit.* 268 and n. 8 cited evidence of at least two per cent of the Australian population living permanently in caravans or mobile homes; Henderson, *op. cit.* 163 cites evidence of ten per cent of Gladstone's population residing in caravans in 1972; Peat Marwick Mitchell & Co., *op. cit.* 64 refer to the 1971 population census statistics which identified 41120 households living permanently in caravans with some 270000 caravans being registered for road use in December 1975; Community Committee Report, *op. cit.* 65 n. 191 reported that from 1971 to 1976 the number of registered caravans in Australia increased from 161000 to 311000.

[54] The present Victorian government has recently decided to relax the ten weeks rule with respect to permanent residents of caravan parks such that they will be permitted to remain in occupation subject to four-monthly review where financial hardship can be shown: Victoria, *Parliamentary Debates*, Legislative Council, 26 May 1982, 246; 22 June 1982, 1515-6 *per* The Hon. R. A. Mackenzie; *Herald* (Melbourne), 21 June 1982, 6.

[55] Boer, *op. cit.* 268.

[56] Day N., 'A permanent piece of portable history' *Age* (Melbourne), 20 April 1982.

[57] O'Callaghan M. L., 'Life's a circus in the vans' *Age* (Melbourne), 30 March 1982.

Nevertheless, mobile home residents do face certain problems and difficulties not encountered by their more stable residential brethren in fixed residences. Boer has provided a worthwhile review of the legal hardships faced by mobile home dwellers[58] and since his paper appeared the Community Committee on Tenancy Law Reform has reiterated the problems encountered.[59] Politicians, both in Australia[60] and England[61] have descibed the conditions experienced by mobile home dwellers in some detail, and in the words of Mr Arthur Palmer speaking in the House of Commons on the Mobile Homes Bill 1975, caravan dwellers in Britain face 'rising site rents, charges for entry to sites, onerous site conditions and harsh treatment often imposed by site owners on those who need to leave sites and need to sell their caravans or mobile homes'.[62]

The legal inadequacy surrounding the regulation of mobile homes in Australia largely arises because caravan dwellers tend to be a disparate population with changing needs and requirements. Previously, caravan dwellers were largely itinerant people or holiday makers, whereas now a considerable proportion are permanent residential occupiers. Legal regulation has failed to account for this shift in usage, and accordingly, it is now in need of review.

(i) Present regulation — statute

In Victoria, in addition to the Housing (Standard of Habitation) Regulations 1971, and the Uniform Building Regulations 1961, mobile homes are regulated pursuant to the Health Act 1958,[63] by the Camping Regulations 1965.[64] Regulation 3 defines 'camper' as including:

> each and every person camping in tents, caravans or similar temporary accommodation on any land with or without the permission of the proprietor and with or without payment of any fee or the giving of any consideration to the proprietor.

These regulations provide for registration of camping areas, and inspections, physical structure of sites and layout, sanitary and bathing facilities, fire precautions, and water supply regulation. Maximum penalties range from $500 to $2000.[65]

Until recently,[66] occupants were not permitted to reside in caravans for

[58] Boer, *op. cit.* 269-81; Hodinson K., ' "Dunroamin"? The Insecurity of the Mobile Home Owner' [1982] *Conveyancer and Property Lawyer* 364.

[59] Community Committee Report, *op. cit.* 65.

[60] Victoria, *Parliamentary Rebates*, Legislative Assembly, 25 November 1980, 3439 *per* Mr Cathie, 3441 *per* Mr Ross-Edwards; 16 September 1982, 378-9 *per* Mrs Toner; Legislative Council, 16 October 1979, 3256 *per* The Hon. D. N. Satlmarsh, 3258 *per* The Hon. A. J. Hunt; Queensland, *Parliamentary Debates*, 25 November 1975, 2242 *per* The Hon. W. E. Knox.

[61] England, *Parliamentary Debates*, House of Commons, 28 February 1975, 887 *per* Mr Tom King; House of Lords, 22 May 1975, 1507-10 *per* Lord Elton.

[62] England, *Parliamentary Debates*, House of Commons, 28 February 1975, 896 *per* Mr Arthur Palmer.

[63] Vic. s. 221.

[64] Vic.

[65] Health Act (Level of Penalties) Regulations 1972, Scehdule Item 5.

[66] *Supra* n. 54.

more than ten weeks, although this rule was seldom enforced.[67] The Minister of Lands, in reply to a question in the Legislative Council recently, noted that the rather Draconian restrictions imposed upon committees of management of caravan parks by the former government[68] have led to a stream of protests from caravan parks all around Victoria. It has been decided to relax the restrictions and in cases of hardship, privately-owned caravans will be allowed to remain on site subject to four-monthly review. The Minister concluded that if hardship could be shown or if the people involved were unemployed or on a pension, they would be allowed to remain on sites permanently.[69]

Because some caravan occupants are now legally entitled to remain permanently in caravan parks, it will be necessary to reconsider the application and content of the Camping Regulations 1965. Review of these regulations has already been commenced, although the government report has yet to be tabled and the amended regulations passed.[70]

Most Australian jurisdictions possess similar regulations to those in Victoria relating to caravan parks, usually providing a system of registration and licensing, together with health and structural regulations.[71] In Queensland, the Residential Tenancies Act 1975 probably excludes caravans from its operation,[72] while in South Australia, the definitions of 'residential tenancy agreement' and 'residential premises' in section 5 of the Residential Tenancies Act 1978-1981 may well include mobile homes,[73] and it is likely that the Housing Improvement Act 1940-1978 would also apply to mobile homes.[74] In the Northern Territory, the recent Tenancy Act 1979 expressly

[67] Boer, *op. cit.* 277.

[68] The views of the former government in relation to permanent residents in caravan parks were expressed by The Hon. A. J. Hunt in reply to a question by The Hon. D. N. Saltmarsh in Victoria, *Parliamentary Debates*, Legislative Council, 16 October 1979, 3256-8, see n. 54.

[69] *Supra* n. 54.

[70] Draft caravan and camping regulations were prepared in 1976 by officers of the Health Commission in conjunction with the Standing Advisory Committee on Caravans and Camping established by the Minister for Tourism; Victoria, *Parliamentary Debates*, Legislative Assembly, 5 October 1976, 2834 *per* Mr Dunstan; 9 December 1981, 4488 *per* Mr Borthwick; 16 September 1982, 378-9 *per* Mrs Toner. These draft regulations are reviewed by Boer, *op. cit.* 277 ff.

[71] New South Wales: Local Government Act 1919, s. 288A; Western Australia: Health Act 1911-1968, Caravans and Camps Regulations 1970, Town Planning and Development Act 1928; Tasmania: Public Health Act 1935, Camping Ground By-Laws, Local Government Act 1962, s. 215; Queensland: Local Government Act 1936-80; see also, Boer, *op. cit.* 277-81.

[72] S. 6 'dwelling house'. See Queensland, Parliamentary Debates, Legislative Assembly, 25 November 1975, 2242 *per* The Hon. W. E. Knox: the Residential Tenancies Act 1975 (Qld) does not extend to caravan dwellers being mere licensees.

[73] 'Residential premises' means premises that constitute or are intended to constitute a place of residence.

'Residential Tenancy Agreement: means any agreement, whether express or implied, under which any person for valuable consideration grants to any other person a right to occupy, whether exclusively or otherwise, any residential premises for the purpose of a residence.

[74] See the definition of 'house' in s. 4.

applies to caravans and demountable buildings as well as any other land leased with a caravan or demountable building,[75] unless used in the tourist industry or leased principally for business purposes.

In England, separate legislation has recently been enacted to deal with the question of mobile homes on an interim basis[76] although a complete statutory code is yet to be produced. As Lord Melchett commented during the debates on the Mobile Homes Bill 1975, 'the fact is that we simply do not know enough about mobile home living, its problems and the extent of those problems, its economics, or its present and potential usefulness as a contribution to housing problems generally, to attempt the production of a comprehensive system of statutory regulation'.[77] In particular, the Mobile Homes Act 1975 provides for the respective rights of home owners and site owners to be expressed in a written agreement and gives home owners a limited security of tenure and, within limits, regulates the right of re-sale.

The Canadian legislation dealing with mobile homes contains a number of different systems of regulation, providing generally for mobile homes to be included within the scope of the general tenancy statutes. The Provinces of Alberta,[78] Prince Edward Island,[79] and Manitoba[80] all include mobile homes within the scope of their normal landlord and tenant statutes, by specifically including mobile homes and mobile home sites within the definition of residential premises. In the Provinces of British Columbia,[81] Newfoundland,[82] Nova Scotia,[83] Ontario,[84] and Saskatchewan,[85] mobile homes are included in separate residential tenancies legislation. In addition, the Provinces of British Columbia,[86] New Brunswick,[87] Prince Edward Island,[88] and Manitoba[89] all possess separate legislation regulating the purchase and sale of mobile homes.

It should be noted that many of these Canadian Provinces have only recently decided to include mobile homes within their residential tenancies legislation, and that this was achieved generally by altering the interpretative sections of existing statutes so as to include mobile homes, and the sites upon which they are stationed within the definitions of residential premises.

[75] S. 4(1) 'dwelling house', 'demountable building', 'premises'.
[76] Mobile Homes Act 1975 (Eng.); The Caravan Sites and Control of Development Act 1960 (Eng.); The Caravan Sites Act 1968 (Eng.).
[77] England, *Parliamentary Debates*, House of Lords, 22 May 1975, 1514.
[78] Landlord and Tenant Act 1964 (R.S.A.) c. 200, s. 16(1)(a)(ii).
[79] Landlord and Tenant Act 1974 (R.S.P.E.I.) c. L-7, s. 90(1)(d)(ii).
[80] Landlord and Tenant Act 1970 (R.S.M.) c. L-70, s. 81.
[81] Residential Tenancy Act 1979 (R.S.B.C.) c. 365, s. 1.
[82] Landlord and Tenant (Residential Tenancies) Act 1973 (Stats Newfoundland) c. 54, s. 2(1)(f).
[83] Residential Tenancies Act 1970 (Stats Nova Scotia) c. 13, s. 2(d).
[84] Residential Tenancies Act 1979 (R.S.O.) c. 78, s. 1(1)(m) 'rental unit'.
[85] Residential Tenancies Act 1979 (R.S.S.) c. R-22, s. 2(j)(iii).
[86] Mobile Homes Act 1979 (R.S.B.C.) c. 281.
[87] Mobile Homes Act 1974 (R.S.N.B.) c. M-15.1.
[88] Mobile Homes Act 1974 (R.S.P.E.I.) c. M-13.
[89] Buildings and Mobile Homes Act 1974 (R.S.M.) c. 54.

(ii) Present regulation — common law

Apart from the above statutory provisions, the occupiers of mobile homes will usually be mere licensees in respect of the sites upon which their homes are stationed. Boer, in discussing the application of the various common law tests which distinguish leases from licences, concluded that these residents appear to be either licensees, tenants at will or, at best, periodic tenants.[90] It is generally agreed that the caravan dweller finds himself or herself in an anomolous situation being the owner of the caravan but mere licensee or tenant in respect of the site.[91] Lord Denning M.R., in deciding the first case under the Mobile Homes Act 1975, considered that prior to the introduction of the Act the occupiers of mobile homes had no security of tenure. 'They were only licensees of the "pitch" on which their homes were standing. They were not protected by the Rent Restrictions Acts, or anything of the kind. They were liable to be ordered to quit at short notice.'[92]

There is some suggestion in the case of mobile homes which are standing on sites and are unable to be easily moved, that the occupier will have exclusive possession of the unit and possibly also the land upon which it is located. For example, in *Taylor v. Calvert*, Lord Denning M.R. described the mobile homes as follows:

> They are more like bungalows than caravans. They have no wheels. Being made of wood, they can be moved with considerable labour and expense. But, beyond doubt, they are very permanent and there is no intention to move them.[93]

Despite this permanence, it was held that the premises were subject to the Act, and the site owners accordingly were under a duty to offer the required standard agreement.

It may be that the parties could enter into an agreement[94] with the intention of creating a lease, thus bringing the occupation within the scope of the Act, but, in Victoria, at present, it appears that the Residential Tenancies Act 1980 was not intended[95] and indeed does not ordinarily apply to the occupiers of mobile homes[96] unless let as part of premises under a tenancy agreement.[97]

[90] Boer, *op. cit.* 273.

[91] England, *Parliamentary Debates*, House of Commons, 28 February 1975, 889-95.

[92] *Taylor v. Calvert* [1978] 2 All E.R. 630, 631. See also *Grant v. Allen* [1980] 1 All E.R. 720; *Lamb v. Adams* (1981) 42 P. & C.R. 145; *Roy Crimble Ltd v. Edgecombe* 10 July 1981, unreported, Court of Appeal; *Halsbury's Laws of England* (4th ed. 1980) Monthly Review, October 1981, W1713.

[93] [1978] 2 All E.R. 630, 631.

[94] A standard form agreement for the lease of a caravan is provided in the *Australian Encyclopaedia of Forms and Precedents* (2nd ed. 1980) viii, Form 61.

[95] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3440 *per* Mr Maclellan.

[96] In 1976 the then Minister for Public Works, Mr Dunstan, in replying to a question whether caravan parks must comply with the Landlord and Tenant Act 1958, said: 'the hiring of a caravan or caravan site would not normally fall within the ambit of the Landlord and Tenant Act 1958'. Victoria, *Parliamentary Debates*, Legislative Assembly, 5 October 1976, 2834.

[97] A qualification suggested by Mr Maclellan in the second reading debates on the Bill. Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 1979, 6487.

(iii) Reform

Boer, writing before the introduction of the Act in Victoria, called for legislation to protect the interests of mobile home residents, and although considering a comprehensive scheme probably too much to ask for at that stage, he felt that amendments could be made to existing statutes.[98] Following the commencement of the recent Victorian tenancies legislation, it is now timely to consider extending such legislation to include mobile home residents. Clearly, a mere extension of the scope of the Act to include mobile homes would not amount to a satisfactory code for, as Boer comments,

> the social, economic and emotional factors involved in 'mobile living' need to be taken into account in any legislation that might be enacted to cope with this phenomenon. Environmental, town planning, building, trade practices, anti-discrimination, local government, taxation, social security, health and landlord and tenant law would need to be reconsidered.[99]

Nevertheless, in the opinion of the present writer, it would be both acceptable and worthwhile to commence reform in this area by extending the scope of the Residential Tenancies Act 1980 without providing an entire code at the present time. By so doing, at least some of the hardships facing mobile home residents could be immediately ameliorated pending the complete statutory regulation of the subject. The particular problems of security of tenure and rights on termination would be effectively overcome if the legislation was extended to these occupiers. Other problems such as resale, site regulation, licensing and planning matters could be considered subsequently. The immediate extension of the Act to mobile home occupiers would, it is submitted, allow the resolution of the majority of the problems raised in this area by the report of the Community Committee on Tenancy Law Reform.[1]

(f) Houseboat dwellers

As with caravan dwellers, the occupants of houseboats should be afforded the protections granted in the Act. In Australia there has been little consideration of the problems faced by permanent residential occupiers of houseboats, and the exact extent of this form of accommodation is uncertain. It is, however, known that boats are presently moored alongside wharfs and jetties in most large cities with harbour facilities, and that in inland waters, such as the Murray-Darling river system, permanent residential accommodation on houseboats is popular.

In England, the problem of security of tenure for houseboat residents has become acute, and in the second-reading debates on the Mobile Homes

[98] Boer, *op. cit.* 291.
[99] *Ibid.* 269.
[1] Community Committee Report, *op. cit.* 65-6.

Bill 1975, in the House of Commons, the plight of these residents was highlighted as follows:

> One group of people who do not come within the ambit of the Bill are the 15000 of our fellow citizens who live on residential boats. It was decided in the preliminary discussions before the Bill was brought forward that to include this group would add further complications to an already complicated piece of legislation. The residential houseboat is another form of mobile home which is in many cases more genuinely mobile than the mobile homes we are considering.
>
> Houseboats have the problem in law of being regarded as chattels and security of tenure is particularly lacking in their case. Many local authorities are actively discouraging the granting of further moorings and are even trying to abolish many existing ones. Nearly 100 houseboats have been evicted from the Thames-side moorings in the past few years. A houseboat loses almost all its value if it has no mooring to which it can be attached.[2]

Following this discussion, the government in England, although acknowledging the problem of residential houseboat-dwellers, decided not to include them within the scope of the Mobile Homes Act 1975,[3] but rather to regulate them legislatively by a separate statute.

Despite this legislative intent, doubts have arisen as to whether houseboats are covered by the legislation. 'Mobile home' is defined in the same manner as a 'caravan' which is defined as:

> any structure designed or adapted for human habitation which is capable of being moved from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted, but does not include —
>
> (a) any railway rolling stock which is for the time being on rails forming part of a railway system, or
>
> (b) any tent.[4]

The Court of Appeal has recently interpreted this definition to mean that a houseboat could be a caravan for the purposes of the Act. On the facts of the instant case, however, it was held that because the houseboat in question was not stationed 'on' land, the occupier was not entitled to an agreement under the Act.[5]

(i) Present regulation — statute

In Victoria, permanent occupancy of residential houseboats is governed by a number of statutes and regulations, the precise application of which depends upon the type of watercourse in which the houseboat is stationed.

In Melbourne's ports and docks, the mooring of boats, whether for residential purposes or not, is subject to the discretion and licence of the harbour master.[6] Regional ports and waterways are similarly controlled by

[2] England, *Parliamentary Debates*, House of Commons, 28 February 1975, 978 *per* Mr Geoffrey Pattie.

[3] *Ibid.* 983 *per* Mr Tom King. Mobile Homes Act 1975 (Eng.) s. 9(1) 'mobile home'; Caravan Sites Act 1968 (Eng.) s. 16 'caravan'; Caravan Sites and Control of Development Act 1960 (Eng.) s. 29(1) 'caravan'.

[4] Caravan Sites and Control of Development Act 1960 (Eng.) s. 29(1).

[5] *Roy Crimble Ltd v. Edgecombe, supra* n. 92.

[6] Melbourne Harbour Trust Act 1958; Harbour Boards Act 1958; Port Phillip Authority Act 1966, and the regulations made thereunder respectively.

administrative officers with powers to grant mooring licences.[7]

In addition, the Melbourne and Metropolitan Board of Works Act 1958 grants the Board power to make by-laws for or with respect to the management and control of rivers, creeks, watercourses, and the banks thereof generally,[8] and in particular, the berthing and mooring of boats.[9] The definition of 'boats' expressly includes 'houseboats',[10] which latter term is undefined. Regulations made under this Act provide for the river officer to have control over the mooring and berthing of boats and it is provided that boats may only be moored with the consent in writing of the river officer.[11]

For the occupiers of residential houseboats, security of tenure is extremely limited, for the regulations provide that the owner of any boat shall be required to remove his boat from its mooring within 24 hours of being so directed by the river officer.[12]

(ii) Present regulation — common law

Whether the Residential Tenancies Act 1980 applies to houseboats depends upon the nature of the interest taken by the occupant. The determination of whether the occupier of a houseboat is a tenant or a licensee is even more uncertain and difficult than in the case of caravan dwellers, for the houseboat may be owned or exclusively occupied by its occupant allowing the occupant to lease the houseboat (chattel) from its owner,[13] while the land to which it is moored may not be exclusively occupied by the houseboat dweller thus entitling the occupant to a mere licence of the mooring site.[14] It is the nature of this latter right, to occupy the realty, which is critical, for without a mooring site, the occupier is effectively deprived of a permanent residence.

While it is generally the case that a houseboat occupier will be a mere licensee of the mooring site and therefore subject to eviction upon notice, it is possible that a more permanent arrangement could be created giving rise to a tenancy. In *West Mersea Urban District Council v. Fraser*[15] the Court of King's Bench held that where a houseboat was permanently moored in mud flats alongside a river, the occupant was entitled to receive

[7] *E.g.* River Murray Waters Act 1958; Geelong Harbour Trust Act 1958; Portland Harbour Trust Act 1958, and the regulations made thereunder respectively.
[8] S. 278(1)(g).
[9] S. 279(1)(a).
[10] S. 279(2).
[11] Melbourne and Metropolitan Board of Works River By-law 1965, r. 17.
[12] *Ibid.* r. 19(a).
[13] See the standard form lease in *The Australian Encyclopaedia of Forms and Precedents, op. cit.* viii, 316.
[14] *E.g. Watkins v. Overseers of Milton-next-Gravesend* (1868) L.R. 3 Q.B. 350 where a licence was present in an agreement to fasten a coal-hulk to a mooring in a river; and *Hill v. Tupper* (1863) 2 H. & C. 121 where a licence was created for an exclusive right to put pleasure boats on a canal.
[15] [1950] 2 K.B. 119.

a fixed water supply the same as was to be provided to other premises in the area.

In the opinion of the present writer, the occupiers of houseboats are in a position sufficiently analogous to that of caravan dwellers to warrant bringing them within the protection of the Act. In tenancy agreements, the houseboat as well as the land to which it is moored should be included in the definition of residential premises so as to provide security of tenure and the other protections afforded by the Act.

(g) Campers

A number of inquiries have recently been conducted into camping in Victoria,[16] and, as previously noted, the government is presently reviewing the existing Camping Regulations 1965 made under the Health Act 1958.[17]

Section 221(1) Health Act 1958 defines 'camping area' as

> any area of land which persons are frequently intermittently or seasonally permitted to use for camping for a consideration to the proprietor of the land,

and provides that camping areas shall be registered with the council. The existing Camping Regulations 1965 provide adequate regulation of camps and camp sites generally in the case of short-term residents, although for long-term campers special regulations are needed.

In the opinion of the present writer, it is neither necessary nor desirable to bring campers who reside temporarily in tents within the ambit of the Residential Tenancies Act 1980. The nature of their occupancy is sufficiently transient to allow them to continue to be mere licensees. In the case of long-term campers in more permanent tent dwellings, special camping regulations should be made to govern[18] their use and occupation of the land and their tenure.

In accordance with the current operation of the Act, and the suggestions of the previous opposition party at the time the Residential Tenancies Bill was debated,[19] it is concluded that all tent dwellers should be excluded from the operation of the Act.

(h) Employee residences

The Community Committee on Tenancy Law Reform made the following recommendation with relation to what were described as 'services tenancies':

[16] Peat Marwick Mitchell & Co., *op. cit.*; Ministry for Tourism, *Victorian Caravan and Camping Report* (1975); Boer, *op. cit.* 270-1; Forests Commission, Vic., *Forests Commission Guidelines for Camping in State Forest Rivers Districts* (1982); Victorian Government Travel Authority, *Guide to Caravan and Camping Parks of Victoria* (1981).

[17] *Supra* n. 70, 13.

[18] See, however, the comments of Boer, *op. cit.* 278: 'It is submitted that there is no logical reason for distinguishing between the two kinds of campers on this basis' (period of occupancy).

[19] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3438 *per* Mr Cathie.

[20] Community Committee Report, *op. cit.* 65.

> all persons whose occupation of residential premises is incidental to their employment should at least have the rights of residential occupiers, unless more extensive rights of tenure have been created.[20]

In the opinion of the present writer, all occupants of residential premises, as defined *infra*, should be subject to the provisions of the Act regardless of the reason or purpose for entering into the occupation. The only exception should be in the case of mobile homes occupied by travelling showmen in connection with their businesses where, because of the short duration of their occupancy, the Act would be unsuitable.

(i) Present regulation — statute

The Act excludes residences occupied by employees in a number of ways. By implication, employees are excluded if they occupy the premises as licensees (*infra*). Section 6(4)(a), (b) and (d) of the Act also expressly excludes a number of tenancy agreements relating to employees (*supra*).

The exclusion in section 6(4)(a) appears to be unnecessary and designed to exclude a common form of residential occupancy which should be covered by the Act; namely, dwellings above shops. The exclusion would not apply unless the occupant leased both the shop and the residential portion of the building, but in this case there appears to be no reason why such premises should be excluded from the operation of the Act.

The exclusion in section 6(4)(b) is similarly restrictive and in the opinion of the present writer represents an unnecessary exclusion of the protections provided by the Act. In some States, special statutory provisions exclude the requirement to licence premises where dwellings, and in particular, moveable dwellings are used by pastoral itinerant workers,[21] but the present limitation is far more restrictive and would apply to all farm cottages and other premises regardless of the length of occupancy.

Finally, the exclusion in section 6(4)(d) appears to be unnecessary, although it is useful in clarifying the application of the Act in light of common law distinctions to be discussed, *infra*. Similar general exclusions of premises occupied by reason of a contract of employment are to be found in the Northern Territory[22] and in some Canadian Provinces,[23] although the recent South Australian[24] and Queensland[25] statutes do not generally exclude employee residences.

(ii) Present regulation — common law

A considerable body of case law has developed around the determination

[21] Local Government Act 1919 (N.S.W.), s. 288A(7)(a)(ii).

[22] Tenancy Act 1979 (N.T.), s. 4(1) 'premises' (j). See also s. 47(2)(i) where a notice to quit may be given if an employee's premises are required by another employee.

[23] Landlord and Tenant Act (R.S.A.) 1964 c. 200, s. 16(1)(a); Landlord and Tenant (Residential Tenancies) Act (Stats Newfoundland) 1973 c. 54, s. 2(1)(f); Landlord and Tenant Act (R.S.P.E.I.) 1974 c. L-7, s. 90(1)(d); Residential Tenancies Act (R.S.S.) 1979 c. R-22, s. 2(j)(v).

[24] Residential Tenancies Act 1978-1981 (S.A.), s. 7(1).

[25] Residential Tenancies Act 1975 (Qld), s. 6.

of the nature of the interest which an employee takes when in occupation of premises belonging to his employer.[26] If section 6(4)(d) of the Act is repealed, it will be necessary to provide elsewhere in the legislation exactly which forms of employee residences are included within the operation of the Act for, at common law, it is difficult to determine whether the occupier will be a tenant or an employee-licensee.

In determining the nature of the occupation which the employee-occupier has, the courts will initially consider the factors already stated,[27] and in particular, whether the premises are subject to the exclusive possession of the occupier. However, where the occupier is also employed by the owner of the premises, a further test is applied. In Australia, this additional test was stated by Dixon J. as follows:

> where the purpose of placing the employee in occupation of the premises is to give him the benefit of a dwelling place whether as a concession or as part of his recompense for his services or in consideration of a deduction from his wages, he is regarded as having an independent occupation of the premises and the relation is construed as landlord and tenant . . . But if the occupation of the premises is subservient to and necessary to the service then it is that of the master.[28]

It might be possible, therefore, for parties to use section 6(4)(d) of the Act as an avenue to avoid its operation by creating a fictitious relationship of employer-employee. Such a device was present in *Wang v. Wei*[29] although on the facts of that case, Judge Edgar Fay Q.C. in the Court of Queen's Bench, held the management agreement to be a sham and a tenancy created. Concern has been expressed at the inclusion of section 6(4)(d) in the Victorian Act by the previous opposition member Mr Miller during the parliamentary debates on the Bill. He indicated that section 6(4)(d) was expressed in unnecessarily broad terms and concluded that '[i]t is in such wide terms that even an agreement to mow a landlord's lawn might be regarded as a contract of employment within that particular sub-clause'.[30] The government Minister was unimpressed with this concern commenting that 'I do not think that anyone in their wildest imagination will create employment conditions to mow the lawn with a view to excluding themselves from the legislation'.[31]

In the opinion of the present writer, employee occupancies should not be excluded from the operation of the Act, and in order to prevent arguments as to the nature of the employment and its relationship to the occupancy, the Act should expressly be made to include such forms of residence.

[26] Chernov, *op. cit.* 42-3; Dawson and Pearce, *op. cit.* 12-13; *Halsbury's Laws of England, op. cit.* xxvii, 23-5.

[27] *Supra* n. 18, 75.

[28] *H.A. Warner Pty Ltd v. Williams* (1946) 73 C.L.R. 421, 429, applied in *Francis Longmore & Co. Ltd v. Stedman* [1948] V.L.R. 322, 323 *per* Barry J.

[29] (1975) 119 Sol. J. 492.

[30] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3442 *per* Mr Miller; Legislative Council, 11 December 1980, 4962 *per* The Hon. D. R. White.

[31] Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 1980, 3442 *per* Mr Maclellan; Legislative Council, 11 December 1980, 4962 *per* The Hon. Haddon Storey.

(i) Hotels — motels

In Victoria, the Act does not apply to tenancy agreements where the rented premises are situated in a hotel, motel, hostel, educational institution, or like institution.[32] While the application of the doctrine of *ejusdem generis* to the words 'or like institution' may be difficult because of the absence of a single preceding class or category,[33] it is clear that throughout the passage of this legislation through Parliament there was never any desire to make its provisions applicable to hotels and motels. The Community Committee on Tenancy Law Reform similarly recommended excluding its application in the case of hotels and motels.[34]

Similar exclusions appear in the recent Residential Tenancies legislation in Queensland,[35] Northern Territory[36] and South Australia.[37] In British Columbia, however, it is interesting to note that their Residential Tenancy Act 1979[38] has recently been amended to deem a tenancy agreement to be created where premises are in an inn and are occupied by a person as his permanent residence for not less than two consecutive months.[39] An 'inn' is defined as including an inn as defined in the Hotel Keepers Act or a boarding-house, rooming house, or apartment hotel containing premises that are occupied under conditions that, at common law, would be considered a licence to occupy the premises.[40]

While not necessarily endorsing the resurrection of the lease-licence distinction in this context, the present writer considers a similar amendment could be incorporated into the Victorian Act by excluding rented premises in hotels and motels only where they are occupied or intended to be occupied for a continuous period of less than 60 days. Thus, while section 6(4)(f)(ii) excludes fixed term agreements where the term certain is less than 60 days, this amendment would exclude periodic agreements also in respect of hotels and motels where occupied or intended to be occupied for less than 60 days.

In the case of hostel accommodation, the characteristics of this form of occupancy are sufficiently similar to that of boarding and lodging-houses to warrant the application of the provisions of the Act.[41] Accordingly, the reference to hostels in the exclusionary provisions should be deleted and in order to avoid ambiguity, hostels should be specifically referred to in the amended definition of residential premises (*infra*).

[32] Residential Tenancies Act 1980 (Vic.), s. 6(4)(g).
[33] *Attorney-General v. Brown* [1920] 1 K.B. 773.
[34] Community Committee Report, *op. cit.* 19.
[35] Residential Tenancies Act 1975 (Qld), s. 6(a).
[36] Tenancy Act 1979 (N.T.), s. 4(1) 'premises' (f).
[37] Residential Tenancies Act 1978 (S.A.), s. 7(3)(a).
[38] Residential Tenancy Act (R.S.B.C.) 1979 c. 365, ss 1, 2.
[39] Residential Tenancy Amendment Act 1980 (British Columbia), c. 48, s. 2.
[40] *Ibid.* s. 1.
[41] *E.g. Marshall v. Commonwealth Hostels Ltd* [1953] V.L.R. 503.

(j) Institutions

The Community Committee on Tenancy Law Reform recommended that premises which are part of hospitals or nursing homes, or of a club or incorporated association should be excluded from the definition of residential premises, and thus the operation of the Act. It was further recommended that premises owned by a college or other educational institution should be included when they are self-contained and separate from the institution.[42]

There was little mention of these suggestions in the parliamentary debates preceding the commencement of the Victorian Act, and the precise exclusions adopted are slightly more inclusive.[43] Section 6(4)(g), already referred to, excludes rented premises situated *in* an educational institution or like institution and, by analogy with the interpretation of the Mobile Homes Act 1975 provided in *Roy Crimble Ltd v. Edgecombe*[44] a court might well interpret the exclusion as not covering educational institutions situated *outside* the main institutional grounds, such as external halls of residence associated with Universities.

In the recent case of *Inland Revenue Commissioners v. McMullen*[45] the House of Lords was faced with the interpretation of the word 'education' in the context of a charitable trust, and decided that the expression was to be given a wide meaning.

Generally, if educational institutions are excluded from the operation of the Act, the occupants will be forced to rely upon the remedies afforded by the common law and those provided by the terms of their individual agreements. In a recent English decision, students occupying a hall of residence were prevented from studying and sleeping by local council building works, and it was held that even though they occupied the premises as mere contractual licensees, the council had an obligation not to disturb the students' quiet enjoyment of their rooms.[46]

In view of the fact that the occupants of educational institutions are governed by often detailed and specific terms in their individual agreements with the institution, it is suggested that they not be brought within the scope of the Act. Thus, the Victorian Act should continue to follow the South Australian provisions which also exclude educational institutions and colleges.[47] It should be noted, however, that the Queensland[48] and Northern Territory[49] Acts do not expressly exclude educational institutions from their operation.

[42] Community Committee Report, *op. cit.* 19.
[43] Ss 6(4)(g) and (h).
[44] *Supra* n. 92.
[45] [1981] A.C. 1.
[46] *Smith v. Nottinghamshire County Council, The Times*, 13 November 1981 (Court of Appeal); *Halsbury's Laws of England* (4th ed. 1980) Monthly Review, December 1981, Y205.
[47] Residential Tenancies Act 1978 (S.A.), s. 7(3)(c).
[48] Residential Tenancies Act 1975 (Qld), s. 6.
[49] Tenancy Act 1979 (N.T.), s. 4(1).

It is similarly suggested that the Victorian Act continue to exclude from its operation hospitals and other medical institutions as the residents of these premises are usually subject to specific regulations in the terms of their contractual licences. Section 6(4)(h) provides that the Act does not apply to a tenancy agreement —

> where the rented premises are situated in a hospital, nursing home, convalescent home, rehabilitation home, home for the aged or disabled, or like institution.

Difficulties might arise with the use of the expression 'situated in' and accordingly it is suggested that the words 'form part of' would be clearer. The interpretation of 'hospital' might similarly cause some difficulty, although it has been decided that there is no necessity for the institution to provide curative treatment for it to be a hospital.[50] Further difficulties might arise as to whether the exclusion applies to patients only or also the hospital staff for whom residential accommodation is provided. In *Re York Central Hospital Association and Vaughan Township* it was held that nurses in a hospital residence who paid weekly for their accommodation with only a right to use premises whilst employed, were mere licensees.[51] Such accommodation would fall within the proposed amended definition of 'occupancy agreement' but would be excluded from the operation of the Act by reason of the proposed amendment to section 6(4)(i) of the Act (*infra*).

(k) Holiday premises

The Community Committee on Tenancy Law Reform recommended that premises used for holiday purposes be excluded from the operation of the Act, and this recommendation was incorporated into the Act by excluding tenancy agreements 'where the rented premises are ordinarily used for holiday purposes'.[52]

A similar exclusionary provision in the South Australian Act was subject to considerable criticism and discussion in the Parliament both prior to and following the commencement of the Act[53] and the provisions were subsequently amended by adding the following subsections:

> This Act does not apply to or in relation to any agreement *bona fide* entered into the purpose of conferring on a person a right to occupy premises for a holiday.[54]
>
> For the purposes of subsection (2a) an agreement conferring a right to occupy premises for a fixed term of two months or longer, shall be deemed, in the absence of proof to the contrary, not to have been entered into *bona fide* for the purpose of conferring a right to occupy the premises for a holiday.[55]

[50] *Tanner v. Marquis Jackson* [1974] 3 A.C.T.R. 32, *per* Blackburn J.
[51] (1972) 22 D.L.R. (3d) 632.
[52] S. 6(4)(i).
[53] South Australia, *Parliamentary Debates*, Legislative Assembly, 23 November 1977, 978 *per* Mr Evans; 25 February 1981, 3216 *per* The Hon. Jennifer Adamson; Legislative Council, 11 February 1981, 2715 *per* The Hon. J. C. Burdett.
[54] Residential Tenancies Amendment Act 1981 (S.A.), s. 5, amending s. 7 by adding sub-s. (2a).
[55] *Ibid.* sub-s. (2b).

In the Tenancy Act 1979 (N.T.), the exclusion of such premises has been achieved by excluding from the definition of 'premises', 'premises used in the tourist industry'.[56] In the opinion of the present writer such an exclusion would be difficult to apply and consequently would lead to uncertainty in the application of the Act. The exclusionary provisions in the South Australian Act appear to be unnecessarily complicated, and accordingly, it is suggested that the Victorian Act should not apply 'where the residential premises are ordinarily used or intended to be used for holiday purposes unless they are so used or intended to be used for a continuous period of more than 60 days'.

It is considered necessary to include holiday premises used or intended to be used for more than 60 days so as to prevent the evasion of the Act in seasonal holiday resorts and elsewhere, and also to provide some additional interpretation of the expression 'holiday purposes'. In the case of caravan parks, the distinction between holiday occupants and permanent occupants takes on considerable importance, for, as Peat Marwick and Mitchell reported,

> permanents develop a sense of belonging and ownership, and frequently resent the seasonal influx of 'tourists' and sometimes take action to discourage their presence by, for example, removing laundry plugs, shower roses, or toilet paper.[57]

Such problems are difficult to overcome and apart from creating separate permanent long-term parks,[58] cannot readily be resolved. In the present context, however, it is suggested that holiday tourist residents should not be subject to the provisions of the Act unless their stay exceeds 60 days.

3. PROPOSALS FOR REFORM

Having considered the different types of residential licensees presently excluded from the operation of the Act, it now remains to examine the most appropriate ways in which best to provide for them. It is clear that reform of the law in this area is necessary. Such reform could adopt either of two approaches.

(a) Separate statutes

On the one hand, it could be possible to regulate each of the different types of residential licence by enacting separate statutes and regulations. This was the course followed by the then government in Victoria in excluding residential licensees from the operation of the Act, although it appears that the decision was reached, not through a process of logical reasoning and a

[56] Tenancy Act 1979 (N.T.), s. 4(1) 'premises' (g).
[57] Peat Marwick Mitchell & Co., *op. cit.* 67.
[58] See the discussion of this suggestion by Boer, *op. cit.* 277-8. Note also the recent policy of the Lands Department in Victoria of creating more caravan park space for tourists rather than permanent residents of Crown reserves: *Herald* (Melbourne), 21 June 1982.

desire to adopt this course on its merits, but rather by default, owing to the absence of research evidence concerning residential licensees and in particular, boarders, lodgers, and mobile home dwellers.[59] The principal reason why the then government chose to adopt this course was because it considered the nature and circumstances of boarders, lodgers and caravan dwellers to be sufficiently different from that of tenants to warrant separate legislation. However, the rationale and explanation was not always clearly expressed, as appears from the following exchange in Parliament:

> Mr. Ross-Edwards — [The] opposition has criticised the fact that no provision has been made in the Bill for lodgers. If legislation is to be introduced to protect lodgers, it should be done separately, not under the Residential Tenancies Bill.
>
> Mr. Miller — Why not?
>
> Mr. Ross-Edwards — Such legislation should be separate, because lodgers are not renting premises and are distinct from tenants. No one knows better than the learned lawyer from Prahran that there is a distinct difference between a tenant and a lodger.
>
> Mr. Miller — Why should we continue the difference?
>
> Mr. Ross-Edwards — I shall allow the honourable member for Prahran to give his own answers to that question.[60]

While acknowledging that there are certain differences between tenants and lodgers, which principally relate to the use of shared bathroom and cooking facilities, the main difficulty in excluding licensees from the operation of the Act is that legislative codes suitable to regulate each type of licence separately, may not be forthcoming for considerable periods of time. It was admitted during the debates that the Residential Tenancies Act had a five year gestation,[61] and in the opinion of the present writer, similar delays could be expected for the equally complex legislation necessary for codifying the law relating to boarders, lodgers, mobile home dwellers, and other residential licensees.

(b) One statute

On the other hand, it is possible that both tenants and licensees could be subject to regulation by the one piece of legislation. This alternative was expressly accepted by the then opposition party in debating the Victorian Bill[62] and possesses definite advantages in terms of both legislative and

[59] See the views expressed by the previous government members in Victoria, *Parliamentary Debates*, Legislative Council, 6 December 1978, 7069; 11 December 1980, 4931 *per* The Hon. Haddon Storey; Legislative Assembly, 25 November 1980, 3440; 23 October 1980, 1633 *per* Mr Maclellan.

[60] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3416-7.

[61] *Ibid.* 3417 *per* Mr Cain.

[62] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3438 ff.; Legislative Council, 5 December 1980, 4405-7; 11 December 1980, 4928-30 *per* The Hon. D. R. White.

administrative expediency. The principal difficulty with such a proposal, concerns whether the two forms of residential accommodation can be effectively melded in the one statute while retaining precision of application and clarity of regulation. In the context of mobile homes, Boer raises the 'fundamental difficulty of whether the accepted concepts and protections . . . of the landlord-tenant relationship found between owner and occupier of a "static" home can be made to apply to the mobile home resident'.[63] Specific problems arise in relation to eviction and the use of common facilties, although, in the opinion of the present writer, these may be adequately overcome by amending the Residential Tenancies Act 1980 accordingly.

In the absence of readily available research evidence relating to the use and occupation of residential licensees' premises, it is submitted that the scope of the Act should be extended to include such occupiers. This suggestion might amount to merely an interim palliative, but would at least afford some increased protection to residential licensees in Victoria. Boer acknowledges that a comprehensive scheme of legislation would probably be too much to ask for at the time he wrote (prior to the Victorian Act) but considered that amendments could be made to existing statutes and that the introduction of standard statutory agreements would obviate many difficulties.[64]

The Residential Tenancies Act 1980 possesses many useful provisions relating to the regulation of residential accommodation and it is suggested that its provisions would be equally beneficial to residential licensees. Should a more comprehensive code be found necessary in the future after research has been conducted into the nature of residential licensees' occupation, then the present Act could be either repealed or substantially amended as necessary.

It is clear that considerable care needs to be adopted when enacting interim legislative measures, and Victoria should not follow the English example of the Mobile Homes Act 1975 which has been described by Lord Justice Ormrod as 'not at all clearly drafted' and 'manifestly defective' in the language used by Parliament.[65]

Accordingly, the present discussion now turns to the precise manner in which the scope of the Act might be amended so as to include and regulate residential licensees most effectively.

4. PROPOSED AMENDMENTS

The principal change to be implemented by the proposed amendments is to abandon the incorporation of the lease-licence distinction in the operation of the Act. To do so will involve the substantial redrafting of the

[63] Boer, *op. cit.* 269.
[64] *Ibid.* 291.
[65] *Taylor v. Calvert* [1978] 2 All E.R. 630, 633.

interpretative provisions of the Act as well as an alteration of other provisions. As the Act will no longer regulate only residential tenancies, but a number of other forms of occupancy, it is initially proposed that the title and terminology of the Act be altered.

Accordingly, it is proposed that:

A — The short title of the Act be changed from the Residential Tenancies Act to the Residential Occupancy Act.

B — The expressions tenant and tenancy be changed to occupant and occupancy wherever they appear in the Act.

C — The expression landlord be changed to owner wherever it appears in the Act.

D — In section 2, in lieu of the definition of Facilities there be inserted the following definition:

'Facilities' in relation to an occupancy agreement includes —

(a) land or buildings intended for use for storage space or car parking;
(b) laundry facilities;
(c) cooking facilities;
(d) recreational areas;
(e) lifts;
(f) garbage storage and disposal facilities;
(g) toilet and washing facilities;
(h) appliances for heating or cooling premises;
(i) communications facilities;
(j) lawns, gardens and outhouses —

provided by the owner for the occupant's use otherwise than as part of the residential premises whether or not such facilities are used in common with other occupants of the same premises.

E — In section 2 a new definition be inserted as follows:

'Mobile home' means any structure designed or adapted for human habitation which is capable of being moved from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer or propelled under its own power along a road or water-course) and any motor vehicle or boat so designed or adapted, but does not include —

(a) a tent;
(b) a carriage that is part of a railway;
(c) a tram that is part of a tramway system;
(d) structures occupied by travelling showmen in connection with their businesses; or
(e) structures kept by their owners on land occupied by them in connection with their dwelling houses and used for habitation only by them or by members of their household.

F — In section 2 a new definition be inserted as follows:
'Mobile home site' means land on which a mobile home is situated for the purposes of human habitation and land which is used in conjunction with land on which a mobile home is so stationed and includes, in relation to a mobile home stationed on a water-course, any land to which that mobile home is moored or abuts and any land which is used in conjunction therewith.

G — In section 2 in lieu of the definition of tenancy agreement there be inserted the following definition:
'Occupancy agreement' means an agreement, whether or not in writing and whether express or implied under which a person grants to another person a right to occupy residential premises as a residence and includes such an agreement created or arising under the terms of a contract of employment or entered into in relation to such a contract.

H — In section 2 in lieu of the definition of tenant there be inserted the following definition:
'Occupant' means —
(a) in relation to an occupancy agreement, the person to whom a right of occupancy of residential premises is granted, and includes a boarder, lodger or like person; and
(b) in relation to a proposed occupancy agreement, the person to whom a right of occupancy of residential premises is to be granted, and includes a boarder, lodger or like person.

I — In section 2 in lieu of the definition of landlord there be inserted the following definition:
'Owner' means —
(a) in relation to an occupancy agreement, the person by whom a right of occupancy of residential premises is granted; and
(b) in relation to a proposed occupancy agreement, the person by whom a right of occupancy of residential premises is to be granted.

J — In section 2 in lieu of the definition of rented premises there be inserted the following definition:
'Residential premises' in relation to an occupancy agreement means premises that are the subject of an occupancy agreement and includes a mobile home, a mobile home site, a hostel, a boarding-house and common lodging-house (as defined in the Boarding and Lodging House Regulations 1963 as amended), and an apartment and apartment house (as defined in the Apartment House Regulations 1955 as amended), but excludes a tent. In this Act a reference to residential premises includes facilities.

K — Section 6(4)(d) be repealed.

L — Section 6(4)(e) be repealed.

M— In lieu of section 6(4)(g) there be inserted the following subsection: Where the residential premises are situated in a hotel or motel unless they are occupied or intended to be occupied by the occupant for a continuous period of more than 60 days.

N — In section 6(4) there be added following subsection (g) the following subsection:
Where the residential premises form part of an educational institution.

O — In lieu of section 6(4)(h) there be inserted the following subsection: Where the residential premises form part of a hospital, nursing home, rehabilitation home, home for the aged or disabled or like institution.

P — In lieu of section 6(4)(i) there be inserted the following subsection: Where the residential premises are ordinarily used or intended to be used for holiday purposes unless they are so used or intended to be used for a continuous period of more than 60 days.

Q — In lieu of section 99(3)(d) there be inserted the following subsection: Any leak in the residential premises.

R — In section 102 there be added the following subsection:
(c) maintain the mobile home site in a reasonably neat and tidy condition.

S — After section 137 there be added the following section:
137A — For the purposes of this Division 'goods' includes any mobile home previously occupied by an occupier under an occupancy agreement.

In addition to the above amendments to the Residential Tenancies Act 1980, amendments will need to be made to the relevant subordinate legislation as previously discussed, including the redrafting of the Apartment House Regulations 1955, the Boarding and Lodging-house Regulations 1963, and the Camping Regulations 1965.

The Melbourne and Metropolitan Board of Works Ordinance made in 1966 limiting occupation in caravan parks to ten weeks should be formally revoked in accordance with stated government policy.

Finally, it is proposed that separate legislation be enacted to regulate the sale and purchase of mobile homes as is presently the case in a number of Canadian Provinces.[66]

5. ASPECTS OF DRAFT PROPOSALS

(a) Occupiers and occupancy

By abrogating the terminology of leases the present proposals aim to create a statutory right of occupancy in respect of residential premises for

[66] *Supra* n. 86-9.

the purposes of the Act. Thus, it will not be necessary to invoke the lease-licence distinction in order to determine the application of the Act.[67] However, although the terminology of the agreement will change, the necessary incidents of the occupation will not, and should disputes arise which are not regulated by the Act, it will be necessary for the courts to look to the nature of the occupancy and its surrounding circumstances according to basic common law principles. The adoption of the neutral term 'occupancy', referable to neither lease nor licence, will, of course, not be a critical determinant of the nature of the relationship created at common law for, as previously noted, the relationship is determined by the law, and not be the label which the parties choose to put on it.[68]

The determination of the nature of the relationship at common law will be relevant in those instances where the Act has not covered the field in question and is not to be regarded as a codification of the common law. Examples might be in respect of the repair and maintenance division of the Act,[69] and the rights and duties of the parties.[70] It is submitted that if the common law is invoked in these circumstances, the proposed amendments, by abandoning the terminology of leases, will not significantly alter the nature of the legal principles to be applied.

By referring to 'owner' in lieu of 'landlord' in proposals C and I, some confusion might be created where the person granting the right of occupancy is not, in law, the owner of the premises. In such instances, where for example, an agent grants the right of occupancy with the authority of the legal owner, the proposals will result in there being a legal owner and an owner for the purposes of the Act. Proposal I attempts to overcome this anomaly by defining owner as being the person by whom a right of occupancy is granted *in relation to an occupancy agreement.* A more accurate description of this individual would be reversioner, but this term was rejected in order to ensure some lay comprehension of the Act.

It should also be noted in proposal H, that boarders and lodgers are specifically referred to so as to avoid uncertainty as to the application of the Act, and similarly in proposal G the definition of occupancy agreement specifically applies to occupancies arising under a contract of employment.

Unlike the provisions of the Mobile Homes Act 1975 (Eng.), which require the occupier to occupy the mobile home as 'his only or main residence'[71] the present proposals require only that the premises be occupied as a residence. It was considered that limiting the usage or intended usage would be an unncessary restriction and would disadvantage individuals who, because of personal reasons, are required to keep multiple homes.

[67] Community Committee Report, *op. cit.* recommendation 1, 65.
[68] *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 Q.B. 513, 528.
[69] Ss 97-103.
[70] In particular s. 92.
[71] S. 1(1).

(b) Structures

Proposal J defines the type of physical structures to which the Act will apply and includes mobile homes, mobile home sites, hostels, boarding-houses, common lodging-houses, apartments, and apartment houses but excludes tents. Facilities are included as part of residential premises.

The definitions of boarding-house and common lodging-house, apartment and apartment house are incorporated by reference to the appropriate regulations[72] while the definition of hostel is undefined.

Specific definitions of mobile home and mobile home site are contained in proposals E and F respectively. It was decided to include both the mobile home and the mobile home site as part of the definition of residential premises, so as to avoid the difficulties encountered where the occupier owns the mobile home but is merely granted a right to station it on a pitch.[73] The definition of mobile home site specifically applies to land to which a houseboat is moored so as to overcome the difficulties which arose in *Roy Crimble Ltd v. Edgecombe*.[74]

The definition of mobile home site is based upon the English definition of 'caravan site'[75] and is separately defined in accordance with the trend in a number of Canadian Provinces.[76] In the case of caravans and houseboats the grant of an estate in the land or a right to use the land on which the structure is stationed or to which it abuts, is of great importance and in this respect the relationship is analogous with the rights which tenants in rural England possessed from the fifteenth century.[77] The present Act, however, merely allows the mobile home occupant to use the land on which the home is stationed or to which it is moored and any land which is used in conjunction therewith, for the period of the agreement without necessarily granting an estate in the land itself to the occupier.

In defining the necessity for mobility of a mobile home, care had to be taken to include demountable structures which, although able to be moved, are generally fixed to a single site. As Lord Denning M.R. commented: '[It] was, no doubt, designed to deal with caravans, but it also applies to very substantial dwellings. So substantial indeed that the 1975 Act might also be called the "Immobile Homes Act". The dwelling houses here . . . are more like bungalows than caravans. They have no wheels. Being made

[72] Boarding and Lodging-house Regulations 1963 and Apartment House Regulations 1955 respectively.

[73] See the comments of Boer, *op. cit.* 267.

[74] *Supra* n. 92.

[75] Caravan Sites and Control of Development Act 1960 (Eng.), s. 1(4).

[76] Residential Tenancies Act 1979 (R.S.S.) c. R22, s. 2(j); Landlord and Tenant Act 1974 (R.S.P.E.I.) c. L-7, s. 90(1); Residential Tenancies Act 1979 (R.S.O.) c. 78, s. 1(1); Residential Tenancies Act 1970 (Stats Nova Scotia) c. 13, ss 2(bb), (bc); Landlord and Tenant (Residential Tenancies) Act 1973 (Stats Newfoundland) c. 54, s. 2(1)(dA), (f).

[77] Bradbrook A. J., *Poverty and the Residential Landlord-Tenant Relationship* (1975) 2.

of wood, they can be moved with considerable labour and expense. But, beyond doubt, they are very permanent and there is no intention to move them'.[78]

The present definition, in proposal E follows that adopted in the English Caravan Sites and Control of Development Act 1960[79] appropriately altered so as to include houseboats. The exclusions follow the recommendations of the then opposition party in debating the Victorian Bill[80] and, in particular, exclusions (d) and (e) are based upon similar provisions in Tasmania[81] and New South Wales[82] respectively. It was considered that the proposed definition of mobile home applied equally to caravans and demountable buildings, and so a separate definition of demountable building, as appears in the Northern Territory's Act[83] was not incorporated.

(c) Facilities

The Community Committee on Tenancy Law Reform recommended that the proprietors of mobile home sites should have a duty to maintain common facilities such as roads, ablution blocks, recreation facilities, and adequate power supply.[84] However, despite this recommendation and similar proposals by the then opposition party in debating the Bill,[85] the Victorian Act, although referring to facilities in its interpretative provisions, did not make the repair requirements generally applicable to common facilities. The maintenance of common facilities takes on special importance in the case of caravan sites, boarding and lodging-houses and accordingly, proposal J includes facilities in the definition of residential premises. In order to ensure the application of the definition of facilities to boarding and lodging-houses, the definition was amended, and proposal D refers to facilities whether or not they are used in common with other occupants of the same premises.

It is submitted that such an inclusion will ameliorate many problems presently faced by tenants whose landlords fail to maintain facilities such as electricity, gas, and hot water[86] while also extending this protection to mobile home dwellers and other occupants of residential premises. The full extent of this protection, however, will depend upon the suitability of the repair and maintenance provisions of the Act[87] which extent is not presently

[78] *Taylor v. Calvert* [1978] 2 All E.R. 630, 631.
[79] S. 29(1) 'caravan'.
[80] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3438 *per* Mr Cathie; Legislative Council, 11 December 1980, 4928 *per* The Hon. D. R. White.
[81] Local Government Act 1962 (Tas.), s. 215(3)(b).
[82] Local Government Act 1919 (N.S.W.), s. 288A(7)(a)(i).
[83] Tenancy Act 1979 (N.T.), s. 4(1).
[84] Community Committee Report, *op. cit.* 66.
[85] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1980, 3439; Legislative Council, 11 December 1980, 4928-36.
[86] Bradbrook A. J., *Poverty and the Residential Landlord-Tenant Relationship* (1975) 48-9; Bradbrook A. J., 'The Rights and Duties of Landlords and Tenants under the Victorian Residential Tenancies Act' (1981) 13 *M.U.L.R.* 159, 195; Peat Marwick Mitchell & Co., *op. cit.* 67.
[87] Ss 97-103.

under discussion, save for proposals Q and R[88] which are suggested in order to allow principally for houseboats and caravans respectively.

(d) Minimum standards

There has been a recent trend nationally, to develop minimum standards codes for caravan parks,[89] and this trend is to be generally endorsed. At present, accommodation in caravan and camping parks,[90] boarding and lodging-houses,[91] and apartment houses[92] is subject to detailed minimum standards regulations which, together with the Housing (Standards of Habitation) Regulations 1971 and the Uniform Building Regulations 1961, provide a plethora of standards with which residential premises must comply. While not denying that particular forms of accommodation require different regulations, it is suggested that a single body of rules would be preferable.[93] There is no logical reason why the physical standards of residential premises should differ merely because of the shared use of facilities in some cases and not in others and, as previously recommended, it is suggested that the above regulations be redrafted in light of the proposed amendments to the Act.

(e) Registration

At present, in Victoria, there exists a scheme for registering camping areas,[94] boarding and lodging-houses,[95] and apartment houses,[96] although no similar scheme operates with respect to flats and other leased premises. The purpose of registering such premises is to enforce the minimum standards regulations presently in force. These requirements for registration and inspection are presently controlled and administered by the Ministry of Health and, in the opinion of the present writer, this department should maintain its jurisdiction over minimum standards enforcement.

There appears to be no logical reason why all residential premises should not be subject to the same minimum standards, and accordingly, if a standard code is enacted for all residential premises it should include appropriate registration and inspection provisions applicable to both premises presently occupied by tenants and residential licensees. The implementation of such a recommendation would result in ordinary rented accommodation at the present time being required to be registered. While owners and agents may believe this to be unnecessary, it would have a useful corollary in that

[88] See the similar protection provided in the Tenancy Act 1979 (N.T.), Schedule 4, lessor's covenant 1(e).
[89] Peat Marwick Mitchell & Co., *op. cit.* 67.
[90] Camping Regulations 1965 (Vic.).
[91] Boarding and Lodging-house Regulations 1963 (Vic.).
[92] Apartment House Regulations 1955 (Vic.).
[93] A view endorsed by the Community Committee Report, *op. cit.* 65.
[94] Camping Regulations 1965, r. 8-18.
[95] Boarding and Lodging-house Regulations 1963, r. 24-9.
[96] Apartment House Regulations 1955, r. 3-7.

in the current times of lack of rental accommodation, statistics could be kept and local trends examined as to which areas are in need of additional premises for accommodation. Such information could be made available to both private individuals interested in investing in properties, and public housing authorities, with benefits to both investors and those seeking residential accommodation.

(f) Period of occupancy

The Victorian Act presently allows for periodic tenancy agreements of any length of period with no minimum or maximum terms, and fixed term tenancy agreements where the term certain is not less than 60 days and does not exceed five years.[97] These limits were subject to considerable debate in Parliament[98] and in the opinion of the present writer the five year maximum should be abolished. The justification for excluding fixed term agreements of greater than five years was because they would give rise to difficulties not presently regulated by the Act. However, it is suggested that if the parties desire to enter into a long-term arrangement they could merely insert additional terms in their agreement as necessary, or apply to the Tribunal for an order that particular provisions of the Act will not apply to that agreement.[99]

Establishing permanence of occupation of residential premises is a difficult task, for problems of interpretation arise if the criterion is stated to be the person's 'only or main residence'[1] while specific time limits tend to be arbitrary and uncompromising and can cause hardship in particular instances. At present, the residential premises sought to be brought within the scope of the Act are subject to various time limits in their definitions in the relevant rules,[2] and, in the opinion of the present writer this wide diversity of definitions is undesirable and should be changed.

In addition to abrogating the five year maximum period in respect of fixed term agreements, proposals P and M include holiday premises[3] and

[97] S. 6(4)(e) excludes fixed term tenancy agreements 'where the term certain exceeds five years and the agreement does not include a provision enabling the landlord or the tenant to determine the agreement by notice (otherwise than on the grounds of a breach of the agreement) before the expiration of five years after the agreement is made'.

[98] Victoria, *Parliamentary Debates*, Legislative Council, 11 December 1980, 4962.

[99] Pursuant to s. 7(1) of the Act.

[1] As in the Mobile Homes Act 1975 (Eng.), s. 1(1).

[2] Camping parks were previously subject to the ten weeks rule of the Melbourne and Metropolitan Board of Works, but residents will now be subject to four-monthly review: *supra* n. 54. 'Boarding houses' are defined as premises occupied from week to week or more than a week, and 'common lodging houses' as premises occupied for a single night or less than a week: Boarding and Lodging House Regulations 1963; caravan parks in Tasmania are subject to a 21 day limit unless licensed: Local Government Act 1962 (Tas.), s. 215; camping areas in N.S.W. must be licensed if used for more than two consecutive days or more than 60 days in any twelve consecutive months: Local Government Act 1919 (N.S.W.), s. 288A(4).

[3] See the deeming provision in the Residential Tenancies Act 1978-1981 (S.A.), ss 7(2a) and (2b).

hotels and motels respectively, where the premises are used or intended to be used for a continuous period of more than 60 days. It is considered that the provisions of the Act should apply to occupancy of this duration as it is reasonably clear evidence of the occupant remaining in the premises permanently.

There has been recent discussion as to whether caravan park usage should be limited to either long term permanent occupancy or tourist usage.[4] While a distinction of this nature might alleviate the problems previously referred to of permanent residents objecting to tourists,[5] it is submitted that such a distinction should not be the basis for the application of the Act and that if tourists reside in caravan parks for longer than 60 days they should be governed by the provisions of the Act, unless application is made for exemption.

(g) Present statutory controls

The requirements for the effective regulation of residential occupancy have been fully canvassed on a number of occasions[6] and generally amount to a necessity for a standard agreement, specific repair and maintenance obligations for both parties, grounds of and regulation for the termination of agreements and some form of rent control. It is suggested that the present controls in this regard adopted by the Victorian Act should be made applicable to other forms of residential occupancy. The Act has established an elaborate machinery to regulate residential tenancies, and it would be generally wasteful of resources to require a duplication of this machinery in the case of residential licensees presently unregulated by the Act.

Although some provisions of the Act are unsuitable for residential licensees, it is submitted that these provisions could be effectively altered in the Act without detracting from its fundamental objectives and operation.[7] Specific subordinate legislative measures will no doubt be required in the near future to regulate caravan parks and boarding and lodging-houses, but until research evidence has been gathered and analyzed into the usage and occupation of these residential premises for permanent accommodation, the rights and duties of such occupants should be improved and clarified in accordance with the existing statutory provisions applicable to residential tenancies.

[4] Boer, *op. cit.* 268-70.
[5] *Supra* n. 57, 25.
[6] Sackville, *op. cit.* 60; Bradbrook A. J., *Poverty and the Residential Landlord-Tenant Relationship* (1975); Bradbrook A. J., 'The Rights and Duties of Landlords and Tenants under the Victorian Residential Tenancies Act' (1981) 13 *M.U.L.R.* 159; Community Committee Report, *op. cit.* 65-6; Boer, *op. cit.* 269-89; Angus, *op. cit.*
[7] *E.g.* proposals Q, R, and S provide for special difficulties faced by mobile home residents arising under the Act.