

*Residential Tenancy Law and Practice — Victoria and South Australia* by A. J. Bradbrook, S. V. MacCallum and A. P. Moore (Law Book Company Limited, Sydney, 1983) pp. vii-lx, 1-940. Price \$89.50, ISBN 0 455 20497 7.

Until recently, barristers and solicitors in Victoria and South Australia, when confronted with a residential tenancies problem, have immediately unearthed the traditionally lengthy stamped lease document, and reached for the nearest copy of Brooking and Chernov<sup>1</sup> or Woodfall<sup>2</sup>.

Now they need look no further than the standard tenancy agreement and Bradbrook MacCallum and Moore<sup>3</sup>, for this new publication is now the definitive work in the area.

The shorter and simpler handbooks by Bradbrook Gardam and MacCallum<sup>4</sup> and Teh<sup>5</sup> will now be relegated to those with only a passing interest, superficial query to resolve, or who are unable to invest in this much more expensive text.

Elegantly bound, and well up to the usual standard of Law Book Company publications, *Residential Tenancy Law and Practice — Victoria and South Australia* will, as Mr Justice King observes in the foreword to the book, 'come to be accepted as the standard work in Australia'<sup>6</sup> for use by lawyers, agents, and researchers, and, although a little daunting for the unqualified landlord or tenant in person, its pages no doubt will constantly be scanned by all those with an interest in or problem concerning residential tenancies, and indeed non-residential tenancies as well.

It is often the case that a recent codification or consolidation of some area of the law sets academics with a penchant for commerce into a flurry of writing in an attempt to present, discuss, and criticize the new product of the legislature. For example, the Family Law Act 1975 (Cth) sparked works by Nygh<sup>7</sup>, Joske<sup>8</sup>, and the Attorney General's Department<sup>9</sup>, largely supplanting Finlay and Bissett-Johnson<sup>10</sup> and Bourke and Fogarty<sup>11</sup>. In England, the Rent Act 1977 was rapidly followed by numerous learned works interpreting the new legislation.<sup>12</sup>

However, if a loose-leaf format is not adopted, writers should be careful to allow sufficient time before taking their work to the press in order for the interested audience to adjust to the legislation and for parliament to cure any inconsistencies, undesirable aspects, and drafting errors. In the present instance, Bradbrook MacCallum and Moore seem to have been a little hasty in publishing this book, especially as it relates to Victoria: The Residential Tenancies Act 1980 (Vic), although amended once already, is shortly to be the subject of radical revision to accord with the present government's views in line with the recommendations of the Community Committee on Tenancy Law Reform in 1978.<sup>13</sup> In South Australia, the legislation has been amended substantially already<sup>14</sup> and is now more stable, thus enabling those parts of the present work dealing with that jurisdiction to be more durable.

At the time of the hurried amendments following the *debacle* surrounding protected tenancies in Victoria in September 1982,<sup>15</sup> the Minister of Consumer Affairs asserted with conviction that:

the government intends to thoroughly remodel this legislation . . . and to give effect to the remainder of the government's policy by completely rewriting existing tenancy law.<sup>16</sup>

<sup>1</sup> *Brooking and Chernov's Tenancy Law and Practice in Victoria* (2nd ed. 1980).

<sup>2</sup> *Woodfall's Law of Landlord and Tenant* (28th ed. 1978).

<sup>3</sup> Bradbrook A. J., MacCallum S. V. and Moore A. P., *Residential Tenancy Law and Practice — Victoria and South Australia* (1983) ('text').

<sup>4</sup> Bradbrook A. J., Gardam J. G. and MacCallum S. V., *A Manual of the Victorian Residential Tenancies Act* (1982) reviewed by Wallace J. [1983] *Law Institute Journal* 228.

<sup>5</sup> Teh G., *Residential Tenancies Handbook* (1957).

<sup>6</sup> Text, vii.

<sup>7</sup> Nygh P. E., *Guide to the Family Law Act 1975* (1st ed. 1975) now in its 3rd ed. 1982.

<sup>8</sup> Joske P. E., *Family Law* (1976).

<sup>9</sup> Attorney General's Department, Canberra, *Family Law Handbook* (1st ed. 1975) now in its 2nd ed. 1980.

<sup>10</sup> Finlay H. A. and Bissett-Johnson A., *Family Law in Australia* (1st ed. 1972) now by Finlay H. A. 3rd ed. 1983.

<sup>11</sup> *Bourke and Fogarty's Maintenance Custody and Adoption Law* (3rd ed. 1972).

<sup>12</sup> Pettit P. H., *Landlord and Tenant under the Rent Act 1977* (1978); Magus S. W., *The Rent Act 1977* (1978); Prophet J., *Fair Rents* (2nd ed. 1979); Farrand J. T., *The Rent Act 1977. The Protection from Eviction Act 1977* (1978).

<sup>13</sup> Community Committee on Tenancy Law Reform, *Reforming Victoria's Tenancy Laws* (1978).

<sup>14</sup> Residential Tenancies Amendment Act 1981 (S.A.) assented to 19 March, 1981.

<sup>15</sup> See: *Age* (Melbourne), 13 October 1982, 25 September 1982.

<sup>16</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 7 October 1982, 811 *per* Mr Spyker; Legislative Council, 20 October 1982, 451 *per* The Hon. W. A. Landeryou.

Such revision has yet to appear and this apparent inactivity has led to heated discussion in the House.<sup>17</sup>

Faced with this prospect, one hopes that the present authors will be able to present a second edition following these significant amendments, with similar celerity to that which they exhibited in publishing the first.

Turning to the substantive treatment of the law, the book begins with a largely academic but nonetheless complete review of the history of the legislation in the two jurisdictions, and a theoretical critique of the legislative solutions adopted. This material has been carefully compiled and is well documented. It will be invaluable to students and academic researchers in the field of tenancy law reform and will also be of interest to those concerned with the introduction of social legislative reforms generally.

An aspect of the legislation which practitioners will be required to examine immediately upon receiving instructions, concerns the application of the Acts. A detailed, clear and informative chapter commences with an analysis of the difficult area of distinguishing leases from licences, for, as the authors note with regret, in Victoria it is necessary for a legal leasehold interest to be created before the Act will apply. After critically analysing the relevant common law principles, it is concluded 'that premises will be excluded from the operation of the Residential Tenancies Act 1980 (Vic.) if exclusive possession is not granted by the owner'<sup>18</sup>.

In South Australia the distinction is not perpetuated, and the application of that Act turns upon whether or not a tenant is given a right of occupancy of the premises for the purpose of residence. It is hoped that the forthcoming Victorian amendments will dispense with this 'confused and ill-defined'<sup>19</sup> distinction in favour of the South Australian approach.

Following this discussion, the authors examine in depth the other legislative determinants of the application of the Acts. While some of the exemptions are only briefly dealt with,<sup>20</sup> the extensive analysis of the application of the Acts to the Crown repays careful reading.

The remaining twenty chapters provide much more than mere annotated statutes, for all aspects likely to affect both occupiers and owners of residential premises are analysed in considerable detail. An unexpected, but nonetheless fascinating topic, is that dealing with anti-discrimination legislation, which has relevance beyond the area of residential tenancies. Another welcome inclusion, presented mainly in chapters 9 and 17, is that of the law relating to public housing authorities. Previously it was a difficult task to resolve quickly a problem with respect to these tenancies, but now the relevant material is readily accessible. Real estate agents are also well provided for in a chapter which clearly states their duties and liabilities under the residential tenancies legislation and general law governing land agents. This book should be acquired by all agents as a matter of priority.

Stylistically, the authors maintain a critical, yet unbiased depiction of the operation of the legislation. Specific sections are described then fully analysed with references to both local and distant jurisdictions, and modern and ancient authorities.<sup>21</sup> Canadian references seem popular with the authors, largely due to the similarity of legislative provisions.

By making the book principally applicable to both Victorian and South Australian legislation, its magnitude is vastly increased, and as a practitioner's text, it tends to become unwieldy to use. In some places it is a laborious task to unravel the relevant principles as they apply to one or the other jurisdiction.<sup>22</sup> Perhaps the second edition could be published in two volumes, each relating to one State only; the size and price of the present edition certainly warrants this.

While the text is intended primarily for Victorian and South Australian readers, those in other states and territories will be interested in the interpretative discussions of essentially similar provisions as well as the more general chapters.<sup>23</sup> Indeed, some interstate legislation and case law does appear quite frequently.

<sup>17</sup> *Ibid.* Legislative Assembly, 28 February 1984 2761-3 *per* Messrs Richardson and Spyker; 29 February 1984, 2850 *per* Mr Richardson, 2855-6 *per* Messrs Richardson and Spyker.

<sup>18</sup> Text, [416].

<sup>19</sup> Text, [405].

<sup>20</sup> For example, the discussion of mobile homes at [426] and hotels and motels at [434]; houseboats and tents receive no mention and yet might be subject to the legislation: see Smith R. G., 'Extending the Scope of the Residential Tenancies Act 1980 to include Residential Licensees' (1983) 14 M.U.L.R., 1, 16, 19.

<sup>21</sup> For example: South Africa, 349, n. 117; *Clun's Case* (1613) 10 Co. Rep. 127a at 128a, 304, n. 8.

<sup>22</sup> For example: text [431]. In addition, it would be useful to have the running head 'Victorian Legislation' instead of 'Appendix 1' to achieve consistency and ease of use.

<sup>23</sup> For example: chs. 1, 2, 3, 5, 8 and 24.

As a research tool for busy practitioners, the text is workable, although some issues lead the researcher along a circuitous route to the solution. For example, the present reviewer took a considerable time to ascertain how a Victorian landlord was to take action to recover compensation for arrears of rental and damage to the rented premises where a sub-tenant, overholding from a fixed term agreement entered into before the commencement of the Act, had abandoned possession and left no forwarding address. In the event, the tribunal made the order sought without recourse to giving any notice before claiming compensation.

Generally, however, the layout of the text is clear and methodical. A small, yet useful improvement, would be to have the word 'page' printed at the top of each column of page numbers in the table of contents, to distinguish these numbers from paragraph references.

The book is fairly well referenced and a current, but incomplete<sup>24</sup>, select bibliography is included. Both Victorian and South Australian Acts and Regulations are reprinted in full as appendices, and, in addition, a comprehensive appendix of forms is included. Another useful aspect for the practitioner is a summary list of penalties applicable under the Acts.<sup>25</sup>

Save for the failure of the authors to update penalties in accordance with the Health Act (Level of Penalties) Regulations 1972 (Vic.)<sup>26</sup>, the book is remarkably free from inaccuracies. It is unfortunate that two typographical errors appear in Mr Justice King's foreword.<sup>27</sup>

Apart from these minor quibbles, the present work is a veritable *tour de force*, painstakingly and thoughtfully researched, perspicuous, and comprehensive. In preparing for the inevitable second edition, the authors might consider obtaining some statistical data relating to the operation of the present legislation, and perhaps include some unreported tribunal decisions. Also, the authors will note that the standard contract adopted by the Victorian Real Estate and Stock Institute has been amended from its original form, and thus some of their criticisms on this front no longer apply.<sup>28</sup>

Both Victoria and South Australia have gone a long way in improving their residential tenancies law, but further reforms are urgently required. One hopes that the present book will be examined in detail by government advisors and those responsible for drafting amending legislation, as it contains a compendium of improvements which could be made to the Acts to improve their scope and operation in this complex and socially important area of the law.

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<sup>24</sup> Omissions include, Boer B. W., 'From Caravans to Mobile Homes' (1978) 4 *Monash University Law Review* 267, noted at 89, n. 119.

<sup>25</sup> Text, [2442].

<sup>26</sup> Statutory Rules No. 100 of 1972 increasing penalties from \$40.00 and \$10.00 to \$500.00 and \$100.00 respectively. See text, [418].

<sup>27</sup> Text, vii lines 23 and 35.

<sup>28</sup> Text, [646-651].

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