Residential Tenancies in Queensland

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Background

It is necessary to commence this account of recent changes in the law relating to residential tenancies in Queensland with a reference to the major revolution in Queensland property law which occurred with the passage of the Property Law Act 1974[1] (P.L.A.), described as "An Act to consolidate, amend, and reform the law relating to Conveyancing, Property, and Contract, and to terminate the application of certain statutes." Not the least of the consolidation, amendment and reform occurred with respect to the general law of landlord and tenant, no less than 66 of the 260 sections and several of the Schedules to the Act being devoted to this subject. Many of these 66 sections in Part VIII did no more than bring about in Queensland, though often in an improved form, a situation which had existed in other common law jurisdictions for many years, while others are in the main a re-enactment of previous Queensland law. While there is room for argument about some of its provisions, this socially important part of the Act did seek to introduce a comprehensive (and almost comprehensible) general law of landlord and tenant.

A controversial matter when the Act was first introduced as a Bill in 1973 was cl. 136, relating to the termination of tenancy of a dwelling-house. Based on s.18 of the Termination of Tenancies Act 1970, it provided that a notice to terminate a tenancy should not, if given by a landlord, be effective to terminate a tenancy (other than for a fixed term) of a dwelling-house unless it were given in writing on one or more of twelve prescribed grounds or on a ground that "the Courts find . . . is a proper and sufficient ground on which to terminate the tenancy and is established from the evidence."

The history of this matter is that there was formerly in Queensland, as in the other States, special legislation[2] originating mainly in wartime and postwar housing and construction material shortages, the policy of which was to fix the rents of certain dwelling-houses and to maintain security of tenure by prohibiting ejectment except on a limited number of prescribed grounds. By 1970 there were for various reasons[3] very few premises still governed by the legislation. The 1970 Act repealed the legislation *in toto,* but retained in s.18(2) the requirement of one or more of a certain specified grounds as a pre-requisite to giving notice to quit, while the rent restriction procedure disappeared completely. Thus there were reintroduced in peacetime most of the grounds which were originally brought in during the wartime emergency in 1942. Cl. 136(1) followed s.18(2)

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1. Now 1974 — 1976
2. The Landlord and Tenant Acts, 1948 to 1961.
3. e.g., high rate of home ownership; exclusion from the Acts of houses let for first time from 1958 onwards.

(with the addition of one extra ground), even to the extent of retaining the extraordinary provision concerning any other "proper and sufficient ground." In a severely critical paper, analysing the 1970 Act and emphasizing its numerous defects, it was said of this ground that a "practitioner must feel very insecure in advising his client about the chances of success if he has to rely on the nebulous ground."[4]

The Queensland Law Reform Commission (Q.L.R.C.) made clear its feelings about the Termination of Tenancies Act 1970 (and especially s.18(2)) in several places of its Report[5] on which the Property Law Bill 1973 was based. It rather washed its hands of the matter by declaring:

> "However simply to remove s.18 without in some fashion preserving the security of tenure which it is supposed to confer upon tenants of dwelling-houses would be to recommend a step having possible social and political implications on which this Commission is neither constituted nor sufficiently well informed nor competent to pass judgment . . . Whilst, therefore, doubting the efficacy of the existing s.18 as a means of protecting security of tenure of periodic tenants of dwelling-houses in this State, we have in the draft Bill included that section with such amendments as are plainly necessary to clarify its meaning and confine its scope to the purpose which it was evidently designed to achieve. This will leave to Parliament the decision whether or not this or some comparable provision should be retained, as well as the question whether or not the provisions of the section should be capable of exclusion by agreement between the parties . . . ."[6]

The Q.L.R.C. also emphasised (in its covering letter to the Minister for Justice) that as individuals each member of the Commission agreed with the philosophy underlying the often-expressed criticism of s.18 that there was no reason why a tenant should enjoy the specially protected position which the legislation conferred, and it made the point that, if special protection of tenants were to be granted, separate and distinct legislation along the line of The Landlord and Tenants Acts, 1948 to 1961, should be passed rather than included in a general property law statute. The Report also mentioned very relevantly that there had been no informative surveys in Queensland, such as those undertaken elsewhere,[7] to offer any guidance on the question whether legislation, and of what kind, was necessary in order to protect the security of tenants.

Subsequently the Minister sought comment and advice from interested parties on this important, economic and political matter

4. J.B. Thomas, paper delivered to 2nd Joint Symposium of Qld. Law Soc. Inc. and Qld. Bar Assoc (1971), 8. "This Act has succeeded in making termination of tenancies so involved that lawyers are going to need to be consulted in many cases where previously a party had issued his own Notice to Quit." (Ibid., at p.10).
5. (1973) Q.L.R.C. 16. See Report, pp. 77, 89-90 and covering letter to Minister.
6. The presented Bill made the provision subject to any agreement to the contrary (cl. 136(2)), which at least clarified that very doubtful point about s.18.
7. See the Research Report prepared for the Commonwealth Commission of Enquiry into Poverty by A.J. Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship,* 1975. This concentrates on the situation in Victoria, New South Wales and South Australia.

on which opinions naturally tend to be subjective. The covering letter of the Q.L.R.C. had stated that in all the comments it had received (on the Working Paper which had preceded its Report) the inclusion of a provision in the form of cl. 136 had been strongly condemned. But it is probably true to say that the Working Paper (and also in due course the Report and the Bill) would have been more likely to have come to the attention of actual and prospective landlords rather than of actual and prospective tenants. Nevertheless the general feeling was that if it were thought that special protection should be given to tenants, it seemed unfair that private landlords should have to bear the brunt of what was essentially a social security matter. In any event, as noted, the clause was expressed to apply subject to any agreement to the contrary and (as in the case of s.18) was not to apply in respect of tenancies for fixed terms. It seemed clear therefore that the underprivileged and the ignorant would not be able to take advantage of any benefit intended to be conferred on them, for landlords would ensure that tenancies would be for fixed terms or in the case of periodic tenancies, that there would be an agreement to the contrary, in either case effectively excluding cl. 136. It was also surprising that nothing more exact than the vague power given to the court concerning a "proper and sufficient ground" had been devised. When the Bill was re-introduced in October 1974, it was found that the controversial clause had simply disappeared altogether, the Minister indicating that it was proposed to enact before 1st December 1975 (when the P.L.A. was to come into operation) separate legislation relating to tenancies of dwelling-houses.

Residential Tenancies Act, 1975

What eventuated was the Residential Tenancies Act 1975 (R.T.A.), which was introduced into the Legislative Assembly at a late hour on 13 November 1975, when a brief and unsatisfactory debate upon the speech of the Minister for Justice and Attorney-General initiating the Bill took place without members having even seen a copy of the Bill. There had been no preliminary report or indication given of the substance of the Bill. The rush of legislation and the desire to close the session as rapidly as possible, in view of the forthcoming general election, ensured that there was inadequate public discussion and that the further debate a few weeks later, when the Bill was passed, was not much more enlightening. A perusal of the relevant Hansards[8] shows that members on both sides evinced comparatively little sympathy for tenants' needs and were rather more concerned about the problems landlords had in dealing with tenants. This was in effect a continuation of the commercial approach expressed by the A.L.P. spokesman in the debate on the initiation of the Property Law Bill 1973 when he stated — "I would not recommend that anyone should buy houses for rental, because I do not see how he could get his money back."[9]

8. [1975] *Parl. Debates (Qld.)*, 13 and 25 Nov.
9. [1973] *Parl Debates (Qld.)*, 6 December, 2382.

This is perhaps not so surprising considering that many of the A.L.P. members who spoke in the debate on the Bill seemed to have had the experience of being landlords at one time or another. Perhaps the grasping, vicious stereotype of the landlord is a fading image.It is true that many a present house-owner has been at some stage of his life either a landlord or a tenant or both. Voluntary and involuntary changes or occupation and transfers not to mention the difficulties of selling or buying a house at a particular time, ensure this state of affairs, which leads to an understanding of both sides of the relationship.

The Bill was claimed by the Minister to recognize the legitimate interests of all parties involved in the residential landlord-tenant relationship and to cover most of the circumstances that are likely to arise between them. It is probably impossible to enact legislation which will do justice to both sides in every possible situation in this field. The Bill was introduced at a time when there had been a considerable amount of discussion of the social implications of this subject. In particular, there had very recently appeared a Report of the Commonwealth Commission of Inquiry into Poverty, *Law and Poverty in Australia,* 1975 (Sackville Report), which contained an extensive discussion of the subject and made many recommendations for reform. Some of these recommendations have indeed found their way into the R.T.A., which is therefore to some extent innovatory legislation in this country. The purpose of this paper is to draw attention to its central features.

Application of R.T.A.

By s.5(1), the Act applies "notwithstanding the P.L.A.", to dwelling-houses and tenancies of dwelling-houses. "Dwelling-house" is defined by s.6 as "premises let for the purpose or principally for the purpose of residence." The term includes units or parts of multiple houses or other buildings and also land let with premises that are dwelling-house within the meaning of the definition. The term does not however include licensed premises, licensed club premises, premises that are ordinarily let for holiday purposes or premises in respect of which the tenant who is a mortgagor or purchaser has attorned tenant to the landlord who is the mortgagee or vendor. These exclusions will remain subject to the P.L.A.

While the provisions of the Act are declared to apply to every "tenancy agreement"[10] (defined by s.6 as "an agreement between a landlord and tenant for the letting of a dwelling-house"), by s.5(2) nothing in the Act "prevents a landlord and tenant from agreeing to terms and conditions that are not inconsistent with the rights, obligations and restrictions conferred or imposed" by the Act. There is thus recognition that the Act is not a complete code of residential tenancy law. It would appear in any event that some of the provisions of the P.L.A. may still apply to R.T.A. tenancies. As to

10. While generally tenancy agreements entered into before and valid and subsisting at the commencement of the Act are covered by it, the important ss. 7, 8 and 15 apply only to tenancy agreements entered into after its commencement.

the possible effect of s.5(2) on any attempted contracting out of the Act, there is some uncertainty. Some of the provisions in the Act specifically preclude any agreements to the contrary, but in the case of others the position is more doubtful. It would have been preferable if the Act had been more specific on this matter.

Implied obligations in tenancy agreement

S.7 will probably be considered as bringing about the biggest change in landlord-tenant law, in so far as it deals with a landlord's obligations concerning repairs and fitness for human habitation. It provides that, notwithstanding any agreement between a landlord and tenant, there shall be implied obligations in tenancy agreements:

(a) on the part of the landlord —

(i) To allow the tenant during the tenancy quiet enjoyment of the dwelling-house and fixtures, fittings, goods and chattels let therewith;
(ii) To provide and, during the tenancy, maintain the dwelling-house in good tenantable repair and in a condition fit for human habitation;
(iii) To maintain during the tenancy fixtures, fittings, goods and chattels let with the dwelling-house in good tenantable repair;
(iv) To comply with all lawful requirements in regard to health and safety standards with respect to the dwelling-house;
(v) To keep common areas (in cases where the dwelling-house is part of a multiple house or other building) in a clean and safe condition;

(b) on the part of the tenant —

(i) To care for the dwelling-house and fixtures, fittings, goods and chattels let therewith in the manner of a reasonable tenant;[11]
(ii) To repair, within a reasonable time, damage to the dwelling-house of fixtures, fittings, goods and chattels let therewith caused by the wilful or negligent conduct of the tenant or persons coming into or upon the dwelling-house with his consent;
(iii) To conduct themself and to ensure that other persons in the dwelling-house with his consent conduct themselves in a manner that will not cause a disturbance or be a nuisance or an annoyance to adjoining or neighbouring occupiers;
(iv) To pay the rent agreed upon or as subsequently varied at the times specified therein.

While there can be no contracting out of s.7, there would appear to be no objection to other or greater obligations being undertaken provided always that the statutory obligations remain fully effective.

The P.L.A. imposes on lessees (unless otherwise agreed) the obligation to keep in repair, except in the case of a lease for a term of three years or less of premises for the purpose of human habitation.[12] In the latter case, the obligation is imposed (notwithstanding any contrary agreement) on the lessor to provide and maintain the

11. *Cf. Carren* v. *Keen* [1954] 1 Q.B. 15, [1953] 2 All E.R. 1118.
12. P.L.A., s.105.

premises in a condition reasonably fit for human habitation, and, in the case of all such short term leases (whether or not for human habitation), on the lessee to care for the premises in a manner of a reasonable tenant and to repair damage caused by him or by persons coming on the premises with his permission,[13] without any onus on the landlord of proving that such damage was caused by "wilful or negligent conduct"[14] as is required by R.T.A., s.7. Thus despite minor differences, somewhat similar provisions now appear both in the P.L.A. and R.T.A. Both Acts came into force on 1 December 1975, but the R.T.A. was enacted later and, would, even apart from s.5 of the R.T.A. (*supra*), be regarded as superseding any overlapping or inconsistent provisions in the earlier Act. There is still a good deal of scope for the P.L.A. in its application to short term residential tenancies (e.g. holiday lettings) excluded from the R.T.A.

An important change in the law brought about by the R.T.A. and, to a lesser extent, by the P.L.A. is the abolition of the common law rule that, in the absence of express provision, there was no obligation on a landlord to ensure that premises were in good repair or fit for human habitation or, if they were, that they would remain that way. The only common law exception was confined to a tenancy of furnished premises, in which case there was an implied condition that the premises were fit for habitation, but at the outset only. The landlord's obligation to keep common areas "in a clean and safe condition" (i.e. in cases where the dwelling-house is part of a multiple house or other building) is a new feature (going further than the common law)[15] which may impose a considerable burden on the landlord and have implications for him in torts law. One of the minor problems which seemed to worry members of the Legislative Assembly when the Bill was debated was whether a landlord would under s.7 now have to mow the lawn; the answer is not free from doubt.

The obligations cast by s.7 on landlord and tenant respectively are consistent with recommendations of the Sackville Report on this matter,[16] but that Report's proposals on *enforcement* of a landlord's obligations[17] are ignored by the R.T.A. (and the P.L.A.). The R.T.A. theory is fine; the practice however may turn out to be quite different. There is no provision in the Act for any overseeing of the landlord's obligations; it remains an uncertain matter for the tenant as to what he should do to enforce his rights, short of a troublesome action for damages or for an injunction. The debate on the Bill showed some anxiety on this point. If the landlord does not carry out required repairs, within a reasonable time after the tenant has served notice on him calling upon him to do so, the tenant may have the repairs carried out and then claim their cost from the landlord as damages for breach of contract. The question of the tenant being

13. P.L.A., s 106.
14. An expression which seems to emanate from the Sackville Report, p.64.
15. See *Liverpool City Council* v. *Irwin* [1976] 2 All E.R. 37.
16. Report of the Commonwealth Commission of Inquiry into Poverty, *Law and Poverty in Australia,* 1975, at pp.63-64.
17. Ibid., at pp.65-68.

relieved from liability to pay rent, if the landlord fails to repair, is a more difficult one and may depend on the application of leases of the doctrine of interdependence of covenants, i.e., in the case of a tenancy, the interdependence of the obligation to pay rent and the performance of the landlord's obligations. It is however, now possible that the tenant may be entitled to set off the reasonable cost of repairs against rent.[18]

The weakness from a tenant's point of view of his seeking to take advantage of any provision of the R.T.A. in his favour is that a landlord may decide to get rid of a "troublesome" tenant who is threatening to prove expensive by his demands for his landlord's compliance with the s.7 obligations. As will be seen, his tenancy (if periodic) may be terminated by his landlord without cause under s.17(3) or he may find himself faced with a "variation of rent" under s.9. The tenant (whether periodic or not) may himself repudiate the tenancy by appropriate notice under s.17, and this is indeed one of the remedies recommended by the Sackville Report as a last resort in "extreme circumstances," as "no tenant should be obliged to live in premises unfit for habitation or in a state of serious disrepair."[19] The other proposed enforcement remedies all seem to depend on the tenant's obtaining court (or "Residential Tenancy Board") orders, with inevitable consequent delays. There may be a part for the innovative Small Claims Tribunals[20] in Queensland to play here.

However critical one may be of the R.T.A., s.7 is at least an improvement on the situation in which common forms of lease formerly used in Queensland normally imposed on tenants considerable repair obligations, though there was in any event a statutory liability.[21] It is in the landlord's interest to preserve his property and perhaps it may not be too much to expect that at least the average reasonable landlord will pay due attention to his statutory obligations under s.7. But that is to speak only of the legal position. In this writer's experience and knowledge, landlords in practice, whatever tenancy agreements, statutes or the common law may say, in general do undertake the burden of repairs which may in fact be the legal responsibility of their tenants — and this is particularly true of the lower end of the rental scale.

Dwelling-house damaged or destroyed

A particularly useful provision in the case of a fixed term tenancy or a periodic tenancy with a long recurring period occurs in s.14. Where a dwelling-house the subject of a tenancy is destroyed or damaged from any cause (other than the act or default of the tenant, his servant or agent or any other person in the dwelling-house with

18. *Knockholt Pty. Ltd.* v. *Graff* [1975] Qd.R. 88; and see *Lee — Parker* v. *Izzett* [1971] 3 All E.R. 1099.
19. Op. cit., at p.65.
20. Set up under the Small Claims Tribunals Act 1973 — 1975.
21. See *Leahy* v. *Canavan* [1970] Qd.R.224 (tenant liable for repairs under s.70 (now repealed) of Real Property Act 1861-1976, even if lease unregistered or by parol).

his consent), so as to render the dwelling-house or a substantial part thereof unfit for occupation as such, the landlord or tenant may, at any time within one month after the date of destruction or damage, give to the other of them notice in writing terminating the tenancy. In such case, the tenancy is retroactively taken to have terminated on the date of the destruction or damage, but without prejudice to any right that may have accrued to the landlord or tenant prior to such termination. This has to be read in conjunction with a proviso in s.7 that the implied obligations on the landlord's part shall not operate to imply on the part of the landlord an obligation to rebuild or reinstate the dwelling-house where the destruction or damage has resulted in the termination of the tenancy under s.14.

S.14 is not expressed to apply notwithstanding any contrary agreement, and it is not clear to what extent it can be varied by agreement between the parties "not inconsistent" with it.[22] Further, the section, while welcome as a change in the long-established rule which in general has prevented the application of the doctrine of frustration to executed leases,[23] nevertheless has some curious features. It does not, for example, alternatively grant the tenant relief from payment of rent, as does the proviso in s.105(1)(a) of the P.L.A. which, unless otherwise agreed, allows abatement of rent in case of destruction or damage rendering the premises unfit for occupation or proportionate relief from payment of rent according to the nature and extent of the damage,[24] as well as the suspension of all remedies for recovery of rent until the premises have been rebuilt or made fit for the occupation and use of the tenant. No relief by way of termination of tenancy is available to a tenant under s.14 of the R.T.A. unless a substantial part of the house is unfit for occupation and he will apparently remain liable for the full rent.[25]

Again, the protection afforded the landlord by the above-mentioned proviso in s.7 may free the landlord from rebuilding or reinstating the dwelling-house, even though the destruction or damage may have been due to his own lack of repair and maintenance.[26] However, the tenant may well be liable, under *his* implied obligations, to repair premises which have been damaged as a result of the wilful or negligent conduct of the tenant or those present in the house with his consent, as in the circumstances s.14 will avail him naught.

Variation of Rent

As mentioned above, rent control had all but disappeared in Queensland by 1970 and its last vestiges were destroyed in that year.

22. See s.5(2).
23. With the result that a tenant at common law remains liable for the rent and for repairing obligations even if the subject-matter of the lease is accidentally destroyed. However, most leases in Queensland have mitigated the effect of the rule.
24. *Cf.* Sackville Report, at p.76.
25. *Quaere,* whether the proviso in s.105(1)(a) of the P.L.A. may still affect residential tenancies.
26. But, like the tenant, he cannot terminate the tenancy under s.14 unless a substantial part of the house is unfit for occupation.

However the security of tenure provisions in the Termination of Tenancies Act 1970 had a somewhat similar effect with respect to periodic tenancies of dwelling-houses in so far as by s.18 of that Act a notice to quit was not effectual to determine the tenancy unless it was given on one or more of certain grounds or the vague "proper and sufficient ground," and if the landlord was unable to terminate the continuing tenancy unilaterally he was unable to increase the rent unilaterally[27] unless the lease contained an express term to that effect. However, s.18 was uncertain in its effect as it applied "subject to any agreement between the landlord and the tenant as to the determination of the tenancy by notice to quit." Consequently, whatever that really meant, landlords took no risks and always contacted out of s.18.

Section 9 provides that, subject to any agreement between a landlord and tenant, a landlord may vary the rent of a dwelling-house held under a periodic tenancy on giving to the tenant at least one month's notice in writing of the proposed variation. Even if the parties have agreed between themselves as to the period, the notice may not be for less than one month.

The Sackville Report took a moderate line on rent control and did not recommend the introduction of a general system of control. Instead it recommended the adoption of a selective system whereby any premises leased at an excessive rental might be "declared" and a new rental set by reference to current market values, somewhat in the lines of the Victorian system.[28] But there is nothing in the R.T.A. which operates in any way as a restriction or limitation on rent increases. Subject to the requirement relating to notice of variation, the landlord may now increase the rent of a periodic tenant by as much and as often as he pleases, subject only to market forces, and without any requirement to determine the existing tenancy.[29]

Freedom from rent control in Queensland is a matter of philosophy, endorsed apparently by the public and by politicians on all sides, and is a reflection of the free market, private enterprise atmosphere of the State. One measure of the success of these policies is the amount of housing available for letting in the State, particularly in the heavily populated south-east corner, in sharp contrast to other heavily populated parts of Australia. Currently supply exceeds demand in practically all sectors of the private rental industry. This is not to say that there are not unreasonable landlords who may make excessive or multiple demands for rent increases on their tenants. But landlords have to take account of market conditions and any landlord who is too greedy for rent will soon find himself with empty premises on his hands.

Nor is it to deny that there are tenants who may find themselves at or below the poverty line as a result of their having to pay market values. The Queensland attitude is that this is a problem for social

27. *Mitchell* v. *Wierıks* [1975] Qd.R.100. If the notice to quit were valid, it could be combined with the offer of a new tenancy at the increased rent (*ibid.*).
28. Op. cit., at pp.87-89. The Report also proposed (at p.85) that a minimum period of six weeks' notice should be given before a landlord could increase the rent.
29. The tenancy agreement may in fact prohibit any variation of rent.

security and not a justification for interference with private landlord-tenant arrangements. It is noteworthy that in the United Kingdom, the exemplar of those who advocate rent restriction and security of tenture, the Government there has tacitly conceded that the Rent Acts have in many respects aggravated the housing crisis and that it might have to revise its hostile attitude to private landlords.[30]

Assignment and Subletting

The Sackville Report recommended that a tenant should have the right to assign or sublet, notwithstanding the express terms of the lease (which have usually severely restricted the tenant's common law right), subject to his obtaining the landlord's consent which should not be unreasonably withheld.[31] This is the purport of s.15, though with certain limitations. Thus, in fact, the prohibition on a landlord's unreasonably withholding his consent applies only in the case of a tenancy for a fixed term of six months or longer and only in respect of a proposed assignment of the lease or a proposed sub-letting of the *whole* of the dwelling-house. In any other case, the landlord may grant or withhold his consent at his discretion.

This provision of the R.T.A. is nothing like as broad or as favourable to the tenant desiring to assign or sublet as s.121(1) of the P.L.A. which also applies notwithstanding any contrary agreement. Despite inconsistency between the two sections, it is likely that s.121 would nevertheless be allowed to have some effect with regard to residential tenancies.[32]

Mitigation of Damage

An overdue reform is introduced by s.16 which provides that a landlord or tenant entitled to claim from the other damages for loss caused by a breach of a tenancy agreement or provision of the R.T.A. has the same duty to mitigate his damage as that which applies generally under the law of contract.

This doctrine from the law of contract had not hitherto been applied in landlord-tenant law, at least in the most common situation likely to be affected by the change in the law, i.e., where a tenant, in breach of his agreement, abandoned the premises and threw possession upon the landlord. In this case, the landlord might simply have left the premises idle and still claimed the recurring amounts of rent from the abandoning tenant. He might even at his option have brought an immediate action for breach of agreement in which we would have been entitled to recover the full amount of the agreed rent for the whole term; but there would have been deducted there from such sum as the Court considered he was likely to derive as profits from the use of the land during the residue of the term.[33]

30. *The Times*, 1 Feb. 1977, see attachment "A", *infra.*
31. Op. cit., at pp. 77-78.
32. S.121 of the P.L.A. also contains certain provisions as to covenants against the making of improvements without consent and the alteration of user of premises without consent and presumably these may apply to residential tenancies.
33. *Buchanan* v. *Byrnes* (1906) 3 C.L.R. 704.

The Sackville Report recommended that a duty should be imposed on a landlord to make reasonable attempts to minimize financial loss arising from the tenant's abandonment of the lease.[34] S.16 is expressed in more general terms and applies both to a landlord and tenant where either is "entitled to claim from the other damages for loss caused by a breach . . ." This seems to go further than the law as stated by the High Court of Australia in *Buchanan* v. *Byrnes*[35] and it is considered that it would cover the case of a landlord not making reasonable efforts to find a substitute tenant. A tenant is also now under a duty to mitigate his damage in the event of a landlord's breach and this may involve the tenant in a certain measure of repair to avoid further loss.

According to the Sackville Report, it is not known to what extent landlords actually do claim the rent as it falls due from abandoning tenants. The previous law (in Queensland) may indeed have been unfair to tenants in theory, but the impression one gains is that in practice the principle was not enforced by landlords against tenants because in most cases it would have been throwing good money after bad.

Termination of tenancies — insecurity of tenure

As mentioned above, the clause which sought to continue the "grounds" provision relating to the termination of the tenancy of a dwelling-house, and consequently giving security of tenure, disappeared from the Property Law Bill when it was re-introduced with changes in 1974. The Termination of Tenancies Act 1970, which contained a "grounds" provision, was completely repealed by the P.L.A., but the Minister indicated that it was proposed to enact before the P.L.A. came into operation on 1 December 1975 separate legislation relating to tenancies of dwelling-houses. The present writer was prophetically wrong (at least in the short term) when he predicted that the discussion of the clause would still be found to be of use, "not just for historical reasons, but more pragmatically because of a strong possibility that it will before long arise phoenix-like from the ashes in some new form".[36]

The Sackville Report, which considered the termination of leases under the heading "Eviction of Tenants," recommended that the grounds upon which landlords could give tenants a notice to quit should be restricted.[37] The grounds listed in the Report coincide in the main with the grounds in s.18(2) of the new repealed Termination of Tenancies Act 1970. The R.T.A., however, having relieved tenants by placing the main burden of maintenance on landlords, proceeded to deprive tenants of security of tenure, except in the case of a fixed term tenancy where there has been no breach by the tenant. A landlord is given by s.17(3) the right to terminate a periodic tenancy, even without breach on the part of the tenant, by a minimum one month's notice to quit irrespective of the type of

34. Op. cit., at p.77.
35. (1906) 3 C.L.R. 704.
36. H. Tarlo, *Property Law Reform in Queensland,* (1974) 8 *U.Q.L.J.* 205, at p.235.
37. Op. cit., at p.81.

periodic tenancy. Similarly a tenant may terminate a periodic tenancy, but in this case by a minimum fourteen days' notice to quit given to the landlord. In both cases, this is subject to any agreement between the landlord and tenant as to termination, but the minimum periods of one month and fourteen days respectively are not reducible.

In the case of a *breach* by the tenant of any obligation, express or implied, whether the tenancy is periodic or for a fixed term, the landlord may by s.17(1) terminate the tenancy by a minimum fourteen days' notice, provided there has been no waiver.[38] By s.17(2), in the case of a tenancy for a fixed term, mutuality (in theory, at least) is achieved by allowing the tenant, where the landlord is in breach of any obligation express or implied and there has been no waiver by the tenant, to terminate the tenancy by a minimum fourteen days' notice.[39]

Thus all fixed term and periodic tenancies, other than fixed terms where there has been no breach, may be terminated by either party, the minimum period in every case being 14 days, except that a minimum one month's notice is required if a landlord is terminating a periodic tenancy without breach of obligation by the tenant.[40] These periods vary from these recommended by the Sackville Report and are generally less than the periods suggested therein, the only exception being in the case of a notice to quit served on a defaulting tenant (the Report proposing to give the tenant, in appropriate cases, the opportunity during the period of 14 days to remedy the breach.)[41] Further, the R.T.A. gives no protection against retaliatory eviction, as recommended by the Report. This would require the court to declare invalid a notice to quit, if it appeared that the notice was issued by the landlord as a result of an attempt by the tenant to enforce his legal rights.[42]

A distinction is made by s.17(5) between a notice to quit given by a landlord and one by a tenant in that, while in either case the notice may be given orally or in writing, a notice given by a landlord is not enforceable under the R.T.A. unless the notice is in writing. This is a provision in the tenant's favour, though there are bound to be prob-

38. For a change operating in favour of the landlord in the law relating to waiver, see s.10(3).
39. As to the possibility of contracting out of s.17(1) or s.17(2), neither subsection contains a provision similar to that in s.17(3) making the notice periods of one month and fourteen days in s.17(3) incapable of reduction by any agreement between the landlord and tenant. On the other hand, neither subsection is stated to be subject to any agreement between the landlord and tenant, as is s.17(3). No clear answer can be given, but it is arguable that an agreement varying the period would be regarded as being inconsistent with the Act and so impliedly void under s.5(2).
40. By s.17(4), a tenancy at will may be terminated by a demand of possession without notice. *Cf.* the requirement by P.L.A. s.137 of notice for "a reasonable period" to terminate a tenancy at will. By s.17(7), in the case of a tenant holding over, the landlord may, without further notice or demand of possession, proceed to recover possession.
41. Op. cit., at p.78-79, 82. *Cf.* the periods prescribed by the Termination of Tenancies Act 1970, s.18(4). On the general question of security of tenure, see attachment "A", *infra.*
42. Op. cit., at p.80.

lems of proof relating to an oral notice given by a tenant. Among the various requirements in respect of a notice in writing pursuant to s.17, it is provided in sub-s.(6) that the notice must if a breach is being relied on, specify and give particulars of it, but there is no need to call on the tenant to remedy the breach.

The P.L.A. contains a series of provisions in s.113 — 136 relating to notices to terminate periodic tenancies; such notices must expire last day of a period. However under s.18 of the R.T.A. a notice given for the required period with respect to a dwelling house may expire at any time, notwithstanding that the date on which possession is to be given does not coincide with the last day of a period of the tenancy, the rent payable, where appropriate, being apportioned.

Re-Entry and forfeiture

A reference in s.20 (primary proceedings for possession) to the term or interest of a tenant having "otherwise terminated" seems to recognize in effect that a residential tenancy may still be determined by re-entry for breach, either on the basis of a term to that effect in the tenancy agreement or under the implied power to re-enter and determine the tenancy given by s.107 of the P.L.A., though it would seem more convenient for a landlord simply to proceed by notice under s.17. However, the question arises whether the relief against forfeiture provisions of the P.L.A. remain applicable to residential tenancies. S.124 (restriction on and relief against forfeiture) of the P.L.A. does not extend to any lease or tenancy for a term of one year or less and this together with certain other exclusions from s.124 would appear to make its substantive provisions of academic interest only. However, by s.124(7), the rights and powers conferred by the section are "in addition to and not in derogation of any right to relief or power to grant relief had apart from" the section. Thus the equitable jurisdiction of the Supreme Court to grant relief against forfeiture[43] continues and there seems no reason why it should not apply to residential tenancies.

The Sackville Report thought that the law relating to forfeiture of leases was generally satisfactory from the tenant's point of view. But it was considered imperative that claims for relief from forfeiture should be heard before courts of summary jurisdiction or preferably before a Residential Tenancies Board in the form recommended by the Report. "Relief from forfeiture may be a valuable defence for some tenants, but to be effective the remedy must be available speedily and without substantial cost."[44] In Queensland, if the right to relief from forfeiture, whether in its statutory or equitable form still exists in respect of tenancies subject to the R.T.A., such relief may be obtained only in the Supreme Court.

43. Not necessarily in case of non-payment of rent only: see *Shiloh Spinners Ltd.* v. *Harding* [1973] A.C. 691; *Pioneer Gravels (Qld) Pty. Ltd.* v. *T. & T. Mining Corporation Pty. Ltd.* [1975] Qd. R. 151.
44. Op. cit., at p. 83. The Report also proposed that "peaceable re-entry" (or self-help) should be abolished as a means of forfeiting a lease or evicting overholding tenants (p.84).

Summary recovery of possession

This part of the R.T.A. (ss. 20 — 28) reproduces with some changes the similarly described parts of the Termination of Tenancies Act 1970 (now repealed) and of the P.L.A. The Sackville Report recommended measures to streamline the procedures for ejecting tenants in breach, and this has been done, though of course the Queensland legislation covers also non-breach cases. It has been estimated that in Victoria the lapse of time between the tenant's default and execution of a court order for possession was a minimum of ten weeks and, more commonly, three to four months. "There is no doubt that this delay may cause considerable hardship to a landlord who is unlikely to be receiving rent during the ejectment proceedings."[45]

There has always been a fairly expeditious procedure in Queensland for recovery of possession. In theory, the new procedure (in the Magistrate's Court, as previously) allows uncontested matters to be dealt with within a couple of weeks and not much longer for a contested matter. But one commentator estimates that, "even in the uncontested case of the tenant who has stopped paying his rent, it will take about five weeks for even the most diligent landlord with the most efficient solicitor to get rid of him," and perhaps a week longer depending on what meaning is given to the provision in s.7 of the R.T.A. that a "tenant shall be taken to have failed to perform the obligation to pay the rent if the rent in respect of any period of the tenancy remains unpaid for seven days after that rent becomes due."[46] This probably postpones for seven days the landlord's right to terminate the tenancy by notice to quit under s.17(1).

Concluding comment

The purpose of this paper is neither to praise or to decry the R.T.A., but principally to convey information about the Act and to a minor degree try to evaluate it in the context of the Sackville Report. Admittedly the R.T.A. is not just a set of rules governing those in a particular economic stratum of society. But the Sackville Report, in its section on *Poverty and landlord-tenant law,* considered it "impossible to remedy the legal disadvantages imposed on poor and vulnerable tenants without affecting the wider landlord-tenant relationship." The legal and administrative difficulties in creating special rules for poor tenants are, according to the Report, simply too great, despite the apparent attractiveness of such an approach.[47] Consequently, it comprehensively reviewed the residential landlord-tenant relationship without focusing particularly on the problems faced by tenants at or below the poverty line, though its statistics showed that tenants were more likely to be poor than the

45. Op. cit., at pp.83-84.
46. See J.B. Thomas, *The Residential Tenancies Act 1975,* (1976) 6 *Qd.Law Soc.Jo.* 51, at pp.55-56.
47. Op. cit., at p.59.

rest of the population.[48] Thus the Minister, when describing the philosophy of the Residential Tenancies Bill (as relating to "the bulk of people in the community making reasonable arrangements"), was not accurate when he asserted that the Sackville Report was only "concerned with people in dire straits and exceptional circumstances."[49]

While there is an obvious trade-off in the R.T.A., with the landlord's obligation to provide and maintain premises in good repair and fit for habitation being set off against the non-defaulting tenant's no longer being able to rely on a statutory security of tenure, yet the Act has generally been accepted in Queensland as a reasonably fair compromise between the interests of landlord and tenant. A member of the Parliamentary Committee involved in the drafting of the Bill (Mr. D.F. Lane) explained that the general approach to the legislation had been one of flexibility:

> "We have endeavoured not to lay down too many rules or too many inflexible guide-lines that would perhaps perpetuate the problems that arose under the Termination of Tenancies Act. It was necessary, however, to impose some basic obligations on both parties to the landlord-tenant relationship . . . Both landlord and tenant will retain the freedom to enter into any fair agreement. Any agreement that sought to encroach on these basic obligations would not be a fair one, so neither party is permitted by law hereafter to enter into such an agreement."[50]

The R.T.A. has been severely criticized by one commentator who completed his analysis of the Act by describing it as:

> "one sided legislation designed to advance the interests of property owners and oblivious to the housing needs of tenants at a time when consumerism is pervading the landlord-tenant relationship . . . It seems more accurate to describe it as nothing more than a landlord's charter."[51]

Landlord-tenant law is a subject on which passions may run high and that writer acknowledged that he was far more concerned with the protection of tenants than of landlords. The writer of this paper cannot agree with many of his conclusions or even with the accuracy of some of his analysis.[52]

One of the several aspects of the landlord-tenant relationship which is not covered by the R.T.A. relates to security deposits. The N.S.W. Government has recently proposed that the Government

48. Ibid., at p.57. It was referring to tenants of both privately and publicly owned residential accommodation. The R.T.A. does not apply to the State Housing Commission and consequently the Sackville Report's recommendations with regard to public housing authorities (see pp.94 — 101) are not relevant to a discussion of the R.T.A.
49. [1975] *Parl. Debates* (Qld.) 25 Nov., 2254.
50. [1975] *Parl. Debates* (Qld.) 13 Nov., 1906. For these reasons the Committee had rejected the concept of a model tenancy agreement to apply in all cases. The Sackville Report (pp.89-90) too did not recommend a standard form of lease, but merely that legislation should imply certain terms in all residential leases which should override the terms of the lease and that all professionally or commercially prepared leases should specifically incorporate the statutory terms.
51. G.L. Teh, *Queensland's Residential Tenancies Act 1975: Landlord's Charter or Fair Law,* (1976) 9 *U.Q.L.J.* 199, at p.223.
52. One of Mr. Teh's assumptions is that there is a dire shortage of accommodation in Queensland, but this is not so (as indicated *supra*).

there should hold all bond money collected from tenants and draw interest on it to provide funds for terminating buildings societies and to finance tenants' advice bureaux. This proposal is somewhat similar to the recommendation of the Sackville Report that all security bond money should be paid to Residential Tenancies Boards to be invested and the income used to offset the cost of the services provided by the Boards.[53] However the New South Wales proposal soon ran into difficulties when it was pointed out that the landlord would simply need to increase the rental rather than ask for a bond. In Queensland, the contentious matter of recovery of deposit is left to the action of the tenant who has at his disposal the cheap, informal and expeditious procedure of the Small Claims Tribunals. This has proved quite an effective remedy and the publicity associated with claims (the names of the parties and the decisions of the Tribunals are regularly published in the newspapers) has done much to encourage landlords to deal honestly, fairly and quickly with their tenants in the matter of the return of security deposits.

The R.T.A. is far from perfect: it is badly drafted in some respects, there are many matters that it does not cover, it is uncertain what scope is still left to the P.L.A., the balancing of competing interests is to some extent a shadow exercise without practical reality; yet despite all these defects, it has to be seen as at least an attempt to create a new approach towards the difficulties which beset the landlord-tenant relationship. But this writer is far from suggesting that what is right for Queensland is necessarily good for or should be attractive to other places. *Chacun a son gout.*

Attachment A

"Not the Way to Help Tenants"

According to *The Times* of 1 Feb. 1977, a "consultation document" published by the U.K. Department of the Environment acknowledges criticism that the Rent Acts "inhibit the existing stock of housing from being used to full advantage or maintained in proper condition." *The Times* comments:

> "Given previous ministerial hostility to the whole concept of private renting the document appears to represent a political about-turn . . . The view amongst ministry officials appears to be that, although the housing pattern has been polarizing for many years between owner-occupancy and council-tenancy, the private rented sector needs to be shored up for some time to come."

There is of course a far stronger element in the U.K. than in Australia of council tenancy (equivalent to State Housing Commission tenancies in Australia). Further, in the U.K. there are, as part of the social security system, not only grants to assist landlords to recondition premises, but also rent allowances to poorer tenants,

53. Op. cit., at pp.70-71.

though apparently the latter have been taken up by only one-third of those entitled to them.

Governmental surveys in the U.K. have shown that there was a sharp drop in the availability of rented accommodation immediately after the *Rent Act* 1974 came into force. Even such a tenant-orientated organisation as *Shelter* has conceded that the Rent Acts have created a sense of injustice and contributed to homelessness. Of course it is not a question simply of rent control; there are the difficulties experienced by landlords in obtaining possession and the matter of responsibility for repairs, as well as the relationship of rents to the cost of providing the accommodation. *The Times* points out that it is the last item that is likely to prove the greatest stumbling block, "since it is acknowledged that many landlords do not find it worthwhile to let their property."

There was also an editorial on the topic in *The Times* of the same date entitled, "Not the Way to Help Tenants." This stated that such gains as have been made with regard to the lower end of the rental market have been made at a heavy cost.

> "The 1974 Act, extending security of tenure to the furnished tenant, only completed a long train of legislation concerned with the landlord only as potential oppressor."

The editorial considered that it was the excessive weight given to the tenant's security in all circumstances that most limited the usefulness of the private sector.

> "As at every other level, our housing policy heaps benefits, often irrelevant , on the incumbent tenant at the expense of those who seek to become tenants themselves. A major easing of the housing shortage could be achieved by drastically widening the opportunities for a landlord to enter into an agreement with a tenant without signing his property away for a lifetime."