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Balancing the scales of property rights: improving security of tenure for Queensland tenants – how and why

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ABSTRACT
Housing is a primary requirement of life and so home ownership remains the ideal for most people. However, not everyone is able to, or wants to, own their own home. These individuals depend upon rental accommodation as their form of home tenure with the number of individuals and families who live in rented accommodation steadily increasing. Ensuring that residential tenants have security of tenure for their home of choice is a right in many jurisdictions but not in Australia. Focusing on the Queensland position, the author examines the current lack of security of tenure experienced by private residential tenants in the context of the recently announced Queensland Government review, and in doing so they highlight matters requiring government attention. The article concludes by recommending changes to existing laws to improve security of tenure for tenants; as well as providing interim measures that may be adopted both long term and prior to finalisation of the current review.

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Introduction

The Australian psyche is geared to wanting to be your own master. As regards to housing, this translates into the desire to own your home rather than rent your home from someone else (Adkins et al., 2002, pp.16–20; Koothari, 2007, [65]). In many jurisdictions this desire is supported by state-funded programs, which provide varying levels of support to enable home acquisition. In Australia, this is seen in various programs targeted to first home owners: for example, the Queensland First Home Owners' Grant scheme. In other jurisdictions this is seen in capital subsidy schemes (Fitzpatrick & Watts, 2017). However, many individuals, in Australia and elsewhere, still have no choice but to rent as both costs and other circumstances impede their ability to own their own home (Bennett, 2016). Separately others, by choice, rent because it suits their lifestyle (Adkins et al., 2002, p. 25). A reason some private residential tenants do not seek longer terms, or better security, is because they believe the present system offers them more flexibility (Morris, 2006; Tenants Union of Victoria, 2015). The current lack of security of tenure at law for private residential tenants therefore would not appear to be a major concern.

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In some areas the overabundance of available rental units, in the Queensland context for example this can be seen in the spate of unit development in Brisbane (Levy, 2018), may in fact give the impression that, as the private residential tenancy market at the moment is in favour of tenants as regards available units, tenants have more power. As such all would appear to be balanced. Those impressions, however, do not reflect current residential tenancy practices or many tenants' reality. A significant social issue exists in Australia: as a consequence of the lack of a guarantee of security of tenure, residential tenants generally are constrained in their use of their home, and can feel *less* than home owners (Choice, 2017). As has been previously considered, this reality is at odds with Australia's international obligations regarding the human right to housing (Wharton & Cradduck, 2011).

While the number of Australians renting has steadily increased, conversely their rights have not (Choice, 2017). Under the current Australian framework most private residential tenants do not have, and do not have an expectation of, lengthy rental tenures, which compares unfavourably with the expectations of most public housing tenants (Wiesel & Pawson, 2015). In Queensland, for example, landlords are able to require tenants to leave at the end of their tenancy without the requirement to provide reasons (s. 291 *Residential Tenancies and Rooming Accommodation Act 2008* "RTRAA")).[1] At the same time, the prescribed residential tenancy agreement form (Form 18a) does not have a space to be completed to include an option for the tenant at their election (or not) to extend their tenancy term when it expires, which means that many tenants do not think to ask for an option to be included as a special term. At the end of the fixed term therefore, while a tenant may request another term, whether this is granted or not is at the discretion of the landlord. This is to be compared to retail shop lease laws, where, irrespective of whether an option term is included in the lease, there is a requirement to offer the tenant a further term at the end of the initial term or to clearly communicate that the landlord will not extend the term (s. 46AA RSLA).

All therefore is *not* balanced in the Queensland private residential tenancy market. Despite residential tenancy laws clearly being consumer protection laws, there has been little change over the last 40 years. Tenants (still) do not have equal bargaining power with landlords (Bradbrook, 1975) as their tenancy may be terminated for no reason. However, as Magistrate Braes observed "[t]he effect of terminating a tenancy is a serious matter and one which cannot be taken lightly…" (Cudo v Moriconi, 2014, [34]). Much work therefore is required to be undertaken at the underlying policy level in order to appropriately balance the power scales and to bring Queensland's tenancy laws into the "new" millennium. This work has begun.

On 30 September 2018, the Queensland Government announced a review of the whole of Queensland rental laws, which Premier Annastacia Palaszczuk intends to result in "contemporary tenancy laws that protect tenants and property owners alike and improve stability in the rental market" (de Brenni, 2018). It is timely therefore to reconsider what are appropriate laws for Queensland private residential tenancies now and in order to ensure the future viability of Queensland's residential tenancy market. It is suggested that the most important concerns are articulating the appropriate level of security of tenure that should be granted to tenants *and* how that security of tenure should be protected. It also now is timely to progress beyond mere discussion of policy positions (Wharton & Cradduck, 2011, footnote 45) and to articulate the specific legislative amendments that should be implemented.

This article's focus is on the position of tenants under the existing Queensland residential tenancy regulatory framework. Specifically, in relation to the means by which a fixed term residential tenancy may be terminated by the landlord *without ground* and the type of notice that is required in these circumstances. The aim is to contribute to the current debate by: identifying the flaws in the existing framework as regards to the impact the ability to give such a notice has to a tenant's security of tenure; developing a number of solutions that could be adopted by the Queensland Government in its review; and promoting reform that will balance the power scales in the residential tenancy market. What is required is a solution to rectify the severity of *without ground* termination while promoting good practices. In the available space the author will articulate long term and more immediate solutions by which this may be achieved.

The article commences by an examination of the current literature regarding home ownership and security of tenure, including engaging with cases in which the current Queensland laws were applied. In doing this it identifies matters requiring attention. It concludes by offering a long-term solution to promote and protect residential tenants' security of tenure, and more immediate solutions that can be used to better inform tenants in the meantime. The issues raised are common to many jurisdictions and the current Queensland review is likely to be of interest to, and observed by, other jurisdictions for the lessons it presents. This article therefore will have a broader interest base beyond those of the various stakeholders in Queensland's private residential tenancy market.

Methodology

The research was undertaken by means of a doctrinal review of the literature and case law. The effect of the lack of security of tenure needs to be considered in a practical context. In order to do this requires engagement with specific laws and cases. As each jurisdiction has its own laws one must be selected for the purpose of this consideration. As relevant to this article the law that applies is from Queensland and cases considered are those from the Queensland Civil and Administrative Tribunal ("QCAT"). The examples, and lessons available, however, are applicable to any jurisdiction that does not currently provide security of tenure for its residential tenants.

Limitations

While noting that there exist similar and other issues for social housing tenants (Bennett, 2016; Fitzpatrick & Pawson, 2014), those issues are beyond the scope of this article. The issue of the financial capacity of particular segments of private tenants as considered, for example, by Morris (2018) also is outside the scope of this article. Further, what is considered here is not the holistic *secure occupancy* model articulated by Hulse and Milligan (2014), but a core component of that model being the legal regime that supports the engagements between landlords and tenants, and through which tenants' rights and interests can be protected.

Increasing a tenant's security of tenure whether by minimum terms or, as is proposed later in this article, by introducing the requirement for the landlord to identify at the start of the landlord–tenant relationship whether it is seeking the possibility of a long-term relationship with the tenant: that is by the clear identification

of the inclusion or not of an option term/s within the residential tenancy agreement, will have impacts for both tenants and landlords. As is seen in case law regarding incorrectly exercised commercial lease options, for example those exercised out of time (Hare v Nicoll, 1966), the mere existence of an option term *per se* brings with it issues regarding its method of exercise, how this needs to be accommodated for and who is to bear the associated costs. This may disadvantage residential tenants who may be unable to afford the cost of legal advice and, while they may think they do, do not in fact understand the process.

Landlords too could be disadvantaged by a requirement to offer an option term as they may reasonably act on the non-exercise of an option to their ultimate detriment when, for example, the "flawed" exercise is in fact recognised by a Court. Further, while the ability to remain for longer terms in any one dwelling is desired by many tenants, this is not desired by all tenants. If minimum terms were either prescribed or became "the norm", it may be that these other tenants would be disadvantaged. What is the appropriate minimum term for a residential tenancy or any option term, and whether these time periods should be prescribed by legislation, is beyond the scope of this article.

Separately, any increase in security of tenure *per se*, with its corresponding increase in the length a tenant remains in any one dwelling, raises issues for maintenance and use. For commercial tenancies, the cost of maintenance is commonly shared between the landlord and the tenant in varying proportions as appropriate. However, for residential tenancies this is a cost to the landlord only. While this position may be reasonable for shorter term tenancies it may not be for longer terms. At what point in time a private residential tenant should be required to contribute to dwelling maintenance, and in what proportion, requires careful consideration and also is beyond the scope of this article.

As an exemplar as to how residential tenants may be better informed of their rights regarding their housing tenure, the author draws upon existing forms and legislative provisions already in use for retail shop leases. However, it is noted that in many respects the underlying rationale for the retail shop lease provisions and forms are quite different to those of residential tenancies, as well as those of commercial tenancies. In particular, residential tenancies lack the goodwill of a business, which refers to a firm's "reputation … in its marketplace and the impact its reputation has upon the perceived value of its business" (Ray, 2018, p. 4), and the more common need to protect that goodwill by enabling security of tenure for the business' lease. However, despite these differences, it is submitted that it is appropriate to engage with the retail shop lease provisions and forms as exemplars of those that have passed Parliamentary scrutiny as being acceptable in form and format.

Literature review

As previously considered, the human right to housing comprises the right to security for your tenure in your home whether you are an owner or a tenant. As Wharton and Cradduck (2011) identified:

> Security of tenure for Queensland tenants has been defined as giving the tenants the 'choice to stay in their home or leave … [with] obvious exceptions', or as encompassing 'a common core of meanings that all refer to the provision for continued occupation of a dwelling'. Although, of course, it can mean a number of things ranging from mild to strong tenant protection against termination of a lease and/or eviction. [references omitted] (p. 17)

Many international jurisdictions have some form of legal right of security of tenure for residential tenants (Bennett, 2016; Hulse & Milligan, 2014). This is particularly seen in European laws, which have embraced a right that is protected both within the European Union and outside it. The national laws of Western European countries, for example those of France and Germany, evidence the general tendency of such laws to only allow the eviction of tenants for legitimate grounds (Victoria State Government, 2015, p. 29; Wharton & Cradduck, 2011). Other jurisdictions, for example England (Fitzpatrick & Watts, 2017) and Australia, notably do not. While not enabling residential tenants' security of tenure, what Australian laws do enable is for the landlord to require the tenant to leave at the end of the tenancy whether they want to or not, and irrespective of the fact that they have been a good tenant (Wharton & Cradduck, 2011).

Available research identified a number of key issues. Firstly, it highlighted the discrepancies between the regulatory frameworks of different jurisdictions in dealing with *without ground* terminations. This further emphasised the difficulties faced by tenants that migrate to Australia from a jurisdiction without this landlord right (Wharton & Cradduck, 2011). Secondly, the research identified the difficulties in balancing the property rights of the landlord (Hulse & Milligan, 2014) with the human rights of the tenant. Consistent with Fitzpatrick and Pawson's (2014) observations, landlord's property right, in this context being those relevant to the exclusive rights of a land owner to generally control who enters their land and under what circumstances, currently have priority. Noting in particular those authors' engagement with Stewart's (1994) early observations that: "[p]roperty relations are relations of power between people: The possession of exclusive rights to something that is scarce and valuable necessarily implied the possession of power over others who also desire the scare and valuable things." [Citations omitted] (Stewart, 1994, as referred to in Fitzpatrick & Pawson, 2014, p. 603).

In Queensland, despite a new tenancy law having been adopted in 2008 (RTRAA), and other more recent amendments that enable the Queensland parliament to prescribe minimum housing standards (Housing Legislation (Building Better Futures) Amendment Act 2017, Part 6, Section 17A – albeit that no standards have as yet been prescribed) tenants have no protection against a *without ground* notice being served to end a tenancy. This situation also persists throughout Australia, although, as is considered later, the position in Victoria soon will change.

It is suggested that this status quo needs to change. In order to promote and protect human rights the default position should be that a residential tenant, who is not in breach of their tenancy agreement and where another prescribed ground does not apply, should be able to remain in their home and to seek an extension of the current tenancy term if they wish (Bennett, 2016; Fitzpatrick & Pawson, 2014).

Status quo *in Queensland*

The current status of Queensland residential tenancy law is that a landlord is able to require a tenant to leave a residential tenancy for a variety of reasons. This includes breaches of the agreement by the tenant (s.281 and s.290A RTRAA), if the premises under a periodic tenancy are sold (s.286 RTRAA), as well for no reason (*without ground)* (s. 291 RTRAA). This ability is to be contrasted with the obligations in

international jurisdictions to give reasons and or to only be able to require a tenant to leave in specific circumstances (Wharton & Cradduck, 2011). There is merit in considering the European models, as in Australia long-term rental is replacing ownership as the dominant housing form for millennials (Hoolachan, et al., 2017). The law, as regards protecting the tenant's human right to housing, however, has not kept pace with this reality.

The current Queensland regime as regards to a notice to leave *without ground* is found within Sections 291, 292, 329 and 330 RTRAA. These provide:

291 Notice to leave without ground

(1) The lessor may give a notice to leave the premises to the tenant without stating a ground for the notice.
(2) However, the lessor must not give a notice to leave under this section because –
  (a) the tenant has applied, or is proposing to apply, to a tribunal for an order under this Act; or
  (b) the tenant –
    i. has complained to a government entity about an act or omission of the lessor adversely affecting the tenant; or
    ii. has taken some other action to enforce the tenant's rights; or
  (c) an order of a tribunal is in force in relation to the lessor and tenant.
(3) Also, the lessor may not give a notice to leave under this section if the giving of the notice constitutes taking retaliatory action against the tenant.
(4) A notice to leave under this section is called a notice to leave *without ground*.

292 Application to tribunal about notice to leave without ground

(1) This section applies if –
  (a) the tenant is given a notice to leave without ground; and
  (b) the tenant reasonably believes the notice was given in contravention of *section 291*.
(2) The tenant may apply to a tribunal for an order to set aside the notice.
(3) The application must be made within 4 weeks after the notice was given.
(4) On an application under this section, the tribunal may make the order sought if it is satisfied the notice was given in contravention of *section 291*.

329 Handover day for notice to leave for premises that are not moveable dwelling premises

(1) This section applies only to notices to leave given for premises that are not moveable dwelling premises.
(2) The handover day for a notice to leave given by the lessor must not be earlier than –

. . .

(k) if the notice is given without ground for a fixed term agreement – the later of –
(i) 2 months after the notice is given; or
(ii) the day the term of the agreement ends.
(3) Nothing prevents a notice to leave under subsection (2)(k) being given at any time before the end of the term of the fixed term agreement.

330 Handover day for notice to leave for moveable dwelling premises

(1) This section applies only to notices to leave given for moveable dwelling premises.
(2) If the tenancy is not a short tenancy (moveable dwelling), the handover day for a notice to leave given by the lessor must not be earlier than –
. . .
(m) if the notice is given without ground for a fixed term agreement – the later of –
(i) 2 months after the notice is given; or
(ii) the day the term of the agreement ends.
(3) Nothing prevents a notice to leave under subsection (2)(m) being given at any time before the end of the term of the fixed term agreement.
(4) If the tenancy is a short tenancy (moveable dwelling), the handover day for a notice to leave given by the lessor must not be earlier than –
(a) if neither paragraph (b) nor paragraph (c) applies – 2 days after the notice is given; . . .

Significantly, the ability of a Queensland landlord to serve a notice to leave *without ground* is not required to be linked to any current breach or inappropriate behaviour by the tenant and may be served on tenants under either a fixed tenancy or a periodic tenancy. A periodic tenancy is one where the end date is not stated, for example if the tenant remains in the premises after the stated end date of the original agreement (s.70 RTRAA) rather than returning vacant possession of the premises to the landlord (s.277 RTRAA).

Such notice, however, must not be served where the tenant has commenced action to enforce a right, or where to do so would be retaliatory. Where the tenant has a fixed tenancy, the notice can require the tenant to leave at the later of end of the tenancy or 2 months after receipt of the notice. Where the tenant has a periodic tenancy, the notice can require the tenant to leave at the end of a minimum of 2 months.

A notice to leave must use the approved form (s.326 RTRAA). The prescribed form, Form 12, requires the landlord or their agent to select at item 4 whether the notice is given *without ground* or *with ground*, with space provided for the details of the specific ground to be provided. A notice that does not select either *without ground* or *with ground* is invalid as not satisfying the requirements of s.326 (Adams v Scowcroft, 2012, [14]). Noting that, as set out in the Form 12, where the notice to leave is given *without ground* there is only a requirement to select that box, whereas if the notice is given *with ground* details of that ground, which must be one of those prescribed within the Act, must be provided in the space available. If a notice is given for a ground other than one prescribed, the notice is deemed to be given *without ground*. For example a notice stating "End of Lease.

Owners require a vacant possession", or similar wording, has been held to be a notice given *without ground* as the ending of the lease (i.e. the approaching of the end date of a fixed term) is not a ground prescribed under the Act (Alikhan v Mian, 2010, [17]-[18]; Cudo v Morconi, 2014, [36]).

Where the notice served is identified as, or is held by QCAT to be, a notice to leave *without ground*, a tenant may bring an action to have the notice set aside *if* it was given after any complaint or other action was taken by the tenant legitimately against the landlord (s.291(2) RTRAA), or the notice is retaliatory (s.291(3) RTRAA), which is for the tenant to prove. Importantly, the protection of s.291(3) RTRAA regarding retaliatory action applies only to a notice to leave *without ground* and not one issued *with ground* (Webster v Smith, 2012, [26]).

The burden of proof relevant to establishing that a notice was retaliatory, is the civil, not criminal standard (Briginshaw, 1938). That is: QCAT must "be 'reasonably satisfied' or feel 'comfortably satisfied' it can reach 'a correct and just conclusion' for each complaint as alleged" (McLachlan v Real, 2011, [12]). Noting, however, that where the tenant lives in assisted housing accommodation a higher threshold test has been held to apply to the issue of a notice to leave *without ground* (Lindenberg v Kalwun, 2011, [58]). However, this lower standard is not necessarily of assistance to tenants as many have found as "it is very difficult of prove claims of retaliatory action" (Cuda v Moriconi, 2014, [15]) as to interpret the term retaliatory too broadly would capture "almost any complaint by the tenant to an agent or landlord" (Du Preez v Linda's, 2010, [16]; also as considered in Spence v Davies, 2011, [8]). Section 291(3) RTRAA must be applied carefully and each case must be considered on its own facts (Du Preez v Linda's, 2010, [16] and [18]). To be held to be retaliatory, the conduct of the respondent landlord in issuing the notice must be "in the prevailing circumstances, unreasonable, excessive or vindictive" ((Du Preez v Linda's, 2010, [17]) and not merely unreasonable to the particular tenant.

One result therefore is that there have been limited successful challenges by tenants in relation to the operation of these procedures, both before and after QCAT became the venue for determining such disputes (s.142 QCATA).[2] Examples of those include: Grimshaw v YMCA (2010), where the tenant satisfied QCAT that the landlord had issued the notice to leave after the tenant instigated a dispute resolution process in regard to the lack of a written agreement evidencing the allocation of a promised car park space ([25]), which was held to be retaliatory action ([26]). In Bauer v McMillan (2013) the Adjudicator at first instance, and the tribunal on appeal [1], confirmed that a notice served after a tenant had complained on numerous occasions about the (lack of) maintenance of the property was retaliatory.[3]

The Lindenberg dispute (Lindenberg v Kalwun, 2011; and Lindenberg v Kalwun (No 2), 2011) is an extreme example of retaliatory action taken by the landlord after a dispute/ill will existing between the landlord and the tenant over a period of 5 years. This included the issue of her lack of membership of the landlord corporation, which the Board refused to allow her to rectify due because it alleged (incorrectly) that she did not meet the requirements for membership (Lindenberg v Kalwun (No 2), 2011, [48]). The dispute, which encompassed two tribunal hearings, involved the landlord's service of two notices to leave *without ground* – the

first dated 2 December 2010 and the second dated 8 June 2011. Those notices were both held to be retaliatory (Lindenberg v Kalwun 2011, [119]; Lindenberg v Kalwun (No 2), 2011, [54]), with the first decision noting the stated reasons for issuing that notice to "trivial and without merit" (Lindenberg v Kalwun 2011, [54]). In setting aside the second notice, QCAT cautioned the landlord against issuing similar notices in the future:

> Kalwun should desist from such acts in the future and that … Ms Lindenberg, and others in her situation, should never be issued with a Notice to Leave without ground for any reason. If a tenancy is to be terminated for conduct or failings by a tenant renting affordable housing from Kalwun, then a Notice to Leave with grounds is the appropriate course of action … Should Kalwun choose to ignore such a position and continue to issue Notices to Leave without Ground to this tenant, then they could find themselves back before this tribunal again with similar application and a claim for compensation. (Lindenberg v Kalwun (No 2), 2011, [55])

It is noted, however, that the facts of the Lindenberg dispute are unique and also that they involved assisted housing and not open market private rentals. Examples of private housing tenants unsuccessfully applying to have a notice to leave *without ground* set aside, despite the particular circumstances, are more common. For example, in Bamfield v Zanfan (2010) while the notice to leave *without ground* was found to be have been served because of the tenant's abusive attitude in response to the landlord's lack of attention to repair work the notice was not deemed to be retaliatory ([22]). In Du Preez v Linda's (2010), while there was "a long history of … discontent … with the conduct of the tenants…" that tenant also was not successful as there was no "assertion of a right by the tenants followed by retaliatory act" ([19]). Similarly, in Spence v Davies (2011), despite "a deteriorating relationship" between the tenant and management, the allegation that the service of the notice to leave *without ground* was retaliatory was not successful ([10]).

In Canendo v Biddi (2012) similarly, to Ms Lindenberg, Ms Canendo was required to be a member of the landlord, which was a housing cooperative, in order to be able to rent property from it ([1]). However, differently to Ms Lindenberg, Ms Canendo's membership was terminated at a properly convened and conducted special meeting of all members of the cooperative and that action was held to be unrelated to her tenancy ([20]-[23]). As such the notice to leave *without ground* was not set aside and her appeal was dismissed (Canendo v Biddi, 2012, [25)]. Other tenants, who may otherwise have succeeded in having a notice to leave *without ground* set aside, failed in their actions because they did not comply with the strict time constraints of the RTRAA to bring an application within 4 weeks of the date of issue of the notice to leave (Cummings v Cairns [22]; McLachlan v Real, 2011, [21]; Wilks v Integrated, 2015, [11]-[12][4]).

More commonly, the service of a notice to leave *without ground* does not result in either a QCAT application, or an academic article. Rather, the tenant merely vacates the dwelling and the rental cycle begins again this time with a new and unsuspecting tenant because there is no mechanism for them to check whether the landlord and or their agent has a history of serving notices to leave *without ground*.

As recent research by Choice (2017) highlights, this position needs to change. To balance the scales government needs to:

> consider ways to better protect tenants' rights and ensure access to quality, stable and affordable housing for all. This means looking at ways to improve security of tenure for renters, as well as to improve affordability and amenity within the private rental market itself. (p. 5)

Solutions

The (now re-elected) Labour Government's policy platform for the 2017 Queensland State election included that they would "... review the private rental housing system to encourage lessors to provide for longer tenure options for tenants, including the introduction of 'prescribed grounds for eviction'" (Queensland Labor, 2017, p.77). Consistent with its Queensland Housing Strategy 2017–2027 (Queensland Government, 2017), by which it stated *inter alia* that it would provide "[f]airness for all" by delivering "better consumer protection and housing stability through legislative and policy reforms" to tenants (p. 17), the government's "Open Doors to renting reform" review has commenced (de Brenni, 2018). The review is in its preliminary phases with the current open consultation running until 30 November 2018. The reality of the volume of work required to modernism Queensland's private rental laws is reflected in the fact that the Queensland Government is engaging in 3 months of preliminary consultations for the purpose of finding solutions prior to it releasing proposed amendments or any new law for specific consultation.

In the meantime, the use of the provisions considered above is common in Queensland (Choice, 2017, p. 18). While the landlord is not permitted to issue a notice in retaliation (s.291(2) RTARA) or if the tenant has asserted its right or there is an order of the tribunal between the parties (s.291(2) RTARAA; (Du Preez v Linda's, 2010), [20]), the ending of a tenancy on the mere whim of a landlord by requiring a tenant to leave at the end of the fixed term, or after 2 months for a periodic tenancy, means the tenant's tenure in their home is not secure. The effect of this regime, absent the ability to exercise an option for a further term, is that, for example in the circumstances of a 6-month tenancy, which is a very common length (Choice, 2017, p. 8), the tenant will be required to start looking for a new home after only 4 months of occupation. Anecdotal evidence,[5] as well as the research referred to above, highlights how stressful this is for residential tenants. Even where the landlord gave 5 month's notice and even though their tenancy ended almost a decade ago, a former tenant still experienced stress when theyvoluntarily and without prompting shared their story with the author.

Appreciating that security of tenure for tenants is multifaceted with some aspects purely within the control of the tenant (Hulse & Milligan, 2014), *security of tenure* in this article, as articulated above, refers to the ability that a residential tenant has to remain in their home for as long as they wish, provided they are not in breach of the tenancy agreement or law. This aspect of security of tenure is within the realm of governments to enable by means of effective and easily enforceable legislation supported by a system of quick, easy to use dispute resolution processes if a tenant's right to security of tenure is disregarded (Hulse & Milligan, 2014, p.651).

The solutions proposed below can be divided between those for implementation in the longer term and those that can be implemented immediately while the current review progresses, and which can be maintained long term. These are:
Long term: remove the right to issue a notice *without grounds*; and introduce the requirement to offer option terms

Immediate: attach a warning notice to, and amend, the residential tenancy agreement to provide space for an option to be included as part of the agreement

Long-term solutions

As has been considered previously, it is necessary to review not merely the basic rights of anyone in their home, but the security of their tenure in that home (Wharton & Cradduck, 2011). To protect that security, it is important that the Queensland Government in fact does introduce a regime of "prescribed grounds for eviction" (Queensland Labor, 2017, p. 77) to prevent tenants from being required to leave their home for no reason. The preferable solution would be to remove the ability to issue any notice *without ground*. Alternatively, any such right to require a tenant to leave *without ground* should be very restricted *and* linked to an increase in the required notice time.

In this regard, Queensland could look to adopt a model similar to that most recently adopted by the Victorian parliament, which is anticipated to commence in 2019. On 18 September 2018, the *Residential Tenancies Amendment Act 2018* ("RTAAV") was enacted and will significantly amend the *Residential Tenancies Act 1997* ("RTAV"). In particular, the RTAAV repeals the existing termination regime contain within Part 6 of the RTAV (s.240 RTAA, 2018) and introduces a new termination regime that will be contained within a new Division 9 of the RTAV. New section 91B RTAAV prescribes that "a residential rental agreement does not terminate and must not be terminated except in accordance with this Division or Part 7 or 8". In this regard, new section 91ZZD RTAAV only enables the landlord to give the tenant a notice to vacate for no reason during the first ("initial") fixed tenancy term. The required time frame for issuing this notice for a fixed term tenancy of not more than 5 years is 90 days for agreements greater than 6 months, and 60 days for agreements less than 6 months. The right to terminate a tenancy in any subsequent fixed terms, or during any periodic tenancies (i.e. where the tenant remains in possession after the end of the fixed term (s.91Q(1) and (2) RTAAV) or where there was never a fixed term), contained currently in section 263 RTAV, has been removed from the new regime.

The most obvious impact, and one that perhaps may be considered to be averse to the interests of landlords, is that during subsequent fixed terms (or if the tenancy is or becomes a periodic tenancy) the landlord will only be able to give notice if the Act permits. That is: after the first fixed term, or during any periodic term, a tenant cannot be required to vacate except for a prescribed ground. However, of more concern, is the potential adverse impact for tenants in that tenants will likely have less secure tenure. That is, while a tenant may be offered a fixed term, they are unlikely to be offered more than one even if they are "good" as the landlord's right to require them to leave must now be for one of the prescribed grounds only, unless the landlord can reach an

agreement with them about their leaving the dwelling (s.91C RTAAV). It is unlikely therefore that this solution will be palatable to many landlords, which may delay any truly significant change in Queensland. If such an alternative was introduced in Queensland, then to make it a balanced alternative there should be greater communication and at an early time of the landlord's intention regarding future terms. This can be addressed by prescribing how a landlord must engage with a prospective tenant, and then existing tenants, about options terms or the absence of such terms in the residential tenancy agreement.

As has been introduced for retail shop leases, where there are requirements in the RSLA to both communicate the existence of any potential option term, as well as to make such an offer absent the existence of one, option terms should be considered to be normal for residential tenancy agreements. However, and despite the activity by tenant's unions to try to better tenant's rights, renting remains a second choice for many as well as one that they do not wish to actively think about. This includes a lack of desire to think about how long they may still need to rent into the future. In comparison, retail shop lease tenants have better levels of information, security and certainty. Retail tenants are advantaged because, as a start pointing, the fact that they need to think about option terms is highlighted as there is a clear provision for option terms on the prescribed forms, and also because they are required to obtain legal advice in the process.

In the Form 7 Lessor Disclosure Statement under "Key disclosure items", the landlord must answer Question 7 "Does the lessee have an option to renew for a further period?" by selecting either "yes" or "no". Then at Part 6 Item 6.1, the landlord must provide the detail of any option/s, first by selecting either the box for "No options to renew lease" or the box "Options as follow"; and then, if an option or options are available, by providing details of their length, with all options to be detailed. Further, if the retail shop lease does not contain any option term then, before the end of the initial term, the RSLA requires the landlord either to offer an extended term or provide advice that one will not be offered (s.46 and s.46AA RSLA).[6] In this regard, the retail shop lease itself also must clearly identify whether the landlord is offering any option terms, what these are and when and how these must be exercised by the tenant. As retail shop lease tenants are required to obtain legal advice before entering into a retail shop lease (s.22D RSLA) those processes, and obligations are explained to them. Ideally, a similar requirement would be implemented for residential tenants offered through a publicly funded independent body. Where a landlord routinely does not offer further fixed terms, this can be communicated by that body and reported so that the information can be easily accessed by future tenants.

Immediate solutions

Conscious of the time that legislative reviews can take from commencement of the first consultation to implementation of the amending legislation, i.e. the RTRAA review took almost 3 years and the RTAA review that took almost 5 years, it is imperative that where possible interim action be taken to support Queensland tenants now. It is not appropriate to wait the same length of time for

Queensland's private residential tenancy power scales to begin to be moved to a balanced position. A level of action is required now that would enable tenants and yet not impact upon the current review. There are a number of intermediary steps that can be taken now to strengthen the security of tenure for Queensland tenants and ensure that they are better informed of current processes.

One interim solution, which also could be adopted long term, would be to amend the existing Form 18a to provide a space for option terms as exists for retail shop leases. This would enable both tenants and landlords to consider the future of their relationship at an earlier time as well as enabling tenants to make comparisons between potential landlords, and their agents. This solution does not need to be linked to any s.46AA equivalent, however, it still would enable prospective tenants to more easily identify those landlords, and their agents, who are genuinely seeking to have long-term tenants and those that are not. This solution also can be easily implemented by the prescribing of a new version of Form 18a.

Most importantly, it is recommended that Queensland law and procedure is changed now to ensure that all tenants are aware that security of tenure is not guaranteed to them. In particular, many tenants appear to be genuinely ignorant of the fact that Queensland's tenancy law does not provide security of tenure for their home occupation. Professional experience shows that this ignorance is not restricted to one sector of the population as it is present across a variety of age, education and socio-economic groups (Wharton & Cradduck, 2011). Another interim solution, which also could be adopted long term, is one that would improve consumer awareness of the current law. That is, that the adoption of a warning statement. This could be worded similarly to that previously required by the former *Property Agents and Motor Dealers Act 2000* ("PAMDA"), together with the additional information contained on that form.[7]

The adoption of a warning statement in an approved form would best be supported by legislation. This again can be very easily achieved, perhaps at the same time as any changes to the Form 18a, and also will not alter in any significant way the current obligations on landlords or their agents or impede the current review. A suggested wording for a new section to be inserted in the RTRAA is:

12A Residential tenancy agreement warning statement

(1) *The lessor or the lessor's agent must ensure that the proposed residential tenancy agreement has attached a* ***warning statement*** *as the first page of the agreement.*
(2) *A residential tenancy agreement is not enforceable at law as against the tenant unless, before signing the agreement, the tenant has signed acknowledging receipt of the warning statement.*
(3) *The lessor or the lessor's agent must direct the tenant's attention to the warning statement.*
(4) *If a residential tenancy agreement does not comply with subsection (1) or the lessor or the lessor's agent fails to comply with subsections (2) and (3); the lessor commits an offence.*
Maximum penalty – 200 penalty units.
(5) *Irrespective of compliance with subsections (1) to (3), the agreement remains enforceable by the tenant as against the lessor.*

An appropriate wording for the warning statement could be:

WARNING

Do NOT sign *the attached tenancy agreement without reading and understanding this warning.*

Do NOT sign *if you feel pressured* .

The landlord is not required to extend your lease at the end of the stated fixed term and may in fact require you to leave at that time without reason. The law permits the landlord to do this, subject to them providing you with a minimum of two months' notice.

You should obtain independent legal advice before you sign the agreement and should consider whether the term stated is suitable, or not, including whether any option should be included.

Stop!!

Before signing this form or the tenancy agreement have you read and understood your rights?

The introduction now of the requirement for the provision of a warning statement on all residential tenancy agreements would achieve several aims. It would make tenants more clearly aware of their rights, enable them to make true comparisons between landlords, enable them to plan for the future, and allow them to negotiate longer terms or an option to renew when they sign their tenancy agreement. This then links to the amendment to the Form 18a, that is the inclusion of a space to state whether there is an option term, which will enable tenants to identify whether the landlord (and agent) is seeking a long-term relationship with them, or not.

Conclusion

While many international jurisdictions have implemented a right to security of tenure for tenants Queensland has not. The Queensland Government is to be commended for its current review, however, as it identified this review is only in the very preliminary stages and not likely to be finalised before the end of 2019. Even then it may be some years before any new law is operational. In any event, the review is likely to take time as whatever is proposed needs to be fairly balanced between the competing demands of the investors who want returns; the tenants who need a home; and the government that wants to create communities to support its citizens.

It is important to recognise that the need for better security of tenure for tenants, and the benefits this brings, is not a one-sided. Empowering tenants by providing them with security of tenure will also benefit investors as the best form of property investment is one in which the landlord sits back and collects their money with no issues arising and no need to change tenants because the existing ones are not suitable. A tenant who views a property as their home and not merely a house, also will invest time and energy and care into their occupation, which will benefit their landlord.

The current review is only in the very preliminary stages and, conscious of current attitudes by parties on all sides, this will mean that achieving security of tenure for tenants may not be a reality for some time. Tenants, however, need support now and more importantly need a mechanism by which they can more clearly understand their

rights. Awareness raising by means of warning notices attached to residential tenancy agreements, and then amending those agreements to make a provision for option term information, is a simple path by which the government can act now. These targeted but minor amendments will have major impacts for consumer education and tenant enablement.

In any event, it must be noted that the Labour Government's pre-election promise was to "review" and not to "fix" the current regime. Therefore, there is no guarantee of when the next stage – implementation of new laws – will be undertaken. It is hoped that this will be in the foreseeable future but at this point the scales begin to wobble. The path to security of tenure for tenants regrettably has been and still is a long one, but one that can commence now, and it is time for Queensland to lead the way.

Notes

1. Similar provisions exist in the other Australian jurisdictions. For example: s.94 *Residential Tenancies Act 1997* (ACT); s.65 *Residential Tenancies Act 1987* (NSW); s.90 *Residential Tenancies Act* (NT); s. *Residential Tenancies Act 1995* (SA); s. 42 *Residential Tenancies Act 1997* (Tas); s.261 *Residential Tenancies Act 1997* (Vic) (noting, however, that current Victorian regime is to change in 2019 – see discussion that follows under Solution); and s. *Residential Tenancies Act 1987* (WA).
2. For a discussion of the difficulties that tenants faced under the previous regime, see Wharton and Cradduck (2011) p. 41.
3. The issue on appeal was not the finding about retaliation but the lack of power of the Adjudicator in the particular circumstances to award the tenant compensation.
4. The tenant's dispute resolution application was lodged before the notice to leave *without ground* was issued and therefore did not comply with the strict requirements of s.292(3) RTRAA [12]. However, in that case the notice itself also was not valid [15]-[18], which had no impact for the decision *per se* as the application was brought by the tenant in trying to have the notice set aside as being retaliatory, rather than the landlord in seeking to have the tenant evicted. The Adjudicator, however, cautioned the landlord if they sought to rely on the defect notice in any future action by it [18].
5. Gathered from informal conversations with past and present residential tenants who voluntarily and spontaneously shared their stories upon discovering the authors' research interest. The author both listened and encouraged them to participate in the current review.
6. **46 Lessor's notice about when option to renew or extend must be exercised**

   (1) This section applies if a retail shop lease provides for an option on the lessee's part to renew or extend the lease.

   (2) At least 2 months, but not longer than 6 months, before the option date, the lessor must give the lessee written notice of the option date.

   (3) In this section –

   option date, for a retail shop lease, means the date under the lease by which the lessee must exercise an option to renew or extend the lease.

   46AA Renewing lease if no option or other agreement

   (1) This section applies if a retail shop lease –

   (a) does not provide for an option on the lessee's part to renew or extend the lease; and

   (b) is not the subject of an agreement for its renewal or extension.

   (2) The lessor must, by written notice given to the lessee within the notice period –

   (a) offer the lessee a renewal or extension of the lease on terms, including terms about rent, stated in the notice; or

(b) tell the lessee that the lessor does not intend to offer the lessee a renewal or extension of the lease.

(3) An offer made under subsection (2)(a) cannot be revoked –

(a) until 1 month after it is made; or

(b) if the lessee accepts the offer within 1 month after it is made.

(4) If the lessor does not comply with subsection (2), the term of the lease is extended until 6 months after the lessor gives the notice (the ***extended period***).

(4A) However, subsection (4) applies only if the lessee, by written notice given to the lessor before the lease would otherwise expire, asks for the extension.

(5) The lessee may terminate the lease before the extended period ends by giving at least 1 month's written notice of termination to the lessor.

(6) In this section –

notice period means the period that is –

(a) for a lease of not more than 1 year – at least 3 months, but not longer than 6 months, before the lease is to end; or

(b) for a lease of more than 1 year – at least 6 months, but not longer than 1 year, before the lease is to end.

7. See PAMDA Part 3, Form 30C.

Disclosure statement

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