A COMPARISON OF SECURITY OF TENURE IN QUEENSLAND AND IN WESTERN EUROPE†

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Queensland residential tenancies are usually granted for up to 12 months with no guarantee of renewal. On expiration of the term, the landlord, without need to provide an explanation, can require the tenant to leave. Europeans find this unusual. As Hammar observes, to 'never be sure whether … you will be allowed to stay for another year … is ok for a student, or for someone working … but not for households'.[1] *This article informs Queensland policy makers and industry about European practices and concludes by proposing legislative amendments to realise the tenant's security of tenure.*

I INTRODUCTION

All Western European countries have legislation that protects tenants (irrespective of whether their tenancy is for a fixed or periodic term) and prevents 'no grounds' termination. The reason that Queensland has not done this appears to be unique. This is especially so in light of the recent strengthening of consumer protection laws,[2] showing that Australia, generally, protects weaker parties. This article compares French and German tenants' rights with those in Queensland, as regards the ability of the landlord to give notice to 'leave without grounds'.[3] It considers why Queensland law and practice[4] do not follow a Western European-like model and concludes with legislative suggestions for change to Queensland

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1 Magnus Hammar, 'Naming and Shaming' [2007] (January) *Global Tenant International Union of Tenants' Quarterly Magazine* 7, 7.

2 See *Competition and Consumer Act 2010* (Cth) sch 2 ('*The Australian Consumer Law*') ('*ACL*'). Section 23 of the *ACL* prohibits *unfair* terms in *consumer contracts*. This specifically applies to contracts granting interests in land for 'personal, domestic or household use or consumption' ie residential tenancies. Although this prohibition is subject to s 5(1)(c) of the *Competition and Consumer Act 2010* (Cth) which provides that terms required or permitted by state laws are exempt from the *ACL*.

3 The perils of attempting to make such comparisons cannot be overstated. See, eg, Alan Watson, *Legal Transplants: An Approach to Comparative Law* (The University of Georgia Press, 2nd ed, 1974) 10–15; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Clarendon Press, 3rd ed, 1998) 17. The authors' experiences in renting in both areas of the world hopefully will enable most of those traps to be avoided.

4 Similar systems operate throughout Australia (Tasmania is an exception). See Penny Carr, Maria Tennant and National Association of Tenants Organisation, 'A Better Lease on Life: Improving Australian Tenancy Law' (Report, National Shelter, April 2010).

tenancy laws. The recommendations are designed to embody international law standards for security of tenure, and the right to housing, in Queensland tenancy laws and practice.

II SECURITY OF TENURE — WHAT DOES IT MEAN?

Nowhere in the world, to our knowledge, is there absolute security of tenure for ordinary lease contracts, as there are recognised cases where no legislation will deny the right of a landlord to terminate the lease (for instance where a tenant has breached the contract). Also, absolute security of tenure, as in the case of a lease for life, is contrary to most countries' contract law as it becomes an ownership issue.[5]

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',[6] or as encompassing 'a common core of meanings that all refer to the provision for continued occupation of a dwelling'.[7] 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.[8]

A practical example of what 'security of tenure' for residential tenancies means is embodied in the model scenario drafted by the European University Institute ('EUI') Tenancy Law Project:[9]

> [The lessor] and [tenant] have concluded a contract limited to one year with automatic renewal for an additional year, provided that no party has given notice three months before the annual deadline. No particular reason for this limitation is mentioned in the contract. After 6 years, respecting the delay of three months before the annual deadline, [the lessor] gives notice of termination without alleging any reasons.

The model scenario provides that security of tenure dictates that the tenant will not be evicted unless the landlord can give a 'legitimate' reason for terminating the tenancy. Such reasons generally include a contract breach by the tenant; the

5 Unless, similarly to Crown leases granted in Queensland under the *Land Act 1994* (Qld), there is the ability to grant perpetual leases or other forms of tenure with a level of security that approaches that of freehold ownership.

6 Tenants' Union of Queensland, 'Submission on the Review of the Residential Tenancies Act 1994' (Submission Paper, Tenants' Union of Queensland, April 2006) 21. But they do not advocate longterm or perpetual leases.

7 Adkins et al, 'Tenure Security and Its Impact on Private Renters in Queensland' (Positioning Paper No 21, Australian Housing and Urban Research Institute Queensland Research Centre, January 2002) ii.

8 Owning one's home could be deemed the supreme form of security of tenure and it is one of the reasons why Australians strive to own their homes. One could also extend insecurity of tenure to '[t]he existence of low and even negative housing equity or leverage, combined with generous lending practices' — Sharon Parkinson, 'Using Panel Data to Link Household Labour Transitions and Housing Insecurity' (Paper presented at the Transitions and Risk: New Directions in Social Policy Conference, Centre for Public Policy, University of Melbourne, 23–25 February 2005) 4.

9 European University Institute, *Project Tenancy Law: Final Project Plan* (2004) European University Institute, 6 <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawPlanFinal.pdf>.

landlord wanting to occupy the dwelling (either themselves or one of their family members); sale of the dwelling; and extensive renovation. Here, 'security of tenure' means that the tenant is able to successfully resist a 'no grounds' termination.

Given the length of time the tenant has occupied the dwelling (six years), an even stronger form of security of tenure would encompass the hardship measures adopted by many Western European countries. Those measures are intended to provide a long-term tenant with a continuance of their tenancy (ranging from a few months to a few years), despite the termination notice having been given 'with grounds'. The hardship provisions, as will be discussed below, have been utilised in cases where the rental market shows very low vacancy rates and/or the tenant is elderly, has young children or is in an especially vulnerable situation.

Nearly all of Western Europe follows the above model of strong security of tenure.[10] Conversely, in Australia[11] a 'no grounds' termination is both legally valid and common practice. Hardship extensions of leases are unheard of. A landlord may give a notice of termination without reason provided that proper procedure is followed and that the notice is not retaliatory. As Carr and Tenant observe:

> Under each [state/territory] Act, landlords may take action to terminate a tenancy on certain prescribed grounds. The prescribed grounds differ between jurisdictions, but all provide for termination on grounds of breach (including rent arrears) and sale of premises (only when an agreement is periodic).
>
> Every jurisdiction except Tasmania allows notices to leave 'without grounds'. Tasmania allows terminations for the reason of 'end of a fixed term' within 28 days of the end of the term … which is effectively 'without grounds'. All States and Territories other than South Australia, Northern Territory and Tasmania allow a tenant to challenge a 'without ground' notice to leave on the grounds it is retaliatory. However, given 'without ground' evictions are available, a tribunal will usually only consider such eviction retaliatory for a certain period of time.[12]

Although some Australian jurisdictions provide a limited form of 'security' in the way of restricting the grounds for eviction, the 'protection' provided does not come close to the strength of protection provided in Western Europe because a 'no grounds' eviction can still be ordered. Australian judges have no flexibility to allow any sort of continuance of tenancies. If the EUI model scenario arose in Queensland, the lessor could validly terminate a six year tenancy by giving only two months' notice before the end of the fixed period. No legitimate reason would need to be given to the tenant and no continuance would be granted on hardship grounds.

10 With the exception of the UK's 'assured shorthold tenancy'. See *Housing Act 1988* (UK) c 50, s 21.

11 All Western European countries offer distinctly more protection than all the Australian states, and Queensland. See Hammar, above n 1, 7.

12 Carr, Tennant and NATO, above n 4, 66. See also Deborah Pippen, 'Security of Tenure: Tenancy Law Reform' (2009) 94 (Summer) *Reform Housing* 20, 21.

As, unlike the laws of France and Germany, each Australian state/territory's law is slightly different, the focus of this article for purposes of comparison will be, from an Australian perspective, on Queensland only, as it is the (current) domicile of both authors.

III SECURITY OF TENURE IN WESTERN EUROPE

Western European countries are governed by what, to an outsider, would seem to be three different 'layers' of law. As is any country in the world, they are governed by international treaties and their domestic laws (see 'International Law' below). However, international law also takes the form of a complex mixture of 'European specific treaties' and European Union ('EU') laws (see 'European Law' below).

A *International Law*

All Western European countries have ratified[13] the *International Covenant on Civil and Political Rights* ('*ICCPR*')[14] and the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*').[15]

Article 17 of the *ICCPR* does not protect the right to housing as such but provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.[16]

This instrument has not been used much in Europe. This is a consequence of the adoption of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention*'),[17] which provides more efficient mechanisms for a tenant seeking redress.[18]

13 There are other treaties concerned with the right to housing but they are beyond the scope of this article. See also: UN-Habitat, 'The Right to Adequate Housing' (Fact Sheet No 21 (Rev 1), Office of the United Nations High Commissioner for Human Rights — United Nations, November 2009) 11 <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx>; Olivier De Schutter and Natalie Boccadoro, 'Le Droit au Logement dans l'Union Européenne' (Working Paper No 2, Cellule de Recherche Interdisciplinaire de Droits de l'Homme, Université Catholique de Louvain, 2005) 6–7.

14 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

15 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

16 *ICCPR* art 17.

17 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

18 See below. Furthermore, many European countries have adopted reservations to the *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), which make it a subsidiary instrument.

Article 11 of the *ICESCR* provides that:

> The States Parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.[19]

General Comment No 4 on the right to housing in art 11 of the *ICESCR* notes that the right 'should be seen as the right to live somewhere in security, peace and dignity'.[20] The notion of security of tenure in the *ICESCR* is thus much wider than the one adopted in this article. It includes the rights of property owners as well as those of persons who have never enjoyed any kind of tenure to their home.[21] This definition is also wide in the sense that it would encompass a 'de facto' sense of security.[22] However, the international texts also refer to the definition adopted by this article:

> Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.[23]

Security of tenure in international law can be best summarised as the 'perception of security, both de facto and de jure, that comes with that tenure'. By signing the *ICESCR*, states have promised to respect, protect and fulfill the human right to housing:

> The obligation to respect human rights requires states to refrain from interfering with the enjoyment of rights. *The obligation to protect requires states to prevent violations of such rights by third parties, such as landlords or private developers*. If the exercise of these two obligations does not result in the access by everyone to an adequate home, then the obligation to fulfill becomes relevant …[24]

19 *ICESCR* art 11(1). This article is based on the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25.

20 Human Rights Committee, *General Comment No 4: The Right to Adequate Housing (Art 11.1)*, 6th sess, UN Doc E/1992/23 (13 December 1991) [7].

21 Although the vast majority of violations of that human right take place in developing countries, wealthier countries are also responsible for a portion of them. For instance, a growing phenomenon in developed countries is 'market-based evictions' where rental increases or private land development (inter alia) force people to leave their home. These types of evictions are considered illegal under international law. United Nations Human Settlement Programme (UN-Habitat), *Enhancing Security of Tenure: Policy Directions — Enhancing Urban Safety and Security — Global Report on Human Settlements 2007* (Earthscan, 2008) vol 2, 11–12 <http://www.unhabitat.org/downloads/docs/GRHS.2007. Abridged. Vol.2.pdf >.

22 Ibid 9.

23 Human Rights Committee, *General Comment No 7: The Right to Adequate Housing (Art 11.1): Forced Evictions*, 16th sess, UN Doc E/1998/22, annex IV (20 May 1997) [11].

24 UN-Habitat, above n 21, 27 (emphasis added). See also UN-Habitat, above n 13, 33–4.

B *European Law*

In the EU, security of tenure is reinforced by at least three different treaties. These treaties are the *European Convention*, the *Charter of Fundamental Rights of the European Union* ('*Charter of Fundamental Rights*')[25] and the *European Social Charter* ('*Social Charter*').[26] Article 8 of the *European Convention* provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society …[27]

The expression 'respect for … [the] home'[28] has been interpreted broadly by the courts. It includes the right to access and occupation of a home, as well as protection against eviction.[29] In *McCann v United Kingdom*[30] the European Court of Human Rights ('ECtHR') held that the eviction of the spouse, who had not individually been given a notice to quit, was a breach of art 8 even though not a contravention of the United Kingdom domestic law. This was because the spouse had not been given any procedural opportunity to have the possession order reviewed on its proportionality to the public interest. In *Cosic v Croatia*,[31] the appellant was the tenant of a property owned by the State. Having lived in her home for 18 years and complied with all her duties as a tenant, she was given a 15 day notice to leave because the dwelling was being sold. The notice was given in accordance with domestic law however the ECtHR considered that the termination notice was in breach of art 8 because, in the particular circumstances, the tenant was not given enough time to search for a new dwelling.

The *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* ('*First Protocol*')[32] on the fundamental right to property is also of relevance to security of tenure in Western Europe and has produced some interesting case law. Article 1 of the *First Protocol* provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

25 *Charter of Fundamental Rights of the European Union*, opened for signature 7 December 2000, [2000] OJ C 303/1 (entered into force 1 December 2009).

26 *European Social Charter (Revised)*, opened for signature 3 May 1996, ETS 163 (entered into force 1 July 1999).

27 *European Convention* art 8.

28 Ibid.

29 *Chapman v United Kingdom* (2001) Eur Court HR 399 [73]. See also *Connors v United Kingdom* (2004) Eur Court HR 223.

30 *McCann v United* Kingdom (2008) Eur Court HR 385.

31 *Cosic v Croatia* (2009) Eur Court HR 80.

32 *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, 213 UNTS 262 (entered into force 18 May 1954).

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[33]

The right of the EU Member states under their respective domestic laws to control the use of property has prompted the ECtHR to make a number of decisions on security of tenure. The decisions usually favour the tenant. A good example of this can be seen in the decision in *Velose Baretta v Portugal*.[34]

In that case, the ECtHR upheld, by a clear majority (only one dissenting judge out of nine judges), the decision of the Portuguese court. The Portuguese court had ruled that the landlords, who were a married couple, were prevented from terminating their tenants' lease even though the landlords were seeking to do so because they wished to move into the tenanted premises. In upholding the original decision the ECtHR considered the specific circumstances of the case. This included the fact that the landlords, who, with their family, were living with one of their parents, had more than adequate current living quarters in which they were able to continue to reside.[35]

The right to property has also been recognised as a fundamental right in the EU by the European Court of Justice ('ECJ'). In making this recognition the ECJ has interpreted the right to property in the same way as the ECtHR.[36]

The *Charter of Fundamental Rights*, which was adopted in 2007, integrates the rights contained in the *European Convention*. The relationship between the *European Convention* and the *Charter of Fundamental Rights* is explained in art 53(3) of the latter:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 7 of the *Charter of Fundamental Rights* is worded in the same way as art 8 of the *European Convention*. Although the *Charter of Fundamental Rights* has not been ratified by all Member states, the *Treaty of Lisbon*[37] now guarantees the freedoms and principles set out in the *European Charter* and gives its provisions a binding legal force throughout the EU.

33 Ibid art 1.

34 *Velose Baretta v Portugal* (1995) Eur Court HR (ser A) 49. For a strong criticism of this case see Andrea B Carroll, 'The International Trend toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States?' (2008) 38 *Seton Hall Law Review* 427, 434–8. Although this article does not reflect the position taken in this article, it is revealing as to the extent of protection afforded to tenants in European law.

35 See also *Immobiliare Saffi v Italy* (1999) Eur Court HR 73, where the Court established that a state's legislation restricting forced evictions was not automatically in breach of art 1 of the *First Protocol*.

36 See *Liselotte Hauer v Land Rheinland Pfalz* (C-44/79) [1979] ECR 3727.

37 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) art 6(1) ('*Treaty of Lisbon*').

The *Social Charter* was adopted in 1961 and revised in 1996. It specifically protects economic and social rights and its revised version contains art 31, a specific article on the right to housing:

> With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
>
> 1 to promote access to housing of an adequate standard;
>
> 2 to prevent and reduce homelessness with a view to its gradual elimination;
>
> 3 to make the price of housing accessible to those without adequate resources.

Paragraph 2 of art 31 targets security of tenure and is to be interpreted in the same way as art 11 of the *ICESCR*, as defined by *General Comment No 4*.[38] Only Finland, France, Italy, The Netherlands, Norway, Portugal and Sweden have adopted art 31 of the *Social Charter* in its entirety.[39] The *Social Charter* and the *ICESCR* afford better protection against eviction for tenants than the *European Convention* and the *Charter of Fundamental Rights* because they target economic and social rights. These two instruments are however difficult for aggrieved tenants to use since they are not directly applicable in many countries and have not (as yet) been directly adopted in national laws. This requires that organisations and pressure groups work to bring these problems to the attention of the committees or legislatures whose function it is to implement such instruments.

The *European Convention* and the *Charter of Fundamental Rights* derive from the *ICCPR*[40] and allow tenants to have their cases reviewed by the courts. However, that process is long and difficult and it rarely leads to the tenants returning to their homes. Furthermore, currently these instruments only apply to landlords that are public authorities.[41] Finally, the competencies of the EU in the area of housing and tenants' rights rest at a high level of regulation.[42] Therefore tenancy law in Western Europe remains essentially a matter for domestic legislatures and domestic courts.[43]

1 *Security of Tenure in France and Germany*

A number of EU Member states have adopted some form of 'right of housing' either at the constitutional level or in their national law.[44] That right is defined in a

38 De Schutter and Boccadoro, above n 13, 6–10. Article 31 goes further in protecting people's right to entering the housing market.

39 As on 2 September 2010.

40 For a discussion on the differences between the *ICESCR* and the *ICCPR*, see Rowan McRae and Dan Nicholson, 'No Place Like Home: Homelessness in Australia and the Right to Adequate Housing' (2004) 10(1) *Australian Journal of Human Rights* 3, 4–6.

41 In *Kay v Lambeth London Borough Council* (2006) 2 AC 465, 29 [64], Lord Hope pointed out that the court itself was a public authority and as such was bound by the *Convention* in its actions.

42 See Christoph U Schmid, *Project Tenancy Law: General Report* (2004) European University Institute, 1–3 <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawGeneralReport.pdf>.

43 De Schutter and Boccadoro, above n 13, 10–12.

44 See France, for instance, Ball, below n 47, 39.

variety of ways but the aim is a common one, to eliminate homelessness. Security of tenure in private rentals is considered to be one method of achieving that goal. This is particularly so in Western European countries where the absence of adequate public housing has forced legislators and governments to give private accommodation an important role in fulfilling the State's duty (see the discussion below).

In descending order, the Western European countries that provide the highest security of tenure are:

- The Netherlands and Sweden
- Austria, Belgium, France, Greece, Italy, Portugal and Spain
- Denmark and Germany
- Ireland, Finland, Switzerland and the United Kingdom[45]

These countries' private rental markets vary in size and nature and are strongly influenced by the availability of tax incentives to private parties to provide rental properties and rent subsidies for low income tenants.

At one end of the spectrum we have the United Kingdom, which has 11 per cent of tenants in private rental accommodation and at the other Germany with 42 per cent of tenants in privately rented dwellings. The analysis of the respective laws and tenancy regimes shows that, as a general rule, the higher the proportion of private renters the better they are protected against evictions.[46] This is irrespective of whether they have what Queenslanders would recognise as a fixed or periodic tenancy.

In order to paint an accurate picture of Western Europe's private rental markets, the provision of security of tenure and to make comparisons with Queensland, the practices and national laws of two countries representing the average level of tenant protection in Europe are chosen for examination. These countries are France and Germany.

45 Schmid, above n 42, 35–40. It must be stressed however that this kind of classification has its limits. Comparing France to Germany shows the perils of this exercise. France has adopted the *Social Charter* and recognises a right to housing but a tenant in France cannot claim an extension of the lease on hardship grounds as a tenant in Germany would be able to (although a French judge can suspend an eviction order for up to three years). Furthermore, terminating the lease to sell the dwelling is a legitimate ground for eviction in France but not in Germany: see the discussion below. Iceland and Norway have not been mentioned by this study.

46 However, a low level of private rentals does not always mean less security of tenure, as the examples of the Netherlands and Spain indicate. The Netherlands have less than 20 per cent of tenants in private rental accommodation and Spain has only approximately 10 per cent. Both countries have a high level of security of tenure. A lower level of public housing, however, does appear to correlate with better protection of private rental tenants. This is seen in Portugal, and again in Spain, where public housing accounts for less than 5 per cent of accommodation and protections granted to private tenants are high. European Social Housing Observatory, *Review of Social, Cooperative and Public Housing in the 27 EU Member States* (CECODHAS, 2009) 14.

(a) France

France has a strong tradition of state involvement both for owner occupation and private rental. This mainly takes the form of government subsidies and tax incentives.[47] France has the largest stock of housing in the European Union relative to its number of residents. This translates into a vacancy rate of around seven per cent.[48] Similarly to other EU Member states, household sizes are declining while the number of households is increasing. An increase of about 250 000 homes annually is expected up to 2020.[49]

In 1992 about 54 per cent of French residents owned their homes. This percentage climbed to 57 per cent in 2005. Previous desires were for a 70 per cent level of home ownership and to that end tax and subsidy incentives had been introduced for owner–occupiers.[50] The rental market in 2006 accounted for just over 40 per cent of dwellings. Approximately 25 per cent of homes are privately rented as opposed to 15 per cent for public housing. Private tenants live generally in inner city areas and are highly mobile by European standards. Each tenant will spend an average of just under four years in one dwelling. Of the private rental providers, 93 per cent of landlords are individuals.[51]

Rent control is imposed in all rental sectors with the result that rent increases have been modest in recent years.[52] Returns for investment in residential properties were 21 per cent in 2006 but reduced to 14 per cent in 2007. In that last year income returns were around 3.5 per cent and capital growth over 10 per cent.[53]

As in most European countries, tenants' movements and unions were born in the 19th century. The first law to limit rent rises was adopted after World War II. However, it was not until 1982, after the socialists' victory at the 1981 national election, that the first law protecting tenants' rights was promulgated. The clear intention of that law was to provide tenants with protection against abusive landlords. It imposed a written contract with minimum terms, rent control mechanisms and security of tenure.[54]

The conservatives reacted strongly to this law, accusing their opponents of violating property rights. The 1982 law was repealed when the conservatives came back into power in 1986 and they adopted the *Méhaignerie Act*,[55] which favoured landlords instead of tenants. The result of this reform was that rents

47 Michael Ball, *European Housing Review 2009* (February 2009) The Royal Institution of Chartered Surveyors, 39 <http://www.rics.org/site/download_feed.aspx?fileID=2150&fileExtension=PDF>.

48 Ibid 35.

49 Ibid 42.

50 Ibid 36. Please note paper current to January 2012 and thus reflects policy position under the previous Sarkozy government.

51 Ibid 37.

52 Ibid. Rent control requires that the new tenant be advised what rent the previous tenant paid.

53 Ibid 38.

54 Natalie Boccadoro and Anthony Chamboredon, *Project Tenancy Law: French Report* (29 March 2004) European University Institute, 1 <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawFrance.pdf >.

55 *Loi n° 86-1290 du 23 Décembre 1986 (Loi Méhaignerie)* [Law No 86-1290 of 23 December 1986] (France) JO ('*Méhaignerie Act*').

increased considerably in a short time. When the socialists were again in power, they adopted the more tenant-focused *1989 Mermaz Act*[56] on which French tenancy law is now based.[57] France is now at the forefront of tenants' rights, having ratified the *Social Charter* and having introduced an enforceable right to access housing in its domestic law.[58]

Another characteristic of France's tenancy laws is that public and private housing are in essence governed by the same provisions. The one exception is that public housing is for life, unless the tenant wishes to terminate the tenancy or breaches the contract.[59] Tenancy law in France is now regulated at the national level by the *1989 Tenancy Act*.[60] Article 10 of the *1989 Tenancy Act* provides that where the landlord is an individual, tenancies must be made for a minimum duration of three years. Where there are special circumstances, such as a private owner wanting to go abroad for a short time or managing a professional project in another town, then the minimum period is reduced to one year.[61] If the landlord is some other legal entity then the general minimum period is six years. On expiration of the term, the tenancy must be renewed for the same period if it has not been terminated by the parties in the meantime.[62]

Pursuant to art 15 of the *1989 Tenancy Act*,[63] a landlord can only terminate the contract if they (or a family member) wish to occupy the premises, sell the dwelling, or for another 'serious and legitimate' ground, such as the tenant having breached the tenancy agreement. To be valid, the termination notice must indicate the grounds for termination and, if the landlord wishes to have a close family member live in the dwelling, the full name and address of that person.[64]

56 *Loi n° 89-462 du 6 juillet 1989 (Loi Mermaz)* [Law No 89-462 of 6 July 1989] (France) JO ('*1989 Tenancy Act*').

57 Boccadoro and Chamboredon, above n 54, 2.

58 *Loi n°2007-290 du 5 mars 2007* [Law No 2007-290 of 5 March 2007] (France) JO, 6 March 2007, 4190.

59 Boccadoro and Chamboredon, above n 54, 3.

60 *1989 Tenancy Act* 8541.

61 Ibid art 10.

62 Boccadoro and Chamboredon, above n 54, 17.

63 *1989 Tenancy Act* 8541 art 15:

> I. Lorsque le bailleur donne congé à son locataire, ce congé doit être justifié soit par sa décision de reprendre ou de vendre le logement, soit par un motif légitime et sérieux, notamment l'inexécution par le locataire de l'une des obligations lui incombant. A peine de nullité, le congé donné par le bailleur doit indiquer le motif allégué et, en cas de reprise, les nom et adresse du bénéficiaire de la reprise qui ne peut être que le bailleur, son conjoint, le partenaire auquel il est lié par un pacte civil de solidarité enregistré à la date du congé, son concubin notoire depuis au moins un an à la date du congé, ses ascendants, ses descendants ou ceux de son conjoint, de son partenaire ou de son concubin notoire. … Le délai de préavis applicable au congé est de trois mois lorsqu'il émane du locataire et de six mois lorsqu'il émane du bailleur. [I. When the landlord terminates the tenant's contract, the termination must be justified either by the landlord's wish to occupy or sell the dwelling or by a legitimate and serious reason, in particular the tenant's breach of one of his duties under the contract. To be valid, the termination notice given by the landlord must indicate the ground for it and, if the landlord wished to occupy the dwelling, the name and address of the occupier who cannot be other than the landlord, his spouse, his registered partner at the time of the notice or his common law partner. The notice must be given at least three months before termination by the tenant and six months by the landlord.] [Nathalie Wharton trans].

64 Ibid.

Of course, the landlord can only terminate for legitimate grounds at the end of the fixed period that the contract was concluded or renewed for.

If the tenant is over the age of seventy and has limited resources, the landlord cannot terminate the tenancy unless the landlord is over sixty years old or has a low income.[65] Finally, there is a moratorium on evictions during the winter months, ie from 1 November to 15 March each year.[66] In other circumstances, a landlord must provide a six month notice of termination, whereas the tenant need only provide a three month notice to the landlord.[67]

If our model scenario took place in France what would be the result of the following scenario?

> [The landlord] and [tenant] have concluded a contract limited to … [three] years with automatic renewal for … [another 3 years], provided that no party has given notice three months [6 months for the landlord] before the annual deadline. No particular reason for this limitation is mentioned in the contract. After 6 years, respecting the delay of … [six] months before the annual deadline, [the landlord] gives notice of termination without alleging any reasons.[68]

Such a notice of termination would be held to be invalid because it does not state the 'legitimate' ground the landlord seeks to rely on to terminate the contract. As a ground for termination is not specifically stated it can be assumed that the landlord's reason for termination is not one of the grounds permitted by art 15 of the *1989 Tenancy Act*. Even if all conditions are met, the tenancy cannot be terminated if the tenant is over seventy years old and with limited resources and no eviction orders will be made during the winter months. Finally, the judge can postpone the eviction order for up to one year in cases of hardship.[69]

The above shows that French tenants enjoy, and expect, security of tenure as a right, irrespective of the length of their original tenancy.

(b) Germany

Germany is a land of contrasts. Despite the fall of the Berlin Wall, its western part is economically and socially similar to other Western European countries, whereas its eastern part is still more similar to Eastern European countries. Unemployment is much higher in the East and there is still an economic gap separating it from the West. The transition to a unified Germany is, in some respects, still a work in progress.[70] In addition, the *Länders*[71] retain considerable political power and freely exercise it when it comes to housing.[72]

65 Ibid.

66 *Loi n° 91-650 du 9 juillet 1991* [Law No 91-650 of 9 July 1991] (France) JO, 11 July 1989, 9228 art 62.

67 *1989 Tenancy Act* 8541 art 15.

68 European University Institute, above n 9, 6. This question has been slightly modified since the minimum rental period in France is generally 3 years.

69 *Loi n° 2009-323 du 25 mars 2009* [Law No 2009-323 of 25 March 2009] (France) JO, 27 March 2009, 5408, art 57.

70 Ball, above n 47, 51.

71 The internal German states.

72 Ball, above n 47, 47.

Population projections, based on immigration levels and birth rates at the start of this century, indicate a decline in population of over 10 per cent.[73] As in France, the average size of households is low (2.2 persons per household) and it is even lower in rented accommodation where singles and couples are concentrated.[74] This impacts on the availability of single-family dwellings in good locations, while still giving the impression that there is enough stock of dwellings available.[75] Additionally, some areas are more sought after than others. For example, Munich has a vacancy rate of only 1.4 per cent against an average vacancy rate in Germany of four per cent.[76]

Germany has a very low owner–occupier rate, at only 42 per cent,[77] with an 11 per cent difference between the East (higher ownership) and the West. Private rentals have a similar share of the market as owner–occupiers. Public housing, comprising six per cent of dwellings, is very small and declining.[78] Public housing is regulated in a similar manner to that in France with a specific subsidy system that can be used by private landlords. Practice shows that dwellings only remain in the public housing sector for as long as there are interest rate subsidies available. This is generally for 40 years. The cooperative rental sector makes up the remainder of the market with a six per cent share.[79]

The majority of privately rented dwellings (around 10 million) belong to individual landlords. The remainder of the rental stock (30 per cent) is owned by companies and institutions. Rents are controlled by federal rules and policies and also by the laws of the 16 *Länders*, which makes for a very complex system.[80] Returns for investment in residential properties were six per cent in 2007. Of that percentage income return was 3.5 per cent and capital growth 2.5 per cent.[81]

Tenancy law was introduced in unified Germany by the *Bürgerliches Geseztbuch* [Civil Code] (Germany) ('*BGB*'), which came into force in 1900. A product of the 19th century approach to private autonomy, hardly any of its rules on tenancy were mandatory.[82] Destruction of buildings during World Wars I and II triggered the adoption of legislation protecting tenants and these movements were amplified in the housing shortage crises of the 1960s and 1970s.[83] In September 2001, the *Tenancy Law Reform Act*, which amended the *BGB*, was enacted to consolidate and simplify private tenancy laws. The new structure is based on the concept of a 'lease object'. Of the new provisions, *BGB* §§ 535–48 apply to all tenancy

73 Ibid 54.

74 Ibid 46.

75 Ibid 47.

76 Ibid 51.

77 Ibid 48. The German mentality, when it comes to home ownership, is very different to that in countries such as Australia. It is later in life that German residents will move into a home they own; at a time when they are less mobile professionally. They will generally purchase a plot of land on which they will have their home built and then remain in it for the rest of their life.

78 Ibid 51.

79 Ibid 45, 51.

80 Ibid 49.

81 Ibid 50.

82 Wolfgang Wurmnest, *Project Tenancy Law: German Report* (2004) European University Institute, 5 <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawGermany.pdf >.

83 Ibid 5–6.

agreements, *BGB* §§ 549–77a apply to dwellings and *BGB* §§ 578–80a apply to other 'objects', such as ships.[84]

There are two types of residential tenancies in German law: fixed term tenancies and unlimited tenancies. These may on first glance appear similar to the Queensland fixed and periodic tenancies, but they are not the same. The former end automatically at the expiration of the term for which they were created and are restricted to very limited situations. These situations include where the landlord has future legitimate projects for the dwelling, ie for their own use, renovation, or renting to employees.[85]

The latter, unlimited tenancies, are the most common form of tenancy in Germany and can only be terminated by landlords when they have a 'legitimate interest' in doing so.[86] Furthermore, the landlord must inform the tenant of the ground on which the tenancy will come to an end.[87] *BGB* § 573(2) provides examples of what a legitimate interest might be, including: that the tenant has breached the tenancy agreement; the landlord needs the dwelling for their own use or the use

84 Ibid 6.

85 *BGB* § 575(1).

86 *BGB* § 573:

> Ordentliche Kündigung des Vermieters
> Absatz 1
> Der Vermieter kann nur kündigen, wenn er ein berechtigtes Interesse an der Beendigung des Mietverhältnisses hat.Die Kündigung zum Zwecke der Mieterhöhung ist ausgeschlossen.
> Absatz 2
> Ein berechtigtes Interesse des Vermieters an der Beendigung des Mietverhältnisses liegt insbesondere vor, wenn 1. der Mieter seine vertraglichen Pflichten schuldhaft nicht unerheblich verletzt hat, 2. der Vermieter die Räume als Wohnung für sich, seine Familienangehörigen oder Angehörige seines Haushalts benötigt, 3. der Vermieter durch die Fortsetzung des Mietverhältnisses an einer angemessenen wirtschaftlichen Verwertung des Grundstücks gehindert und dadurch erhebliche Nachteile erleiden würde; die Möglichkeit, durch eine anderweitige Vermietung als Wohnraum eine höhere Miete zu erzielen, bleibt außer Betracht; der Vermieter kann sich auch nicht darauf berufen, dass er die Mieträume im Zusammenhang mit einer beabsichtigten oder nach Überlassung an den Mieter erfolgten Begründung von Wohnungseigentum veräußern will.
> Absatz 3
> Die Gründe für ein berechtigtes Interesse des Vermieters sind in dem Kündigungsschreiben anzugeben. Andere Gründe werden nur berücksichtigt, soweit sie nachträglich entstanden sind.
> Absatz 4
> Eine zum Nachteil des Mieters abweichende Vereinbarung ist unwirksam.
> [Valid Tenancy Termination by the Landlord
> Paragraph 1
> The landlord can only terminate when he has a legitimate interest in ending the rental arrangement. Termination given in pursuance of putting up the rent is not admissible.
> Paragraph 2
> The landlord has a legitimate interest in ending the rental arrangement in particular if: 1. the tenant is at fault for a significant breach of his duties under the contract, 2. the landlord needs the dwelling for himself, his family or for dependants of his household to occupy, 3. the continuation of the tenancy would prevent the landlord from using his real estate in an economically adequate way; renting the premises in another way to put up the rent is excluded; further the landlord cannot terminate by relying on the fact he wishes to sell his property when he gives or intends to give notice to the tenant of this intention.
> Paragraph 3
> The grounds for the legitimate interest of the landlords must be disclosed in a written notice of termination. Other grounds will only be considered if they arise thereafter.
> Paragraph 4
> Any agreement made to the detriment of the tenant is invalid.] [Nathalie Wharton trans].

87 *BGB* § 573(3).

of a family member; or the landlord needs to undertake 'work' on the property, ie the building is unsound and needs renovating. However, ending the tenancy to put up the rent or because of an intention to sell or renovate a sound building are invalid grounds.[88]

The length of the termination notice depends on the duration of the tenancy contract. A three month notice is required for tenancies up to five years duration. Tenancies which are between five to eight years in length require a six month notice. Tenancies longer than eight years require a nine month notice.[89] However, even if the landlord has a legitimate interest in ending the tenancy, the notice of termination may not be enforceable. The tenant may be able to obtain a prolongation of the tenancy on the ground that it would have severe consequences for them, or their family; for instance where it would be difficult to find another dwelling.[90] Conversely, a tenant may terminate an unlimited tenancy for no reason, provided they give the landlord three months' notice.[91]

Returning to our model scenario, let us consider it now from a German tenant's perspective:

> [The lessor] and [tenant] have concluded a contract unlimited in time on three months … notice. After 6 years, respecting the notice of three months the landlord gives notice of termination without alleging any reasons.[92]

The notice of termination is clearly invalid since it fails to state any legitimate ground for ending the contract. It also breaches the German Civil Code because three months' notice is given when six months' notice is necessary for tenancies lasting over five years. Finally, even if a valid six months' notice had been given, the tenant could still extend the lease if they could show the court that an eviction would cause hardship.

Similarly to what the French legislation provides, German law affords security of tenure to private tenants irrespective of the length of their original tenancy. Again, like French tenants, German tenants are aware of their rights and expect that security of tenure will be provided.

88 *BGB* § 573(1) — regarding the prohibition to terminate to increase rent, also referred to as 'rent control'.

89 *BGB* § 573c(1).

90 *BGB* § 574 — the so-called social clause. Old age or illness can also be taken into consideration.

91 *BGB* § 573c(1).

92 European University Institute, above n 9, 6. The question has been modified to take into account the fact that a contract with an initial fixed period that is renewable is atypical of German law. It only provides for fixed term contracts or unlimited tenancies. This tenancy is likened to an unlimited tenancy in view of how long it has been operating.

IV SECURITY OF TENURE IN QUEENSLAND

A *Profile of the Rental Market*

On 3 December 2007, Kevin Rudd became Prime Minister of Australia, ending over a decade of Liberal-National coalition rule. Part of Labor's election promises included that a federal Labor government would:

> work with States, Territories and non-government organisations to … introduce national tenancy standards … to ensure that tenants' rights are protected in relation to matters such as eviction, unfair rents, repairs and maintenance, quality of rental accommodation, appeals and bond security …[93]

Additionally, for more than a decade prior to the very recent state elections, Queensland has been under the control of a Labor government. Despite this federal and state control, irrespective of a recent Labor policy paper that gives attention to long term tenancies as an alternative to home ownership,[94] and ignoring the fact that the Tenants' Union of Queensland continues to lobby for security of tenure,[95] Labor appears to want to focus on addressing the more complex problem of housing affordability[96] rather than the protection of tenants.

Land law in Australia, while English in origin, is now 'peculiarly Australian … [and responsive] to the vast spaces and [a] less structured social system'.[97] The great majority of Australians (and Queenslanders) own their homes and are more likely to be landlords than tenants.[98] This further exacerbates the issue of the appropriate protection of tenants' rights. The 2007–08 statistics released by the Australian Bureau of Statistics showed that nationally the proportion of occupiers renting their accommodation had increased to 30 per cent.[99]

In Queensland in 2003–04 the Residential Tenancies Authority noted that approximately 32 per cent of households lived in rental accommodation, with over 80 per cent of those tenants renting from private landlords. This shows the number of Queenslanders in private rental accommodation (20 per cent) is

93 Australian Labor Party, *Protecting the Rights of Renters and Boarders, National Platform and Constitution* (April 2007) Australian Labor Party, 90 <www.alp.org.au>.

94 Kevin Rudd, Tanya Plibersek and Wayne Swan, *New Direction for Affordable Housing: Addressing the Decline in Housing Affordability for Australian Families* (June 2007) Australian Labor Party, 28 <http://www.alp.org.au/media>.

95 Penny Carr and Tenants' Union of Queensland, 'Outdated Tenancy Laws in Australia' [2007] (January) *Global Tenant: International Union of Tenants' Quarterly Magazine* 2, 2; Carr and Tennant, above n 4.

96 Tanya Plibersek, 'Rents Rise 5.8 Per Cent as Young Australians Forced into Rental Trap', *Tenant Support Network National News* (Canberra), 24 October 2007 — 'Young couples and families will be forced into the rental trap, paying dead money instead of saving for a deposit for their own home'. See also Pippen, above n 12, 22.

97 Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 2007) 1.

98 Terry Burke, 'Australian Rental in Context' [2007] (January) *Global Tenant: International Union of Tenants' Quarterly Magazine* 3, 4. But on the rental market there is a shift towards denser style housing that represents nearly 40 per cent of rentals — Residential Tenancies Authority (Qld), 'Tenancies Act Review' (Policy Review Paper, March 2007) 10.

99 Australian Bureau of Statistics, 'Housing Occupancy and Costs, 2007–08' (Media Release, Catalogue Number 4130.0, 6 November 2009).

similar to that of French renters (25 per cent). Also, the need for private rental accommodation is expected to increase in Queensland.[100]

Queensland is facing a housing crisis due to its population growth,[101] increased house prices and mortgage rates.[102] The vacancy rates published by the Office of Economic and Statistical Research of the Queensland Treasury, for the June 2007 quarter, show only a 2.8 per cent vacancy rate.[103] This low vacancy rate, compared with that of France and Germany, could explain why the average tenancy duration also rose (slightly) to an average of 11.5 months in 2005 and 2006.[104] That number, however, is well below that of France (4 years) which itself is below the average by European standards. Another element adding to the crisis in Queensland is the reduction of public housing accommodation, which means that tenants with very limited resources 'spill' into the private rental market on a long-term basis.[105]

Under the Howard government, Australia seemed to have been strongly influenced by the ideals of globalisation and competitiveness. According to one commentator, 'this has meant financial and labour market deregulation, weakening of trade unions, privatisation, substantial restrictions on the role of government, including tighter targeting of welfare, and greater dependence on private finance and free markets'.[106] One important exception to these trends has been the introduction of far reaching and efficient consumer protection laws.

Reform for Queensland tenants, however, appears far off, with the nail in the coffin coming from Queensland's own regulator, which, during a recent revision of the tenancy legislation, noted:

> Some submissions … argued that landlords should be prevented from issuing a 'no grounds' eviction. … [T]he law should only recognise 'just cause' evictions, which would protect tenants from arbitrary evictions and encourage more long-term stable tenancies. The Office of Fair Trading did not find sufficient justification to introduce this measure … to do so would have serious implications on the rental … market. In any event, trying to list all valid reasons would be a difficult or impossible task.[107]

100 Residential Tenancies Authority (Qld), above n 98, 9–10.

101 In the twelve months preceding 31 December 2009, the population growth in Queensland was 2.4 per cent — Office of Economic and Statistical Research, 'Australian Demographic Statistics: December Quarter 2009' (Information Brief, Queensland Treasury, 24 June 2010).

102 Tanya Plibersek, 'Once a Phase, Renting Becomes a Way of Life', *Sydney Morning Herald* (Sydney), 25 July 2007, 13. 'The data from the 2006 Census paints an alarming picture of the number of households losing over 30 per cent of their income in rent payments: 519,764 households in Australia — or 36.7% of households that rent; … [and] 119,020 households in Queensland — or 37.2% of households that rent': Wayne Swan and Tanya Plibersek, 'Housing Affordability Crisis Hits Renters' (Press Release, NDRN6, 25 July 2007).

103 Office of Economic and Statistical Research, 'Rental Housing Vacancy Rates QLD: June 2007' (Report, Queensland Treasury, 13 July 2007).

104 Residential Tenancies Authority (Qld), above n 98, 10.

105 Michele Slatter, 'On the Way Out: Evictions and the Eviction Process' (Paper presented at the 3rd National Homelessness Conference — 'Beyond the Divide', Brisbane, 6–8 April 2003) 3. See also the statistics in Carr and Tennant, above n 4, 10–11.

106 Burke, above n 98, 6.

107 Gareth Griffith and Lenny Roth, 'Residential Tenancy Law in NSW' (Briefing Paper No 13/07, NSW Parliamentary Library Research Service, February 2008) 29. See also Residential Tenancies Authority (Qld), above n 98, 54; NSW Minister for Fair Trading, 'Residential Tenancy Law Reform: A New Direction' (Report, NSW Government Fair Trading, September 2007).

Despite having a rental market where vacancies are low and private renters make up over 20 per cent of the population, Queensland has not adopted any form of security of tenure. Remarkably (by European standards), the average length of tenure is under a year and the legislatively proscribed tenancy agreement does not contain any provision for easy inclusion of any option term.[108] Clearly, renting in Queensland is considered a temporary situation.

B *Security of Tenure: What Influences It?*

The debate surrounding what is the appropriate security of tenure for tenants involves a variety of perspectives. These include financial considerations, contractual considerations, property rights and the 'welfare state' argument.

1 *Financial Considerations*

Statistics show that the investment in public housing has not provided homes for all of those who need a roof over their heads as public housing represents less than 20 per cent of all rentals.[109] Government policy seems to be to leave it to private landlords to provide homes for those who cannot afford to buy real estate. To encourage them, the government has set up tax incentives which are the deductibility of mortgage interest and a reduced capital gains tax.[110]

In the current economic climate and with term deposits offering high interest, security of tenure may be viewed as a disincentive to property investment. Studies, however, show that improved protection of tenants has no influence either way on a landlord's decision to invest.[111] This is reflected in the Western European situation where a country such as the United Kingdom, which has limited security of tenure, offers no better income returns (3 per cent)[112] on rental property investment than countries such as France (3.5 per cent) and Germany (3.5 per cent) which provide strong security of tenure.

108 Unlike the original version, the current version of the legislatively prescribed residential tenancy agreement (Residential Tenancies Authority (Qld), *General Tenancy Agreement Form 18a* (20 April 2011) <http://www.rta.qld.gov.au/Resources/Forms/Forms-for-general-tenancies/General-tenancy-agreement-Form-18a.aspx>) does not have provision for the automatic inclusion of option periods. This may, however, be done by means of a special condition, but professional practice shows it is generally not.

109 Residential Tenancies Authority (Qld), above n 98, 9.

110 Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Addendum — Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (11 May 2007) 17 [59]: 'With Australia's 'negative gearing' policy, perhaps the most generous of all developed countries, and the tax benefit from capital gains, a subsidy of $21 billion is given to the high-end market. The redistribution of even a small amount of this could significantly alleviate the housing crisis for low-income households'.

111 Slatter, above n 105, 7 — security of tenure should not worry the majority of investors who put money in real estate on a longterm basis. Also, for the 30 per cent 'accidental' investors, studies show that tenancy reforms have had little impact on their behaviour on the market. See also Pippen, above n 12, 22.

112 Michael Ball, *European Housing Review* (Royal Institution of Chartered Surveyors, 2009) 124.

2 *Contractual Considerations*

In Queensland, a residential tenancy agreement is a form of contract that obeys general contract law rules. This is the essence of the following statement by the Queensland Residential Tenancies Authority ('RTA'):

> It is also important for both lessors/agents and tenants to keep the other informed of potential changes wherever possible and to negotiate mutually acceptable outcomes to cover the range of possible contingencies. Lessors also have the option to enter into fixed term agreements of varying lengths, as opposed to periodic tenancies, if the different notice periods are an issue.[113]

The principle set out in this extract is of course freedom of contract. It is used as an argument to identify that parties can arrange a mutually satisfactory contractual relationship between themselves without undue interference by the state. For residential tenancies there are a few provisions that parties are not able to 'contract out' of, but these are essentially procedural in nature.[114] Requiring a valid reason for terminating a tenancy at the end of the current term is not one of those provisions.

Western European countries have a radically different approach. Termination of contract is only possible where the landlord has a 'legitimate' reason for ending the tenancy.[115] Terminating a contract outside of these legitimate circumstances is considered unconscionable. A typical example of prohibited unconscionable conduct can be found in Switzerland's legislation on tenancies. Although Swiss law is one of the least protective of tenants in Western Europe,[116] art 271 of the *Schweizerisches Obligationsrecht* [Federal Code of Obligations] (Swiss) 1882 provides that, regarding cancellation of termination, in general:

> 1. Le congé est annulable lorsqu'il contrevient aux règles de la bonne foi.
>
> 2. Le congé doit être motivé si l'autre partie le demande.
>
> [1. Notice to leave can be cancelled when it is contrary to good faith[117] principles. 2. Grounds for the notice to leave must be given if the other party asks for them.] [Nathalie Wharton trans].

Examples of what 'contrary to good faith principles' means, ie conduct deemed to be unconscionable, can be divided into four categories, based on Swiss case law:[118]

113 Residential Tenancies Authority (Qld), above n 98, 51.

114 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ch 2 divs 1–2.

115 See the French *1989 Tenancy Act* art 15 and the German *BGB* § 573.

116 Schmid, above n 42, 37.

117 The notion of good faith in art 271 is an ensemble of non-legal norms of sociology and morals that the law protects. To find them the judge must look for the norms generally valid in society and among them select those that are pertinent to the rules on tenancy and their goals. This very theoretical definition has been put into a more practical form by commentators of the law. See, eg, *Arrêt de la Cour de Justice* [Judgement of the Court of Justice] (Geneva, Switzerland), 4 May 1992, n° 118.

118 David Lachat, *Le Bail à Loyer* (Schulthess, 1997) 470.

1. Termination without any worthy interest: for example — the landlord wants to show his power; does not want to give a reason for the notice; the tenant is two days late in the payment of the rent; or does not wish the tenant's boyfriend/girlfriend to move in.
2. Contradictory and unfair termination: for example — the tenant's children are noisy but at the time the lease was made the landlord said she/he liked children; with the landlord's knowledge, the tenant had just leased more space right next door to extend business activities; or the landlord wants to 'acquire' the tenant's clients.
3. Disproportionate termination in regard of the party's interests: for example — the tenant has criticised the dwelling; trifles (ie washing left in the common washing machine, or the tenant has three cats instead of the permitted two); or the tenant parked their car badly, once.
4. Termination based on other considerations than the lease itself: for example — nationality, religion or race; or political party membership or membership of a tenants association.

Apart from the fact that these grounds are clearly abusive, the reason for only allowing termination by the landlord for legitimate reasons, is that the landlord is only at risk of losing revenue, whereas the tenant may lose a home. As Carr and Tennant observe:

> Once a tenant moves into a property, they are virtually in a monopoly situation given the cost of 'taking their business elsewhere'. 'Without ground' evictions underline and emphasise the power differential and result in tenants trading off their rights against the fear of eviction. This is particularly true for those who perceive or know they have limited alternative options. In this way, without ground evictions, the failure or inability to challenge excessive rent increases and tenants' acceptance of substandard properties are intertwined.[119]

The tenant is clearly the weaker party in this contractual relationship and is in need of protection. In Queensland, parties to contractual relationships are generally required to comply with equitable rules regarding unconscionable conduct[120] and good faith dealings during the term of the contract,[121] as well as other specific consumer protection laws.[122] However, this still does not prevent a landlord from ending a residential lease at its expiration for no reason, even if the tenant has been a model tenant during the term of their tenancy.[123] There is no common law protection, or equitable or legislated right for a good tenant to stay in rented premises beyond the expiration of a fixed term, against a landlord who wishes to remove them.

119 Carr and Tennant, above n 4, 24. See also Adkins et al, above n 7, 12–13.

120 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

121 *Stern v McArthur* (1988) 165 CLR 489.

122 *Competition and Consumer Act 2010* (Cth) sch 2.

123 See Lee Hansen, 'Unfair Terms in Residential Tenancy Contracts' (Issues Paper, Tenants Union of Victoria, May 2006).

3 *Fundamental Rights: Right to Housing*

As seen above, in Western Europe the right to housing is mainly protected by art 11 of the *ICESCR*. As defined by *General Comment No 4*, it includes a degree of security of tenure described as the '*perception* of security, both *de facto* and *de jure*, that comes with that tenure'.[124]

The federal government is empowered by the Constitution[125] to enter into international treaties. Pursuant to s 51(xxix), Australia ratified the *ICESCR*. However, for international treaties to be enforceable in Queensland, they require specific legislative enactment at the state level.[126] The Queensland government, however, has not enacted specific legislation adopting the treaty.

At the international level there are two main mechanisms that monitor and report on the Signatory states' compliance with the *ICESCR*. The first is the UN Special Rapporteur on the Right to Adequate Housing who reports to the Human Rights Council. The UN Special Rapporteur monitors the provision (or not) of adequate housing in various states.[127] The second is the Committee on Economic, Social and Cultural Rights which reports every five years on compliance with the *ICESCR*.[128]

In 2006, Mr Kothari, the Special Rapporteur, noted in his report on Australia that '[i]n most states/territories [tenancy laws] allow landlords to freely evict tenants, or increase rents requiring the tenant to take formal remedial action to prove such an increase is excessive'.[129] Subsequently, in 2009, the Committee on Economic, Social and Cultural Rights criticised Australia for not implementing the *ICESCR*.[130] The Committee noted

> with concern that the incidence of homelessness has increased in the State party over the last decade … The Committee recommends that the State party take effective measures, in line with the Committee's general comment No.4 (1991) on the right to adequate housing (art. 11, para. 1, of the Covenant), to address homelessness in its territory. The State party

124 UN-Habitat, above n 21, 27. See also the discussion at the beginning of this article (emphasis in original).

125 *Constitution* s 51(xxix).

126 *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438. See also Charlesworth et al, *No Country Is an Island: Australia and International Law* (UNSW Press, 2006) 29. This is because tenancy laws are state/territory based rather than federally based.

127 The Special Rapporteur position was instigated by the United Nations Commission on Human Rights in 2000 to promote the right to housing. The Special Rapporteur submits reports to the Human Rights Council with the collaboration of NGOs and other organisations — Office of the High Commissioner for Human Rights, *Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* (2011) United Nations Human Rights <http://www.ohchr.org/EN/Issues/housing/Pages/HousingIndex.aspx>.

128 All countries that have ratified the *ICESCR* must submit a report two years after ratification and then every five years, regarding the measures taken by their country to protect the *ICESCR* rights. The Committee members then invite the country that has made the report to discuss it with them before making final observations to the said country. See *ICESCR* arts 16, 17.

129 Kothari, above n 110, 8 [17].

130 Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009).

> should implement the recommendations of the Special Rapporteur on the Right to Adequate Housing contained in the report of his mission to Australia.[131]

In its pre-election manifesto, the Labor party declared it was 'committed to supporting the international human rights instruments to which Australia is a signatory'.[132] Despite this declaration, there appears to be little attention given to security of tenure by Labor, whose focus has been on making home ownership more accessible.

The judiciary, for its part, seems to be torn between those judges wanting to interpret statute in light of Australia's international duties and those, the majority, who will only commit to enacted duties.[133] In any event, judges who are willing to interpret Commonwealth or state/territory legislation in light of the international instruments ratified by Australia have never done so in respect of security of tenure for tenants.

It is worth noting that in very recent years, Victoria and the Australian Capital Territory ('ACT') have each adopted a form of human rights legislation.[134] Like the *European Convention* and the *Charter of Fundamental Rights*, the ACT and Victorian legislation were mainly inspired by the *International Covenant on Civil and Political Rights*. Using the equivalent of art 8 of the *European Convention*, the *Victorian Charter* has produced recent case law that is pertinent to the issue of security of tenure. In *Homeground Services v Mohamed (Residential Tenancies)*,[135] the Victorian Civil and Administrative Tribunal prevented a non-profit welfare agency from evicting a tenant because he would have become homeless as a consequence of the eviction. The decision was based on s 13(a),[136] which protects the privacy of one's home, and s 38(1),[137] which prevents a public authority from violating human rights, of the *Victorian Charter*. The welfare agency was deemed to be a public authority and their notice to vacate, based on s 263 of the *Residential Tenancies Act 1997* (Vic), was held to breach the tenant's human rights.

131 Kothari, above n 110.

132 Australian Labor Party, above n 93, 206.

133 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 290–1; *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 31–4, 37–8, 48; *Al-Kateb v Godwin* (2004) 219 CLR 562, 589–95, 616–17, 622–30, 642, 661–2; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9, 220–1, 224–5. See also Ronald Sackville, 'Homelessness, Human Rights and the Law' (2004) 10(2) *Australian Journal of Human Rights* 11.

134 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').

135 [2009] VCAT 1131.

136 *Victorian Charter* s 13: 'Privacy and reputation: A person has the right — (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'.

137 *Victorian Charter* s 38: 'Conduct of public authorities: (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.

Even more recently, in *Director of Housing v Sudi*,[138] the same Tribunal (although overturned on appeal for legal technicalities) found in favour of a widower and his three year old son who were not in fact the tenants. The landlord (a public authority) was attempting to evict the father and son without ground after the tenant (their mother and grandmother respectively) died from cancer. Again, the notice was held to be in breach of ss 13(a) and 38(1).

These Tribunal decisions in Victoria are related to ECtHR decisions discussed earlier, based on art 8 of the *European Convention*, and represented a step in the right direction. This step appears now, however, to have been retraced. In any event, irrespective of the fact that *Director of Housing v Sudi* was reversed on appeal, similarly to the judges of the ECtHR, it is clear that the Tribunal and the Victorian courts will only protect tenants against landlords who are public authorities. This leaves the great majority of tenants who rent from profit-oriented landlords without protection against unfair evictions.

4 *The Welfare State*

Although lack of security of tenure is not the first cause of homelessness,[139] it certainly has an impact on it. At the international level, security of tenure is considered 'an essential element of a successful shelter strategy'.[140] A lack of security of tenure can have a very negative impact on the lives of all tenants. It impacts on health (due to chronic stress),[141] on family stability (due to children

138 [2010] VCAT 328 (31 March 2010). On 6 September 2011, the Victorian Court of Appeal (*Director of Housing v Sudi* [2011] VSCA 266) reversed this decision, ordering VCAT to grant the possession order. The core question debated was whether VCAT had jurisdiction to sanction violations of the *Charter.* The Victorian Court of Appeal held that it did not because of legal technicalities and because the purpose of the Tribunal was to provide inexpensive and quick resolution of disputes. The Court referred to recent UK decisions and ECtHR case law but considered that Victorian laws presented 'dramatic statutory differences'. This reasoning does not conform to international law as expressed in those cases. The ECtHR in *McCann v United Kingdom* (2008) Eur Court HR 385, had persuaded the United Kingdom Supreme Court that judicial review (appeal on questions of law only) was an insufficient 'procedural safeguard' because this type of review was not 'well-adapted for the resolution of sensitive factual questions' which can be better resolved by first instance jurisdictions 'responsible for ordering possession'. Furthermore, the ECtHR considered that increasing the role of these first instance jurisdictions in this way would not 'have serious consequences for the functioning of the system or for the domestic law of landlord and tenant' and that in most cases applicants would not be able to raise 'an arguable case which would require a court to examine the issue'. Finally, the *ICCPR*, to which Australia is a party and on which the *Charter* is based, provides that '[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State Party [for breaches of *ICCPR* rights]'. The Victorian Court of Appeal, however, chose to ignore international human rights laws on security of tenure and to concentrate instead on domestic rules, possibly in anticipation of revision of the *Charter* which is predicted to diminish the protection it offers.

139 Sharon Vincent, 'What about the Homeless in Waverley?: Part I — Research Findings' (Homelessness Research Statistics, Waverley Local Government Area — Waverley Council, January/February 2004).

140 UN-Habitat, above n 21, 10.

141 See, eg, Alan Morris, 'Living on the Margins: The Worlds of Older Private Renters in Sydney' (2006) 12 *Australian Journal of Human Rights* 205, 215.

having to change schools)[142] and on social cohesion (due to the fact that tenants feel unable, due to the uncertainty, to participate in the community).[143]

With an average rental term of less than one year and tenants who should be in public housing spilling into the private rental market, these problems are exacerbated in Queensland.

In France and Germany, where the public housing sector is as small as in Queensland, the state has also introduced tax and other incentives (for instance building subventions) to boost the private rental market. Security of tenure (and rent control) is a necessary counterbalance to these incentives in order to ensure that tenants enjoy proper living conditions so that the state can fulfil its human rights and other international obligations.

C *Legal Context*

The analysis of Queensland's laws will be undertaken in two parts. This will be done firstly by considering the history of the current laws. Secondly, the provisions relevant to the landlord's ability to issue a notice to leave without ground will be identified and their application considered in practice.

1 *History and Context of Tenancy Laws*

The power of the State of Queensland to make laws regarding residential tenancies stems from its state constitutional power 'to make laws for the peace welfare and good government …' of Queensland.[144] Specific laws were introduced after World War II, including provisions regarding fixed rents and security of tenure,[145] as part of the government's mechanism for dealing with the post-war housing shortage. The legislation was most recently changed in 2009 when the then existing law[146] was repealed on the commencement of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ('*RTRAA*').[147]

2 *Notice to Leave without Ground*

The essence of a notice to leave without ground is that the landlord does not, and is not required to, give an explanation to the tenant as to the reason they are being required to leave. The right of the landlord to terminate a lease without grounds is found in s 291 of the *RTRAA*.[148] It provides that:

142 Tenants' Union of Queensland, above n 6, 22.

143 Tamara Walsh, 'A Right to Inclusion? Homelessness, Human Rights and Social Exclusion' (2006) 12 *Australian Journal of Human Rights* 185. See also Pippen, above n 12, 22–3.

144 *Constitution Act 1867* (Qld) s 2; *Constitution of Queensland 2001* (Qld) s 8.

145 *Landlord and Tenant Act 1948* (Qld); *Landlord and Tenant (Amendment) Act 1948* (Qld).

146 *Residential Tenancies Act 1994* (Qld).

147 *RTRAA* s 528.

148 Formerly the *Residential Tenancies Act 1994* (Qld) s 165.

> (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.

When first introduced, s 291 consisted of sub-ss (1) and (4) only.[149] Their application was subject only to the requirement that the notice would not enable a fixed term tenancy to be terminated prior to the end of the stated term.[150] In 1998 amendments introduced sub-ss (2) and (3).[151] This was for the purpose of fine-tuning the section and to prevent retaliatory action being taken against a tenant exercising their right to make a complaint because of the behaviour of the landlord.[152] The ability to terminate without ground is subject to the requirements regarding the period of notice that must be given. For both fixed term tenancies and periodic tenancies, a minimum of two months' notice must be given to the tenant.[153]

While the *RTRAA* did not commence until 2009, consultation for the new legislation began in early 2006 when a discussion paper was released for community consultation.[154] However, despite consultation with a range of stakeholders, including those representing consumers, there was no amendment of the previous provision granting the landlord the right to terminate a lease without ground.

The law makes it clear that Queensland tenants may apply to have a notice to leave cancelled by the Tribunal if the notice was given in retaliation to the tenant

149 Ibid ss 165(1)–(2).

150 Ibid ss 197(i), 199(f).

151 Appearing then as sub-ss (1A) and (1B): *Residential Tenancies Amendment Act 1998* (Qld) s 76.

152 Explanatory Memorandum, Residential Tenancies Amendment Bill 1998, 21.

153 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 329.

154 Explanatory Memorandum, Residential Tenancies and Rooming Accommodation Bill 2008, 2.

trying to enforce their rights.[155] Unfortunately, compared with Western Europe, there is little case law[156] or academic literature on this area.

Under the previous dispute resolution process, very few cases came to the attention of the courts because there was no appeal from the decision of the Referee and grounds for review were limited.[157] In one case, however, the late Dutney J made some remarks that are relevant to present tenancy law:

> The … Act permits a landlord to give … a notice to leave on a number of grounds. In any … case, more than one basis for giving a notice may exist. … The landlord is free to choose the section of the Act under which to give notice. That choice is not taken away merely because the Tribunal questions the landlord.[158]

The Queensland Civil and Administrative Tribunal ('QCAT') is now competent to hear appeals from Magistrates regarding tenancy disputes. However, recent case law has not been encouraging of those seeking better protection for tenants' rights. In *Bamfield v Zanfan Pty Ltd*[159] QCAT had to decide whether the Caloundra Magistrate had been right in not setting aside a notice to leave without ground. The tenant alleged the notice was retaliatory. He had been a tenant for over two years and had complained repeatedly throughout that time about his unit's state of disrepair. His complaints were well documented and there were no allegations of damage being caused by the tenant. QCAT found that although the abusive attitude of the tenant after being denied repairs, including allegedly calling a female agent 'a bit of trash',[160] was the reason for the notice, it did not constitute retaliation.

Case law in this area is still building. However, if *Bamfield* is any indication of QCAT's future actions, identifying a notice as retaliatory is unlikely. The landlord also has the ability to serve another notice once the proceeding has been dealt with, again without being required to provide a reason.[161] As Dutney J observed, the landlord has the power to pick the provision on which they seek to rely. As such, it would appear that s 291(3) is ineffective in protecting tenants from being abusively evicted.

155 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 291(3).

156 *Bamfield v Zanfan Pty Ltd* [2010] QCAT 1 (22 February 2010) [22].

157 *Renton v Baldwin & van der Beek* [2009] QSC 103 (7 May 2009) [2]: McMeekin J confirmed that '[n]o appeal lies from a decision of a Referee under the Act. The right to judicially review a Referee's decision under the Act is limited by s 19 of the Act to issues of want of jurisdiction and breach of natural justice'. See also the *Remely* saga: *Remely v O'Shea* [2009] HCASL 46 (12 March 2009); *Remely v Vandenberg* [2009] QCA 017 (16 February 2009); *Remely v O'Shea* [2008] QSC 172 (21 August 2008); *Remely v O'Shea* (No 3) [2009] QSC 110 (12 May 2009); *Remely v O'Shea* [2008] QCA 119 (20 May 2008); *Remely v O'Shea* [2008] QCA 78 (4 April 2008); *Remely v O'Shea* [2007] QCA 369 (23 October 2007). For cases in which *Remely* is cited, see *Hill v Robertson Suspension Systems Pty Ltd (No 2)* [2009] QDC 305 (19 June 2009) [11]–[12], as to the appropriateness of ordering payment of costs on an indemnity basis. In those cases the application was dismissed because it was held to be a merits review to which the relevant legislation, the *Small Claims Tribunal Act 1973* (Qld), does not apply: *Remely v O'Shea* [2007] QSC 225 (28 August 2007) [38], [45]–[46].

158 *Remely v O'Shea* [2007] QSC 225 (28 August 2007) [44].

159 [2010] QCAT 1 (22 February 2010).

160 Ibid [13].

161 Tenants' Union of Queensland, above n 6, 22.

V RECOMMENDATIONS FOR CHANGE

The Queensland RTA justifies 'without grounds' terminations as follows:

> 'Without grounds' terminations are legitimate in some instances, such as where the reason for termination is outside of the list of reasons for terminating a tenancy, or the lessor does not want to enter into reasons why the tenancy is being terminated.[162]

This statement seems rather difficult to justify or even to understand. The fact that the landlord does not want to give reasons for a decision to end the tenancy is hardly 'legitimate'. German and French law make it clear what a legitimate ground for terminating a tenancy is and require that this ground be disclosed to the tenant. The RTA goes on to state that '[r]ather than abolishing the ability to terminate "without grounds", greater encouragement should be given to ensure terminations are for identified reasons'.[163] However, the RTA does not make it clear what form this encouragement might take and why it might make a difference. Finally, the RTA states that '[t]he RTA Board considered that there were sufficient mechanisms built into the Tenancies Act to support tenants, and did not propose any changes to the 'without grounds' provisions'.[164]

A review of the laws of France and Germany clearly shows how ineffective the Queensland legislation is at protecting tenants. With no legitimate termination provisions, it is difficult to identify the 'sufficient mechanisms' designed to 'support tenants'. The only mechanism seems to be the cancellation of a retaliatory notice which is a very weak remedy.[165] Queensland tenants are not at all protected against abusive notices as current provisions enable the landlord to serve a notice to leave without ground, taking effect either at the end of the fixed term or thereafter, provided sufficient notice has been given.

Despite Australia having ratified the *ICESCR* and the criticism of the UN agencies, Queensland has not,[166] nor has any other jurisdiction, adopted a form of security of tenure comparable to those in Western Europe. While international treaties such as the *ICESCR* have to be translated into domestic law to acquire

162 Residential Tenancies Authority (Qld), above n 98, 51.

163 Ibid.

164 Ibid.

165 Tenants' Union of Queensland, 'Response to the Residential Tenancy Authority on Tenancies Act Review Policy' (June 2007) 55:

> The discussion paper provides scant evidence for this proposition. While the RTA continues to provide for a Notice to Leave Without Grounds (s 165), retaliatory evictions remain lawful and inevitable. This view has been supported by Mr Bill Randall SM, who hears tenancy matters full time in Brisbane Tribunal (discussed in conversations with the TUQ's Statewide Coordinator), and tenancy workers regularly assist tenants in evictions that are clearly retaliatory.

166 With the possible exception of Tasmania (see Carr and Tenant, above n 4) and the Victorian decisions of *Homeground Services v Mohamed (Residential Tenancies)* [2009] VCAT 1131 (6 July 2009) and *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010).

any sort of validity, one cannot help wondering why Australia remains a party to a treaty it does not specifically implement.[167]

Even if the Queensland economy and geography was able to accommodate everyone who wished to own their own home, the fact remains that the most vulnerable members of society will remain in rented homes. The aging of the population and the recent economic crisis will only see an increase in the number of renters. This segment of the population, which is nearly as large as the one in France and many other Western European countries, is in the greatest need of security of tenure.[168] Older Australians are also at risk of disproportionate rent increases following every lease renewal, as there is no limit, other than what the market will bear, on the amount of rent a landlord can ask a tenant to pay. This risk arises in a market where low vacancy rates leave tenants in a relatively powerless situation in rent increase negotiations.[169]

Although the issue of rent control is beyond the scope of this article, it should be noted that the measures implemented to control rent in Australia have been tempered by inherent difficulties. The primary test for the excessiveness of the increase is how it compares to other market prices, which in and of itself does not guarantee affordability. Additionally, tenants are usually required to provide market knowledge, which is difficult for them to obtain. As a result, tenants may be subject to arbitrary and extortionate rent increases which do not relate to market prices but only serve to further increase them. When notified of a rent increase, tenants must decide to pay or move. A mere two month notice period does not allow tenants in low income households to prepare their budget for the increase or save for the move. Existing provisions also do not allow for consideration of the personal circumstances of tenants, such as their ability to afford the increase. Many tenants are living in housing stress and already have inadequate income, after housing cost, to sustain a quality of life for their families.[170]

The ability to terminate without ground is contrary to the good faith dealings that consumer law is increasingly demanding from contracting parties. The reasoning behind the adoption of unconscionability rules that protect consumers, should also apply to tenants who face similar situations. The necessity for every human being to live in a home makes tenants vulnerable to their landlord's decisions in managing the rented property, in the same way that consumers are vulnerable to businesses they buy goods from.

167 The reason could be the 'undemocratic' process with which treaties are ratified in Australia where the Federal Parliament does not have the power to block such as measure: *Constitution* s 51(xxix).

168 Kothari, above n 110, 17 [58]:

> the … homeownership model has neglected sections of society that do not have the means for purchasing their homes, and those facing serious discrimination. [The Special Rapporteur] is particularly concerned that the present model not only affects the most disadvantaged groups of the Australian society, but … is going to affect more and more middle-class households.

169 A recent survey of public housing applicants' needs shows that affordability of rent is the primary reason that drives private tenants' want to go into public housing and the most common complaint against private rental providers. Ross Llewellyn Wiseman, *One Can Only Hope Things Will Improve!: A Survey of Applicants Housing Needs* (Mangrove Housing Association Inc, 2005) 13; Slatter, above n 105, 3.

170 Carr and Tennant, above n 4, 47.

The recommended change to tenancy laws would be one that brings Queensland's (and other Australian jurisdictions') legislative protections closer to those of France or Germany, although, as described above, both countries have adopted different rules. France has adopted a system of fixed but renewable tenancies, whereas Germany provides tenants with periodic tenancies. Change should remove the landlord's ability to terminate a residential tenancy agreement without legitimate grounds, thus allowing tenants to enjoy a reasonable expectation upon entering a lease that it will be renewed.

One argument against introducing a 'with grounds' termination requirement is that 'trying to list all valid reasons would be a difficult or impossible task'.[171] Yet legislators all over Europe and post war parliaments in Australia managed this task rather well, even if they produced somewhat different solutions. The National Association of Tenant Organisations ('NATO') has recommended that tenancies should be terminated against tenants' wishes only in the following circumstances:

- There are grounds as prescribed by residential tenancies legislation;
- When appropriate notice is given; and
- In the case of a dispute, a Tribunal/Court determines that in all the circumstances of the case it is appropriate to end the tenancy. It should not fall to the tenant to have to apply to the Tribunal to stop a termination from proceeding.

  Landlords should be allowed to give notices of termination on certain reasonable grounds only. These grounds should be:

  - *Serious or persistent breach* — including failure to pay rent.
  - *Frustration* — that is, the premises are uninhabitable eg premises made unfit to live in due to a natural disaster.
  - *Sale of premises* — the contract of sale requires vacant possession. Landlords should not be allowed to give notice on this ground during the fixed term of a tenancy.
  - *Landlord requires the premises for their own housing, or an immediate family member's housing* — landlords should not be allowed to give notice on this ground during the fixed term of a tenancy.
  - *Demolition, approved change of use or major renovation* — landlords should not be allowed to give notice on this ground during the fixed term of a tenancy.
  - *Tenant has ceased to be employed by the landlord* — and the tenancy arose out of a contract of employment between the landlord and the tenant, and the landlord needs the premises to

171 Griffith and Roth, above n 107, 29. See also Tim Seelig, 'The Views of Tenants on Rental Conditions and Tenancy Law in Queensland — A Report on Tenancy Law Reform Focus Group Discussions' (Report, Tenants' Union of Queensland, November 2007) 36.

house another employee. Landlords should not be allowed to give notice on this ground during the fixed term of a tenancy.

- *Tenant no longer eligible for housing assistance* — for example, where a tenancy is offered by a community housing provider under a youth accommodation scheme.[172]

These propositions correspond generally to tenants' rights in Europe. It is suggested that there could be two ways in which such rules could be implemented.[173] Tenancy agreements could be made of a mixture of fixed and periodic durations. After an initial fixed period, during which neither landlord nor tenant can terminate unless there is a breach, the lease continues as a periodic tenancy that can only be terminated on specific grounds by the landlord but can be terminated with a prescribed notice by the tenant for no reason. Alternatively, the tenancy agreement could consist, as in France, of the renewal of the initial fixed period, as if the tenant had perpetual options to renew. In addition, the tenant should enjoy a degree of flexibility in putting an end to the tenancy before the end of the fixed term, should this term be over six months or a year. The landlord would have to wait for the end of the term to terminate for legitimate grounds.

It should be noted that termination for legitimate reasons inevitably leads to an asymmetrical relationship between landlord and tenant. While the latter should be able to terminate giving a few months' notice, the former might find themselves 'stuck' in the relationship for years unless they needs to occupy or sell the dwelling. This system is the one that prevails in Western Europe and best protects tenants' human right to housing. Tenants in Australia believe wrongly that there is a compromise to strike between flexibility and security of tenure, but this is not how the right to security of tenure operates to protect them. The interest of landlords is balanced with that of tenants in favour of the latter because the right to ownership has less weight than the right to housing. In other words, tenants have more to lose than landlords, are the weaker party in the relationship and thus require specific protection.

Other than the legitimate grounds for termination, Western European legislation also provides a 'hardship' mechanism which allows a tenant to stay in their home for a further period of time so that they might find another dwelling. This applies even if the landlord has a legitimate ground for terminating the tenancy. This aspect of security of tenure could be covered by the above suggestion of NATO that '[i]n the case of a dispute, a Tribunal/Court determines that in all the circumstances of the case it is appropriate to end the tenancy'.[174] The court should clearly have the power to extend the lease in order to allow the tenant enough time to find an alternative suitable dwelling.

172 Carr and Tennant, above n 4, 43–4.

173 Discussing the implementation of state/territory or Commonwealth legislation to bring about security of tenure is beyond the scope of this article. According to Deborah Pippen however, '[t]he lack of any significant and consistent changes in tenancy legislation across the country as a whole is a clear indication that national leadership is needed to ensure that Australia meets its human rights obligations' — Pippin, above n 12, 22.

174 Carr and Tennant, above n 4, 43.

VI CONCLUSION

Renting remains a second choice for most Queenslanders and one that they do not wish to actively think about. Tenants generally have no expectation of lengthy tenancies, nor do they appear to seek them, believing that the present system offers more flexibility of movement.[175]

Arguably, with landlords and house owners being in the majority (which is not always the case in Europe), democracy should not allow changes to the current system. The adoption of a Bill of Rights to protect basic civil and political rights has proven impossible up until now, in all but two states/territories, and there appears to be little to suggest that an issue such as the right to housing would succeed where consensus as to a Bill of Rights has failed.

Yet international human rights conventions which Australia has ratified command that the right to housing and security of tenure be respected. Australian states and territories clearly offer too little protection to tenants against evictions and change seems to be far off despite government promises and international criticism of the current situation.

The fight for security of tenure is exacerbated by the fact that public opinion favours providing more public housing to more adequately meet the needs and wishes of the most vulnerable members of Australian society. However, the public housing situation remains alarming in Queensland with many 'public tenants' spilling into the private rental market where rents are high and landlords are profit oriented. This is in stark contrast with the situation in France or Germany where the line between private tenancies and public housing is totally blurred.

As the number of households in mortgage stress rises and an increasing number of people find themselves financially unable to consider home ownership, the need for adequate tenant protection becomes more pressing.

This article suggests the adoption of tenancy laws that would only allow eviction on 'legitimate' grounds and recommends that courts and tribunals have the power to extend leases where necessary, in order safeguard the interests of tenants.

Prestigious Western European cities such as Paris or Berlin house a considerable population of middle and upper class households enjoying rental periods of superior length to Queensland tenants. Mentalities could change in Australia with the current development of quality units in major cities. Furthermore, high mortgage interest rates and high returns on 'safe' financial investments such as term deposits, coupled with artificially high land prices now make renting a financially interesting choice. Policy makers should take advantage of this situation to make renting a legally valid alternative to ownership and only security of tenure can make this achievable.

175 Adkins et al, above n 7, 16–20, 25. See also Morris, above n 141, 208–9; Kothari, above n 110, 19 [65].