

GOUGH WHITLAM, TENANCY LAWYER

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This article traces Gough Whitlam's career in tenancy law, from practitioner in the early post-war period, to the progenitor of law reform in the 1970s. Whitlam's career illustrates significant aspects of the development of Australian tenancy law through the eras of rent control, decontrol, and the Residential Tenancies Acts, as well as changes in the professional status of tenancy law practitioners.

I INTRODUCTION

Edward Gough Whitlam (1916–2014) was the Australian Labor Party's longest serving federal parliamentary leader (1966–1977) and Prime Minister of the most actively reformist government (1972–1975) in the country's history. Less well known is that Whitlam was also a tenancy lawyer. Before his election to the Australian Parliament in 1952, and for some time afterwards, Whitlam practiced as a barrister specialising in landlord-tenant cases. In parliament and later in government, Whitlam had several further encounters with tenancy law and tenancy legal practice.¹

This article traces Whitlam's career in tenancy law, from practitioner in the early post-war period, to the progenitor of law reform in the 1970s. It does not claim that tenancy law was formative of Whitlam's political career: Whitlam himself nominated the campaign for the 1944 referendum on 'Postwar Reconstruction and Democratic Rights' as his first inspiration.² Nor was tenancy law expressly among the 'abiding interests' of Whitlam's post-parliamentary life.³

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1 Whitlam himself was only briefly a tenant during these periods. As a university student he resided at St Paul's College. Upon marrying in 1942, Gough and Margaret Whitlam rented a flat at Elizabeth Bay, but from 1944 sublet it while Gough was on active service and Margaret and the couple's first child lived with her parents at Vaucluse. From 1945 Gough also lived there while their own home was built at the southern Sydney suburb of Cronulla. That property was purchased with Whitlam's war service home loan; they bought the block of land next door with prize money from Whitlam's wins in the ABC's National Quiz Championship. In 1956, following an electoral boundary change, the Whitlams built their next home in Cabramatta, which they owned for more than 20 years. See Troy Bramston, *Gough Whitlam: The Vista of the New* (Harper Collins, 2025) 55, 70, 72; Jenny Hocking, *Gough Whitlam: A Moment in History* (Miegunyah Press, 2008) vol 1, 116.

2 EG Whitlam, *On Australia's Constitution* (Widescope, 1977) 47.

3 Gough Whitlam, *Abiding Interests* (University of Queensland Press, 2006).

Instead this article aims, with Whitlam as a guide, to illustrate some significant aspects of the development of Australian tenancy law through the eras of rent control, decontrol, and the Residential Tenancies Acts; as well as changes in the professional status of tenancy law practitioners. It begins with Whitlam's cases, which illustrate the operation of rent and eviction controls, and the complexity of the law at the time. Next, this article sketches the changing politics of rent control and housing policy during the Whitlam's time as an Opposition Member of Parliament. This article then details the contributions of the Whitlam Government to Australia's modern residential tenancies legislation and tenants' advocacy services.

II IN PRACTICE: WHITLAM'S TENANCY CASES

Whitlam was admitted to the New South Wales ('NSW') bar in 1947 after completing a Bachelor of Law at the University of Sydney, war service in the Royal Australian Air Force, and associateships with two judges. As he built his practice, Whitlam took briefs from the Legal Service Bureau ('LSB'), a federal agency providing legal advice and assistance to veterans.⁴ Established during the war by HV Evatt as Commonwealth Attorney General, the LSB was Australia's first government-funded legal assistance scheme.⁵

Also productive of work for counsel was tenancy law. In 1947 this comprised the common law of property as received from England, subject to various piecemeal statutory amendments and, especially, the *National Security (Landlord and Tenant) Regulation* 1945 (Cth) – the Australian Government's wartime rent and eviction control regime. On its expiry in 1948, the regime was immediately re-enacted by the state parliaments. In NSW the *Landlord and Tenant (Amendment) Act* 1948 (NSW) ('LTA Act') maintained the controls longer than elsewhere. The law was frequently amended (eight times in its first ten years) and even more frequently litigated. The state law reports of the late 1940s and 1950s are remarkably full of tenancy cases determined by the NSW Supreme Court.

Over the 10 years spanning 1947–56, Whitlam appeared in 11 tenancy cases decided by the NSW Supreme Court and reported in the State Reports or the Weekly Notes, and in two tenancy cases decided by the High Court.⁶ Eight involved residential tenancies, with four appearances for landlords and four for tenants. The case reports illustrate a range of aspects of tenancy law and rental housing practice in the immediate postwar period.

4 Hocking (n 1) 116.

5 Don Fleming and Francis Regan, "'Evatt's Bastard Child': The Commonwealth Legal Service Bureau 1942–51" (2003) 7(2) *Australian Journal of Legal History* 255.

6 For a complete list of Whitlam's reported tenancy cases, see the Appendix. The two tenancy cases decided by the High Court that Whitlam appeared in are *Owen v Woolworths Properties Ltd* (1956) 96 CLR 154 and *Thompson v Easterbrook* (1951) 83 CLR 467, both of which are discussed in Part II of this article.

A Fair Rents

The most prominent feature of the law, and the focus of Whitlam's most prominent case, was the system for setting 'fair rents' for residential and commercial tenancies. In *Owen v Woolworths Properties Ltd*, Whitlam represented the landlord, the owner of the Woolworths building then at the corner of Market and Pitt Streets, Sydney.⁷ The landlord had received a relatively favourable fair rent determination from a stipendiary magistrate in their capacity as the Fair Rents Board under the *LTA Act*; the appellant tenant, who leased a shop in the building, was disputing the determination. The Board's process, known as the 'basic rent plus' approach, is summarised in the High Court's judgment:

[T]he stipendiary magistrate ... first fixed a 'basic rent', an expression currently in use but not found in the statute. This was fixed by taking the rent payable for the premises on the 'prescribed day', 31st August 1939, and adjusting it ... by inquiring whether the rent actually then payable was as at 31st August 1939 insufficient, and by adding the amount of the insufficiency found to exist as at that date. The result is the 'basic rent', a rent relevant in point of time to 1939 ...

To the basic rents were added apportioned parts of the increased outgoings borne by the lessor in respect of the whole building by way of rates, insurance, cleaning, materials, wages, lift maintenance, light and power repairs and management, together with an additional allowance by way of interest calculated at 0.5% on the capital value of the premises as at 31st August 1939.⁸

In an appeal to the NSW Supreme Court, the tenant argued that the Board erred by including land value in the premises' capital value and by omitting from its calculation of outgoings the benefit to the landlord of the 1952 repeal of federal land tax. The Supreme Court held against those arguments, but overturned the determination for another reason, ruling that the Board erred by considering the basic rent at all. In the Court's interpretation of the *LTA Act*, fair rents for dwellings houses were determined according to a relatively constrained process involving determination of a basic rent, while 'in the case of premises other than dwelling-houses the Board is given a very wide discretion to determine the rent which, in its opinion, is fair';⁹ in particular, it was required to consider certain factors prescribed in the *LTA Act* but not the state of affairs in 1939 (with the exception of the capital value at that date). Both parties appealed to the High Court. The High Court held against the tenant's arguments, but also held that because neither party had argued the 'width of discretion' issue, the Supreme Court had erred in overturning the Board's determination for that reason.¹⁰

The immediate upshot was that Whitlam's client landlord got to keep their relatively favourable fair rent determination. The case was also an important signal of judicial discontent with the practices of Fair Rents Board, despite the Supreme Court being overruled. Eight years later the issue again came before the High Court in *Rathborne v Abel*, in which the Court held that the *LTA Act* provided a much wider discretion in fair rent determinations both for dwellings and for commercial

7 (1956) 57 SR (NSW) 245 ('*Owen*'), revd (1956) 96 CLR 154 ('*Owen (High Court)*').

8 *Owen (High Court)* (n 7) 158–9 (Dixon CJ, Williams, Fullagar, Kitto and Taylor JJ for the Court).

9 *Owen* (n 7) 251 (Owen J).

10 Ibid 164.

premises than the Fair Rents Board's 'basic rent plus' approach admitted, and that the current capital value of premises was a relevant matter for the Board to consider.¹¹ This would have allowed much higher rents, so the *LTA Act* was amended to restore the 'basic rent plus' approach – a 'patch' amendment, admitted the Minister of Justice, reflecting the new Coalition Government's pre-election commitment to the status quo, while also characterising the *LTA Act* as 'a thing of patches. The Act is almost in shreds'.¹²

B Eviction Controls

Eviction controls were the other major feature of postwar tenancy law, including restricted grounds for termination, additional protections for certain categories of persons, and other conditions.¹³ Several of Whitlam's cases illustrate some of these provisions.

In *Oliver as Agent for the Women's Hospital (Crown Street) v Holliday*, Whitlam represented the hospital landlord, which sought to recover possession of premises it had leased to a tenant for use as a lodging house.¹⁴ It proceeded by giving a notice to quit on the ground the premises were required for use as a hospital – which was a specific ground for termination under the *LTA Act*.¹⁵ Other presumably more commonly encountered grounds included a tenant's failure to pay rent,¹⁶ other breaches by a tenant,¹⁷ and the landlord reasonably requiring the premises for their own or a dependent's occupation,¹⁸ or for demolition.¹⁹ In ejectment proceedings on any ground the court was required to consider the balance of hardship between the parties,²⁰ with the 'own occupation' and demolition grounds subject to a further condition: the landlord had to make available suitable alternative accommodation to the tenant.²¹ No provision was made for termination without grounds, nor at the end of a fixed term, nor to prepare premises for sale. In the present case, the Supreme Court had no difficulty finding that the narrow grounds at section 62(5)(j) of the *LTA Act* were established.²² However, other legal protections were at issue too.

11 (1964) 38 ALJR 293 ('*Rathborne*'). In *Owen (High Court)* (n 7), Whitlam's senior counsel was Garfield Barwick; in *Rathborne* (n 11), Barwick was Chief Justice of the High Court.

12 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 September 1966, 1028 (John Maddison, Minister of Justice).

13 Having characterised rent and eviction controls as the major features of the *Landlord and Tenant (Amendment) Act 1948* (NSW) ('*LTA Act*'), I briefly note a major non-feature: the absence of provisions relating to the habitability of premises and obligations to do repairs. These were matters for the lease. Concepts of habitability and good repair have a long history in the caselaw, but the obligations could be on either party. See *Chief Executive Officer (Housing) v Young* [2022] NTCA 1.

14 (1951) SR (NSW) 316 ('*Oliver*').

15 *LTA Act* (n 13) s 62(5)(j).

16 *Ibid* s 62(5)(a).

17 *Ibid* ss 62(5)(b)–(e), (n)–(p).

18 *Ibid* s 62(5)(g).

19 *Ibid* s 62(5)(m). There were also presumably even less commonly encountered grounds, such as the landlord intending the use the premises as a vicarage: at s 62(5)(h).

20 *Ibid* s 70(1).

21 *Ibid* s 70(2).

22 *Oliver* (n 14) 319 (Owen J).

Several of the residents of the lodging house (but not the hospital's tenant) met the definition of 'protected persons' under the *Landlord and Tenant (War Service) Amendment Act 1949* (NSW) ('*LTWSA Act*'). This category comprised current and discharged members of the Defence Force (and United Kingdom and allied forces), and their female dependants and dependant parents.²³ Against protected persons, eviction proceedings on most grounds (including the hospital ground, and excluding the tenant's breach grounds) were subject to the additional condition that alternative accommodation was available to the person,²⁴ at no greater rent for no less floor space and in no less 'congenial' condition.²⁵ These provisions ran to where a protected person was in possession and 'claiming under the lessee'²⁶ – so they applied where the protected person was a sub-tenant but not, as the Court held in the present case, where they were a lodger. However, here the tenant had one more argument: under section 6 of the *LTA Act*, a lodging house was 'special premises' for which the Act expanded the definition of 'lease' to include 'any leave or licence', so as to bring lodgers in special premises within the Act's controls. The Supreme Court held against the argument, finding that the *LTA Act* and the *LTWSA Act* 'provide two separate codes', such that the expanded definition was only for the purpose of the *LTA Act*, not the *LTWSA Act*, and the lodgers were not entitled to the additional conditions of the *LTWSA Act*. Subsequently, the NSW Government amended the *LTA Act* to incorporate the *LTWSA Act*'s 'protected person' provisions, effectively making them one code and closing the loophole through which Whitlam's client had stepped.

Several of Whitlam's cases involved 'protected persons', perhaps reflecting LSB referrals. Another of these was *Ex parte Austin; Re Staples*, in which Whitlam represented a protected person in an appeal against a possession order.²⁷ Whitlam's client was the sub-tenant of a lessee who had sublet the premises without the consent of the premises' owners – a breach by the lessee and grounds for recovery of possession of the premises. However, because the sub-tenant was a protected person, the *LTWSA Act* would have prevented the possession order from being enforced – except that one of the owners, the widow of a First World War veteran, also claimed to be a protected person. One of the other effects of this status was that a protected lessor's proceedings for possession were, in most circumstances, not subject to the additional conditions otherwise applying to protected tenants.²⁸ In the present case the appellant successfully argued that the qualifying 'war service' had to be in the Second World War, not the First.

23 *Landlord and Tenant (War Service) Amendment Act 1949* (NSW) ('*LTWSA Act*') s 3.

24 *Ibid* ss 4, 6.

25 *Ibid* ss 7, 8.

26 *Ibid* s 6.

27 (1950) 51 SR (NSW) 40 ('*Austin*').

28 Another effect was that a protected person could apply for a warrant to occupy a vacant dwelling and become the tenant thereof: *LTWSA Act* (n 23) ss 5–10; *Landlord and Tenant (Amendment) Act 1954* (NSW) ss 104–9. One of the circumstances in which a lessor's 'protected person' status did not exclude the additional conditions for protected tenants was where the lessor held a concurrent lease (ie, they held a lease of the reversionary interest of the head-lessor): see *Duhig v Hartley* (1952) 69 WN NSW 348 – another Whitlam case.

Two of Whitlam's cases turned on the 'alternative accommodation' requirement in section 70(2) of the *LTA Act*. In *Thompson v Easterbrook*, a landlord sought to recover possession of premises that combined a dwelling and a shop, arguing their dominant purpose was commercial and the alternative accommodation requirement was not engaged.²⁹ The Supreme Court held no, and Whitlam successfully defended the tenant against the landlord's appeal to the High Court. In *Brauer v Evans*,³⁰ another 'dwelling plus shop' case, Whitlam represented the landlord and successfully argued that the tenant had in fact ceased to occupy the premises as a dwelling, distinguishing *Thompson v Easterbrook*.

C Property Law Complexity

As the foregoing shows, the *LTA Act* and associated legislation was complex. The complexity was compounded by the incidents of the common law of property threaded throughout the legislation and the caselaw. This is evident in *Oliver as Agent for the Women's Hospital v Holliday*, where the different treatment of lodgers under the *LTA Act* and the *LTWSA Act* turned on their not having the requisite possessory interest to be 'claiming under the lessee'. It is also evident in *Killiby v Farthing* ('*Killiby*'), which concerned the interaction of tenancy law with matrimonial disputes.³¹ Here Whitlam represented the appellant landlord in an action for the ejectment of a deserted spouse after the purported surrender of the tenancy of the 'matrimonial home'.

A year previously, the Supreme Court had decided *Webb v Diethe*, which concerned a male tenant leaving his wife and purporting to surrender the tenancy while the wife remained in occupation.³² Following English precedents, the Court held that there could be no valid surrender by a husband where 'the wife is a deserted wife and the premises were the matrimonial home', and the wife was thus entitled to defend the landlord's ejectment action based on the tenant's continuing possession.³³ In *Killiby*, Whitlam's client faced the opposite situation: a female tenant had purported to surrender her tenancy after leaving her husband in occupation of the premises. The Court held there was no rule preventing the surrender: 'there is no obligation on a wife to maintain her husband or provide a roof over his head'.³⁴

Another argument was put by the husband: that he was a licensee of his wife and, according to precedents on trespass, entitled to a reasonable amount of time to remove himself from the premises, and to an injunction protecting this entitlement against the landlord's ejectment action. The Supreme Court held no: ejectment actions in NSW were common law proceedings in which the right of possession was crucial, and equitable remedies, such as injunctions, were not available for the protection of licences.³⁵ The argument might have worked in

29 (1951) 83 CLR 467 ('*Thompson*').

30 (1956) 73 WN (NSW) 291; *Thompson* (n 29).

31 (1954) 55 SR (NSW) 85 ('*Killiby*').

32 (1953) 70 SR (NSW) 190.

33 Ibid 192 (Owen J).

34 *Killiby* (n 31) 86–7 (Street CJ).

35 Ibid.

England where, as the Court observed, the judicature reforms of the 1870s had brought together common law and equity – and it might have worked in NSW post-*Supreme Court Act 1970* (NSW) – but in the present case the ejectment action by Whitlam’s client could proceed.

Looking across the reported cases, there are a couple where Whitlam’s advocacy saves a tenancy (*Ex parte Austin*; *Re Staples*,³⁶ and *Thompson v Easterbrook*³⁷) but, it is fair to say, no great victories – or even valiant losses – for social justice principles more broadly. It is a record of often highly technical wins and losses for clients – landlords as well as tenants – in a dense, complex area of the law.

III IN PARLIAMENT

At a by-election in October 1952, Whitlam was elected Member for the Division of Werriwa, which then spanned Sydney’s southern outskirts from Cronulla to Liverpool and Fairfield. The main topic of his maiden speech was housing supply. ‘[T]he volume of home construction’, Whitlam said, ‘is as good a criterion as any other with respect to the financial and economic health of a community’.³⁸ Whitlam castigated the Menzies Coalition Government for a decline in home building since it came to office in 1949, highlighting reduced access to finance for home buyers and shortfalls in public housing funding under the Commonwealth and State Housing Agreement.³⁹ Notably for a person who had spent much of the previous five years dealing with landlords, Whitlam made no mention of the private rental sector as a factor in Australia’s future housing supply.

By the dates of the law reports, Whitlam appears to have continued some level of legal practice for another four years. Perhaps the 1956 electoral redistribution, which saw Werriwa and the Whitlam household move westward, was a prompt for Whitlam to wind up his practice. Just a couple of years later he was engaged with tenancy law again – if very briefly – through the Anti-Eviction and Tenants’ Protection Committee.

A Anti-Eviction and Tenants’ Protection Committee

In April 1958 Whitlam joined the newly established Anti-Eviction and Tenants’ Protection Committee, which comprised eight other federal Labor MPs, six NSW Labor MLAs and 10 members of the NSW ALP State Executive. Organised by the federal MP for East Sydney, Eddie Ward, the Committee was formed amid controversy within the NSW Labor Party about rent and eviction

36 *Austin* (n 27).

37 *Thompson* (n 29).

38 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 1953, 1423 (Edward Gough Whitlam).

39 *Ibid* 1424.

controls.⁴⁰ In power in NSW since 1941, the Labor Government had begun to change its policy on rent and eviction controls in 1954, when it amended the *LTA Act* to allow new dwellings (that is, completed on or after 16 December 1954) and existing dwellings that had not been rented in the period since 7 December 1941, to be decontrolled upon registration of a new lease.⁴¹ In 1958 it proposed to go further, allowing the decontrol of dwellings that had not been rented in the period since 1 December 1957 and – adopting a Liberal Party amendment – dwellings of which the landlord had recovered possession other than as a result of proceedings on ‘own occupation’, demolition and certain other grounds.⁴² The latter measure in particular roused opponents in the party and the wider labour movement, who predicted that landlords would seek to decontrol their properties by harassing tenants out of their tenancies.⁴³ The formation of the Committee reflected these concerns.

The Committee’s name was evocative. A quarter century earlier, local Anti-Eviction Committees were established by unionists and socialists to defend unemployed workers and families against eviction during the Great Depression.⁴⁴ These committees employed direct action, picketing premises under threat of eviction, sending delegations to local agents and landlords to warn them off and, in some cases, engaging police and bailiffs in violent confrontations.⁴⁵ Anti-Eviction Committees were especially active in the Hunter Valley and in inner Sydney, where Ward was the newly elected local MP.⁴⁶

The 1958 Committee had less impact. The Labor Party’s State President declared it a ‘front organisation’ and media reported it as a vehicle aimed at controlling the party’s annual conference.⁴⁷ Whitlam, who plausibly was there to discuss tenancy law, withdrew from the Committee, while the Premier, Bob Heffron, and federal Labor leader, Herbert Vere Evatt,⁴⁸ moved to wind the Committee up. It disbanded within weeks, passing a final motion in support of ‘nation-wide rent control’.⁴⁹ By this time, Victoria, Tasmania and Western Australia were largely decontrolled and the rest (except NSW) had decontrolled new tenancies, with Queensland and South Australia also substantially increasing

40 Helen Gloria Nelson, ‘The Politics of Rent Control in New South Wales’ (PhD Thesis, University of Sydney, 1977) 51.

41 *LTA Act* (n 13) s 5A.

42 *Landlord and Tenant (Amendment) Act 1958* (NSW) s 2.

43 Nelson (n 40) 49–52.

44 Iain McIntyre, *Lock Out the Landlords! Australian Eviction Resistance 1929–1936* (Homebrew Books and Active Distribution, 2nd ed, 2008).

45 Ibid; Nadia Wheatley and Drew Cottle ‘Sydney’s Anti-Eviction Movement: Community or Conspiracy?’, in Raymond Markey (ed) *Labour and Community: Historical Essays* (University of Wollongong Press, 2001) 191.

46 Wheatley and Cottle (n 45) 193.

47 Nelson (n 40) 52.

48 Thirty years previously Evatt was himself a rent control scholar, writing on Australia’s first rent control regime, the *Fair Rents Act 1915* (NSW): HV Evatt, ‘A “Fair Rent” Experiment in New South Wales’ (1920) 2(1) *Journal of Comparative Legislation and International Law* 10.

49 Nelson (n 40) 54.

base rents for existing tenancies.⁵⁰ In 1960, the NSW Government passed questions of rent and eviction controls to a Royal Commission, which recommended swingeing decontrol for all but low-income households.⁵¹ After Labor lost office in 1965, elements of the recommendations were legislated by the Coalition Government in 1968, in amendments providing for market rents for tenants on incomes above a certain threshold,⁵² and a new ground for termination where the tenant's 'means ... are such that it is reasonable that [they] should acquire or lease other premises'.⁵³ The alternative accommodation requirement was almost entirely removed, and commercial premises entirely decontrolled. Exits from control accelerated.

As Graham Freudenberg observes, Ward's 'fights had become reruns of all the old bouts', and his East Sydney electorate 'was itself poised for a change in nature and style as fast as any urban area in Australia'.⁵⁴ In 1960, as Arthur Calwell succeeded Evatt as federal leader, Whitlam defeated Ward in a parliamentary party vote to become Deputy Leader. Seven years later Whitlam succeeded Calwell, and embarked on a modernisation of the party and its policies.

IV IN GOVERNMENT

At the 2 December 1972 federal election, Whitlam led the Labor Party to victory, ending 23 years of conservative Coalition rule. It had taken to the election an expansive program of high aims: 'to promote equality; to involve the people of Australia in the decision-making processes of our land; and to liberate the talents and uplift the horizons of the Australian people'.⁵⁵ Whitlam immediately set the energetic mode of the government, forming a two-person ministry with his deputy leader pending finalisation of the election results; hence for two weeks, Whitlam was Minister for Housing, among 11 other portfolios. Whitlam again led Labor to retain power at the May 1974 election.

Among the many initiatives of the Whitlam Government were two pieces of tenancy law reform: the reintroduction of rent control in the territories, which were then still governed directly by the Commonwealth. By ordinance, Australian Capital Territory ('ACT') rents were fixed as at 1 January 1973,⁵⁶ and Northern Territory ('NT') rents as at 31 July 1973,⁵⁷ each subject to fair rent determinations according a 'basic rent plus' approach. Neither lasted long after the end of the

50 Robert Albon, 'An Economic Evaluation of Rent Control and Other Rental Housing Market Policies in Australia' (PhD Thesis, Australian National University, 1981) 52–4.

51 *Royal Commission of Inquiry on the Landlord and Tenant (Amendment) Act, 1948, as Amended* (Report, October 1961) 67.

52 *LTA Act* (n 13) s 4AA.

53 *Ibid* s 62(5)(w).

54 Graham Freudenberg, *A Certain Grandeur: Gough Whitlam in Politics* (Macmillan, 1977) 14.

55 Gough Whitlam, '1972 Labor Party Policy Speech' (Speech, Blacktown Civic Centre, 13 November 1972), reproduced in Whitlam, *On Australia's Constitution* (n 2) 266–7.

56 *Landlord and Tenant (Control of Rents) Ordinance (No 2) 1973* (Cth).

57 *Landlord and Tenant (Control of Rents) Ordinance 1974* (Cth).

Whitlam Government (subsequent amending ordinances made fair rent determinations voluntary processes, without reference to a basic rent). However, two other initiatives had more enduring impact: the Law and Poverty Commission, and the Social Welfare Commission.

A The Law and Poverty Commission, and the Social Welfare Commission

In its final months, the McMahon Coalition Government had established the Commission of Inquiry into Poverty, constituted as a single Commissioner, Professor Ronald Henderson, with relatively narrow terms of reference. In March 1973 the Whitlam Government significantly augmented the Poverty Commission with additional commissioners and broader terms of reference.⁵⁸ As the ‘Law and Poverty’ Commissioner, Professor Ronald Sackville was engaged to investigate ‘areas of substantive law, whether Federal or State, that are of special significance to the poor’, and ‘[t]he delivery of legal services to the poor, including ... alternative forms of legal advice and assistance including those offered in connection with non-legal services’.⁵⁹

Tenancy law was one of those areas of substantive law. In a research report, part of a series commissioned by the Inquiry, legal academic Adrian Bradbrook reviewed the state of the law and found it ‘sadly deficient in most of the relevant areas of tenant needs’.⁶⁰

No advice or assistance is provided for a prospective tenant by any governmental agency in any State, there is no legislation to ensure that the tenant is not bound by onerous and oppressive terms in a lease, and the means of solving any dispute between a landlord and tenant are far from fair and sensible and are based on conditions relevant to a bygone era in the United Kingdom ... The existing legislation also fails to satisfy fully the needs of the landlord ... It is not overstating the case to say that the current body of landlord-tenant law in Australia is a scandal.⁶¹

The *Law and Poverty Report* largely adopted the critique, and recommended a set of reforms to turn tenancy law away from property law, and away from the courts, and towards principles of consumer protection.⁶² In particular, it recommended prescribed standard forms of lease, with standard terms – including guarantees that premises are fit for habitation, and obligations on landlords to make repairs – standard notice periods and grounds for termination, and prohibitions on fees other than rents and bonds.⁶³ Regarding rents, the Report found ‘general rent control has little to commend it’,⁶⁴ recommending instead that rents should be set by the market, with provision for rent increases excessive to the market to be challenged and adjudicated. Eviction should be restricted to certain grounds –

58 Ronald Henderson, *Commission of Inquiry in Poverty First Main Report: Poverty in Australia* (Report, April 1975) vii.

59 Ronald Sackville, *Law and Poverty in Australia: Commission of Inquiry into Poverty Second Main Report* (Report, October 1975) ix (‘*Law and Poverty Report*’).

60 Adrian J Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (Report, 1975) 1.

61 Ibid 1–2.

62 Sackville (n 59).

63 Ibid 89–90.

64 Ibid 86.

breach, 'own occupation', and sale requiring vacant possession, rather than the baroque list of the postwar controls – determined by a tribunal with discretion to decline or postpone termination in hardship cases. Specialist tribunals, which the Report called 'Residential Tenancies Boards', would deal with disputes, providing 'speedy hearings, free as far as possible from the formal rules of procedure and evidence', with lawyers mostly displaced by tenants' unions, government consumer protection agencies and tenants themselves.⁶⁵ Those agencies would also provide information and advice to tenants on their legal rights and the rental market. Tenants' bonds would be lodged with the government, both to protect the money for the duration of the tenancy and, in the interim, generate interest income to offset the cost of the tribunals and information services. The reformed laws would apply generally, covering private and public tenancies, and lodging house residencies, mostly alike.

Aside from its recommendations about tenant representation, the *Law and Poverty Report* also made recommendations about legal aid. In this regard it was building on actions that the Whitlam Government had already taken, having in 1973 expanded the remit and resources of the LSB beyond a veterans' service to become the Australian Legal Aid Office ('ALAO'), which employed lawyers and provided grants of aid for disadvantaged persons and parties in federal legal matters. The *Law and Poverty Report* recommended the establishment of an independent statutory Legal Aid Commission to administer a network of local legal centres, based on ALAO branches. Local committees would also participate in the governance of the local legal centres, setting priorities for non-criminal work and community legal education.⁶⁶

The recommendation for local legal centres picked up a wider theme of the Whitlam Government: community participation in an expanded concept of social welfare. In 1973, the Government had established the Social Welfare Commission, headed by Marie Coleman, to administer the Australian Assistance Plan ('AAP'): 'a national, experimental program to get people together to improve their own community in the way they want'.⁶⁷ A multitude of local community-based projects and services were funded by the AAP, including women's refuges, playgrounds, home help for the elderly and, notably, South Sydney Community Aid's 'Tenants Rights Project', which produced legal information for tenants.⁶⁸

The *Law and Poverty Report* was presented to the Government on 20 October 1975 – a hectic time for the Government, absorbed by the Opposition's obstruction of supply bills in the Senate.⁶⁹ Three weeks later, the Whitlam Government was

65 Ibid 92–3.

66 Ibid 48–51.

67 Australian Government Publishing Service, 'People Power: Australian Assistance Plan' (Brochure, 1975) cited in Joanne Scott, Melanie Oppenheimer and Erik Eklund, 'A "Program of Such Potential": The Australian Assistance Plan', in Erik Eklund, Melanie Oppenheimer and Joanne Scott (eds) *The State of Welfare: Comparative Studies of the Welfare State at the End of the Long Boom, 1965–1980* (Peter Lang, 2017) 85, 92.

68 Scott et al (n 67) 93; Paul Mortimer, *Unfinished Business: The Story of the Tenants' Union of NSW 1976–1996* (Tenants' Union of NSW, 1996) 12.

69 Edward Gough Whitlam, *The Truth of the Matter* (Penguin Books, 1979) 72.

dismissed by Governor-General Sir John Kerr; eight weeks later, Whitlam's Labor Party lost the federal election.

That was not, however, the end of the *Law and Poverty Report's* proposed reforms. In 1977, the states established Legal Aid Commissions, with federal and state funds, providing employed lawyers, aid grants, and funding for community legal centres.⁷⁰ The AAP was terminated in 1976, but not before the Tenants Rights Project helped organise the establishment of the Tenants' Union of NSW, which in turn would organise networks of local tenants advice services.⁷¹ First staffed by volunteers, the services employed paid advocates from the 1980s, funded by interest on bonds lodged with the government per the *Landlord and Tenant (Rental Bonds) Amendment Act 1977* (NSW) ('*LTRBA Act*').⁷²

The *LTRBA Act* implemented one of the *Law and Poverty Report's* tenancy law reform recommendations. Over the quarter century from 1975, each state and territory enacted residential tenancies legislation that more comprehensively – but not completely – reflected the *Law and Poverty Report's* recommendations. South Australia was first in 1978,⁷³ then Victoria in 1980;⁷⁴ after a long campaign by the Tenants' Union of NSW and other housing advocacy groups, the *Residential Tenancies Act 1987* (NSW) commenced in 1989. The NT's *Residential Tenancies Act 1999* (NT) was the last enacted. All fell short of Sackville's recommendations in some respects: allowing termination without grounds, excluding many if not all lodgers from coverage, and relying much less on government agencies than tenants themselves to enforce their contractual rights. They also differed from each other on many points of detail. But the basic model was largely as outlined in the *Law and Poverty Report*: wide coverage, standard forms, prescribed terms, bond protection, market rents, accessible dispute resolution and orderly termination by tribunals.⁷⁵

V CONCLUSION: RESIDENTIAL TENANCIES LAW AND PRACTICE TODAY

Australian residential tenancies law, and tenancy legal practice, are today very different from when Whitlam practiced. Residential tenancies legislation on the *Law and Poverty Report's* consumer protection model is well-established in all

70 Andrea Durbach, "'Between the Idea and the Reality': Securing Access to Justice in an Environment of Declining Points of Entry", in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds) *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 214, 219.

71 Mortimer (n 68) 12.

72 Ibid 27.

73 *Residential Tenancies Act 1978* (SA).

74 *Residential Tenancies Act 1980* (Vic).

75 Chris Martin et al, *Regulation of Residential Tenancies and Impacts on Investment* (Australian Housing and Urban Research Institute, 2022); Brendan Edgeworth, 'Australian Residential Tenancies Law 40 Years after the Sackville Report: A Multi-Level Snapshot', in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds) (n 70) 119; Anthony Moore, 'Adrian Bradbrook and Residential Tenancy Reform', in Paul Babie and Paul Leadbeter (eds) *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press, 2014) 139.

states and territories. From time to time all have reviewed and revised their Acts so that they are increasingly comprehensive regimes for most aspects of renting: for example, all now make specific provisions regarding residential tenancy databases, the keeping of pets, and options for tenants experiencing domestic and family violence. Fewer answers to legal problems in residential tenancies are now to be found in property law statutes and caselaw, and the divide from commercial tenancies has widened.

Lately, most jurisdictions have enacted amendments to improve tenants' security, by removing or limited the ability of landlords to give termination notices without grounds.⁷⁶ 1948-style rent controls are a thing of the past – almost. In NSW, there still exist tenancies subject to the postwar rent and eviction controls,⁷⁷ but they are now certainly tiny in number.⁷⁸

The vast majority of residential tenancies litigation is in civil and administrative tribunals, and rarely the superior courts. Very few lawyers in private practice specialise in residential tenancies law; instead, almost all the specialist tenancy lawyers are employed in community legal centres, such as the Tenants' Union of NSW, and its counterparts in most other jurisdictions.⁷⁹ Legal Aid NSW has a small staff of housing specialists, and ACT Legal Aid operates a tenancy service, while some other state Legal Aid agencies do not have any tenancy legal practice. In NSW, Queensland, Victoria and Western Australia, there are state-wide networks of tenant advocates (lawyers and non-lawyers) employed in local community organisations, providing an important but thinly spread service. On the available data, the Tenants' Union of NSW estimates the annual funding of these services ranges from less than \$8 per renting household in Tasmania, to just over \$19 per renting household in Victoria.⁸⁰ Both the lawyers and advocates advise and represent tenants only, never landlords, unlike what the bar's cab rank rule required of Whitlam.

Residential tenancies law and legal practice today are not the straightforward products of the *Law and Poverty Report*, but they can be seen as incomplete developments of its themes. Other present-day features of our rental housing system were less anticipated. The Whitlam Government, and the *Law and Poverty Report*, looked to improve housing by growing homeownership, public housing and housing cooperatives, but since the 1980s private rental has grown at the

76 Chris Martin, 'Tenancy Syzygy? Australian Residential Tenancies Law in the 2020s' (Conference Paper, Australian Housing Research Conference, 20 February 2025).

77 See, eg, *Wallalong Land Developments Pty Limited v Charles Joseph Warren* [No 2] [2024] NSWLC 8, and an associated media report: Michaela Whitbourn, 'Joey's Home is His Castle. He Pays \$50 a Month in Rent', *Sydney Morning Herald* (online, 3 September 2024) <<https://www.smh.com.au/national/nsw/joey-s-home-is-his-castle-he-pays-50-a-month-in-rent-20240827-p5k5m6.html>>.

78 No new tenancies subject to the controls have been created since 1 January 1986 at the latest (*LTA Act* (n 13) s 5AA), and the *LTA Act* was repealed in 2018, but it lives on for the tenancies to which it applied via schedule 2, part 7 of the *Residential Tenancies Act 2010* (NSW).

79 There is no specialist tenancy community legal centre in South Australia, and Canberra Community Law's tenancy practice serves public housing tenants only.

80 Tenants' Union of NSW, Submission to the Reviewer, *Independent Review of the National Legal Partnership* (2023).

expense of the other housing tenures – raising the question whether residential tenancies legislation has been too accommodative, and other policies too encouraging, of private landlords over would-be homeowners and social housing providers.⁸¹ Fifty years after the Whitlam Government, it's time for the Australian Government to coordinate a thorough re-examination of residential tenancies laws, and a substantial increase of funding for tenancy legal services, to close gaps and divergences, and enhance the ability of tenants to make a home in rental housing.

APPENDIX: WHITLAM'S REPORTED TENANCY CASES

The following is a list of the reported tenancy cases in which Whitlam appeared:

1. *Brauer v Evans* [1956] 73 WN 291;
2. *Duhig v Hartley* [1952] 69 NSW WN 348;
3. *Electrical Commission of New South Wales v Australian United Press Ltd* (1954) 55 SR (NSW) 118;
4. *Ex parte Austin; Re Staples* (1950) 51 SR (NSW) 40;
5. *Ex parte Halliday; Re Grigsby* (1947) 48 SR (NSW) 26;
6. *Killiby v Farthing* (1954) 55 SR (NSW) 85;
7. *McDonald v Moyes* (1952) 69 WN (NSW) 123;
8. *Milne v Lahz* (1951) 52 SR (NSW) 30;
9. *Oliver as Agent for the Women's Hospital v Holliday* (1951) 51 SR (NSW) 316;
10. *Owen v Woolworths Properties Ltd* (1956) 57 SR (NSW) 245;
11. *Owen v Woolworths Properties Ltd* (1956) CLR 154;
12. *Thomas v Alpha Knitwear Pty Ltd* (1951) 51 SR (NSW) 285; and
13. *Thompson v Easterbrook* (1951) CLR 83.

Cases numbered 1–3, 4, 6, 9–11 and 13 are discussed in this article.

81 Martin (n 76) 11.