IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP9 of 2020

ON APPEAL from the judgment of Blokland J in proceeding No. 1 of 2019 (21911211)

BETWEEN:

CHIEF EXECUTIVE OFFICER (HOUSING)
Appellant

AND

ENID YOUNG
First Respondent

AND

PETRIA CAVANAGH in her capacity as Administrator of the Estate of ROBERT CONWAY (deceased)
Second Respondent

ANNOTATED SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

Introduction

1. The Australian Human Rights Commission makes these submissions pursuant to the leave granted by Southwood J on 23 December 2020 to appear as amicus curiae in this appeal. The submissions address the proper interpretation of the landlord's obligation in s 48(1)(a) of the *Residential Tenancies Act 1999* (NT) (**RTA**) to ensure that premises are habitable in light of Australia's international human rights obligations.

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2. At paragraph 6 of the Notice of Appeal filed on 6 October 2020, the Appellant claims that her Honour Blokland J erred in construing s 48(1)(a) of the RTA by holding that 'habitable' requires an overall assessment of humaneness, suitability and reasonable comfort of the premises judged against contemporary standards. The Appellant's position is that habitability should be limited to considerations of health and safety.

3. The Commission submits that her Honour's decision on this point should be upheld for the following four reasons.

4. First, the RTA in general, and s 48(1)(a) in particular, is beneficial and remedial legislation aimed at protecting the rights of tenants from what would otherwise be an imbalance of power in favour of landlords and, as such, should be given a 'fair, large and liberal' interpretation consistently with ordinary principles of statutory interpretation. Such an approach supports the decision of Blokland J in rejecting a narrow interpretation of s 48(1)(a) focused only on issues of health and safety.

5. Secondly, to the extent that there is ambiguity in the meaning of the term 'habitable' in s 48(1)(a) of the RTA, it should be interpreted in a way that is consistent with Australia's international law obligations at the time the RTA was enacted. In particular, it should be interpreted in a way that accords with Australia's obligation in article 11(1) of the *International*

Covenant on Economic, Social and Cultural Rights (**ICESCR**)[1] to ensure the right to adequate housing.

6. Thirdly, a narrow construction of the term 'habitable' focused only on health and safety is not consistent with the right to adequate housing under article 11(1) of the ICESCR. Her Honour's decision that the standard of habitability requires an assessment of the humaneness, suitability and reasonable comfort of the premises accords with Australia's obligations in relation to the right to adequate housing under international law.

7. Fourthly, an historical analysis of the enactment of the RTA shows that the Act was passed in contemplation of Australia's international law obligation to ensure adequate housing, which provides another basis upon which to construe the term 'habitable' consistently with the right to adequate housing. The RTA extended the minimum legislative standard of 'habitability' for the first time to public housing tenants and was, in substance, directed to ensuring that this particularly vulnerable group had access to adequate housing. This context provides further support for her Honour's wide construction of the term 'habitable' in s 48(1)(a).

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1 *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5 (ratified by Australia on 10 December 1975, entered into force generally on 3 January 1976, entered into force for Australia on 10 March 1976) **HIB 571**.

Background

8. Section 48(1) of the RTA provides as follows:

> **Premises to be clean and suitable for habitation**
>
> (1) It is a term of a tenancy agreement that the landlord must ensure that the premises and ancillary property to which the agreement relates:
>
> (a) are habitable;
>
> (b) meet all health and safety requirements specified under an Act that apply to residential premises or the ancillary property; and
>
> (c) are reasonably clean when the tenant enters into occupation of the premises.

9. Before Blokland J in the Supreme Court, the Appellant argued that the meaning of the term 'habitable' in s 48(1)(a) was 'confined to considerations of safety and health'.[2] Her Honour rejected the Appellant's submissions as construing s 48(1)(a) too narrowly[3] and held that:

> The assessment of whether the premises were habitable should have included not only the health and safety of tenants but an overall assessment of the humaneness, suitability and reasonable comfort of

2 Respondent's Summary of Submissions, AB 703 at [61].
3 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, AB 897 at [76].

the premises, even if only basic amenities are provided, judged against contemporary standards.[4]

10. In reaching that view, her Honour had regard to the following matters:

(a) the statutory context in which the term 'habitable' was used in the RTA, noting that the term was invariably used in a manner that was separate and different from (although overlapping with) concepts of health and safety;[5]

(b) ordinary and dictionary definitions of the term 'habitable', which drew on factors wider than health and safety;[6] and

(c) relevant authorities which held that the concept of habitability was concerned not only with safety but with reasonable comfort, for the purposes for which the premises were taken, and also imported the notion of humanity or humaneness.[7]

11. As shown below, her Honour's decision on the proper construction of s 48(1)(a) is supported by common law principles of statutory interpretation based on human rights and accords with the content of Australia's international human rights obligations, in particular the right to adequate housing.

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4 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, AB 899 at [80].
5 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, AB 895–897 at [73] and [76].
6 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, AB 897–898 at [77].
7 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, AB 898–899 at [78]–[79].

Relevant principles of statutory interpretation based on human rights

Remedial or beneficial provisions to be interpreted liberally

12. There is a general rule of construction that a remedial or beneficial provision is to be given a 'fair, large and liberal' interpretation rather than one which is 'literal or technical'.[8] A remedial or beneficial provision is 'one that gives some benefit to a person and thereby remedies some injustice'.[9] In particular, where legislation protects or enforces human rights, courts have a 'special responsibility to take account of and give effect to the statutory purpose'.[10]

13. There are a number of textual indicators in the RTA that it is intended to be 'beneficial' legislation and s 48(1)(a) is a remedial provision concerned with protecting the rights of tenants. One of the express objectives of the RTA is 'to ensure that tenants are provided with safe and habitable premises under tenancy agreements and enjoy appropriate security of tenure' (RTA s 3(d)). Another objective is 'to fairly balance the rights and duties of tenants and landlords' (RTA s 3(a)). Having regard to the fact that at common law, 'a tenant of residential premises was largely at the mercy of his or her landlord,' these objectives must be seen in the context of the need to effectively protect tenants from what would

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8 *AB v Western Australia* (2011) 244 CLR 390 at 402 [24] (French CJ, Gummow, Hayne, Kiefel and Bell JJ), citing *IW v City of Perth* (1997) 191 CLR 1 at 12 (Brennan CJ and McHugh J).

9 *Re McComb* [1999] 3 VR 485 at 490 ([22]).

10 *Waters v Public Transport Commission* (1991) 173 CLR 349 at 359 (Mason CJ and Gaudron J). See also *IW v City of Perth* (1997) 191 CLR 1 at 22–23 (Dawson and Gaudron JJ), 58 (Kirby J).

otherwise be an imbalance of power in favour of landlords.[11]

14. To achieve these objectives, the RTA and the *Residential Tenancies Regulations 2000* (NT) (**Regulations**) in their current form include:

(a) a prohibition on the landlord entering into a tenancy agreement if the premises are not habitable (RTA s 47(a));

(b) a prohibition on the landlord contracting out of certain statutory obligations, including the requirement in s 48(1)(a) that premises be habitable (RTA s 20);

(c) provision for a prescribed residential tenancy agreement which applies as a default agreement if a purported tenancy agreement is not in the form required by the RTA (RTA s 19(4) and reg 10 and Sch 2 of the Regulations);

(d) an obligation in the prescribed residential tenancy agreement that the landlord must ensure that the premises are habitable (Sch 2, item 6 of the Regulations); and

(e) the power of the Northern Territory Civil and Administrative Tribunal to rescind or vary a term of a tenancy agreement (other than a mandatory statutory term) if it is satisfied that the term is harsh or unconscionable (RTA s 22(1)).

15. These provisions strongly indicate that a primary purpose of the RTA is to

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11 *Gration v C Gillan Investments Pty Ltd* [2005] 2 Qd R 267 at [78]–[80] (Wilson J), referred to with approval at [1] (Williams JA).

protect the rights of tenants, including their right to adequate housing. It is also clear from the express terms of s 48(1)(a), which imposes an obligation on landlords to ensure that premises are habitable, that the provision was intended to be for the benefit of tenants. In these circumstances, the word 'habitable' should be given a 'fair, large and liberal' interpretation consistently with the decision of Blokland J. Such an approach is also consistent with Australia's obligations in relation to the right to adequate housing under international human rights law.

Consistency with international human rights law

16. The content of Australia's international law obligations is relevant to the proper construction of ambiguous provisions in legislation passed after ratification of the relevant treaty.

17. Even where an international instrument has not been implemented in domestic law, it is well settled that legislative provisions that are ambiguous are to be interpreted by reference to the presumption that Parliament did not intend to violate Australia's international law obligations.[12]

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12 This principle was first stated in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. It has since been reaffirmed by the High Court on many occasions: see, eg, *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181 (Barton, Isaacs and Rich JJ); *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69 (Latham CJ), 77 (Dixon J), 80-81 (Williams J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ); *Dietrich v R* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J) (***Teoh***); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562;

18. This principle applies not only to Commonwealth Acts, but also to State and Territory legislation.[13]

19. The essence of the principle was encapsulated by Mason CJ and Deane J in *Teoh*:

> Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, **at least in those cases in which the legislation is enacted after, or in contemplation of**, entry into, or ratification of, **the relevant international instrument**. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.[14] [Emphasis added.]

20. Their Honours said that there were 'strong reasons for rejecting a narrow conception of ambiguity':

> If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[15]

21. The RTA was assented to on 10 November 1999 and commenced on

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Coleman v Power (2004) 220 CLR 1 at 91 (Kirby J). Despite his criticism of the rule, in *Al-Kateb* at [63]–[65] McHugh J acknowledged that 'it is too well established to be repealed now by judicial decision'.

13 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 [97] (Gummow and Hayne JJ); *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100 at [61] (Perry J).

14 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at [26] (Mason CJ and Deane J).

15 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at [27] (Mason CJ and Deane J).

1 March 2000. As explained in further detail below, it was enacted against a background of international law obligations that protected the rights of people in Australia to adequate housing, and in contemplation of the right to adequate housing under international law. It follows that, to the extent it is ambiguous, the term 'habitable' in s 48(1)(a) of the Act should be construed in accordance with Australia's obligations under international law, in particular the right to adequate housing.

International law on the right to adequate housing

22. At the time the RTA was passed, Australia's international law obligations in relation to adequate housing were contained in a number of international instruments:

(a) article 11(1) of the ICESCR – the right of everyone to an adequate standard of living for themselves and their family, including adequate housing;

(a) article 14(2)(h) of the *Convention on the Elimination of all forms of Discrimination Against Women* (**CEDAW**)[16] – the right of women in rural areas to enjoy adequate living conditions, particularly in relation to housing; and

(a) article 27 of the *Convention on the Rights of the Child* (**CRC**)[17] –

16 *Convention on the Elimination of all forms of Discrimination Against Women* [1983] ATS 9 (ratified by Australia on 28 July 1983, entered into force generally on 3 September 1981, entered into force for Australia on 27 August 1983).

17 *Convention on the Rights of the Child* [1991] ATS 4 (ratified by Australia on 17 December 1990, entered into force generally on 2 September 1990, entered into force for Australia on 16 January 1991).

the right of every child to an adequate standard of living, including an obligation on States to assist parents and others responsible for children to implement this right and to provide material assistance and support programmes, particularly with regard to housing.

23. The Committee on Economic, Social and Cultural Rights (**CESCR**) is the body responsible for monitoring the implementation of the ICESCR. It was established on 28 May 1985 to carry out the functions assigned to the United Nations Economic and Social Council in Part IV of the ICESCR.[18]

24. Australia has submitted five periodic reports to the Economic and Social Council and, later, the CESCR pursuant to articles 16 and 17 of the ICESCR setting out the measures adopted, and the progress made, in achieving the rights guaranteed by the ICESCR. As discussed in more detail in paragraph 51 below, this has included reporting to the CESCR about the RTA and some of the ways in which it has contributed to Australia fulfilling its obligations insofar as the right to adequate housing in article 11(1) of the ICESCR is concerned.

25. As part of its functions, the CESCR issues general comments on articles of the ICESCR. These general comments represent authoritative statements of its opinions and practice, are regularly referred to by States

18 United Nations Economic and Social Council resolution 1985/17, 'Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights'.

Parties when establishing the meaning of the relevant provisions[19] and, as a result, may be referred to for interpretive purposes.[20] Consideration of the views of the body responsible for monitoring compliance with the ICESCR assists in ensuring that the treaty is interpreted uniformly by contracting States.[21]

26. In 1991, the CESCR issued a general comment on the right to adequate housing.[22] The Committee considered that the right to adequate housing was derived from the right to an adequate standard of living and was 'of central importance for the enjoyment of all economic, social and cultural rights'.[23] Significantly, it said that the right should not be interpreted in a 'narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity'.[24] Rather, it involved 'the right to live somewhere in security, peace and dignity'.[25]

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19 See Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, 1st ed, 2014), p 5.

20 *Vienna Convention on the Law of Treaties* [1974] ATS 2 (done at Vienna on 23 May 1969, acceded to by Australia on 13 June 1974, entered into force generally on 27 January 1980), article 31(3)(b).

21 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 at 186-7 [71] (McHugh J).

22 Committee on Economic, Social and Cultural Rights, *General Comment No. 4 (1991) The right to adequate housing (art. 11(1) of the Covenant)*, UN Doc E/1992/23 E/C.12/1991/4, pp 114–120 **HIB 616**.

23 Committee on Economic, Social and Cultural Rights, *General Comment No. 4 (1991) The right to adequate housing (art. 11(1) of the Covenant)*, UN Doc E/1992/23 E/C.12/1991/4, at [1] **HIB 621**.

24 Committee on Economic, Social and Cultural Rights, *General Comment No. 4 (1991) The right to adequate housing (art. 11(1) of the Covenant)*, UN Doc E/1992/23 E/C.12/1991/4, at [7] **HIB 622**.

25 Committee on Economic, Social and Cultural Rights, *General Comment No. 4 (1991) The right to adequate housing (art. 11(1) of the Covenant)*, UN Doc E/1992/23 E/C.12/1991/4, at [7] **HIB 622**.

27. In the decision below, Blokland J held that an assessment of the habitability of premises should have included not only the health and safety of tenants but an overall assessment of the humaneness, suitability and reasonable comfort of the premises judged against contemporary standards. Her Honour's interpretation of the term 'habitable' in s 48(1)(a), including by reference to humaneness, suitability and reasonable comfort, is consistent with the right to adequate housing under international law for the following five reasons.

28. First, in international law, the centrality of 'dignity' as an element of adequate housing is important and extends beyond considerations of health and safety.[26] Dignity is a concept fundamental to human rights law. It is recognised as an inherent value in all people, one that they share in equal measure, that is the foundation for their fundamental rights, and that entitles them to respect by others.[27] The idea that all people have intrinsic worth, and that some forms of treatment are inconsistent with this intrinsic worth provides a minimum degree of content to the concept of dignity. A narrow interpretation of habitability limited to health and safety is inconsistent with the concept of dignity in the right to adequate housing under international law.

29. Secondly, under international law, the concept of humaneness is closely

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26 The High Court has also described statutory residential tenancy laws as 'laws calculated to preserve the health, safety and dignity of tenants': *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 at [74] (Kiefel CJ, Keane, Nettle and Gordon JJ). The aim of preserving the dignity of tenants must be considered when considering the 'irreducible minimum level of habitability' (at [65]) that applies to leases.

27 For example, see the Preamble to the ICESCR (**HIB 572**) and the references to 'dignity' in the Universal Declaration of Human Rights.

tied to dignity. For example, international law deals specifically with the interaction between dignity and humane treatment when considering the minimum conditions, including conditions of accommodation, required when people are held in detention by the state.

30. Article 10(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**) provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[28] The provision has been developed and interpreted by reference to a number of United Nations instruments that articulate minimum international standards including the *Standard Minimum Rules for the Treatment of Prisoners* (**Standard Minimum Rules**).[29] Rules 9 to 14 of the Standard Minimum Rules deal with the basic requirements of accommodation for people deprived of their liberty by the state to ensure that they are treated in a way that is humane and respects their dignity.

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28 *International Covenant on Civil and Political Rights* [1980] ATS 23 (ratified by Australia on 13 August 1980, entered into force generally on 23 March 1976 (except article 41 which came into force on 28 March 1979), entered into force for Australia on 13 November 1980 (except article 41 which came into force for Australia on 28 January 1993)) **HIB 591**.

29 The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. They were adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1 **HIB 602**. At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development: United Nations Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (1994) at [9.3] **HIB 642**; *Potter v New Zealand*, Communication No. 632/1995, UN Doc CCPR/C/60/D/632/1995 (1997) at [6.3] **HIB 659**. See also, United Nations Human Rights Committee, *Concluding Observations on the United States*, UN Doc CCPR/C/79/Add.50 (7 April 1995) at [20] **HIB 649** and [34] **HIB 651**. Further, the United Nations Human Rights Committee has invited States Parties to the ICCPR to indicate in their periodic reports under article 40 the extent to which they are applying the Standard Minimum Rules: United Nations Human Rights Committee, *General Comment 21 (Replaces general comment 9 concerning humane treatment of persons deprived of liberty)* (10 April 1992) at [5] **HIB 628**.

The requirements provide a baseline of functional amenity and are not limited to questions of health and safety. More specifically, these rules provide that:

(a) accommodation must meet all requirements of health, with due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation;

(b) windows must be large enough to enable a person to read or work by natural light, and be constructed in a way that allows the entrance of fresh air whether or not there is artificial ventilation;

(c) sanitary installations must be adequate to enable the person to comply with the needs of nature when necessary and in a clean and decent manner;

(d) adequate bathing and shower installations must be provided; and

(e) all parts of an institution regularly used by prisoners must be properly maintained.

31. Thirdly, in circumstances where states are required to ensure that those subject to detention are housed in accommodation that is regarded as humane, the minimum obligations that apply to landlords when leasing residential premises should exceed this baseline threshold. People who are paying for rental accommodation, whether this is public housing or a private tenancy, are entitled to premises that are suitable for the

purposes for which they are leased and that provide them with security, peace and dignity. Indeed, one of the objectives of the RTA is to facilitate landlords receiving a fair rent in return for providing safe and habitable accommodation to tenants (RTA s 3(e)). Taking a human rights approach, an assessment of whether the standard of habitability has been met requires at least a consideration of whether the premises are humane, especially where rent is paid for possession.

32. Fourthly, the requirement that housing is consistent with human dignity imports a qualitative assessment about the standard of accommodation. As Blokland J observed, that assessment should be made against contemporary standards. Given that the statutory obligation in s 48(1)(a) that premises be habitable applies to all leased premises, the qualitative assessment does not require that premises be luxurious. It anticipates a range of premises, including ones where only basic amenities are provided. Nevertheless, there are some amenities that are fundamental for dignified living. The CESCR considered that, for premises to be habitable in accordance with the right to adequate housing, they should have adequate space and protect inhabitants from cold, damp, heat, rain and wind.[30] Further, the CESCR observed that an adequate house 'must contain certain facilities essential for health, security, comfort and nutrition'. These include 'safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage,

30 Committee on Economic, Social and Cultural Rights, *General Comment No. 4 (1991) The right to adequate housing (art. 11(1) of the Covenant)*, UN Doc E/1992/23 E/C.12/1991/4, at [8(d)] **HIB 623**.

refuse disposal, site drainage and emergency services'.[31]

33. Fifthly, in order for housing to be 'adequate' in accordance with international law, it must be suitable for the purpose for which it is provided. If premises are unsuitable to live in, they cannot be said to be adequate. Suitability in this sense means more than merely an absence of immediate risk of bodily injury or risk to health.

The RTA was enacted in contemplation of the right to adequate housing

34. The historical context in which the RTA was enacted shows that the Act was passed in contemplation of the right to adequate housing under international law and, in the Commission's submission, with the aim of fulfilling it. The Commission refers below to a limited set of extrinsic material that provides further support for the argument that the term 'habitable' in s 48(1)(a) should be interpreted in accordance with Australia's international law obligations relating to the right to adequate housing.

35. The Northern Territory was one of the first Australian jurisdictions to enact legislation guaranteeing minimum conditions for residential tenancies. The Government recognised that 'dependable rental housing accommodation is a basic need of our society and, unless there are some enforceable rules … tenants could suffer by the arbitrary and

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31 Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, UN Doc E/1992/23 at [8(b)] **HIB 623**.

unjustified actions of some owners'.[32] Section 55 of the *Tenancy Act 1979* (NT) (**Tenancy Act**) provided that every lease, written or otherwise, shall be read as including the terms set out in Schedule 4. These included, on the part of the landlord: to provide and maintain the premises in good tenantable repair and in a condition fit for human occupation; and to comply with all lawful building, health and safety standards.[33] However, the *Tenancy Act* was limited to private rental premises and did not extend to public housing.[34]

36. In 1991, the Northern Territory Minister for Health and Community Services, who was responsible for the administration of the *Tenancy Act*, established a working group tasked with the review of the Territory's tenancy laws.[35]

37. On 19 November 1993, the report of the working group was provided to the Attorney-General for the Northern Territory.[36] The Working Group Report contained 115 recommendations covering 46 topics. When the *Residential Tenancies Bill 1999* (NT) was eventually introduced, the Minister for Industries and Business said in his second reading speech said that '[t]he mainstay of the residential tenancy bills are the key principles which government has adopted from the report of the working

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32 Northern Territory, *Parliamentary Debates*, 29 November 1978, p 605 (the Hon J Robertson, Minister for Community Development, Second Reading speech for the Tenancy Bill 1978) **HIB 2**.
33 *Tenancy Act 1979* (NT), Sch 4, items 1(b) and (d) **HIB 36**.
34 *Tenancy Act 1979* (NT), s 5 **HIB 8**.
35 Northern Territory, *Parliamentary Debates*, 27 April 1999, p 3225 (the Hon T Baldwin, Minister for Lands, Planning and Environment) **HIB 466**.
36 *Report of the Working Group appointed to review Tenancy Law in the Northern Territory of Australia* (November 1993) (**Working Group Report**) **HIB 160**.

group'.[37]

38. The Working Group Report noted that existing legislation applied to residential or domestic tenancies but not to public housing.[38] It formed the view that effective tenancy legislation should meet a number of criteria including: being a coherent body of law, clarifying rights and obligations of parties to a lease, and reversing the imbalance between the relative bargaining strength of each party to a lease.[39] The working group had earlier noted that tenants are 'recognised generally to be in a weaker bargaining position' than landlords.[40]

39. The working group recommended that new legislation 'unambiguously extend coverage to all tenants,' including those in public housing, so that 'no one group should be placed in an inferior position under the law' and that all tenants would 'have access to the protection of the legislation'.[41] However, it noted that there may need to be provision for certain exemptions to be made based on the constraints imposed on public housing policy by virtue of the Northern Territory being a party to the Commonwealth State Housing Agreement.[42]

40. During this period, the Commonwealth Department of Housing and Regional Development commissioned a report on *Minimum Legislative*

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37 Northern Territory, *Parliamentary Debates*, 19 August 1999, p 4272 (the Hon T Baldwin, Minister for Industries and Business) **HIB 560**.
38 Working Group Report, p 27 **HIB 179**.
39 Working Group Report, p 28 **HIB 180**.
40 Working Group appointed to review tenancy law in the Northern Territory, *Discussion Paper: Tenancy Review*, October 1992, p 11 [5.1] **HIB 69**.
41 Working Group Report, p 30 **HIB 181**.
42 Working Group Report, p 31 (Recommendation 4) **HIB 181**.

Standards for Residential Tenancies in Australia. In the foreword to the report, published in May 1995, the Deputy Prime Minister and Minister for Housing and Regional Development referred to the Commonwealth's national housing reform agenda. He noted the Commonwealth Government's contribution to low cost public housing through the Commonwealth State Housing Agreement, and its support for low income private tenants through the Rent Assistance program. He said that the Commonwealth Government also had 'a significant interest in ensuring that low income tenants receive consumer protection which guarantees access to affordable, secure and appropriate housing in both public and private rental markets'.[43] Those consumer protection guarantees were primarily the responsibility of State and Territory governments, but the Commonwealth sought to have input into their development through a consumer code of practice, to be incorporated into the Commonwealth State Housing Agreement, which would provide a clear framework for the rights and responsibilities of public housing tenants. The Deputy Prime Minister said that the Minimum Legislative Standards Report would help in the development of that framework.

41. One of the identified minimum legislative standards was that residential tenancies legislation should bind the Crown, including State and Territory housing authorities, with appropriate exemptions.[44] A second was that

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43 Robyn Kennedy, Peter See and Peter Sutherland, *Minimum Legislative Standards for Residential Tenancies in Australia*, Report prepared for the Commonwealth Department of Housing and Regional Development, May 1995 (**Minimum Legislative Standards Report**), foreword **HIB 204**.

44 Minimum Legislative Standards Report, pp 49 **HIB 260** and 51–52 **HIB 262–263**.

landlords (including public authorities) should have an obligation to maintain premises and common areas in a reasonable state of repair and fit for human habitation.[45] A third was that terms included in a residential tenancy agreement that contravened the relevant Act should be void.[46]

42. There was negotiation between the Commonwealth and the States and Territories over the appropriate action to be taken in their respective areas of responsibility in order to effectively protect the rights of low income tenants to adequate housing. The content of those negotiations was recorded in the Communique from the Council of Australian Governments Meeting that took place on 11 April 1995 in Canberra. A copy of that Communique was subsequently tabled in the Northern Territory Parliament.[47]

43. Under the heading 'Public Housing', the Communique recorded that a new model of housing assistance would be achieved through re-negotiation of the Commonwealth State Housing Agreement. The reforms would 'bring about a fundamental shift in roles and responsibilities entailing the Commonwealth accepting responsibility for income support and housing affordability and the States and Territories for housing services and tenancy and property management'.[48]

44. The following year, the Commonwealth enacted the *Housing Assistance*

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45 Minimum Legislative Standards Report, p 70 **HIB 281**.
46 Minimum Legislative Standards Report, pp 55–56 **HIB 266–267**.
47 Council of Australian Governments Meeting, 11 April 1995, Canberra, *Communique*, Tabled document 1683, 16 May 1995 **HIB 421**.
48 Council of Australian Governments Meeting, 11 April 1995, Canberra, *Communique*, Tabled document 1683, 16 May 1995, p 5 **HIB 425**.

Act 1996 (Cth), which provided the legislative framework for the determination of a standard form Commonwealth State Housing Agreement.[49] The primary object of the Act was to 'provide financial assistance to the States for the purpose of ensuring that people can obtain housing that is affordable, secure and appropriate to their needs'.[50] In this context, 'State' included the Northern Territory and the Australian Capital Territory.[51] Among other things, the form of agreement was to include provisions relating to the rights and obligations of the people to whom the assistance would be provided.[52]

45. The Act was explicit about its objectives. The preamble to the Act made clear that 'housing and shelter are basic human needs', that those most at risk of failing to obtain housing of an appropriate standard were 'people who are economically or socially disadvantaged', and that Australia had acted to protect the rights of all of its citizens, including people who have inadequate housing, by recognising international standards for the protection of universal human rights and fundamental freedoms through ratifying the ICESCR and the ICCPR.[53]

46. In achieving these goals, the Act was also clear that grants of housing assistance needed to be accompanied by broader cooperation between the Commonwealth and the States and Territories.[54]

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49 *Housing Assistance Act 1996* (Cth), ss 5–7 **HIB 435–437**.
50 *Housing Assistance Act 1996* (Cth), s 4(1) **HIB 434**.
51 *Housing Assistance Act 1996* (Cth), s 3 (definition of 'State') **HIB 433**.
52 *Housing Assistance Act 1996* (Cth), s 5(3)(g) **HIB 435**.
53 *Housing Assistance Act 1996* (Cth), Preamble **HIB 430–431**.
54 *Housing Assistance Act 1996* (Cth), Preamble **HIB 432**.

47. On 15 July 1996, the Commonwealth Minister for Social Security made a determination pursuant to s 5(1) of the *Housing Assistance Act 1996* (Cth) of a standard form Commonwealth State Housing Agreement.[55] The recitals recorded the fact that Commonwealth and State and Territory Ministers had agreed to implement housing reforms to improve consumer outcomes and delineate clearly the respective roles and responsibilities of the Commonwealth and the States.[56] It seems clear that this was a reference to the agreement recorded in the 1995 COAG Communique. The Minister's determination also identified the responsibilities of States and Territories under the Commonwealth State Housing Agreement. These included that States and Territories establish priorities having regard to the Commonwealth and State and Territory policy objectives, develop strategies and programs to deliver agreed outcomes, implement appropriate strategies and programs, manage the delivery of services, and develop a Code of Practice in relation to consumer rights and responsibilities which was consistent with the purpose and objectives of the Agreement and other applicable Commonwealth and State and Territory legislation.[57] These were the same responsibilities identified by the Deputy Prime Minister in the foreword to the Minimum Legislative Standards Report referred to in paragraph 40 above.

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55 Commonwealth of Australia, Gazette No. S 272, 17 July 1996, *Housing Assistance (Form of Agreement) Determination No. 1* **HIB 441**.

56 Commonwealth of Australia, Gazette No. S 272, 17 July 1996, *Housing Assistance (Form of Agreement) Determination No. 1*, p 2, recital (B) **HIB 442**.

57 Commonwealth of Australia, Gazette No. S 272, 17 July 1996, *Housing Assistance (Form of Agreement) Determination No. 1*, pp 13–14, clause 5(3)(a)–(d) and (g) **HIB 453–454**.

48. On 27 April 1999, a discussion draft for a Residential Tenancies Bill was introduced into the Northern Territory Parliament. The discussion draft proposed to include, for the first time, public housing within the scope of the minimum standards of legislative protection.[58] In introducing the discussion draft, the Minister noted that tenancy legislation addressed one of the very 'basic aspects of modern day society', namely 'the need to be adequately housed'.[59] It is significant that the Minister chose to use the language of the right to adequate housing in article 11(1) of the ICESCR when introducing the draft.

49. For completeness, it should be noted that the inclusion of public housing in the Northern Territory's legislative scheme was not unqualified. Consistently with the Working Group Report and the Minimum Legislative Standards Report, the Minister was given the power to modify provisions of the RTA or the Regulations in their application to a class of tenancy agreement, or to exempt a class of tenancy agreement entirely from any or all of the provisions of the Act or the Regulations.[60] The form of this exemption is now s 7 of the RTA. At the time that the Bill was introduced into Parliament, the Minister for Housing detailed a number of specific exemptions that would be sought for public housing, in relation to 'giving of receipts, payment of rent in advance, fair rent determination and

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58 Discussion Draft for a proposed Residential Tenancies Act, Tabled paper 1083, 27 April 1999, clause 5 **HIB 481**.

59 Northern Territory, *Parliamentary Debates*, 27 April 1999, p 3226 (the Hon T Baldwin, Minister for Lands, Planning and Environment) **HIB 467**.

60 Discussion Draft for a proposed Residential Tenancies Act, Tabled paper 1083, 27 April 1999, clause 7 **HIB 482–483**.

assignment or sub-letting tenant's premises'.[61] However, despite the breadth of the exemption power, it appears that it has not been used to exempt any class of tenancy agreement from the terms of s 48.

50. The above analysis shows that the RTA was passed in contemplation of the right to adequate housing, and as part of a broader reform agenda between the Commonwealth and the States and Territories aimed at protecting the rights of low income tenants to adequate housing. This reform agenda was explicitly based on Australia's international human rights obligations, including the right to adequate housing in article 11(1) of the ICESCR. This provides further support for the proposition that the term 'habitable' in s 48(1)(a) should be construed consistently with the right to adequate housing in accordance with the principle of statutory interpretation encapsulated by Mason CJ and Deane J in *Teoh*. The decision of Blokland J on the meaning of the term is so consistent.

51. Finally, to the extent that there is any doubt about the historical or present relevance of the RTA to Australia's ability to fulfil its obligations under international law, Australia has consistently represented to the international community that it fulfils its human rights obligations through the mechanism of State and Territory tenancy laws including the RTA. For example, Australia's third periodic report to the CESCR in 1998 noted that most assistance provided to low income and otherwise disadvantaged people to meet their housing needs was provided through

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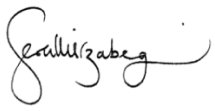
61 Northern Territory, *Parliamentary Debates*, 14 October 1999, p 4463 (the Hon L Braham, Minister for Housing) **HIB 565**.

the Commonwealth State Housing Agreement and the Rent Assistance Program.[62] The report also referred to State and Territory legislation covering the rights and obligations of landlords and tenants as dealing with a number of relevant matters, including 'fitness of premises' and 'maintenance and repair'.[63] Moreover, Australia's Common Core Document submitted to the CESCR along with its fourth periodic report in 2008, covering the period from January 1998 to June 2006,[64] specifically referred to the RTA as one of the means adopted by Australia in protecting the rights of tenants to adequate housing.[65] Although Australia referred to the role of the RTA in protecting tenants from forced evictions and from arbitrary rent increases, this was in response to a specific question asked by the CECSR in 2000.[66] There is no reason to think that these are the only ways in which Australia relies upon the RTA to fulfil its international law obligations including its obligation to ensure adequate housing.



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1 February 2021

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62 Australia, *Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant*, UN Doc E/1994/104/Add.22 (23 July 1998), pp 42–43 **HIB 701–702**.

63 Australia, *Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant*, UN Doc E/1994/104/Add.22 (23 July 1998), p 43 **HIB 702**.

64 Australia, *Fourth periodic reports submitted by States parties under articles 16 and 17 of the Covenant*, UN Doc E/C.12/AUS/4 (7 January 2008), at [2] **HIB 741**.

65 Australia, *Core Document Forming Part of the Reports of States Parties*, UN Doc HRI/CORE/AUS/2007 (22 July 2008), pp 105–106 **HIB 848–849**.

66 Committee on Economic, Social and Cultural Rights, *Concluding Observations on Australia*, UN Doc E/C.12/1/Add.50 (11 September 2000) at [34] **HIB 739**.