A WARM AND DRY PLACE TO LIVE: ENERGY EFFICIENCY AND RENTAL ACCOMMODATION

Barry Barton*

I. Introduction

In residential tenancies, it is usual for the landlord to be responsible for the fabric of the building and the main appliances, and for the tenant to be responsible for paying for electricity, gas and other fuel. It is also the tenant who is affected by the building's heating and ventilation performance – whether it can be kept warm and dry without undue expense. A landlord has no financial incentive to invest in extra insulation or better appliances, because the benefits will be reaped by the tenant in lower energy bills and higher levels of comfort, and because the improvements do not have a direct influence on the rent that the landlord can charge. The result is that energy efficiency investments tend not to get made. In policy terms, the interests of the landlord and tenant are not aligned; the incentives are split. It is a classic example of a principal-agent gap, and as the "landlord-tenant problem" is one of the market failures that affects efficiency in markets for energy and energy products.[1] The energy use affected by the principal-agent problem in the United States residential sector for refrigerators, space heating, water heating and lighting has been estimated as 31.4 per cent of the total sectoral energy use;[2] so the issue is a substantial one. The problem of energy efficiency in rental accommodation is therefore the subject of this article.

* Faculty of Law and Director of the Centre for Environmental, Resources and Energy Law, University of Waikato. Thanks to Janet Stephenson and Philippa Howden-Chapman for comments on a draft. A version of these research results is published as "Energy Efficiency and Rental Accommodation: Dealing with Split Incentives" in Paul Babie and Paul Leadbeter (eds) *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press, 2014).

1 International Energy Agency *Mind the Gap: Quantifying Principal-Agent Problems in Energy Efficiency* (OECD/IEA, Paris, 2007). In spite of the substantial international understanding of the issue, during the 1990s, the New Zealand Treasury disputed the existence of market failures in relation to insulation, saying that there was no reason to suggest that rental streams and property values did not adequately reflect energy-efficiency investment decisions. Parliamentary Commissioner for the Environment *Getting More from Less: A Review of Progress on Energy Efficiency and Renewable Energy Initiatives in New Zealand* (Wellington, 2000) at 60-65.

2 *Mind the Gap* at 191. Analysis suggesting that the issue is smaller is K Gillingham, M Harding and D Rapson, "Split Incentives in Residential Energy Consumption" (2012) 33 Energy Journal 37.

In New Zealand dwelling houses are often colder than international standards stipulate,[3] and that causes health problems, especially for the young, the old, and other vulnerable members of the population. Energy law and policy are also important because of the significant adverse effect on the environment of the production of energy and its use; in most countries energy use is the main source of greenhouse gas emissions.[4] In tackling these problems, we must address energy demand and efficiency and not focus unduly on energy production and renewables.[5] This important truth is borne out by comprehensive studies by the International Energy Agency in its annual *World Energy Outlook,* in its scenarios for energy supply and demand through to 2035, differentiated mainly on the basis of government policies globally.[6] In the New Policies Scenario, energy demand to 2035 increases by one-third, compared with almost 45 per cent in the Current Policies Scenario, and the energy savings are mostly energy efficiency (72 per cent) and closely-related fuel and technology switching (12 per cent). In terms of the emissions of carbon dioxide that cause climate change, energy efficiency alone contributes 49 per cent of the abatement produced by the New Policies Scenario, and fuel and technology switching another 6 per cent. By contrast, renewables contribute only 25 per cent.[7] Another study shows that the most cost-effective technologies to reduce greenhouse gas emissions are efficiency measures; in fact many have a negative cost.[8] The key message is that energy efficiency is where the big gains are to be made.

3 N Isaacs and others, 'Energy in New Zealand Houses: Comfort, Physics and Consumption' (2010) 38 Building Research & Information 470.

4 The drivers of government energy efficiency policies have recently been summarized under the headings of: energy security, economic development and competitiveness, climate change, and public health. S Pasquier and A Saussay, *Progress Implementing the IEA 25 Energy Efficiency Policy Recommendations: 2011 Evaluation* (OECD/IEA Insights Series, Paris, 2012) p 13. Another good recent explanation of the various rationales of energy efficiency action generally is L Ryan and N Campbell *Spreading the Net: The Multiple Benefits of Energy Efficiency Improvements* (2nd ed) (OECD/IEA Insights Series, Paris, 2012) at 14.

5 B Barton "The Denominator Problem: Energy Demand in a Sustainable Energy Policy" (2013) 9 Policy Quarterly 3.

6 International Energy Agency *World Energy Outlook 2013* (OECD/IEA, 2013) at 35-36, 241. The Current Policies Scenario takes into account measures formally enacted mid-2013. The New Policies Scenario also takes account of other announced relevant commitments. The 450 Scenario shows what is needed to set the global energy sector on a course compatible with a near 50% chance of limiting the long-term increase in the average global temperature to 2°C.

7 At 260. The world energy-related CO_2 emissions abatement in the New Policies Scenario relative to the Current Policies Scenario by 2035: energy service demand 9%, end-use efficiency 42%, supply efficiency 7%, fuel and technology switching in end-uses 6%, renewables 25%, biofuels 3%, nuclear 5%, carbon capture and storage 2%.

8 P-A Enkvist, J Dinkel and C Lin, *Impact of the Financial Crisis on Carbon Economics: Version 2.1 of the Global Greenhouse Gas Abatement Cost Curve* (McKinsey & Co, 2010) <http://solutions.mckinsey.com/climatedesk/>. The original version was P-A Enkvist, T Nauclér and J Rosander, "A Cost Curve for Greenhouse Gas Reduction" (2007) 1 McKinsey Q.

In technical terms, energy efficiency is a ratio of function, service, or value provided to the energy converted to provide it.[9] One would think that people would invest to increase the energy efficiency of their houses, cars, and industries, but the record is that people often fail to make such investments that appear to be rationally justified. This phenomenon, which is spread widely through society and economy, is the "energy efficiency gap" – a series of barriers that inhibit investment.[10] The principal-agent gap is one such barrier. Others are information gaps, averseness to risk, and the presence of multiple gatekeepers whose approval or disapproval will influence an investment in energy-efficient technology. In New Zealand efforts to promote energy efficiency are made under the Energy Efficiency and Conservation Act 2000 and the National Energy Efficiency and Conservation Strategy made under it. But analysts such as the Green Growth Advisory Group recommend that New Zealand have a greater focus on demand side management to improve energy efficiency.[11]

Conventional policy instruments to improve residential energy efficiency, such as subsidies, rebates, or certificates, are less effective because of the different interests of landlords and tenants. It can be complicated to get the benefits of such schemes. Alterations to a dwelling require the landlord's consent, and a tenant can be reluctant to ask for improvements, or indeed to have any more dealings with the landlord than are absolutely necessary.[12] Similarly, policy action to improve the quality of new housing, such as in a building code, does not benefit tenants except those who happen to move into new housing. Because buildings last many years, action in building codes, while vital, is slow to have an effect.

9 Amory B Lovins "Energy Efficiency, Taxonomic Overview "(2004) 2 *Encyclopedia of Energy* at [383]; IEA *Implementing Energy Efficiency Policies: Are IEA Member Countries on Track?* (2009) at 19. Generally, see M Eusterfeldhaus and B Barton, "Energy Efficiency: A Comparative Analysis of the New Zealand Legal Framework" (2011) 29 JERL 431.

10 M A Brown, "Market Failures and Barriers as a Basis for Clean Energy Policies" (2001) 29 Energy Policy 1197; Alan H Sanstad, W Michael Hanemann and Maximillian Auffhammer, 'End-Use Energy Efficiency in a 'Post-Carbon' California Economy: Policy Issues and Research Frontiers' in W Michael Hanemann and others, *Managing Greenhouse Gas Emissions in California* (California Climate Change Center at UC Berkeley, Berkeley, 2006)6- at 6-17; IEA, *Mind the Gap*, above n 1 at 20; Kenneth Gillingham and Karen Palmer "Bridging the Energy Efficiency Gap: Policy Insights from Economic Theory and Empirical Evidence" (Resources for the Future, Discussion Paper 13-02-REV, 2013).

11 Green Growth Advisory Group *Greening New Zealand's Growth* (Ministry of Economic Development, 2011).

12 See Centre for Social Research and Evaluation *Household Energy Affordability: Qualitative Research Report* (Ministry of Social Development and Energy Efficiency and Conservation Authority, 2010) at 42.

Adrian Bradbrook analyzed the landlord-tenant problem twenty years ago.[13] He considered several law reform measures from the United States, and argued that the landlord should have a legal duty to make rental housing energy efficient, just as the usual duty to repair. His evaluation took him to conclude that a carrot-and-stick approach was desirable; inducements in the form of new tax credits or rebates, and new requirements under the law of landlord and tenant. The same issues were part of his analysis in a chapter "The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector" in 2010.[14] He held that action, whether legislative or judicial, was required to impose an energy efficiency duty on landlords, to set minimum energy performance standards, and to make disclosure requirements. More generally, Ceri Warnock has argued that sustainability in construction generally should get more attention in the administration of the Building Act 2004 and the Resource Management Act 1991 working in tandem.[15]

II. Rental Dwellings

Several characteristics of rental housing are significant to this matter. First, the percentage of households living in rental accommodation is increasing in New Zealand. Twenty years ago, 26 per cent of households were in rentals; in 2011 it was 33 per cent.[16] If the rental part of the residential sector is difficult to influence in energy efficiency, then the performance of the sector as a whole is affected. Most of the renters rent from private individuals rather than Housing New Zealand or another public or community provider, and most landlords operate on a small scale with only 1-3 properties.[17]

Secondly, poor people tend to live in rental housing. Around half (49 per cent) of all those aged under 65 who are in poverty live in private rental accommodation; the figure rises to two-thirds (65 per cent) when Housing New Zealand and private rentals are counted together.[18] Poverty rates are higher in rental housing for those under 65 and those who are more elderly. The concentration is even higher for children; 68 per cent of poor children

13 "The Development of Energy Conservation Legislation for Private Rental Housing" (1991) 8 Env & Planning L J 91.

14 A Bradbrook, "The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector" in A McHarg, B Barton, A Bradbrook, and L Godden (eds) *Property and the Law in Energy and Natural Resources* (Oxford University Press, Oxford, 2010) 391.

15 A C Warnock "Sustainable Construction in New Zealand" (2005) 9 NZJEL 337.

16 Department of Building and Housing *Briefing for the Minister of Housing* (December 2011) at 11; New Zealand Productivity Commission *Housing Affordability Inquiry* (2012) at 37.

17 NZ Productivity Commissionat 38 and 203.

18 All the figures in this paragraph are from Bryan Perry, *Household Incomes in New Zealand: Trends in Indicators of Inequality and Hardship 1982 to 2012* (Ministry of Social Development, Wellington, 2013) at 125, 131. Also see P Howden-Chapman, M G Baker and S Bierre, "The Houses Children Live in: Policies to Improve Housing Quality" (2013) 9 Policy Q 35 and I McChesney, "Child Poverty: the 'Fuel Poverty' Dimension" (2013) 9 Policy Q 40.

live in rental accommodation (21 per cent in Housing NZ dwellings, 47 per cent in private rentals). To put it another way, the child poverty rate is 54 per cent in Housing NZ houses, and 32 per cent in private rentals, while it is 13 per cent in privately owned homes with a mortgage and 2-6 per cent where there is no mortgage. The significance of these figures is that a low-income household has fewer options available to invest in energy efficiency improvements. It is also more likely to have weak market power to bargain with a landlord about the state of the dwelling on offer.

The feature of low income is disclosed in a survey of New Zealand households in the Energy Cultures research programme. It showed four distinct clusters or segments of energy culture: Energy Economic, Energy Extravagant, Energy Efficient, and Energy Easy.[19] Rental housing, youth, and low income were associated in the Energy Economic cluster; but so were environmental awareness and good energy-saving practices. Significantly, this group had the lowest levels of house insulation and energy-efficient heating. From a policy point of view, the Energy Economic group (as the term is used in the Energy Cultures research) must be reached by addressing their material needs rather than their opinions or knowledge base, and the landlord-tenant problem must be tackled in any policy measures.

Thirdly, rental properties are more likely than other dwellings to be cold, and that is bad for human health. Rental dwellings tend to be older and worth less than owner-occupied dwellings, and renters are more likely to be dissatisfied with the quality of their dwelling. Until recently, very little housing has been purpose-built for the rental market; most rentals are older housing.[20] One of the leading reviews of the energy characteristics of New Zealand households found that dwellings rated with indoor temperatures below 16°C are more likely to be accommodating tenant households than owner-occupiers.[21] To put this in context it should be noted that New Zealand houses as a whole have low indoor temperatures owing to persistent under-heating; commonly, only in living rooms on winter evenings does the temperature even come close to the World Health Organization's healthy indoor temperature range of 18–24°C.[22] An Expert Advisory Group on poverty believes that many poor families are by necessity endangering the health of their children by living in poor quality housing.[23] The health dimension is perhaps the most important

19 J Stephenson and others"Energy Cultures: A Framework for Understanding Energy Behaviours" (2010) 38 Energy Policy 6120-6129; R Lawson and others, "Understanding Energy Cultures" (paper presented at Australian and New Zealand Marketing Academy 2012 Conference, University of South Australia, 3-5 December 2012).

20 NZ Productivity Commission, above n 16 at 43, 46, 203.

21 N Isaacs and others "Energy Use in New Zealand Households: Report on the Year 10 Analysis for the Household Energy End-Use Project (HEEP)" (BRANZ Study Report SR 155 2006) at 28.

22 N Isaacs and others (2010) above n 3; NZ Productivity Commission, above n 16 at 203.

23 Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Issues and Options Paper for Consultation* (Office of the Children's Commissioner, August 2012) at 29.

dimension of residential energy efficiency. Low indoor temperatures are associated with poor health and excess winter mortality.[24] A cost-benefit analysis of New Zealand's main subsidy programme for residential insulation and clean heating showed that the benefits of the programme were five times its resources costs, and that virtually all the benefits (99 per cent) were in the health of the occupants, not energy savings or employment.[25]

One therefore sees several substantial reasons for action on residential energy efficiency: climate change, environment, energy policy, and human health. But it is also possible to state a rationale in human rights terms; that access to modern energy services should be incorporated within the human rights framework.[26] Energy services are already implicit in a range of existing human rights obligations, in particular obligations in the field of socio-economic rights, and deserve greater clarity and prominence. Access to modern energy services can be identified as an independent human right, but other lines of reasoning, such as consumer rights, are also possible.[27] Another line of argument is the right to habitable rental housing. Most nations have ratified the International Covenant on Economic, Social and Cultural Rights.[28] Article 11(1) of the Covenant addresses housing as part of the standard of living:

> 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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of co-operation based on free consent.

The right to housing concerns unhealthy and demeaning living conditions as much as forced evictions or homelessness.[29] Rights to health and the rights of children are related. Parties to the Covenant must report periodically on progress.[30] Ratifying the Covenant binds New Zealand, Australia, and other

24 P Howden-Chapman and others "Effect of Insulating Existing Houses on Health Inequality: Cluster Randomised Study in the Community" (2007) BMJ334 <doi:10.1136/bmj.39070.573032.80>.

25 A Grimes and others *Cost Benefit Analysis of the Warm Up New Zealand: Heat Smart Programme* (prepared for Ministry of Economic Development, 2011 revised 2012).

26 A Bradbrook, J Gardam and M Cormier "A Human Dimension to the Energy Debate: Access to Modern Energy Services" (2008) 26 JERL 526.

27 G Larsen and R Lawson "Consumer Rights: An Assessment of Justice" (2012) 112(3) J Business Ethics 515 < 10.1007/s10551-012-1275-9>.

28 996 UNTS 3 (adopted by UN General Assembly Res 2200A(XXI), 16 December 1966, entered into force 3 January 1976).

29 S Leckie (ed) *National Perspectives on Housing Rights* (Kluwer Law International, Boston, 2003).

30 United Nations Committee on Economic, Social and Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights *Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant: New Zealand* (E/C.12/NZL/3) 2011. The report describes government policies in relation to insulation, clean heating and energy efficiency in housing.

countries to give effect to the rights guaranteed, and a commitment like Article 11 cannot be ignored in administrative and legal decision-making; it is a proper rationale for the development of policy in relation to the quality of housing.[31] However, the obligation is a general one; it is to be realized progressively and in view of the availability of resources. Moreover, it is not enforceable as part of New Zealand law; it does not create a legal right of action against a landlord or against the government. The Human Rights Commission's role in relation to such rights is one of inquiry, education, and encouragement. *Lawson v Housing New Zealand*[32] held that it was for international forums and not the High Court to judge whether New Zealand had fulfilled its international obligations. In any event the housing obligation in Article 11 was phrased in general terms, and the state housing policy complained of (market-level rentals accompanied by a targeted accommodation benefit) did not appear to have run counter to it. Nor could the right under the New Zealand Bill of Rights Act 1990, not to be deprived of life, be read to apply.

III. Basic Principles of the Common Law of Landlord and Tenant

With these rationales for action in mind, we can turn to consider the existing legal situation, primarily in New Zealand law, but in terms that share much with other common law countries. The underlying common law is reasonably clear, although not altogether satisfying. In the absence of any express covenant, and in the absence of any statutory requirement, the landlord has no duty to ensure that premises are in repair, kept in repair, or fit for any particular purpose. There is no implied condition that the land shall be fit for the purpose for which it is taken. "The general rule must therefore be, that where a man undertakes to pay a specific rent for a piece of land, he is obliged to pay that rent, whether it answer the purpose for which he took it or not."[33] The rule applies to the letting of an unfurnished dwelling-house. "It appears, therefore, to us to be clear upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that it is, or shall be, reasonably fit for habitation or cultivation."[34] While the letting of a readily-

31 K Meikle "Economic, Social and Cultural Rights: Protection in Aotearoa New Zealand – An Overview" in M Bedggood and K Gledhill (eds) *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Human Rights Foundation / Thomson Reuters, Wellington, 2011) 39 at 58; also, using the right to housing as an example, P Hosking "Freedom from Poverty: The Right to an Adequate Standard of Living" in Bedggood and Gledhill 112.

32 *Lawson v Housing New Zealand* [1997] 2 NZLR 474.

33 *Sutton v Temple* (1843) 12 M&W 52 at 64, 152 ER 1108.

34 *Hart v Windsor* (1843) 12 M&W 68 at 86, 152 ER 1114. Also *Arden v Pullen* (1842) 10 M&W 321, 152 ER 492, and Lewison (ed) *Woodfall on Landlord and Tenant* (looseleaf, Thomson Sweet & Maxwell) at [13.001]. In fact the old authorities were not inescapable; there were other authorities that were not followed: J I Reynolds "Statutory Covenants of Fitness and Repair: Social Legislation and the Judges" (1974) 37 Mod L Rev 377.

furnished house could be distinguished, the Court decided, "We are all of the opinion, for these reasons, that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let."[35] *Chappell v Gregory* held that in the absence of a promise to put a house in repair, a person who takes the lease of a house from a lessor takes it as it stands.[36] This is the position in New Zealand as much as Britain. Even where the only use of the property that the lease allows is as a boarding house, and upgrading is required before it can be so used, the rule is caveat lessee; the lessee must take the property as he or she finds it.[37] "Apart from express stipulations there is no obligation on a lessor during the term of the lease to repair or maintain improvements."[38] A warranty as to the quality of land sold or leased is not generally to be implied, but a court may decide to imply one where the totality of the circumstances requires it.[39]

In *Southwark London Borough Council v Mills*[40] Lord Millett explains that this doctrine is based not on fictions such as the ability of the tenant to inspect the property before taking the lease, but solely on the general rule of English law which accords autonomy to contracting parties. In the absence of statutory intervention, the parties are free to let and take a lease of poorly constructed premises and to allocate the cost of putting them in order between themselves as they see fit. Indeed, the case is a clear if unhappy modern illustration of the limits of the common law in reshaping the landlord-tenant relationship for modern housing needs. Council tenants sued because of the lack of sound insulation between one flat and the next. Even the normal noise of the neighbouring household was plainly audible and the lack of privacy caused tension and distress. There was no warranty in the tenancy agreements that the flats had sound insulation or were in any other way fit to live in. "Nor does the law imply any such warranty. This is a fundamental principle of the English law of landlord and tenant."[41] There was a covenant to repair but no such obligation requires a landlord to make it a better house than it originally was. "The law has long been settled that there is no implied covenant on the part of the landlord of a dwelling house that the premises are fit for human

35 *Hart v Windsor* at 87. Also *Edler v Auerbach* [1950] 1 KB 359.

36 *Chappell v Gregory* (1864) 34 Beav 250 at 253, 55 ER 631.

37 *Balcairn Guest House Ltd v Weir* [1963] NZLR 301.

38 *Felton v Brightwell* [1967] NZLR 276 at 277 per Wild CJ.

39 *Gabolinscy v Hamilton City Corp* [1975] 1 NZLR 150 at 163. There may be a growing willingness to imply such obligations, especially as contract law is more generally applied to leasing disputes: D Grinlinton "Fitness for Purpose of Leased Premises" [2000] NZLJ 105. However as a rule, obligations will be implied to give business efficacy to a lease only under stringent conditions; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 (PC).

40 *Southwark London Borough Council v Mills* [2001] 1 AC 1 at 17.

41 *Southwark* at 7 per Lord Slynn.

habitation, let alone that they are soundproof."[42] The covenant for quiet enjoyment, which the law does imply, did not help because it is prospective in its nature and does not apply to things done before the grant of the tenancy.[43]

Lord Hoffman observed that in England, Parliament has intervened in the rental housing market in different ways; but so far it had declined to impose an obligation to install soundproofing in existing dwellings. The development of the common law should not get out of step with legislative policy. Similarly Lord Millett recognized that the case illuminated a problem of considerable social importance. No one would wish anyone to live in these conditions. But there was a huge stock of pre-war housing, much of which admitted damp and was scarcely fit for human habitation. Southwark Borough alone estimated the cost of upgrades as £1.271 billion. "These cases raise issues of priority in the allocation of resources. Such issues must be resolved by the democratic process, national and local. The judges are not equipped to resolve them."[44] It is likely that judges in most parts of the common-law world would speak similarly of the limitations on judicial creativity in efforts to solve a social problem.

IV. Residential Tenancies Act 1986

The Residential Tenancies Act 1986 is the main New Zealand statutory intervention of this kind. It provides a general code for the residential landlord-tenant relationship, modifying rules of common law, and (with few exceptions) preventing parties from contracting out of its provisions. Historically, New Zealand has had various kinds of tenant protection legislation. The present Act is modelled on that of South Australia, and is similar to the equivalents in other Australian states and territories.[45]

Section 45(1) imposes responsibilities on landlords that are as close as one gets to obligations as to fitness:

> The landlord shall—
>
> (a) provide the premises in a reasonable state of cleanliness; and
>
> (b) provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes; and
>
> (c) comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises ...

42 *Southwark* at 17 per Lord Millett.

43 *Southwark* at 11 per Lord Hoffman. It should be added that the covenant for quiet enjoyment is not for acoustical peace but for undisturbed title.

44 *Southwark* at 26.

45 D Grinlinton *Residential Tenancies: The Law and Practice* (4th ed, LexisNexis, Wellington, 2012) at 2.

The landlord therefore need not undertake that the dwelling is habitable, or that it provides a healthy indoor living environment. (There is no equivalent of the American warranty of habitability.[46]) There is no undertaking that the dwelling will be warm or capable of being kept warm. (Of course, a landlord may agree to such undertakings, and will be bound by them, but there is no reason to think that they are at all usual.) What is compulsory is, firstly, a warranty as to cleanliness. Then there is a warranty as to repair, but it is restricted by the reference to the age and character of the premises. Even without that restriction, an obligation to repair cannot justify a claim for energy efficiency improvements; the warranty to repair will not be interpreted to turn the building into something different in character from what it was.[47]

The third warranty is for compliance with requirements under other enactments. It takes our inquiry primarily to the Housing Improvement Regulations 1947. In passing, however, one may note requirements under the Building Act 2004 and the Education Act 1989 for minimum temperatures of 16°C in old people's homes and early childhood centres.[48] Leaving to one side our opinion whether that is warm enough, we should note that the Building Act is otherwise almost entirely focussed on the way that buildings are designed and constructed. It will therefore help the tenants of newly-constructed dwellings, but not residents in old ones.

V. Housing Improvement Regulations 1947

The Housing Improvement Regulations 1947 occupy an important position in the law on the quality of residential accommodation, but they do so in an anomalous and unsatisfactory manner. They were originally made under the Housing Improvement Act 1945. Their historical origins reflect

46 In the United States, nearly all courts have held that a residential lease includes a non-disclaimable implied warranty that the premises are habitable: *Javins v First National Realty Corp* 428 F.2d 1071 (DC Cir 1970). See J W Singer *Introduction to Property* (2nd ed, Aspen, New York, 2005) at 480. But the implied warranty, implied by the courts or by statute, has not solved low-income people's housing problems: David A Super "The Rise and Fall of the Implied Warranty of Habitability" (2011) 99 Cal L Rev 389.

47 The law on this point has been worked out in relation to obligations to repair incurred by a tenant, in cases such as *Lister v Lane* [1893] 2 QB 212 (CA). Repair does not go as far as replacement or making a new and different building. Generally see G W Hinde, N R Campbell and P Twist *Principles of Real Property Law* (LexisNexis, Wellington, 2007) at [11.092].

48 The Building Code, Sched 1 of the Building Regulations 1992, Clause G5.3.1 provides, for old people's homes and early childhood centres only, that habitable spaces, bathrooms and recreation rooms shall have provision for maintaining the internal temperature at no less than 16°C measured at 750 mm above floor level, while the space is adequately ventilated. The Education Early Childhood Centres Regulations 1998 under the Education Act 1989, cl 22 require a temperature of 16°C measured between 0.5 m and 1.0 m above the floor.

the perceptions of the 1930s and 1940s about health in housing.[49] They are now in force under the Health Act 1956 section 120C,[50] which authorizes the making of regulations for purposes including "(e) The protection of dwellinghouses from damp, excessive noise, and heat loss". Our particular concern, "heat loss", has not been specifically addressed in the Regulations, but Regulation 15 declares in simple terms that "Every house shall be free from dampness." Regulation 6 requires that every living-room of a house be fitted with a fireplace and chimney or other approved form of heating. Regulation 11 requires that habitable rooms be fitted with windows for the admission of air. The Regulations prescribe requirements for minimum room sizes for houses, requirements for toilets, requirements to apply to boarding houses, and occupancy ratios to prevent overcrowding. Non-compliance with the Regulations or general unfitness for human habitation are grounds for the local body to issue a repair notice or a closure notice.[51] These requirements are imposed on houses and habitable rooms without distinguishing between owner-occupied dwellings and tenanted dwellings.

Housing NZ Corp v Ladbrook[52] shows the potential of the Regulations to be useful to tenants by reason of section 45(1)(c) of the Residential Tenancies Act. The tenant of a state house had long complained of dampness and mould, and applied to the Tenancy Tribunal for work to be done and for compensation. The landlord installed extractor fans and heat pumps, and made repairs where wood had rotted. The Tribunal did not accept that the problems were caused solely by lifestyle factors and by the tenant's failure to do more to prevent condensation, so that the landlord had breached its responsibility to provide premises free from dampness. That responsibility must be the duty in the Housing Improvement Regulations, because it is not in the Residential Tenancies Act. The Court agreed that a small compensation payment was due to the tenant.

49 S Bierre and others "Institutional Challenges in Addressing Healthy Low-Cost Housing for All: Learning from Past Policy" (2007) 30 Social Policy Journal of New Zealand 42 at 48.

50 The Act of 1945 was renamed the Urban Renewal and Housing Improvement Act in 1969 by the Urban Renewal and Housing Improvement Amendment Act 1969, and was repealed by the Local Government Amendment Act 1979 s 9.

51 The procedures for issuing a repair notice or a closure notice are in s 42 of the Health Act 1956. At least under the former Act, there was no requirement for a repair notice that it be practicable to bring a house into compliance: *Hiatt v Christchurch City Council* HC Christchurch A179/77, 7 October 1980. Failure to comply with a notice is an offence: *Garden City Developments Ltd v Christchurch City Council*, HC Christchurch AP 168/92, 29 July 1992.

52 *Housing NZ Corp v Ladbrook* [2010] DCR 102.

Two recent studies of Tenancy Tribunal decisions find many cases where the issues are broadly similar.[53] These studies are particularly useful because even though Tribunal decisions are online, they are not indexed or searchable by topic. Most cases heard by the Tribunal were brought by landlords for rent arrears or for lack of cleanliness. Of the cases that were complaints by tenants about the condition of the housing, Bierre and others[54] found that the majority of cases concerned water and condensation, and that mould was the most common issue. In twenty of the forty-five cases, tenants obtained compensation or damages from landlords for failure to provide a dwelling in a reasonable state of repair, and in six the tenants were granted an order for the tenancy to be terminated. Proof was often difficult; inspections by the Tribunal were rare. Mould and damp was sometimes taken to be the result of the tenant's housekeeping rather than any defect in the building. Paradoxically, where a tenancy is terminated, as happens in the most severe cases, the Tribunal loses its power to order repairs, and the dwelling goes back on the market for a new tenant.

The Housing Improvement Regulations apply and are enforceable generally in their own right, as well as through section 45(1)(c) of the Residential Tenancies Act in the case of tenancies. However, the Regulations would have been difficult to enforce when they were made, and they have not adjusted to changes in expectations. Regulation 18(1) for example declares that "Every house and all the appurtenances and appliances of every house shall at all times be kept in a state of good repair." What happens if I am an owner-occupier and am behind with my house maintenance? Enforcing the provisions about the number of people who may sleep in a room would be, well, nightmarish. There is reported uncertainty about the application of the Regulations to apartment sizes, and to boardinghouses, and there can be no surprise that there is considerable inconsistency reported in the administration of these provisions by local authorities.[55] The Regulations are prescriptive, in contrast to modern legislation that focuses on outcomes rather than solutions, and they are not often enforced because they are thought to be dated.[56] For all of that unease and difficulty, the duty to enforce is entirely clear; the Health Act 1956 empowers and directs every local body to enforce the regulations within its district.[57]

53 S Bierre, P Howden-Chapman and M Bennett *Minimal Expectations? The Regulation and Interpretation of Rental Housing Standards in New Zealand* (draft paper, 2013); L Rogers *Paper Walls: the Law that is Meant to Keep Rental Housing Healthy* (Social Justice Unit, Anglican Care Canterbury and Anglican Diocese of Christchurch, 2013) <www.paperwalls.org>.

54 Bierre and others (2013) above n 53 at 11-20.

55 Department of Building and Housing *Getting the Balance Right: Review of the Residential Tenancies Act 1986* (2004) at 15.

56 Bierre and others (2007) above n 49 at 47.

57 Health Act 1956 s 23(d). The obligation is subject to the direction of the Director-General (the Chief Executive of the Ministry of Health). Section 64 authorizes the local authority to make bylaws for the purposes of the Act.

Overall, the Housing Improvement Regulations are the closest that the present law comes to protecting tenants against cold housing. But they are prescriptive in an old-fashioned way; they are little understood and often overlooked. Worse, they do not require protection from heat loss; the power in the Act to make that requirement has not been exercised. Questions of warmth, capability of being kept warm at a reasonable price, proper insulation, and reasonable residential energy efficiency have therefore not been dealt with.

VI. Housing Improvement Regulations in Relation to the Building Act

For all these strengths and weaknesses, the Housing Improvement Regulations 1947 have suffered some overshadowing by the Building Act 2004. It is reported that local authorities are uncertain about the status of the Regulations and their place in relation to the Building Act.[58] That is understandable, because the Regulations are little-known and obviously old-fashioned, while the Building Act is sophisticated modern Act which is the domain of a sharply focused regulatory community in local authorities and the housing industry. The matter calls for careful consideration.

The Housing Improvement Regulations and the Building Act both control aspects of how dwellinghouses are built and maintained. They address issues that are similar but different. The Regulations only concern dwellinghouses, boarding houses and lodging houses. They are directed at public health and the prevention of overcrowding. They concern the standard of fitness of housing for human habitation. Regulation 4 says that "[t]he provisions of this Part of these regulations prescribe for the purposes of section 4 of the Act standards of fitness with which every house to which these regulations apply, whether erected before or after the passing of the Act, must comply." The purpose in section 4 appears to be that in the original Act of 1945, "for the purpose of prescribing standards of fitness with which any house, whether erected before or after the passing of this Act, must comply". The emphasis is on fitness as housing. The enforcement provisions are confirmation;[59] the local authority may issue a notice for repairs, alterations or works required for a dwellinghouse that does not comply with the regulations, and if the work is not done it may issue a closing order which prohibits the use of the premises for human habitation or occupation. Other uses of the building may be acceptable; it is only human habitation and occupation that are the

58 Bierre and others (2013) above n 53 at 7; S Bierre, P Howden-Chapman and L Early (eds) *Homes People can Afford: How to Improve Housing in New Zealand* (Steele Roberts Aotearoa, Wellington, 2013) at 42.

59 Health Act 1956, ss 42-47.

concern. In addition, the Regulations apply whether the dwellinghouse was built before or after the passing of the Act; the emphasis is on the use of the building rather than the process of constructing it.

In contrast, the Building Act 2004 is concerned chiefly with building work, which is primarily the construction and alteration of buildings. Section 3 states:

> This Act has the following purposes:
>
> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
>
> (i) people who use buildings can do so safely and without endangering their health; and
>
> (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
>
> (iii) people who use a building can escape from the building if it is on fire; and
>
> (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
>
> (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

It is supported in section 4 by a long list of principles. The matters to be ensured in section 3(1) are broad and they are certainly cover energy efficiency, suitable heating, and protection from heat loss; but the Act addresses them chiefly by regulating building work through the Building Code, and by providing systems for building consents, certification, and the regulation of building practitioners. The focus is on construction and alterations. An exception is Part 2 Subpart 6 as to existing buildings which are dangerous, earthquake-prone or insanitary.[60] A local authority may close such a building or require rectification or demolition. If the building is closed, then no person may use or occupy the building, or permit any other person to do so. This prohibition is not restricted to use for human habitation or occupation. Another exception is the requirement for an annual warrant of fitness for more complex buildings that must have a compliance schedule for specified systems, such as lifts, sprinklers and emergency lighting.[61] The purpose is to ensure that electrical and mechanical systems are working safely. The Building Act and the Housing Improvement Regulations therefore have identifiably different purposes and methods; but there is plainly overlap.

In fact, it is common for statutes to overlap, especially statutes of a regulatory character. Often a person carrying out some activity is obliged to comply with multiple statutes. Real inconsistency usually appears only where compliance with one Act would contravene the requirements of another,

60 Building Act 2004, ss 121-133.

61 Building Act 2004, ss 108-111.

but good legislative drafting tries to avoid such situations. Parliament often indicates how statutes are to be read together, and has done so in the Health Act 1956. The power to make regulations that applies to the Housing Improvement Regulations is stated in its opening words as being "[s]ubject to the Building Act 2004".[62] The Regulations themselves must therefore be read as subject to the Building Act. The phrase "subject to" indicates which is to prevail if there is conflict or collision between enactments.[63] The Health Act also prevents a local authority from making any bylaw more restrictive than the Building Act or Building Code.[64]

Section 18 of the Building Act may have been intended to indicate how that Act was to be read in relation to other Acts, but in fact it addresses the relationship between what it requires and what the Building Code requires:

> (1) A person who carries out any building work is not required by this Act to—
>
> (a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or
>
> (b) take any action in respect of that building work if it complies with the building code.
>
> (2) Subsection (1) is subject to any express provision to the contrary in any Act.

Subsection (2) is odd, but perhaps another Act could alter the balance between the Building Act and the Building Code. The reason probably lies in the Building Act 1991, where section 7 did operate between the Building Act and other statutes, to say that, except as specifically provided in any other Act, no one was required to achieve performance criteria additional to or more restrictive than those in the Code. But it would be extreme to argue that the present section 18 still says that; the phrase "required by this Act" stands in the way.

It is more important, in truth, to perceive that overlap does not mean conflict or even inconsistency, and that the courts try to find a construction that reconciles any apparent inconsistency and give effect to both expressions of Parliament's intention.[65] The High Court did just this in *Christchurch*

62 Health Act 1956, s 120C. The Interpretation Act 1999 s 20 has the effect that the 1947 Regulations continue in force under the 1956 Act as if they had been made under it, so that the "subject to" proviso and the reference to the Building Act 2004 must limit the powers and duties prescribed by the Regulations. Bierre and others (2007) above n 49 at 52 document the correspondence and interdepartmental meetings that led to the enactment of the predecessor of s 120C. It was thought that the result would be that the new regulations would only apply to housing once it was built.

63 JF Burrows and RI Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 440.

64 Health Act 1956 s 65A: no bylaw "requiring any building to achieve performance criteria additional to or more restrictive than those specified in the Building Act 2004 or the building code." However, it is not thought that many local authorities have made bylaws on buildings under the Act.

65 Burrows and Carter above n 63 at 449.

International Airport Ltd v Christchurch City Council in relation to the Building Act 1991 and the Resource Management Act 1991, in circumstances similar to the one that concerns us.[66] Under the RMA, the Council had imposed additional insulation requirements on houses near the airport in order to control noise. The Court held that there was no sound basis for excluding the existence of overlap in the functions of building consent authorities and planning consent authorities. The purposes of the functions were different, and the control of effects under the RMA did not usurp the role of the Building Code. The Council was not imposing a requirement on building work, but on the use of the building for residential occupation; a building consent could have been obtained without the extra insulation but the building could not have been occupied and used. Section 7 of the Building Act 1991 (the predecessor of section 18 of the current Act) did not apply because the consent conditions did not apply only to the physical building structure; it was ineffectual to prevent authorities from imposing controls as part of the lawful exercise of their RMA powers.

While the specific terms of provisions like section 18 are important, they must be read in the context of the emphasis on discerning the purpose of different Acts and finding room for each to operate, as the Court did in *Christchurch International Airport*. Even if section 18 went back to its 1991 version, section 7, it would not prevent that process of reconciliation of the provisions of different Acts even where they overlap. Similarly, Parliament's statement in the Health Act that the Regulations are "subject to" the Building Act will subordinate the one to the other only where there is conflict.[67] Indeed, this is the necessary approach; the alternative is to assert that one Act, in this case the Building Act, has an exclusive territory where no other Act can intrude. That would make other Acts ineffective, or even meaningless, even though they address aspects of the public interest that cannot be controlled under the stated purposes of the Building Act; and it would be extraordinary to say that subsequent legislation could not invade that exclusive territory. All that is left is the doctrine of implied repeal, that a later statute impliedly repeals the former; but a court will only apply it where the two statutes are so. totally inconsistent that they cannot stand together.[68] It is a doctrine of last resort. Mere overlap and inconvenience in the regulatory scheme, which is the

66 *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1NZLR 573, [1997] NZRMA 145; foll'd in *Department of Survey & Land Information v Hutt City Council* [1997] NZRMA 378, *Re Portmain Properties (No 7) Ltd*, EnvCt C121/97, 26 March 1997, and (in relation to the Building Act 2004) *Petone Planning Action Group v Hutt City Council*, HC Wellington CIV-2008-485-1112, 22 September 2008. Warnock, above n 15, considers the difficulty of interpreting *Christchurch International Airport v Christchurch City Council*.

67 Burrows and Carter, above n 63 at 440, quote Megarry J in *C&J Clark Ltd v Inland Revenue Comsrs* [1973] 2 All ER 513 at 520 (ChD), aff'd [1975] 1 All ER 801 (CA), "Where there is no clash, the phrase does nothing: if there is a collision, the phrase shows what is to prevail."

68 Burrows and Carter above n 63 at 453.

worst than can be said of the relationship between the Housing Improvement Regulations and the Building Act, is not enough. It cannot be said that the Regulations are impliedly repealed by the Building Act, in full or in part.

The conclusion must be that the Housing Improvement Regulations 1947 and the Building Act 2004 overlap, in ways that may cause inconvenience, but that their purposes are different, the former being directed towards the use of buildings for human habitation and occupation, and the latter being directed to the construction and alteration of buildings. The overlap does not appear to produce actual repugnance or conflict; the more likely result is that it produces duplication and additional requirements. That result is not ruled out by the three provisions with which Parliament has addressed the relationship between the Regulations and the Act.

VII. Consumer Legislation

It may be asked whether other consumer protection legislation can come to the tenant's aid. The answer is not very clear. The Consumer Guarantees Act 1993 provides guarantees to consumers where goods and services are supplied in trade. Goods must be of acceptable quality and must be reasonably fit for purpose. Services must be carried out with reasonable care and skill, and must be fit for purpose. "Goods" are defined not to include a whole building attached to land, unless the building is a structure that is easily removable and is not designed for residential accommodation. A "whole" building has been held to mean an entire building, not a complete one, but how the term applies to multi-unit buildings is unclear; it would be odd if different rules applied.[69] Nor is it clear whether "services" include the provision of rental housing; the term is defined to include rights under a contract for the provision in trade of "facilities for accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking, or recreation". As for the requirement that the goods or services be supplied "in trade", a commercial provider or Housing New Zealand would be caught, but the common case of a residence that is the investment property of an individual, a couple, or a family trust is less sure. In none of these respects is the law clear. It remains for an enterprising and a receptive court to explore whether the Consumer Guarantees Act's guarantees of acceptable quality, reasonable care, and reasonable fitness for purpose apply to residential accommodation in a way that requires housing that is protected against dampness and heat loss.

The Fair Trading Act 1986 also provides consumer protection, requiring, in trade, the accuracy of representations and the avoidance of misleading and deceptive conduct. The Act applies to representations made by any person in trade concerning the nature of any interest in land or the characteristics of

69 *Jackson v McClintock* (1998) 8 TCLR 161 (HC); noted, D McMorland (1998) 8 Butterworths Conveyancing Bull 64; D Grinlinton "Fitness for Purpose of Leased Premises" [2000] NZLJ 105.

land. Grinlinton shows that these requirements must apply to leases just as much as sales of fee simple estates in land, even if there are few such cases, and that they must apply to real estate agents.[70] *Small v Lawry*[71] suggests that a tenant can obtain compensation under general contract law if a landlord makes a misrepresentation that a house is insulated, although the tenant there was unsuccessful.

Consumer protection does not appear to extend to direct regulation, under the Real Estate Agents Act 2008, of the property management, residential tenancy or letting agency operations that are part of many real estate agencies. The Act defines "transaction" (which is an element of "real estate agency work" for which one needs a licence under the Act) as not including any tenancy to which the Residential Tenancies Act applies. This is a pity, because it would be desirable to have the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 spelling out required standards of conduct in rental transactions-, such as not withholding information from a customer, and not failing to disclose known or likely defects.

VIII. Public Housing and Social Housing

Four per cent of New Zealand housing is social housing provided by Housing New Zealand Corporation.[72] Its legislation requires it to exhibit a sense of social and environmental responsibility, but only in giving effect to the Crown's social objectives in a businesslike manner.[73] (Otherwise it is subject to the general law of residential tenancies just as are private landlords.) The present Crown social objectives are silent on habitability, but the Corporation states that its houses must be warm, dry and safe places to live.[74] In recent months it has effectively reached its target of insulating every state rental property where practicable.

IX. State of New Zealand Law at the Present

The state of the law in New Zealand, then, is that in a lease or tenancy there is no implied warranty of habitability or fitness for purpose. It is unlikely that the courts will take the initiative to fashion one out of the general law of landlord and tenant, especially in the face of the policy enunciated in *Southwark v Mills*. It is unknown whether some such protection can be found as part of the guarantee of services fit for purpose under the Consumer Guarantees Act; the breadth and purpose of the guarantee does seem to give some space for judicial activism. There is a duty on residential landlords, under

70 D Grinlinton "Fitness for Purpose of Leased Premises" [2000] NZLJ 105 at 107.

71 *Small v Lawry* Tenancy Tribunal Hamilton 11/01447/HN, 26 September 2011.

72 Department of Building and Housing *Briefing for the Minister of Housing* (December 2011) at 12 (4.3%). Another 1.2% is social housing provided by local authorities and not-for-profits.

73 Housing Corporation Act 1974, ss 3B and 3C.

74 Housing New Zealand, *Statement of Intent 2013-2016* at 20-21.

the Residential Tenancies Act and the Housing Improvement Regulations, to ensure that dwellings are free from dampness, but the duty seems little known and little enforced. However the Regulations do not address undue heat loss specifically. There is no legal duty for Housing NZ Corporation to do any better than other landlords. There is little relevant in the Building Act because it is primarily directed at construction and the execution of building work, and few rentals are newly built. The better thermal properties that the Act and Building Code now require for the construction of dwellings will take decades to make a difference. The main relevance of the Building Act to existing buildings is if they are dangerous, earthquake-prone or insanitary, or if they have complex systems that require annual inspection.

Under the existing law, there are opportunities to use the Housing Improvement Regulations 1947 more vigorously to enforce the duty to provide housing that is free from dampness. The Regulations have not been repealed by the Building Act. Advocacy, publicity and training could increase the willingness of local authorities and Tenancy Tribunal adjudicators to enforce the duty. Parliament specifically tells local authorities to enforce the Regulations. A higher profile for the Regulations may bring on scrutiny and criticism along with better outcomes for tenants, but a policy review would probably be no bad thing.

X. Policy Options

We find that there is a strong case for reform to ensure that rental dwellings, especially in the existing housing stock, are reasonably free from heat loss, and have adequate levels of insulation and weatherproofing to ensure that they can be kept warm at a reasonable expense. The quality of rental housing is important in human health and energy policy terms, and the present law is unsatisfactory in allowing dwellings to be rented out even if they suffer from undue heat loss and dampness. The law is also unsatisfactory in its lack of clarity. The Expert Advisory Group on Solutions to Child Poverty recommends that the Government ensure that all rental housing meets minimum health and safety standards, according to an agreed warrant of fitness, that the current insulation subsidy programme Warm Up New Zealand: Heat Smart be extended, and that specific targeting incentivize landlords to insulate their rental properties.[75] The Productivity Commission recommends a review of the law on the quality of rental accommodation to ensure its effectiveness.[76] Several policy options can be identified. Some involve law reform, while others that do not require it could actually make a real difference.

75 Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (Office of the Children's Commissioner, 2012) at 47, 49.

76 NZ Productivity Commission, above n 16 at 207.

But reform needs to recognize the reality on the ground. The costs of mandatory repairs and improvement may be passed on in higher rents; buildings may be condemned and lost from the housing stock; and tenants may accept non-complying housing if they have nowhere else to go. The Productivity Commission calls for law reform to be accompanied by growing the community housing sector and realigning the state housing portfolio so that those in the worst housing have suitable alternatives. Law reform must be complemented by an increased supply of suitable housing.

A. Ordinary Energy Efficiency Schemes

The first of the policy options is a general one and complements others below. It is that the ordinary energy efficiency schemes that help owner-occupiers must also, as far as possible, be made accessible to landlords and tenants. (Alternatively, special programmes for rentals must complement the owner-occupier ones.) The Warm Up New Zealand: Heat Smart programme of insulation subsidies was criticized by Treasury because only 14 per cent of the houses insulated were rentals when, as we have seen, 33 per cent of all houses are rentals.[77] Conversely, it is said that the South Australia Residential Energy Efficiency Scheme is just as likely to be taken up by tenants as by owner-occupiers.[78] This accessibility of general measures to landlords and tenants should be high on any New Zealand policy agenda.

B. Information Disclosure

An information disclosure requirement is a relatively unintrusive policy measure. A building energy efficiency certificate is obtained from an accredited appraiser after an inspection. It can apply an energy efficiency rating system to the building, it can estimate heating and lighting costs, and can recommend improvements. A building owner may be required to hold a certificate for certain kinds of building, or before offering a building for sale. The underlying assumption is that better information reduces transaction costs and enables purchasers more accurately to understand and price the energy efficiency character of a building. The building need not reach any particular rating or level of performance.

Australia has experience of information disclosure mechanisms. In the Australian Capital Territory, energy efficiency ratings will gradually cover the housing stock. From 1999, on the sale of a house, the vendor has been required to obtain an energy efficiency rating from a licensed building assessor and make it available to purchasers, and now a landlord who is advertising premises for lease must disclose any existing energy efficiency rating for

77 Treasury *Budget 2013 Information Release* (July 2013).

78 Australian Capital Territory Government Environment and Sustainable Development Directorate *AP2: A New Climate Change Strategy and Action Plan for the Australian Capital Territory* (2012) at 34.

them.[79] Thus a rating is required to sell a house, and once it is rated the rating must be disclosed to prospective tenants, so many rental properties will remain unrated for some time. In July 2009, the Council of Australian Governments agreed to a National Strategy on Energy Efficiency that includes requirements for the disclosure of energy efficiency for residential rentals, along with disclosure of greenhouse gas and water performance.[80] Australia, therefore, points to information measures as a path ahead for rental housing. Other information disclosure requirements are in place for commercial buildings.[81] Other examples are to be found in Europe. The EU Directive on Energy Efficiency of 2002 requires energy performance certificates to be made available when buildings are constructed, sold, or rented out. There are major challenges with compliance and the monitoring of certificate quality, but certificates are thought to have stimulated a range of useful activity and to have had a positive impact in that increased levels of efficiency are rewarded in the market.[82]

C. Information Disclosure – Voluntary

If the foregoing option is a regulatory requirement for information disclosure, the next option is non-mandatory information disclosure initiatives that harness the power of information to bring about change.[83] An example is the Student Tenancy Accommodation Rating Scheme, a website for the benefit of prospective tenants, sponsored by Dunedin City Council, the University of Otago and Otago Polytechnic.[84] Ratings are made from landlord answers to questions about fire safety, security, insulation, heating, and ventilation. There is no complaints system for objections to the ratings, but there is an audit process. Such rating systems allow the landlords of good-quality premises to differentiate their offerings from poor-quality housing, and so segment the market and obtain higher rentals and higher occupancy

79 Civil Law (Sale of Residential Property) Act 2003 (ACT), s 23, Residential Tenancies Act 1997, s 11A (ACT). ACT, *AP2*, above n 78 at 34.

80 *National Strategy on Energy Efficiency*(July 2009), section 3.3.2, annexed to Council of Australian Governments *National Partnership on Energy Efficiency*(2 July 2009).

81 Building Energy Efficiency Disclosure Act 2010 (Cth), ss 11-13. See N Durrant *Legal Responses to Climate Change* (Federation Press, Annandale, 2010) at 142; A Zahar, L Godden, J Peel *Australian Climate Law in Global Context* (Cambridge University Press, 2012) chap 9, and S Bruce "Climate Change Mitigation through Energy Efficiency Laws: from International Obligations to Domestic Regulation" (2013) 31 JERL 313.

82 European Union Directive 2002/91/EC on the energy performance of buildings, art 7; International Energy Agency *Energy Efficiency Market Report 2013* (OECD/IEA, 2013) at 130. One implementation of the Directive of 2002 is the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007, SI 2007/991. Later EU Directives on energy efficiency still rely on the energy performance certificate system.

83 Such measures are "decentred regulation" which can be understood as regulation, but not state regulation. See J Black "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2001) 54 Current Legal Problems 102.

84 <www.housingstars.co.nz>.

rates. One can imagine different schemes; one could rely on independent assessments, whether detailed professional work or a simpler walk-through checking for basics such as insulation in the ceiling, insulation in the crawl space, double glazing, and the lack of visible mould. Or the measure could be tenant satisfaction, in the same way that restaurants or tourist ventures are rated by users. Less reliable information, perhaps, but better than no information. One can see them generating new legal issues, such as the rights of tenants to bring in building assessors and publish the assessment on the web, and to report their own opinions without suffering eviction or legal action. Nonetheless, they provide a path for concerned landlords, tenants and citizens to take action themselves.

Information disclosure, whether compulsory or voluntary, has its limitations. It cannot always be assumed that people choose cold housing because they do not know about the problem. In particular the most vulnerable tenants may be quite unassisted, even hindered, by information disclosure. It is not a lack of information that leads them to take substandard accommodation, but a lack of options. Market segmentation may leave them more completely stuck with the worst of the housing. Information disclosure should be accompanied by other measures.

D. A General Standard: A New General Requirement for Protection from Heat Loss

The law can be reformed to require that rental dwellinghouses are reasonably protected against heat loss, or are provided in a condition capable of being maintained reasonably warm and damp-free at a reasonable expense. These are general standards rather than exact rules.[85] Courts and tribunals are accustomed to applying general standards, such as reasonable fitness for purpose, in a common-sense manner. They have an advantage of being adaptable to different circumstances. Over time, a court or agency's practice gives a good picture of what is and is not acceptable.

There are several different places that such a standard could go. The choice is coloured by how one sees the problem, and by what enforcement options are desired. The standard could be placed in the Housing Improvement Regulations by an amendment Regulation under the powers that already exist in the Health Act. However, the overall character of the Regulations is very prescriptive and out of date, and one may ask whether they should be patched with an amendment, or whether they should be completely replaced. Their relationship with the Building Act is also unsatisfactorily unclear. A

85 F Schauer "The Convergence of Rules and Standards" in R Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) at 21; J Black "Which Arrow? Rule Type and Regulatory Policy" [1995] Public Law 94; J Braithwaite and V Braithwaite "The Politics of Legalism: Rules versus Standards in Nursing-Home Regulation" (1995) 4 Social and Legal Studies 307. In New Zealand we often talk of prescriptive standards in building or health and safety, and the minimum energy performance standards under the Energy Efficiency and Conservation Act 2000 fit that use of terminology, but here we will discuss them as rules.

second option is the Building Act itself. Even though, as we have seen, it is mainly concerned with the quality of building work, it controls existing buildings that are dangerous, earthquake-prone or unsanitary. Buildings that are insufficiently insulated could be added to the list.[86] However the problems on the current list (and the systems that require a warrant of fitness) all have a degree of safety urgency that a lack of insulation does not have; the effect of a cold house is a gradual one. Again local authorities have an enforcement obligation, but the suite of options available may not be suitable. Consumer legislation is a third possible home for the standard, but it is very general, and it is up to individual complainants to invoke the Consumer Guarantees Act in courts or the Dispute Tribunal. Energy efficiency legislation is a fourth. It may be that section 45 of the Residential Tenancies Act 1991 is the best place to put the standard, if the problem is understood to be one peculiar to rental housing, but again it is up to individuals to invoke the requirement with no enforcement duties being imposed on any government agency.

E. Technical Rules

The last law reform option is for a set of detailed technical rules for the energy performance of rental dwellinghouses. The Government has called for a Housing Warrant of Fitness system to use on Housing New Zealand properties, and then other social housing and other rentals, where the Government is providing a housing subsidy.[87] The system is being developed jointly by the Housing and Health Research Programme of the University of Otago, out of its research on a Healthy Housing Index, and the New Zealand Green Building Council, out of its Homestar programme.[88] Legislation will be required to apply the system more broadly. Just as we saw for a general standard, there are different places in the fabric of legislation where the Warrant of Fitness system could be placed. It could go directly into the Residential Tenancies Act. Or the Energy Efficiency and Conservation Authority could make a "minimum energy performance standard" (MEPS) under the Energy Efficiency and Conservation Act 2000, which becomes a requirement under the Residential Tenancies Act.[89] The Act authorizes the government to make MEPS for "energy-using products and services, including all vehicles" which is probably too narrow to include dwellings, so that an amendment is needed. Alternatively a separate approval procedure could be instituted for the Warrant of Fitness.

86 The possibility of specifying fire standards and insulation was mentioned in the Department of Building and Housing *Getting the Balance Right: Review of the Residential Tenancies Act 1986* (2004) at 16.

87 N Smith "Housing WoF to be developed and trialled" (press release, 16 May 2013).

88 M Keall and others "Assessing Housing Quality and its Impact on Health, Safety and Sustainability" (2010) J Epidemiol Community Health <doi:10.1136/jech.2009.100701>.

89 Energy Efficiency and Conservation Act 2000, s 36. Amendments have been proposed by H Walker MP in 2012, by the Expert Advisory Group (2012) above n 23 at 30, and by the Healthy Homes Guarantee Bill 2013 (164-1), (P Twyford MP).

Internationally, one possible precedent is in the United Kingdom, where the Energy Act 2011 requires regulations to be in place by 1 April 2018 to prohibit the landlord of a domestic private rental property that falls below a prescribed standard of energy efficiency (as demonstrated by the energy performance certificate) from letting the property out until energy efficiency improvements have been made.[90] However the prohibition does not apply if the improvements cannot be funded by the Green Deal, an innovative financing plan.[91]

It is no easy matter to develop a Warrant of Fitness system that is technically defensible, applicable to many different kinds of housing, fair to landlords and tenants alike, and still kept reasonably simply to administer. The rules could be performance-based so as to avoid undue prescriptiveness, but administration will probably be helped with easy-to-follow "acceptable solutions" like under the Building Act. Assessors with adequate training will be required. Solutions will be needed for houses that are impracticable to renovate. Heritage buildings will need care. Periodic inspections or warrant renewals will be necessary to verify compliance. Enforcement will have be carefully adapted to the circumstances, and aimed at securing improvements rather than removing buildings from the housing stock or terminating the occupancy of hard-pressed families. Some agency, such as the local authority, should carry the responsibility of enforcing the warrant system. For all its difficulties, a Warrant of Fitness or some similar minimum standard is undoubtedly better than some of the possible law reforms that one can imagine, such as the introduction of a general minimum temperature for all rental housing.[92]

90 Energy Act 2011 (UK), s 43. Another useful comparison is T Hoppe, S Bellekom and K Lulofs "Energy Efficiency in the Dutch Residential Sector: Reflections on Policy Implementation" (2013) 9 Policy Q 9.

91 The Green Deal is a major initiative in Britain, but is probably unsuited to New Zealand where most of the gains from insulation and other energy efficiency improvements are taken in improved household warmth rather than reduced energy bills. Under the Green Deal, the loan is repaid from energy bills, and the "golden rule" is that the energy savings should be greater than the finance costs. The Green Deal faces a number of challenges: M Dowson and others "Domestic UK Retrofit Challenge: Barriers, Incentives and Current Performance" (2012) 50 Energy Policy 294; M Tovar "The Structure of Energy Efficiency Investment in the UK Households and its Average Monetary and Environmental Savings" (2012) 50 Energy Policy 723-735.

92 A very different approach, is minimum heat rules made by many municipalities in the United States and Canada, where the provision of heat is more essential, but also where many rental dwellings are in multi-unit buildings. For example, City of London, Ontario, Vital Services By-law, PH-6, s 3.4: between 15 September and 15 June the landlord must maintain a continuous supply of heat to a rented unit so that a minimum temperature of 20°C shall be maintained, 6 am to 11 pm, 18°C at night.

XI. Conclusion

The law of New Zealand on the energy performance of rental housing is plainly inadequate. It leaves a well-recognized market failure that reduces the interest of both landlord and tenant in installing insulation and carrying out other improvements. It falls inequitably on the poorer and more vulnerable members of society. Fortunately a range of policy options is available to produce a better result.