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ENERGY EFFICIENCY AND RENTAL ACCOMODATION: DEALING WITH SPLIT INCENTIVES

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Energy law and energy policy, to which Adrian Bradbrook has contributed so much, are significant for several reasons. The first reason, very relevant to the concern of this chapter, is to meet human needs. In New Zealand dwelling-houses are often colder than international standards stipulate,[1] and that causes health problems, especially for the young, the old and other vulnerable members of the population. The second main reason is the significant adverse effect on the environment of the production of energy and its use. The third reason is climate change; energy production is the main source of greenhouse gas emissions.[2]

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[1] Nigel Isaacs et al, 'Energy in New Zealand Houses: Comfort, Physics and Consumption' (2010) 38 *Building Research & Information* 470.

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

While energy law and policy can focus on change in the way that energy is supplied, such as by increasing renewable energy supplies, the demand side requires much more attention; in fact, the demand side, including energy efficiency, is where the big gains are to be made. In climate change terms, this important truth has been demonstrated by comprehensive studies by the International Energy Agency in its annual *World Energy Outlook*.[3] It estimates that if governments worldwide put in place policies to stabilise atmospheric concentrations of carbon dioxide at 450 parts per million, then 57 per cent of the change would come from energy efficiency measures. Another study shows that the most cost-effective technologies to reduce greenhouse gas emissions are efficiency measures; in fact, many efficiency measures have a negative cost.[4] The key message is that energy efficiency is more important, and more possible, than technologies and policy measures on the supply side.

Energy efficiency is a ratio of function, service or value provided to the energy converted to provide it.[5] 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.[6] A number of barriers can be identified: information gaps, averseness to risk and the presence of multiple gatekeepers whose approval or disapproval will influence an investment in energy-efficient technology. One of the most apparent barriers is the 'principal-agent' gap

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[3] International Energy Agency ('IEA'), *World Energy Outlook 2009*. Similar data is presented in subsequent annual versions.

[4] Per-Anders Enkvist, Jens Dinkel and Charles Lin, *Impact of the Financial Crisis on Carbon Economics: Version 2.1 of the Global Greenhouse Gas Abatement Cost Curve* (McKinsey & Co, 2010) available at <http://solutions.mckinsey.com/climatedesk/>. The original version was Per-Anders Enkvist, Tomas Nauclér and Jerker Rosander, 'A Cost Curve for Greenhouse Gas Reduction' (2007) 1 *McKinsey Quarterly* 35.

[5] *Encyclopedia of Energy* (2004) vol 2 Energy Efficiency, Taxonomic Overview (Author: Amory B Lovins) [383]; IEA, *Implementing Energy Efficiency Policies: Are IEA Member Countries on Track?* (2009) 19. Generally, see Marcel Eusterfeldhaus and Barry Barton, 'Energy Efficiency: A Comparative Analysis of the New Zealand Legal Framework' (2011) 29 *Journal of Energy & Natural Resources Law* 431.

[6] Marilyn 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 et al, *Managing Greenhouse Gas Emissions in California* (Berkeley: California Climate Change Center at UC Berkeley, 2006) 6-9, 6-17; IEA, *Mind the Gap: Quantifying Principal-Agent Problems in Energy Efficiency* (2007) 20.

which exists where incentives, costs and benefits are not divided evenly — where the incentives are split.

The 'landlord-tenant problem' is a classic example of the principal-agent gap, and therefore one of the market failures affecting efficiency in markets for energy and energy products.[7] The landlord is responsible for the fabric of the building and the main appliances, but it is usually the tenant who is responsible for paying the energy bills and who is affected by the building's heating and ventilation performance. A landlord has no interest in investing in extra insulation or better appliances, because the benefits will be reaped by the tenant, without a direct influence on the rent the landlord can charge. 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,[8] so the issue is a substantial one. The landlord-tenant problem is therefore the subject of this chapter, with particular reference to the way that it manifests itself in New Zealand.

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.[9] 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.

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7 IEA, above n 6. 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) 60-5.

8 IEA, above n 6, 191. Analysis suggesting that the issue is smaller can be found in Kenneth Gillingham, Matthew Harding and David Rapson, 'Split Incentives in Residential Energy Consumption' (2012) 33 *Energy Journal* 37.

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

Adrian Bradbrook analysed the landlord-tenant problem over twenty years ago in his article 'The Development of Energy Conservation Legislation for Private Rental Housing'.[10] He considered several law reform measures from the US, arguing that the landlord should have a legal duty to make rental housing energy efficient, just as the landlord had a legal duty to carry out repairs. His evaluation led 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 entitled 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector' in 2010.[11] 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.

I 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. (Bradbrook had noted the same thing in his research in Australia in 1991.) Twenty years or so ago, 26 per cent of households were in rentals; in 2011 it was 33 per cent.[12] If the rental part of the residential sector is difficult to reach in energy efficiency, then the performance of the sector as a whole is affected.

Secondly, poor people tend to live in rental housing. At the time of writing, 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 ('Housing NZ') and private rentals are counted together.[13] Poverty rates are higher in rental housing for those under 65 and those who are elderly. The

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10 (1991) 8 *Environment & Planning Law Journal* 91.

11 Adrian Bradbrook, 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector' in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010) 391.

12 Department of Building and Housing, *Briefing for the Minister of Housing* (December 2011) 11.

13 All the figures in this paragraph are from Bryan Perry, *Household Incomes in New Zealand: Trends in Indicators of Inequality and Hardship 1982 to 2011* (Wellington: Ministry of Social Development, August 2012) 119, 125. Also see 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).

concentration is even higher for children; over 70 per cent of all children in poverty live in rental accommodation (20 per cent in Housing NZ dwellings, 50 per cent in private rentals). To put it another way, the child poverty rate is 50 per cent in Housing NZ houses and 30 per cent in private rentals, while it is 10 per cent in privately owned homes with a mortgage and 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.[14] 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 (within the meaning of 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 to be cold than other dwellings, and that is bad for human health. 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.[15] 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 Organisation's healthy indoor temperature range of 18-24°C.[16] An Expert Advisory Group on poverty believes that many poor families are by necessity

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[14] Janet Stephenson et al, 'Energy Cultures: A Framework for Understanding Energy Behaviours' (2010) 38 *Energy Policy* 6120; Rob Lawson and John Williams, 'Understanding Energy Cultures' (Paper presented at Australian and New Zealand Marketing Academy 2012 Conference, University of South Australia, 3-5 December 2012).

[15] Nigel Isaacs et al, '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) 28.

[16] Ibid.

endangering the health of their children by living in poor-quality housing.[17] The health dimension is perhaps the most important dimension of residential energy efficiency. Low indoor temperatures are associated with poor health and excess winter mortality.[18] A recent 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.[19]

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. Adrian Bradbrook, Judith Gardam and Monique Cormier have argued in persuasive terms that access to modern energy services should be incorporated within the human rights framework.[20] 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.[21] Another line of argument is the right to habitable rental housing. Most nations have ratified the *International Covenant on Economic, Social and Cultural Rights*.[22] 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.

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17 Expert Advisory Group on Solutions to Child Poverty, above n 13, p 29.

18 Philippa Howden-Chapman et al, 'Effect of Insulating Existing Houses on Health Inequality: Cluster Randomised Study in the Community' (2007) 334 *British Medical Journal* 460 <http://www.bmj.com.proxy.library.adelaide.edu.au/content/334/7591/460.pdf%2Bhtml>.

19 A Grimes et al, *Cost Benefit Analysis of the Warm Up New Zealand: Heat Smart Programme* (prepared for Ministry of Econmic Development, 2011 revised 2012).

20 Adrian J Bradbrook, Judith G Gardam and Monique Cormier, 'A Human Dimension to the Energy Debate: Access to Modern Energy Services' (2008) 26 *Journal of Energy & Natural Resources Law* 526.

21 Gretchen Larsen and Rob Lawson, 'Consumer Rights: An Assessment of Justice' (2012) 112 *Journal of Business Ethics* 515.

22 Opened for signature 16 December 1966, 9936 UNTS 3 (entered into force 3 January 1976).

The right to housing concerns unhealthy and demeaning living conditions as much as forced evictions or homelessness.[23] Rights to health and the rights of children are related. Parties to the Covenant must report periodically on progress.[24] Ratifying the Covenant binds New Zealand, Australia and other 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.[25] However, the obligation is a general one; it is to be realised 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* held that it was for international forums and not the High Court to judge whether New Zealand had fulfilled its international obligations.[26] In any event, the housing obligation in Article 11 was phrased in general terms, and the complained-of state housing policy (i.e. 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* (NZ) not to be deprived of life be read to apply.

II Existing New Zealand Law

With these rationales for action in mind, we can turn to consider the existing legal situation, primarily in New Zealand law but also in terms that share much with other

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[23] Scott Leckie (ed), *National Perspectives on Housing Rights* (Kluwer Law International, 2003).

[24] 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*, UN Doc E/C.12/NZL/3 (17 January 2011). The report describes government policies in relation to insulation, clean heating and energy efficiency in housing.

[25] Karen Meikle, 'Economic, Social and Cultural Rights: Protection in Aotearoa New Zealand — An Overview' in Margaret Bedggood and Kris Gledhill (eds), *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Human Rights Foundation / Thomson Reuters, 2011) 39, 58; also, using the right to housing as an example, Peter Hosking, 'Freedom from Poverty: The Right to an Adequate Standard of Living' in Margaret Bedggood and Kris Gledhill (eds), *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Human Rights Foundation / Thomson Reuters, 2011) 112.

[26] [1997] 2 NZLR 474.

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.'[27] 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.'[28] While the letting of a readily-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.'[29] *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.[30] This is the position in New Zealand as much as in the United Kingdom. Even where the only use of the property which 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.[31] 'Apart from express stipulations there is no obligation on a lessor during the term of the lease to repair or maintain improvements.'[32] 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.[33]

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

28 *Hart v Windsor* (1843) 12 M & W 68, 86, 152 ER 1114. See also Lewison (ed), Sweet & Maxwell, *Woodfall on Landlord and Tenant* [13.001].

29 *Hart v Windsor*, 87. Also, *Edler v Auerbach* [1950] 1 KB 359.

30 (1864) 34 Beav 250, 253; 55 ER 631.

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

32 *Felton v Brightwell* [1967] NZLR 276, 277 (Wild CJ).

33 *Gabolinscy v Hamilton City Corp* [1975] 1 NZLR 150, 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] *New Zealand Law Journal* 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, 283 (PC).

In *Southwark London Borough Council v Mills*,[34] 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.'[35] 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 habitation, let alone that they are soundproof.'[36] 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.[37]

Lord Hoffman observed that in England, Parliament has intervened in the rental housing market in different ways; but so far it has 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 recognised 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

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34 [2001] 1 AC 1, 17 ('*Southwark v Mills*').

35 Ibid 7 (Lord Slynn).

36 Ibid 17 (Lord Millett).

37 Ibid 11 (Lord Hoffman). It should be added that the covenant for quiet enjoyment is not for acoustical peace but for undisturbed title.

them.'[38] 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.

III *Residential Tenancies Act 1986*

The *Residential Tenancies Act 1986* (NZ) ('Residential Tenancies Act') 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. In the context of this volume, it is pleasing to observe that the 1986 Act is modelled on that of the state of South Australia, and is similar to Acts in other Australian jurisdictions.[39]

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

> The landlord shall —
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> (a) Provide the premises in a reasonable state of cleanliness; and
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> (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
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> (c) Comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises …

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.)[40] There is no undertaking that the dwelling will be warm or capable of being kept warm. (A landlord may agree to such undertakings, and will be bound by them, but there is no reason to think that many landlords offer them.) 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

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38 Ibid 26.

39 David Grinlinton, *Residential Tenancies: The Law and Practice* (LexisNexis, 4th ed, 2012) 2.

40 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 Joseph William Singer, *Introduction to Property* (Aspen, 2nd ed, 2005) 480.

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.[41]

The third warranty is for compliance with requirements under other enactments. It takes our inquiry primarily to the *Housing Improvement Regulations 1947* (NZ) ('Housing Improvement Regulations'). In passing, however, one may note requirements under the *Building Act 2004* (NZ) ('Building Act') and the *Education Act 1989* (NZ) for minimum temperatures of 16°C in old people's homes and early childhood centres.[42] Leaving to one side our opinion whether that is warm enough, we should note that the Building Act is otherwise almost entirely focused 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.

IV *Housing Improvement Regulations 1947*

The Housing Improvement Regulations occupy an important position in the law on the quality of residential accommodation, but they do so in an anomalous and unsatisfactory manner. They are dated; they were originally made under the *Housing Improvement Act*. Their historical origins reflect the perceptions of the 1930s and 1940s about health in housing.[43] They are now in force under the *Health Act 1956* (NZ) ('Health Act') s 120C,[44] which authorises 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,

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[41] 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. Repair does not go as far as replacement or making a new and different building. See generally GW Hinde, Neil Campbell and Peter Twist, *Principles of Real Property Law* (LexisNexis, 2007) [11.092].

[42] The Building Code, being sch 1 of the *Building Regulations 1992* (NZ), cl 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* (NZ) under the *Education Act 1989* (NZ), cl 22 require a temperature of 16°C measured between 0.5 metres and 1.0 metre above the floor.

[43] Sarah Bierre et al, 'Institutional Challenges in Addressing Healthy Low-Cost Housing for All: Learning from Past Policy' (2007) 30, *Social Policy Journal of New Zealand* 42, 48.

[44] 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* (NZ), and was repealed by the *Local Government Amendment Act 1979* (NZ) s 9.

but Regulation 15 declares in simple terms that '[e]very 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.[45] These requirements are imposed on houses and habitable rooms without distinguishing between owner-occupied dwellings and tenanted dwellings.

Housing NZ Corp v Ladbrook shows the potential of the Regulations to be useful to tenants.[46] 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.

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 '[e]very 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, so to speak, nightmarish. There is reported uncertainty about the application of the Regulations to apartment sizes, and to boarding-houses, and there can be no surprise that there is considerable inconsistency reported in the administration of

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45 The procedures for issuing a repair notice or a closure notice are in s 42 of the Health Act. 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* (Unreported, HC Christchurch, A179/77, 7 October 1980). Failure to comply with a notice is an offence: *Garden City Developments Ltd v Christchurch City Council* (Unreported, HC Christchurch, AP168/92, 29 July 1992).

46 [2010] DCR 102.

these provisions by local authorities.[47] 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.[48] Quite likely, the dominance of the Building Act puts the 1947 Regulations into the shade; as well as being less well-known, less comprehensive and less modern, they are subject to that Act, so in case of conflict they give way.[49] Yet they occupy different terrain: while the Building Act ensures that houses and other structures are well-built, the Regulations ensure that they are, and remain, fit for human habitation.

Overall, the Housing Improvement Regulations are dated; they are prescriptive in an old-fashioned way; they deal with damp but not with heat loss; they are little understood and often overlooked. But they are the only protection against substandard housing which the law, at the time of writing, offers to tenants.

V 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* (NZ) ('Consumer Guarantees Act') 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.[50] 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,

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[47] Department of Building and Housing, *Getting the Balance Right: Review of the Residential Tenancies Act 1986*, (2004) 15.

[48] Bierre et al, above n 43, 47.

[49] The *Health Act 1956* s 120C(1) says that the power to make regulations is subject to the Building Act. On its history, see Bierre et al, above n 43, 52. The *Building Act 2004* s 18 may also be relevant in restricting requirements made under that Act.

[50] *Jackson v McClintock* (1998) 8 TCLR 161 (HC); noted, D McMorland, (1998) 8 *Butterworths Conveyancing Bulletin* 64; David Grinlinton, 'Fitness for Purpose of Leased Premises' [2000] *New Zealand Law Journal* 105.

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 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* (NZ) 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 land. Grinlinton shows that these requirements must apply to leases just as much as to sales of fee simple estates in land, even if there are few such cases, and that they must apply to real estate agents.[51] *Small v Lawry* 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.[52]

Under the *Real Estate Agents Act 2008* (NZ), consumer protection does not appear to extend to direct regulation of the residential tenancy or letting agency operations which are part of many real estate agencies. Section 4(1) of 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* (NZ) spelling out required standards of conduct, such as not withholding information from a customer, and not failing to disclose known or likely defects.

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51 Grinlinton, above n 50, 107.

52 [2011] NZTT Hamilton 11/01447/HN (26 September 2011).

VI 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 by senior judges 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 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. There is no legal duty for the Housing NZ Corporation to do any better than other landlords. It is therefore desirable to consider what two other relevant jurisdictions have done.

VII Australia

Australia has opted for information disclosure mechanisms as a key part of its action on the landlord-tenant problem, but so far in the commercial sector only. The *Building Energy Efficiency Disclosure Act 2010* (Cth) applies to a corporation that owns a 'disclosure affected' building or disclosure affected area of a building.[53] The owner must provide a building energy efficiency certificate to any prospective purchaser, lessee or sublessee. This certificate must at a minimum state the energy efficiency rating for the building, an assessment of the energy efficiency of the lighting for the building or area, and guidance on how energy efficiency may be improved. The energy efficiency rating in the certificate must also be stated in any advertisement of the building or space for sale or lease. Certificates and ratings are supplied by accredited assessors, and are registered. The requirements are backed up by civil penalties and infringement notices. These obligations under the Act are restricted to buildings and areas in buildings that are used or capable of being used as an office, and where at least 75 per cent of the space in the building by net lettable area is for administrative, clerical, professional or similar information-based activities, including

[53] *Building Energy Efficiency Disclosure Act 2010* (Cth) ss 11-13. For constitutional reasons, it targets 'constitutional corporations' which include foreign corporations and trading and financial corporations formed within the limits of the Commonwealth; that is, virtually all corporations.

any support facilities for those activities, where the area of the building for such activities is at least 2000 m^2.[54]

Australian national policy is to go further and make similar disclosure requirements for the sale and rental of residential properties. At the time of writing, disclosure requirements are not consistent between states and territories,[55] and the Australian Capital Territory is the only jurisdiction where purchasers can expect independent energy efficiency assessments of properties. In the ACT, energy efficiency ratings will gradually apply to the housing stock. From 1999, on the sale of a house, the vendor is required to obtain an energy efficiency rating and make it available to purchasers.[56] More recently, the *Residential Tenancies Act 1997* (ACT) has required a landlord who is advertising premises for lease to state any existing energy efficiency rating for them.[57] The rating to be supplied is the most recent energy efficiency rating, prepared for the premises for the purpose of a sale of the premises. These statements are prepared by licensed building assessors.[58] 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, presumably stimulated by the ACT's example, the Council of Australian Governments agreed to a National Strategy on Energy Efficiency which includes requirements for the disclosure of energy efficiency for residential rentals, along with disclosure of greenhouse gas and water performance.[59] As part of this effort, a Residential Building Disclosure Programme is being developed.[60]

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[54] *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Act 2010* s 3 and the *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* ss 5-6.

[55] Nicola Durrant, *Legal Responses to Climate Change* (Federation Press, 2010) 142; Alexander Zahar, Lee Godden and Jacqueline Peel, *Australian Climate Law in Global Context* (Cambridge University Press, 2012) ch 9.

[56] *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 23. See generally Australian Capital Territory Government Environment and Sustainable Development Directorate, *AP2: A New Climate Change Strategy and Action Plan for the Australian Capital Territory* (2012) 34.

[57] *Residential Tenancies Act 1997* (ACT) s 11A.

[58] *Construction Occupations (Licensing) Act 2004* (ACT) s 123AC.

[59] *National Strategy on Energy Efficiency*, July 2009, s 3.3.2, annexed to Council of Australian Governments, *National Partnership on Energy Efficiency*, 2 July 2009.

[60] Department of Resources, Energy and Tourism, *Draft White Paper, Strengthening the Foundations for Australia's Energy Future* (Canberra: December 2011) 189. This may require state legislation, unless the Commonwealth can find another constitutional head; the corporation's power is unlikely to be adequate.

Australia therefore points to information measures as a path ahead. In the ACT there is growing experience of their use in the rental market.

VIII United Kingdom

In the United Kingdom, energy performance certificates are a compulsory form of information disclosure, pursuant to a European Union Directive. The *Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007* apply to dwellings and certain other buildings.[61] When a building owner is selling or renting out a building, he or she must supply a current energy performance certificate, without charge. The certificate, valid for ten years, is produced by a qualified assessor who inspects the dwelling as to construction, insulation, heating and ventilation. (Multiple-unit buildings may be reviewed together.) The builder of a new or refurbished house must obtain a certificate for it. The certificate rates the building on a scale from A to G, so that the prospective tenant or buyer can compare it with other properties. It estimates the costs of lighting and heating the property. It recommends specific measures to improve the rating of the building, with indicative costs and likely savings. It is limited in accuracy, in being derived from modelling the performance of a building of a given size, shape, orientation and materials; and it does not use invasive inspection techniques. A different requirement, for certain publicly-owned buildings, is a display certificate, which discloses actual energy operation ratings, including use of fuel.

Going beyond energy performance certificates, the United Kingdom has had a variety of incentive schemes to improve the quality of its housing stock generally.[62] From October 2012, the key scheme is the Green Deal. The Green Deal was an important component of the United Kingdom government coalition agreement of 2010, and was the chief subject of the *Energy Act 2011* (UK) ('Energy Act'). The Green

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[61] (UK) SI 2007/991, made to implement European Union Directive 2002/91/EC on the energy performance of buildings. It required minimum energy performance standards for new buildings, certificates for existing buildings (as implemented in the UK Regulations discussed here) and regular inspection of boilers, heating systems and air-conditioning systems. The European Commission has proposed more vigorous activity: 'Proposal for a Directive of the European Parliament and of the Council on Energy Efficiency and Repealing Directives 2004/8/EC and 2006/32/EC' COM/2011/370. It is unclear at the time of writing whether this proposal will proceed.

[62] Mark Dowson et al, 'Domestic UK Retrofit Challenge: Barriers, Incentives and Current Performance' (2012) 50 *Energy Policy* 294.

Deal is a financing framework, using private funds to pay for fixed improvements for the energy efficiency of households and non-domestic properties. The financing, from a Green Deal provider, can be obtained for energy efficiency purposes after evaluation by an accredited Green Deal assessor. The funds are repayable only from the energy bills for the property, under an arrangement with the energy suppliers. The householder is not liable otherwise, so that the obligation to make repayments runs with the land rather than the individual. If all goes well, the repayments are outweighed by the energy savings; indeed the 'golden rule' is that the expected financial savings must be greater than the costs attached to the energy bill.[63]

The landlord-tenant problem has plainly been a major driver in the design of the Green Deal. Landlords will face no capital costs, and the repayments will come out of the tenants' energy bills. However the Energy Act goes further, and requires regulations to be made — to come into effect by 1 April 2016 — that a landlord of a domestic private rental property may not unreasonably refuse the tenant's request to make energy efficiency improvements funded by a Green Deal plan or a like mechanism.[64] The Act goes even further on 1 April 2018, by when regulations must be in place 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.[65] The intention is for the minimum standard to be set at E on the A-to-G scale. However, this requirement is limited to improvements that can be funded by a Green Deal plan or equivalent, so that there are no capital costs to the landlord; if all possible Green Deal improvements are made but still do not bring the property up to the E standard, then it may be let out anyway.

The Green Deal has been criticised as regressive, complex, unattractive to consumers and likely to reduce the amount spent on insulation.[66] It may not be

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63 Department of Energy and Climate Change, *The Green Deal: A Summary of the Government's Proposals* (2010).

64 *Energy Act 2011* (UK) s 46.

65 *Energy Act 2011* (UK) s 43.

66 Dowson et al, above n 62; Miguel A Tovar, 'The Structure of Energy Efficiency Investment in the UK Households and its Average Monetary and Environmental Savings' (2012) 50 *Energy Policy* 723; Rowena Mason, 'Coalition's Green Deal Plans to Insulate 14 million Homes "Spiralling out of Control"', *The Telegraph*, 8 June 2012; Damian Carrington, 'Green Deal would See Home Insulation Rate Plummet', *The Guardian*, 11 June 2012.

well-targeted at the needs of the poor. It contains no element of subsidy for retrofit works. It may not be effective in reaching low-adoption households such as private renters. The rate of interest to be paid on the improvements may turn out to be higher than mortgage rates, which will be unattractive to house owners, and, if to run long into the future, may depress the value of a house. The finance companies may lend selectively, only on the most inefficient houses, in order to obtain adequate returns. The scheme requires elaborate administration and regulation of the work of the financial providers, assessors and energy companies; it is legally complicated. It is technically complex in estimating the annual energy savings from different retrofit packages.

As part of EU requirements, the United Kingdom experience therefore shows the way ahead for Australia in energy information disclosure. Once the Green Deal is fully under way, it will also provide insights into a determined effort to bring energy efficiency improvements into rental accommodation.

IX Policy Options

With a clear picture of the present state of New Zealand law, and with the benefit of comparisons with two other countries, it is now possible to evaluate some options for policy change and law reform.

A *Ordinary Energy Efficiency Schemes*

Initially, an important general point should be made: that ordinary energy efficiency schemes that are aimed primarily at owner-occupiers must also, as far as possible, be made accessible to landlords and tenants. Some schemes may be better than others; 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.[67] This accessibility of general measures to landlords and tenants should be high on any New Zealand policy agenda. In addition, modifications to the ordinary rules of tenancies seem necessary. Tenants may need the right to remove energy efficiency installations that become fixtures, or compensation where that is impossible.[68]

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67 Australian Capital Territory, above n 56, 34.

68 Bradbrook, above n 10, 92.

B *Public Housing*

If we proceed on the assumption that we wish to improve energy efficiency in rental accommodation with the minimum of complexity in law reform, then the simplest option of all is to improve public housing. No law reform is required: only funding. Four per cent of New Zealand housing is social housing provided by the Housing New Zealand Corporation.[69] 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.[70] (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 role is to provide safe, warm and dry homes for people in the greatest need. It identifies an urgent need to reconfigure the state housing portfolio, in part because of houses that are in poor condition.[71] It intends to insulate every state rental property where practicable,[72] and in recent months the Energy Efficiency Retrofit programme has effectively reached this target.

C *Housing Improvement Regulations*

The next simple option, needing no change in the law, is to use the *Housing Improvement Regulations 1947* (NZ) more vigorously. Non-governmental organisations concerned with poverty, health and tenants' rights need not wait for the government. Publicity and training would increase the willingness of local authorities and Tenancy Tribunal adjudicators to enforce the duty to provide housing free from dampness. 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.

D *New General Requirement for Protection from Heat Loss*

A policy review of the Housing Improvement Regulations could produce a requirement that houses be free from undue heat loss, as the parent Act allows for. Such a simple

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

70 *Housing Corporation Act 1974* (NZ) ss 3B and 3C.

71 Housing New Zealand, *Briefing for the Minister of Housing* (December 2011) 3, 5, 8. The closest the Crown social objectives come to this is that 'New Zealanders have access to housing that meets their needs and is affordable'.

72 Housing New Zealand, *Statement of Intent 2012-2015*, 22, 38.

non-quantified requirement could provide a minimum standard, capable of being applied in the most serious cases. Courts and tribunals are accustomed to applying general standards, such as reasonable fitness for purpose, in a common-sense manner even if an engineer might ask for something more exact.[73] The prescriptive and old-fashioned character of the Regulations would be a problem in any effort to amend them; it is very likely that a policy consensus would be for something better, and that could mean delay. It would be a pity if the quest for perfect regulations becomes the enemy of the good.

Alternatively, a new modern requirement could be devised that residential rental accommodation be free from heat loss and dampness. While this rubric from the Health Act seems workable, the obligation could be expressed as an obligation to provide the premises in a state reasonably capable of being maintained warm and free of damp at a reasonable expense. It could be incorporated in section 45 of the *Residential Tenancies Act 1986* (NZ); that specific Act would be a better fit than the broad *Consumer Guarantees Act 1993* (NZ) or the construction-oriented *Building Act 2004* (NZ).[74] Another option is for a 'minimum energy performance standard' ('MEPS') under the *Energy Efficiency and Conservation Act 2000* (NZ). MEPS lend themselves to technically-specific requirements, and are in effect in New Zealand for various appliances. The Act authorises 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.[75] A MEPS for rental housing would require technical work but seems to deserve active examination.

Perhaps the most active or most restrictive law reform would be to impose a new general requirement but then to require periodic inspection to verify compliance. It could be a building warrant of fitness.[76] As noted, energy performance certification

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[73] 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.

[74] 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) 16.

[75] Such a proposal is the Energy Efficiency and Conservation (Warm Healthy Rentals) Amendment Bill, Consultation Draft, H Walker MP, 20 June 2012. The relevant section is s 36, *Energy Efficiency and Conservation Act 2000*.

[76] Expert Advisory Group on Solutions to Child Poverty, above n 13, 30.

with prescribed performance minima is to be introduced in the UK from 2018. It will be a considerable challenge, and it is not surprising that a considerable lead-time is planned; but it shows what a determined effort to improve building performance would look like. It would not be unduly intrusive but it would put pressure on the owners of poor-quality housing.

E *Information Disclosure*

Less intrusive are information disclosure mechanisms. The British energy performance certificate, and the Australian building energy efficiency certificate, only require that performance be measured and disclosed. They increase the amount of information available to a prospective purchaser, or (in the future) a prospective tenant. Better information reduces transaction costs and enables purchasers more accurately to price the energy efficiency aspects of a dwelling; so information disclosure is arguably compatible with the free play of market forces.[77] An information disclosure regime should be pursued. It does require a complex technical framework for assessors to make accurate and meaningful ratings. It also requires attention for the tenants at the bottom of the market who may not have the luxury of turning down rentals with poor ratings.

Nonetheless, we should be open to the power of information to bring about change. One promising information measure is a website for information about the quality of rental accommodation, for the benefit of prospective tenants. It needs no formal regulation or law reform at all.[78] The information on a website could be the result of a detailed assessment, or it could be a quicker and cheaper walk-through assessment checking for basics such as insulation in the ceiling, insulation in the crawl space, double glazing, lack of visible mould and so on. Cheaper still would be reports of consumer satisfaction: the entries by tenants about how they found the place, in the same way as tourists report their experiences in travel adviser websites.[79] This would be less reliable information, perhaps, but better than no information at all.

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[77] There is of course a great deal of evidence that conventional market explanations of conduct are inadequate in relation to energy efficiency: Brown, above n 6.

[78] A website of this kind is a form of 'decentred regulation' which can be understood as regulation, but not state regulation. See Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 102.

[79] In the travel industry, for example, a useful website for condominiums or units is <https://www.condoadvisory.com>.

One website with basic information is the Student Tenancy Accommodation Rating Scheme ('STARS'), sponsored by Dunedin City Council, the University of Otago and Otago Polytechnic.[80] Ratings are made from landlord answers to a questionnaire about fire safety, security, insulation, heating and ventilation, and general amenities. There is no complaints system for objections to ratings, but there is an audit process. Such rating systems allow the landlords of good-quality premises to differentiate them from poor-quality housing and segment the market. There could be benefits for landlords in higher rentals and higher occupancy rates, and benefits for communities and institutions in a good profile for their city and in health benefits for its residents. Such information systems pose consequential 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. Once again, we must note that such systems may do little for the most vulnerable tenants. Nonetheless, they provide a path for concerned landlords, tenants and citizens to take action themselves.

X Conclusion

Thus, a range of policy options exists to deal with the unsatisfactory aspects of the law of residential tenancies in respect to energy efficiency: some options for more vigorous use of the existing law and of information-sharing possibilities, some for changes of the law with varying degrees of complexity and departure from the status quo. The present law in New Zealand, as in a number of other jurisdictions, needs reform in order to meet energy policy and climate change objectives, and, no less importantly, to improve human health and well-being.

[80] See <http://www.housingstars.co.nz/the-scheme>.