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**MARKET RENT: TOWARDS A REGULATORY
FRAMEWORK THAT UNLOCKS RENTAL
AFFORDABILITY**

Submitted for the LLB (Honours) Degree

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2021

Abstract

'Generation Rent' is a well-documented phenomenon that denotes the recent changes in housing pathways, characterised by the decline in home ownership and the simultaneous rise of private renting. The private rental sector accommodates around 1.5 million New Zealanders. One of the biggest issues tenants face today is the cost of renting, which tends to be volatile and precarious. This paper considers the adequacy of New Zealand's current market rent regime, and examines the corresponding legal protections against unreasonable rent increases. It discusses how the Tenancy Tribunal determines a fair market rent. It considers that the current market rent regime places an unfair evidential burden on tenants and it questions the reliability of market rent evidence. This paper argues that the current market rent regime offers an opportunity for landlords to increase rents beyond reasonable market rates simply because they are not proven to be excessive. In consideration of the current rental, and wider housing market, it does not regard the market rent regime as providing adequate protection. Accordingly, this paper examines how recent social and legal changes in other jurisdictions may serve as a model for more equitable outcomes in New Zealand. It shows that Ireland is a comparable jurisdiction that has moved from a position of liberalised rent to the introduction of constraints in designated pressured areas to address affordability concerns. We should consider these examples and take further steps to ensure that all New Zealanders are able to live in an affordable home.

Keywords: *"Rental Crisis", "Market Rent", "Residential Tenancies Act 1986", "Tenancy Tribunal", "Rent Control"*

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*“One of the most oppressive and recurring problems facing tenants today, excluding deteriorated housing conditions, is exorbitant and continuing general rent increases.”*¹

I Introduction

Housing policy in New Zealand has traditionally been characterised by significant market intervention in support of home ownership.² For decades this has normalised home ownership as the tenure of choice, whilst renting has been perceived as somewhat inferior.³ However, there has been considerable growth in the private rental sector (PRS) over the past two decades, largely in response to the long-term decline in access to home ownership. Consequently, there are increasing concerns for rental affordability.⁴

New Zealand’s population is expected to grow markedly over the next 30 years.⁵ Although longer-term measures that increase the supply of housing are imperative to achieve affordability, shorter-term measures that stabilise rents may be appropriate to protect those most vulnerable. This paper considers the adequacy of New Zealand’s current market rent regime and examines how recent social and legal changes in other jurisdictions may serve as a model for more equitable outcomes in New Zealand. It does so in the following way. Part II provides context to this problem. Part III reviews the history of rent regulation in New Zealand, up to the enactment of the Residential Tenancies Act 1986, which Part IV explores. Part V analyses the significant changes to the PRS over the past two decades. Part VI reviews the 2020 reforms. Part VII and Part VIII concern the regulation and

1 Richard E Blumberg, Brian Quinn Robbins and Kenneth K Barr “The Emergence of Second-Generation Rent Controls” (1974) 8(4) *Clearinghouse Rev* 240 at 240.

2 Jennifer Joynt and Leon Hoffman *Navigating in and out of Aotearoa New Zealand’s Intermediate Housing Market: A Housing Pathways Analysis* (Auckland Council, Technical Report 2021/14, 7 April 2021) at 30; Laurence Murphy “To the market and back: Housing policy and state housing in New Zealand” (2003) 59 *GeoJournal* 119 at 119.

3 Joynt and Hoffman, above n 2, at 30; Jacqueline Paul, Jenny McArthur, Jordan King, Max Harris, and Scott Figenshow “Transformative Housing Policy for Aotearoa New Zealand: A Briefing Note on Addressing the Housing Crisis” (6 October 2020) The University of Auckland Public Policy Institute <www.policycommons.ac.nz>.

4 Alan Johnson, Philippa Howden-Chapman, and Shamubeel Equb *A Stocktake of New Zealand’s Housing* (Ministry of Housing and Urban Development, February 2018) at 2, 4, and 10.

5 Stats NZ “New Zealand’s population could reach 6 million by 2050” (8 December 2020) <www.stats.govt.nz>.

enforcement of market rents. Part IX analyses the economic theory and international evidence on rent control. Finally, Part X concludes that, in consideration of the current rental market and the governing law, further legislative intervention is necessary.

II Context

Adequate housing is a basic human right.⁶ It is a “fundamental determinant of wellbeing, central to health, family stability, and social cohesion.”⁷ Therefore, to be adequate, a home must be more than a mere roof over one’s head. It must be affordable, suitable, stable, and legally secure.⁸ To this end, home ownership has long been the quintessential ‘Kiwi dream’⁹ - a rite of passage that every New Zealander aspires to achieve. However, due to the rising cost of real estate, this dream is slipping further out of reach for many.

‘Generation rent’ is a phenomenon that denotes the recent changes in housing pathways, characterised by the decline in home ownership, and the simultaneous rise of private renting.¹⁰ Once a transitional tenure, the PRS is now housing more New Zealanders, and for longer periods of their lives.¹¹ With short supply and a lack of available alternatives, the cost of renting has increased markedly, outstripping wage growth and inflation.¹² In 2019, more than a quarter of renter households spent at least 40 per cent of their income on

6 Human Rights Commission *The Human Right to Adequate Housing in New Zealand* (25 July 2017) at 1. Recognized in the 1948 Declaration of Human Rights and in multiple International Human Rights Treaties ratified by New Zealand. See Article 11(1) of the International Covenant on Economic, Social and Cultural Rights.

7 New Zealand Productivity Commission *Housing Affordability Inquiry* (March 2012) at 5.

8 Leilani Farha *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and the right to non-discrimination in this context* (United Nations Human Rights Council, A/HRC.47/43/Add.1, 28 April 2021) at [4].

9 Selena Equb and Shamubeel Equb *Generation Rent: Rethinking New Zealand’s Priorities* (online ed, Bridget Williams Books, Wellington, 2015) at 7; Paul, McArthur, King, Harris, and Figenshow, above n 3; Joynt and Hoffman, above n 2, at 32; and Karen Witten, Penelope Carroll and Lucy Telfar-Barnard “The New Zealand Rental Sector” (4 August 2017) Sustainable Cities <www.sustainablecities.org.nz> at 28.

10 Kim McKee, Adriana Mihaela Soaita and Jennifer Hoolachan “‘Generation rent’ and the emotions of private renting: self-worth, status and insecurity amongst low-income renters” (2020) 35(8) *Housing Studies* 1486 at 1470.

11 Witten, Carroll and Telfar-Barnard, above n 9, at 2; and Joynt and Hoffman, above n 2, at 4.

12 Stats NZ *Housing in Aotearoa: 2020* (December 2020) at 47; and Johnson, Howden-Chapman, and Equb, above n 4, at 11.

housing costs - an unacceptably high amount according to international standards.¹³ The New Zealand Property Institute forecasts that the cost of renting will continue to rise and will become the greatest housing issue in New Zealand.¹⁴ Despite these concerns, and unlike comparable jurisdictions, there is insufficient rent control in New Zealand. New Zealand is one of eight countries in the Organisation of Economic Co-operation of Development (OECD) that does not regulate initial rents or subsequent rent increases.¹⁵ The closest resemblance to rent control is found in s 25 of the Residential Tenancies Act 1986 (RTA), as discussed in Part VII. Nevertheless, the regulatory environment has not always been like this. Prior to the enactment of the RTA, various forms of rent regulation were implemented in New Zealand, as reviewed below.

III History of Rent Regulation

Prior to the twentieth century, there was little-to-no government intervention in the PRS.¹⁶ Parties were able to contract freely, with market activity being primarily governed by the forces of supply and demand.¹⁷ However, the economic disturbances caused by World War I forced the government to impose restrictions.¹⁸ In New Zealand, rent regulation began with the War Legislation Amendment Act 1916, which fixed rents and mortgages at their

13 Organisation of Economic Co-operation and Development *Overview of Affordable Housing Indicators* (27 May 2021) at 2.

14 New Zealand Property Institute “Property Institute housing predictions for 2018” *Scoop Business* (online ed, New Zealand, 31 January 2018).

15 Organisation of Economic Co-operation and Development *PH 6.1 Rental Regulation* (25 May 2021) at 2.

16 See Susan Bright *Landlord and Tenant Law: Past, Present and Future* (online ed, Hart Publishing, Oxford, 2006) at 42, 234, and 257; Mary Ann Glendon “The Transformation of American Landlord-Tenant Law” (1982) 23(3) *BC L Rev* 503 at 503; and Amanda Quester “Evolution Before Revolution: Dynamism in Connecticut Landlord-Tenant Law Prior to the Late 1960s” (2006) 48(4) *The American Journal of Legal History* 408 at 408.

17 Above n 16.

18 Te Ara “Story: First World War” (20 June 2012) <teara.govt.nz> at 8; Michael Reddell “World War One and the New Zealand economy” (25 April 2018) *Croaking Cassandra* <www.croakingcassandra.com>; C Weststrate “The Effects of Price Control in New Zealand” (1958) 34(67) *The Economic Record* 103 at 103; Also see legislation enacted in other jurisdictions *Fair Rents Act 1915 (NSW)*; *Increase in Rent and Mortgage Interest (War Restrictions) Act 1915 (UK)*; France introduced rent control legislation in 1914; and many states in the US introduced rent control during the war.

pre-war level.¹⁹ The purpose was to prevent rent increases and evictions during the war. The Act, which largely replicated its British counterpart enacted in the previous year, was the first reported form of rent control in New Zealand.²⁰

Since 1916 the “extent and application of rent control legislation has varied considerably, at some periods being virtually phased out, and at other times being revised and widely extended.”²¹ Although, in almost every instance in history, rent regulation has been imposed in response to an event or situation that either causes a significant supply and demand imbalance or makes it impossible for tenants to continue to pay their rent.²²

Renters’ issues came to the forefront again during the Great Depression.²³ Reduced economic activity meant that many tenants were unable to meet their contractual obligations.²⁴ The Fair Rents Act 1936 was enacted to make “temporary provision for the restriction of increases in rent.”²⁵ Pursuant to the Act, rents were fixed at their ‘basic’ level, that is, the rent that was payable on the 1st of May 1936.²⁶ However, both landlord and tenant had the right to apply to the Magistrate for a rent review. The Magistrate had jurisdiction to “fix such rent as in their opinion would be fair and equitable for the tenant to pay, with regard to the relative circumstances of the landlord and of the tenant.”²⁷ The rent assessment was expressly subjective, and was often considered ‘pro-tenant.’²⁸ However, this was necessary to achieve the legislative purpose at the time.

19 War Legislation Amendment Act 1916, s 2(1); and C Weststrate, above n 18, at 103.

20 Compare Increase in Rent and Mortgage Interest (War Restrictions) Act 1915 (UK) and War Legislation Amendment Act 1916 (NZ).

21 TN Gibbons *Introduction to Residential Tenancies and Dwellinghouses* (online ed, LexisNexis NZ Limited) at [12.001]; See Tenancy Act 1948, Tenancy Act 1955, and Rent Appeal Act 1973.

22 Gibbons, above n 21, at 12.001; and John Willis “Short History of Rent Control Laws” (1950) 36 *Cornell L. Rev.* 54 at 54.

23 Elinor Chrisholm “Renter Activism in New Zealand, 1916-2016” (25 July 2017) One Two Three Home <www.onetwothreehome.org.nz>.

24 Above n 23.

25 Fair Rents Act 1936, title.

26 Sections 5(1)(a), 5(1)(b).

27 Sections 6(1), 7(1).

28 Property Law and Equity Reform Committee *Report on Residential Tenancies* (NZPELRCom 34, May 1985) at [10].

Although the idea of government intervention was gaining support during the interwar period, the aftermath of World War II prompted rent regulation to become commonplace in many jurisdictions.²⁹ Numerous Acts were passed in New Zealand, including the Tenancy Act 1955 and the Rent Appeal Act 1973. Similar to preceding legislation, the Tenancy Act 1955, fixed rents to their ‘basic’ level, with both parties holding a right to a rent review.³⁰ The Magistrate, again, had jurisdiction to determine the ‘fair’ rent for the tenancy, in consideration of the capital value of the property.³¹ Nevertheless, there remained strong reference to the rent that was deemed to be “fair and reasonable,” thus the rent assessment remained largely subjective. Whereas, the Rent Appeal Act 1973 established the Rent Appeal Board to determine the ‘equitable’ rent for the tenancy.³² The Board’s assessment was based on the rent that “a reasonable landlord might expect to receive and a reasonable tenant might expect to pay” with regard to the locality, state of repair, general level of rents, and landlords outgoings.³³ Although there are similarities to New Zealand’s current market rent provision, which will be analysed later, “the Rent Appeal Boards were criticised...because it was felt that the ‘equitable rent’ criteria was unfairly used to the landlords’ detriment; while tenants [said] the criteria was still not strict enough on landlords.”³⁴

By the 1980s the law was scattered across the Property Law Act 1952, the Tenancy Act 1955, and the Rent Appeal Act 1973.³⁵ Consequently, the law was relatively inaccessible and perplexing for both landlord and tenant.³⁶ In 1982 the Property Law and Equity Reform Committee was asked to review the existing legislation with the view of its consolidation into a single Act or in some other appropriate manner.³⁷ The Committee’s findings and

29 Willis, above n 22, at 54.

30 Tenancy Act 1955, s 18(1).

31 Section 21.

32 Rent Appeal Act 1973, s 6.

33 Section 8.

34 Above n 28, at [22].

35 At [8].

36 At [8]; Diane Stephenson “The Residential Tenancies Act 1986: A Progress Report” (1988) Auckland U L Review 6(1) 65 at 68.

37 Property Law and Equity Reform Committee *Interim Report on Legislation Relating to Landlord and Tenant* (November 1983) at [1].

recommendations were highly influential to the drafters of the new Act. Although there was debate as to whether rent controls should be included, the “whole subject of rent control [was seen as] an economic matter beyond [the Committees] sphere of competence.”³⁸ Furthermore, at the time, rent controls were less of a pressing issue. Home ownership was increasing, and the PRS was relatively stable.³⁹ Thus the Committee did not recommend re-enacting rent controls. Drawing heavily upon these recommendations, in 1986 Parliament passed a single landlord-tenant Act – the Residential Tenancies Act 1986 (RTA).

IV The Residential Tenancies Act 1986

The RTA defines the rights and obligations of landlords and tenants, and applies to “every tenancy for residential purposes except as specifically provided.”⁴⁰ The purpose of the RTA is to:⁴¹

...reform and restate the law relating to residential tenancies, to define the rights and obligations of landlords and tenants of residential properties, to establish a tribunal to determine expeditiously disputes arising between such landlords and tenants, to establish a fund in which bonds payable by such tenants are to be held, and to repeal the Tenancy Act 1955 and the Rent Appeal Act 1973...

Prior to its enactment an aggrieved party, depending on the claim, could pursue legal remedies in the District Court, High Court (formerly the Supreme Court), or before the Small Claims Tribunal.⁴² Consequently, the dispute resolution process was often tedious and convoluted.⁴³ There was an obvious need for the RTA to provide a “speedier and more effective means of resolving disputes.”⁴⁴ To this end, a specialist Tenancy Tribunal was

38 Above n 28, at [16].

39 Stats NZ “Homeownership rate lowest in almost 70 years” (8 December 2020) <www.stats.govt.nz>; and Johnson, Howden-Chapman, and Eaqub, above n 4, at 13.

40 Residential Tenancies Act 1986, ss 4, 5.

41 Long title.

42 Above n 28, at 12 and 22; Stephenson, above n 36, at 68; above n 30, ss 26-29; and above n 32, ss 12-18.

43 Stephenson, above n 36, at 68.

44 Above n 28, at [18].

established to adjudicate upon disputes that could not be resolved between the parties, or through mediation.

A The Tenancy Tribunal

The Tenancy Tribunal has exclusive jurisdiction to determine any tenancy dispute, and is quite distinct from an ordinary court.⁴⁵ It is “designed to be a flexible and informal body concerned as much with justice as the letter of law.”⁴⁶ When adjudicating a dispute, the Tribunal must do so in a “fair and expeditious manner” according to the general principles of law, and the “substantial merits and justice of the case,” but is not bound to “give effect to the strict legal rights or obligations or to legal forms and technicalities.”⁴⁷

The Tribunal forms a crucial part of the New Zealand justice system. It is one of the most common legal institutions the public interacts with. The Tribunal receives over 20,000 applications annually, with the majority being initiated by landlords concerning a tenant’s failure to pay rent.⁴⁸ There is no corresponding level of complaints by tenants, despite the notorious issues they experience.⁴⁹ This suggests that the current system, which relies heavily on tenants self-reporting their problems, is inadequate. A combination of factors, derived from the inherent power imbalance in the relationship, contribute to this. It has been reported that tenants fear a breakdown of the relationship or eviction if they were to

45 Above n 40, s 77(1).

46 Andrew Alston *Residential Tenancies Act 1986* (1987) 4 BCB 157 at 158, as cited in Diane Stephenson, above n 36, at 77.

47 Above n 40, ss 85(1), 85(2).

48 Tenancy Services “Data and Statistics” <www.tenancy.govt.nz>. In 2020 the Tenancy Tribunal received 22,230 applications, of these 79.48% were initiated by private landlords.

49 Johnson, Howden-Chapman, and Eaquad, above n 4, at 45; Stats NZ “Renting vs owning in NZ” (26 June 2019) <www.stats.govt.nz>; Stats NZ “Renters less satisfied with their housing” (26 June 2019) <www.stats.govt.nz>; He Kainga Oranga/Housing and Health Research Programme *The People’s Review of Renting* (Renters United, August 2017) at 10; Stats NZ, above n 12, at 12; Kate Newton “Why renters won’t complain about landlords” *Radio New Zealand* (online ed, Wellington, 9 July 2018); and Ethan Te Ora “Are these the most rundown flats in Wellington? ‘They must be trying to set a world record,’ says renter” *Stuff NZ* (online ed, Wellington, 29 April 2021).

complain, especially when there is a lack of affordable alternatives.⁵⁰ Furthermore, although the RTA is intended to be applied without legal representation,⁵¹ it remains challenging for a layperson to understand the relevant law, their rights and to gather sufficient evidence. These factors, amongst others, tend to discourage a tenant from enforcing their legal rights, which is of increasing concern in light of the pronounced changes to the PRS, as discussed below.

V Renting in New Zealand: The Social Context

When the RTA was passed in 1986, around 25 per cent of households rented their home.⁵² At the time, renting was predominantly understood as a short-term accommodation option for young people without children - as a ‘stepping stone’ to home ownership.⁵³ Although home ownership continues to be a majority tenure in New Zealand, since 1986 the PRS has changed markedly.

A Home Ownership

New Zealand’s housing crisis is well recognised and long-standing.⁵⁴ Strong population growth, low interest rates, and housing scarcity have caused house prices to rise significantly, particularly in the major cities of Auckland and Wellington.⁵⁵ Home ownership peaked in 1991, when almost three-quarters of households owned their own

50 He Kainga Oranga/Housing and Health Research Programme, above n 49, at 11; and Ministry of Urban Development and Housing *Reform of the Residential Tenancies Act: Implementation – Frequently Asked Questions* (6 August 2020) at 42.

51 Above n 40, s 93(2).

52 Ministry of Housing and Urban Development, above n 50, at 3.

53 Above n 7; and Ministry of Housing and Urban Development *Reform of the Residential Tenancies Act 1986: Discussion document* (August 2018) at 3.

54 Philippa Howden-Chapman *Home Truths: Confronting New Zealand’s Housing Crisis* (online ed, Bridget Williams Books, Wellington, 2015) at 8; Farha, above n 8, at [29]; Elle Hunt “Can you help me?: The quiet desperation of New Zealand’s housing crisis” *The Guardian* (online ed, Wellington, 19 March 2021); and Joshua McDonald “Can New Zealand Fix Its Housing Crisis” *The Diplomat* (online ed, Melbourne, 26 March 2021).

55 Stats NZ, above n 12, at 13, 113 and 116; and Andrew Barker “Improving Wellbeing Through Better Housing Policy in New Zealand” (6 September 2019) Organisation of Economic Co-operation and Development <www.oecd.org> at 5.

home.⁵⁶ Home ownership has since been falling, and at the time of the 2018 Census home ownership was at its lowest in over 70 years.⁵⁷ As social housing options are limited, the decline in home ownership has been matched with considerable growth in the PRS. Around a third of households, including 43 per cent of children, now live in a rented home.⁵⁸

B Generation Rent

‘Generation rent’ is a term that denotes the phenomenon of the growing number of people who have been priced out of the housing market and are renting for longer, or for life, giving rise to intergenerational housing inequalities and inequities. The rise of generation rent and the housing crisis it faces is putting increased pressure on the PRS. This is characterised by soaring rents, declining turnover of tenancies, increased homelessness, and continuing rates of housing-related poverty.⁵⁹ Generation rent has previously been analysed by Selena and Shamubeel Eaqub in their book *Generation Rent: Rethinking New Zealand’s Priorities*. They assure the reader that it:⁶⁰

...is not a phenomenon unique to New Zealand. Countries such as Australia, the United Kingdom, the United States, Spain, and Ireland are facing problems similar to ours in both the owner-occupied housing and the rental market.

However, they warn that “other countries seem to be getting it right.”⁶¹

56 Stats NZ, above n 12, at 28.

57 Stats NZ, above n 12, at 28; and Ministry of Housing and Urban Development, above n 50, at 3.

58 Cabinet Social Wellbeing Committee *Reform of the Residential Tenancies Act 1986 – Improving Fairness in the Act* (11 October 2019) at 17; Ministry of Housing and Urban Development, above n 53, at 6; and Stats NZ, above n 12, at 36.

59 Eaqub and Eaqub, above n 9, at 9-10; and Johnson, Howden-Chapman, and Eaqub, above n 4, at 4.

60 Eaqub and Eaqub, above n 9, at 9.

61 At 10.

C Rental Affordability

Historically rents and wages have risen at a similar pace. However, since 2015 rents have risen faster than wages, and prices in general.⁶² Although rental affordability is most problematic for tenants in the major cities of Auckland and Wellington, and the surrounding towns and communities, such issues are not limited to these regions. Rather, every region in New Zealand is experiencing similar issues to a certain extent. According to the Trade Me Rental Price Index, New Zealand rents saw the largest year-on-year increase in two and a half years in March 2021, growing by 6 per cent, with the largest increases in Hawkes Bay and Taranaki.⁶³

A significant share of household income is spent on housing costs. Housing costs include mortgages, rates, insurance, and rent.⁶⁴ Affordability is a subjective assessment; dependent on both willingness and ability to pay. Thus, there is no statutory definition or measure as such in New Zealand. However, the income measure is widely used.⁶⁵ This measure recognises affordability where a household spends less than 30 per cent of their income on housing costs. In New Zealand, more than four out of every ten renter households spend over 30 per cent of their income on housing costs, and this rate continues to rise.⁶⁶ Furthermore, the OECD has set the overburden rate, which captures the share of households spending an unacceptable amount on housing costs at 40 per cent of income. In 2019, more than a quarter of renter households exceeded the overburden rate.⁶⁷ High

62 Johnson, Howden-Chapman, and Eaquad, above n 4, at 4 and 11; Stats NZ “The state of housing in Aotearoa New Zealand” (15 December 2020) <www.stats.govt.nz>; and Shamubeel Eaquad “What’s wrong with our housing market? Generation Rent: Revisited” (31 October 2019) Metro Mag <www.metromag.co.nz>.

63 Trade Me “Rents show biggest annual increase in over two years” (22 April 2021) <www.trademe.co.nz>.

64 Stats NZ “Housing costs” <www.stats.govt.nz>.

65 Ministry of Housing and Urban Development “Experimental Housing Percentage Measure” (18 May 2020) <www.hud.govt.nz>; Willem Adema and Marissa Plouin *Building for a Better Tomorrow: Policies to Make Housing More Affordable* (Organisation of Economic Co-operation and Development, Technical Report, January 2021) at 5; and James Kerr and Flynn Valentine-Robertson *Housing Affordability Measure Method* (Ministry of Housing and Urban Development, July 2019) at 1.

66 Stats NZ, above n 12, at 11.

67 Above n 13, at 2; and Stats NZ “Household income and housing-cost statistics: Year ended June 2019” (18 February 2020) <www.stats.govt.nz>.

rents can trigger other forms of deprivation as households are forced to choose between everyday spending needs, such as on healthy food, heating and education.

It is evident that rental affordability is of major concern in New Zealand. Yet, the concern should not be limited to those who rent. Commentators have acknowledged that “the rental crisis affects us all, and its crippling New Zealand’s progress.”⁶⁸ “It’s driving down our economy, restricting innovation and lowering our standard of living.”⁶⁹ Consequently, there has been increased pressure mounting on the government to provide solutions.⁷⁰

VI 2020 Reforms

In light of these changes, New Zealand has recently experienced the biggest overhaul of its residential tenancy laws since the RTA was first enacted.⁷¹ The reform intended to:⁷²

...modernise New Zealand’s rental laws and align them with the present day realities of renting in New Zealand. It aims to promote good faith relationships in the renting environment, and to ensure there are appropriate protections in place for both tenants and landlords.

Notable amendments were made, affecting both landlords and tenants, to improve security of tenure, living conditions, and tenants’ ability to assert their legal rights.⁷³ The reform attempted to “strike an appropriate balance between protecting a landlord’s interest in their property and ensuring tenants receive fair rights for the rent they are paying.”⁷⁴ Despite the

68 Michael Worth “The rental crisis affects us all – and it’s crippling NZ’s progress” Grant Thornton (25 March 2021) <www.granthornton.co.nz>.

69 Above n 68.

70 Craig McCulloch “Rent controls should remain an option – Swarbrick” *Radio New Zealand* (online ed, Wellington, 30 April 2021); Henry Cooke “Government asked for advice on temporary rent controls as it prepared massive housing package” *Stuff New Zealand* (online ed, Auckland, 29 April 2021); and Janine Starks “Housing market still needs brakes applied, rent control could be the way to go” *Stuff New Zealand* (online ed, Auckland, 15 May 2021).

71 Residential Tenancies Amendment Act 2020 came into force on the 12th August 2020.

72 Ministry of Housing and Urban Development, above n 50, at 3.

73 Above n 40, ss 13, 22F, 22G, 42A, 42B, 45B, 60AA, 60B, 95A.

74 Community Law Waikato “Reform of the Residential Tenancies Act 1986” (19 February 2020) <www.clwaikato.org.nz>.

growing concerns for rental affordability no substantive changes were made regarding rent control, except for limiting rent increases to once every 12 months (unless otherwise agreed).⁷⁵ This is a change from once every 180 days.⁷⁶ Limiting the frequency of increases is an attempt to stabilise rents, however, the Ministry of Housing and Urban Development has acknowledged that tenants may face larger rental adjustments every 12 months as a result.⁷⁷

Further concerns for rental affordability came following significant tax changes within the government’s housing package announced earlier this year.⁷⁸ Many commentators have since warned of the policies unintended consequences. Notably, that landlords costs will increase and therefore it is likely that rents will increase and the supply of rental accommodation will decrease.⁷⁹ Therefore this package could further exacerbate the existing affordability issues.

In New Zealand, a landlords rent setting ability remains relatively unrestricted. Rents are determined by the free market and can be increased every 12 months by giving no less than 60 days’ written notice.⁸⁰ There is no statutory limitation for such increases. For comparison, of the 38 OECD member countries, New Zealand is one of eight countries that does not regulate initial rental prices, or the rate of rent increases.⁸¹ The only protection against unreasonable rent levels is that a tenant, similar to preceding legislation discussed in Part III, can apply to the Tribunal for a rent review in accordance with s 25 of the RTA. For a fixed term tenancy, an application must be made no later than three months from the

75 Above n 40, ss 24(1)(d), 24(1)(e), 28(1).

76 Tenancy Services “Legislation changes affecting rent increases” <www.tenancy.govt.nz>.

77 Ministry of Housing and Urban Development, above n 50, at 41.

78 Beehive “Govt housing package backs first home buyers” (23 March 2021) <www.beehive.govt.nz>.

79 David Law *Rent controls: The next mistake in housing policy* (The New Zealand Initiative, 29 April 2021) at 1; Susan Edmunds “Housing policy: What the changes mean for homeowners, investors, first-home buyers, renters and bach owners” *Stuff New Zealand* (online ed, 23 March 2021); and News Hub “Tax expert unhappy with Government housing package, expects less rental, higher rents” (online ed, 24 March 2021).

80 Above n 40, s 24(1).

81 Above n 15, at 2.

start of the tenancy, or the date of the last rent review, that is, the date the new rent is payable.⁸² A tenant is entitled to a rent reduction if they can establish that their rent substantially exceeds the general levels of rent for comparable tenancies.⁸³ Section 25 restricts a landlord's rent setting ability and therefore is the closest resemblance to rent control in New Zealand.

VII Section 25: Market Rent

The concept of market rent was introduced into New Zealand tenancy law in 1986, and is defined as:⁸⁴

...the rent that, without regard to the personal circumstances of the landlord or tenant, a willing landlord might reasonably expect to receive, and a willing tenant might reasonably expect to pay for the tenancy, taking into account the general levels of rent...for comparable tenancies of comparable premises in the locality or similar localities...

Although preceding legislation, based on fairness and equity, was considered partisan, the RTA sought to protect the interests of both landlord and tenant.⁸⁵ Pursuant to s 25 of the RTA, the rent assessment is expressly objective, based on the reasonable expectations of a landlord and tenant in consideration of the rents for comparable tenancies.⁸⁶ Accordingly, if a suburb is being gentrified, or has attractive amenities, the market rent will reflect this.

82 Above n 40, s 25(2); also see *Munro v Harley* [2011] NZTT Wellington 160, at [A(f)]; *Anita Jane Gale, Leah Jerry and Cody Stewart v Alice Presley* [2020] NZTT Auckland 4265124 at [75].

83 Above n 40, s 25(3).

84 Section 25(3).

85 *Ziki Investments (Properties) Ltd v McDonald* [2008] 3 NZLR 417 at [58].

86 Section s 25(3).

The current regime offers an opportunity for individual landlords to raise the market rent through rent increases, especially in tight rental markets as a tenants' willingness to pay is generally higher.⁸⁷ Although one adjudicator expressed the view that:⁸⁸

...market rent is not the amount of rent that a person is prepared to pay for a property. In these times where the demand for rental properties is greater than the supply there will be people who are prepared to pay more than a property is worth...

This view is not strictly correct, because the market rent is what people are “prepared to pay.”⁸⁹ Section 25 does not prevent rent increases in a rising market. Accordingly, where demand exceeds supply market rents will rise, as was seen in the first quarter of 2021.⁹⁰

In addition, s 25(1) stipulates that the rent cannot substantially exceed the market rent.⁹¹ Arguably, the use of ‘substantially’ allows rent increases beyond justifiable market rents, simply because they are not deemed to be excessive. Furthermore, when exercising its jurisdiction, the Tribunal fixes the “rent to an amount...that is in line with the market rent.”⁹² Thus, it would be difficult to construe this particular intervention to be rent control, as it is commonly understood.⁹³ Section 25 does not influence what the market rent is, nor does it restrict rents below the market price; rather it prevents rent increases that substantially exceed reasonable market rates.⁹⁴

87 Child Poverty Action Group “Submission on the Reform of the Residential Tenancies Act 1986 (RTA)” at [20].

88 *Manjori Bhattacharya v Ganesh Superannuation Fund Limited* [2021] NZTT Wellington 427986, 4281719 at [11].

89 *Harpreet Kaur v De Zoete – Sharma Family Trust* [2019] NZTT Auckland 4180019 at [37].

90 Above n 63.

91 Above n 40, s 25(1).

92 Section 25(1).

93 Comparable market rent provision discussed in Douglas Robertson and Gillian Young *An Evaluation of Rent Regulation Measures within Scotland’s Private Rented Sector* (Shelter Scotland, 23 March 2018) at 21.

94 Above n 87, at [20].

Finally, when making an application to the Tribunal the tenant bears the burden of proof.⁹⁵ Following the discussion in Part IV, the United Nations Special Rapporteur observed that:⁹⁶

Given the overall housing shortage, tenants are reluctant to challenge rent increases as they fear that their tenancies could be cancelled in retaliation. Many also fear that they may be rated negatively by agencies that collect data on tenants to allow homeowners to select “the right tenant”, who is, of course, a tenant that simply pays the rent and refrains from causing any “trouble.”

Consequently, we may question why our tenancy laws are constituted in this way. It may go some way in correcting the existing power imbalance if a landlord was to justify a rent increase ahead of time, rather than a tenant having to challenge it after the fact. For comparison, in Ireland, a landlord is required to provide the rents of at least three comparable properties accompanying the written notice.⁹⁷ Additionally, in Germany, a landlord must refer to “a list of representative rents, information from a rent database, an opinion provided with supporting grounds by an officially appointed and sworn expert, or examples of equivalent payment of at least three individual comparable dwellings.”⁹⁸ In both jurisdictions, the evidential onus, in the first instance, rests on the landlord.

VIII Determining Market Rent

Pursuant to s 25, two elements must be established. Firstly, the Tribunal must ascertain the market rent for the tenancy, based on evidence of rents for comparable tenancies. Secondly, it must be satisfied that the “rent payable or to become payable exceeds the market rent by a substantial amount.”⁹⁹

95 Above n 40, ss 10, 25(1).

96 Farha, above n 8, at [41].

97 Residential Tenancies Board “Rent Review Outside Rent Pressure Zones – How are rents review outside a Rent Pressure Zone?” <www.rtb.ie>.

98 German Civil Code, s 558a(2).

99 Above n 40, s 25(1).

Although s 25 appears to present a straightforward analysis of market rent, in reality, there are practical difficulties to doing so. In fact, “assessing a fair market rent is no easy task.”¹⁰⁰ The difficulty can be derived from the generality of the provision, the informal nature of the evidence, and the broad discretion conferred on adjudicators. Consequently “rent setting and adjudication.....would appear to be more of an art than a science.”¹⁰¹ In light of this, it is necessary to review the adjudication process. To do so, these two elements will be analysed, with reference to previous Tribunal orders.

A Comparable Rents

In accordance with s 25(3), the basis of the inquiry is on an assessment of the general levels of rents for comparable tenancies.¹⁰² Essentially rents for comparable properties must be similar. In light of the importance of protecting a landlord’s return on investment, a tenant is required to provide unequivocal evidence that their rent is unreasonably high. Multiple sources of evidence can be used, including a rental appraisal, Tenancy Services bond data, and Trade Me advertisements, which will be assessed in turn below.

An adjudicator’s role is to determine whether the tenancies are comparable, in terms of size, location, condition, or any other relevant factors. In a recent case, the adjudicator agreed that the assessment is one of “comparing apples with apples.”¹⁰³ Yet, due to the nature of the legal test and evidence reasonably available, the difficulty with most market rent assessments is finding the ‘apple.’ By analogy, often it is like comparing ‘apples’ with ‘oranges.’

100 *O’Hagan v Barfoot & Thompson Ltd* [2012] NZTT Manukau 1467, at [19].

101 Robertson and Young, above n 93, at 23.

102 Above n 40, s 25(3). See *Thai v Mahmood* DC Christchurch CIV-2003-009-3542, 20 February 2004, at [24]; and *Tami Brunelle Mansfield v Deborah Silk and Christine Pask as Trustees of the Chocolate Fish Trust and other parties* [2021] NZTT Hawera 4246581 at [9].

103 *Asha Jane Thornton and Brendon Harold King v Property Applications NZ Limited, Victor Rutherford Breslin, Victor Earnest Rutherford and Martin Breslin* [2020] NZTT Kaikohe 4243033 at [80].

Tribunal orders from the previous three years are available on the Ministry of Justice website.¹⁰⁴ The relevant orders were reviewed by using the keyword search terms; “*section 25*,” “*market rent*,” and “*s 25*.” The focus was on four broad factors; namely, the rent increase, the source(s) of evidence presented, the adjudicators acceptance of such evidence, and the decision. This gave an overview of the adjudicative process.

This review found that the most persuasive evidence of market rent tends to be an appraisal.¹⁰⁵ An appraisal is carried out by a professional, “who knows the premise and its condition, and who has given the appraisal after referencing rents of similar calibre properties within the locality.”¹⁰⁶ It is therefore intuitive for adjudicators to rely on appraisals. Despite this, it was found that they are rarely presented before the Tribunal, especially by a tenant.¹⁰⁷ This is likely because they are relatively inaccessible to tenants.

In the absence of an appraisal, adjudicators have expressed difficulty in “establishing a comparison between the property in question and other tenancies.”¹⁰⁸ When we consider that an appraisal is completed by a professional trained in this field, we may question the ability of an adjudicator to effectively enact this role and determine market rent. To avoid any doubt, consideration should be made for the law requiring an appraisal to be performed. For example, the Tribunal process funding them through bonds, or a landlord having to provide an appraisal at the beginning of a tenancy agreement, or to justify a rent increase.

Nevertheless, as aforementioned, Tenancy Services bond data and Trade Me advertisements are other sources of evidence that can be employed. However, there are various limitations to these sources (as discussed below), which can make it difficult for

104 Tenancy Tribunal “Search for Tenancy Tribunal orders” <www.forms.justice.govt.nz>.

105 *Munro v Harley*, above n 82, at [B(1)(c)]; *William Murray Dawson v Mr Web Limited* [2021] NZTT Thames 4280058 at [13]; and *Carolynne Mercy Corry v Mr Web Limited* [2021] NZTT Dunedin 4278756 at [18].

106 *William Murray Dawson v Mr Web Limited*, above n 105, at [13].

107 After reviewing the market rent orders from the previous three years, five occasions were identified where an “appraisal” or “valuation” was submitted by the tenant.

108 *Jemma Cooper v Home Let Property Management Limited And N3 Investments Limited* [2021] NZTT Hamilton 4271722 at [32].

an adjudicator to draw conclusions, and for a tenant to establish their claim. This is because the information is incoherent, as explained below, and does not provide any detail about the condition of the property in comparison to the property in question. Its persuasiveness falls entirely on the adjudicator’s subjective interpretation.

1 Tenancy Services Bond Data

A bond is security for the performance of a tenant’s obligations. Although it is not a legal requirement, a landlord is permitted to receive a bond of no more than four weeks’ rent.¹⁰⁹ Landlords who charge a bond must lodge it within 23 working days after payment is made.¹¹⁰ A failure to do so is an unlawful act.¹¹¹ The bond is held by Tenancy Services and can be used to cover any claim relating to the tenancy, such as unpaid rent or damage.¹¹² Bonds are also used to provide information about the activity in the rental market, namely to calculate ‘market rent’ statistics.¹¹³

Every month Tenancy Services releases ‘market rent’ statistics.¹¹⁴ These are publicly available online, and therefore are readily available to tenants. The statistics indicate the lower, median, and upper quartile rent for each dwelling type, in each suburb in New Zealand, based on the bonds that were lodged over the previous six months.¹¹⁵ To ascertain the necessary comparison, a tenant is required to establish the quartile to which their tenancy relates. No one is required to inspect the property, the assessment is made based on the evidence presented. However, it has been noted that “rents can vary within the broad areas listed and it can be difficult to determine where the particular property sits in relation to the others contained in the statistics.”¹¹⁶

109 Above n 40, s 18(1).

110 Section 19(1)(b).

111 Section 19(2).

112 Compliance Matters “Landlords – Lodging a bond” <www.business.govt.nz>

113 Tenancy Services “Market rent” <www.tenancy.govt.nz>.

114 Above n 113.

115 Above n 113.

116 Above n 108, at [32].

The reliance on these statistics varies considerably amongst adjudicators. For some, the assessment is based solely on the statistics.¹¹⁷ For others, they are seen as no more than a mere starting point, and in some cases dismissed altogether. This is because the information is generalised and not specific to the property in question. It omits important details about the condition of the property which can influence the rent, for example, it does not distinguish between furnished and unfurnished properties.¹¹⁸

Additional limitations have been identified, including that: the data is incomplete as not all properties have bonds; few bonds may be lodged within the suburb; the dwelling types have no statutory meaning and are self-designated by landlords; and the data is calculated from bonds lodged over the previous six months so it may not be indicative of current market rents. Furthermore, there can be disagreement over the dwelling type, number of bedrooms, and location, as these factors can influence the market rent. In *Munro v Harley* the number of bedrooms was in dispute. However, as one bedroom did not meet building requirements the adjudicator considered the property a four bedroom house with a study, which ultimately lowered the market rent.¹¹⁹

In light of these limitations, Tenancy Services advises that bond data “should not be used alone to determine the market rent of any property.”¹²⁰ It may be considered problematic that one of the most accessible sources of evidence “should not be used alone.”¹²¹ To mitigate this, New Zealand could standardise a formula for calculating rents, similar other jurisdictions. In the Netherlands initial rents are set according to a points system, based on the quality and locality of the property. The maximum initial rent is determined by the number of points received.¹²²

117 *Sikeli Cawanikawai v Oxygen.co.nz Limited* [2021] NZTT Hutt Valley 4288557 at [6]; *Barfoot & Thompson Limited and Weinong Lei v Kathryn Lee Cullum* [2021] NZTT Remote Location 4272190 at [92].

118 Tenancy Services “Difference between MBIE and Trade Me rental figures” <www.tenancy.govt.nz>.

119 *Munro v Harley*, above n 82, at [B(1)(a)].

120 Above n 113.

121 Above n 113.

122 DKM Economic Consultants *Rent Stability in the Private Rented Sector Final Report* (The Housing Agency, September 2014) at 26.

2 Trade Me Advertisements

The final source of evidence to be considered are Trade Me advertisements. Trade Me is New Zealand’s largest online advertising platform for rental properties.¹²³ The advertisements show the asking rents for new tenancies in the market. Therefore, they evidence “what a willing landlord and a willing tenant would be prepared to pay” in the current market.¹²⁴

When determining the market rent for a three bedroom flat, the parties will present advertisements of three bedroom flats in the same, or similar suburbs. As with bond data, the adjudicator’s role is to determine whether the properties are comparable, controlling for differences in size, condition, location, or any other relevant factors. However, it has been noted that:¹²⁵

Determining market rent based on Trade Me advertisements is a difficult task. These are advertisements designed to promote rental properties to potential tenants. Accordingly, a level of hyperbole is likely in the descriptions.

Although compared to bond data, Trade Me advertisements are said to more accurately capture the current market rent. This is because they show the rents for new properties in the market, rather than being compiled from data over the previous six months.¹²⁶ However, the caveat is that they represent advertised rents. Despite the legal requirement that the final rent must be advertised, parties remain able to agree to a higher (or lower) rent.¹²⁷ Thus, advertised rent may not necessarily equate to final rents.

123 Trade Me “Property” <www.trademe.co.nz>.

124 Above n 89, at [37].

125 *Ben Hoffman and Jacqueline Hoffman v Jeremy J Bain* [2020] NZTT North Shore 4227986 at [17].

126 Above n 118.

127 Above n 40, ss 22F, 22G.

Furthermore, there can be inconsistencies between the ‘market rent’ calculated by Tenancy Services and those advertised on Trade Me. Notably, in one case the adjudicator acknowledged that:¹²⁸

Tenancy Services data indicates that the range for market rents... is between \$580.00 and \$677.00. This is interesting, when considering the... properties currently listed on Trade Me advertised for less than \$580.00 per week.

These inconsistencies contribute to the overall difficulty in determining market rent. Especially, in a case like this, when the represented rents could lead to vastly different outcomes.

B What is a ‘Substantial Amount?’

The second element to be considered is whether the “rent payable or to become payable...exceeds the market rent by a substantial amount.”¹²⁹ Although the meaning of ‘substantial’ is not defined by the RTA, the legal test is wholly objective.¹³⁰ The assessment cannot be based on the personal or financial circumstances of the landlord or tenant, or the perceived unfairness of the rent increase.¹³¹ Although other jurisdictions have similar provisions, it appears unique that in New Zealand a tenant is required to establish the rent to this higher threshold.¹³²

The issue is not whether the rent increase is substantial, but whether the rent exceeds the market rent by a substantial amount.¹³³ Historically, this distinction has confused landlords, tenants, and adjudicators. If a sitting tenant has been enjoying below-market rent for an extended period, the law does not limit a landlord’s ability to increase the rent. In one case

128 Above n 125, at [16].

129 Above n 40, s 25(1).

130 At s 25(3).

131 Stephenson, above n 36, at 68; *Munro v Harley*, above n 82, at [B]; *Tami Brunelle Mansfield v Deborah Silk and Christine Pask as Trustees of the Chocolate Fish Trust*, above n 102, at [9]; and *Aye Maung v Property Brokers Limited* [2021] NZTT Napier 4288862 at [15].

132 See Residential Tenancies Act 2004 (IE), s 19. Rent cannot “exceed” the market rent.

133 *William Murray Dawson v Mr Web Limited*, above n 105, at [16].

a 56 per cent rent increase did not substantially exceed the market rent.¹³⁴ Despite how burdensome a single rent increase of this kind may be, there are no protections in law for a tenant. In this way, New Zealand tenancy law differs from many jurisdictions where rent increases for sitting tenants are limited to prescribed amounts, typically based on the consumer price index (CPI).¹³⁵

Substantial is defined in the Collins dictionary as “large in amount or degree.”¹³⁶ In various cases, the Tribunal has considered a 10 per cent difference between the rent payable and the market rent to be substantial.¹³⁷ To illustrate this: if the market rent was \$650 per week, according to this method, the rent payable would have to be more than \$715 to warrant a reduction - arguably a high threshold. However, as the Tribunal is not bound by its previous decisions this method has not been applied consistently. As Stephenson found:¹³⁸

The absence of such specificity has resulted in the decisions of the Tribunal varying, if not with the ‘foot’ of the adjudicator, at least with his/her own interpretations of the broad jurisdictions conferred.

Notably, in *O’Hagan v Barfoot & Thompson Ltd*, the adjudicator took a markedly different approach by comparing the rent increase to the CPI over the same period. The adjudicator found that although the rent substantially exceeded the market rent, a rent increase was still warranted. Accordingly, a ‘fair rent’ was determined based on the CPI plus 5 per cent.¹³⁹

In consideration of the differing interpretations, we may argue in favour of a standardised formula of the kind applied in *O’Hagan v Barfoot & Thompson Ltd*. It would assist the

134 Melissa Nightingale “Upper Hutt pensioner ‘devastated’ at \$135 rent increase” *The New Zealand Herald* (online ed, Wellington, 31 March 2021).

135 Above n 15, at 2.

136 Collins Dictionary “Substantial” <www.collinsdictionary.com>; and above n 89, at [40].

137 *Kamel-Deen JT Khudaish, Walla Altounesi v Vikki Seaman* [2020] NZTT Hamilton 4276141 at [13]; *William Murray Dawson v Mr Web Limited*, above n 105, at [16]; *Joan Munden v Leaders Hawkes Bay Limited* [2021] NZTT Napier 4287386 at [1]; *Carolynne Mercy Corry v Mr Web Limited*, above n 105, at [21]; and *O’Hagan v Barfoot & Thompson Ltd*, above n 100, at [11].

138 Stephenson, above n 36, at 68.

139 *O’Hagan v Barfoot & Thompson Ltd*, above n 100, at [19].

Tribunal process by providing a consistent and transparent means of determining market rent. Regardless, it may be beneficial for the Tribunal, or Parliament, to provide further guidance as to what substantially exceeding the market rent means.

C Market Rent: Conclusion

Section 25 is the only legal protection against unreasonable rents in New Zealand. It is therefore imperative to the wellbeing, and interests, of both landlord and tenant that market rent assessments are accurate. Tenants should feel confident that the rent they are paying is reasonable, while a landlord should remain able to yield a reasonable return on investment. However, under the current law, determining market rent is often a difficult task. Adjudicators draw conclusions from the evidence presented, yet there are recurring shortcomings in such evidence which undermine the legitimacy of the assessment. Furthermore, in the current rental market, it is arguable that the use of “substantial” in s 25(1) further contributes to affordability concerns as it offers an opportunity for individual landlords to push the bounds of market rent simply because the increase is not proven to be excessive.

If rent controls are unnecessary, various solutions have been recommended that would support the application and enforcement of s 25, and would lead to more equitable outcomes for tenants. Solutions can be found within the existing market rent provision, for example through the use of free appraisals, and further guidance as to the meaning of “substantial.” Alternatively, solutions can be found by referencing policy in other jurisdictions.

To reiterate, s 25 does not limit rent increases in a rising market, and in no way does it address rental affordability. Accordingly, it is necessary to examine measures that do, particularly rent controls. In New Zealand, rent controls remain very political, and consequently, there is a risk that they are misunderstood. However, like any other government-mandated price controls such as the minimum wage, there are both costs and benefits. This discussion on rent control is organised into two parts. Part IX(A) reviews the

economic theory and evolution of rent controls since World War I. Part IX(B) provides a comparative analysis of the rent control enacted in Ireland. Concluding, in accordance with economic theory that traditional rent control policies lead to obvious and detrimental consequences. However, recent social and legal changes in other jurisdictions serve as evidence that it is possible to design efficient and equitable rent control policies.

IX Rent Control

A market failure is an economic situation characterised by an inefficient allocation of goods and services in a free market.¹⁴⁰ The rental housing market is particularly susceptible to market failures due to the power imbalance between a landlord and tenant, and the short-term inelasticity of supply.¹⁴¹ This provides the rationale for government intervention.

Rent control is a broad term for legislation that limits the rent a landlord can charge. The legislative purpose is generally two-fold; to maintain the existing stock of affordable rental housing and to limit the economic disruptions caused by large rent increases.¹⁴² In this way, rent controls can be compared to consumer protection law:¹⁴³

Where the rental market cannot function normally, such as in meeting supply or when moving costs limit the mobility of consumer rental services...regulations protect consumers who find themselves in inferior bargaining positions.

140 Bradley W Bateman “Analysing Market Failure: Adam Smith and John Maynard” (2015) 47(1) *History of Political Economy* 128 at 132; and The Library of Economics and Liberty “Market Failures, Public Good, and Externalities” <www.econlib.org>.

141 Christine Whitehead and Peter Williams *Assessing the evidence on Rent Control from an International Perspective* (LSE London, October 2018) at 8; and Elizabeth Watson *A closer look at some of the supply and demand factors influencing residential property markets* (Reserve Bank of New Zealand, December 2013) at 23.

142 Prasanna Rajasekaran, Mark Treskon, and Solomon Greene *Rent Control: What Does the Research Tell Us about the Effectiveness of Local Action?* (Urban Institute, January 2019) Urban Institute at 1.

143 David Hulchanski *Market Imperfections and the Role of Rent Regulation in the Residential Rental Market* (Ontario Commission of Inquiry into Residential Tenancies, Toronto, 1984) at 77.

Although traditional rent control policies tended to be partisan, as discussed below, modern rent control policies seek to uphold the broad common interests of both landlord and tenant. The most important of these is a landlord's interest in the long-term profitability of their investment, and a tenant's interest in long-term stability and security of tenure. Consequently, rent controls have evolved into complex legal measures as governments endeavour to find the optimal point at which these two interests balance.

A Emergence of Three Generations of Rent Controls

1 First Generation Rent Control

First generation rent controls – those imposed in many jurisdictions during both World Wars, simply froze rents at their given level.¹⁴⁴ Such controls mirrored ‘rent ceilings,’ as they set the maximum rent a landlord could charge, which was below the market-clearing price.

Since the War economists have written extensively about first generation rent controls. A brief literature search provides thousands of books, articles, and studies.¹⁴⁵ Economists are virtually unanimous in concluding that “a ceiling on rents reduces the quantity and quality

144 See War Legislation Amendment Act 1916, Fair Rents Act 1936, Tenancy Act 1955, and Rent Appeal Act 1973. These were forms of first generation rent controls in NZ.

145 Richard Arnott “Time for Revisionism on Rent Control?” (1995) 9(1) *Journal of Economic Perspectives* 99; Walter Block and Edgar Olsen *Rent control, myths and realities: international evidence of the effects of rent control in six countries* (Fraser Institute, Canada, 1981); Sabithulla Khan *Rent Control: government tyranny or a logical solution?* (SAGE Publications, London, 2020); Kaushik Basu and Patrick Emerson *The Economics and Law of Rent Control* (The World Bank, August 1998); Edgar O Olsen “An Econometric Analysis of Rent Control” (1972) 80 *Journal of Political Economy* 1081; Richard Epstein “Rent Control and the Theory of Efficient Regulation” (1988) 54 *Brook. L. Rev.* 74; Robert C Ellison “Rent Control: A Comment on Olsen” (1991) 67 *Chi-Kent, L. Rev.* 947; Blair Jenkins “Rent Control: Do Economists Agree” (2009) 6 *Econ Journal Watch* 73; O Olsen “What do economists know about the effect of rent control on housing maintenance?” (1988) 1 *J Real Estate Finan Econ* 295; Richard Arnott and Masahiro Igarashi “Rent control, mismatch costs and search efficiency” (2000) 30 *Regional Science and Urban Economics* 249; Denton Marks “The Effect of Rent Control on the Price of Rental Housing: An Hedonic Approach” (1984) 60 *Land Economics* 81; Bengt Turner and Stephen Malpezzi “The review of empirical evidence on the costs and benefits of rent control” (2003) 10 *Swedish Economic Policy Review* 11; Olsen Edgar “Is Rent Control Good Social Policy? (1991) 67 *Chi-Kent L. Rev* 931; and Walter Block “On Rent Control” (1993) *The fortunate encyclopaedia of economics* 421.

of housing available.”¹⁴⁶ This can be illustrated through a simple supply-demand analysis. Notably, where rents are set below the market-clearing price, the quantity demanded necessarily exceeds the quantity supplied, leading to excess demand. Arnott has synthesised further consequences identified by his profession, namely that:¹⁴⁷

There has been widespread agreement that rent controls discourage new construction, cause abandonment, retard maintenance, reduce mobility, generate mismatch between housing units and tenants, exacerbate discrimination in rental housing, create black markets, encourage the conversion of rental to owner-occupied housing, and generally short-circuit the market mechanism for housing.

However, Arnott is of the opinion that under wartime conditions first generation rent controls were appropriate measures, as they improve equity.¹⁴⁸ This reasoning could be extended to other crises, such as the six month rent freeze during the COVID-19 pandemic. Thus, such controls will continue to be appropriate as a temporary measure.

In closing, first generation rent controls have unfavourable effects on the rental market. Consequently, law and society have advanced, which has allowed further forms of rent control to evolve.

2 *Second Generation Rent Control*

By the late twentieth century, rent controls had developed extensively. Second generation rent controls limit the rate of rent increases to a prescribed amount, typically based on the CPI, within and between tenancies.¹⁴⁹ Additional increases are generally allowed in response to increased costs, or profitability concerns.

146 Richard Arnott “Time for Revisionism on Rent Control?”, above n 145, at 99.

147 At 99.

148 Richard Arnott *Rent Control* (Boston College Department of Economic, September 1997) at 8.

149 Robertson and Young, above n 93, at 10.

Although there is broad agreement concerning the adverse effects of first generation rent controls, “expert opinion [on second generation rent controls] is more equivocal.”¹⁵⁰ Furthermore, as many “economic textbooks continue to apply the analysis of a rent ceiling to second-generation rent controls” it can be difficult to derive general propositions about their impact on the housing market.¹⁵¹ Some economists argue that second generation rent controls are more flexible, as they allow periodic rent increases, and thus are less harmful than their predecessors. In fact, Arnott found that it should be possible to design a second generation rent control programme that improves efficiency.¹⁵² However, there remains much economic theory and empirical evidence against such policies.

3 Third Generation Rent Control

As traditional housing pathways shifted in the 2000s a further form of rent control, termed third generation rent control, emerged.¹⁵³ Third generation rent controls come in many forms, but generally limit rent increases within tenancies, but not between. Thus the free market is restored when a tenant vacates the property. Accordingly, third generation rent controls “will not have an increasingly adverse effect on the rental housing market.”¹⁵⁴ For this reason, many jurisdictions implement third generation rent controls.¹⁵⁵

Additionally, Arnott found that when third generation rent controls are introduced into an unregulated market, like New Zealand’s, unlike traditional forms of rent control, they do not generate excess demand, but rather induce a different long-run equilibrium in the market.¹⁵⁶ Although some distortion remains, Arnott found that they can improve security of tenure. Therefore, they may “provide a reasonable policy compromise between those

150 Above n 148, at 8.

151 At 8.

152 At 11.

153 Richard Arnott “Tenancy rent control” (2003) 10 *Swedish Economic Policy Review* 89 at 92.

154 Arnott, above n 153, at 103.

155 These jurisdictions include Switzerland, Germany, Ontario (Canada), Sweden, France, Ireland, Spain, Oregon (US), New York (US), New Jersey (US), Maryland (US), California (US).

156 Arnott, above n 153, at 89.

who oppose any form of rent regulation and those who favour extensive government intervention in the rental housing market.”¹⁵⁷

Arnott further emphasised that well-defined third generation controls can benefit both parties, rather than simply benefiting one group at the expense of another, or making conditions worse for everyone. Supplementary policy can mitigate the potential adverse consequences that have traditionally been identified.¹⁵⁸ Furthermore, when we consider that rent controls are often “implemented in areas with rising rents and high population growth, investments may remain attractive even after regulations are implemented.”¹⁵⁹

As aforementioned, third generation rent controls come in many forms. This “allows each jurisdiction to choose its policy from an extensive menu of provisions”¹⁶⁰ dependent on its suitability within the wider economic, social and political environment. For this reason, rent controls vary considerably between jurisdictions. To illustrate this: in Germany, rents are regulated in pressured areas through an index system, and cannot exceed the local comparative rent by more than 10 per cent.¹⁶¹ Importantly, evidence suggests that this control has slowed rental inflation.¹⁶² Whereas, in Ontario rent increases for all dwellings, including new and improved properties, are limited to the CPI, but are free to adjust to the free market between tenancies.¹⁶³ It was warned that including all dwellings types would reduce supply, however, there is insufficient evidence of this kind thus far.¹⁶⁴ Furthermore, in Luxembourg, rents cannot exceed 5 per cent of the invested capital in the rental dwelling.¹⁶⁵ As previously mentioned in the Netherlands, initial rents are determined

157 At 93.

158 Whitehead and Williams, above n 141, at 12; For example, unlimited tenancies, restrictions on evictions, minimum quality requirements.

159 DKM Economic Consultants, above n 122, at 16.

160 Above n 148, at 16.

161 The index system calculates the local comparative rent. Index system calculates the maximum rent per square meter based on inputs, such as bedrooms, location etc.

162 Fabian Muhlen “Finding profit in rent-capped times” (22 November 2019) DLA Piper <www.dlapiper.com>.

163 Previously the rent control only applied to buildings constructed before 1991.

164 Whitehead and Williams, above n 141, at 21.

165 Above n 15, at 3.

according to a points-based system and can be increased by a maximum of inflation plus 1 per cent annually.¹⁶⁶ Finally, in Sweden, the determination of rents is based on collective bargaining power with the tenants' union.¹⁶⁷ These are merely five different examples of third generation rents which, in reality, have not necessarily led to the catalogue of consequences that economists warn of. This suggests that rents controls are not such a radical housing policy.

4 Conclusion

In summary, for both first and second generation rent controls, the economics profession appears to have reached a consensus that they are ineffective and counterproductive housing policies.¹⁶⁸ However, as Arnott explained:¹⁶⁹

The nature of rent control has changed from a rent freeze to rent regulation which allows for each jurisdiction to choose its [own] policy... At the same time, economic theory has become more sophisticated and sensible As a result, expert opinion on the effects of modern rent control policies has become increasingly agnostic.

Strikingly, third generation rent controls remain a common regulatory measure in many jurisdictions.¹⁷⁰ In fact, they are implemented in the majority of OECD countries, many of whom are experiencing similar rental affordability issues to New Zealand. Therefore, in consideration of the current rental market and growing affordability concerns, perhaps New Zealand should address these issues in a similar way to other jurisdictions by adopting a form of third generation rent control.

166 Above n 122; and above n 15, at 4.

167 Above n 15, at 4.

168 Above n 148, at 1; Blair Jenkins "Rent Control: Do Economists Agree" (2009) 6(1) *Econ Journal Watch* 73 at 105; and David Law, above n 79, at 1, 3 and 8.

169 Above n 148, at 16.

170 These jurisdictions include Switzerland, Germany, Ontario (Canada), Sweden, France, Ireland, Spain, Oregon (US), New York (US), New Jersey (US), Maryland (US), California (US).

B Comparable Jurisdiction

In their book, Selena and Shamubeel Equb emphasised that although “renting has not traditionally been part of the Kiwi dream; it has always seemed like a second-rate option,”¹⁷¹ it doesn’t have to be that way. New Zealand is fortunate to have “plenty of international comparisons to learn from to make renting better.”¹⁷² This includes mechanisms to make renting more affordable. Illustrative of this is the rent control in Ireland.

1 Ireland

Ireland has traditionally been closer to New Zealand’s current housing model. Housing policy facilitated the expansion of owner-occupancy, and when home ownership peaked in 1991 Ireland was considered a ‘nation of homeowners.’¹⁷³ However, over the two past decades, there has been considerable growth in Ireland’s PRS, largely in response to the long-time decline in access to home ownership. Thus, “compared with its former importance, the privately rented sector is now more than a residual feature of the housing system.”¹⁷⁴ However, a lack of security of tenure and rent stability have been principal issues in Ireland. In light of the discussion in Part V, there are evident similarities between the traditional structure of New Zealand’s and Ireland’s housing models.

Originally rents for all tenancies could not exceed market rates – a provision largely comparable to s 25 of the RTA. However, a significant supply and demand imbalance following the Global Financial Crisis caused average rents to increase by around 10 per cent per annum.¹⁷⁵ In response, the Irish government has implemented successively stronger regulation, as the PRS and rents have grown. In 2016 a robust variant of third

171 Equb and Equb, above n 9, at 3.

172 At 3.

173 National Economic and Social Council *Homeownership and Rental: What Road is Ireland On?* (December 2014) at 11 and 56; Lancelot O’Brien and Brian Dillion *Private Rented: The Forgotten Sector of Irish Housing* (Threshold Research Committee, Dublin, 1982) at 28; Richard Waldron “Generation Rent and housing precarity in ‘post crisis’ Ireland” (2021) *Housing Studies* 1 at 7.

174 O’Brien and Dillion, above n 173, at 28.

175 Waldron, above n 173, at 12; and Valesca Lima “Delivering Social Housing: An Overview of the Housing Crisis in Dublin” (2018) *Critical Housing Analysis* 5(1) 1 at 3.

generation rent control was introduced in Rent Pressure Zones (RPZs). Originally rent increases within RPZs were capped at 4 per cent annually for three years.¹⁷⁶ Empirical studies found that, although rents continued to rise, rental inflation did slow.¹⁷⁷ However, the RPZs were criticised for the permissible rate of rent increases and for the number of exemptions. Consequently, rents remained too high.¹⁷⁸ In light of this, the government recently announced that rent increases will be capped at inflation as recorded in the Harmonised Index of Consumer Prices (HICP).¹⁷⁹ This is expected to significantly reduce rental inflation.¹⁸⁰

Although the effects of this change are currently unknown, Ireland provides an example of a jurisdiction with a similar underlying housing structure to New Zealand, but has “moved from a position of liberalised rent to the introduction of constraints in designated pressures areas” in response to affordability concerns.¹⁸¹ Furthermore, the United Nations Special Rapporteur recommended New Zealand should look to freeze rents within pressured areas.¹⁸² Thus New Zealand should watch the experiences of Ireland, and the effects of this recent change.

176 Rebuilding Ireland “Rent Predictability Measure – FAQs” <www.rebuildingireland.ie>. For an area to become a RPZ, the average rents in the previous quarter must be above the average national rent in the quarter; and the annual rate of rent inflation must be greater than 7 per cent in the last four of the six quarter.

177 Achim Ahrens, Maria Martinez-Cillero and Conor O’Toole *Trends in Rental Price Inflation and the Introduction of Rent Pressure Zones in Ireland* (Economic and Social Research Institute, June 2019) at 8.

178 Ahrens, Martinez-Cillero and O’Toole, above n 177, at 9; and Department of Housing, Local Government and Heritage “Minister O’Brien receives Government approval for significant changes to RPZs” (press release, 1 July 2021).

179 Department of Housing, Local Government and Heritage, above n 178; Colin Gleeson “Rent increases to be capped at inflation in pressure zones” *The Irish Times* (online ed, Ireland, 1 July 2021).

180 Compare the HICP which has averaged 0.73 per cent over the past three years, to the previously applicable 4 per cent rent cap.

181 Whitehead and Williams, above n 141, at 23.

182 Farha, above n 8, at [85(k)].

C Rent Control – Yes or No?

The financial harm from high rents and restrictions on returns on investment are both important concerns; inevitably there will be a tipping point, as evidenced by the many jurisdictions that impose third generation rent controls. Importantly, there is no longer one form of rent control, despite the widely held assumption “that a rent freeze would be the type of control introduced even though there have been very few instances of [that] model since the 1960s.”¹⁸³ Today, there is a ‘menu’ of rent control policies to choose from, including restrictions in pressured zones, index systems based on inputs, and increases limited to the CPI.

Although rent controls remain very political in New Zealand, it is arguable that if nothing is done, whether that be a form of rent control or an alternative policy option, rental affordability will only get worse. For this reason, New Zealand should monitor the experiences of Ireland as they impose significantly stronger rent restrictions.

X Conclusion

If New Zealand’s population is destined to grow beyond 6 million, there will be further pressure for house prices and rents to rise.¹⁸⁴ Private renting will necessarily feature predominantly in our future housing landscape.¹⁸⁵ Housing policy must continue to adapt to reflect and support this. Importantly, it must address both housing and rental issues simultaneously. Although the 2020 reforms were a significant step in the right direction, tenant protections remain comparatively limited in New Zealand.¹⁸⁶

In New Zealand, the only legal protection against unreasonable rent increases is in s 25 of the RTA. This paper has highlighted that, in consideration of the current rental market and the evidence reasonably available to the Tribunal, the application and enforcement of s 25 is inadequate. Furthermore, s 25 does not slow rental inflation in a rising market. For this

183 Whitehead and Williams, above n 141, at 10.

184 Stats NZ, above n 5.

185 Johnson, Howden-Chapman, Eaqub, above n 12, at 6.

186 Farha, above n 8, at [40]-[42] and [85(k)].

reason, jurisdictions such as Ireland, have shifted away from market-based rents to the imposition of third generation rent controls to address affordability.

Renting, in its current state, is unfair and inequitable for a nation that prides itself on the antonym of these two things. It must be emphasised that regardless of your tenancy status, the rental crisis affects you.¹⁸⁷ It has, and will continue to have a stream of flow-on effects throughout the economy – on employment, health, education, productivity, and debt levels. It is therefore imperative for the future of New Zealand that housing policy directly addresses this issue. Solutions must be found within the existing legislation, or by referencing the rent controls enacted in comparable jurisdictions.

187 Worth, above n 68.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,923 words.

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