CHAPTER 9

THE LAW AND THE LEASES

The Commonwealth of Australia Constitution Act prescribed that some part (unspecified) of the State of New South Wales was to be allocated to the Commonwealth as the territory for the establishment of the Seat of Government of the Commonwealth. Section 125 of the Constitution provides:-

> *125. The seat of Government of the Commonwealth shall be determined by Parliament and shall be within the territory which shall have been granted to or acquired by the Commonwealth and shall be in the State of New South Wales and be distant not less than one hundred miles from Sydney.*
>
> *Such territory shall contain an area of not less than one hundred square miles and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.*
>
> *The Parliament shall sit at Melbourne until it meet at the seat of Government.*

Before any area or site for the Seat of Government was chosen, Quick and Garran in their monumental work of 1901 gave an opinion of the import of section 125 which has prevailed undisputed ever since. The learned authors wrote:-

> *Land owners or Crown Lessees within the Territory chosen for the seat of Government will not be dispossessed unless the Federal Parliament chooses to dispossess them. The result of the transfer of territory will be that instead of holding from the Crown as represented by the Government of New South Wales, they will hold from the Crown as represented by the Government of the Commonwealth; and the Commonwealth, in the exercise of its exclusive jurisdiction over the territory, will be free to resume so much of the privately owned land as it requires, in accordance with laws passed under the power of "eminent domain" (Sec. 51-xxxi), – and subject, of course, to the constitutional requirement of just compensation.* [1]

The site of the Territory for the Seat of Government having been determined it was legislatively transferred from New South Wales to the Commonwealth by a series of Commonwealth and New South Wales Parliamentary enactments. The successive Acts were the Seat of Government Act 1908 (Commonwealth), the Seat of Government Surrender Act 1909 (New South Wales), and the Seat of Government Acceptance Act 1909 (Commonwealth) – the latter two complementing one another in ratifying the Agreement as to conditions of transfer, the surveyed metes and bounds of the Territory and providing for a date of transfer to be proclaimed. The date was duly proclaimed as 1 January, 1911.

Before the transfer was effected, the Commonwealth Government took steps to establish the machinery whereby laws for the government of the Territory could be made, and whereby those laws would be administered, by the Executive Government of the Commonwealth – the Governor-General and his Ministers. The result was the Seat of Government (Administration) Act 1910.

From the lands administration point of view, the two most important provisions of the Seat of Government (Administration) Act 1910 were sections 9 and 12. Section 9 provided:-

> *9. No Crown lands in the Territory shall be disposed of for any estate of freehold except in pursuance of some contract entered into before the commencement of this Act.*

and Section 12 provided:-

> *12.(1). Until the Parliament makes other provision for the government of the Territory, the Governor-General may make Ordinances having the force of law in the Territory.*

One of the conditions imposed by the Seat of Government Acceptance Act 1909 (section 6) was that – *all laws in force in the Territory immediately before the proclaimed day* (1 January, 1911) *shall, so far as applicable, continue in force until other* provision *is made.* The Seat of Government (Administration) Act 1910 therefore enabled *other provisions* to be made by Ordinances progressively as they became necessary for the various different aspects of administration. Regulations are of course made under Ordinances.

The intention of the early Federal Parliaments that *every square inch of* privately owned lands in the Territory eventually chosen as the site for the seat of Government should be acquired has never been carried fully into effect. Nevertheless, the Crown in right of the Commonwealth is today the absolute owner of all land within the City Area and of most Territory land outside that area. (The *City Area* is defined in the City Area Leases Ordinance as being the area in the Territory specified as such by the Minister from time to time. The boundaries of this area expand with the construction of new suburbs. As at present specified the City Area includes Fyshwick, Watson, Belconnen, the Woden Valley and all suburbs between). The

practical effect of this land ownership by the Commonwealth and of section 9 of the Seat of Government (Administration) Act is that Crown lands in the territory are disposed of for estates of leasehold.

Since the land tenure in the Territory was to be essentially different from what it had been when the area was part of New South Wales – leasehold instead of predominantly freehold – the Commonwealth needed new laws (Ordinances) to provide the mode of granting leases, rights and obligations of lessees, building controls and the like. In fact, a new code of land tenure needed to be set up for the Territory – a code which is not entirely radical and yet certainly not traditional either.

The four leasing Ordinances under which the new code has developed, are, in their order of importance:-

City Area Leases Ordinance 1936-1969;
Leases Ordinance 1918-1958;
Leases (Special Purposes) Ordinance 1925-1943;
Church Lands Leases Ordinance 1924-1932.

Before examining some of the many provisions which distinguish leases granted under the various Ordinances it may be of assistance to note the fewer points of similarity. To begin with, whilst each of these four Ordinances applies within the City Area the Leases Ordinance also applies outside the City Area. (The Leases Ordinance is therefore a Territory-wide Ordinance in the fullest sense of the term). The Minister referred to in each Ordinance is the Minister of State for the Interior and all leases granted by the Minister are granted in the name of the Commonwealth. Another point of similarity is that all leases granted under these Ordinances (excepting most of those granted in the City Area under the Leases Ordinance) are subject to related legislation, in particular, the Building and Services Ordinance 1924-1942, the Building Ordinance 1962, the Buildings (Design and Siting) Ordinance 1964 and the Real Property Ordinance 1925-1969.

The importance of this building legislation in Canberra is that it operates to govern or regulate the lessee's covenant to build. An extensive knowledge of the legislation is not however a prerequisite to an understanding of the basic principles of the leasehold tenure operating in Canberra. Indeed, for present purposes it is sufficient that the mere existence of the legislation be known. The title registration practices and procedures prescribed by the Real Property Ordinance are however issues which are more central to the existence of any land settlement. They will therefore be briefly considered later.

The leasing Ordinances will be dealt with in the ascending order of importance.

Church Lands Leases Ordinance 1924-1932

The distinguishing feature of leases granted under this Ordinance is that they are of course granted only to Churches, that they are granted in perpetuity, that no rates or taxes are levied upon the land and that the land rent is 10 cents per annum payable if and when demanded by the Minister.

All leases granted under the Church Lands Leases Ordinance are granted subject to such covenants and conditions as the Minister determines. In practice, this Ministerial power has been used mostly to prescribe the style and minimum cost of the edifice to be erected on the leased land and the conditions upon which the lease may be determined.

The Ordinance provides that the land in respect of which any lease is granted is to be used solely for Church purposes and that land is not deemed to be so used unless it is used solely as a site for a Church. The Ordinance concludes, however, by relaxing this restriction to permit residences for clergy or a school where religious instruction only is given to be also erected on the land.

The Church Lands Leases Ordinance makes no provision for an application by the lessee for a variation of the purpose for which the land leased may be used. It would seem therefore that the only method by which a lessee of land leased under this Ordinance could have the *Church purposes only* restriction removed would be to surrender the lease and obtain a re-grant of lease under some other Ordinance for some other purpose. This course of action would of course presuppose Commonwealth approval.

Upon determination of a lease granted under this Ordinance the Commonwealth is under no obligation to hold the land for Church purposes. It would revert to Crown land that could perhaps be leased under other Ordinances for other purposes, or to some other Church under this Ordinance, or be left vacant or be used for some Commonwealth purpose.

As no one denomination is entitled to more than one lease under this Ordinance there are few Church Lands leases in existence—about twenty, each the principal site of the relevant Church in Canberra. They are of course all within the City Area as the Ordinance only applies within that area.

Leases (Special Purposes) Ordinance 1925-1943

Under this Ordinance the Minister is empowered to grant leases of land within the City Area for any purposes other than business or residential purposes. The leases can be for periods up to but not exceeding 99 years and subject to such covenants and conditions as to rent and otherwise as the Minister determines or as are prescribed. A lessee's covenant to build is invariably included in each of these leases.

With one exception special purpose leases may provide for re-appraisement of the unimproved value of the leased land during each twentieth year thereafter. The exception is that land leased under the Ordinance for use solely as a site for a Church, a residence for clergy or a school where religious instruction only is given is not subject to re-appraisement. The earliest granted leases under this Ordinance seldom if ever contained any provision for re-appraisement but those granted in more recent years almost invariably contain such a provision. The land rent charged varies, in some cases being one per cent and in others up to two and a half per cent per annum of the unimproved value of the leased land. Rates are not payable in respect of land leased under this Ordinance which is occupied by or used in connection with any certified school.

Leases may be granted under this Ordinance to approved associations for the purposes of the association. *Approved Association* is defined as any society association or other body which is not carried on for profit or gain to the individual members and which the Minister declares to be an approved association for the purposes of the Ordinance.

The Leases (Special Purposes) Ordinance 1925-1927 was amended in 1929 to give the Minister power to grant to the Government of any country or to any accredited agent of that Government a lease of land for any diplomatic, consular or official purpose of that Government or for the purpose of an official residence for any accredited agent of that Government or for all or any number of those purposes. This amendment plus the acknowledgement a couple of years later that leases could be granted under the Ordinance for residences for clergy are the only exceptions Parliament has chosen to make to the restriction that leases are only to be granted under this Ordinance for purposes other than business or residential. The test to be applied when considering an application for a special purpose lease is therefore whether or not the purpose for which the leased land will be used is a business or residential purpose. If the purpose is either or both the application must fail. If the purpose is neither business nor residential other matters matters such as whether or not the applicant is an approved association can be considered.

Most special purpose leases – there are about 180 of them – are used for club buildings, diplomatic residences and offices, Churches, Church schools or residences for clergy.

The restriction on the purposes for which land could be leased under this Ordinance was considered over 30 years ago. There were and are obviously some occasions when the activities of a special purpose applicant – such as a charitable organisation – would or could involve using the land for both. Under this Ordinance such an applicant is simply not eligible for a lease, the charitable nature of the applicant's activities being completely irrelevant. The acid test was, and has always been: is the purpose for which the land will be used business or residential? If it is either business or residential, no lease is available under the Leases (Special Purposes) Ordinance. The

business and/or residential purpose leases under the City Area Leases Ordinance have however always been available to charitable and other organisations but the problem was that leases granted under that Ordinance are subject to more onerous covenants and conditions as to rent rates etc. than leases granted under the Leases (Special Purposes) Ordinance. The solution adopted was not to relax the restriction on the purposes for which leases could be granted under the Leases (Special Purposes) Ordinance but to amend the City Area Leases Ordinance to empower the Minister to approve a reduction of rent and to grant relief from lease covenants and conditions in the case of approved associations.

All leases granted under the Leases (Special Purposes) Ordinance contain a provision entitling the Commonwealth to determine the lease in certain events. The lessee has statutory tenant right in improvements effected by him and provision is made for the conversion of a special purpose lease into a business purpose lease under the City Area Leases Ordinance when the special purpose for which the lease has been granted is not being fulfilled or has been accomplished or where the fulfilment of the special purpose is no longer possible.

Leases Ordinance 1918-1958

The Leases Ordinance is the oldest of the four Territory leasing Ordinances and the only one of them to apply throughout the whole Territory. Undoubtedly this Ordinance was originally designed to provide for the many hundreds of rural leases which were to be granted after its enactment but it has operated to support the granting of more than rural leases. The original Ordinance was short and terse and subsequent amendments have not changed that. However, the Regulations made under the Ordinance do now and have always provided more comprehensive conditions. Regulation 5 provides that leases may be granted for grazing, fruit growing, horticultural, agricultural, residential or business purposes or any other purpose approved by the Minister. It is clear therefore there is no statutory restriction on the purpose for which a lease may be granted under this Ordinance. In this chapter we are mainly concerned with the operation of the Leases Ordinance within the City Area.

In the City Area no less than 10,000 people hold fortnightly tenancies of Commonwealth erected houses or flats by virtue of leases granted under the Leases Ordinance and outside the City Area the Commonwealth has granted several hundred rural, mostly 50 year, farming leases, and some few long term (25 years) residential leases. The much wider application of the Leases Ordinance and the large number of people affected by its operation gives to it a greater importance than either of the two earlier mentioned Ordinances. A clear understanding of this Ordinance and of the various leases granted thereunder is therefore necessary. This understanding, however, is not always obtained. For one reason or another the leases granted under the Leases Ordinance are very often the least understood of all Territory leases.

To begin with, the word *lease*. It is essential to any understanding of the law governing Territory leases generally, and particularly the vast majority of those granted in the City Area under the Leases Ordinance, that the legal meaning of this word be known and fully appreciated.

I agree that in ordinary parlance and conventional language it may fairly be said that a distinction is constantly made between a tenancy and a lease – but I am unable to say that I can introduce this same loose parlance in the rule.

(Re Negus (1895) 1 Ch. p.73
per Chitty J.

The word *lease* in the wider legal sense includes all types of periodic tenancies, whether they be yearly, quarterly, monthly, fortnightly or weekly. It follows therefore that the 10,000 fortnightly tenants of Commonwealth owned houses and flats in the City Area are just as much lessees from the Commonwealth as are the holders of what are known by popular description as rural leases. The lease in each instance is in the discretion of the Minister to grant pursuant to the Leases Ordinance and Regulations made thereunder.

Under Regulation 16, the Minister is empowered to grant a lease to any person upon a weekly, fortnightly, monthly or quarterly tenancy. In practice, with Government built houses, the Minister grants these leases upon fortnightly tenancies. The fortnightly lessees are each required to execute a document entitled *Acknowledgement of Tenancy* before entry into possession of the rented premises. The use of the work *Tenancy* in this document seems to cause unwarranted confusion about the relationship created. The simple facts are that a tenant is a lessee and this *Acknowledgement of Tenancy* form is as much a lease document and evidence of the existence of a lease as any other document evidencing a lease under this or any other Ordinance.

The fortnightly lessee-tenant technically enjoys no more than a right of possession (domestic use and enjoyment) of the premises in fortnightly rests in consideration of the agreed rent being paid fortnightly in advance and other covenants in the lease being observed. There is no doubt that these fortnightly leases are the most insecure form of tenure the Commonwealth offers in the City Area. The Minister can at the end of a fortnightly term terminate any one or each of them. The Landlord and Tenant Ordinance has no application to the Commonwealth and the Recovery of Lands Ordinance 1929-1938 enables the Minister to obtain a Court ejectment order in any case where a tenant duly served with a notice to quit, or a notice of determination, as the case may be, fails to vacate (notwithstanding some vociferous but sadly misconceived allegations that this last mentioned Ordinance is invalid).

In practice the Minister is never given to disturbing any fortnightly tenant except for persistent default of rental payments or failure to observe lease covenants, such as wilful abuse of the premises, rowdy behaviour or

parting with possession of the premises. It is quite normal for these fortnightly tenants (or their sons, daughters etc.) to remain in continuous occupation of the same Government owned house or flat for several decades.

The position of these fortnightly tenancies within the Territory is simple enough but often misunderstood. The reader who not only perceives that these tenancies are in fact leases but also appreciates their inception and conclusion, the law governing them in between and how they as leases fit into the leasing pattern has advanced towards a fuller understanding of the Territory leasehold system. The point is, they constitute one of the kinds of lease prescribed by Ordinance, not mere common law leases, as between the ordinary proprietor and his tenant.

There are within the City Area a small number of other leases granted under the Leases Ordinance. The Federal Capital Commission erected and managed several hotels some of which were subsequently leased out to private enterprise management under the Leases Ordinance. In addition, there have probably been some few other Commonwealth erected buildings in the City Area held at different times on leases granted pursuant to the Leases Ordinance and it may be that one or other unimproved blocks of the land in the City Area has been leased under this Ordinance to some organisation for some particular purpose, e.g. a provisional sports area, showgrounds, storage yard or the like. At any rate, this type of grant is possible under the Leases Ordinance. The number of these leases within the City Area would certainly not be large – probably no more than 10 or 15 concurrently at any time – and whilst the (ostensibly) longer term of some of them might appear to confer a greater security of tenure than the fortnightly lessee has, it must not be forgotten that the distinctive mark of all leases granted under the Leases Ordinance is the lack of any real security of tenure.

Land leased under the Leases Ordinance, whether on fortnightly tenancy or long term lease within the City Area, or on long term rural or residential lease outside the City Area, may be withdrawn at any time by the Minister when the land is required for any public purpose of the Commonwealth. This is tantamount to saying all leases granted under the Leases Ordinance are determinable without cause. In stark contrast, as will next appear, no lease granted under the City Area Leases Ordinance can ever be determined without cause.

The process of compulsory acquisition of land is commonly called *resumption*. The relevant statute for a normal Commonwealth acquisition anywhere throughout Australia is the Lands Acquisition Act 1955-1966. The resumption of land granted under the Leases Ordinance is however not a normal acquisition. No competent administrator would seek to effect such a resumption under the Lands Acquisition Act. The simple truth is that the lessee under the Leases Ordinance, whether the land be situated in or outside the City Area or whether the lease be a 50 year rural lease or a lease for any

other term or any other purpose, holds the lease subject to the Minister's power to withdraw the whole or part of the land for any public purpose at any time. The lease is determined by notice in writing signed by the Minister and the lessee's interest in the land is converted solely into a right to receive compensation merely for any lessee purchased or effected improvements on the land in respect of which he had expressly in that lease been accorded tenant right of compensation. The Recovery of Lands Ordinance stands behind the resumption or withdrawal process should the lessee refuse to deliver up possession of the land.

City Area Leases Ordinance 1936-1969

The City Area Leases Ordinance is the most important of the Territory leasing Ordinances. Over 23,000 leases have been granted under it. As indicated by its title the Ordinance applies only within the City Area of the Territory. In fact, it is in this Ordinance that the words *City Area* are defined.

Under the City Area Leases Ordinance the Minister is empowered to grant leases of land for business purposes or for residential purposes or for both business and residential purposes. A lease granted for business purposes or for both business and residential purposes may specify the class or particular classes of business for which the land included in the lease may be used. The lessee covenants not to use the land for any other purpose. There is provision for application in course of time by the lessee for a variation of the purpose for which the leased land may be used, and the application may be approved or rejected.

The Ordinance provides for the leases to be for such period not exceeding 99 years and subject to such covenants and conditions as to rent and otherwise as the Minister may determine or as may be prescribed. In practice, almost all leases granted under the City Area Leases Ordinance are for a 99 year term and almost all lease covenants and conditions are prescribed by the Ordinance.

Of no less importance than the purpose covenant is the covenant to build. Virtually every City Area parcel of land made available at auction for leasing is a bare site conditioned by the imperative requirement that the lessee shall forthwith set about erecting thereon a building, dwelling, shop, offices as the particular case may be. The periods within which construction must be commenced and completed, the materials of construction (brick, timber etc.) and the minimum cost of the building to be erected are all prescribed and stipulated in the lessee's covenant to build. The covenant also stipulates that the lessee shall submit building plans and specifications to the Minister for approval (of design and siting) and not commence construction prior to the approval of those plans. The usual periods stipulated are 6 months for commencement of construction and 12 months for completion, or such extension thereof as the Minister may in writing approve.

Another basic covenant by the lessee is the covenant to pay land rent at the prescribed rate of five (5) per cent per annum of the amount that the Minister has notified as the unimproved value of the land. This unimproved value of the land is re-appraised by the Minister during the twentieth year of the lease and during each twentieth year thereafter. Provision is made for an appeal against the re-appraisement. Unimproved value is defined in the Ordinance as:-

> *the capital sum which the lease, subject to the terms and conditions upon which it is held or is to be held, might be expected to realise if offered for sale on reasonable terms assuming that the improvements (if any) on the land had not been made and that the lease had an unexpired term of 99 years at the time of the sale, and leaving out of consideration any rent payable in respect of the lease other than prospective increments or decrements of rent after re-appraisement.*

The importance of the covenant to build and the purpose and land rent covenants cannot be over-emphasised. It is as though written across the Canberra leasehold sky are the three most important commandments:-

> *Thou shalt not use leased land for any purpose other than the purpose for which it is granted.*
> *Thou shalt pay land rent.*
> *Thou shalt briskly design and erect a building as approved on the land.*

The Minister's power or right to determine a lease granted under the City Area Leases Ordinance has always hinged on or been exercisable if, and only if, the lessee fails to comply with any one of these three lease covenants. The determination of one of these leases therefore can never result from some capricious whim on the part of the Minister or his advisers. The only occasions when the power to determine a lease can be exercised are clearly set out in the covenant of the lease which provides:-

3. It is mutually convenanted and agreed as follows:-

(a) That if –

(i) any rent payable under this lease shall remain unpaid for twelve calendar months next after the date appointed for payment thereof (whether such rent shall have been formally demanded or not); or

(ii) a building in accordance with sub-clause (c) of clause 1 of this lease is not commenced and completed within the periods specified in the said sub-clause; or

(iii) after completion of a building as aforesaid the land is at any time not used for a period of two years for the main purpose for which this lease is granted,

the Commonwealth may determine this lease but without pre-

judice to any claim which the Commonwealth may have against the lessee in respect of any breach of the covenants on the part of the lessee to be observed or performed.

The covenant to pay rent is bolstered by an additional covenant wherein the lessee covenants to pay to the Minister as additional rent a sum at the rate of 8 per cent per annum accruing from day to day on any amount of land rent payable under the lease which remains unpaid one calendar month after the day appointed for payment. Not being specifically provided for in the Ordinance, this particular covenant rests on the Minister's power to grant leases subject to such terms and conditions as he determines. No one should, however, be unaware of this 8 per cent covenant or, indeed, any other covenant.

The covenant to build must always be considered in conjunction with the building legislation. The covenant to build, and the additional covenants not to erect any building on the land without the previous approval in writing of the Minister, and to maintain, repair and keep in repair all buildings and erections on the land to the satisfaction of the Minister compel adherence to the Building Regulations.

The covenant by the lessee to use the land only for a specified purpose must be the dream come true of all Town Planners. In the City Area of the Territory, the Commonwealth owns all the land and its Town Planners allocate parcels of land for leasing and also pre-dictate the particular purposes (restriction of use) respectively imposed on each parcel. Leases are granted in dormitory suburbs for residential or for business purposes, with the business purpose ones grouped together as a suburban shopping centre and apart from the residential purpose leases. The corner or mid street suburban shop therefore is non-existent. In other main business centres leases are granted exclusively for commercial business purposes only, or in industrial areas for industrial purposes only, as the case may be. Thus the benefits of zoning are obtained at the outset (without any zoning legislation) and retained at all times by the existence of the purpose covenant in each and every lease. Any breach of the purpose covenant is also made a prosecutable offence, punishable by a fine plus a penalty of twenty dollars ($20) per day for each day of persistence in the breach.

Under the City Area Leases Ordinance, the Minister is empowered to offer sites for industrial, business and/or residential leases for grant (sale) by auction, or he may invite applications, or he may grant leases without auction or applications. Auction is the usual method employed. At auction, the successful bidder pays to the Commonwealth the amount of the bid that made him or her the successful bidder, a survey fee and first year's land rent in advance. The amount of the successful bid is colloquially described as a *premium* but this word is not mentioned in any legislation relating to leases in the Territory. Upon auction purchase, or upon a successful application, the purchaser or the applicant, as the case may be, obtains

a right to the grant of a lease. There are, before the lease is actually granted, certain formalities to be completed such as the engrossing of the lease document (or Deed as some loosely call it). The term commences, however, on the day of the auction or the day of the successful application, as the case may be. The failure of a person entitled to the grant of a lease to accept, sign and seal the lease document within a prescribed period empowers the Minister to determine the right to the grant.

There are by virtue of the City Area Leases Ordinance certain conditions of tenure attaching to leases granted under the Ordinance which operate as initial restriction on transfers, mortgages etc. The most important restriction in the sense that it applies to all leases of unimproved land granted under this Ordinance arises from the covenant to build. Until the completion of a building on the land in accordance with a building plan or design approved by the Proper Authority the lease or any interest in the lease cannot be transferred, sub-let or mortgaged without the consent of the Minister. (The *Proper Authority* is defined to mean the Proper Authority appointed under the Canberra Building Regulations made under the Building and Services Ordinance 1924 or under that Ordinance as subsequently amended). In practice, consent to a mortgage is usually readily given where the Minister is satisfied that the money to be advanced under the mortgage is bona fide required by the lessee for the purpose of erecting or completing the building. In practice, consent to the transfer of a lease before the building is completed is not given but the Ordinance does provide in cases of extreme fortuitous hardship for a refund of the premium paid for the grant of a lease which has subsequently been surrendered or determined. Nothing in the Ordinance however should be read to obscure the fact that one of the prime commandments of the whole statutory leasing system established by the City Area Leases Ordinance is *Thou shalt build.* The commandment is not idle until the building has been completed nor in practice is the threat to determine the lease for failure to build.

The auction at which leases are offered may be a restricted auction, i.e. an auction at which the right to bid is restricted to a specified class of persons. The specified class is invariably those who have not or whose spouse has not at any time within a specified number of years held any lease or any interest in a lease granted under the Ordinance. The purchaser at these auctions obtains a lease which is subject to a further restriction on the right to transfer, mortgage sub-lease etc. Section 28B of the Ordinance which prescribes these restrictions contains certain exceptions, exemptions and distinctions but by and large it may be said that a restricted auction lessee is, for the period of the first 5 years after the commencement of the lease, unable to transfer, mortgage or sub-lease his lease without the consent of the Minister. After that first 5 year period he can do as he likes, transfer, mortgage, sub-let, but not sub-divide.

The fortnightly lessees under the Leases Ordinance may during their tenancy make an application to purchase the rented dwelling. In this event, if

the purchase is effected, the Commonwealth will grant to the tenant purchaser a 99 year residential purpose only lease under the City Area Leases Ordinance. The Commonwealth has mortgage facilities available to assist the tenant purchaser, but, whether these are made use of or not, the type of lease will be the same, and a 5 year restriction on the lessee's right to transfer or agree to transfer his interest in the land will apply. The no-transfer provision in these tenant purchase, or *section 28A leases* as they are more often known, is removed if at any time the lessee has made an offer to surrender the lease to the Minister in consideration of the payment to the lessee of an amount agreed upon between the parties, or in default of agreement, determined by arbitration and the Minister has declined to purchase it. Obviously these section 28A leases will not include a covenant to build but otherwise the lessee will hold the lease on the same terms and conditions as other residential lessees under the City Area Leases Ordinance.

As mentioned earlier, the Minister fixes or notifies the unimproved value of the land before making it available for leasing and this value is re-appraised by the prescribed authority during the twentieth year of the term of the lease and during each twentieth year thereafter. Provision is made for appeals against re-appraisement to be made to an Appeals Board consisting of 3 persons appointed by the Minister. The unimproved value of land included in a lease in respect of which there has been a variation of the purpose for which the land may be used is re-appraised by the prescribed authority on the day next following the day upon which the order effecting the variation takes effect.

The leases granted under this Ordinance each contain a covenant wherein the Commonwealth covenants and agrees that if at the expiration of the lease the Minister shall have decided not to sub-divide the land and that it is not required for any Commonwealth purpose the lessee shall be entitled to a further lease of the land for such further term and subject to such conditions as may then be provided or permitted by Statute Ordinance or Regulation.

Under the City Area Leases Regulations the Minister is authorised to enter without payment of compensation upon the land included in any lease and construct and maintain sewers, drains, connections thereto, etc. This reservation is often mistaken for an easement. It should however be appreciated that there are specific methods of creating easements and that easements simply do not come to life because an over anxious administrator chooses to describe something as an *easement* or a *proposed easement.*

The lessee under the City Area Leases Ordinance has statutory *tenant right* to be compensated for the value in situ of completed improvements, and for this purpose *improvements* are defined to include buildings and erections but not improvements effected at the cost of the Commonwealth unless the Commonwealth has received or is entitled to receive payment for the improvements. The tenant right in improvements is of course not only available at the expiration of the term of the 99 year lease. The Commonwealth is equally liable to pay the value of lessee effected and completed improve-

ments, e.g. a duly completed dwelling, upon the prior determination or surrender of a lease.

The real property lawyer will have recognised many pages back that the leases granted under the City Area Leases Ordinance are a quite different category from Common Law leases which arise as a result of arrangement between parties. Not only is the beginning and the end of these Canberra leases provided for by statute but so complete is the legislative coverage of essential incidents throughout that there is hardly any scope at all for common law implications. It is therefore imperative that the person seeking a detailed knowledge of leases granted under this Ordinance should cultivate the habit of looking into the Ordinances and Regulations for the statutory terms, conditions and provisions of the lease and Common Law should be turned to as a last resort if, and only if, some incident is not compassed in the legislation. The need for this was well illustrated in Owendale Pty. Limited v. Anthony (1967) 41 A.L.J.R. p.89. In that High Court case a lease granted under the City Area Leases Ordinance contained a covenant by the lessee company that it would within one year after the commencement of the term or any such further time as might be approved, commence to erect a building in accordance with plans and specifications prepared by the lessee and approved by the Commonwealth. The lease also contained a provision that the acceptance of rent during or after the periods referred to in the building covenants should not prevent or impede the exercise by the Commonwealth of the powers conferred on it to determine the lease. The lessee did not commence building, nor did it submit plans and specifications within a year from the commencement of the term. On the day before the end of the year the lessee wrote a letter to the Commonwealth in which it said that the planning of the proposed structure had reached an advanced state and the Commonwealth replied intimating the necessity to apply for an extension of time. Thereafter for a period of nearly two years correspondence passed between the Commonwealth and the lessee, the Commonwealth asking for explanations and assurances, and the lessee giving reasons for its delays. The Commonwealth gave notice to the lessee of intention to determine the lease and subsequently on three occasions gave notice in writing pursuant to section 22(5) (a) of the Ordinance to comply with the conditions of the lease within the time specified in the notice, and after the lapse of time specified in the last notice gave formal notice of determination. The Court upheld the appeal by the lessee company against the determination of the lease. To use a legal expression, it is impossible to find any *ratio decidendi* in the Court's decision.

As this case was only the second time in 40 years the High Court had been called upon to consider leases granted under the City Area Leases Ordinance the Court was very clearly in a strange field and it must be said, with respect, that the Court erred in regarding a lease granted under the City Area Leases Ordinance as a common law lease. The various members of the Court in their tentative approaches to the legislation laboured to import the very common law implications which the legislation was designed to exclude.

Counsel for the lessee (Plaintiff/Appellant) who had the running of the case skilfully employed the tactic of proffering precepts developed at common law for regulating unspecific leasing arrangements between over-bearing landlords and subservient tenants, thus obscuring the fact that Crown leases in Canberra are all cast in a rigid mould created by legislative enactment. Counsel for the Commonwealth was unsuccessful in exposing this mould to the Court's gaze, though he did spend much erudition in attempts to adopt to the case each red herring introduced by the lessee. It seems from their separate judgments that each member of the Bench caught a wrong bus, unaware of the *Canberra Leasehold Special Bus* meticulously equipped and routed by legislative enactment for their expedition.

The Owendale case is one of those judicial exercises best forgotten and a future Court should have no difficulty in distinguishing (ignoring) it and applying the specific provisions of the Ordinances. The decision, if followed in future cases, would mean in effect that the Commonwealth's right to determine leases for non-compliance with lease covenants was practically non-existent and the administration of leases granted under the City Area Leases Ordinance would soon become a chaotic nightmare. The lesson to be learned, because of and not from this case, is simple but all important. Just as a statute can ordain the mode of birth of a lease, so also can it ordain the mode of its burial or any exigency throughout its life span.

The lessees power to sub-let is one of many examples of this legislative mould. The power can be found in section 29(a) of the City Area Leases Ordinance and there can be little doubt that this sub-section provides a complete code covering the sub-leasing power of lessees. The opening words of the sub-section, which make the power to sub-lease subject to the remainder of the Ordinance, appear to completely oust any residual or concurrent common law power. It follows therefore that any sub-letting of a lease granted under the City Area Leases Ordinance, whether it be a weekly, quarterly or yearly tenancy amounts to an exercise of the statutory power to sub-lease.

The importance of the legislation for an exact knowledge of Canberra's leasehold system cannot be over emphasised, and if the person seeking that knowledge is to avoid absurd interpretations he or she should at least become familiar with the Acts Interpretation Act, leavened with a fair degree of common sense. In addition, it is important to remember that every provision in the leasing Ordinances should always be read in its context and in the broader context of the whole of the legislation and without forgetting the inter-relation of other Ordinances.

Before moving on to the question of land title registration it may be noted that the ancient rule of *caveat emptor* (let the buyer beware) is not ousted because the land being offered for sale by the Commonwealth happens to be leasehold land. The purchaser takes that which he sees, or which,

as a prudent and diligent purchaser, he ought to have seen, and is not entitled to anything better. The Commonwealth is under no responsibility to indicate any features in relation to the land but rather the responsibility lies on the purchaser to examine the land and make his own judgments. If in laying the foundations for the building or in anything else the purchaser's estimate of costs is exceeded, the purchaser cannot then be heard to complain that the Commonwealth should pay the excess.

Real Property Ordinance 1925-1969

A knowledge of land title registration in Canberra is essential for a full understanding of the leasehold system in operation. To obtain this it is necessary to know the Torrens system of title registration and appreciate its operation and administration as prescribed by the Real Property Ordinance.

The Torrens system of land title registration is an Australian reform taking its name from Robert Torrens, one time Collector of Customs in South Australia and later Premier of that State, or Province, as it was then known. The system was established in South Australia in 1861 and subsequently in other Australian jurisdictions. The main object of the legislation behind it is to remove the disadvantages of the Common law system of title by deed.

Under the Common Law system, usually referred to as *the old system,* a deed is necessary in the transfer of the ownership of an estate or interest in land, or in any dealing with the land such as a mortgage, sub-lease etc. Each one of these deeds must be stockpiled as an essential part of the chain of title. It is obvious that any flaw in the chain, mislaying a deed, etc. will be difficult or perhaps even impossible to remedy but in any event it will be expensive.

The advantages claimed for the system invented by Torrens are simplicity, cheapness and certainty. The main feature or distinguishing mark of the Torrens system is the introduction of the Certificate of Title, a document of prescribed uniform format in which is entered in the most succinct yet comprehensive fashion exact particulars of the land parcel, usually by reference to a survey Deposited Plan of the neighbourhood, of the person or persons to whom the land is granted and for what legal estate or interest, all reservations, restrictions, conditions and qualifications pertaining thereto and specifying all encumbrances (easements, mortgages) appurtenant thereto.

This single document in the office of the Registrar of Land Titles (counterpart held by the registered proprietor of the land) takes the place of the collection of deeds which go to make up the chain of title under the old system. The Certificate of Title makes lengthy retrospective examination of title quite unnecessary thus giving simplicity, cheapness, and certainty. The Certificate of Title is a certification by the State of the Title of the person named in the certificate. In other words, it is a State guaranteed title.

The Torrens system of land title registration has been adopted in all Australian States and New Zealand and in some countries in the northern hemisphere but vested and conservative interests such as the legal profession

or land title guarantee corporations have ensured that in no jurisdiction (save perhaps South Australia and New Zealand) is it the exclusive form of title. The City Area of the Territory for the Seat of Government is however a Torrens title only area.

The most important concept of the Torrens system is the Register Book.

> *. . . it is the key to the whole working of the system. The Register Book consists of duplicates of all Crown Grants and Certificates of Title, each one constituting a separate folium of the book, on which the Registrar-General records the particulars of all instruments, dealings and other matters required to be registered affecting the title to the land included in the grant or certificate.* [2]

The adoption of the Torrens system in an exclusive leasehold area such as the City Area in the Territory has presented no insurmountable difficulties. The original lessee under the City Area Leases Ordinance, the Church Lands Leases Ordinance, the Leases (Special Purposes) Ordinance and most of the longer term leases granted in and out of the City Area under the Leases Ordinance are issued a single registered document called a Crown Lease (counterpart bound in the Register Book at the Registrar's Office). This Crown Lease, which contains the terms, conditions and covenants of the lease, must not be thought of as in any way inferior to a Certificate of Title. They both perform the same function and attract the same protections and benefits.

These Crown Leases, bound in the Register Book, are all public documents available to be searched upon the payment of a nominal fee.

These are the main facts of the leasehold system of land tenure in the Australian Capital Territory. In general and in particular they must be fully grasped to understand the administration of land in the area.

NOTES ON CHAPTER 9

1. Quick and Garran., *The Annotated Constitution of the Australian Commonwealth* 1901, p.982.
2. Helmore, B.A., *The Law of Real Property (N.S.W.)* p.322. Sydney, 1961. Law Book Co.