

## **APPENDIX B - HISTORY**

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#### **Crown Leasehold**

The principle of Commonwealth ownership of land in the Australian Capital Territory was given expression in s125 of the Constitution which states in part that-

The seat of Government of the Commonwealth shall be determined by Parliament and shall be within territory which shall be granted to or acquired by the Commonwealth and shall be vested in and belonging to the Commonwealth.

Public leasehold of land in the ACT was provided for by the *Seat of Government (Administration) ACT 1910* which states in s9 that ‘no Crown lands in the territory shall be sold or disposed of for any estate of freehold’.<sup>i</sup>

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 was developed, were, in their order of importance-

*City Area Leases Ordinance 1936;*  
*Leases Ordinance 1918;*  
*Leases (Special Purposes) Ordinance 1925;* and  
*Church Lands Leases Ordinance 1924.*<sup>ii</sup>

In 1989 the ACT became self-governing. *The Australian Capital Territory (Planning and Land Management) Act 1988* provides for the land within the ACT to be ‘national land’ or ‘territory land’. section 29 states that the ACT Executive is responsible for the management of territory land on behalf of the Commonwealth. section 29(3) provides that the term of an estate in territory land granted on or after self-government (11 May 1989) ‘shall not exceed 99 years or such longer period as is prescribed, but the estate may be renewed’.<sup>iii</sup>

The ordinances were modified upon self-government to apply solely to *Territory Land* and respectively became-

*City Area Leases Act 1936;*  
*Leases Act 1918;*  
*Leases (Special Purposes) Act 1925;* and  
*Church Lands Leases Act 1924.*<sup>iv</sup>

### **Overview of relevant legislation**

Comment and reference in this part of the paper is limited to the provisions of the legislation relevant to the granting of particular types of leases. While that approach is considered appropriate to provide a basic understanding of how such matters were handled in the past, no attempt has been made to track and note each and every amendment to that legislation from its introduction to its repeal. Consequently, what is being offered is not a definitive statement on the operation of that legislation over time, but rather very much *an overview*.

### **The City Area Leases Ordinance 1936**

The *City Area Leases Ordinance 1936* (“CALO”) was the ordinance under which the majority of leases in the ACT were granted, until 1992 when it was repealed in connection with the introduction of the *Land (Planning and Environment) Act 1991*.<sup>v</sup> Section 5 of that ordinance permitted the grant of leases of land for business or residential or both business and residential purposes.

Section 4 provided that the ordinance would apply only to land the property of the Commonwealth within the area specified, from time to time, by the Minister as “the City Area”. That area was capable of being varied and the description of the boundaries of the City Area was notified by publication in the *Gazette* (C’th).

Between 12 December 1924, when the first public sale of CALO leases occurred, and 2 April 1992, when the substantive provisions of the *Land (Planning and Environment) Act 1991* (“Land Act”) commenced<sup>vi</sup>, about 84 000 leases were granted under CALO.<sup>vii</sup>

#### Terms of leases

Section 12 provided that a CALO lease could be granted under for any period not exceeding 99 years.<sup>viii</sup>

The first leases were granted under CALO in 1924 and without exception were for terms of ninety-nine years. Apart from some lease restricted to twenty-five year terms for planning reasons, this general situation continued until the late 1960s when lease terms of fifty years were adopted for commercial and industrial leases. ...individual leases were granted for seventy five year terms in special circumstances.<sup>ix</sup>

#### Methods of disposal of leases

A lease could be granted following-

- its sale at auction – section 13;
- inviting applications – section 14;
- the value bid at auction not reaching the reserve price or the highest value placed on the lease by an applicant not reaching the reserve price – section 15;
- no bid or offer being made – section 16;
- no auction being held or no application being invited – section 17; or
- the holding of a ballot – section 17A.

#### Land rent – Its abolition and the re-introduction of the power to charge rent for new leases

Until 1 January 1971, when land rent under CALO leases was reduced to a nominal level (five cents per annum, if and when demanded)<sup>x</sup>, CALO leases were generally granted conditional upon quarterly payments of land rent equivalent to 5% of the unimproved value of the land determined either by-

- the amount bid for the lease at auction; or more usually
- the amount determined by the Minister in connection with the grant - (section 18 CALO).

Initially, CALO provided that the unimproved value of land included in a lease would be re-appraised during the twentieth year of the lease term and during each tenth year thereafter.<sup>xi</sup> In 1935, the re-appraisal periods were made a uniform twenty years for the term of the lease.<sup>xii</sup> Consequently, the amount of land rent payable by the lessee of a CALO lease would be varied following re-appraisal of the unimproved value of the land at 20 year intervals.

The ordinance did not provide for re-appraisal of the unimproved value following a change of circumstance, specifically a variation to a purposive provision of the lease (“variation to a purpose clause”), until the introduction of the amendment to section 25 given effect by Ordinance No. 7 of 1964. So, any added value to a lessee arising from a variation to purpose clause of a CALO Crown lease prior to 21 August

1964 would not benefit the lessor through an increase in land rent until the next twentieth year re-appraisal of unimproved value was undertaken and the change in circumstance taken into account.

In April 1974 CALO was amended to empower the Minister to grant leases subject to land rent.<sup>xiii</sup> In practice, land rent was reintroduced for new commercial and industrial leases and not residential leases. From 1974 to 1980 there was any number of different models of rental leases granted. Whilst the method of calculation of rent varied often from one lease to another, what remained reasonably constant was the provision for the re-appraisal of the amount of rent payable after the initial six years of the lease and thereafter every three years.

Between 1976 and 1980, new commercial leases were granted subject to a reserve rent set by the Commonwealth. At auction any premiums bid over the reserve rent were payable as a capital sum. The reserve rent was payable for each of the first six years except for those cases where either to enable the building development to be completed or as an incentive to the developer, an exemption from payment of rent was given for one year, or longer in isolated cases. The rent was then reviewed after every subsequent three years to become a percentage of the net assessed rental value of the completed development. The percentages used were 15% for motel, 20% for office and 25% for retail leases.<sup>xiv</sup>

During the same period, industrial leases were granted subject to payment of the assessed fair market rent. Again rent was reviewed at six year and then tree-yearly intervals.<sup>xv</sup>

In June 1980, the Minister for the Capital Territory announced the adoption of new policies governing the sale of new commercial leases and policies aimed at facilitating the rationalisation the plethora of disparately different forms of commercial lease terms and rent provisions.<sup>xvi</sup>

Further changes to conditions under which both residential leases and leases for business purposes occurred as the direct consequence of the introduction of Private Sector Land Development in 1987 and also following self-government in 1989.

#### Lease Variations

It should be noted that any variation to a non-purposive provision of a CALO lease would, prior to the amendment of section 11A given effect by Act No. 12 of 1991, have needed to be achieved by the “surrender and regrant” process of lease variation because no other appropriate legislative provision existed.

Between 1 January 1971 and the repeal of the Act in 1992, a cash premium based on a percentage of the added value attributable to a lease variation made under section 11A was payable by the lessee before the variation would be made effective. There was no provision to discount any such premium for the holder of a rental lease whose rent would likely increase commensurately at the next re-appraisalment.

Grants to *approved associations* not limited to *Leases (Special Purposes) Ordinance 1925*

While CALO permitted the grant of leases of land for business or residential or both business and residential purposes, it did not prohibit the grant to leases to *associations* and in section 23, specifically provided for avenues for rent reduction and relief from lease provisions for *approved associations*.

### **The Leases Ordinance 1918**

The *Leases Ordinance 1918* (“LO”) was the oldest of the four Territory leasing ordinances and the only one of them to apply throughout the whole of the 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.<sup>xvii</sup>

Regulation 5 of the Regulations made under the ordinance provided that leases could 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 was no statutory restriction on the purpose for which a lease could be granted under this ordinance.<sup>xviii</sup>

About 200 rural leases existed at any one time under the LO; a number of properties with Government owned improvements; some service station sites; and, prior to the introduction of the *Housing Assistance Act 1987*, which vested ownership of public housing in the *Commissioner for Housing*, about 10,000 fortnightly tenancies were held by public housing tenants.

Regulation 9 specified eligibility criteria for persons applying for the grant of a lease or for consent to the assignment of a lease but left the Minister with a broad discretion in determining a person’s eligibility. Nevertheless, Regulation 9 prohibited the grant of a lease to a person unless the Minister had determined that person eligible to become a lessee.

Leases could be granted-

- without inviting applications – Regulation 10;
- following calling for applications in the form of tenders – Regulation 12;
- where two persons were equally eligible to become a lessee, by ballot – Regulation 14; and
- where no person responded to an invitation to apply for the grant of a lease, by direct grant to an eligible person – Regulation 15.

#### Leases subject to payment of land rent

Leases were granted conditional upon the payment of land rent subject to such re-appraisal and at a level as the Minister would determine – sections 3 and 3A – an avenue of review of the level of rent was available to the lessee under the provisions of the *Land Valuation Ordinance 1936*.

In 1971, the *Gorton Gift* legislative changes reduced to a nominal level rents under all leases granted under the *City Area Leases Ordinance 1936* and all leases (except diplomatic leases) granted under the *Leases (Special Purposes) Ordinance 1925*. The *Gorton Gift* arrangements did not affect rents under LO leases.

#### Transfer etc only with consent

Regulation 19 prohibited, without the Minister's consent, any-

- assignment of a lease;
- subletting of the leased land; or
- parting with possession of the leased land.

#### Lease Terms

Having regard for the fact that LO leases served the Government as a means of granting rights and obligations over land in the Territory which was not immediately required for the development and construction of the city of Canberra (ie “the land bank”), terms of LO leases varied considerably between weekly tenancies and twenty five or fifty year leases. The maximum term originally prescribed in the law was twenty five years.

### **The Leases (Special Purposes) Ordinance 1925**

Under the *Leases (Special Purposes) Ordinance 1925* (“L(SP)O”), the Minister was empowered to grant leases of land within the *City Area* for any purposes other than business or residential purposes. The leases were for periods up to but not exceeding 99 years and subject to such

covenants as to rent and otherwise as the Minister determined or as were prescribed.<sup>xix</sup>

The definition of *City Area* followed the definition which applied, from time to time, under section 4 of CALO.

With one exception, leases could provide for re-appraisal of the unimproved value of the leased land during each twentieth year thereafter. That exception was 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 was given, was not subject to re-appraisal. The earliest leases granted under this ordinance seldom, if ever, contained any provision for re-appraisal but those granted in later years almost invariably contained such a provision. The land rent charged varied, in some cases being in some cases being one percent and in others up to two and a half percent per annum of the unimproved value of the land leased.<sup>xx</sup>

The ordinance was amended in 1929 to give the Minister power to grant the Government of any country (outside the Commonwealth) or to any accredited agent of that Government a lease of land for diplomatic, consular or official purpose or for the purpose of an official residence.<sup>xxi</sup>

The Minister was also empowered to grant leases to any *approved association* for the purposes of that association. An “approved association” was any society or association or other body which was not carried on for profit or gain to its individual members and which the Minister declared (by notice in the Gazette) to be an approved association.<sup>xxii</sup>

By 1958 the following associations had been declared by the Minister to be *approved associations*-

- National Young Women’s Christian Association (*Gazette*, 17 July 1930);
- Canberra Grammar School (*Gazette*, 30 July 1931);
- Church Extension Association (Incorporated) (*Gazette*, 30 July 1931);
- Roman Catholic Church Authorities (*Gazette*, 25 August 1932);
- Roman Catholic Church Authorities (*Gazette*, 15 August 1935);
- Canberra United Masonic Temple Trust (*Gazette*, 14 November 1935);
- Canberra Church of England Girls Grammar School (*Gazette*, 2 April 1936);
- North Canberra RSL Memorial Club (*Gazette*, 28 February 1952);
- Country Women’s Association (*Gazette*, 9 October 1952);
- Canberra Workmen’s Club (*Gazette*, 10 September 1953); and
- Polish Ex-Servicemen’s Association (*Gazette*, 12 June 1958).<sup>xxiii</sup>

On 1 January 1971, land rent under L(SP)O leases, except for leases granted to foreign governments (“diplomatic leases”), was reduced to a nominal level (five cents per annum, if and when demanded).<sup>xxiv</sup> Land rent for diplomatic leases was retained with one notable exception, where land rent had been earlier commuted.

Brennan reports in 1971 that about 180 L(SP)O leases existed and were used for club buildings, diplomatic residences and offices, Churches, Church Schools or residences for clergy.<sup>xxv</sup> By the time the L(SP)O was repealed by the *Land (Planning and Environment) Act 1991*, in the order of 450 L(SP)O leases, including diplomatic leases, had been granted.<sup>xxvi</sup>

Upon self-government, the responsibility for diplomatic leases was retained by the Commonwealth<sup>xxvii</sup>, while the responsibility for granting and managing leases of *Territory Land* was transferred to the ACT Government<sup>xxviii</sup>. Reliable estimates of the number of L(SP)O leases granted and retained under the control of the ACT Government are not readily available but accessible data suggest that in the order of 320 leases would fall in that category.

In the context of commenting on *tenant rights*, Brennan mentions in 1971 that special provision was made for the conversion of a L(SP)O lease into a business lease under CALO when the special purpose, for which the lease had been granted, was not being fulfilled or had been accomplished or where the fulfilment of that special purpose was no longer possible<sup>xxix</sup>. In terms of policy and practice, it was not uncommon for a lease needing to be regranted under a different ordinance in order for it to be used for a different purpose or in order for it to be held by a class of different lessee.

As a matter of course, L(SP)O leases were granted by direct grant following an application from an eligible party, such as a foreign government, Church, or approved association.

The ordinance contained no specific provision prohibiting the transfer of an L(SP)O lease. Theoretically however, if the drafting of the subject Crown lease has been undertaken reasonably thoughtfully, the potential to transfer the lease to another party could have been somewhat, but not entirely, restricted by the inclusion of a provision requiring the use of the land by the grantee for the specified purpose, such as-

The LESSEE covenants with the COMMONWEALTH to use the land only for the purposes of a school for girls operated by the Canberra Church of England Girls Grammar School and ancillary thereto, for residential purposes;

Accordingly, while the lease could have been transferred, the provision for the use of the land would remain the same.

Only with the approval of the Minister could the purpose for which the land could be used be varied, either by surrender of the lease and the grant in exchange of a lease with a varied purpose provision or by the registration of an Instrument of Variation under the provisions of section 72A of the *Real Property Ordinance 1925*.

### **Church Lands Leases Ordinance 1924**

The *Church Lands Leases Ordinance 1924* (“CLLO”) was remarkable for several reasons-

- it was a very short piece of legislation;
- it permitted the Minister to grant leases only for church purposes and only within the *City Area* – sections 2 and 3(1);
- originally it restricted the size of any parcel of land leased to five acres (subsequently to 2 hectares) – section 3(2);
- no denomination was entitled to more than 1 lease – section 3(3);
- land rent was fixed at a nominal level – section 6;
- leases were granted *in perpetuity* and were not limited in term to a maximum of ninety-nine years as with leases granted under the other major leasing ordinances – section 5; and
- the lessees of land so leased were exempt from the payment of rates and taxes associated with the land – section 8.

For obvious reasons, the holder of a CLLO leases would be unlikely to want to divest themselves of it; particularly since an eligible party could obtain one (and one only) from Commonwealth or subsequently, the Territory on behalf of the Commonwealth, under such attractive terms and conditions.

There was no specific provision enabling the variation of any aspect of a CLLO lease.

According to departmental records, less than fifty leases were granted under the CLLO prior to its repeal.

### **The Land (Planning and Environment) Act 1991**

The four pieces of leasing legislation, under which leases were granted prior to 2 April 1992, were repealed by Act No. 118 of 1992<sup>xxx</sup> upon the

commencement of the substantive provisions of the *Land (Planning and Environment) Act 1991* (“Land Act”).

The statutory provisions governing the grant of leases of *territory land* were then to be found in Part V – Land Administration of Act No. 100 of 1991<sup>xxxi</sup>.

Regulations were made under Land Act on 8 May 1992<sup>xxxii</sup>. The Land (Planning and Environment) Regulations dealt with matters required under the Act to be prescribed including, at Regulations 12, 13, 14 and 15 arrangements for calculating the amount of a change of use charge for particular leases including prescribed classes of leases.

There have been a number of amendments to both the Act and the Regulations since their introduction. Those changes have been researched and analysed and, to the extent that they are material to a discussion on concessional leases, they been dealt with in the report.

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<sup>i</sup> Bills Digest 1997-98, Australian Capital Territory (Planning and Land Management) Amendment Bill 1997, Department of the Parliamentary Library, Parliament of Australia.

<sup>ii</sup> Brennan F, *Canberra In Crisis – 1971* – Dalton Publishing Company – p166.

<sup>iii</sup> Bills Digest 1997-98, Australian Capital Territory (Planning and Land Management) Amendment Bill 1997, Department of the Parliamentary Library, Parliament of Australia.

<sup>iv</sup> Act No.109 of 1988 – *ACT Self-Government (Consequential Provisions) Act 1988*.

<sup>v</sup> Act No. 118 of 1991 – *Land (Planning and Environment)(Consequential Provisions) Act 1991*.

<sup>vi</sup> Act No. 100 of 1991 – *Land (Planning and Environment) Act 1991*.

<sup>vii</sup> Figures supplied by DUS.

<sup>viii</sup> Ordinance No.31 of 1936 – An Ordinance Relating to the Leasing of Commonwealth Lands in the City Area of the Territory – *City Area Leases Ordinance 1936*.

<sup>ix</sup> Report to the Minister for the Capital Territory – *Changes to commercial leasehold arrangements in Canberra* – January 1980 – Chairman R. Else-Mitchell – p3, para 2.2.

<sup>x</sup> Ordinance No. 45 of 1970, section 15 – “The Gorton Gift”.

<sup>xi</sup> Ordinance No. 8 of 1924, section 14 – *City Area Leases Ordinance 1924*.

<sup>xii</sup> Ordinance No.1 of 1935, section 8 – *City Area Lease Ordinance 1935*.

<sup>xiii</sup> Ordinance No. 13 of 1974, sections 2, 3 and 4.

<sup>xiv</sup> Report to the Minister for the Capital Territory – *Changes to commercial leasehold arrangements in Canberra* – January 1980 – Chairman R. Else-Mitchell – p3, para 2.7.

<sup>xv</sup> Report to the Minister for the Capital Territory – *Changes to commercial leasehold arrangements in Canberra* – January 1980 – Chairman R. Else-Mitchell – p3, para 2.8.

<sup>xvi</sup> Statement For Press – The Minister for the Capital Territory - 9 June 1980.

<sup>xvii</sup> Brennan F, *Canberra In Crisis – 1971* – Dalton Publishing Company – p169.

<sup>xviii</sup> Brennan F, *Canberra In Crisis – 1971* – Dalton Publishing Company – p169.

<sup>xix</sup> Brennan F, *Canberra In Crisis – 1971* – Dalton Publishing Company – p167.

<sup>xx</sup> Brennan F, *Canberra In Crisis – 1971* – Dalton Publishing Company – p168.

<sup>xxi</sup> Ordinance No. 14 of 1929, section 2.

<sup>xxii</sup> *Leases (Special Purposes) Ordinance 1925*, sections 3(3) and 3(5).

<sup>xxiii</sup> Laws of the Australian Capital Territory 1911-1959, Vol I - *Leases (Special Purposes) Ordinance 1925*, Footnote p808.

<sup>xxiv</sup> Ordinance No. 46 of 1970, section 4 – “The Gorton Gift”.

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<sup>xxv</sup> Brennan F, *Canberra In Crisis* – 1971 – Dalton Publishing Company – p168.

<sup>xxvi</sup> Figures supplied by DUS.

<sup>xxvii</sup> Ordinance No. 39 of 1989 – *National Land Ordinance 1989* (C'lth).

<sup>xxviii</sup> *Australian Capital Territory (Planning and Land Management) Act 1988* (C'lth), section 29.

<sup>xxix</sup> Brennan F, *Canberra In Crisis* – 1971 – Dalton Publishing Company – p169.

<sup>xxx</sup> Act No. 118 of 1991 – *Land (Planning and Environment)(Consequential Provisions) Act 1991*, Schedule 2.

<sup>xxxi</sup> Act No. 100 of 1991 – *Land (Planning and Environment) Act 1991*, Part V.

<sup>xxxii</sup> Regulations 1992 No.5 – *Land (Planning and Environment) Regulations*.