THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

REPORT ON
THE CANBERRA LEASEHOLD SYSTEM

HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON TRANSPORT, COMMUNICATIONS AND INFRASTRUCTURE

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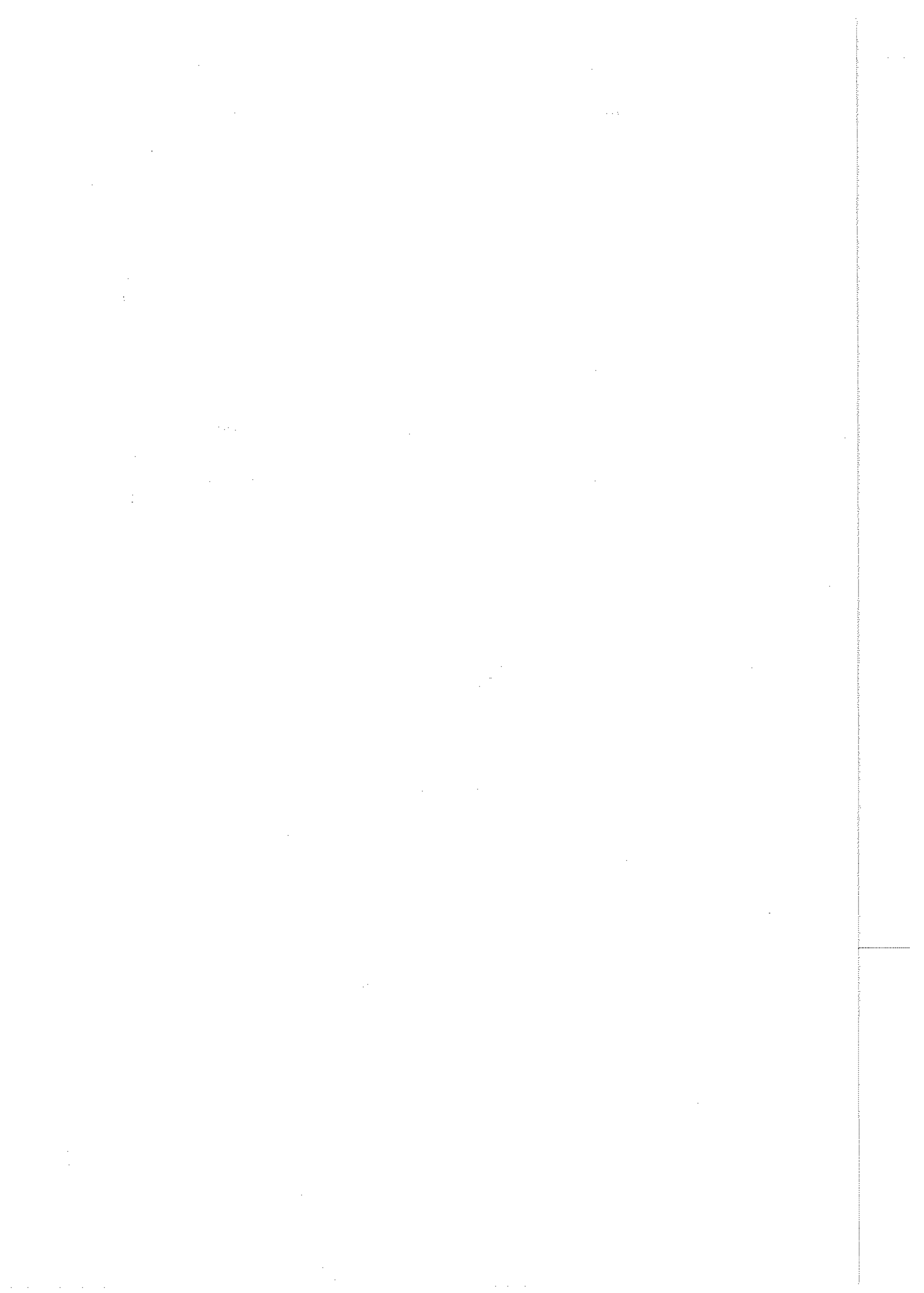

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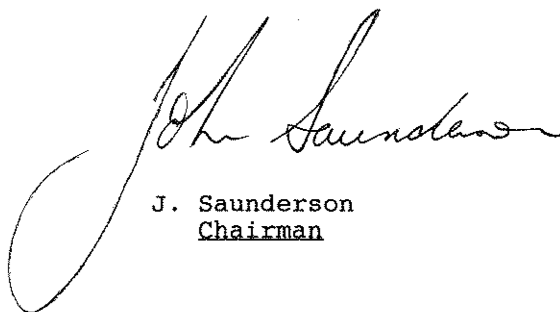
ADOPTION OF JOINT SUB-COMMITTEE REPORT

On the 9th day of November, 1988 the House of Representatives Standing Committee on Transport, Communications and Infrastructure adopted the Joint Sub-Committee report on the Canberra Leasehold System.



J. Saunderson
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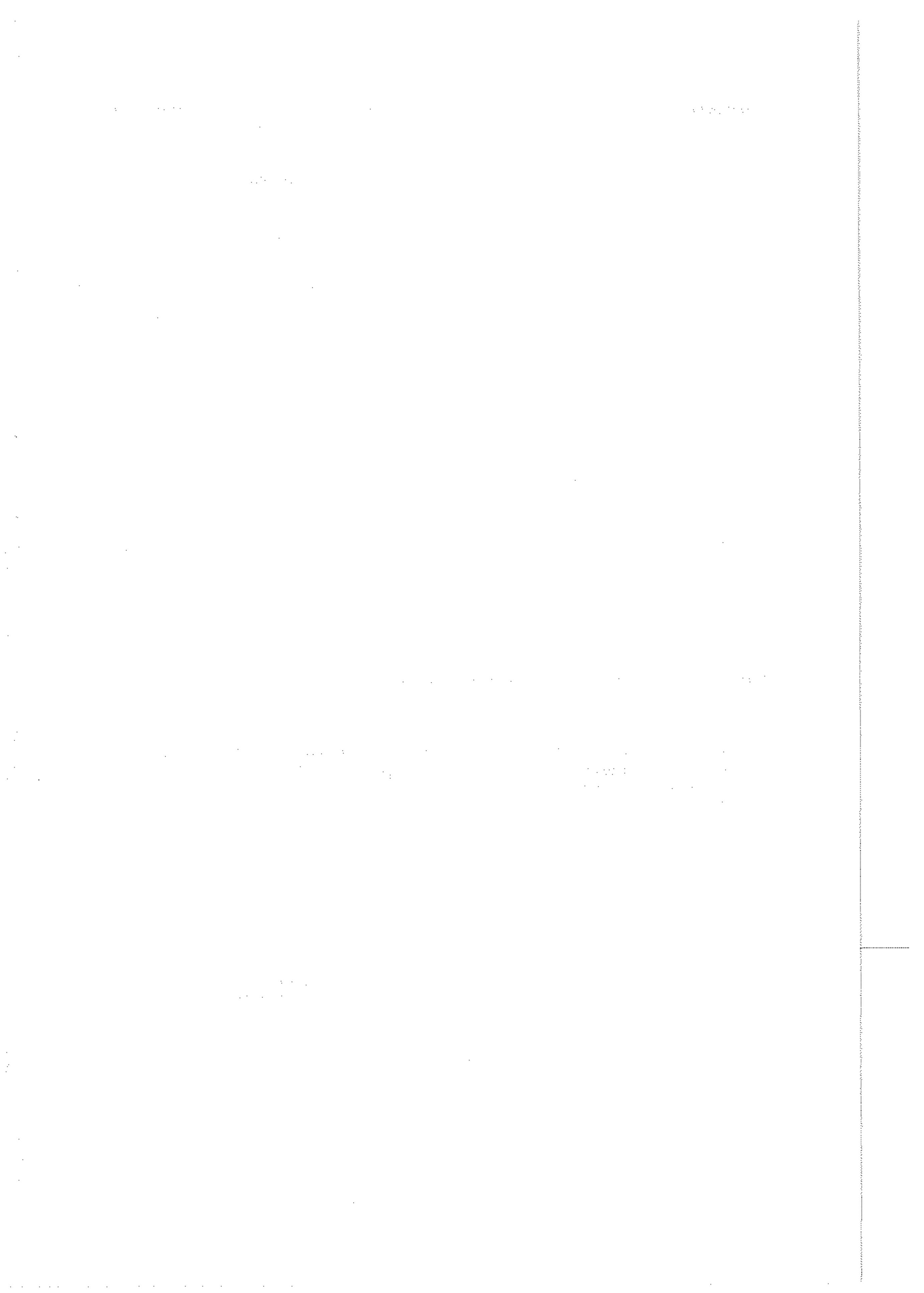


CONTENTS

Page

ACKNOWLEDGEMENTS vii

RECOMMENDATIONS ix

CHAPTER 1: BACKGROUND TO THE INQUIRY 1

CHAPTER 2: LEASEHOLD PROPERTY TENURE IN THE ACT 5

Establishment and Functions of the Leasehold System 5
(a) Reasons for Leasehold 7
(b) Concept of Leasehold Tenure 7
(c) Functions of Leasehold Tenure 9
Leases and Lease Ordinances 11
Administration of the Leasehold System 14
Benefits of the Leasehold System 17

CHAPTER 3: SPECIFIC ASPECTS OF THE LEASEHOLD SYSTEM 21

Introduction 21
Length of Lease 21
Responsibility for Planning and Estate Management 26
Role of Lease Administration in Redevelopment 31
Effects of Plans on Planning and Development Authorities 34
Private Sector Involvement 35
Summary 41

CHAPTER 4: ADMINISTRATION OF THE LEASEHOLD SYSTEM 43

Introduction 43
Amendments to Lease Purpose Clauses 44
Betterment 46
Breach of Purpose Clauses 52
Ordinance Simplification and Consolidation 55
Development Rights 58
Summary 58

		Page
CHAPTER 5:	PUBLIC PARTICIPATION	59
	Introduction	59
	Public Participation in Planning Decisions	59
	Section 11A City Area Leases Ordinance - Appeal Procedures	63
	Section 17 CALO and Section 72A Real Property Ordinance - A Matter for the Public Record	66
	Public Information	68
	The Future Role of a Joint Parliamentary Committee on the ACT After Self-Government	69
	Summary	70
MINORITY REPORT:	Mr A.J. Downer, M.P. Mr T.A. Fischer, M.P. Mr C.W. Blunt, M.P. Mr R.G. Halverson, M.P.	73
APPENDIX 1:	THE CANBERRA LEASEHOLD SYSTEM	77
	Report by Professor Max Neutze	
APPENDIX 2:	LIST OF SUBMISSIONS	137
APPENDIX 3:	INDIVIDUALS WHO APPEARED BEFORE THE JOINT SUB-COMMITTEE	141

Acknowledgements

The Joint Sub-Committee wishes to thank all contributors to the inquiry, both those who provided written submissions and those who gave oral evidence.

Those who forwarded submissions or letters but did not appear before the Joint Sub-Committee may be assured that their contributions were taken into account during deliberations.

Recommendations

Recommendation 1: The Committee recommends that the Commonwealth retain ownership of land in the ACT.

Recommendation 2: The Committee affirms the view that the leasehold system of property tenure provides an appropriate basis for land planning and management in the ACT and that it should be retained.

Recommendation 3: The Committee recommends leases should be for a term of years rather than in perpetuity. Residential leases should be for 99 years. Non-residential leases should be for 99 years or for shorter periods and their renewal should be at the discretion of, and on terms negotiated with, the ground landlord, and will include the payment of a further premium.

Recommendation 4: The Committee recommends that the City Area Leases Ordinance be amended to provide for the renewal of residential leases at the end of 99 years without further charge.

Recommendation 5: The Committee recommends that lease purpose clauses in leases under the Ordinances be treated as both instruments of land use control and parts of an agreement. Administration and planning should be closely related to one another and co-ordinated.

Recommendation 6: The Committee recommends that the authority responsible for lease administration, in close co-operation with the proposed Territorial Planning Authority, should take the initiative, rather than being reactive in relation to redevelopment.

Recommendation 7: The Committee recommends that approved policy plans and development plans should be binding on the planning and development authority.

Recommendation 8: The Committee recommends that implementation of land development by the private sector must be closely monitored and its effects carefully assessed by the ACT Administration.

Recommendation 9: The Committee believes that the current methods of amendment of lease purpose clauses under section 11A of the City Area Leases Ordinance are unsatisfactory and recommends that they should be replaced by surrender of the existing lease and the grant of a new lease for the new purpose.

Recommendation 10: The Committee recommends the current 50 per cent betterment levy should be replaced by compensation to the lessee for the value of the lease that is surrendered, including improvements, and a charge of the full premium value for the grant of a new lease together with the cost of any necessary off-site services.

Recommendation 11: The Committee recommends that the lease administration section of ACT Administration should take action against lessees who breach the purpose clauses of their leases.

Recommendation 12: The Committee recognises that there are benefits in simplifying leases. However, the Committee recommends that in the process there should be no weakening of safeguards.

Recommendation 13: The Committee recommends that the development rights of some of the older existing leases need to be defined more precisely.

Recommendation 14: The Committee believes there should be opportunities for public participation in planning decisions not only when draft policy and development plans are being prepared but also when specific decisions are being made to change lease purposes or to grant leases on unleased land in established areas.

Recommendation 15: The Committee recommends there be a legislative requirement for proposals for surrender and a new grant to be publicly notified (section 11A CALO). They would be considered in the first instance by the planning and leasing authority. Its decisions would be subject to objection or appeal through the AAT. This procedure would apply to leases under any of the four lease ordinances.

Recommendation 16: The Committee recommends that the financial terms and other conditions of leases granted under section 17 of the City Area Leases Ordinance or under section 72A of the Real Property Ordinance should be on the public record.

Recommendation 17: The Committee recommends that the ACT Administration publish a booklet which sets out the features of the leasehold system, explains the rights and responsibilities of lessees and provides an introduction to the areas of the department responsible for the various aspects of leasehold administration. This booklet should be made freely available.

Recommendation 18: The Committee, therefore, recommends that within one year the ACT Administration report to both the House of Representatives and Senate Standing Committees on Transport, Communications and Infrastructure on how these recommendations are operating.

CHAPTER 1

BACKGROUND TO THE INQUIRY

1.1 In 1987 the former Joint Committee on the ACT commissioned Professor Max Neutze to study and report on the leasehold system in response to a growing perception that the leasehold system having 'served the Territory well in its first phase of development is experiencing problems in the redevelopment period of the city's growth'. (Joint Committee on the ACT, 1987, paragraph 7.5)

1.2 The Terms of Reference for the study were as follows:

> The consultant is requested to report and recommend to the Committee on:
>
> 1. The nature of the leasehold system of land tenure and the opportunities it creates for planning management of the ACT;
>
> 2. Consequences of the current approach to administering the system in relation both to development and redevelopment, including such aspects as:
>
>   - the determination and administration of lease purpose clauses;
>   - enforcement of lease purposes;
>   - the process for variation of lease purposes;
>   - the nature and rate of betterment tax when lease purposes are varied; and
>   - appeal mechanisms;
>
> 3. Institutional arrangements for managing the leasehold system by the National Capital Development Commission and the Department of Territories;

4. Policy relating to the expiration and renewal of leases.

1.3 Following the 1987 double dissolution the Joint Committee on the ACT was not reappointed in the 35th Parliament. Under current Committee arrangements ACT matters are referred specifically by each Chamber to their respective Standing Committee on Transport, Communications and Infrastructure.

1.4 On 5 November 1987 the House of Representatives agreed with message No. 37 from the Senate which empowered the Senate Committee to sit as a joint committee with the House of Representatives' Committee and:

(2) That the joint committee appoint as its chairman the Chairman of the Senate Committee or the Chairman of the House of Representatives Committee.

(3) That the quorum of the joint committee be 2 Senators and 2 Members of the House of Representatives.

(4) That a sub-committee of the Senate Committee, when considering the matters referred to in paragraph (1), be empowered to sit with a sub-committee of the House of Representatives Committee, when that sub-committee is considering those matters, as a sub-committee of the joint committee.

(5) That a Senator who is not a member of the Senate Committee may attend a meeting of the joint committee or a sub-committee, with the approval of the joint committee or sub-committee, and participate in its proceedings and deliberations, but may not vote.

1.5 On 18 April 1988 the House of Representatives in considering message No. 131 from the Senate passed a motion:

(1) That all aspects of the Australian Capital Territory leasehold system be referred to the Standing Committee on Transport, Communications and Infrastructure for inquiry and report.

(2) That the Committee when inquiring into this matter:

   (a) confer with a similar committee of the Senate; and

   (b) have power to consider and make use of the evidence and records of the Joint Committees on the Australian Capital Territory appointed during previous Parliaments and the paper entitled _The Canberra Leasehold System_ prepared by Professor Max Neutze for the Joint Committee on the Australian Capital Territory appointed in the 34th Parliament.

1.6 The House of Representatives agreed with message No. 131 from the Senate:

> That the Standing Committee when considering this matter be empowered to sit as a joint committee with the Standing Committee on Transport, Communications and Infrastructure of the House of Representatives when that Committee is considering this matter, under the same provisions as the joint committee empowered by Resolution of the Senate of 3 November 1987, concurred in by the House of Representatives on 5 November 1987, to examine proposed variations to the plan of lay-out of the City of Canberra.

1.7 The work of the inquiry on the Canberra leasehold system was undertaken by a joint sub-committee. The members of the Joint Sub-Committee were:

Mr J.V. Langmore, M.P., Chairman,
Australian Capital Territory

Senator G. Chapman, South Australia

Senator D.J. Foreman, South Australia

Senator R.F. McMullan, Australian Capital Territory

Mr A.J. Downer, M.P., South Australia

Mr T.A. Fischer, M.P., New South Wales

Mr J. Saunderson, M.P., Victoria

Mr J.H. Snow, M.P., New South Wales

Senator M.E. Reid, was given approval to participate in the proceedings of the Joint Sub-Committee under paragraph 5 of message No. 37 from the Senate and agreed to by the House of Representatives (see paragraph 1.4).

1.8 The reference was advertised in The Canberra Times in late April. The House of Representatives and Senate Standing Committees on Transport, Communications and Infrastructure called for written submissions from interested persons and organisations and the closing date for receipt of submissions was 27 May 1988. A number of interested parties had difficulty in meeting the deadline and the Committees did accept submissions after the closing date.

1.9 The Joint Sub-Committee received 23 written submissions and 4 supplementary submissions. Public hearings were held on 15 June 1988 and 15 July 1988. Sixteen witnesses appeared before the Joint Sub-Committee and 423 pages of evidence were taken. Appendix 2 lists the submissions received by the Joint Sub-Committee and Appendix 3 provides a list of witnesses.

CHAPTER 2

LEASEHOLD PROPERTY TENURE IN THE ACT

ESTABLISHMENT AND FUNCTIONS OF THE LEASEHOLD SYSTEM

2.1 The birth of Canberra was primarily the product of political forces and antagonisms. The acquisition of territory for the national capital resolved the conflicting interests of Melbourne and Sydney in vying for national capital status. In the minds of the people framing the legislation for the establishment of the new National Capital there were two strands of thought:

> Firstly, there was a well developed concern about the possibility of substantial land speculation that might eventuate because of the siting of the National Capital in an undeveloped area. Land scandals associated with the grant of lands and speculative development were especially common in Sydney and Melbourne in the 19th century and led to heightened concern that after the long debate about the siting of the National Capital it would give rise to unseemly land speculation.
>
> Secondly, the debates on Federation and the establishment of a new National Capital were set against the needs of the limited funds available for the establishment of a Federal Government and its associated bureaucracy. It was essential that the establishment of the National Capital be seen as an exercise that could be self funded out of the sale and development of land and associated land rent revenues. (Evidence, p. 310)

2.2 The emphasis in the debates was on the social evils of speculation, high profits for the speculators and high prices and costs for home buyers and the public providers of services. (Neutze Evidence, p. 12) With this background came the idea of public ownership of land and that private occupation of land should be leased rather than sold 'for an estate of freehold'. As Professor Neutze (see Appendix 1 for his paper entitled The Canberra Leasehold System) notes:

> There was no alternative to the government undertaking the works necessary to establish the city: private developers would not have been willing to take the risk. To establish the city, the government needed to own the site. Without public ownership of all the land, values would have soared and the land required for public purposes, for defence, research, education and open space would have been costly to acquire. Public ownership made land available for Commonwealth and other public purposes and also allowed sites to be granted at zero or small cost to non-profit-making bodies including churches, schools, clubs, political parties and national associations, and other users judged to be socially valuable. Without public ownership it is inconceivable that the natural topography would have been conserved to provide the landscape setting for the city and the National Capital Open Space system, with recreation reserves, throughout the Territory. (Evidence, pp. 11 and 12)

At the time of Federation:

> Public land ownership and leasehold tenure were seen as a way of passing on unearned increases in the value of the land to the whole community rather than to individual land holders. (National Capital Development Commission (NCDC) Evidence, p. 102)

2.3 The principle of Commonwealth ownership of land was given expression in section 125 of the Constitution which states in part:

> 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 belong to the Commonwealth. ... (ibid.)

(a) Reasons for Leasehold

2.4 There were a number of reasons why a leasehold system was adopted in the ACT.

2.5 The leasing of land was seen as a way of ensuring _orderly development_ by placing conditions on the granting of leases. By leasing the land the Commonwealth Government could provide sites at low capital cost for housing and for public and community services as well as for commercial activities. Leasehold provided a means of planning the city so that it developed in a _predictable_ fashion. It was expected to be less difficult to enforce urban than rural lease conditions since use of land in urban areas could be more readily observed. Leasehold could _prevent speculation_ in allotments by requiring building within a specified period, thus establishing stability and predictability of land use. It reassured residents and other lessees about existing and future use of nearby land. (Neutze Evidence, p. 12)

(b) Concept of Leasehold Tenure

2.6 Although the operation of leasehold tenure in the ACT is widely accepted, it was evident to the Committee that the concept of leasehold tenure as a land policy is little understood.

2.7 Essentially there have been three strands of land policy in Australia, according to Professor Neutze.

1. The government leasing of land to users which enables the achievement of public objectives

through the conditions under which the lease is granted and through revenue from the rents charged.

2. The taxation of land which aims to both produce revenue and discourage owners from keeping their land idle or under-used.

3. The regulation of land use in order to achieve social and environmental objectives through land use management - this was traditionally known as town planning and now it is known as environmental planning. (Neutze Evidence, p. 10)

However, 'the only measures that can be used once land is owned freehold (short of resumption) are taxation and regulation'. (ibid.)

2.8 Mr Ed Wensing, in oral evidence to the Committee, clearly made the distinction between freehold and leasehold tenure:

> Freehold tenure empowers land-holders to control the use and development of the land, and its sale, transfer and subdivision. Leasehold tenure splits that down the middle. Leasehold tenure empowers the landlord to control the use, development and subdivision of the land but the lessee only has rights and entitlement to the use and enjoyment of the land for the terms and conditions laid down by the State. (Evidence, pp. 292-293)

2.9 The Committee believes it should be noted that the leasehold tenure system in the ACT serves two major interests - national and local. Canberra land is a national heritage to be safeguarded and used for the benefit of the nation and its capital. (Neutze Evidence, p. 43) Leasehold tenure ensures that ownership of the land remains in the public domain for the benefit of all Australians. Not only does the leasehold system

serve the Territory's National Capital and Seat of Government characteristics but it serves the interests of the local Canberra community by ensuring orderly development in a predictable fashion and by preventing speculation.

(c) Functions of Leasehold Tenure

2.10 There are two functions performed by leasehold tenure:

(i) land use planning;

(ii) estate management;

and it is Government which has the dual role of carrying out these functions - as planner and as landlord.

2.11 The functions of estate management and land use planning are distinct but closely related. As the NCDC stated:

> From the first auction in December 1924, the lease agreement between the Commonwealth and the lessee was more than just the contractual basis of tenure for individual sites. Leases were drawn to contain purpose clauses and development conditions. In this way they became and have remained the primary instrument of land use control. The interests of the Commonwealth and the community have thereby been safeguarded in accordance with the original intentions of Parliament. (Evidence, p. 103)

2.12 The management of the estate which includes lease administration should maximise the long-term return to the community from the whole leasehold estate. Professor Neutze states that:

> The primary objective of the ground landlord is to maximise wealth deriving from the estate. (Evidence, p. 29)

and:

> One of the objectives of a planning authority is the protection of amenity which, on a large estate, is consistent with maximisation of the value of the land. (ibid.)

2.13 In the exercise of this dual role there exists the possibility of conflict between the Government's desire as landowner and estate manager to maximise the economic return from its property and its responsibility to ensure that the National Capital develops in accordance with the City Plan. For instance:

> Planning objectives, however, are broader and include the wellbeing of those living outside the estate and of future generations. A planning authority is concerned to ensure social equity so that all, even poor households, are not deprived of environmental amenities such as accessibility to social facilities and services. (Neutze Evidence, p. 29)

Further, Professor Neutze points out:

> These broader objectives may not be consistent with the objectives of a lessor [ground landlord]. (Evidence, pp. 29 and 30)

Hence, it is important to understand the distinct, but closely related functions of estate management and land use planning. They are, according to Professor Neutze, closely related for two reasons:

> (i) they both make use of a very important instrument, lease conditions defining development rights; and
>
> (ii) in the great majority of cases an enlightened lessor and an enlightened planning authority will agree on the appropriate lease conditions. (Evidence, p. 32)

This relationship between the two functions has not always been evident in the way land use planning and lease administration have been handled in the past in Canberra. There needs to be co-ordination between the two functions.

2.14 The public ownership of land and the system of leasehold tenure in the ACT have made it possible for the government 'as lessor and planner to promote its plan by initiating land development and land use changes and to control the use of land after development through direct contracts with lessees'. (Neutze Evidence, p. 17)

2.15 Lease purpose clauses are a very important instrument in controlling land use development. By stipulating conditions on the granting of leases the government has ensured the planned, orderly and rational development of Canberra.

LEASES AND LEASE ORDINANCES

2.16 In 1924 the first Canberra leases were auctioned with bidders nominating a capital price and:

> The successful bidder was required to pay the first year's land rent, 5 per cent of the sum bid, to obtain the lease. From 1935, however, rents were fixed at 5 per cent of the assessed value and any amount bid in excess of that value had to be paid as a cash premium. This was the first step in conversion from a rental to a premium leasehold system. From 1962 bidding was solely for the premium that had to be paid. In 1970 land rent was effectively abolished when it was reduced to five cents payable on demand and a premium became the only payment: the conversion was complete. (Neutze Evidence, p. 17)

2.17 There was an important change in 1936 with:

> ... the introduction of Section 19A into the City Area Leases Ordinance [CALO] giving lessees the right in improvements on their leases. As is quite common elsewhere, prior to 1936 CALO provided that improvements would become the property of the landlord when a lease expired. Under Section 19A, if a further lease is granted the lessee does not have to pay for the value of improvements and if no further lease is granted the ground landlord must compensate the lessee for the value of improvements. Along with others this amendment increase[s] the equity of lessees in their leases. (ibid. p. 18)

2.18 With the earliest leases the breadth of the purposes permitted varied 'from very restrictive and inconsistent for the Sydney and Melbourne Buildings in Civic to very simple in Mort and Lonsdale Streets'. (ibid.)

2.19 The great majority of leases are auctioned so that the prices and conditions are on the public record. However, there are:

> ... occasions ... when a business has special requirements and negotiates with the Commission and the Department for a suitable site with appropriate lease conditions. Section 17 of CALO makes provision for such cases. It does not make any provision for lease conditions and the "appropriate fee" to be publicly notified and this has caused disquiet in some cases, particularly the White Industries lease. (Neutze Evidence, p. 19)

2.20 There are four categories of lease granted in the ACT, each under a separate ordinance.

1. The City Area Leases Ordinance 1936 (CALO) is the most important. It applies to business (including industrial) and residential leases within the defined city area. Leases can be for up to 99 years, and most are for that period. The leases are granted subject to a number of covenants and conditions, of which the most important are those which define the

purpose for which the lease may be used, a period within which building must be commenced and completed and a minimum cost and maximum intensity of development.

2. The Leases (Special Purposes) Ordinance 1925 provides for the granting of leases for purposes other than residential and business. These leases also may be for up to 99 years and contain purpose and building covenants. They are used for embassies and for non-profit bodies such as schools, clubs, associations and additional leases to churches. This ordinance makes no provision for transfer of leases.

3. The Church Lands Leases Ordinance 1924 provides for the lease of one site of not more than 5 acres to each church or denomination. They have always been rent free and are leases in perpetuity. These leases can be used only for church purposes or certain church-related purposes in conjunction with a church.

4. The Leases Ordinance 1918 is the only ordinance to apply to the whole of the Territory. It is used for rural and all other leases outside the City Area, and for certain short term leases within the City Area, including rental of premises for Commonwealth uses, tenants of government housing and temporary industrial storage. Canberra's two drive-in theatres were developed on leases granted under this ordinance. Leases are usually granted for up to 50 years in rural areas and up to 25 years in the City Area. They are not transferable without prior consent of the Minister. (Neutze Evidence, pp. 19 and 20)

2.21 In January 1971 CALO was amended so that a lessee who was granted a change in lease purpose under section 11A had to pay the government fifty per cent of the increase in the value of the site which resulted from the change, less $1500. The amendment was prompted by the fact that lessees could have stood to make a very substantial capital gain where changes in lease conditions significantly increased development rights. (Evidence, p. 24) As Professor Neutze points out:

> The objective was to recover something for the public purse following abolition of land rents but to leave an incentive for lessees to undertake desirable redevelopment. The 50 per cent was essentially an arbitrary fraction, though with land rents at 5 per cent of capital value the Commonwealth's equity interest was probably less than 50 per cent prior to 1971. (ibid.)

2.22 The question of charging betterment, when it is charged, and the formula used is the subject of much concern and is discussed in Chapter 4. For a detailed description of leasing arrangements, variation in lease conditions and examples of the different situations where betterment has been levied, see Appendix 1, pages 90 to 98.

ADMINISTRATION OF THE LEASEHOLD SYSTEM

2.23 Responsibility for the functions of land use planning and estate management currently rests with the National Capital Development Commission (NCDC) and the ACT Administration within the Department of the Arts, Sport, the Environment, Tourism and Territories respectively. The administrative structure is changing with the move towards self-government.

2.24 Following the Block Review of the ongoing role of the National Capital Development Commission, the Government has adopted the Block recommendation that the NCDC be abolished and:

> A small National Capital Planning Authority will be set up by the Federal Parliament to oversee a National Capital Plan which will be binding on the ACT Government. (Hon. G. Punch, M.P., Ministerial Press Release, _National Capital Planning and Development_, 88/97, 7 July 1988)

and:

> Local planning will be the responsibility of the ACT Government's own administration. (ibid.)

2.25 Responsibility for national capital planning in the ACT remains with the Commonwealth and responsibility for metropolitan/municipal planning will be at the local level.

2.26 With the Government's decisions of 7 July 1988 in relation to self-government and the NCDC, the ACT Administration, in its August 1988 paper entitled _An Overview of Canberra's Future Planning and Development Arrangements_, has identified two challenges ahead:

- to pursue those aspects of development of their national capital that make it an effective seat of government and a place of which all Australians should be proud; and
- to develop Canberra in a balanced way as a place to live, catering for the employment, welfare, education, health, cultural and recreational needs of more than a quarter of a million people, with proper regard for economic, social and environmental factors. (ibid. p. 2)

2.27 Under the proposed arrangements there will be a new organisation, the National Capital Planning Authority (NCPA). The NCPA will oversee the Federal responsibilities which have been identified as:

- setting the overall planning principles in a National Capital Plan; and
- protecting the integrity and character of *Canberra's layout - open spaces, etc. and* national institutions. (ibid. p. 3)

2.28 The NCPA will be a statutory authority responsible to a Federal Minister and subject to his general direction. The primary function of the NCPA will be to 'prepare, administer, continuously review and propose amendments (as necessary from

time to time) to a National Capital Plan (NCP)'. (ibid. p. 4) The National Capital Plan will be legally binding on the Federal and ACT Governments.

2.29 On the matter of basic territorial responsibilities the ACT Administration maintains that:

> An important advantage of the new arrangements will be that metropolitan/municipal planning and development decisions will be effectively co-ordinated with decisions on management (including maintenance) of the wide range of community services now provided by the ACT Administration - transport, housing, education, health, welfare, recreation, etc. These planning and development decisions impact directly on the local running costs of Canberra. (ibid.)

2.30 Further, ACT Administration says:

> It is envisaged that a self-governing ACT should be responsible for:
>
> . developing and managing a Territorial Plan for the ACT as a viable Territory offering residents and visitors an attractive, efficient and safe working, living and recreational environment;
>
> . decisions on implementation of the Territorial Plan through
>
>   - a statutory Territorial Planning Authority with direct access to the Chief Minister
>
>   - a separate statutory office of Lease Administrator who would conduct an open process of lease administration - (s)he would be required to ensure consistency of all aspects of lease administration with the National Capital Plan and Territorial Plan, and publicly notify schemes for the granting of new leases and interests in land

- co-ordinating detailed territorial works planning with operational management tasks of the Administration, where appropriate;

- managing the ACT estate;

- acting as the client for design and construction of territorial works - the ACT Administration over time would be able to commission Federal, State or private sector organisations for projects on a "value for money" basis; and

- facilitating speedy resolution of development proposals that meet planning criteria, through the facilities of such organisations as the Office of Industry and Development and the Canberra Development Board. (ibid. p. 5)

2.31 ACT Administration mentions that land is to remain under Commonwealth ownership and:

> It is not proposed to give the ACT Government freehold title or otherwise alienate the land to that Government. The leasehold system would remain unaltered, at least pending the outcome of the current Parliamentary review.
>
> However, the ACT Executive would be given control over all land in the ACT except Designated National Capital Areas and areas specifically reserved by the Commonwealth for its purposes - it would be required to manage the land in accordance with the National Capital Plan. (ibid. p. 6)

BENEFITS OF THE LEASEHOLD SYSTEM

2.32 Canberra's unique and distinctive urban development has been achieved because, according to the NCDC (Evidence, p. 110), the current system includes the following:

- Commonwealth ownership of land in the ACT;

- a land tenure system which involves land use control within leasehold;

the planning, oversight and implementation of the development of Canberra by the Commonwealth.

2.33 The success of planning and development in Canberra is evident: there is now widespread acceptance of the leasehold system of tenure; leasehold has provided certainty and security in development; planning costs in Canberra have been lower than in the States. The lower planning costs, which have been up to a third lower than in the States, can be attributed to the single tier structure of planning in the ACT. Moreover, Canberra has one of the lowest costs of development in comparison to other Australian municipalities. The inefficiencies inherent in State systems such as fragmented development fronts, distortion of the planning process by development pressures and mismatches between the demand for infrastructure and community services and their provision, are avoided in Canberra. The leasehold system, according to the NCDC, has enabled:

- pro-active development by releasing sites with specific development conditions tailored to each block to control the type of land use and the quality of building;
- the lessee to initiate change to development rights, with the Commonwealth bound to respond according to clearly laid down rules;
- the lessee to have the certainty of an enforceable contract in which rights and obligations are clear; the lessee is obliged to pay only for the entitlements of the contract;
- leases to provide the basis for equitable and consistent property dealings between lessor and lessees; the exact nature of the lease covenants is on the public record;
- the use of the lease as a comprehensive tool for planners and estate managers pursuing joint goals of serving the community through astute investment of its resources and the provision of community facilities and services. (Evidence, pp. 112 and 113)

2.34 Critics of leasehold tenure usually have been those who want the tenure system changed for 'business' reasons. The overriding argument for change has been based on the grounds of economic development. With freehold, landholders would be able to control the use and development of the land, and its sale, transfer and subdivision. The Building Owners and Managers Association (BOMA), Canberra Association for Regional Development (CARD) and the Master Builders' Construction and Housing Association (CHA) of the ACT argue that:

> The private ownership of land and other economic assets is fundamental to the operation of a private enterprise economic system and putting legal and constitutional requirements to one side, there is currently no need [sic] why the land tenure system should be fundamentally different from that in operation in other parts of Australia. Quite the contrary, we are uniquely placed to have the potential of a better land tenure system than most parts of Australia, as we can effectively incorporate some planning controls within a modified system.
>
> Recent developments have placed Australia quite squarely in a deregulated economic environment, where all economic and investment decisions must be weighed against competing decisions in different locations. Financial deregulation for Australia will expose it to the competitive winds of rational investment, and similarly Canberra cannot be isolated by a peculiar and unnatural historical tenure system that would severely impede its ability to attract and maintain long term acceptable investment. (Evidence, p. 312)

There is no evidence that the leasehold system has inhibited private land development and in fact most people who held an opinion are inclined to think that the Civic redevelopment has been too fast.

2.35 To put the legal and constitutional requirements aside is irresponsible to the people of Australia. The Committee along with many Australians see Canberra land as a national heritage to be safeguarded and used for the benefit of the nation and its capital. Leasehold has provided planned, orderly and predictable development and has prevented speculation. It has ensured certainty and lessees know they have an enforceable contract in which rights and obligations are clear.

2.36 **Recommendation 1: The Committee recommends that the Commonwealth retain ownership of land in the ACT.**

2.37 **Recommendation 2: The Committee affirms the view that the leasehold system of property tenure provides an appropriate basis for land planning and management in the ACT and that it should be retained.**

2.38 The system of public ownership of land with leasehold tenure has the capability to continue to serve the needs of the ACT at the national and municipal level. However, there are weaknesses and deficiencies with the administration of the leasehold tenure system which has allowed Canberra land to be treated as the property of lessees (see following chapters).

CHAPTER 3

SPECIFIC ASPECTS OF THE LEASEHOLD SYSTEM

INTRODUCTION

3.1 The Joint Sub-Committee endorses the leasehold system of land tenure in the ACT. Given our general endorsement there are five specific matters about the nature of the leasehold system which we wish to address:

- length of lease;
- responsibility for planning and estate management;
- role of lease administration;
- responsibilities of the planning and development authorities;
- private sector involvement.

LENGTH OF LEASE

3.2 Residential leases in Canberra are granted for 99 years and at present these leases will be renewed at the end of their term without the payment of a further premium. The NCDC maintains that renewal of residential leases is appropriate as:

> The peculiar claims of residential leases, ... merit special consideration. The desire to hand down one's home and property from one generation to the next is a feature of the Australian sentiment and culture. (Evidence, p. 150)

and:

> The Commission does not see any advantage in moving to a perpetual leasehold system. (ibid.)

3.3 There has been an ongoing argument that leases should be converted to leases in perpetuity. Mr Keith Lyon, Deputy Secretary, ACT Administration, told the Committee that:

> Government policy comes very close to accepting, I believe, the notion of perpetual leases in connection with residential leases. I am certainly aware that some elements of the business community feel that the same principles should generally apply to certain industrial and commercial leases. The arguments that run counter to this relate to the need to keep options open and the principle of the government owning the land not being in a situation where it would automatically renew leases. (Evidence, p. 252)

3.4 One of the difficulties with perpetual leasehold is that it is fraught with contractual problems. (Wensing Evidence, p. 293) As the NCDC pointed out:

> If you accept the fact that a lease is both a contract and a means of land use control, the contract is not only one placing responsibilities on the lessee but also on the landlord. If that lease is for perpetuity, the landlord can be in a position where not only has he a responsibility to protect that lease, but he also has a planning policy which may have been endorsed for a quite different use in the area. A lease which has a term of years gives an opportunity for negotiations because of an expectation of a termination at some stage on the lease, so that that conflict can be overcome. (Evidence, p. 162)

3.5 A strong argument against converting residential leases to leases in perpetuity is that 'while Section 11A of CALO remains in force, it would be possible for the owner of a

residential lease in perpetuity to get a variation in lease purpose clause which allowed it to be used for non-residential purposes while it remained a lease in perpetuity'. (Neutze Evidence, p. 41)

3.6 The limited term of leases provides the Commonwealth with control of the lease through the existence of a fixed time limit on the lease.

3.7 The whole question of lease in perpetuity has tended to come from questions being raised about the attractiveness of Canberra for investment purposes.

3.8 Currently non-residential leases under CALO of less than 99 years can be converted to 99 year leases by the payment of a modest premium. Professor Neutze argues that:

> While this may be appropriate in most cases, there are some cases in which it is not. Especially when the lease is for a purpose that does not require a large investment and that is unlikely to continue for a long time, short term leases for business purposes should continue to be granted. What is more significant, however, is that Ministerial discretion has been used to allow lessees of non-residential leases to renew their leases at any time prior to the last 15 years of their lease, for a further 99 years, by paying ten per cent of its value for rating purposes (Press Statement of the Minister for the Capital Territory, 9 June 1980). This latter provision almost creates leases in perpetuity. (ibid.)

and he further argues that:

> Fixed term leases are frequently justified in part because they facilitate redevelopment. But it has often been pointed out that it is not possible to predict when redevelopment is likely to be desirable at the time a lease is first issued, and therefore lease termination

> cannot be relied upon for this purpose. There are two reasons why this conclusion is incorrect.
>
> The first is that it is easy to predict that some non-residential uses are likely to have a relatively short economic life. ... [See Appendix I, p. 115 for example]
>
> The second reason is that a limited term lease gives the landlord power to influence land use well before a lease expires. Since land rent is no longer collected, the only powers available to the lessor for the control of land use are the lease purpose clause and the limited period of the lease. When negotiating a change in use the landlord needs to use both of those powers ... . The fact that a lease will eventually run out provides eventual control to the landlord. The offer of a new long lease is one of the carrots which can be held out to existing or potential lessees. Long leases are, of course, necessary for investment in new buildings or major alterations. Well before the expiry date a lessee will need an extension if the property is to be saleable or used as security for long term mortgage borrowing. ... All renewals should be on terms negotiated with the landlord. Nor should leases for less than 99 years be able to be extended to 99 years unless the reason for the shorter lease has ceased to exist. (Evidence, p. 42)

3.9 The last two points of Professor Neutze's argument are important. Often businesses which are not fully resourced enter a lease arrangement then look for a speculative gain to cash up on closure of the business and, as part of that gain, seek a change in lease conditions. The requirement that businesses enter into renewal negotiations and lease extensions may provide an incentive for businesses to assess thoroughly the economics of going into a particular business and not hope to make a speculative gain with changes to the lease if the business is not viable. Renewal terms for non-residential leases should not be guaranteed in advance. To do this forgoes one of the main tools available to the ground landlord to promote the kind of development that is desirable without giving away public assets.

3.10 NCDC makes the point that:

> ... for non-residential leases a fixed term serves a valuable public purpose where land is clearly not in its 'end state'. Lease periods which respect viable life-cycles of use and improvements but match in with predictable needs for growth and renewal are a valuable planning tool. In practice, the stimulus to reviewing the most appropriate planning intentions, with a view to changing or renewing development rights begins to occur some time before the end of the term approaches.
>
> The principle of time-limited leases is particularly important for some community purpose leases where the rate of change in a community's social needs may be relatively high. (Evidence, p. 150)

3.11 Leasehold is not a disincentive to investment as some people have argued. 'Its attractions for developers are reflected in a statement made by the founder and then managing director of Lend Lease Corporation:

> As to the principle when they put it up for auction, not only did every bidder know exactly what he could and could not do with his particular site, but he also knew what everyone else - the other eleven owners in that particular city block - could and could not do. So that one doesn't have to fear as to what is going to happen next door to him, what is going to happen in front of him. (Dusseldorp, 1961)'. (Neutze Evidence, p. 12)

3.12 **<u>Recommendation 3</u>: The Committee recommends leases should be for a term of years rather than in perpetuity. Residential leases should be for 99 years. Non-residential leases should be for 99 years or for shorter periods and their renewal should be at the discretion of, and on terms negotiated with, the ground landlord, and will include the payment of a further premium.**

3.13 Recommendation 4: The Committee recommends that the City Area Leases Ordinance be amended to provide for the renewal of residential leases at the end of 99 years without further charge.

3.14 Although renewal of residential leases has been taking place there is no legislation to give effect to this. By amending CALO to incorporate a statutory right of renewal of residential leases, residential lessees will have the security of knowing that their leases will be renewed. The NCDC support this and argue that 'unlike commercial leases, in the large majority of residential leases the same need for the Commonwealth to consider changed development rights on expiry does not exist'. (Evidence, p. 150) The Committee's recommendation approximates residential leases in perpetuity but the lease purpose clause still controls land use and development rights are still clearly retained by the Commonwealth.

RESPONSIBILITY FOR PLANNING AND ESTATE MANAGEMENT

3.15 The development of Canberra has been fraught with difficulties. It began with differences as to where the capital should be and then extended to conflict between the grand planner, politicians and the public servants. Progress had hardly begun when the depression struck and the city's growth stopped. The war followed and it was not until the 1950s that Canberra was finally, if still somewhat begrudgingly, accepted as the national capital, its growth assured and Burley Griffin's concept realised - and then extended. In 1954 the control of Canberra was much where it had been in 1923, mainly in the hands of three Commonwealth departments: Interior, Works and Health. The National Capital Planning and Development Committee was an advisory committee only, with no executive authority. (The Capital and the Committee, Canberra and The Parliamentary Joint

Committee on the A.C.T., a paper presented to the Canberra and District Historical Society by Senator John Knight, Chairman of the Parliamentary Joint Committee on the A.C.T., August, 1980)

3.16 Uncertainty about the future of the Burley Griffin plan, the problems that had emerged with the patchy development of the city, the increasing transfers of public servants to Canberra and divided administrative responsibilities within the Territory were all factors which led to the appointment of a Parliamentary Committee of inquiry in 1954.

3.17 The Senate Select Committee on the Development of Canberra presented its report to the Senate in September 1955. The Committee recommended: (Recommendations 3 to 7)

- That the present system of divided departmental control of Canberra be replaced by a single Authority to be known as the Canberra Authority, and that to this end new provisions be inserted in the Seat of Government (Administration) Act providing for its establishment.

- That the Authority be constituted by a Commissioner, be a corporation sole with perpetual succession and an official seal, have power to acquire, hold and dispose of real and personal property, and be capable of suing and being sued in its corporate name.

- That the Authority be responsible to the Minister for the administration, planning, construction and development of the Federal Capital, and have powers, subject to necessary modifications, similar to those prescribed under section 14 of the Seat of Government (Administration) Act 1924.

- That the Authority be assisted by six permanent technical Directors comprising a Town Planner, Surveyor, Building Architect, Landscape Architect, Building Engineer, and a Roads and Services Engineer, who shall give such advice and assistance to the Commissioner as the Commissioner requires and shall perform such duties as the Commissioner directs.

- That the Authority be empowered to engage professional men, and seek the best expert advice on any matter pertaining to the development of the city.

3.18 As a result of these recommendations the Minister for the Interior on 28 August 1957 introduced the National Capital Development Commission Bill 1957 into the House of Representatives. The legislation provided for the NCDC to be responsible to the Minister for planning and construction and development of the national capital. Responsibility for administering the capital was to stay with the Minister for the Interior. (ibid. pp. 12 and 13)

3.19 In July 1982, following a decision by the Commonwealth Government that a review should be undertaken of the role and functions of the NCDC, the Committee of Review of the Role and Functions of the National Capital Development Commission was appointed. The members of the Committee were Mr George M. White (Chairman), Professor Max Neutze and Emeritus Professor Sir Rupert Myers, KBE. The Committee became known as the White Committee.

3.20 The White Committee in its report entitled Canberra Planning and Development said:

> It was envisaged by the 1955 Senate Select Committee that estate management would be a part of the responsibility of the planning and development authority. This approach was not adopted by the Government. The separation of estate management from planning and development caused few major problems during the early years when the major part of the Commission's work was in greenfields development, the need for public consultation was only sporadic, private enterprise activity was believed to have a limited role in the local economy, and financial constraints and the need to operate within a clear financial framework were less stringent than they are

> today. There is reason to believe that the separation of estate management was originally welcomed by NCDC because it was left free to pursue the primary goal of planning and developing the national capital.
>
> The circumstances today are quite different. Much of the pressure for new development is taking place in built-up areas where the impact on existing residents is far greater. There is need therefore for greater care in defining and maintaining planning policies and intentions, particularly where private lessees are seeking to maximise their development rights. Furthermore, the encouragement of private sector development requires negotiation over a range of factors and such negotiations are likely to be more streamlined and more efficient when there are fewer government agencies directly involved. (op. cit. p. 74)

3.21 There has been a number of major reviews of planning, development, land tenure and administration in the ACT between 1973 and 1987. As the NCDC points out:

> The problems of poor lease administration and inefficiencies resulting from the separation of the leasing function from planning and development have been considered in the context of numerous inquiries beginning in the early 1970s and leading up to the present time. Characteristically each review has grappled with the question of which organisational structure is most likely to ensure the continued efficient and effective planning and management of the Commonwealth's leasehold estate. (Evidence, p. 105)

3.22 The submissions this Committee received and the evidence it heard overwhelmingly supported planning and estate management being integrated into a single responsible authority. Both Professor Neutze and the White Committee are of the view that the estate management function should be integrated with the planning and development function. They recommended that a restructured NCDC should be the responsible authority.

3.23 The Committee was advised that the integration of estate management with planning was the only means of ensuring a common objective of preserving and enhancing the character of the National Capital.

3.24 The Government has made a decision, based on the Block Review (see Chapter 2, paragraphs 2.24 to 2.31 for outline of proposed structures) to implement a 'clear and unambiguous division between national and local responsibilities'. A basic principle, according to ACT Administration, is that the agencies of government should not be asked to serve two masters - the Federal Parliament and the proposed ACT Legislative Assembly. 'No single body could effectively serve both governments - each government will need its own source of advice on planning issues'. (ACT Administration overview paper, p. 2)

3.25 The Committee expresses its concern that in the administration of the Territorial Plan the separation of the national capital planning function may give rise to national capital planning intentions not being reflected in territorial planning decisions and thus detrimental to the preservation and enhancement of national capital characteristics. This separation of functions will require consultation and co-ordination which have not necessarily been a feature of the present system of separate planning and estate management authorities. Although the functions of land use planning and estate management are distinct they are closely related.

3.26 Further, the Committee sounds a warning that in the planning and development of Canberra, it must not be forgotten that Canberra land is a national heritage to be safeguarded for all Australians, which is the major reason why this Committee recommends the retention of the leasehold system of land tenure. The ACT Administration in discussing future directions for Canberra stated that:

> The ACT Administration records that as well as lease administration it now also has a responsibility for economic and social development and management. ... To that end, as previously indicated, the Government has seen fit to restructure the ACT Administration, create the Office of Industry and Development and strengthen the role of the Canberra Development Board. It is consistent with that Government initiative to ensure that any changes to the leasing system, any changes to the way that system operates and/or any changes to the way that system interfaces with all other municipal and Territorial activities are all directed to promoting the economic, social and/or environmental development and administration of the ACT. (Evidence, p. 226)

The Committee is concerned that the ACT Administration, in giving expression to the Government's decision, does not lose sight of the fact that Canberra land is a national heritage which must be safeguarded. It is essential to keep a reasonable balance between different objectives.

3.27 Recommendation 5: The Committee recommends that lease purpose clauses in leases under the Ordinances be treated as both instruments of land use control and parts of an agreement. Administration and planning should be closely related to one another and co-ordinated.

ROLE OF LEASE ADMINISTRATION IN REDEVELOPMENT

3.28 In the initial conversion from rural to urban land use in Canberra the initiative in development was taken by the planning and land development authorities and the lease administration. In today's climate where redevelopment is much more important, both planning and the lease administration are reactive. Lease administration is:

> ... not just a passive administrative operation. The Government in Canberra is not like a planning authority in other parts of Australia, even though there are similarities between the planning functions. The Government is the owner of the land in the ACT and one would expect the owner of the land to be interested in its best use and not simply sit back and wait until those who happen to be tenants of its land at the particular time to come forward with proposals for changing its use. This is not to argue that there should have been more redevelopment or, indeed, less redevelopment, but rather that the initiative for redevelopment should come primarily from the ground landlord. This is not to say either that there should not be opportunities for lessees to initiate redevelopment, but it does have implications for the stance which the Government should take under those circumstances. (Neutze Evidence, p. 67)

3.29 The ability of the lease administration authority to take the initiative in relation to development is, according to the NCDC, largely dependent on a close and co-operative relationship between it and the planning authority. The relationship must recognise the necessity for leasing operations to be conducted within the overall planning policy framework. (Evidence, p. 147)

3.30 On the question of the initiating role of the lease administration section and redevelopment, ACT Administration claims that the Office of Industry and Development 'is taking an active role, if not leadership in sponsoring redevelopment'. (Evidence, p. 229) The Administration also makes the point that:

> If an area warrants redevelopment, either on account of changes in the range of acceptable land uses or on account of the permissible scale of development, commercial interests are usually the first to establish the possibilities. This is an important role for the private sector. (Evidence, p. 230)

3.31 On the one hand the Administration claims it is active in sponsoring redevelopment but on the other it would appear it cannot identify and, therefore, initiate redevelopment possibilities. Essentially then, the Administration's role is a reactive one. The Administration, as ground landlord, should not sit back 'and wait until those who happen to be tenants of its land at the particular time to come forward with proposals for changing its use'. (Neutze Evidence, p. 67) Responsibility for deciding whether redevelopment is or is not warranted and the nature of the desirable redevelopment rests with the ground landlord. If the Administration is to undertake the promotional role it outlined to the Committee (see paragraph 3.26) then the Administration must take the initiative and responsibility rather than taking a reactive (sponsoring) role.

3.32 Professor Neutze expressed his concern with the importance the ACT Administration places on the role of the private sector in establishing redevelopment possibilities (see paragraph 3.30). He said:

> ... [it] reflects very clearly the failure of the ground landlord to take any responsibility for deciding whether redevelopment is or is not warranted and the nature of desirable redevelopment. The view that the individual lessees are the best and only appropriate judges of this matter would not be accepted by political leaders or urban administrators anywhere else in Australia or in other western countries. They would be rejected by both public and private ground landlords anywhere in the world. (Evidence, p. 406)

3.33 Recommendation 6: The Committee recommends that the authority responsible for lease administration, in close co-operation with the proposed Territorial Planning Authority, should take the initiative, rather than being reactive in relation to redevelopment.

EFFECTS OF PLANS ON PLANNING AND DEVELOPMENT AUTHORITIES

3.34 In other States, approved plans are not binding on State Governments. The situation in the ACT is rather different as the NCDC has not only been a planning authority but also a major development authority. (Neutze Evidence, p. 76) There is no formal requirement for the Commission to give due weight to its own adopted plans.

3.35 Policy and development plans are adopted by the NCDC and noted by the Minister after they have been released for public comment and following representations. At present the NCDC is not bound by its own plans even though these plans can be used as the legal basis for a number of decisions binding on lessees, for instance, Ministerial veto of proposed variations under section 11A of CALO. The Commission should be bound to conform to published plans that have been approved by the Minister after public consultation.

3.36 The NCDC advised the Committee 'that the planning processes documented in the Commission's Plans Systems Manual ensure that the Commission's planning decisions are governed by approved policies and that such policies will not change unless they have again been subject to the usual procedures (including public consultation)'. (Evidence, p. 152)

3.37 Both the ACT Administration and the NCDC agree that policy and development plans should be binding.

3.38 Recommendation 7: **The Committee recommends that approved policy plans and development plans should be binding on the planning and development authority.**

PRIVATE SECTOR INVOLVEMENT

3.39 The private sector has been given an important role to play in development. Land development in Canberra is now to be undertaken by private enterprise.

3.40 Under the old arrangements Canberra land was serviced by private contractors working to plans prepared by the government. During this period the land was not leased.

3.41 With the new arrangement the NCDC, and in due course its successor, the Territorial planning authority, is responsible for overall planning of residential land development, e.g. location of new suburbs and, together with the ACT Administration, for setting and policing standards of development, e.g. to ensure they conform with public health, safety and environmental protection.

3.42 The NCDC or its successor will continue to be responsible for planning, design and construction of infrastructure related to residential land development including headworks, major services, major roads, public transport and community facilities not funded from land sales.

3.43 A new system of an undisclosed reserve price is to operate at auctions of raw land with an option to negotiate with the highest bidder in the event of a reserve not being reached.

3.44 Developers that purchase land will be free to sell the serviced land as they wish, for example, by private treaty, through agents or by auction. Developers may integrate land servicing and house construction activities.

3.45 At the Joint Sub-Committee's public hearing of 15 July 1988, the Chairman asked the ACT Administration to set out its views on the benefits and costs of transferring land development

to the private sector. In their response of 22 September 1988 the Administration, in discussing the basis and objectives of the transference, said that:

> Cessation of public sector subdivisional development reduces the demand on the ACT budget. Historically, amount [sic] allocated have fluctuated (more in accordance with overall Federal budget strategy rather than local needs) but usually substantial sums have been required. ...
>
> The introduction of private sector land servicing frees funds for other purposes and/or decreases borrowing. This has become increasingly important with the establishment of ACT finances on a Commonwealth/State basis. ...

and:

> In introducing private sector land servicing, therefore, the first objective was to move from a situation where public sector land servicing almost invariably added to the Territory expenditure burden to one where competitive public sale of raw land packages for development would provide a revenue return to the Territory budget.
>
> Other major objectives included the maintenance of standards, and providing more choice for purchasers in response to market demand without real increases in prices to the buyer - home and commercial.
>
> With these in mind, standards and processes have been carefully formulated and published, with a view to ensuring, as far as is possible, that the full benefits potentially available from the new system are obtained.

The Administration also said control measures have been developed which include comprehensive and streamlined procedures and land servicing standards to ensure:

- Government and community interests are protected in regard to the standards, amenity and maintenance costs of urban infrastructure and private industry clearly aware of the performance standards required of it; and
- that control measures do not, on the other hand, limit private enterprise flexibility, competitiveness and ability to meet different sectors of market demand.

3.46 A land release program has been formulated which, according to the Administration, will be regularly monitored and adjusted to meet changing circumstances.

3.47 The Administration advised the Committee that the aim of the land release program is to match land supply to market conditions, 'in a manner which encourages competitive production and sale and ensures prospective residential and commercial purchasers choices of location and type'. (ACT Administration additional information)

3.48 The Committee was told by witnesses that private sector development of land in Canberra raises serious questions about whether the advantages of public land ownership can be maintained.

3.49 With the land development function passing to private enterprise, the Committee was advised that developers will be involved in speculative holding of vacant land when they expect its increase in value to exceed holding costs. 'One of the advantages of Canberra's system of public land development is that large contracts and continuity of work provide economies of scale' and 'if such large areas of land were to be allocated to individual private developers they would become monopolies and land prices would tend to rise because of the lack of competition'. (Neutze Evidence, p. 15) Also, the rate at which blocks are sold and occupied would become less predictable with

the result that development would be scattered and the cost of the provision of schools and other public services in new areas would rise.

3.50 There is a difficulty in forcing private developers to complete and sell developments to a schedule. Professor Neutze cites the experience in South Bruce where Jennings both subdivided and serviced lots and built houses. He says that:

> A common procedure would be for a developer to sell enough blocks to recover outgoings and keep the others until their value rises as those that have been sold [sic] occupied. A developer can always claim that demand is not large enough for him to meet the specified date of completion. In the final analysis, the government is unlikely to send a developer bankrupt; nor can it be sure whether the threat of imminent collapse is real or whether the developer is simply acting as a rational speculator in dragging its heels. Once developers become the risk-taking entrepreneurs in land development the integration of planning and land development, from which Canberra has gained much in terms of efficient and timely provision of services, will inevitably be lost. (ibid.)

and:

> In the longer term private land development seems certain to have an impact on the leasehold system. Private risk-taking developers will want to have an influence on lease conditions. They will want the land on which they have construction leases to be leased to residents and businesses with broad and permissive purpose clauses to increase their market value. Leases for which a premium but no rent is paid, and which are sold by private developers will look just like freehold to most people. Developers' pressures to convert Canberra leases to freehold tenure would become even stronger. (ibid. pp. 15 and 16)

3.51 The success of any initiatives to improve the system of leasehold administration may be at risk with the privatisation of all land development in Canberra. In a careful consideration of the State systems, the NCDC believes there may be some risks associated with the decision to privatise. They have identified that:

> There may be under-supply in some market sectors and instability in land prices. The cumulative effect of development tracts may tend to fragment development fronts and increase requirements for government funded major infrastructure. Community facilities may be delayed, or, where provided, not utilised effectively.
>
> Unless these risks can be avoided there is the possible consequence indicated by Neutze that " ... the integration of planning and development, from which Canberra has gained much in terms of efficient and timely provision of services, will inevitably be lost." (Evidence, p. 116)

3.52 The bulk of funds expended on land development has been spent with private enterprise contractors and the Australian Institute of Urban Studies (AIUS) believes that:

> ... the only benefits of introducing private land developers would be to remove the funds required at present for that activity from the public budget and to replace them with private funding, while rewarding a small number of companies or individuals for taking on the funding responsibility. (Evidence, p. 370)

Further, the AIUS has no doubt that higher land prices would result, as would greater administrative complexity and the small gains to be made would be far outweighed by the cost to the Canberra community.

3.53 In their submission to the Committee, the ACT Administration said they have contributed to and/or encouraged Government initiatives that have the effect of:

- transferring the major responsibility (both financially and logistically) for land development to the private sector (this frees public funds for other purposes); (Evidence, p. 216)

and that:

> All the above initiatives are consistent with getting "the best out" of the leasehold system and promoting efficiency and effectiveness. In the case of private sector land development the initiative will promote competition and promote healthy variety in the forms of development. Private sector development also recognises the logistic reality of limitations on borrowing through the Loan Council. (ibid. p. 217)

3.54 The argument advanced by the Administration that private sector land development will 'promote healthy variety' is disputed by Professor Neutze. He says that 'On the contrary experience elsewhere in Australia is that competition in land development promotes uniformity and that land development in Canberra has in fact been more varied than in other cities'. (Evidence, p. 405)

3.55 The success of private sector involvement will hinge on the ability of the ACT Adminstration to effectively and efficiently manage the estate. Any land development project undertaken by the private sector needs to be monitored closely to ensure that projects are not held for speculative gain and are completed in a reasonable time to facilitate the planned availability of land. The socio-economic implications of private sector involvement need to be assessed. Without effective

monitoring the Administration will not be in a position to adequately measure the effects of such development on Canberra and its community.

3.56 The Committee is concerned that without astute management and a commitment to the principles of leasehold by the ACT Administration, the effect of private sector development will undermine the leasehold system and increase the price of land for home buyers, builders and other businesses. The Committee concludes that implementation of the new policy must be closely monitored and its effects carefully assessed. At the very least a public capacity for land development must be retained to ensure that there is adequate competition and to undermine any tendency for collusion between private developers.

3.57 Recommendation 8: **The Committee recommends that implementation of land development by the private sector must be closely monitored and its effects carefully assessed by the ACT Administration.**

SUMMARY

3.58 The Committee endorses leases in years rather than perpetuity and has recommended that in the case of residential leases renewal at the end of 99 years should be a statutory right.

3.59 With non-residential leases the ground landlord must maintain its right to use lease purpose clauses and length of lease as planning tools. Arguments for perpetual leasehold have been based on the attractiveness of Canberra for investment purposes and the desire of investors to control development rights. There is no evidence that the leasehold system inhibits development in the ACT. The Committee believes that renewal of non-residential leases should be at the discretion and on terms negotiated with the ground landlord. The Administration has not

used its power to grant extensions of non-residential leases as a lever to achieve its objectives as ground landlord but has given away the right of extension without achieving anything in return.

3.60 Although the Government has made the decision to separate national capital and territorial planning and development, the Committee stresses the need for co-ordination and co-operation between the two areas. In the past there has not always been co-ordination between the NCDC and the Administration. Fundamental to co-operation and co-ordination is the attitudinal effect of the authorities. The Committee is concerned that the current administrative weaknesses will be perpetuated under the new arrangements and that opportunities to enhance and preserve the National Capital will be forsaken. In a system where the ground landlord is the keeper of the national heritage, it is not unreasonable to expect the ground landlord to take a major role in initiating redevelopment.

3.61 All approved policy and development plans need to be binding and both the NCDC and ACT Administration agree on this point.

3.62 Private sector development of land is fraught with risks which will, with the passage of time, have an effect on the Canberra community. The Committee is concerned that without astute management by the ACT Administration, private sector development will undermine the leasehold system and minimise land prices. There needs to be very close monitoring of development projects to ensure that the benefits which have accrued under public land development are not lost.

CHAPTER 4

ADMINISTRATION OF THE LEASEHOLD SYSTEM

INTRODUCTION

4.1 A number of the submissions received by the Committee supported the leasehold system of land tenure, but was critical of its administration. Concern was expressed with the way the Administration carried out its role of ground landlord. The Committee was told that:

> Leasehold can be considered as a satisfactory alternative to private ownership only when it is supported by a wise, careful and provident administration. Without that support it defeats the need for which it was devised. (Evidence, p. 43)

4.2 In commenting that Canberra land should be treated as a national heritage, to be safeguarded and used for the benefit of the nation and its capital, the AIUS said that:

> A lack of clarity about that purpose, and the development of unsound practices in applying the leasehold system, have led to a general failure by officials to appreciate the true scope of the public's interest. Thus inadequate co-ordination created loopholes in the leasehold system to be exploited for substantial private gain in the short term, at substantial public cost over the long term. (Evidence, p. 351)

4.3 The Joint Sub-Committee notes the criticisms that have been made concerning the administration of the leasehold system. The Committee believes it would be beneficial to advance positive suggestions for reform to enable the leasehold system to serve more effectively the Canberra community.

4.4 Professor Neutze identifies several areas where administrative reform is needed. These matters were also identified by several witnesses who appeared before the Committee.

AMENDMENTS TO LEASE PURPOSE CLAUSES

4.5 At present section 11A of CALO is unsatisfactory as a means of amending lease purpose clauses. There are at least two reasons:

> ... the first is that the Supreme Court, to which section 11A amendments go, is not expert in planning and land use matters, and the second is that the Supreme Court is inaccessible to people who would have a reasonable expectation of being able to object to these kinds of changes in any other situation. (Neutze Evidence, p. 67) (see Chapter 5, section on section 11A, CALO-Appeal procedures.)

4.6 In the event of an amendment to lease purpose clauses, the very nature of the leasehold system - an agreement between lessor and lessee - calls for the surrender of an existing lease and the grant of a new lease for the new purpose. If a lessee has a lease for the use of land for a particular purpose and the lessee wants to use the land for another purpose, 'the obvious thing to do is to surrender that lease under terms' which the lessee can negotiate with the landlord and seek a new lease. (Neutze Evidence, p. 68)

4.7 Section 11A was first inserted into CALO so that minor variations could be made. It has become:

> ... in effect, a means of very substantially changing the use to which land is put ... (ibid.)

4.8 As the NCDC points out:

> Section 11A was not originally designed to serve the needs of complex changes to land use and development rights specified in lease covenants. Its provisions do not specify that public participation occur in establishing redevelopment rights, nor that there be disclosure of the financial terms and conditions under which the change proceeds. Betterment provisions, also provided in section 11A, do not necessarily reflect the true public costs of infrastructure augmentation the proposal will require.
>
> The ordinance does not specify how planning conditions attaching to the NCDC's support for change are to be secured. Further, there are restrictions on the scope of changed lease covenants which the Registrar of Titles will register.
>
> The process of change is subject to a decision of the Supreme Court. The NCDC, as planning authority, does not have standing in the court. Neither is the court the most suitable forum for town planning decisions. (Evidence, p. 114)

4.9 The appropriateness of the Supreme Court in deciding variations to lease purpose clauses is discussed in Chapter 5 - Public Participation.

4.10 Surrender and regrant has been used for redevelopment of leases under all ordinances apart from CALO. Radical variations in the purpose for which a site can be used under CALO require the granting of a new lease rather than a variation to an

existing lease because of the necessary reconsideration of all terms of the lease including the financial terms. (Neutze Evidence, p. 406)

4.11 There is a need for 'minor' to be strictly defined and the use of section 11A to be restricted to its original intent. Minor variations should be able to be handled without surrender and regrant.

4.12 With the surrender of a lease and its regrant a number of issues arise. By what process should the regrant price be determined? The Committee believes that the system of auction to set the regrant price is not appropriate in all instances of lease surrender and regrant. Intellectual property needs to be preserved. By auctioning a lease which has been surrendered and is to be regranted with radical variations, the Administration would in effect be selling the ideas of the original lessee. The Committee believes that it should not be necessary to go to auction with a new lease change if the person seeking the regrant already has a lease on it. The Valuer-General should be able to determine the real market value of the new lease after variation.

4.13 Recommendation 9: The Committee believes that the current methods of amendment of lease purpose clauses under section 11A of the City Area Leases Ordinance are unsatisfactory and recommends that they should be replaced by surrender of the existing lease and the grant of a new lease for the new purpose.

BETTERMENT

4.14 The introduction of betterment was seen as a measure of equity. As noted in Chapter 2, paragraph 2.21, CALO was amended in January 1971 so that a lessee, who was granted a change in lease purpose under section 11A, had to pay the government 50 per cent of the increase in the value of the site which resulted from the change, less $1500. The amendment was prompted by the fact

that lessees could have stood to make a very substantial capital gain where changes in lease conditions significantly increased development rights. Betterment, *therefore, is a means of* recovering 'for the community those increases in the value of land which are created by the community and conferred when a change in land use is permitted'. (Neutze Evidence, p. 407))

4.15 The amount of betterment payment is a contentious issue. It is argued that the 50 per cent betternment levy is quite arbitrary with no empirical or administrative basis. Also it is argued that it provides incentive for 'developers' to undertake redevelopment. The implication of this incentive value of betterment is that Canberra land under leasehold is not attractive to developers. This is not the case as we have already discussed (see Chapter 2, paragraph 2.34). The ACT Administration sees betterment as a part of redevelopment and urban policy.

4.16 A major concern with the way betterment is administered is the amount of revenue which is foregone. A 50 per cent betterment amounts to a subsidy. Developers are required to pay less than the full market price. The Chairman, in evidence, pointed out that although one can argue the benefits to the community of an economic activity, it has generally not been government policy in Australia to subsidise economic activity unless it has particularly high benefits like research and development or exports. (Evidence, pp. 277-278)

4.17 The ACT Administration accepted that a reduction in betterment is at least an incentive, if not a subsidy in a direct sense. (Evidence, p. 278)

4.18 Mr. Ed Wensing, a witness before the Committee, provided the Committee with some examples of lease purpose variations where the betterment charged (and on occasions reduced) was a significant fraction of the final profit the developer gained from the variations to the lease purpose clauses. In the case of

City section 22, the former Uniting Church site, the original lease was granted in 1955 at no cost. Mr. Wensing told the Committee that:

> The original church site was valued at nothing; it had no trade value; it was a church lease for church purposes only; it had no market value whatsoever. However, when the developers and the church approached the Crown and said that they wanted to redevelop, and in the process of working out the betterment, the Department put a value on it of $3.6m. (Evidence, p. 295)

4.19 Mr Wensing maintains that the $3.6m figure was a clear advantage to the Church and the developer. The five office sites were apparently valued at only $8.6m. This proved subsequently to be a low valuation as four of the five sites were sold by the Church for about $8m.

4.20 The actual calculation of the betterment was puzzling according to Mr Wensing. As far as he could make out from Professor Neutze's reports and newspaper reports, the Administation:

> ... substracted the value of the church from the value of the office sites, hence $8.6m less $3.6m gives you $5m; it then divided it by two - why I do not know. It is obsessed with the use of the formula contained in section 11A of the City Area Leases Ordinance, when in fact it was not really strictly applicable in this case. I do not know. However, that reduced the betterment part, which is $2.5m; then for some unknown reason, as an act of grace, perhaps because it was dealing with God, it reduced the sum to $2.25m. This means that the church paid the Commonwealth only the equivalent of $258 a square metre land area for the five City Area Leases Ordinance leases. The market value of the above sites, derived from comparable sales - and again I use <u>The Canberra Times</u> site as

> the comparable sale - was worth about $25.8m, or about $2,500 a square metre land area. (Evidence, p. 296)

4.21 The leases were issued to the Church in October 1985 and the leases over blocks 4, 5 and 6 were sold to Northbourne Investments and:

> It was going to build a church on block 2 and the office building for the church on block 3. The building permit showed the value of those sites; block 7 $11m; block 6 $11m - they are the two taller buildings on the site - block 5 $5m and block 4 $5m; a total value of about $32m. That excludes the church and the church office building... (Wensing Evidence, p. 296)

In October 1986, the reported sale price of block 7 was $30m, block 6 sold for $30m and block 5 sold for $15m, most of them with leasing arrangements, which grossed $75m. Northbourne Investments kept block 4 and leased it back to the Government. The rental per annum is about $1.5m which suggests a capital value of about $15m. The total value of the office sites is $90m. Mr Wensing points out that if the cost of the land and the four buildings are taken into account, it leaves a gross profit of $50m. The Administration put a value of $3.6m on the original site.

4.22 A fundamental point is that leasehold 'does not impose on or attribute to any leaseholder presumptive rights about what the lease can be used for if the current lease term and lease conditions are unsatisfactory, or no longer relevant or potentially profitable'. (ibid. p. 299)

4.23 Mr. Wensing maintains that the Uniting Church had:

> ... no presumptive rights about the future development of that site. If it chose not to use the site for a church, the correct procedure for the Department to have followed

> should have been - and it should have stuck to its guns - initially to have said to the Church, 'You have to hand that back and you have to compete with anybody else on the open market who wants to use that site for other purposes. You can have a site back for a church'. The Commonwealth, in an entrepreneurial manner, could have made an arrangement whereby a developer or a number of developers of the remaining sites could have contributed to the construction of a church for the Uniting Church on a smaller site, but the Church itself had no presumptive rights on the remaining land for purposes other than church uses. (ibid. p. 305)

4.24 The Committee is concerned that in the application of betterment, ACT Administration has foregone revenue. The 50 per cent minus $1500 formula contained in section 11A of CALO is not appropriate. The Commonwealth owns the land and the redevelopment rights, not the lessee. It is not logical that 50 per cent of the redevelopment rights are foregone under the current CALO provisions. Market value of the site with the development rights granted under the lease before and after the variation in the purpose clause should be the basis on which betterment is levied. A 100 per cent levy based on value after variation grant would reflect current market value. Mr. Wensing calculates there has been a loss of revenue to the Commonwealth in the order of $100m to $150m and he does 'not think that is an underestimate in today's dollars if you look at all the lease variations and lease transfers that have involved major redevelopments over the last 10 or 15 years'. (ibid. p. 299)

4.25 Betterment, under the current method of calculation is a subsidy and as ACT Administration argue is an incentive for developers to invest in Canberra. The Committee queries the Administration's approach to betterment, especially in the redevelopment of Civic. Changes to lease purpose clauses (see Appendix 1, p. 117, for recent lease redevelopment case histories) are providing developers with the opportunity to make a sizeable capital gain on their investment. With Civic

redevelopment the Committee does not believe that an incentive for developers (through the current rate of betterment levy) is necessary in spite of claims by some developers that the betterment charged is too high and will jeopardise the viability of the project. The returns on investment do not support such an assertion. With growth and development the increases in the value of the land created by the community and conferred when a change in land use is permitted must be properly reflected in the betterment levied.

4.26 With the introduction of Territorial responsibility the monies received from betterment will be paid to the ACT. The NCDC and ACT Administration commissioned a study to ascertain the best means of determining infrastructure funding for redevelopment and urban consolidation. The main report (August 1988) was produced by Neilson Associates Pty Ltd and the consultants say that:

> The application of betterment charges to date has been somewhat confused, not necessarily consistent between projects, and has involved the deduction from betterment charges of some of the costs associated with the redevelopment projects proceeding.
>
> Betterment levies should be charged in every case of lease purpose change, on the basis of fair before and after valuations. It is a matter of policy to establish what proportion of the increment in value associated with the change of use should properly be paid to the community.
>
> Betterment has nothing whatsoever to do with infrastructure funding and should be dealt with as a totally separate financial transaction. (NCDC, ACT Administration, Financing Infrastructure for Redevelopment and Urban Consolidation, Main Report, August 1988, p. 5)

4.27 Professor Neutze argues that there is 'no good reason to offer a speculative gain to lessees to encourage redevelopment'. (Evidence, p. 24) He maintains it is likely that the prospect of making such speculative profits will encourage an excessive amount of redevelopment. Civic is an example of this. However, he

says it may be necessary 'to encourage lessees to initiate socially desirable redevelopment if the government fails to take the initiative, but it would be neither necessary nor desirable if the lessor were to play the more positive role'. (ibid.)

4.28 **Recommendation 10: The Committee recommends the current 50 per cent betterment levy should be replaced by compensation to the lessee for the value of the lease that is surrendered, including improvements, and a charge of the full premium value for the grant of a new lease together with the cost of any necessary off-site services.**

BREACH OF PURPOSE CLAUSES

4.29 There has been a history of non-enforcement where lessees breach the purpose clauses of their leases. There has been dissatisfaction with the extent to which lessees have been permitted to remain in breach of conditions of their leases for long periods. (Neutze Evidence, p. 32) Resident groups have been active in seeking the Administration to act on lessees in breach of their leases. Complaints about the failure of the then Department of the Capital Territory to prosecute purported breaches of lease purpose clauses on twenty-three nominated residential leases were the subject of a report by the Commonwealth Ombudsman in 1979. The Ombudsman found the complaints to be well-founded. Lack of enforcement 'in some areas, Fyshwick for example, has created such a weight of vested interest in maintaining breaches that it has proved politically expedient to legitimise the breaches rather than enforce them'. (Neutze Evidence, p. 32)

4.30 The Committee was told that:

> Many statements in the media by representatives of the private sector show that they do not regard the lease as an agreement between a lessor and a lessee;

> rather lease conditions are seen as an undesirable source of restriction on development opportunities and of uncertainty about future property values. Lessees act like owners of freehold titles and see lease conditions as being a rather clumsy form of land use control - even worse than zoning. The administering department does little to counter this view. Thus the Assistant Secretary, Business Leases, in the ACT Office was quoted in The Canberra Times on August 19, 1987, in relation to a dispute about the use of land leased to a church as saying, "this land belongs to the church and not to the Commonwealth..." (ibid. pp. 32-33)

and that:

> ... unless lease purpose clauses are enforced and enforced fairly actively then those lease purpose clauses lose effectiveness in both of the purposes for which I have argued they perform. They lose purpose as a planning tool, as a land use control mechanism, and they lose their purpose as a means of defining the terms of the contract. Enforcement should take account of both of these functions of the lease system as well. ... What is really required is for the lease purpose clause and the terms of the lease to be regarded as they are, as an enforceable contract, rather than simply as a means of control over land use which many lessees seem to regard as an unwarranted infringement of their right to do what they like with their lease. (ibid. pp. 73-74)

4.31 The credibility of the leasehold system is at stake if lease purpose clauses are not enforced. Ineffective enforcement of leases results in planning intentions not being achieved and:

> ... it results in a position where lessees in the area who are observing the lease, lose their certainty of whether the area will be conducive to their remaining there. ... it is not simply a planning matter, in terms of planning as a plan being realised, but it is the fundamental intentions behind planning and that is that people have an understanding of the area they are in. They have a degree of

certainty of what can be expected there, and the *system should be such* that it *encourages* that degree of certainty. (NCDC Evidence, p. 165)

4.32 There is a difficulty with the system as the enforcement procedures are clumsy and heavy handed. The NCDC points out that clumsy procedures may partly contribute to the difficulties involved in lease enforcement. The Real Estate Institute of the ACT also acknowledges difficulties and says that:

> existing powers to achieve compliance with *lease conditions are* inappropriate and draconian, i.e. lease is determined for breach of lease covenant. (Evidence, p. 339)

4.33 The ACT Administration carries out lease enforcement to the extent of existing available resources. On the number of breaches investigated during the 1986/87 financial year, the Administration investigated 105 alleged residential breaches and three court actions against offenders were taken under section 9A of CALO. Figures for the investigation of alleged non-residential breaches were not given. However, NCDC and ACT Administration were working on a Fyshwick policy plan which was published in September 1988. Lease breaches in Fyshwick are a major concern and there has been a reluctance to enforce lease purpose clauses until the policy plan was finalised. Under the plan:

> Current lessees in breach of their lease purpose clause will be notified by the Lands Branch and given a 12 month period to either:
>
> (a) *regularise usage by obtaining a variation* in accordance with the new land use policies; or
>
> (b) where this is not possible, cease the unauthorised use. (*NCDC Fyshwick Policy* Plan, p. 7)

4.34 One of the problems of enforcement with Fyshwick leases has been the ambiguity and complexity of leases. Leases need to be in an enforceable format; i.e. they need to be unambiguous and not too complex'. (ACT Administration Evidence, p. 234)

4.35 **Recommendation 11: The Committee recommends that the lease administration section of ACT Administration should take action against lessees who breach the purpose clauses of their leases.**

ORDINANCE SIMPLIFICATION AND CONSOLIDATION

4.36 The ACT Administration advised the Committee that:

> ... all future directions must recognise the need for reducing the potential for complexity and over-regulation, without losing the attributes of the basic leasing system. (Evidence, p. 223)

and:

> To illustrate the potential for complexity, the following statutes each contain matters bearing directly on the operations of the leasing system and how leases are issued and managed:
>
> - Leases Ordinance 1918
> - Church Lands Leases Ordinance 1924
> - Leases (Special Purpose) Ordinance 1925
> - Real Property Ordinance 1925
> - Recovery of Lands Ordinance 1929
> - Queanbeyan Leases Ordinance 1929
> - City Area Leases Ordinance 1936
> - Australian National University (Leases) Ordinance 1967
> - Mining Ordinance 1970
> - Canberra College of Advanced Education (Leases) Ordinance 1977.
>
> In addition, the following statutes also have a bearing on how the leasing system operates:

- Lands Acquisition Act 1955
- National Capital Development Commission Act 1957
- Buildings (Design and Siting) Ordinance 1964
- Districts Ordinance 1966
- Building Ordinance 1972.

> There is yet a third group of enactments having a bearing on the management of both leased and unleased land having regard to environmental and amenity protection and regulation. They are particularly pertinent to land use. (ibid. p. 224)

4.37 The Administration argues that:

> ... if the advantages of simplicity, title and certainty offered by leasehold systems are to be realised in the ACT, then legislative review <u>must</u> be undertaken. There seems little justification for having a situation where leases can be issued under a variety of legislative authorities when there is only one leasing system. This is particularly the case when leases issued under one authority are more advantageous to land users than if issued under another; there is an unacceptable element of chance as between similar land users in that situation. (ibid. pp. 224-225)

and that this complexity:

> ... has added to the administrative cost of the leasing system and the Administration has this aspect under review. The ACT cannot afford to direct resources to fund unnecessary complexity which can penalise entrepreneurial development. (ibid.)

4.38 Concern has been expressed in submissions and evidence to simplifying lease purpose clauses and amalgamating the ordinances. The essential differences between each ordinance relates to very specific purposes and this specificity needs to be maintained. Each ordinance addresses very different leasing

purposes. The concern is that if the four ordinances (see Chapter 2, paragraph 2.20) are amalgamated some of the integrity of the leasehold system will be lost. There is:

> ... one fundamental difference between the City Area Leases Ordinance and the other ones. The other three leasing ordinances provide for the Commonwealth to resume the sites almost at will, whereas there is no provision for that at all under the City Area Leases Ordinance and the Commonwealth has to resort to the Lands Acquisition Act.
>
> The other essential difference is that the other three ordinances apart from the City Area Leases Ordinance grant leases for very specific purposes and for very specific terms and they give the Minister the power to do that quite apart from and quite distinct from the granting of leases under the City Area Leases Ordinance. I think it relates back to the point ... that the lease does not entitle the lessee to any presumptive rights about any uses to which that land may be put once his lease for a very specific purpose expires or becomes redundant. (Wensing Evidence, pp. 304-305)

4.39 The ACT Administration said that:

> When we talk about simplifying leases, we are not talking about slackening them, losing controls and all the other things. There was in the suggestion by the people from the Conservation Council that in some way, by simplifying, we meant that we would be slackening them or making them less restrictive. There are situations where, indeed, we would wish to make them less restrictive, but not to cause, if you like, planning anarchy, or something like that, or diminish the environment. (Evidence, p. 275)

4.40 <u>Recommendation 12</u>: The Committee recognises that there are benefits in simplifying leases. However, the Committee recommends that in the process there should be no weakening of safeguards.

DEVELOPMENT RIGHTS

4.41 Professor Neutze argues that if 'the owner of the land in Canberra is to be able to exercise its role as landlord fully development rights need to be precisely defined in lease conditions' (Evidence, p. 36) and:

> One of the problems is that many of the older leases have purpose clauses which are stated in very general terms, like residential or industrial, and these purpose clauses do not really define the development or the redevelopment rights. (ibid. p. 71)

4.42 **<u>Recommendation 13</u>: The Committee recommends that the development rights of some of the older existing leases need to be defined more precisely.**

4.43 The ACT Administration advised that:

> This is already being done, where appropriate, as older leases come forward for renegotiation. It would not be reasonable to attempt to unilaterally redefine existing ongoing leases, particularly if this could be seen as conferring disadvantage on individual leaseholders. (Evidence, p. 232)

SUMMARY

4.44 There was very little criticism of the nature of the leasehold system of land tenure. However, criticism of the administration of the leasehold system has been widespread. There are a number of areas where administrative reform is required. Poor administrative practices have put at stake the credibility of the leasehold system. Reform will enable the leasehold system to serve more effectively the Canberra community. Throughout this chapter the Committee has recommended reform in a number of areas.

CHAPTER 5

PUBLIC PARTICIPATION

INTRODUCTION

5.1 Public participation is the essence of the political process. It is necessary and vital to the effective functioning of Canberra's system of land tenure today. Administrative bodies should not operate in a vacuum and impose policies and developments on the public without proper consultation. A feature of the system must be openness and accountability.

5.2 There are three areas where public participation, openness and accountability can be enhanced in the operation of the leasehold system of land tenure:

- Public Participation in Planning Decisions
- Section 11A City Area Leases Ordinance - Appeal Procedures
- Section 17 CALO and section 72 A Real Property Ordinance - A matter for the Public Record

PUBLIC PARTICIPATION IN PLANNING DECISIONS

5.3 The Joint Committee on the ACT in its 1979 Report Planning in the ACT concluded that the planning system in the ACT should be more accessible. Following the Committee's recommendation a system of plans (primarily existing land use plans, policy plans and development plans) was introduced by the NCDC to allow public comment on proposed changes in established

areas of Canberra. There are difficulties with the nature of some of these plans. The question arises whether they are sufficient for the public to make adequate comment upon. As Professor Neutze notes:

> Existing land use plans show the uses which are permitted under leases that have been granted, the City Plan of Canberra and other commitments entered into by the Commonwealth. In principle, policy plans propose general changes in land use in large or small areas while development plans propose more specific changes needed to implement the policy plans, including investments in services and public facilities to be made by public bodies, and investments expected to be undertaken by existing or prospective lessees. Both kinds of plans can cover any area from a single site to the whole of metropolitan Canberra. Some are plans for a particular element in urban structure such as transport and others cover particular areas. Both kinds of plans are normally made available to the public in draft form for comment before adoption by the Commission. Some of the plans are quite precise, but others, such as the Draft Plans issued in 1987 for Section 35, Block 2, Turner (St Vincent de Paul) are not sufficiently precise to give lessees who might be affected a clear indication of what is likely to occur. Frequently, the distinction between the two kinds of plans has been found to be inappropriate and many are now published as a "Policy Plan - Development [or Implementation] Plan", the latter being a more detailed version of the former. When finally approved by the Commission, these are also noted by the Minister under Section 12 of the NCDC Act, giving them some degree of formal status. (Evidence, p. 26).

and:

> Although in content and form they vary widely, from precise site proposals to vaguely expressed intentions, they are very much like zoning plans for freehold land. The Commission claims that they are not as binding as statutory planning schemes. (ibid.)

5.4 As the Committee has already noted in Chapter 3, (see paragraphs 3.34 to 3.37) the NCDC is not bound by its plans. It was emphasised to the Committee that the 'Commission is a servicing and development authority _and_ a planning authority' and it 'is remarkable that it is not even required formally to give due weight to its own adopted plans'. (ibid.) If a body is not bound by its own adopted plans, the role and importance of public participation may not necessarily be given due weight, if at all.

5.5 The Committee is mindful of the ease with which public comment can be dismissed even though the public participation processes have been followed. In this period of change towards self-government, and implementation of new structures within the local bureaucracy, the Committee believes that the ACT Administration must not overlook public participation and consultation in Canberra's planning and development processes. With the implementation of self-government, the Legislative Assembly will also have the opportunity for local parliamentary scrutiny of Territory planning and development.

5.6 Although there is public participation in planning decisions when draft policy and development plans are being prepared, the opportunity for public participation must also be available when specific decisions are being made to change lease purpose clauses or to grant leases on unleased land in established areas. In Canberra public participation is:

> ... invited in consideration of draft policy plans and development plans, which are essentially proposals to vary development on leases, to lease land for particular purposes and to carry out related public works on unleased land. This is the appropriate opportunity for the public to consider a group of related developments on leased land, and the proposals need to be in a form which permits their implications to be clearly understood. The fact that a policy plan or development plan has been approved does not remove the need to notify and provide

> opportunities for objections when lease purpose clause changes are being considered for individual leases. It is only at the stage when development or redevelopment proposals are put forward that the implications will be clearly evident to people likely to be affected. At present such opportunities are not meaningfully provided for either by legislation or procedure. (Neutze Evidence, p. 40)

5.7 Clearly there is a need for reform. The current mechanism 'for dealing with redevelopment is really quite unsatisfactory' and:

> While one could argue that, when the NCDC was established and as long as it was primarily concerned with the development of raw rural land into urban land there was relatively little need for a formal appeals mechanism, now that redevelopment has become much more active, the need for a formal appeals mechanism is very obvious. (ibid. p. 75)

5.8 The NCDC agrees that there is a need to improve and formalise procedures for public participation in plan making. The Commission has identified weaknesses in the administration of the leasehold system which includes:

> . in contrast to the system of public consultation to which Commission plan-making is committed, the **implementation of leasing legislation is at present not open to public scrutiny.** [their emphasis] The need for more open procedures in establishing lease conditions parallels the needs in plan-making; (Evidence, p. 115)

Moreover, it claims that:

> Improving and formalising procedures for public participation in plan-making should also be brought to fruition. The Commission's draft proposals (NCDC, 1988b) support Neutze's

> recommendations in this respect. Plans made under these proposals would become binding on the Commission.
>
> Other deficiencies, including those arising from s11A of the City Area Leases Ordinance could be addressed by an amendment to that ordinance accompanied by the implementation of a comprehensive land use and administrative appeals system. The Commission has already made substantial progress in proposals for a suitable land use planning appeals system (NCDC, 1988a). (Evidence, p. 116)

5.9 **Recommendation 14: The Committee believes there should be opportunities for public participation in planning decisions not only when draft policy and development plans are being prepared but also when specific decisions are being made to change lease purposes or to grant leases on unleased land in established areas.**

SECTION 11A CITY AREA LEASES ORDINANCE - APPEAL PROCEDURES

5.10 Section 11A has become:

> ... in effect, a means of very substantially changing the use to which land is put and it does not provide the normal kinds of opportunities for the landlord to take the initiative and set out what the landlord's objectives are for land use change. Nor does it provide adequately for people who might be affected by the proposed land use change to have their views heard. (Neutze Evidence, p. 68)

Moreover, there is no provision for any form of appeal which may be used against decisions to permit changes in the purposes for which leases are granted under the other three ordinances.

5.11 The NCDC recognises the inadequate appeals process arising from section 11A of CALO. The Commission has:

> ... made clear in terms of all of the public discussion on the appeal system that it believes the present methods of changing the lease - the present vehicle for doing that is through the Supreme Court - and the present opportunities that offer for public objection are all inadequate and that in no case are those satisfactory for a community that is now becoming much more involved in the planning process. (Evidence, p. 169)

5.12 At present, section 11A of CALO is 'the only means of changing lease conditions that involves public notification and some opportunity for objection ...'. (Neutze Evidence, p. 38) Section 11A was introduced in 1936 to allow the variations of a lease 'in relation to the purpose for which the land subject to the lease may be used' by an application to the Supreme Court (see Appendix I, page 93, for historical detail). Under CALO a lessee may seek to vary his/her lease providing an application is made to the Supreme Court and:

> It can be vetoed by the Minister, in which case it does not go to the Court, if in his view (normally after receiving advice from his department and the National Capital Development Commission) the change in purpose would be "repugnant to the principles for the time being governing the construction and development of Canberra." Objectors can, at some expense, oppose the application before the Supreme Court. (Neutze Evidence, p. 21)

5.13 The Committee is concerned with the difficulties objectors face in making an application before the ACT Supreme Court. The costs involved in opposing an application under section 11A in the Supreme Court are a major disincentive to the lodgment of an objection by individuals and non-profit bodies. As Professor Neutze notes 'Section 11A can scarcely be said to give effective opportunity for public comment on, or objection to a development proposal'. (ibid. p. 22)

5.14 The ACT Supreme Court is an inappropriate forum to hear applications on lease change matters. Not only is it inaccessible because of the high costs of disputing an application which effectively thwarts public participation in the determination of variations in lease conditions, but the Court lacks expertise in planning and land use matters to consider sufficiently the merits of proposed variations.

5.15 The issue of appeals procedures was addressed by the Joint Committee on the ACT in its 1979 report Planning in the ACT, the Administrative Review Council (Land Use in the ACT, 1982) and the Committee of Review of the Role and Functions of the National Capital Development Commission (White Committee) in its 1983 report entitled Canberra Planning and Development. The Joint Parliamentary Committee recommended the establishment of an independent, expert land use tribunal to hear appeals including appeals against decisions of the Department of the Capital Territory in relation to variations of lease purpose clauses. The Administrative Review Council concluded that members of the public should be able to approach a single review body with expertise in land use matters and the Council argued that the Administrative Appeals Tribunal (AAT) with the appointment of suitable experts, could hear the public's grievances. The White Committee also accepted that all appeals should be dealt with by the AAT.

5.16 An effective appeals system is necessary in the operation of the leasehold system. The Committee believes the AAT with specialist expertise can be effective and efficient in hearing appeals. Moreover, appeals should be open to an affected third party. The Committee endorses that:

> Lease purpose clauses and development rights should be recognised as both land use controls in the planning sense and part of the terms of an agreement between a lessor and lessee. Any change in those terms should both be

> negotiated between lessor and lessee and be subject to public notification and open to objection in the same way as a change in zoning. A proposal from a lessee to change those terms should be considered by both the landlord and the planning authority in the first instance. Their decision (which must finally be agreed) would be open to appeal by either the applicant or an affected third party. (Neutze Evidence, pp. 37 and 38)

Further, the Committee recognises there should be a legislative requirement that proposals for surrender and a new grant be publicly notified.

5.17 **Recommendation 15: The Committee recommends there be a legislative requirement for proposals for surrender and a new grant to be publicly notified (section 11A CALO). They would be considered in the first instance by the planning and leasing authority. Its decisions would be subject to objection or appeal through the AAT. This procedure would apply to leases under any of the four lease ordinances.**

SECTION 17 CALO AND SECTION 72 A REAL PROPERTY ORDINANCE - A MATTER FOR THE PUBLIC RECORD

5.18 Under section 17 of CALO a lessee can approach the Minister for the grant of a lease. However, the terms and conditions of the leases are not a matter of public record. In certain circumstances the provisions of section 17 are quite reasonable when:

> ... a lessee comes up with a particular purpose in mind and goes to the NCDC and says that he needs a lease for a particular purpose such as a fun park or something else, and negotiates directly. Under those circumstances it is quite reasonable for the ACT Administration to grant a lease for a particular purpose to a particular lessee rather than putting it out to tender, or putting it out to auction. There may be no

> other people who are interested in it and if there are the business might reasonably complain that its good idea can now be pinched by somebody else. I have no objection to the section at all, but I do believe that the terms and conditions of leases granted under that section ought to be publicly available just as are the terms and conditions of leases which go out for auction. (ibid. p. 71)

5.19 Section 72A of the Real Property Ordinance allows the Minister to accept surrender of the lease and issue a new lease. As Professor Neutze explained it 'is a bit like Section 17 for someone who already has a lease' (ibid.) and he commends the Department for refusing to use section 72A for leases under CALO because there is no provision for public notification. However, if there are any variations or changes to leases under the other lease ordinances then section 72A of the Real Property Ordinance is operative and the conditions and financial terms of leases granted are not a matter of public record.

5.20 The NCDC has stated (Evidence, p. 149) that it is generally not in favour of the use of section 72A to circumvent the process of the City Area Leases Ordinance. Also, the Commission would support the regular publication of the details of sale of leases under section 17 of CALO.

5.21 ACT Administration maintains that:

> As a general policy, the Administration believes that all lease transactions should be on the public record with the exception being limited to protection of the Commonwealth's commercial interest (expected to arise very infrequently). (Evidence, p. 233)

Further, the Administration agrees with the NCDC but with the proviso that:

> ... use of Section 72A of the Real Property Ordinance should not be necessary if simplifications to Section 11A of the City Area Leases Ordinance were to be put in place. (ibid.)

5.22 The Committee makes the point that if section 72A remains it should be amended, irrespective, to make sure that if a lease is granted under it the terms of the lease will be on the public record.

5.23 Recommendation 16: The Committee recommends that the financial terms and other conditions of leases granted under section 17 of the City Area Leases Ordinance or under section 72A of the Real Property Ordinance should be on the public record.

PUBLIC INFORMATION

5.24 The Committee believes that the public needs every assistance in dealing with government departments. There has been a welcome trend in recent years for departments to willingly provide written information for citizens on their rights and responsibilities. It is surprising, given that every ACT citizen is bound by the leasehold system of land tenure, that there has been no comprehensive information booklet produced on the system by the relevant department.

5.25 Recommendation 17: The Committee recommends that the ACT Administration publish a booklet which sets out the features of the leasehold system, explains the rights and responsibilities of lessees and provides an introduction to the areas of the department responsible for the various aspects of leasehold administration. This booklet should be made freely available.

THE FUTURE ROLE OF A JOINT PARLIAMENTARY COMMITTEE ON THE ACT AFTER SELF-GOVERNMENT

5.26 The Committee is of the firm belief that Canberra land is a national heritage to be safeguarded and used for the benefit of the nation and its capital.

5.27 To ensure the preservation of the national heritage, it is the responsibility of the Parliament to oversee and review the work of the National Capital Planning Authority. This statutory authority must be subject to scrutiny by the Parliament for and on behalf of the people of Australia rather than making it responsible to the executive government through a Federal Minister. The Conservation Council of the South-East Region and Canberra (Inc.) believes that:

> ... there is an active and very important role for this [Joint Sub-Committee] or a subsequent Committee in examining Canberra's planning from the national perspective. The development and approval of the proposed 'National Capital Plan' for Canberra must not be left solely in the hands of a minister or the executive arm of Government. This Committee must be involved in the process. We note with concern that there are currently no proposals put forward for the people of Canberra to object to the contents of the 'National Capital Plan'; this Committee provides one avenue. (Evidence, p. 187)

5.28 As in the past, the proposed joint parliamentary committee on the ACT will provide the forum for public participation, through submission, inquiry and hearing, on matters which affect the National Capital and Seat of Government characteristics of Canberra. The Commonwealth Parliament, through a joint parliamentary committee, will be able to exercise its overview role as owner of the land on behalf of the Australian people as laid down in the Constitution. Moreover, as part of the Commonwealth Parliament's responsibility to the

nation, a joint parliamentary committee on the ACT will monitor the orderly and efficient development of the national capital for the Canberra community and all Australians.

SUMMARY

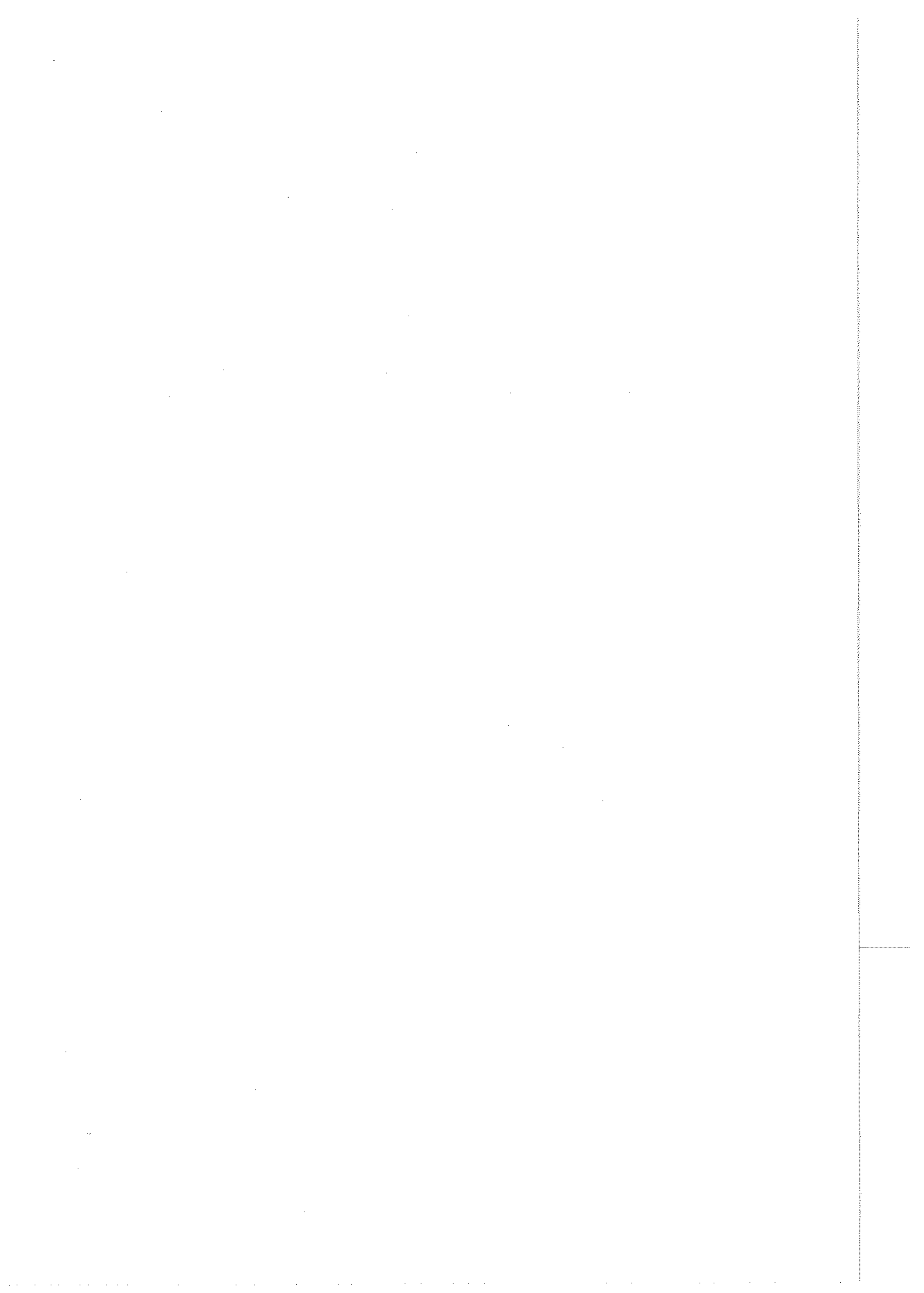
5.29 The recognition of the need for public participation in planning and development and the introduction of discussion papers is belated. Successive Parliamentary committees have recommended changes in the system especially in the area of appeals but to date nothing has been introduced. The increasing pressure for redevelopment and the profile which is emerging of the ACT Administration making lease condition variations without due regard to community feeling, clearly demonstrates there is a need now for an effective and accessible appeals system. The Committee has recommended that the AAT hear appeals.

5.30 Of concern to the Committee is the non-requirement under certain sections of some ordinances for conditions and financial terms of leases granted to be made public. This situation is untenable. It promotes mistrust in the way the system is administered and does not foster the image of an open and co-operative administration. To assist in promoting an open and co-operative administration with the public it serves, the Committee has recommended the ACT Administration produce an information booklet on the leasehold system of tenure, which should be made freely available to all Canberra citizens.

5.31 The Committee believes that Canberra land is a national heritage to be safeguarded. The Commonwealth Parliament through the proposed joint parliamentary committee on the ACT will provide the necessary scrutiny and the forum for public participation in safeguarding Canberra land as a national heritage.

5.32 This Committee is acutely aware of the consensus of views on aspects of the lease system expressed by various Committees. Previous reports have identified weaknesses in the administration of the system and areas for change especially the appeals system which was first recommended some ten years ago. Given this consensus of views, the Committee believes it is about time changes were made to the administration of the system.

5.33 Recommendation 18: The Committee, therefore, recommends that within one year the ACT Administration report to both the House of Representatives and Senate Standing Committees on Transport, Communications and Infrastructure on how these recommendations are operating.



MINORITY REPORT BY MR A.J.G. DOWNER, M.P., MR T.A. FISCHER, M.P., MR C.W. BLUNT, M.P., AND MR R.G. HALVERSON, M.P.

1. We do not accept that the Commonwealth should retain ownership of land in the ACT and maintain the leasehold system of property tenure for a limited life of 99 years for residential leases and 99 years or less for non-residential leases.

2. Throughout Australia the concept of land tenure based on the principle of freehold has been widely accepted, in particular for residential property. Freehold tenure is an important element of our social and economic structure and our national ethos: Australians have traditionally strongly opposed the concept of the nationalisation of land.

3. Australians broadly accept that freehold provides for greater security of tenure. That is why, in 1980, most of the Northern Territory's Crown Leases were automatically converted to freehold. There is no logical reason why the people of the ACT should be denied the privilege of freehold or perpetual leasehold which is available to other Australians.

4. While our preferred option would be to allow for freehold tenure for both residential and non-residential land, section 125 of the Constitution raises questions about whether that would be constitutionally feasible. Section 125 states that:

> The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, ...

Nevertheless, there is no question whatsoever that perpetual leasehold is a clear, constitutional, option.

5. The reasons for limited leasehold tenure being introduced were; first, to prevent speculation in land resulting from the siting of the National Capital; secondly, to enable the Government to defray the costs of establishing and maintaining the capital through revenue derived from land rents; and thirdly, to distribute throughout the community profits made from the increase in the value of land.

6. Subsequent changes to the leasehold system including the abolition of land rent and the emergence of Canberra as a mature, self-sustaining city has made this reasoning redundant.

7. This was recognised in Justice Else-Mitchell's inquiry into Land Tenure which reported in 1976. The report said:

> Residential land in the ACT should be held under perpetual leases ....

8. Proponents of the leasehold system argue principally that it facilitates planning. This is an incomplete argument. In each of Australia's six States planning is easily facilitated by the statutory planning systems of State and Local governments. The majority view that limited leasehold facilitates planning and estate management gives no consideration to how those functions can be as efficiently performed through the familiar statutory planning systems of the rest of Australia.

9. While we accept that land use in Canberra is of national concern, both self-government and the residual role of the Commonwealth Parliament will ensure that local as well as national interest issues are taken fully into account.

10. The majority report argues that leasehold should be limited to 99 years and does so by swallowing at face value the argument of the NCDC that, 'A lease which has a term of years gives an opportunity for negotiations because of an expectation of a termination at some stage on the lease, so that conflict can be overcome.'

11. Obviously, if the lease is for a period of 99 years rather than 5 or 10 years this argument is a nonsense and only reinforces the more practical view that a statutory planning system and freehold (or perpetual leasehold) makes more practical sense than the 99 year leasehold system. After all, as has been seen in Civic, Kingston, Turner and Braddon, review of land use does not allow 99 year cycles in any case.

12. As far as business leases are concerned, we do not believe the arguments are in any way different from the arguments for and against residential leasehold. The argument that a commercial lease should reflect the expected life span of most buildings ignores the fact that planning permission from local government (at the least) is always required for redevelopment of commercial property beyond the bounds of the ACT to ensure the redevelopment is consistent with community aspirations.

13. Other arguments supporting a move to, at the very least, perpetual leasehold which the majority report fails to consider are:

(i) the renewal of leases as the principal planning tool provides for piecemeal redevelopment because leases may expire at different times;

(ii) heritage listings make the concept of fixed term leases subject to redevelopment on expiry an intellectual absurdity and, in effect, provide for perpetual leasehold;

(iii) freehold or perpetual leasehold may well increase the attraction to interstate investors of privately developed land;

(iv) the limited leasehold system requires more administration than is necessary because all property has to go through the process of review for the purposes of lease renewal regardless of whether there is any redevelopment or change in land use proposal (which typically there would not be).

14. In conclusion, the majority report's case rests more on an emotional and ideological commitment to State control of land than a demonstration of practical advantages for limited leasehold tenure.

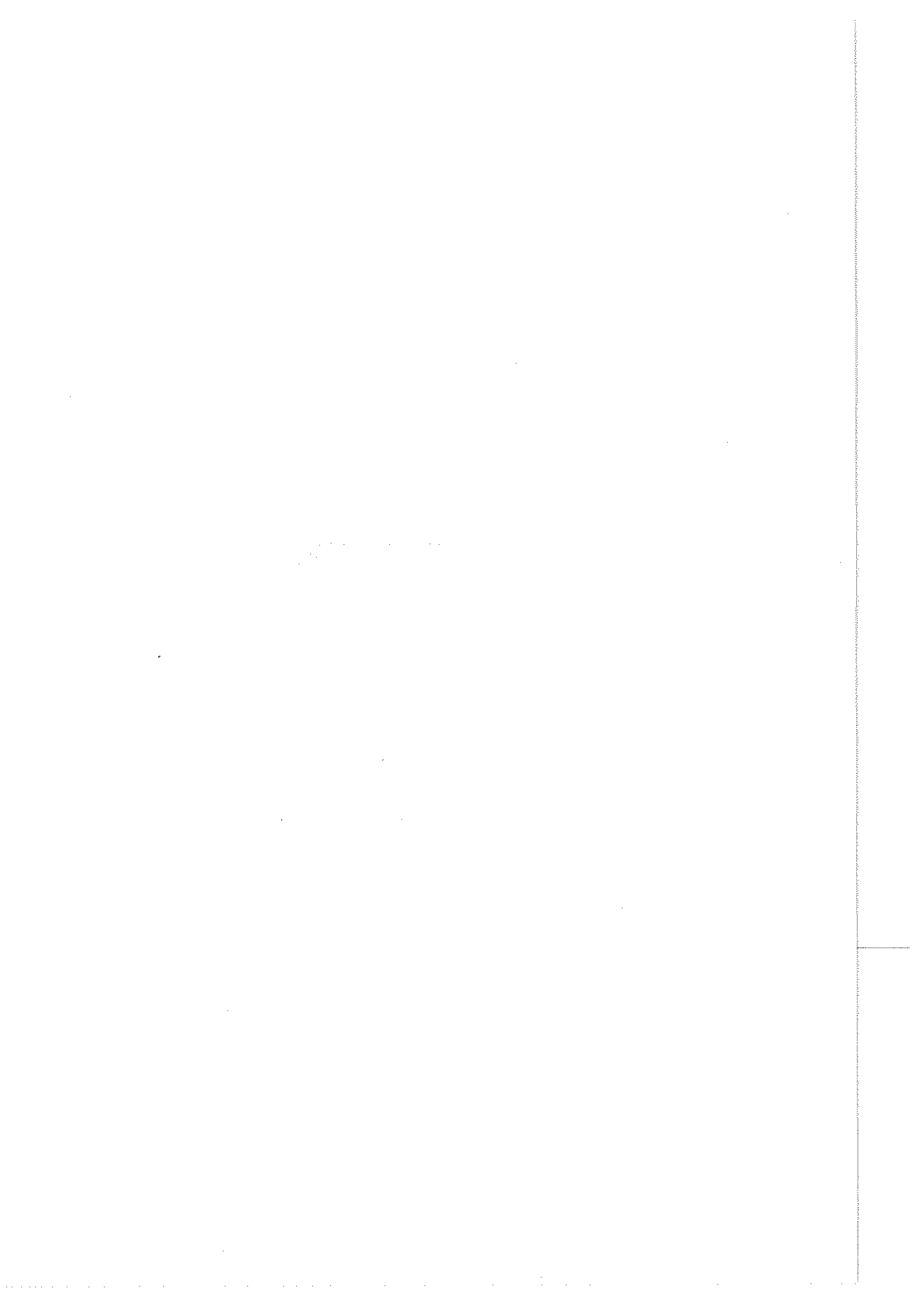
15. Freehold or perpetual leasehold is consistent with the very Australian aspiration to enable each Australian to own a little piece of Australia. There is no reason why residents of the ACT should be denied that aspiration.

Mr A.J.G. Downer, M.P.
Mr T.A. Fischer, M.P.
Mr C.W. Blunt, M.P.
Mr R.G. Halverson, M.P.

Appendix 1

THE CANBERRA LEASEHOLD SYSTEM

Report by Professor Max Neutze



THE CANBERRA LEASEHOLD SYSTEM*

Max Neutze
Urban Research Unit
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(Report Commissioned by the Joint Parliamentary Committee on the ACT)

* I have received very valuable assistance from Shelley Schreiner who wrote the Appendix and provided information from examining Departmental records. Officers of the ACT Administration were very helpful in making material available. Discussions with them and with officers of the NCDC and comments received on a draft of this report from both were very helpful. Mr Tim Bonyhady, Faculty of Law, Australian National University, also provided very useful comments on the draft.

Terms of Reference

This Report was commissioned by the Joint Parliamentary Committee on the Australian Capital Territory in response to a growing perception that the leasehold system which had "served the Territory well in its first phase of development, is experiencing problems in the redevelopment period of the city's growth" (Joint Committee on the ACT, 1987, para. 7.5). The Report was required to set out the essential features of the system and possible ways of overcoming some of its present problems."

The terms of reference for the study were as follows.

The consultant is requested to report and recommend to the Committee on:

1. The nature of the leasehold system of land tenure and the opportunities it creates for planning management of the ACT;
2. Consequences of the current approach to administering the system in relation both to development and redevelopment, including such aspects as:
   - the determination and administration of lease purpose clauses;
   - enforcement of lease purposes;
   - the process for variation of lease purposes;
   - the nature and rate of betterment tax when lease purposes are varied; and
   - appeal mechanisms;
3. Institutional arrangements for managing the leasehold system by the National Capital Development Commission and the Department of Territories;
4. Policy relating to the expiration and renewal of leases.

Summary

Public ownership of the site for Canberra and leasehold tenure for land for residential and business use were adopted early in the twentieth century to ensure orderly development of the city in line with the adopted plan and to avoid scattered development and land speculation. The lease agreement then serves two distinct, but closely related purposes. First, it is the means by which the use of privately occupied land is controlled in the interest of the broader community. Second, it is a contract which defines the rights and obligations of the Commonwealth as ground landlord and the lessee.

In Canberra the government is both the ground landlord and the planning authority. On most occasions these two arms of government have a common interest in the orderly and efficient development of the city. Their interests, however, are not identical. The ground landlord should be primarily concerned with maximising the flow of income from the estate and the planning authority to preserve and enhance the amenity of the city as the National Capital and for the benefit of all residents. Administration of leases needs to take both concerns into account.

Recommendations

1. Lease purpose clauses should be treated as both instruments of land use control and parts of an agreement between a ground landlord and a lessee. Lease administration and planning should be carried out by separate sections of a single authority.

2. As with initial conversions from rural to urban land use, the lease administration section should take the initiative, rather than being reactive, in relation to redevelopment.

3. Current methods of amendment of lease purpose clauses under Section 11A of the City Area Leases Ordinance are unsatisfactory and should be replaced by surrender of the existing lease and the grant of a new lease for the new purpose.

4. There should be a legislative requirement for proposals for surrender and a new grant to be publicly notified. They would be considered in the first instance by the planning and leasing authority. Its decisions would be subject to objection or appeal through the Administrative Appeals Tribunal (not the Supreme Court). This procedure would apply to leases under any of the four leases ordinances.

5. The current 50 per cent betterment levy should be replaced by compensation to the lessee for the value of the lease that is surrendered, including improvements, and a charge of the full premium value for the grant of a new lease together with the cost of any necessary off-site services.

6. The development rights of some of the older existing leases need to be defined more precisely.

7. The financial terms and other conditions of leases granted under Section 17 of the City Area Leases Ordinance or under Section 72A of the Real Property Ordinance should be on the public record.

8. Leases should be for a term of years rather than in perpetuity. Residential leases should be for 99 years with a provision in the ordinance that they are renewable for a further 99 years without further payment. Non-residential leases should also normally be for 99 years, except in cases where a shorter term is appropriate. Their renewal should be at the discretion of, and on terms negotiated with, the ground landlord, which will normally include the payment of a further premium.

9. The lease administration section should be more active in taking action against lessees who breach the purpose clauses of their leases.

10. A land management account should be established. From it should be paid all development costs and into it should be paid lease premiums, including premiums for new leases granted on the occasion of redevelopment.

11. There should be opportunities for public participation in planning decisions not only when draft policy and development plans are being prepared but also when specific decisions are being made to change lease purposes or to grant leases of unleased land in established areas.

12. Approved policy plans and development plans should be binding on the planning and development authority.

History

The origins of the leasehold system of land tenure used in Canberra have been described in detail by Brennan (1971) and more briefly by Neutze (1987). In this report the emphasis is on the original objectives of public ownership and on the modifications to the system over time as the people responsible for its administration and their attitudes have changed, and in some cases, become much less clear. The origins of the system are revealed most clearly in the debates about land in the nineteenth century in Australia. With the benefit of hindsight there are two themes that recur intermittently from Governor Phillip's land grants in the 1780s to Canberra in the 1980s.

The first is land policy, expressed in attempts by governments to administer public land to achieve public objectives. From 1788 through the early twentieth century the main public objective was development of land: the epitome of the anti-social holder of property was the speculator. It was desirable that property should be used for production and yield income as a result; it was undesirable for a property owner to profit simply from the increase in the value of his land which resulted from the growth in population and the general development of the country. Nonetheless speculative land holding occurred in both rural and urban areas (Cannon, 1966).

The second theme is the administration of land, particularly difficulties in the enforcement of conditions placed on grants of land. A narrow focus on administration, however, misrepresents the problem. Land policy inevitably requires long term measures and administrative continuity. One generation can pass laws and establish principles of administration but if the intentions of those policies and principles are not understood by succeeding generations, they are bound to be eroded.

Essentially there have been three strands of land policy in Australia. The first, which is our main concern here, is through government leasing of land to users, in which the public objectives are achieved through the conditions under which the lease is granted and through revenue from the rents charged. The second is through the taxation of land, which aims to both produce revenue and discourage owners from keeping their land idle or under-used. The third is regulation of land use in order to achieve social and environmental objectives through land use management, that is what was traditionally known as town planning and is now known as environmental planning. The only measures that can be used once land is owned freehold (short of resumption) are taxation and regulation.

The earliest land grants were made by Governor Phillip on condition that the grantees live on the land, in return for which they were to be exempt from rent and taxes for ten years (Else-Mitchell, 1974). The first land granted by the crown after European settlement was leased to military personnel and emancipated convicts. The effectiveness of these measures to encourage development depended on the degree to which the conditions were policed, and breaches penalised. Macquarie was the last of the colonial governors to attempt to enforce the lease conditions. Soon afterwards, the annual quit rent, originally required to be paid after seven years, was made redeemable by a capital sum and later grants were of freehold land.

There is, a long history of debate between those who saw leasehold tenure, and land rents under it, as means of encouraging development of pastoral land and those who saw land as a commodity which could be converted into government revenue by sale. Land was the stock in trade of the colonial governments with the result that large areas came into the possession of individual land owners, many of whom did little to develop their holdings.

Constitution Convention and early Parliamentary debates in the first decade of the century make it clear that prevention of speculation was a principal objective when it was decided, first, that the territory for the national capital should be acquired and, second, that land for private occupation should be leased rather than sold "for an estate of freehold". The reasons for these two closely related decisions are fairly clear.

The building of the national capital would immediately increase the value of land at the site, and its value would continue to increase as population grew and services were provided by the government. There were many examples of governments having to pay large sums for land that they had sold or granted to private owners for a small sum a few years earlier. The cost of property acquisition if the national capital had been located in either Sydney or Melbourne would have been prohibitively high. Not only would large and costly sites have been needed for Parliament House and government offices, but the high cost of sites for defence establishments, research and educational institutions would have meant that they would almost certainly have been banished to the fringes of the city.

Nevertheless, the decision to build a national capital on a rural site was a bold venture for the newly formed nation. There was no alternative to the government undertaking the works necessary to establish the city: private developers would not have been willing to take the risk. To establish the city, the government needed to own the site. Without public ownership of all the land, values would have soared and the land required for public purposes, for defence,

research, education and open space would have been costly to acquire. Public ownership made land available for Commonwealth and other public purposes and also allowed sites to be granted at zero or small cost to non-profit-making bodies including churches, schools, clubs, political parties and national associations, and other users judged to be socially valuable. Without public ownership it is inconceivable that the natural topography would have been conserved to provide the landscape setting for the city and the National Capital Open Space system, with recreation reserves, throughout the Territory. The emphasis in the debates was on the social evils of speculation, high profits for the speculators and high prices and costs for home buyers and the public providers of services. There was also concern about the unplanned urban sprawl which speculation produces by holding land vacant after it has been serviced for development. The Constitution required that the Capital Territory should be at least 100 square miles but, in order to avoid speculation in land across the border in NSW, Parliament decided that it should be not less than 900 square miles.

The reasons for adopting leasehold were similar. Leasing of land was seen as a way of ensuring orderly development by placing conditions on the granting of leases. Although Australian experience of using leasehold to achieve rural development objectives was mixed, there remained a strong commitment to it. Overseas experience, especially European, of the use of leasehold land in urban development was influential. At the turn of the century the cities of Stockholm and Amsterdam had begun to buy and lease land for urban use. Similarly the first British new town, Letchworth, had been launched using the same principles. By leasing land the Commonwealth Government could provide sites at low capital cost for housing and for public and community services as well as for commercial activities. Leasehold provided a means of planning the city so that it developed in a predictable fashion. It was expected to be less difficult to enforce urban than rural lease conditions since use of land in urban areas could be more readily observed. Leasehold could prevent speculation in allotments by requiring building within a specified period, thus establishing stability and predictability of land use. It reassured residents and other lessees about existing and future use of nearby land. Its attractions for developers are reflected in a statement made by the founder and then managing director of Lend Lease Corporation:

> As to the principle when they put it up for auction, not only did every bidder know exactly what he could and could not do with his particular site, but he also knew what everyone else - the other eleven owners in that particular city block - could and could not do. So that one doesn't have to fear as to what is going to happen next door to him, what is going to happen in front of him. (Dusseldorp, 1961)

The establishment of a new capital demanded heavy up-front investment not required in a slowly growing urban settlement. Water supply, sewerage, electricity, roadworks and a rail connection had to be completed before settlement. Leasehold rents collected from lands with urban value held promise of eventual recovery of the costs incurred. In January 1901, Edmund Barton, first prime minister, in an election speech at Maitland said:

> So far as the law of the land allows land within the federal area will not be sold. Its ownership will be retained in the Commonwealth. The land will be let for considerable terms but with periodical re-appraisement so that the revenues thus obtained will assist the cost of creating the Commonwealth Capital. (Quoted in Brennan, 1971, p. 19)

Canberra's creators were, however, very concerned with the planning, or in their conception, the design and layout of the city. The Commonwealth held a competition for its design. There seems little doubt that the government saw its task as that of a large developer that had purchased a site. All that was needed was to build the city over the course of time. Rather than thinking about the task as implementation of a plan, they thought of it as development of the design.

Planning and Public Land Ownership

The idea of public ownership preceded the plan (design) for the city and, indeed, it would have been pointless attempting to build an entire city without public ownership. This can be seen from the experience of the Canadian Government which acquired sites in Ottawa only for its own seat of government, for Gatineau National Park and a city green belt. The city itself, as a result, is planned and its development controlled only to the same extent as other municipally managed Canadian cities. Since there were few residents and the property interests of the existing owners in the ACT had been appropriated, the established interests of residents and property owners offered little impediment to Canberra's development. There can be no doubt that the conversion of land from rural to urban use has occurred in a more orderly and efficient way in Canberra than elsewhere in Australia. This supports the view that urban development is one area in which coordination by planning can perform better than an unregulated market.

The reason for this is that the government, as planner and principal developer, owns the site and can plan and build, or have built whatever is planned, while in other cities the planning authority can have plans for future development but has to wait for the owners of individual sites to decide when and what to build. The government planner/developer in Canberra does,

of course, have to pay attention to market demands. It can offer leases for particular uses but lessees will take them up only if the value of the sites to them for the purpose designated is at least equal to the reserve price. Nevertheless, the planner/developer can take the initiative in deciding when and where development should occur. It can directly control the location, though not the rate at which new development opportunities are taken up. Where land is privately owned, however, the chief role of the planning authority is only the prevention of development that is inconsistent with the adopted plan.

Given public ownership of the site of Canberra all of this could, in theory, be achieved without a leasehold system of tenure. The lease conditions that are used to define the development rights on the sites made available, and to require that development occur within a specified period, could be replaced by a covenant on freehold titles (McAuslan, 1975, pp. 292-302). That procedure has been used elsewhere but it is less purposeful because the seller loses financial "interest" and responsibility once a property is sold. Such covenants are generally very inflexible. They can only be amended by agreement between the vendor and the purchaser, or by the courts when a property owner claims, perhaps in changed circumstances, that they are no longer appropriate. Australian courts have generally been reluctant to amend such covenants. There is no lessor to protect the broader community interest in maintaining the covenants that constrain the activities of occupants. Unless there is legislation giving a public body such a role the covenants are maintained only by other freeholders taking action against breaches and is limited to situations where the covenant itself gives them a legitimate interest in the matter. Through land rent, through the continued ownership of development rights, and through maintaining the right to vary lease terms and conditions at the end of a non-residential lease, the government has a continuing financial interest in, and responsibility for, Canberra land after initial development.

Alternatively land use, but not the timing of development, could be controlled by selling freehold sites and relying on a conventional zoning scheme. In Australia such schemes have proved to be most unreliable means of controlling land use, largely because of difficulties of administration under zoning schemes which of necessity give a good deal of discretion to local councils. This is highlighted by the fact that most of the dismissals of councils in NSW have been because of maladministration of land use controls.

The recently announced decision to turn the land development function in Canberra over to private enterprise raises serious questions about whether these advantages of public land ownership can be maintained. Several State governments are attempting to establish

metropolitan development programmes of the kind which has been used in Canberra for many years. (For example Planning for the Future of the Perth Metropolitan Region, 1987). Such programmes occur naturally where planning and development are integrated but are difficult to implement where they are not. This matter is related to the main issues dealt with in this report. Under present arrangements Canberra land is serviced by private contractors working to plans prepared by the government. The land is not leased during this period. The recent decision will presumably require that private developers be granted short term construction leases, subject to performance conditions, which would then be transferred at a fee to businesses and residents. The land development would have to accord with general conditions laid down by the government planning authority.

It is very difficult to carry out such an operation without speculative holding of vacant land by developers when they expect its increase in value to exceed holding costs. The rate at which blocks are sold and occupied would become less predictable, and as a result, development would be scattered and the cost of provision of schools and other public services in new areas would rise. One of the advantages of Canberra's system of public land development is that large contracts and continuity of work provide economies of scale. If such large areas of land were to be allocated to individual private developers they would become monopolies and land prices would tend to rise because of the lack of competition. Despite occasional periods when there are surpluses of developed lots in Canberra the stock of serviced lots in other cities, which incur high holding costs, are commonly greater.

The experience in South Bruce, where Jennings both subdivided and serviced lots and built houses, shows how difficult it is to force private developers to complete and sell developments according to a schedule. A common procedure would be for a developer to sell enough blocks to recover outgoings and keep the others until their value rises as those that have been sold occupied. A developer can always claim that demand is not large enough for him to meet the specified date of completion. In the final analysis, the government is unlikely to send a developer bankrupt; nor can it be sure whether the threat of imminent collapse is real or whether the developer is simply acting as a rational speculator in dragging its heels. Once developers become the risk-taking entrepreneurs in land development the integration of planning and land development, from which Canberra has gained much in terms of efficient and timely provision of services, will inevitably be lost.

In the longer term private land development seems certain to have an impact on the leasehold system. Private risk-taking developers will want to have an influence on lease conditions.

They will want the land on which they have construction leases to be leased to residents and businesses with broad and permissive purpose clauses to increase their market value. Leases for which a premium but no rent is paid, and which are sold by private developers will look just like freehold to most people. Developers' pressures to convert Canberra leases to freehold tenure would become even stronger.

The main objective of the decision appears to be to reduce the amount of public capital used in land development in Canberra. There seems to be no clear reason why it should be replaced by private capital if the use of public capital results in greater efficiency and amenity. There may, however, be gains from the fact that private developers are more sensitive to market demands, and it is argued elsewhere in this report that a public developer must also have regard to these.

Some of the limits to the powers of authorities responsible for planning and regulating the use of freehold land have been outlined above. It is important to understand both the history of land use planning and the interest of property owners in it. Land use planning is not something that has been imposed on reluctant property owners by governments. Property owners can be among the strongest supporters of land use controls. Those controls provide owners with a degree of certainty about the future use of land near their properties.

> We again sound a warning that the advantages of a planned city, and incidentally the cost of a planned city, will be dissipated and wasted if policies for development and conduct of business are not clearly established and clearly defined and unequivocally supported by effective enforceable legislation. (Canberra Chamber of Commerce, 1966)

There is, however, a deep ambivalence among property owners and developers, whether they be lessees or freeholders, towards land use controls. They see profitable development opportunities that they are prevented from taking because of land use controls. The more thoughtful recognise the value of such controls in improving the environment and thereby increasing the value of their own properties. Individual owners, of course, oppose any restrictions on the use of their own property but still support restrictions on the use of property owned by others. Such self-centred and inconsistent views are not confined to the private sector; they are also held by public sector organisations. Planning and servicing authorities want everyone else controlled but to be able, themselves, to respond flexibly to changing circumstances: everyone else should be controlled!

The implementation of public plans for the use of freehold land relies to a large extent on negative and restrictive, land use controls. It must wait for private land owners to take the initiative in development. By contrast, a government leasehold system of tenure makes it possible for the government as lessor and planner to promote its plan by initiating land development and land use changes and to control the use of land after development through direct contracts with lessees.

Leasing Arrangements

The first Canberra leases were auctioned in 1924 with bidders nominating a capital price. The successful bidder was required to pay the first year's land rent, 5 per cent of the sum bid, to obtain the lease. From 1935, however, rents were fixed at 5 per cent of the assessed value and any amount bid in excess of that value had to be paid as a cash premium. This was the first step in conversion from a rental to a premium leasehold system. From 1962 bidding was solely for the premium that had to be paid. In 1970 land rent was effectively abolished when it was reduced to five cents payable on demand and a premium became the only payment: the conversion was complete. In the light of subsequent events, it is interesting to note that the Minister who announced the change, Mr Hunt, stated that "the system of land tenure was in no way affected by the new system of land charges. . ." (press statement,4 March 1971), a view which may have been legally correct but was economically nonsensical. Information issued to prospective bidders for commercial leases in 1987 contains the statement: "Once developed, leases can be bought and sold like freehold elsewhere," which is also correct but emphasises the similarities to freehold rather than the differences. Mr Hunt in the same statement, said that "at the end of the fixed term of the lease use reverts to the Commonwealth if it needs it for its own use, otherwise a new lease can be negotiated."

The abolition of land rents had important planning as well as financial implications. One of the great difficulties of land use planning under a freehold system of land tenure is that owners of sites frequently have a very strong incentive to make a capital gain by evading restraints on the use to which their land can be put, or having them relaxed. If they can convert their site from a lower to a higher income-producing use, its value will increase. The cumulative effects of such changes can destroy the utility of a plan as a guide to future land use for private businesses and for the planners of transport and other services, and its ability to maintain and enhance amenity. The pressure that is brought to bear by property owners seeking capital gains makes the orderly implementation of zoning plans for freehold land almost impossible.

In Canberra, however, under a rental leasehold system such pressures were much less intense since a lessee who obtained permission to change the use of a site could expect land rent to increase in proportion to the increase in its value. That, at least was the position in theory. In practice, long before 1970, most rents had lagged well behind 5 per cent of the current market value because of the long (20 year) interval between revaluations. In addition, as interest rates increased with rising inflation, rental yields in the private market increased above five per cent, leaving even more of the equity in the hands of lessees. Throughout the 1960s the difference between 5 per cent paid as land rent and the return on first-ranking debentures, usually 2 or 3 percentage points, provided the benchmark for premiums expected at auctions, a rough indication of the initial value of the lessee's equity in the lease. Furthermore property rates, also levied on the value of the site, had been kept at very low levels compared with other Australian cities in order, among other considerations, to make a move to Canberra more attractive to prospective settlers, especially to reluctant transferees from the larger cities. Again the result was to raise the equity of lessees.

An important change in 1936 saw the introduction of Section 19A into the City Area Leases Ordinance giving lessees the right in improvements on their leases. As is quite common elsewhere, prior to 1936 CALO provided that improvements would become the property of the landlord when a lease expired. Under Section 19A, if a further lease is granted the lessee does not have to pay for the value of improvements and if no further lease is granted the ground landlord must compensate the lessee for the value of improvements. Along with others this amendment increase the equity of lessees in their leases.

In a city such as Canberra where leases are granted for particular urban uses with a view to long term future requirements, changes in use through redevelopment should occur less frequently than in unplanned cities. Indeed, generous areas have been set aside close to central areas for future requirements. Nevertheless, it is not possible to foresee every eventuality and some changes are inevitably necessary.

The earliest leases varied greatly in the breadth of the purposes permitted, from very restrictive and inconsistent for the Sydney and Melbourne Buildings in Civic to very simple in Mort and Lonsdale Streets: for "the main purpose of an industry (other than a noxious trade) employing not more than 25 employees and for any purpose subsidiary thereto such as a residence or a shop." With experience an appropriate level of specificity has been achieved for new leases, though not without transitional difficulties. Industrial leases are a case in point. There has been a general shift towards specificity in industrial leases since 1959, when the first leases

with purpose clauses restricted to specific industries were granted. In 1968 provisions of the City Area Leases Ordinance (CALO) were amended to restrict retail sales of certain goods, considered pre-requisites for the viability of potentially competing major shopping centres, from industrial leases (Department of Interior, 1970). As well, general undefined terms such as "residential" used in earlier leases have caused difficulty in administration. The first proposal to replace a house on Northbourne Avenue with a motel in 1963 included a claim (unsuccessful) that the main use of the lease would remain "residential."

The great majority of leases are auctioned so that the prices and conditions are on the public record. There are occasions, however, when a business has special requirements and negotiates with the Commission and the Department for a suitable site with appropriate lease conditions. Section 17 of CALO makes provision for such cases. It does not make any provision for lease conditions and the "appropriate fee" to be publicly notified and this has caused disquiet in some cases, particularly the White Industries lease (see Appendix).

Leases Ordinances

There are four categories of lease granted in the ACT, each under a separate ordinance.

1. The City Area Leases Ordinance 1936 (CALO) is the most important. It applies to business (including industrial) and residential leases within the defined city area. Leases can be for up to 99 years, and most are for that period. The leases are granted subject to a number of covenants and conditions, of which the most important are those which define the purpose for which the lease may be used, a period within which building must be commenced and completed and a minimum cost and maximum intensity of development.

2. The Leases (Special Purposes) Ordinance 1925 provides for the granting of leases for purposes other than residential and business. These leases also may be for up to 99 years and contain purpose and building covenants. They are used for embassies and for non-profit bodies such as schools, clubs, associations and additional leases to churches. This ordinance makes no provision for transfer of leases.

3. The Church Lands Leases Ordinance 1924 provides for the lease of one site of not more than 5 acres to each church or denomination. They have always been rent free and are leases in perpetuity. These leases can be used only for church purposes or certain church-related purposes in conjunction with a church.

4. The Leases Ordinance 1918 is the only ordinance to apply to the whole of the Territory. It is used for rural and all other leases outside the City Area, and for certain short term leases within the City Area, including rental of premises for Commonwealth uses, tenants of government housing and temporary industrial storage. Canberra's two drive-in theatres were developed on leases granted under this ordinance. Leases are usually granted for up to 50 years in rural areas and up to 25 years in the City Area. They are not transferable without prior consent of the Minister.

Variation in Lease Conditions

The normal method of changing the conditions under which a lease is granted is for it to be surrendered and a new lease issued with different conditions. This method is used in the ACT for leases under all ordinances except the City Area Leases Ordinance (CALO). Section 11A was introduced to this ordinance in 1936 to allow the variation of a lease "in relation to the purpose for which the land subject to the lease may be used, "by an application to the Supreme Court. The original intention was to permit adjoining lessees who might be adversely affected by the change to oppose the application on the grounds that it altered the conditions under which their leases were granted. The clause is quite wide and applies not simply to land use but also to all development rights that are specified in the lease purpose clause. There is no similar provision for variation of the purpose for which leases granted under the other ordinances may be used. The lessee for whom Section 11A was introduced into CALO had a lease in the Sydney Building which stipulated two shops on the ground floor. The application was for a variation to allow partitioning into four shops.

There is no record of the Section being used again between 1936 and 1963 and the Department reports that few variations were granted before 1981, when statistics began to be kept, and only 3 in 1981-82. This may be due in part to the fact that , with industrial leases at least, "[t]he wide purpose-clause offers no impediment to the transition from one form of industrial activity to another according to changes in the requirements of individual businessmen or varying social and economic conditions". (Department of Interior, 1970:18). Increasing use of formal variation procedures therefore springs from (1) increasing specificity of purpose clauses, (2) greater change in commercial areas and (3) a growing and changing city with consequent pressures for redevelopment.

Although, at least in the initial case, the variation in <u>lease purpose clause</u> did not involve a change in lease <u>purpose</u>, the Section has come to provide the accepted vehicle for lessees who

wish to change the purpose for which they are permitted to use their lease and other related conditions. Indeed private sector interests argue that the purpose of Section 11A is to facilitate redevelopment (see Town House Motel, Appendix). Most redevelopments of CALO leases are possible only with such a variation. Applications under the Section by lessees and developers to allow them to redevelop their sites at much higher densities and for different uses became widespread in the 1980s with 29 variations granted in 1982-83 and a further 45 in the next four years. The upsurge in the use of Section 11A occurred after the White Committee of Inquiry reported generally favourably on the leasehold system, and partly as a result of positive encouragement of the redevelopment of leases in Civic given by the NCDC in its Civic Centre Policy Plan. If a CALO lessee seeks to vary his lease, an application must be made to the Supreme Court. It can be vetoed by the Minister, in which case it does not go the the Court, if in his view (normally after receiving advice from his department and the National Capital Development Commission) the change in purpose would be "repugnant to the principles for the time being governing the construction and development of Canberra." Objectors can, at some expense, oppose the application before the Supreme Court.

Section 11A and its interpretation by the Court reflect the ambiguity with which the leasehold system is viewed. A recent Federal Court judgement (Morpath Pty Ltd v. ACT Youth Accommodation Group and others, Nos G 59 and 61, June 1987) traced the legal origins of the Section to provisions in British property law for changing the covenants on titles to allow "reasonable" use of freehold land. As the judgement points out, the use of Section 11A has not been limited to cases where lease conditions prevent reasonable use. Despite the fact that the part of the Section that relates to the Minister's discretion refers to the "principles governing the construction, and development of Canberra," the Courts and the administrators have come to regard decisions under the Section as being largely concerned with planning issues. It will be argued below that lease conditions are both a land use control instrument and a crucial part of the contractual agreement between lessee and lessor which defines the rights and obligations of the lessee and, it could be argued, imposes obligations of enforcement on the lessor.

There is another way in which lessees under any of the four ordinances can be given permission to use their lease for a different purpose. Section 72A of the Real Property Ordinance 1925 allows a lessee to apply to the Minister to surrender a lease in exchange for another lease on the same site which permits its use for different purpose. The surrender and regrant method has been used only for minor variations under CALO because the administering department has taken the view that it would be inappropriate to allow major variations since, unlike Section 11A, it provides no procedure for public notification and opportunity for

objection. It might be an acceptable mechanism if development rights were subject to some separate planning control which made provision for public consultation, but is certainly not acceptable when lease conditions are the only form of land use control.

Of course Section 11A can scarcely be said to give an effective opportunity for public comment on, or objection to a development proposal. The costs of opposing an application under Section 11A in the Supreme Court are beyond the means of most individuals and non-profit organisations. This is evident from recent cases in which an environmental and a community housing group have been prevented from continuing to oppose applications in the court for financial reasons.

A significant number of recent high density redevelopments (including the Canberra Club, YWCA, YMCA, RSL, Legacy, the Polish Club, CWA, Police and Citizens Boys Club and Uniting Church [City] sites) have involved leases granted under the Leases (Special Purpose) Ordinance or the Church Lands Leases Ordinance. These leases, in part or in whole, have been surrendered under Section 72A of the Real Property Ordinance and new City Area Leases Ordinance leases issued. There is no other means of carrying out such a change although it is believed that Section 72A was introduced to permit minor changes to Special Purpose leases and to reassure mortgagors of clubs etc that leases could be made marketable in cases of financial difficulties. There is no public notification, or opportunity to object to such changes, a completely unsatisfactory situation.

In 1968 Section 8A was inserted into the City Area Leases Ordinance in order to define terms such as "industry." It gives a relatively broad definition which permits a wide range of goods to be sold from "leases for the purpose of an industry," though it excludes the kinds of general retailing usually found in shopping centres. Effectively it led to a wider range of permitted uses in Fyshwick and Braddon Industrial Areas. It does not apply to more recent industrial leases for which the permitted uses are defined more precisely.

The use to which a lease can be put is specified in the purpose clause. The intensity of use and building bulk permitted under older leases are usually controlled only by the building regulations and design and siting controls. Many older leases were issued at a time when there was a general control over height of building in the Territory through the Canberra Building Regulations, Regulation 20(1), to not more than two floors. By the late 1960s some leases that were granted included covenants governing site coverage, height, plot ratio and other development intensity limits. In addition to requiring approval for proposed structures under

the Building Ordinance, the approval of NCDC under the Building (Design and Siting) Ordinance 1964 was necessary. The Commission's Policy 2 (Architectural Control Drawings and Conditions of Building Approval) specified that:

> Any special design and siting requirements contained in the conditions of lease or comprising the conditions of building approval established prior to the offer of grant of lease shall constitute the Commission's design and siting policy in respect to the development of a lease. (NCDC, 1967: p.6)

Where the above departed from other policies, the approved development and lease conditions took precedence. Policy 4 (Relationship between Neighbouring Buildings) controlled height, bulk, form, siting and character of building with specific definitions of coverage, height (2 storeys), plot ratio and so forth. Current practice is to include development conditions (and sometimes architectural control drawings) formulated during the approval process into the terms of a new lease.

The definition of development rights in leases has, however, been haphazard and there is a good deal of variation between leases issued at different times with regard to whether their development rights are controlled by building regulations, NCDC Design and Siting Policy, or lease conditions. Some redevelopment proposals involve a large increase in intensity of use, and therefore in development rights, for leases for which intensity of use is not specified in the lease purpose clause. Section 11A does not, of course, apply to such proposals. For example, a change in lease purpose may not be required to replace a two storey office building with a twelve storey office building, though other lease conditions may need to be changed. Such changes in development intensity are approved by the Minister, under the authority of the lease covenant which requires his consent to the erection of, or structural alteration to, any building on the site. The Minister may, then, issue a new lease without any public notification. This is undesirable when the new lease can grant new development rights and markedly change the intensity of land use; both changes that could affect other lessees in the vicinity.

Minor, but significant changes in land use can occur under Section 10 of CALO which permits limited business activities in residential areas. The Minister can approve a bona fide resident "carrying on his profession, trade occupation or calling." There are some 330 properties for which such approval has been given. Approvals are published in the Gazette, are subject to annual renewal and can be appealed by either the applicant or affected neighbours in the Administrative Appeals Tribunal (see for example Francis Charles Boyle and Anor v. Anthony

Norman Charge and Anor ACT G 76 of 1986). No variation in lease conditions occurs and no betterment is charged. The Section is used widely by doctors, dentists, veterinarians and other self-employed people. Difficulties sometimes arise when lessees cease to live in the premises so that they are used solely for business, while remaining residential leases. Further aberrations may emerge under the dual occupancy policy which allows a second house to be built on a residential lease when one dwelling is occupied and the other used, (though only in part, legitimately) for professional purposes.

Betterment

Prior to the abolition of land rents, lessees who were successful in obtaining a change in the lease purpose clause using Section 11A or for whom the Minister approved variations in lease conditions which significantly increased development rights, stood to make very substantial capital gains. This was because land rents set at 5 per cent of assessed value were revised only at 20 year intervals and hence were well below market rents. The abolition of land rents made such gains even greater. At the same time as collection of land rent ceased (January 1971) the City Area Leases Ordinance was amended by inserting Subsections (9)-(9G) into Section 11A, under which a lessee, granted a change in lease purpose, has to pay to the government 50 per cent of the increase in the value of the site which resulted from the change, less $1500. The objective was to recover something for the public purse following abolition of land rents but to leave an incentive for lessees to undertake desirable redevelopment. The 50 per cent was essentially an arbitrary fraction, though with land rents at 5 per cent of capital value the Commonwealth's equity interest was probably less than 50 per cent prior to 1971.

There is, of course, no good reason to offer a speculative gain to lessees to encourage redevelopment. On the contrary, it is likely that the prospect of making such speculative profits will encourage an excessive amount of redevelopment. It may, however, be necessary to encourage lessees to initiate socially desirable redevelopment if the government fails to take the initiative, but it would be neither necessary nor desirable if the lessor were to play the more positive role outlined below.

If redevelopment of a site under the Church Lands, Special Purpose, or Leases Ordinances is proposed for a different use the usual procedure is for the old lease to be surrendered and a new lease, usually under the City Area Leases Ordinance, granted. The Department, in deciding how much to charge for the new lease, has treated these cases in the same way as variations in lease purpose under Section 11A of CALO and levied a betterment charge of 50

per cent less $1,500 (see, for example, Section 22 City, Appendix) There is no specific legislative backing for this procedure, though there is no doubt that the landlord can set a price for the grant of a new lease. An alternative, which was proposed but not implemented in the case of the Starlight Drive-in site, was the surrender of the Leases Ordinance lease, issue of a new CALO lease for the same purpose and the requirement that the lessee seek a variation under Section 11A. In some cases the betterment has been waived where the non-profit organisation concerned undertook to spend an equivalent amount on community facilities. This occurred in 1984 in four cases: the YMCA (City), St Vincent de Paul (Turner), Police and Citizens Boys Club (Turner) and Legacy (City) sites.[1] Current policy is to charge betterment. The alternative to charging betterment, which I will argue would be more appropriate, is to charge the same for the grant of a new lease whether or not the land had previously been leased by the new lessee; to charge the full market value for the new lease after compensating for the value of the surrendered lease. This is the favoured policy for the Starlight Drive-in (see Appendix) though with this Leases Ordinance lease there would be no compensation for the surrendered lease. Its disadvantage under current procedures is that there would be no opportunity for public consultation or appeal.

Where redevelopment involves only a change in intensity with no change in use and the intensity of use was not defined in the lease purpose clause, the Department has similarly levied a 50 per cent betterment charge. This occurred, for example, in the current Ansett city office lease in Civic (previously the Manchester Unity building) redeveloped by L.J. Hooker. There is no specific legislative backing for a betterment charge in these cases and the levy is under challenge by the developer in the Supreme Court.

Betterment is levied in the case of residential redevelopment only if more than two units are to be constructed on a site. In Kingston, for example, where site amalgamation was required, new leases were issued. The charge on the new lessees was first for the augmentation of services. If that charge was less than betterment assessed under the formula a further charge was levied. The discounting of the betterment charge by the cost of works external to the lease for which the lessee is normally liable seems wrong in principle.

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1 The proposed redevelopment of the St Vincent de Paul site did not go ahead. For the new proposal being considered in 1987, betterment will be charged.

Planning and Public Participation

Following the recommendations of the Joint Committee on the ACT (1979:131-44) to allow public comment on proposed changes in the established areas of Canberra, a system of plans, primarily existing land use plans, policy plans and development plans, was introduced by the National Capital Development Commission under its 1957 Act. Existing land use plans show the uses which are permitted under leases that have been granted, the City Plan of Canberra and other commitments entered into by the Commonwealth. In principle, policy plans propose general changes in land use in large or small areas while development plans propose more specific changes needed to implement the policy plans, including investments in services and public facilities to be made by public bodies, and investments expected to be undertaken by existing or prospective lessees. Both kinds of plans can cover any area from a single site to the whole of metropolitan Canberra. Some are plans for a particular element in urban structure such as transport and others cover particular areas. Both kinds of plans are normally made available to the public in draft form for comment before adoption by the Commission. Some of the plans are quite precise, but others, such as the Draft Plans issued in 1987 for Section 35, Block 2, Turner (St Vincent de Paul) are not sufficiently precise to give lessees who might be affected a clear indication of what is likely to occur. Frequently, the distinction between the two kinds of plans has been found to be inappropriate and many are now published as a "Policy Plan - Development [or Implementation] Plan", the latter being a more detailed version of the former. When finally approved by the Commission, these are also noted by the Minister under Section 12 of the NCDC Act, giving them some degree of formal status.

Although in content and form they vary widely, from precise site proposals to vaguely expressed intentions, they are very much like zoning plans for freehold land. The Commission claims that they are not as binding as statutory planning schemes. In particular, as Cohen (1985) and others, including the Commission itself, have pointed out,[2] the Commission, the planning and development authority, is not bound by them. Of course government servicing and development authorities are seldom wholly bound by land use controls over freehold land, but they are rarely planning authorities as well. The Commission is a servicing and development authority and a planning authority. It is remarkable that it is not even required formally to give due weight to its own adopted plans.

2 Quoted in a letter from the then Minister for the Arts Heritage and the Environment to the President, Reid Residents Association, 24 February, 1987.

Leasehold and Land Use Planning

The leasehold system of land tenure in Canberra has always been seen as an essential means of land use control; a part of the planning system which controls the use of land in the established parts of the city. It complements the control, exercised through public ownership, of non-urban land and public land development in the newly developing parts of the city. Here we examine how a system of this kind might be expected to work and in the final section argue that a number of changes are required in Canberra if lease administration and planning are to provide their full potential benefits for the national capital and its residents.

To understand the relationship between leasehold tenure and land use planning it is necessary to show how they operate separately. Because it is less well understood, how leasehold tenure operates when there is a separate planning authority is described first and then how a planning system operates in similar circumstances. The objective is to make it clear that the functions of estate management and land use planning are distinct but closely related. There are many examples of different degrees of separation between the two functions in Europe, ranging from the wholly privately owned Grosvenor Estates of the Duke of Westminster, the Cadogan Estate in Chelsea, the Calthorpe and Bournville Estates in Birmingham (McAuslan, 1975) through Letchworth Garden City Corporation, originally a private company but now a public corporation, and the other British new towns to the City of Stockholm where a Real Estate Department manages the estate and a Planning Department exercises planning controls over the use of both leasehold and freehold land (Ratzka, 1980).

The situation is similar in the City of London which acquired and later developed much property that was cleared by war-time bombing. Its development and subsequent management were under the direct control of the real estate section of the Corporation of the City. In an interview the retired chief legal officer, Sir Desmond Heap, a noted authority on planning law, recounted conflicts between the real estate and planning sections of the Corporation which had to be resolved by the Corporation of the City of London itself.

Where land is leased on long leases for urban use, the rights and privileges attaching to the site are shared between the ground landlord (lessor) and the lessee in a manner prescribed by the lease agreement, which is a contract between the lessor and the lessee. The lease terms usually define the development rights and obligations (such as a requirement to build within a given time and to maintain the property), the rent or premium to be paid, the duration of the lease and the rights, if any, of the lessee at the end of the lease period (such as compensation, if any for

improvements and rights to a new lease). Normally there is a separate municipal planning authority and its land use controls would be expected to take precedence over any private agreement made between a lessee and a lessor. The planning authority exercises the same control over the use of leased land as over the use of freehold land. The mechanism of control is, however, different. The ground landlord usually negotiates the approval of development proposals (such as a housing estate) as a whole with the planning authority as well as applying for permission for individual developments.

Neither the lessee nor the lessor can unilaterally change the terms of a lease agreement, but either can negotiate with the other if they want a change. The initiative would normally be expected to come from the ground landlord, who can, eventually, make unilateral decisions when the lease expires. When obtaining a lease, a lessee will be interested in the terms of leases on surrounding property owned by the lessor because they will affect the value of his lease. The lessee might possibly have a case against the landlord if those terms were changed without the lessee's consent, if it can be shown that his or her reasonable expectations in entering into the lease have been adversely affected. The existence of Section 11A would weaken the case because it implies that variation is possible. The provision for ". . . compensation to other persons or otherwise, as the Court thinks just . . ." in subsection 8(b) of that Section, however, implies that the landlord is expected to recognise the interests of other lessees before permitting a change in lease purpose. The situation would be similar to that of owners of freehold subject to a covenant where one owner is able to take action against another for breach of the covenant. The Commonwealth as landlord has a greater responsibility to safeguard the interests of those with whom it has entered into lease agreements than the responsibility of state and local governments to maintain land use controls over freehold land. Any activity that would be detrimental to the purposes for which the lease agreement was concluded, including the reasonable expectations of lessees, should be avoided. This includes the expectations of business (Dusseldorp, 1961) and the expectation of quiet enjoyment of a residential lease.

If the lessee wanted to redevelop the site for a more valuable use, it would be necessary to negotiate with the ground landlord, who would require a higher rent or, if the rent was fixed, a premium reflecting the increased value. When the landlord took the initiative in such negotiations, it might, in the interest of the amenity of the whole estate, sometimes wish to negotiate a change in lease purpose to a less valuable use, in which case the lessee would expect a lower rent or to be compensated for the loss in value. The landlord could, as an alternative, negotiate to buy out the remaining portion of the lease and offer a new lease for the

new purpose to either the existing or a new lessee. The price at which a lease could be bought out would depend on the rental value of the property, the terms of the lease, the period the lease had to run and end-of-lease provisions. In any of these cases any change of use would have to be approved by the planning authority.

If the landlord is to act in this way it is necessary that development rights be specified quite precisely in the lease conditions . While they are specified in the conditions attached to recent Canberra leases they are not always clearly defined in leases granted in earlier years. As described above, development rights have often been specified in development conditions, architectural control drawings or conditions of building approval. This problem may need to be remedied.

In both Stockholm and Letchworth redevelopment, when it occurs, is at least as likely to be initiated by the lessor as by the lessee. In the strictly private London and Birmingham estates the lessees have no rights to initiate redevelopment. Since leases in all of these estates are typically long and land rents are often relatively low, the lessor is not in a very strong bargaining position. The landlord normally determines the terms for renewal of a lease (though, especially in the case of residential property, some of the terms are set by legislation in some countries) and must agree before there can be any changes in the terms of a lease during its currency. For example, a lessor might agree to the renewal of a lease for a long term with greater development rights in return for a higher rent or a premium. The important difference between leasehold and freehold is that leases divide the rights and privileges of a property owner between lessee and lessor. That division specifies the basis for negotiation between lessee and lessor.

Where a single lessor owns a large number of contiguous properties, as in new towns or large estates, the lessor's interests in amenity and environmental quality within the estate will frequently have much in common with those of the planning authority. Like a planning authority the lessor of a large estate limits the rights of the occupants of individual properties in the interest of the larger community.

The landlord's interests are not, however, always the same as those of the planning authority. The primary objective of the ground landlord is to maximise wealth deriving from the estate. One of the objectives of a planning authority is the protection of amenity which, on a large estate, is consistent with maximisation of the value of land. Planning objectives, however, are broader and include the wellbeing of those living outside the estate and of future generations.

A planning authority is concerned to ensure social equity so that all, even poor households, are not deprived of environmental amenities such as accessibility to social facilities and services. These broader objectives may not be consistent with the objectives of a lessor. Even the New Towns Commission and Letchworth Garden City Corporation, a public corporation, have to submit development proposals to the local government for planning permission, and the Stockholm Real Estate Department's leasehold agreements have to be endorsed by the City's Planning Department.

Planning and Leasing Authorities: Roles and Responsibilities

The close relationship of and distinction between the functions of planning and leasing need to be explored further, though they are implicit in the above discussion. A ground landlord aims to allocate leases of sites to uses and users according to market demand while giving due weight to the impact of the use of one lease on the market value of other leases. It aims, in short, to maximise the value of its total property within the constraints set by planning controls. It should be free to act in a commercial manner within those constraints, negotiating with lessees, buying and selling leases and negotiating changes in lease conditions which it believes to be in its commercial interest, bearing in mind always that in a large estate (and Canberra must be one of the largest in the western world) the use of one site may affect the value of others. Of course a public landlord should be accountable for its actions in the same way as other public sector organisations performing business functions. A planning authority, on the other hand, has to ensure that the interests of lessees, lessors and other residents, are protected. It defines development rights in the light of those interests in its long term planning for development and redevelopment and also in considering whether to approve individual land use changes.

A leasing authority which charges land rents rather than relying on lease premiums can also achieve other social objectives. For example, in Canberra, before the abolition of land rents, it was sensible and possible to provide shopping centres and other socially useful commercial services at a relatively early stage in suburban development. Other than any premium payable as a result of competition for the grant of a lease, no capital outlay was needed to get possession of the land. Land values, and therefore rents, at that stage were very low but later rent revision allowed the government to reap the betterment in commercial land values that comes with further development. A leasehold system that relies solely on premiums, however, requires the landlord to act like a developer of freehold land and delay the provision of many services until the market value of the site has reached high enough levels to at least cover

development costs, which may be many years after people who want commercial services move into an area.

Another difference between a landlord and a planning authority relates to process. A landlord might be expected to bargain with individual lessees and to compensate or be compensated for agreed changes in rights and obligations under a lease agreement. This is a long standing practice in Canberra[3]. But when planning authorities negotiate with property owners about changes in development rights, for example requiring developers to provide public amenities in exchange for development permission, it is seen to be slightly improper. Planning authorities, since their powers to control the use of land derive from powers given only to governments, are expected to operate according to well publicised rules and to treat all property owners that are in the same situation in the same way. In a word, lessor-lessee relationships are in the private domain whereas relationships between planning authorities and property owners are in the public domain. In dealing with property owners planning authorities are expected to permit third parties, those who are only indirectly affected by a change in land use, the opportunity to safeguard their interests; they provide for public participation and appeals against decisions to permit a change in land use. Lessors provide no such third party rights, though they might be expected (or required in equity) to consider the interests of one of their lessees who was affected by a change in the development rights of another lessee.

What kind of administrative arrangement provides an appropriate level of separation and integration of the functions of lease administration and land use planning? This study's analysis of the relationships between the functions has implications for their distribution. An arrangement like that in Stockholm where the Real Estate and Planning Departments are separate sections of the same wider organisation - in this case Stockholm City Council - would be expected to work well. Any proposal from a lessee to change the use of a site has to be negotiated with the Real Estate Department <u>and</u> approved by the Planning Department. Any proposal from the Real Estate Department must be in accord with approved land use plans, though that Department can exercise influence in the preparation of the plans. For the purpose of this report, however, it is more important to describe what should be done than who should do it. Much emphasis in this report has been placed on the separate functions and separate objectives of lease administration and planning. It has also been argued, however, that they are, and should be very closely related for two reasons:

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3 See Department of Capital Territory (or Interior) Lanyon Pty. Ltd. v. The Commonwealth: Historical and Background Statement" (1973?) relating to Block 2 Section 12 City ,the Wales Centre site.

1. they both make use of a very important instrument, lease conditions defining development rights; and

2. in the great majority of cases an enlightened lessor and an enlightened planning authority will agree on the appropriate lease conditions.

The final section will examine what changes should be made in the way land use planning and lease administration are handled in Canberra in order to achieve the appropriate relationship between the two functions.

Enforcement of Lease Conditions

The great majority of Canberra leases are used in accord with their purpose clause. Nevertheless, lack of enforcement in some areas, Fyshwick for example, has created such a weight of vested interest in maintaining breaches that it has proved politically expedient to legitimise the breaches rather than enforce them. There has been some dissatisfaction with the extent to which lessees have been permitted to remain in breach of conditions of their lease for long periods (Wensing, 1986). Enforcement has been difficult in some cases (see for example The Minister of State for Territories v. Gregory's (Properties) Pty Ltd, Nos S.C. 823 and 824 of 1984). The court can order that an activity not permitted under the lease should cease. If it continues the lessee can be fined for contempt of court, with the level of the fine determined by the court. This has never happened in Canberra. The one case that was taken to court, the Gregory's case cited above, was lost. If it is not used for its legitimate purpose for a year, the Minister may terminate the lease. The department responsible for lease administration has not given lease purpose clause enforcement a high priority. It and the Commission have apparently regarded them less as a contract between lessee and lessor than as a land use control measure used solely to achieve planning objectives; objectives which are established by the Commission as planning authority. The Department has not always been prepared to exercise the rights of a landlord where persistent breaches of lease conditions have occurred.

Many statements in the media by representatives of the private sector show that they do not regard the lease as an agreement between a lessor and a lessee; rather lease conditions are seen as an undesirable source of restriction on development opportunities and of uncertainty about future property values. Lessees act like owners of freehold titles and see lease conditions as being a rather clumsy form of land use control - even worse than zoning. The administering department does little to counter this view. Thus the Assistant Secretary, Business Leases, in

the ACT Office was quoted in the Canberra Times on August 19, 1987, in relation to a dispute about the use of land leased to a church as saying, "this land belongs to the church and not to the Commonwealth . . ."

Implications for Canberra

1. Allocation of Responsibility

Responsibility for land use planning and estate management are currently allocated to the National Capital Development Commission and the ACT Office of the Department of Arts, Sport, the Environment, Tourism and Territories respectively. The Commonwealth Government, through the Minister can, and sometimes does, exercise a direct influence on both the Commission and the ACT Administration. The Minister has only an indirect influence on planning but the leasing ordinances give him or her responsibility for important decisions. The attitudes of various governments and ministers have shaped, to varying degrees, both planning and lease administration in Canberra. The Stockholm model of allocating these functions to separate arms of a local or regional government would not be appropriate because of the importance of national capital considerations in Canberra's planning. It was these considerations which led the White Committee (1983) to recommend that a National Capital Development Commission, reconstituted to include both local and national interests on its controlling body, be responsible for both functions. In my view such an arrangement is still likely to produce the best results, though I would now wish to emphasise that the two functions should be performed by distinct sections of such a Commission. Lease administration is not solely a means of implementing land use plans; it also has its own objectives. Both functions need to be clearly understood.

2. Roles of Ground Landlord and Planner

The Canberra plan consists, for the most part, of the public lands retained for national, territorial and municipal purposes, together with the sum of the purpose clauses of existing leases, and the long and short term plans for the development of new and expanding urban districts. It is only where the planning authority believes that a change in use is desirable that a land use plan for an established area would be different from the existing purpose clauses. A plan for changing land use in a specific area might be initiated by the planning or the lease administration section. Such a plan should involve both sections and, ultimately, would require planning approval after public notification and opportunity for objection. Like new

development, redevelopment is a crucial urban transition where lease administration should be harnessed to implement land use plans and land use plans should give due weight to their impact on the value of leases and the reasonable expectations of existing lessees. Any change in the planned use would be open to objection from a public interest point of view and, even when approved, such a change would not, of itself, confer development rights: they would still have to be negotiated and purchased. An approved plan for a land use change should commit the landlord to initiating the specified changes in lease purposes. Some lessees may be unwilling to change the use of their leases or to accept a reasonable offer to purchase them. The only power remaining in the hands of the landlord in this case, short of compulsory acquisition, is that the leases will eventually run out. As argued below, it is important to retain that power.

The lease administration authority for Canberra needs to act in a more positive rather than a reactive way. Like new development, redevelopment should be initiated by the landlord. The landlord should always take actions that are consistent with planning policies, but either it or the planning authority may initiate discussions with a view to changes in planning policies or particular lease conditions. Given that lease purpose clauses are both private contracts and instruments of public land use control, it is appropriate that the terms of all new leases, including those issued by the Minister under Section 17 of CALO, be publicly notified. It is also appropriate that measures that are usually used to enforce both should be available in the ACT (Wensing, 1984). In Australia breaches of public land use control can be dealt with through criminal remedies, though injunctive relief is now more common. Breaches of private contracts are handled in the civil jurisdiction. There is also a good case for the leasing authority taking a much stronger line with lessees who breach lease conditions. If breaches are allowed to continue the courts are less likely to agree to order the activity to cease at a later date. Lease conditions should be enforced, otherwise Canberra will be without effective land use planning and conditions in leasehold contracts will become difficult to enforce due to disuse. Private prosecutions for breaches should continue to be possible where the landlord fails to act.

In order to ensure public accountability, it is desirable that the financial terms as well as other conditions under which leases granted by the Minister under Section 17 of CALO and those granted under Section 72A of the Real Property Ordinance, should be on the public record.

3. A Land Management Account

Several reports on planning and development in the ACT have recommended that an account be established for land development in Canberra into which revenues from land development would be paid and from which its costs would be met (e.g. White Committee, 1983, pp. 77-8; Commission of Inquiry into Land Tenures, 1976, p. 95; Sommer, 1987). One objective of the recommendation was to ensure that the land developer operated in a financially responsible manner; there is no incentive for it to do so when land development is paid for from annual appropriations and all revenue from leases is paid into consolidated revenue. Indeed this matter was raised in relation to the possible waiving of betterment charges for Section 22 City. It would also permit the financial results of the land development operation to be monitored more readily. Those recommendations were made at a time when there was very little redevelopment occurring in Canberra. The arguments for a land development account apply equally to redevelopment. The role of lessor/estate manager recommended in this report implies that lease premiums negotiated for increased development rights, like premiums obtained when leases are offered for newly developed sites, would be paid into such an account. For this reason as well as others the development authority for Canberra should also manage developed sites. A more suitable name for the account might be the Canberra Land Management Account. A set of accounts covering all of its functions would provide valuable information about the costs of developing and managing land in Canberra. Notional accounts of this kind were supposed to have been established in the mid 1960s but they have not been made public.

Since the Commonwealth Government owns the land in Canberra it might be thought that any profits or losses on the account should accrue to the Commonwealth, as is the situation at present. The Commonwealth, however, does not appear to have exercised a strong control over the financial aspects of land development in Canberra. If the net outcome of the land management account was part of the ACT budget there would be strong local pressures to ensure that it operated efficiently. There need not be a subsidy to the ACT from such an arrangement since the potential revenue from land would be taken into account by the Grants Commission in assessing the Commonwealth grant to the Territory. The arrangement would put the ACT in a similar position to the states which receive revenue from crown land leases and the sale of crown land.

4. Definition of Development Rights

If the owner of the land in Canberra is to be able to exercise its role as landlord fully development rights need to be precisely defined in lease conditions. Lease purpose and building bulk and intensity are defined loosely, if at all, in some older leases.

An assessment needs to be made of the best way to correct these defects, whether through legislation which interprets terms such as "residential" used in older leases and incorporates, for example, development conditions in the lease, or through revision of conditions of individual leases. As sites which are under pressure for redevelopment are often held under these older style leases such changes would help to ensure an orderly process of change.

This does not imply very detailed lease purpose clauses but it does require lease purpose clauses that define both the development rights that a ground landlord needs to have defined and the land use which needs to be controlled to achieve planning objectives.

5. Development Rights and Betterment Charges

The estate manager (the lessor) should be free to initiate negotiations with lessees with a view to purchase or redevelopment of their leases. Compulsory purchase would be used only if the site was needed for a public purpose. The current Land Acquisition Act 1955 applies throughout Australia and permits the Commonwealth to compulsorily acquire only for a "Commonwealth purpose" which has been interpreted very narrowly. The comparable state Acts permit acquisition for more broadly defined "public purposes". Powers to compulsorily acquire leases in the ACT should be similar to those available in the States to acquire freehold land.

Unlike most governments in the western world there is some doubt whether the Commonwealth, in its own territory, has the power to compulsorily acquire land for redevelopment. The purchase of rural land to build the City was regarded as a Commonwealth purpose but the purchase of leases for redevelopment is not. Such powers should be used sparingly but they are needed in some circumstances.

If, as usually occurs at present, negotiations for enhanced development rights were to be initiated by a lessee, and if the lessor supported the proposal in principle, and if it received planning approval, the lessor should then negotiate the largest sum possible in payment for

those rights. In some cases the lessor may wish to purchase the lease at its market value with its current development rights and auction it with the improved development rights. In other cases after negotiating the terms, a new lease would be granted to the existing lessee.

The current 50 per cent (less $1500) betterment charge should disappear and be replaced by the largest amount which could be obtained either from the current lessee or from purchase and grant to a new lessee with enhanced development rights. Such arrangements would be in keeping with the views expressed by the Commission of Inquiry into Land Tenures (First Report, 1973, p. 70) that ". . .the whole of the difference should be appropriated by the Crown and not merely half less $1,500." In some cases the amount might be smaller than under the present formula. For example, earlier proposals from the Uniting Church for the redevelopment of Section 22 in Civic included a considerable amount of space for community facilities but the development was not considered to be financially feasible by the church given the assessment of the betterment tax payable. If proposals are regarded as socially desirable there is a case for some flexibility in assessing betterment but the principles should be part of published agreed policy and there should not be ad hoc decisions. In principle the market value is what someone is prepared to pay for specified development rights. If development rights are increased to allow more profitable use the amount of betterment recoverable should be much larger than the present levy.

Like any other public authority that deals in property, the lessor would be required to buy and sell leases and development rights at market values. It would, of course, agree to or seek a change in use only if it regarded the new use as in the public interest. The final decision about whether to go ahead might depend on how much a lessee was prepared to pay for the rights. There are problems in having public authorities negotiate privately with individual established or potential lessees. Such problems are not insurmountable. They already exist when leases are allocated by the Minister to individual businesses under Section 17 of CALO. They also occur with many other public authorities. As noted above, the results of negotiations should be made public.

6. Variations in Lease Purpose Clauses and Development Rights.

Lease purpose clauses and development rights should be recognised as both land use controls in the planning sense and part of the terms of an agreement between a lessor and lessee. Any change in those terms should both be negotiated between lessor and lessee and be subject to public notification and open to objection in the same way as a change in zoning. A proposal

from a lessee to change those terms should be considered by both the landlord and the planning authority in the first instance. Their decision (which must finally be agreed) would be open to appeal by either the applicant or an affected third party.

Given that Section 11A of CALO is the only means of changing lease conditions that involves public notification and some opportunity for objection, it is laudable that the administering department has resisted attempts by property owners and developers (as happened, for example, in the Idonz case relating to redevelopment of the Town House Motel lease), to use Section 72A of the Real Property Ordinance 1925 which permits the Minister to terminate a lease under any of the four ordinances and issue another with different conditions, and makes no provision for objection. That Section has been used, because there is no alternative, where lessees of Leases Ordinance, Special Purposes or Church Lands Leases have been granted permission to change the purpose for which they are used and, frequently, new leases issued under CALO.

Nevertheless Section 11A should be repealed and replaced by a combination of provision for surrender of leases under the Real Property Ordinance and the granting of new leases by the Minister under the City Area Leases Ordinance (NCDC, 1965, p.9). Such a procedure must include a legislative requirement for public notification and appeal if the ground landlord and the planning authority agree to the change, and it should be used for changes in purpose clauses of leases under all four ordinances. Such a procedure is currently proposed for the Starlight Drive-in (see Appendix), though without public consultation over specific development proposals, and was advocated by Wensing (1986:48-9). This could be achieved by amendment to the leasing ordinances or to the Real Property Ordinance. Requiring new leases for major changes in use has the added advantage that all the lease conditions can be revised to define development rights precisely, in the way they are defined for other new leases. Leases whose purpose clauses are changed under 11A often have inadequate definition of development rights and other defective lease conditions.[4]

The Supreme Court is inappropriate not only as a first body to consider applications for lease purpose variations but also as a body to hear appeals against decisions by the landlord planning authority. It is so expensive that few objectors can afford to dispute an application that is heard before it, and insufficiently expert in planning matters or leasehold administration to consider

4 There are other problems arising from the fact that the surrender and issue of a new lease for the same site is regarded as a sale for the purposes of capital gains taxation. This is undesirable and a means of avoiding it needs to be found (see Real Estate Institute of the ACT, August 1987 Newsletter).

the merits of proposed variations. It is proposed that applications for surrender and grant of a new lease would be decided by the planning and lease administrations in the first instance, but be subject to appeal.

In considering applications for surrender and regrant for a different purpose the planning and lease administrations, and the appeal body, should give considerable weight to the role of lease purpose clauses in providing stability and predictability of land use in Canberra. Both the existing land use plans of the NCDC and the approved policy plans should be considered. Both help to establish the "reasonable expectations" of businesses and residents about the future use of land. Those expectations should not be lightly upset, though there will be occasions when, after weighing the advantages and disadvantages, it will be clear that the public interest is best served by a change.

A planning appeals mechanism, which might be a special jurisdiction within the Administrative Appeals Tribunal, should be set in place to consider objections to decisions taken on planning grounds about these changes. At such appeals people, who may be indirectly affected, as well as the lessee and the planning authority, would be able to make representations relating to the effects the proposal would have on others. This is quite distinct from an appeal that may be made by a lessee against a decision by the public authority as landlord. Such appeals could also be handled by the Administration Appeals Tribunal, presumably through a different expert panel.[5] This would be an alternative to the methods used by State governments in the administration of their crown lands and which was recommended by the (then) Department of Capital Territory in a submission to the Commission of Inquiry into Land Tenures in 1973: to establish a Land Board which would act as a court in dealing with appeals by lessees who claim to be disadvantaged. A similar suggestion was made by the Joint Committee on the ACT (1979, pp. 144-50) for a Land Tribunal.

Minor lease clause variations should be possible without surrender and grant of a new lease, provided a satisfactory definition can be found of "minor variations". Such a definition would need to include the requirement that the variation must not have significant implications for other lessees.

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5 A single appeals body that can draw on a wide range of expertise to hear different kinds of appeals is not uncommon. The AAT is already one example. Also the recently established NSW Land and Environment Court deals with appeals against decisions related to environmental, valuation and planning matters.

7. Public Participation

Public participation is generally called for when any planning scheme is prepared or varied. In Canberra public participation is invited in consideration of draft policy plans and development plans, which are essentially proposals to vary development on leases, to lease land for particular purposes and to carry out related public works on unleased land. This is the appropriate opportunity for the public to consider a group of related developments on leased land, and the proposals need to be in a form which permits their implications to be clearly understood. The fact that a policy plan or development plan has been approved does not remove the need to notify and provide opportunities for objections when lease purpose clause changes are being considered for individual leases. It is only at the stage when development or redevelopment proposals are put forward that the implications will be clearly evident to people likely to be affected. At present such opportunities are not meaningfully provided for either by legislation or procedure.

8. The Binding Nature of Policy Plans and Development Plans

Following the consideration of any representations made when they are released for comment, policy plans and development plans are adopted by the NCDC and noted by the Minister. The plans can then be used to justify, for example, a decision whether to recommend that the Minister veto an application from a lessee to vary a lease purpose clause under Section 11A. Nevertheless, those plans do not confer development rights, which in Canberra are conferred through a lease contract (see Morpath Pty Ltd. v ACT Youth Accommodation Group Inc. and Others, No. ACT G 59 and 61 of 1986). Statutory plans generally commit the planning authority to act in ways that are consistent with its own plan.

The Commission should be bound to conform to published plans that have been approved by the Minister after public consultation. If it is not so bound, Commission planning for changes in established areas can increase rather than reduce uncertainty about future land use. If departures from adopted policy are contemplated, the changed policy should be formally adopted only after following the procedures used when they are adopted. In exceptional circumstances the Minister could approve any actions contrary to the plan (as he does now), but such approval would be given only after due notice and opportunity for public comment.

9. Lease terms

A number of changes in lease administration in recent years have given non-residential lessees under CALO rights that are more like the rights of perpetual lessees than those of lessees for a limited period. Indeed there has been active lobbying for the conversion of all Canberra leases to leases in perpetuity (Dept. of Territories, 1987; Raison,1979).

9.1 Residential Leases

Although there has been no legislation to give it effect, the government has stated that residential leases will be renewed at the end of their 99-year duration without the payment of a further premium. For residential leases this is appropriate and would have strong local political support. In my view the government commitment to renew all residential leases at the end of their 99 year terms without any further payment should be incorporated by amendment in the City Area Leases Ordinance. This would remove any anxiety residential lessees may have about their future security and prevent residential lease issues clouding discussions about the appropriate terms for non-residential leases. There is, however, a strong argument against converting residential leases to leases in perpetuity. Especially while Section 11A of CALO remains in force, it would be possible for the owner of a residential lease in perpetuity to get a variation in lease purpose clause which allowed it to be used for non-residential purposes while it remained a lease in perpetuity.

9.2 Non-Residential Leases

Owners of non-residential leases under City Area Leases Ordinance for less than 99 years have been given the right to convert their leases to 99 year leases by the payment of a modest premium. While this may be appropriate in most cases, there are some cases in which it is not. Especially when the lease is for a purpose that does not require a large investment and that is unlikely to continue for a long time, short term leases for business purposes should continue to be granted. What is more significant, however, is that Ministerial discretion has been used to allow lessees of non-residential leases to renew their leases at any time prior to the last 15 years of their lease, for a further 99 years, by paying ten per cent of its value for rating purposes (Press Statement of the Minister for the Capital Territory, 9 June 1980). This latter provision almost creates leases in perpetuity.

Fixed term leases are frequently justified in part because they facilitate redevelopment. But it has often been pointed out that it is not possible to predict when redevelopment is likely to be desirable at the time a lease is first issued, and therefore lease termination cannot be relied upon for this purpose. There are two reasons why this conclusion is incorrect.

The first is that it is easy to predict that some non-residential uses are likely to have a relatively short economic life. Thus the Town House was built on a 33-year CALO lease. This is recognised also in the Leases Ordinance 1918 which is used to grant short term leases in rural areas, some of which will be needed for future urban use, and for some land uses in urban areas that are not expected to continue for a long period. An example is the Sundown drive-in cinema which was granted a lease under the Leases Ordinance in 1968 for 25 years. It was claimed not to be economically viable and ceased operation after 16 years in 1984. The lease should have been surrendered when the activity ceased to be economic, or terminated by the landlord when it had not been used for the nominated purpose for a year. Instead the lessee carried out a public campaign to be granted the right to use the lease for an alternative, profitable purpose. Eventually, without the matter being publicly considered in any orderly manner, a new lease was granted for a tourist development. An important feature of the publicity campaign was the view put by the lessee, indefensible but not challenged by the landlord, that the lessee had the right to a new lease for a profitable purpose.

The second reason is that a limited term lease gives the landlord power to influence land use well before a lease expires. Since land rent is no longer collected, the only powers available to the lessor for the control of land use are the lease purpose clause and the limited period of the lease. When negotiating a change in use the landlord needs to use both of those powers as does, for example, Letchworth Corporation. The fact that a lease will eventually run out provides eventual control to the landlord. The offer of a new long lease is one of the carrots which can be held out to existing or potential lessees. Long leases are, of course, necessary for investment in new buildings or major alterations. Well before the expiry date a lessee will need an extension if the property is to be saleable or used as security for long term mortgage borrowing. In my view the decision announced by Mr Ellicott when Minister for the Capital Territory in June 1980 that he would exercise ministerial discretion and permit non-residential leases to be renewed for a further 99 years on the terms noted above should be reversed. No further renewal on those terms should be permitted. All renewals should be on terms negotiated with the landlord. Nor should leases for less than 99 years be able to be extended to 99 years unless the reason for the shorter lease has ceased to exist.

Conclusion

The history of lease administration in Canberra lends support to a conclusion reached in relation to rural leases by the Rural Reconstruction Commission (1946):

> It is better for the State to sell its land than to give it away piecemeal, particularly as capital profits can be taken out of the land and subsequent holders left to shoulder a heavier capital burden. Leasehold can be considered as a satisfactory alternative to private ownership only when it is supported by a wise, careful and provident administration. Without that support it defeats the needs for which it was devised.

Successive Ministers and their advisors have treated Canberra land as the property of lessees which, for some long-forgotten reason, is not freehold. They have not seen it as they should: as a national heritage to be safeguarded and used for the benefit of the nation and its capital.

APPENDIX: Recent Lease Redevelopment Case Histories

Shelley Schreiner

1)	Uniting Church	Section 22 (City)
2)	Ansett Terminal	Block 7, Section 26 (City)
3)	Sundown Drive-in	Block 6, Section 97 (Symonston)
4)	Starlight Drive-in	Block 5, Section 61 Watson
5)	Town House Motel	Block 13, Section 23 (City)
6)	YMCA & Legacy	Section 10 (City)
7)	White Industries	Sections 11, 41 & 60 (City)

SECTION 22 (City)

Congregational Union of Australia (Uniting Church)

In 1955 the Congregational Church was granted a lease in perpetuity for a primary church site under the Church Lands Leases Ordinance 1924 of the whole of Section 22 in the city, a site of just over 1 hectare. The site fronts Northbourne Avenue immediately north of the site of the City Tourist Terminal. It was long recognised as underdeveloped and, despite reservations about over supply of office space and an inadequate public transportation system in the city centre, both the Commission and the then Department of the Capital Territory responded positively to approaches in the 1970s about the possibility of the site being redeveloped with a mix of office blocks, residential units, a churches centre with worship and community facilities (along the lines of the Woden Churches Centre), and a landscaped area of public open space.

The original, and all subsequent, development proposals rested on the Church obtaining sufficient revenue from the conversion of portions of its lease to City Area Leases Ordinance CALO leases, with newly defined purpose clauses allowing commercial and other sorts of development, and their subsequent sale, to finance the construction and ongoing operation of the Churches Centre. The NCDC and the Department agreed in principle to the proposals given certain requirements for staging the development to avoid problems of over supply of office space. During the 1970s, a variety of subdivision proposals, development conditions, and levels of betterment charge were discussed. With regard to the latter, the two major proposals were for either an agreement for a charge on a continuing rent basis for the commercial leases, and no premium or rent for the residences, churches centre and a proposed commercial car park to be operated by the church, or for a 50 per cent of betterment charge on those leases which were converted to CALO leases with commercial purpose clauses. Both of these alternative arrangements represented significant concessions on the part of the Commonwealth Government to enable the development to proceed. However, when the Church requested a further substantial reduction in the betterment (to $300,000), the Government responded negatively given the inappropriateness of virtually full public financing of the Churches Centre from the sale of a site it was granted free.

In 1982 the Church notified the Government of the withdrawal of their proposals for the site, a move based on the Church's assessment that the proposal was not financially viable without substantially greater concessions than those offered.

In 1984 the Church again approached the Department with a redevelopment and subdivision proposal. This proposal no longer had a residential component, but still sought to finance the construction and operation of a Churches Centre, community facilities and public open space through the conversion of portions of its site to commercial office use. Waiver of the premium payable on this form of redevelopment was sought on a similar basis to the concessions to YMCA and Legacy earlier in the year. The Church proposed to use money raised through the conversion and sale of portions of its lease for the city facilities plus centres in the suburbs, and for retirement and nursing homes.

Departmental documents of October 1984 note that the then Minister Tom Uren had instructed that the YMCA and Legacy waivers were not to be understood as precedents. Consideration was, however, given by the Government to foregoing the betterment charge and legal advice was sought as to whether it was constitutional, given the religious nature of the organisation in question. Early in 1985, a ministerial review of the practice of excusing payment of the betterment charge normally payable by lease holders for certain charitable groups was undertaken. It was agreed that no waiver of land redevelopment charges would be approved in the future, given that such concessions confer advantages on particular organisations without regard to the co-ordination of Territorial social development or Government priorities. The Church was duly informed that as it would gain substantially from any subdivision and issue of new CALO leases, it would be appropriate for the Commonwealth to expect some return for the new arrangement and, therefore, the development premium, based on the betterment formula, would not be waived.

During 1985 negotiations between the Church and the Government centred on subdivision and leasing procedures, development conditions, lease covenants and so forth. Eventually, it was decided to subdivide the section into six sites each with a separate lease. The Church would surrender substantial portions of its lease and these would be regranted with varied purpose clauses as five separate leases under the City Area Leases Ordinance. Four of these were to be sold, while the fifth, combining rental income-generating commercial offices and space for community and social activities, would continue to be held by the Church. This surrender and regrant procedure was specifically noted as avoiding the use of Section 11A of CALO and had been used to renegotiate the leases of the Polish Club, the Police and Citizens Boys' Club and St Vincent de Paul. The assessed betterment charge for the varied leases with their increased development potential was 50 per cent of an increase in site value of $5 million. The Church continued to argue for waiver on the basis that it still faced difficulty in financing the churches portion of the redevelopment. Consideration was given to this argument, and to the off-site

landscaping works and relocation of services that would be carried out by the developer, and an offer of a reduced betterment charge of $2.25 million was made. This was agreed to by the Church and on the 31st of October 1985, five new CALO 99 year leases were granted.

BLOCK 7, SECTION 26 (City)

Ansett Terminal Lease

In 1954 Ansett was granted a 99 year lease under the City Area Leases Ordinance 1936 for a block in Section 26 in the city centre with frontages to Northbourne Avenue and Mort Street. The purpose clause of this original lease specified that the land could be used ". . .for the main purpose of a travel agency and if so desired for professional chambers, offices and/or one residential flat only." In 1984 a sale of the lease was negotiated with the Hooker Corporation pending a successful application to vary the lease purpose clause under Section 11A of CALO to provide greater development rights. Subject to such changes, NCDC approval of the design of the proposed new structure and a specified set of development conditions which would be incorporated into the varied lease, were sought. These conditions cover subjects such as maximum gross floor area permissible and site access. In this case, the issue of site access was extensively argued because of possible negative effects on traffic segregation in the vicinity of the ACTION bus terminal. Despite NCDC's preference for exit from the site via Mort Street, an agreement, later incorporated into the lease, was reached for vehicular entry and exit from Northbourne Avenue.

In March an application was lodged with the Supreme Court to vary the purpose clause of the original Ansett lease under Section 11A of CALO. The new clause was proposed to read:

> To use the premises only for the purposes of offices, professional suites, banks, co-operative societies, retail shops, bars, restaurants, cafes, clubs, personal services establishments, residential flats and car parking
>
> PROVIDED ALWAYS THAT:-
>
> The ground floor of the building shall be used predominantly for such purposes other than offices, professional suites and car parking.

The Minister was advised by the Department not to exercise his powers under Section 11A (2)(b) to lodge a certificate with the Court that the variation of the lease purpose would be repugnant to the principles governing the construction and development of the City of Canberra, an action which would effectively veto the application. This advice was based on the view that the proposed variation was consistent with the Civic Centre

Policy Plan for the area in question. It was also noted that negotiations had resulted in a set of development controls being produced by the NCDC and that these controls would be incorporated into a fresh lease agreement giving effect to the lease purpose variation. Further, an undertaking to accept a fresh lease agreement would be incorporated into the Hooker representative's affidavit to the Court. The application was successful and a provisional order was made by the Court on 26 April 1985. A betterment charge of $348,500 (50 per cent of the enhanced value of the new lease), was determined by the Valuation Branch of the Taxation Office. In September of 1985, the NCDC agreed to increase the permissible gross floor area of the proposed building from 10,000 to 11,300 square metres. A new valuation for the increased development rights was made and a second betterment premium of $175,000 was levied. In early 1986 the lease was sold by Hooker to Concrete Constructions who then surrendered their varied CALO lease and were granted a new one due to expire in 2053, the remainder of the original lease's term.

BLOCK 6, SECTION 97 (Symonston)

Sundown Drive-in Theatre

In 1968 a 25 year lease was granted through competitive tender under the Leases Ordinance 1918-1958 to Southern Drive-In Pty Ltd for the purpose of providing a drive-in theatre and associated facilities and services. The original lease was for a 9.3 hectare site in Narrabundah situated on the corner of Jerrabomberra Avenue and Narrabundah Lane and was subject to an annual rental of $3,250 for the first 10 years with a re-appraised rent for the final 15.

Declining patronage in the latter 1970s and early 1980s led to closure of the theatre on 3 May 1984. The lessee notified the Department that it was exploring alternative uses for the site and would be seeking a variation of purpose. It was also requested that the Department undertake a review of the lease UCV to allow back rates to be reduced, and that there be a rent re-determination. Tentative proposals for a Saturday morning trash and treasure market and for a construction workers' village were quickly abandoned in the face of the NCDC's opposition and apparent wish to see the lease terminated prior to any consideration being given to a change in land use.

In November of 1984 the company notified its intention to seek a change of lease purpose to allow development of a mobile home park with ancillary facilities. While there seems to have been some support for this proposal within the Department, argued largely on the need for low cost accommodation, the NCDC staunchly opposed it on the basis that the site did not meet locational criteria in relation to schools, shops, services and public transport. The use was also seen as prejudicial to future planning of the area. The proposal for a transportable homes development did, in fact, receive considerable public discussion, largely engendered by the lessee's public presentation of its case via a full page advertisement in the *Canberra Times*, and the NCDC's decision, occasioned in the immediate sense in response to the Sundown proposal, to explore siting a mobile home park in Duffy, as well as public calls for more low cost accommodation in Canberra. In general, the NCDC position at this time was that if the lease could not be used for a purpose within the existing lease, it should be handed back to the Commonwealth. Resistance to following this course by the lessee was no doubt substantially related to the fact that he would receive nothing for the surrendered lease.

The company owed a considerable sum ($75,181 in April 1985) in rates and rent and this was an issue over which several representations for relief were made. In May the Minister

offered the lessee a 3 month period in which to find another acceptable use for the site, and notified him that if he failed to do so, then he should surrender the lease. If the lease were surrendered within 3 months, then he would under Section 3A(B) of the Leases Ordinance be granted a 50 per cent rebate on land rent, but not rates, calculated from a period beginning in January 1984, the date on which the company notified the Department of its financial difficulties. Subsequently, the lessee did successfully negotiate a proposal to develop a low cost tourist facility on the site with the NCDC.

Development conditions and development guidelines drawn up by the NCDC in July of 1985 supported the issue of a new lease under the Leases Ordinance for a term of 30 years with an option for another 20 for the purpose of low tariff overnight and holiday accommodation. Both the lessee and the Department argued unsuccessfully for a full term of 50 years in the first instance. Ultimately, a 30 plus 20 agreement was made. The re-negotiations for the new lease extended beyond the conditional 3 month period offered the lessee during which a rebate on outstanding rent would be given on the surrender of the original lease, and an extension of this consideration was requested. A final decision on this matter was delayed for some months pending further investigation of the impact of the proposed tourist facility and specific lease conditions. In July 1986 the company was informed that rates and rent arrears must be paid before the issuing of a new lease.

The lessee argued at length for a partial discharge under the Ordinance of its liabilities arising from prior occupation of the site. In September the lessee was advised that rent for the period 9 January 1984 to 21 July 1986 would be reduced by $31,777 thus leaving an amount of $47,247 owing, and rates for the year 1983-84 would be reduced by $2,012. Outstanding general rates after the remission remained at $15,932. In September 1986 the original lease was surrendered and soon after a new lease was issued under the Leases Ordinances for a term of 30 years for the purpose of "low tariff overnight and holiday residential accommodation."

BLOCK 5, SECTION 61 (Watson)

Starlight Drive-in Theatre

In 1955 a 25 year lease was granted under the Leases Ordinance for the purpose of a drive-in theatre. The site of the first such use for a lease in Canberra is some 6.4 hectares in area and situated just off the Federal Highway, the "gateway" to Canberra in what is designated in the Commission's Metropolitan Policy Plan of 1984 as the North Watson Tourist Area. The lease, held by Canberra Enterprises Pty Ltd, was extended for a second 25 year term in 1980 for the same purpose. As with the Sundown Drive-in during the past few years, attendances have declined and operation of the business was no longer considered commercially viable. Late in 1986 the company informed the Commission and the Department that the block was to be sold by auction or tender. The Commission requested that all prospective buyers be advised that, although the Metropolitan Policy Plan indicated development of tourist facilities in the area, any change of purpose would have to be assessed in planning terms and, following the issue of a CALO lease, would be subject to the lease purpose variation procedures of Section 11A, and thus no development rights other than those in the existing lease could be assumed.

In early 1987 negotiations with a prospective buyer's agent began. The Department was notified of the buyer's intention to submit a proposal for redevelopment of the site in accordance with the criteria set out for the North Watson Tourist Accommodation Centre and this was accompanied by a proposal to vary the lease by conversion of the present lease to a CALO lease with an unchanged purpose clause and then to seek a variation under Section 11A and an extension from the remaining 19 to 99 years. Departmental documents indicate at the time that, dependent on NCDC approval of new use in principle, this procedure was acceptable, particularly because it would ensure that the variation would be dealt with through the Supreme Court where objections could be heard. Unlike the Sundown Drive-in case, where the proposed change of use was for an area for which no fully formulated policy plan existed, the Starlight proposal was a fairly straight forward proposition; thus, the NCDC indicated in February its support for the variation.

During the months between February and August 1987 there was periodic discussion of the best means of effecting the variation. Attention focused on the amount of return to the Commonwealth and on provision for public consultation. The Commission stated that it did not believe the proposal required public consultation because the proposed change was within the accepted policy. Departmental documents varied on whether to pursue a strategy which

would include the making of an application to the Supreme Court, thus allowing opportunity for public objection, or to follow a simple surrender and regrant procedure in which the lessee surrenders the existing lease and is granted a new 99 year lease under CALO with a new purpose. In the second case, a full market value premium would be charged, effectively granting the lease for a site treated as undeveloped. Despite seeming support for creating opportunities for a public hearing on the proposed variation, this latter procedure appeared at the time of writing (September, 1987) to be favoured within the Department and on the 14th of August 1987 was recommended to the Minister for approval.

BLOCK 13, SECTION 23 (City)

Town House Motel

The original lease for Block 5, a site in the city on the corner of Marcus Clarke Street and Barry Drive, was granted for 33 years under the City Area Leases Ordinance in 1960 for the purpose of a motel. Designed by architect Enrico Taglietti and built in 1961, the building was regarded as distinctive in its time and, more recently, worthy of heritage recognition. At 3 storeys, it was the tallest structure in the vicinity. The upper floors were wrapped externally with balconies and these, along with other features emphasised views and open air.

In 1979 the lease for the Town House Motel was sold to Idonz Pty Ltd. Departmental documents indicate that there was long-standing, if informal, approval for more development on the Motel site. In late 1983 Idonz began negotiations over a proposal to subdivide the site. The intention was to sell one portion for development as offices and to retain the site of the existing motel which would be extended. In 1984 an application before the Supreme Court under Section 11A to vary the purpose and subdivide the site was approved. The new leases were rewritten to incorporate clauses setting out conditions governing development intensity as determined by the Commission. Betterment for the two new leases was paid, in the case of the increased development rights for the motel, a sum of $348,500. Idonz subsequently sold the newly subdivided Block 12, on which was located a restaurant, for redevelopment into offices stipulating as a part of the sale contract that the new building was to contain features compatible with the existing motel.

In April 1983 plans for the motel extension were submitted to the NCDC. After its initial refusal there was a long delay and approval was not granted until June 1986 after referral to the Design and Siting Review Committee. During the course of the dispute, the Commission approved siting of a 7 storey office building on the old Country Women's Association (CWA) site to the northeast of the motel. The design permitted a blank wall on the common boundary coming within 3.4 metres of the motel's access balconies. Idonz sought an order in the Federal Court for a set back of the adjoining building. Court documents revealed that Commission officers had, in fact, recommended such a set back, but there is no record of further consideration of this when the decision to approve the CWA development was made. Despite a judgement that the siting would adversely affect the motel, the Court decided that there had been no failure in the decision-making process. In June 1985 construction on the adjacent block began, and excavation to the boundary led to serious subsidences on the motel site.

Despite receiving the NCDC's long-delayed approval for the motel extension, Idonz now argued that the venture was severely prejudiced by the proximity of the neighbouring building and was no longer commercially viable. A contract to sell to the Capital Property Corporation was completed and a proposal put forward to redevelop the site as offices.

The proposed developer made repeated and extensive representations to the Department that the Section 11A procedures should be avoided. It was argued that the recent decision by Justice Gallop in the Morpath case had introduced uncertainty into a legislative measure intended to "facilitate redevelopment." Examples of other redevelopments which had proceeded via surrender and regrant without recourse to Section 11A were raised. Further, the proposal included the degazettal of an area of 850 square metres of road reservation on the corner of Barry Drive and Marcus Clarke Street and its addition to the new lease. The developer argued that as the amalgamation necessarily involved a surrender and regrant procedure, this could be a means of avoiding the Section 11A procedures. In response, the Department noted that the other redevelopments in this area in which such a procedure had been followed were ones where the original lease was granted under the Leases (Special Purpose) Ordinance, not the CALO. It also noted that Section 11A allows an opportunity for public objection, and that further, it would be inappropriate for the Commonwealth to undertake a surrender and regrant arrangement in order to overcome the difficulties encountered in the Morpath case. The Commission, while accepting the Department's right to determine the method of proceeding, argued in support of the developer's request to avoid Section 11A that ". . .there is a case to support such action on grounds of natural justice given that major developments have proceeded in Civic recently without recourse to the Section 11A provisions." In November 1986 the Department wrote to the developer advising him to seek to vary the lease in the Supreme Court, the ". . . .mechanism laid down in the legislation and as such the one which should be followed."

The decision to support, in principle, the change of use and the proposed redevelopment was not unanimous in either the Department or the Commission. The Department's Transport Planning Section opposed the redevelopment on the multiple grounds that it would contribute to parking problems, put pressures on public transport, influence adversely policies to decentralise employment, create office space for which there was little demand and remove needed hotel/motel accommodation from the city centre. In the NCDC, the Chief Planner also recommended that the proposal be rejected and that the site should be redeveloped within the terms of the existing lease as a hotel.

An application to vary under Section 11A was made to the Supreme Court and the case was heard on the 1st of April 1987. The case had received considerable public attention in the preceding months and three formal objections - from a regional conservation group, a transport engineer and town planner, and a nearby resident - were registered. The objectors had, prior to the actual hearing, applied to the Minister of the Department of Territories and to the Attorney-General for financial support to meet court costs. These applications were rejected. On the day of the hearing, the objectors notified the court that they were withdrawing due to lack of funds.

Several affidavits were presented to the court including one from Mr Ray Gallagher representing the Department and one from Mr Malcolm Latham as NCDC Commissioner which argued variously that material progress in solving the car parking and public transport problems had been made, that the proposed development contributed to the policy of revitalising Civic particularly by increasing the number of office workers in the city centre, that the demand for offices was high, and that other hotels were mooted or under construction. Latham argued, with respect to his Chief Planner's recommendation, that if this application for redevelopment was rejected, all subsequent applications having the same or similar effects would have to be rejected. In Civic, he suggested, this would effectively mean that all development would cease.

The evidence of the Department and the Commission was judged persuasive and a provisional order was granted for the variation subject to payment of all charges, taxes, etc. The developers were ordered to meet the costs of the objectors and half of those of the Commonwealth. In June 1987 the sale of the lease was settled at a total price of $4,690,000. Betterment was set at $186,000 for the increased development rights and a capital sum of $11,220 charged for the grant of additional land. This latter sum reflected the deduction of developer's costs of off-site works and service relocations from the original market value calculated at $132,350. In July 1987 the Town House Motel was demolished to make way for a 13 storey, 15,000 square metre office block.

SECTION 10 (City)

YMCA & Legacy Leases

The original leases to the YMCA and Legacy in the city were granted in 1956 and 1957 respectively, under the Leases (Special Purposes) Ordinance for neighbouring sites bounded by London Circuit, Constitution Avenue and Allara Street. In 1960 the YMCA built the existing indoor recreation centre which fronts London Circuit and about the same time Legacy constructed Legacy House on the corner of Constitution Avenue and Allara Street.

The YMCA had periodically explored the possibility of some form of redevelopment integrating commercial and recreational uses and using revenue generated from commercial development to finance community facilities. Departmental documents state that the ". . .association originally sought a significantly larger site but as the development had to be staged, the lease was limited to half of the area sought. The remainder of the area sought has been deemed reserved for YMCA purposes ever since." In 1981 the Association was offered a redevelopment package of three leases, two for offices and one for the YMCA facilities, for its existing lease and the additional land. The YMCA failed to raise finance and the proposal was withdrawn.

In late 1983 the YMCA and Legacy negotiated a joint venture for their two sites with the Canberra Building Society (CBS). Legacy's lease was surrendered and regranted as a 99 year CALO with new purpose and development conditions. A previously unleased piece of Crown land on the corner of Allara Street and Constitution Avenue was added to the new lease. The YMCA's lease was also surrendered, combined with additional land and regranted as two leases: a 99 year CALO lease with a purpose clause permitting office development and a 99 year Special Purposes lease. The two CALO leases were then transferred to CBS and consolidated under Section 45 of the Real Property Ordinance.

In their original submission to the Minister for the redevelopment, the YMCA requested the waiver of the 50 per cent betterment due for the varied leases with new development rights. No benefit, they argued, would go into the hands of commercial developers. They proposed to spend the money for community facilities and programs in Canberra, particularly to upgrade and extend the Section 10, City facility, and to make these available to all citizens of the ACT. The Minister was persuaded and granted the waiver subject to the condition that the foregone betterment of $1.4 million be deposited in a trust account and used in a manner acceptable to

the Department, and that the funds be spent in Canberra. A similar concession was granted to Legacy for the $650,000 due in betterment tax. Further, no premiums were charged for the additional Crown land granted in the new leases. A condition of the lease was that the YMCA spend a minimum of $1.8 million on the Civic facilities.

Through the latter part of 1984 and early 1985 the YMCA investigated how best to use its resources in Canberra. A variety of possibilities were canvassed, both for facilities and services in the suburbs and for the London Circuit premises, a site which, because of its high visibility and location in the area of Special National Concern, attracted the particular consideration of the Department and the Commission. There was some discussion of an alternative to the rebuilding or refurbishment of the existing buildings in the form of a swap of the YMCA lease for the Olympic Swimming Pool across Allara Street and a more concentrated development for recreation purposes in the environs of the pool but this idea was eventually abandoned. Despite a study of possible alternatives, ranging from the construction of a new building to the modernisation of the existing building, little progress was made during the next year toward realising the preferred option of renovation and extension. The YMCA continued to explore provision of facilities in the suburbs and in the middle of 1986 applied for a direct grant of land in the Tuggeranong Town Centre for recreational, health and fitness and child care facilities. The bulk of the $1.4 million foregone by the Commonwealth will ultimately be used there. In the meantime, a long overdue and minimal $300,000 facelift for the city facilities was being undertaken in 1987. The covenant to spend $1.8 million is deemed not binding on the YMCA, precedence being given to the condition in the Minister's letter of 8 December 1983 where it is stated that the waiver of betterment is conditional on the funds being ". . .used to provide additional community facilities in Canberra."

SECTIONS 11, 41 & 60

White Industries

The White Industries development is, to date, the largest and most complex which has taken place in the city centre. It occupies a site of 7.74 hectares which straddles Allara Street and is bounded by London Circuit, Constitution Avenue, Nangari Street and Glebe Park. This constitutes virtually the whole of Sections 11, 41 and 60 and, prior to 1984, was unleased Crown land. In 1981 the Canberra Development Board and the Department invited submissions for the leasing of Glebe Park site as a centre for leisure and entertainment activities: a "Tivoli Gardens." In 1982 White Industries submitted a proposal for the development of the three Sections. As negotiations proceeded through 1982 and 1983, a proposal for a five part development was formulated. In final form, this was to consist of two groups of commercial offices each with three buildings, an international standard hotel, a convention centre and a commercially operated leisure gardens.

The general agreement for the development was reached in December 1983 and, with the approval of the Prime Minister, the Minister for Territories and Local Government made an offer of lease to White Industries. The major tenets of that agreement were that the premium for the site was to be waived and that the Company would construct and hand back to the Commonwealth, at no cost, a convention centre which the Company would then lease for a term of 25 years. The first five years of the convention centre lease were to be rent free. In addition, the NCDC undertook to design and construct all required site servicing, and to arrange relocation of the existing services from the site. The latter item would eventually include a cost of some $2.6 million for the relocation and augmentation of services with an additional Commonwealth contribution of $350,000 for verge works. The Commonwealth guaranteed to sub-lease all available lettable office space on normal market terms and conditions for a period of ten years.

The Minister's letter of offer outlined building covenants for minimum cost of construction and gross floor area - both of which were later revised. For the offices, the provisional maximum gross floor area (g.f.a.) was set at 52,000 square metres. The agreement required that public access be maintained through the site. It also set car parking provision at one car space per 500 square metres of gross floor area, a stipulation which later was to become highly contentious. Dates for commencement and completion of construction were set at 1 May 1984 and 31 December 1988. The agreement included provision to vary the City Plan removing an

unconstructed portion of Bunda Street and allowing degazettal of part of Nangari Street. The agreement was also conditional on the production of a completely new design for the office component of the development.

In February of 1984 the project, to quote Malcolm Latham, was "still in its infancy." Changes in the size of the offices and the hotel were proposed and the architects began again to design a new scheme. In March the Commission prepared a revised set of design criteria. Of note, was the altered requirement for one car space per 100 square metres g.f.a. reflecting a new Commission standard. The NCDC began drafting lease and development conditions while the Department drew up a provisional lease agreement consisting of two leases - one CALO "head lease" covering all five parts of the project and a second convention centre Special Purposes lease incorporating the lease back agreement. Not unexpectedly, the revised requirement for a greater level of parking provision was hotly contested by the developers. In April a new design for the complex was unveiled and despite some indication that there were reservations about it, the proposal was accepted. At this stage, the proposal was for four office blocks with a combined g.f.a. of 54,000 square metres.

White Industries protested that the new car parking requirement was both contrary to the original letter of offer, and one which could render the project uneconomic but offered to provide one space per 250 square metres of g.f.a. The Commission, however, would not agree to this and insisted on the new standard. The Department pressed for a negotiated settlement. Interestingly, they sought and received legal advice that the provision of car parking is not a design and siting matter, and that provisions are, in fact, enforced through lease covenants. Eventually, a negotiated agreement on parking was achieved with one space per 100 square metres of g.f.a. in the offices, with an allowance of one space per 500 square metres for an area up to 12,000 square metres set aside for storage, printing and computer facilities.

Discussions also continued on the actual form of the leases. The Company requested that the hotel site be granted on a separate lease due to financiers' requirements. This was ultimately done, but the Commonwealth protected its interest in ensuring that the hotel would in fact be built by requiring a binding and unconditional undertaking from White Industries to do so. Similarly, certainty that the convention centre would be built was linked to the inclusion in the leases of conditions of subdivison and release of the 3 office blocks south of Allara Street despite Company opposition to this provision. A minimum cost of construction for the convention centre was covenanted at $17 million.

In August 1984 governmental needs for office space led to an increase of some 20,000 square metres in the net office area. The Department favoured charging the full market value premium for these additional building rights valued at some $3.66 million and freezing the concessional arrangements agreed upon in the original offer. White Industries accepted responsibility for payment and exercised an option for additional area for which it ultimately paid $447,000 in development rights, though not without first arguing that this second payment be waived in consideration of the company's contribution to verge works of $350,000.

The White Industries development proceeded more slowly than originally anticipated. The first group of office buildings was finished in 1986 and sold on individual titles following partial surrender and re-grant procedures. The second group was nearing completion by September 1987 and construction had commenced on the convention centre and the hotel.

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Appendix 2

LIST OF SUBMISSIONS

ACT Administration, GPO Box 158, Canberra, ACT, 2601.

Australian Institute of Urban Studies, ACT Division, GPO Box 809, Canberra, ACT, 2601.

Australian Institute of Valuers (ACT Division), PO Box 145, Curtin, ACT.

Braddon Residents Association, C/- 30 Torrens Street, Braddon, ACT, 2601

Building Owners and Managers Association of Australia Limited, GPO Box 1025, Canberra, ACT, 2601.

Burgess and Cottier Pty. Ltd., 8 Beltana Road, Pialligo, ACT, 2609.

Campbell Residents' Association, PO Box 107, Campbell, ACT, 2601.

Conservation Council of the South-East Region and Canberra (Inc.), GPO Box 1875, Canberra, ACT, 2601.

Evans, Mr. G., GPO Box 1875, Canberra, ACT, 2601.

Gately, Mr P.M., 9 Victory Place, Flynn, ACT, 2615.

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Kerrison, Mr K., 5 Beltana Road, Pialligo, ACT, 2609.

Lansdown, Mr R.B., 3 Shackleton Park, 36 Shackleton Circuit, Mawson, ACT, 2607.

McMillan, Mr J., 30 Torrens Street, Braddon, ACT, 2601.

National Capital Development Commission, Braddon, ACT, 2601.

Neutze, Professor M., Urban Research Unit, Australian National University, GPO Box 4, Canberra, ACT, 2601.

Reid Residents' Association Inc., C/- 32 Booroondara Street, Reid, ACT, 2601.

Royal Australian Planning Institute, ACT Division, GPO Box 1491, Canberra, ACT, 2601.

Save the NCDC Committee, PO Box 55, Ainslie, ACT, 2602.

The Association of Consulting Engineers Australia, New South Wales Chapter, Canberra Branch, PO Box 170, Curtin, ACT, 2605.

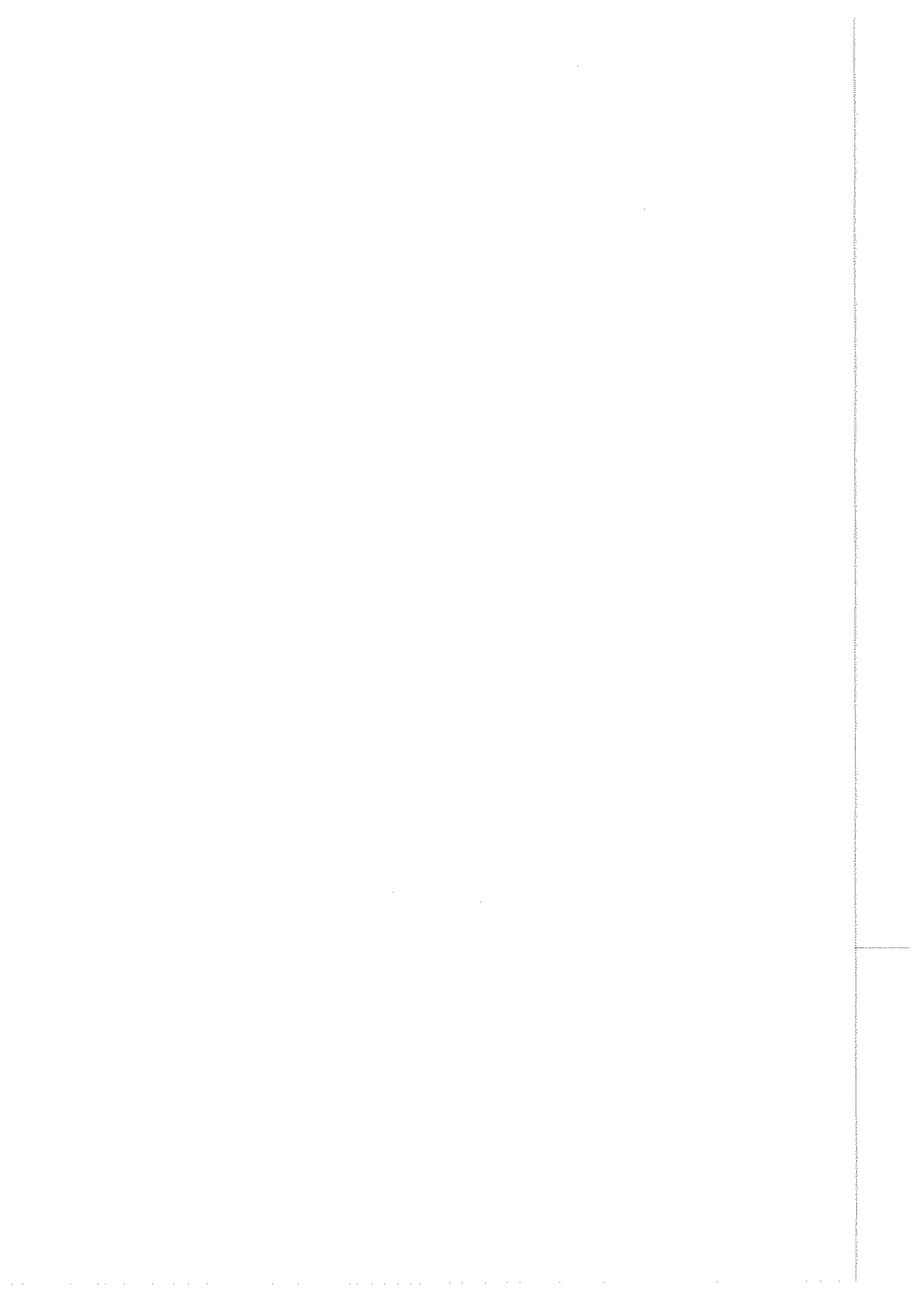
The Real Estate Institute of the Australian Capital Territory Ltd., PO Box 68, Deakin, ACT, 2600.

Turner Residents' Association, C/- 13 Stawell Street, Turner, ACT 2601.

Wensing, Mr E., 164 Maribyrnong Avenue, Kaleen, ACT, 2617.

Appendix 3

INDIVIDUALS WHO APPEARED BEFORE THE JOINT SUB-COMMITTEE



Campbell, Mr G.J., Chief Planner, National Capital Development Commission, Braddon, ACT.

Evans, Mr G.W., Co-Convenor, ACT Self-Government Campaign Committee, GPO Box 1875, Canberra, ACT.

Fleming, Mr A.I., Director, Conservation Council of the South-East Region and Canberra, GPO Box 1875, Canberra, ACT.

Frisch, Mr R.H., Executive Director, Real Estate Institute of the Australian Capital Territory Ltd., 16 Thesiger Court, Deakin, ACT.

Geddes, Mr M.J., Member, Urban Working Group, Conservation Council of the South-East Region and Canberra, GPO Box 1875, Canberra, ACT.

Guild, Mr P.N., Assistant Secretary, Office of Industry and Development, ACT Administration, Canberra, ACT.

Hunt, Mr P., Assistant Secretary, Management Improvement, ACT Administration, Canberra, ACT.

Lang, Ms J., Associate Commissioner, National Capital Development Commission, Braddon, ACT.

Lyon, Mr K.T., Deputy Secretary, ACT Administration, Canberra, ACT.

Martin, Mrs H.C., Acting Executive Officer, Institute of Urban Studies, GPO Box 809, Canberra, ACT.

Morison, Mr I.W., Councillor, Institute of Urban Studies, GPO Box 809, Canberra, ACT.

Neutze, Professor G.M., 50 Bindaga Street, Aranda, ACT.

Rowland, Mr J.R., Member of the Executive, Conservation Council of the South-East Region and Canberra, GPO Box 1875, Canberra City, ACT.

Snow, Mr G.R., Representative, Building Owners and Managers Association, Canberra Association for Regional Development, and Master Builders Construction and Housing Association of the ACT, Canberra, ACT.

Sommer, Mr H.E., Director (Land Development), National Capital Development Commission, Braddon, ACT.

Wensing, Mr E.G., 164 Maribyrnong Avenue, Kaleen, ACT.