

T H E S E N A T E

FORTY-SIXTH REPORT
FROM
THE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Australian Capital Territory
Landlord and Tenant Ordinance (No. 2) 1973

MEMBERS OF THE COMMITTEE

Senator D. M. Devitt (Chairman)
Senator W. W. C. Brown
Senator P. D. Durack
Senator J. R. McClelland
Senator J. M. Wheelton
Senator I. A. C. Wood
Senator the Hon. R. C. Wright

FUNCTIONS OF THE COMMITTEE—Since 1932, when the Committee was first established, the principle has been followed that the functions of the Committee are to scrutinize regulations and ordinances to ascertain—

- (a) that they are in accordance with the Statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES

TRANSCRIPT OF EVIDENCE

(Taken at Canberra)

THURSDAY, 11 OCTOBER 1973

Present

Senator Devitt (Chairman)

Senator Brown

Senator Wood

Senator Durack

Senator Wright

MR J. C. MCFARLAND, Rent Controller of the Australian
Capital Territory,

MR J. B. FISHER, Executive Officer (Legislation), Department
of the Capital Territory, and

MR P. WRITER, Legislation Section, Department of the Capital
Territory,

were called before the Committee and examined.

CHAIRMAN - Gentlemen, the Committee is concerned with section 36 of the Landlord and Tenant Ordinance of the Australian Capital Territory as amended by section 12 of Ordinance No.33 of 1973. This section prohibits the sale of goodwill of business premises except with the consent of the Rent Controller. The goodwill of businesses is recognised in law as an item of property capable of sale, and the section could have the effect of depriving a person of a valuable item of property, which may have previously been purchased at a high price, without compensation. It has been indicated to the Committee by the Minister in his letter of 25 September 1973 that one of the reasons for this power being vested in the Rent Controller is to prevent payment of a portion of goodwill to landlords of premises. The Committee will no doubt want to know whether, if it is designed to prohibit that type of transaction, the Ordinance could specify the transactions which it is designed to prevent instead of giving this general power to the Rent Controller. I would like to begin by asking the Rent Controller whether there are any occasions, other than the one I have mentioned, when he would exercise his discretion to prohibit a transaction.

Mr McFarland - So far we have had 8 applications under this section and each of those have been where the vendor of the business has wished to sell, among with other assets, the goodwill of the business to a purchaser. I have consented to the sale of those assets and the goodwill in each case and I have also made it clear that, should there be any part of that consideration to be paid to the landlord, then that would require a separate consent and that I would not give that consent. So where it is a straight-out vendor purchaser transaction the consent has been given each time and would be given each time.

Senator WRIGHT - There is nothing in the regulation, is there, to require your consent to be based upon that consideration only?

Mr McFarland - That is true.

Senator WRIGHT - There is nothing in the policy of the regulations, is there, that would be restricted or controlled if the consent in the case of business premises were required to be given or refused according to whether or not the whole of the goodwill was payable to the tenant or shared with the landlord?

Mr McFarland - No, the regulation does not spell it out.

Senator WRIGHT - There is nothing contrary to the policy in specifically stating that the applicant was entitled to consent in the case of business premises if he was the recipient of the whole of the goodwill, and that the transaction was prohibited to the extent to which any part of the goodwill was payable to the landlord? That would be a much more explicit proposition for the commercial community to rely on, would it not?

Mr McFarland - This is true.

Senator DURACK - I notice that in section 36 of the Ordinance, at the top of the second page, it says a person shall not require any bonus or premium, etc., 'any prescribed premises including any dwelling house.' Have there been any premises prescribed?

Mr McFarland - Yes. There is a definition of prescribed premises in the Ordinance. I think it is section 8.

Senator WRIGHT - In effect it is primarily producing premises, business premises, holiday premises and licensed premises?

Mr McFarland - Any other premises other than those primary producing, licensed, farms and so on, that type of thing.

Senator WRIGHT - So 'prescribed premises' means any premises other than agricultural, business, holiday, licensed, and includes any part of any premises and any land or appurtenances leased?

Senator DURACK - So we would have a very funny result now, will we not, when we add 'including that any prescribed premises which does not include business premises by definition,' then in brackets as including 'any dwelling house or business premises'?

Senator WRIGHT - No, only for the purposes of section 36. I agree with your comment, but you see although 'prescribed premises' as subject to the Controller does not include business premises, under section 36 it does.

Mr McFarland - Business premises are included for the purpose of section 36 only and exempt from the rest of the Ordinance.

Senator WRIGHT - When were business premises excluded from 'prescribed premises' in section 8?

Mr McFarland - In 1957.

Senator WRIGHT - What was the purpose of including business premises in section 36?

Mr McFarland - The main purpose of bringing them in recently was that we found that tenants of businesses may go into a new area, build a business up for 3 years and then when the lease came up for renewal in the subsequent 3 years, or a year, or whatever the term of the lease might be, in some cases the landlord was asking a high premium. This was done mainly to stop what we could call key money, passing from the tenant to the landlord. For instance, a man might work hard and build up a successful chemist shop business in a particular new suburb of Canberra, and then, at the end of 3 years, or at the end of the lease, whatever its term, the landlord would come along and cut himself in on the action by asking for a premium for the renewal of the lease. This is one of the features.

Senator WRIGHT - That would be so in the case of licenced premises too, would it not? I found in Hobart that the breweries adopted that policy about 12 years ago, and it was particularly objectionable to me. I cannot see why you attend to business premises but not licenced premises.

Mr McFarland - We have not had any instances of licensed premises coming forward, to my knowledge. On the other hand, I think a lot of the licensed premises are owned by the breweries themselves and probably the incidence of these things occurring with licensed premises would be a lot lower.

Senator BROWN - But you would not be likely to have any approaches made to you, surely, by persons engaged in business in licensed premises, because they have probably received advice to the effect that they are excluded.

Mr McFarland - This is quite true, nevertheless I think if there had been any of these cases, probably they would have been brought to the notice of the Minister, because the chemists, for instance, and other people were coming, and they were excluded at the time.

Senator WOOD - Why would you not include it in case there is any such instance?

Mr McFarland - I have no objection to its being included. It is not there, but there would be no objection to its being included.

Senator WOOD - You were strong about stopping landlords getting any part of the goodwill. Take the case of a landlord who worked in with his tenant and gave him a lower rent on the basis of helping him to build up, and so on, and there was some arrangement there that if any of them sold they would share the goodwill. That could be an arrangement. I know of a case where a property was rented at an extremely reasonable price to conduct the business. Would you not consider that the landlord in that case might be able to participate in some appreciation when the property was sold?

Mr McFarland - I think each case would have to be looked at on its merits. Of the 3 cases that I have had so far, there was only one instance in which there was an agreement between the landlord and the tenant that in the event of the sale of the business the goodwill would be halved, would be shared between them. This was really of no consequence as it happened, because the goodwill only brought \$10, so I do not think anyone would

have fought about that. But I can see your principle and I would say that one would have to take that into account. It would be a case by case approach.

Senator WOOD - There was an arrangement to that effect.

Mr McFarland - Yes, but not necessarily so. Firstly, as a general principle, I would say that I would take the view that I would be trying to prevent, or would not be consenting to, the premium going back to the landlord. It would have to be a fairly strong case, I think, which was put forward to me.

Senator WRIGHT - Take the case of the original grant of the lease. If I had been carrying on my own business in my own premises as a chemist for 30 years and I had leased to you for 7 years, you should not control that?

Mr McFarland - I think that would be one of the exceptional cases, Senator, where that happened.

Senator WRIGHT - This consent to a premium should only apply in the case of an assignment or a sub-lease, should it not?

Mr McFarland - Yes, you are quite right. I have not had the instance come forward yet where the man was carrying on a business in his own premises. There is no consent needed there.

Senator WRIGHT - If business premises were included in prescribed premises only in 57, or excluded wholly in 57, it is quite a new scope of restriction, is it not, now to bring them in for section 36 only by this regulation?

Mr McFarland - Yes.

Mr Fisher - In the instance that Senator Wood put before us the Ordinance contained a provision to the effect that payments

going to the landlord in the nature of goodwill were prohibited. As was earlier suggested in our talk, he would not be able to accept a situation where that landlord could receive part of the goodwill even though in the circumstances it was justified. Before, we were talking about the Ordinance specifying that payments in the nature of goodwill to the landlord might be prohibited. If that were done, it could not accommodate the situation where such a payment might be justified.

Senator WRIGHT - Senator Wood was putting the case in which a lessee has either bought the goodwill or has developed it and is selling his lease or sub-lease. Are you, Senator Wood, suggesting that in that case the landlord should be entitled to participate in goodwill?

Senator WOOD - The arrangement was for a low rent to enable them to build up a business. Then, when the business was built up, would he not be entitled to some of the goodwill? For instance, I have got a case in mind, a property that is rented, and people live in it. The rent they are being charged is probably about the rent they would pay for it as a residence, but because of its situation and its size, they carry on a very profitable business, making many thousands of dollars a year. Would that landlord not be entitled to some arrangement with the tenant, because the landlord is not charging the tenant for business premises?

Mr Fisher - I can quite see the force of the argument. I think what I am trying to suggest is - and this was suggested earlier - that if we were to amend the Ordinance so as to provide

that goodwill could not pass to the landlords, we could not accommodate that sort of situation. So there might be a suggestion that perhaps the Ordinance should not state this specifically, as was suggested earlier.

Senator WOOD - The point that I am driving at here is that if full rent had been charged those people from the beginning, they might not have got off the ground.

Mr Fisher - That is right. So perhaps the Ordinance should not absolutely prohibit payment to the landlord.

Senator WOOD - Yes, where it is a genuine case of the landlord co-operating with the tenant in order to build up a business.

Mr Fisher - The Rent Controller would consider that.

CHAIRMAN - Do you anticipate any problem in identification of goodwill?

Mr McFarland - Yes. We have had some instances where the amount that is ascribed to goodwill as distinct from the other assets could have been open to question. I have not questioned it up to date, largely because one would have to be expert, I imagine, in calculating what the goodwill of that particular business would be, and this would be something beyond my capabilities.

CHAIRMAN - It is not a pure science.

Mr McFarland - It is not a science; it is whatever you can get for it, from my experience.

CHAIRMAN - You said earlier that you had had 8 applications and you had approved them. What sort of circumstances would arise to cause you to reject an application?

Mr McFarland - If a portion of the goodwill was being paid to the landlord under circumstances where I thought the landlord was entitled to none of it - it would be difficult to say - you would have to take a case by case approach. Not having struck one of these yet it is hard to cite an instance, but if any was going back to the landlord I would make a full inquiry into the reasons. Was it being passed back with the full consent of the tenant, or was it by some sort of blackmail that he was getting it? I would look at the original agreement between the landlord and the tenant to see whether in originally signing the agreement the tenant was aware that if he built up any goodwill he would have to pass some of it back. I think generally I would just look at the circumstances to see that they were dealing at arm's length and that there was no duress, or factors like that.

CHAIRMAN - That is your main consideration?

Mr McFarland - I think so. If people come to a deal, really there is no bother with it. But if the landlord leans on the tenant, where the tenant ought to get all the goodwill, then I think that would be a circumstance where I would object to payment of it to the landlord.

Senator DURACK - Take the position that everyone seems to think is some sort of evil - though I do not necessarily agree with that - where a landlord lets premises and the tenant builds up a business in them. When the tenant takes a 3 year lease he knows as a matter of business what his position is, does he not? He creates a good business and then finds the landlord will not renew the lease - the most probable situation from a business

point of view would be that the landlord would want to increase the rent of the premises, not that he would require a premium.

Mr McFarland - Some of them do require both. Some increase the rent and require a premium.

Senator DURACK - The question of whether you would approve an increase in rent would be under other provisions of the Act?

Mr McFarland - It is not included at the moment. There is no provision.

Senator DURACK - There is no rent control on businesses.

Mr McFarland - No.

Senator DURACK - That seems to be an even funnier situation. I would have thought in that case the commercial arrangement would be for a thumping rent rather than-----

Mr McFarland - I think it would be, too.

Senator DURACK - That seems to me to be a funny situation. But let us assume that the parties come to an agreement freely for a renewal on the basis of a payment of a premium. It may well be that the tenant in these cases decided that that is the best business arrangement for him to make rather than going into other premises. For all you know he may have had other premises, but he has decided that he wants to stay in these and pay the premiums because he has worked out that that is a better deal. They come to you; do you go into all these ramifications of the commercial arrangements between the two parties or would you simply say: 'No, that is not to be permitted because this is a classic case where the landlord is not entitled to.'

Senator WRIGHT - As I understood it, the Controller said it was the intention to exercise it only where part of the goodwill was to go to the landlord. That was the vice of it, not the excessiveness of it.

Senator DURACK - What I am putting there is that if the parties come to an agreement in that situation the lessee may well have had the option of other premises that he could have moved his business into, but he decides that all in all, from a commercial point of view, it is better to come to this arrangement with the landlord. What I am asking is: Are you going to look into all these aspects of it or are you simply going to operate a rule of thumb that this is a vice?

Mr McFarland - I think in the circumstances you describe one would have to look into all the aspects of it. I have not had this situation occur yet, so it is a bit hypothetical. Canberra is a little different, I feel, to the rest of Australia insofar as,

if you are operating a chemist shop and on the renewal of your lease the landlord wants to extract \$10,000 if you like, you cannot just open a shop next door because there is no shop next door to open whereas in New South Wales, for instance, you could probably move down the road and build your own premises if you were wealthy enough on a block of land providing you had the right zoning. So we do find the peculiar situation where some small businesses are built up, they have not contracted in any way - they have contracted for a 3-year lease - and then at the expiration of the lease the landlord can come along and say: 'I will renew your lease, but it is going to cost you X thousand dollars premium and so much rent.' It is not a question of that chemist, if you like, who has built up some local goodwill opening a shop next door or even down the road. There is just no shop there.

Senator WRIGHT - Is that because the government lease permits a chemist shop only on those premises?

Mr McFarland - No. It is largely because in that area there can only be a certain number of shops, rather than just a chemist shop.

Senator WRIGHT - That is common to all other capital cities, zoning of cities.

Mr McFarland - Not quite to the same extent, though.

Senator WRIGHT - Oh quite so, you have the limited suburban area, but the government lease does not say that in that one shop in Civic Centre or Belconnen you shall carry on only a chemist shop in that area.

Mr McFarland - No.

Senator WRIGHT - So I do not see that Canberra is different from other capital cities in respect of zoning. Do you?

Senator WOOD - Someone in the next shop could still open a chemist shop.

Mr McFarland - Yes. I think it is restricted though, with respect. If you were a chemist in, say, a suburb in the Woden Valley, one that I know where there is a group of 10 shops, and you had built up a business where there was a lot of local goodwill, then if there was a butcher shop next door and the paper shop and a draper and so on they might be quite prepared to stay there. There are only 10 shops. If the 9 other people stay there you cannot move out of yours into another one, and it is owned by the same landlord anyway. So you are back to square one. There is not the competition between landlords in that locality that exists, I suggest, in the other States.

Senator WOOD - Supposing a person was conducting a business in one of the other 9 shops, it failed and the shop became empty, then there would be nothing to stop a chemist getting into that shop.

Mr McFarland - Except that they are all owned by the one landlord, as a rule, in that block; this is the problem as I see it. This is the distinction.

Senator DURACK - The shopping centre out here at Manuka, for instance - is the whole of that shopping centre-----

Mr McFarland - Not necessarily Manuka. I had a particular one in mind; I was thinking of the block at Torrens, for instance, which covers a fairly wide area in the Woden Valley.

I was only thinking of that because I happen to know the area. That block is owned, as far as I know, by the-----

Senator DURACK - And there are no other business premises?

Mr McFarland - There are business premises, but owned by the one landlord as I understand it.

Senator DURACK - There are no other premises there owned by other landlords?

Mr McFarland - No, not in close proximity.

CHAIRMAN - It is a shopping complex.

Mr McFarland - That is correct.

Senator WOOD - That would only apply to areas such as that, but the areas like Manuka-----

Mr McFarland - This is probably one of the things that I would want to look at, what is the competition between landlords for the tenants' business.

Senator WRIGHT - May I intervene on another angle?

CHAIRMAN - Yes.

Senator WRIGHT - I am surprised to hear you say that you are not competent to evaluate, and do not adopt the practice of evaluating, the goodwill. On that basis I cannot see that this system can take control of business premises' either rent or goodwill, because the very purpose of the control is to maintain an economic moderation of inflationary rents.

Mr McFarland - With respect, I feel that the payment of the goodwill-----

Senator WRIGHT - But is that not the position at the moment?

Mr McFarland - This is the position.

Senator WRIGHT - Well going from there, you have a grant of a new lease from a landlord and he has got his own business on it. He goes out of it and he grants a lease. I put to you the case that he wants \$10,000 for his goodwill and \$100 a week rent. Without assessing the real value of the two together, you cannot equitably control one, I suggest.

Mr McFarland - There is no attempt made at the moment to control business premises rents, you see.

Senator WRIGHT - No, that is right. But this control would be quite nugatory if we leave this regulation as it is. He can say: 'Instead of asking you \$100 a week rent, I will ask \$200 rent and no goodwill.' So this would be quite nugatory on the grant. And then when you come to the assignment or sub-lease of the lease you have no control over the rent of the business, have you?

Mr McFarland - No. There is one distinction though, if I could make it, that if we take the hypothetical example of a chemist who has come to the end of his 3 years, and perhaps a month before, the landlord says: 'Well look, I want out of you \$5,000 premium and \$100 a week rent for the next 3 years if you want to stay here.' Now I see that as being quite different to

the landlord saying 'I want \$200 a week rent and no goodwill' - because the chemist may have to make up his mind in one month whether he is going to move out or stay there, whereas if it is \$200 a week rent he may have a period of time to readjust himself. He says he will pay the \$200, because that will give him time to look around and see whether or not he can open a business somewhere else. He has not had that immediate capital outlay which he is stuck with once he pays it. It is a sunk cost.

Senator WRIGHT - Did you have any experience in this field in relation to local and personal goodwill for the purpose of income tax?

Mr McFarland - No, my only experience is when I was studying income tax at one time. I can remember a distinction-----

Senator WRIGHT - I just asked you because there, before we altered the law about 10 years ago, there was interminable struggle as to what was goodwill, and the changes I know in a solicitor's office that take place when they are negotiating it are that you just transmute goodwill into rent and vice versa according to whether you have a taxable goodwill or not. You can do the same here for the purpose of avoiding control. So it seems to me, Mr Chairman, just for the comment of the Controller while he is here, that if you take control only of the goodwill or premium payable upon the assignment of a lease, and have no control over the rent on the grant or assignment of a lease, I would think it was quite illusory, and from the point of view of individual rights we would have to consider whether or not this extension is proper. I just say that, because the great advantage

of getting witnesses from the Department is that you can have face to face discussions, and while thoughts are being developed other thoughts can be contributed to us, not in any spirit of contention.

Mr McFarland - This was seen as a temporary measure, I might add; there is some legislation on the drawing board at the moment to control commercial rents, so this may make a difference to your statement in that then you would have goodwill controlled and commercial rents controlled as well. But I take your point that if you only control goodwill, it can be put into the rent - with the one rider of that adjustment period that the man has. If the landlord comes along to him at the expiry of his lease and says: 'Look, it is going to cost you \$5,000 if you want to stay here,' he has got to make up his mind immediately whether he will part with that \$5,000 or not, whereas if his rent goes from \$100 to \$200 a week then he has got some period of adjustment, so that he can make up his mind.

Senator WRIGHT - I would have thought your concern was only whether or not the sum total of the amount being paid was artificially inflating values, inequitably putting up costs. It is not a question of the justice as between the two parties. From the point of view of your-----

Mr McFarland - I beg your pardon. The way we have interpreted this, rightly or wrongly, is that we were looking at the justice between the two parties.

Senator WRIGHT - Only because, I suggest, you were considering whether or not the price was excessive, having regard to the value of it.

Mr McFarland - This is true.

Senator WRIGHT - And therefore inflationary.

Mr McFarland - Not necessarily only inflationary.

It could be that there is harsh and unconscionable action on the part of the landlord, and I think justice came into it rather than the question of inflation.

Senator WRIGHT - I suggest that that is an area of equity not open to rent control. He is only there to see that the values are not excessively inflated, I would think, in this instance. It is different from war-time control, where the scarcity of houses was one of the real reasons for rent control.

CHAIRMAN - What opportunities are available for a person who feels himself aggrieved by a decision to appeal?

Mr McFarland - There is no appeal.

CHAIRMAN - The decision is final.

Mr McFarland - Yes.

Senator WOOD - A very interesting point.

Senator DURACK - The fair rent board is only on rent, is it?

Mr McFarland - Only on rent.

Senator WOOD - I think the point that the Chairman brought out is a very interesting one because this is one of the things that the Committee has been most concerned about - the right of appeal. There is definitely no right of appeal?

Senator WRIGHT - Giving or withholding of the consent under Section 36 is what you mean?

Mr McFarland - Yes.

Senator BROWN - What intrigues me is it would appear, that if you can establish, or if the parties can establish that there was an arrangement in good faith initially in the assignment of the lease, then the lessee would have no redress with you. But what I cannot understand is this. I will come back to the point that Senator Wright raised. You do not have any control over the rent, the only field in which you are allowed to exercise any jurisdiction at all would be in the area of goodwill.

Mr McFarland - Goodwill and assets.

Senator BROWN - Surely you must use some sort of criteria or establish whether the amount being asked for represents in money terms the goodwill. What criteria do you use to assess that?

Mr McFarland - With the 8 cases that we have had so far, you must take into consideration that this has only been here since 9 August, so we have not had a lot of experience with it. The 8 cases that have come forward so far have all been a goodwill payment from the purchaser of the business to the vendor of the business, who was the old tenant. In those cases I have not seen fit to query the amount of the goodwill passed between them. It looked fairly clear, which is why I did not query it. Sometimes the only information is the sale of a business at \$25,000. I have asked them to specify the amount of the goodwill but I have not queried it. There are cases where some of them like to write their assets up and keep the goodwill low, so that the depreciation would be of advantage for taxation purposes presumably. I have in some instances asked for the depreciation schedule showing the assets, but once I got that I satisfied myself in each of the cases

that that was the amount that was shown for the assets. Had it not been, I am not sure that I would have gone any further with it - I do not hold myself competent to assess goodwill. Goodwill is different in every business, there is personal and there is local goodwill. It is a very complex subject and a lot of times I suspect those who do hold themselves confident to assess it. So I have not seen it as being part of the controller's duty to say whether or not the figure asked for goodwill was a fair one. I have seen it as his duty to see that the goodwill passed without duress between the two parties dealing at arm's length.

Senator DURACK - What is the purpose of having the power to control payment of goodwill as between vendor and purchaser on the assignment of the lease?

Mr McFarland - Really, I would not be exercising the power at all to stop payment of goodwill between a vendor and a purchaser if they were dealing at arm's length, so I do not know whether there is any purpose in the ordinance.

Senator DURACK - Why is the power there?

Mr McFarland - I do not know why the power is there.

Senator DURACK - You might get some irrational success or who would misuse it.

Mr McFarland - This is quite so. I think the philosophy of this new amendment was mainly to prevent the harsh conditions which some landlords were placing on tenants by demanding a goodwill payment.

Senator DURACK - You have said that, but you do not see really, you cannot really see what the purpose of the power is in relation to a vendor and a purchaser on assignment?

Mr McFarland - No I cannot.

CHAIRMAN - I had much the same thoughts, Senator Durack as to what was the social purpose of the legislation. What was its intention?

Mr McFarland - The intention was to prevent the payment of goodwill or key money on the renewal of a lease between the landlord and the tenant. This was the real purpose of it.

CHAIRMAN - Have any members of the Committee any further questions?

Senator WRIGHT - May I just ask another question on another much more general matter than Section 36? I am looking at Section 3 of the new amending ordinance which seems to fix all rents in cases of rents of premises at the 1 January, 1973. Does it give you the right to vary them at any time?

Mr McFarland - After 12 months. I can make a determination each 12 months.

Senator WRIGHT - And that is subject to appeal?

Mr McFarland - That is subject to appeal to the Fair Rents Board.

CHAIRMAN - Any further questions, gentlemen?
Mr McFarland is there anything further that you would like to put to the Committee in relation to this matter?

Mr McFarland - No. I am satisfied.

CHAIRMAN - Gentlemen, thank you very much for attending the meeting this morning and for giving us the value of your knowledge and understanding of this legislation.