

T H E S E N A T E

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FORTY-NINTH REPORT

A.C.T. Ordinance 1974 No.19
City Area Leases Ordinance (No.2) 1974

MEMBERS OF THE COMMITTEE

Senator D.M. Devitt (Chairman)
Senator W.W.C. Brown
Senator J.N. Button
Senator M.G. Everett, Q.C.
Senator D.B. Scott
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 scrutinise 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 upon 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.

Standing Committee on Regulations and Ordinances

FORTY-NINTH REPORT

The Standing Committee on Regulations and Ordinances has the honour to present its Forty-ninth Report to the Senate.

A.C.T. Ordinance 1974 No.19

City Area Leases Ordinance (No.2) 1974

2. This Ordinance provides that where a person (called the vendor) has, with the consent of the lessee of a parcel of land, entered into a contract with a person (called the purchaser) for the assignment of the lease of the land to the purchaser, and the purchaser pays to the lessee the moneys owing to the vendor under the contract and requests the lessee to assign the lease to the purchaser, the lessee shall thereupon assign the lease to the purchaser. Should the lessee fail to do so, the purchaser may apply to the Supreme Court for an order that the lease be so assigned. Where the Court is satisfied that the lessee has failed to comply with the purchaser's request, it may order the assignment of the lease. The Ordinance also provides that the lessee is taken to have given consent to the contract between the vendor and the purchaser unless the contrary is proved. The Ordinance applies to all contracts whether made before or after the Ordinance came into effect.

3. It was stated in evidence before the Committee that the Ordinance was intended to deal with the situation where a person made a contract to buy a house and land from a builder, and the lease of the land was held by a finance company, which refused to assign the lease to the purchaser. The Ordinance is not, however, confined to this situation.

4. The Committee considers that it is reasonable to expect the purchaser to contract with all parties having an interest in the property which he intends to purchase, and it is difficult to understand how a purchaser could enter into a contract with a builder for the assignment of a lease when the lease is held by another party not bound by the contract. It is not proper for an ordinance to seek to overcome defective contractual arrangements by interfering with the rights of the parties.

5. The Ordinance trespasses unduly upon the rights and liberties of citizens in that

- (a) it is expressed to be retrospective and to apply to contracts made before the Ordinance;
- (b) it purports to bind the lessee by a contract to which he may not have been a party;
- (c) it reverses the onus of proof;
- (d) it ignores the contractual rights of the vendor.

6. The Committee recommends the disallowance of the Ordinance.

7. The Ordinance and the transcript of the evidence taken by the Committee are attached as appendices to this report.

D.M. Devitt
Chairman

Senate Committee Room
Monday, 12 August 1974

APPENDIX 1

AUSTRALIAN CAPITAL TERRITORY

No. 19 of 1974

AN ORDINANCE

To amend the *City Area Leases Ordinance 1936-1973*, as amended by the *City Area Leases Ordinance 1974*.

I, THE GOVERNOR-GENERAL of Australia, acting with the advice of the Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910-1973*.

Dated this thirtieth day of May, 1974.

PAUL HASLUCK
Governor-General.

By His Excellency's Command,

GORDON BRYANT
Minister of State for the Capital Territory.

CITY AREA LEASES ORDINANCE (No. 2) 1974

1. (1) This Ordinance may be cited as the *City Area Leases Ordinance (No. 2) 1974*.^a Short title and citation.

(2) Section 1 of the *City Area Leases Ordinance 1974*[†] is amended by omitting sub-section (3).

(3) The *City Area Leases Ordinance 1936-1973*,[‡] as amended by the *City Area Leases Ordinance 1974* and by this Ordinance, may be cited as the *City Area Leases Ordinance 1936-1974*.

2. After section 35 of the *City Area Leases Ordinance 1936-1973*, as amended by the *City Area Leases Ordinance 1974*, the following section is inserted:—

“36. (1) Where—

(a) a person (in this section called ‘the vendor’) has, with the consent of the lessee of a parcel of land, entered into a contract with a person (in this section called ‘the purchaser’) for the assignment of the lease of that parcel to the purchaser;

(b) the purchaser pays or tenders to the lessee a sum equal to the aggregate of all moneys payable by the purchaser to the vendor under the contract and remaining unpaid; and

Obligation of lessee to assign in certain circumstances.

^a Notified in the *Australian Government Gazette* on 30 May 1974.

[†] Ordinance No. 13, 1974.

[‡] Ordinance No. 21, 1936, as amended by Nos. 38 and 40, 1936; No. 21, 1938; No. 14, 1947; No. 18, 1950; No. 9, 1951; No. 18, 1957; No. 21, 1959; No. 12, 1961; No. 38, 1963; No. 7, 1964; No. 19, 1966; No. 13, 1967; Nos. 3 and 28, 1968; No. 25, 1969; No. 69, 1970; No. 11, 1971; and Nos. 3 and 58, 1973.

(c) the purchaser requests the lessee to assign the lease of the parcel of land to the purchaser, the lessee shall thereupon assign the lease of that parcel of land to the purchaser.

" (2) Where a lessee has failed to comply with a request made in accordance with sub-section (1), the purchaser by whom the request was made may make application to the Supreme Court for an order under sub-section (5).

" (3) The Supreme Court has jurisdiction to hear and determine an application under sub-section (2).

" (4) An application under sub-section (2) shall be made by motion.

" (5) Where, on an application under sub-section (2), the Supreme Court is satisfied that the lessee of a parcel of land has failed to comply with a request made by the applicant in accordance with sub-section (1), the Supreme Court may make an order directing that lessee to assign to the applicant the lease of that parcel of land.

" (6) Where the Supreme Court makes an order directing the lessee of a parcel of land to assign the lease of the parcel to a person, the Supreme Court may also, by its order—

(a) specify a period within which that lease is to be so assigned; and

(b) direct the lessee to deliver to that person such documents and instruments as the Court thinks necessary.

" (7) Where—

(a) the Supreme Court makes an order under sub-section (5); and

(b) any moneys tendered to the lessee in accordance with sub-section (1) have not been accepted by the lessee,

the Supreme Court shall, by its order, give such directions as to the time and manner of payment of those moneys to the lessee as it thinks proper.

" (8) Payment of moneys by a purchaser to a lessee for the purpose of sub-section (1) or in accordance with directions given under sub-section (7) shall, for the purposes of the contract between the purchaser and the vendor, be deemed to be payment to the vendor.

" (9) Where moneys paid, for the purpose of sub-section (1) or in accordance with directions given under sub-section (7), to a lessee by a purchaser exceed the amount payable by the vendor to the lessee, the vendor is entitled to recover from the lessee the amount of the excess.

" (10) Where a purchaser makes a payment to a lessee for the purpose of sub-section (1) or in accordance with directions given under sub-section (7), the purchaser shall give to the vendor notice in writing of the fact and amount of the payment.

Penalty: \$50.

" (11) Notice for the purpose of sub-section (10) may be given by post.

" (12) This section applies whether a contract was entered into before or after the date of commencement of this Ordinance.

" (13) Where a person enters into a contract for the assignment of the lease of a parcel of land of which he is not the lessee, the contract shall, for the purposes of this section and of any application under this section, be taken to have been entered into with the consent of the lessee of parcel unless the contrary is proved."

APPENDIX 2

SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES

TRANSCRIPT OF EVIDENCE

(Taken at Canberra)

MONDAY, 12 AUGUST 1974

A.C.T. CITY AREA LEASES ORDINANCE (NO.2) 1974

Present

Senator Devitt (Chairman)

Senator Brown

Senator Scott

Senator Button

Senator Wood

Senator Everett

Senator Wright

MR MILTON PENKETH, Assistant Secretary, Government Branch,
Department of the Capital Territory; and

MR MARK DOUGLAS, Executive Officer, Government Branch,
Department of the Capital Territory,
were called and examined.

CHAIRMAN - We turn our attention now to the City Area Leases Ordinance, and you will be aware from the correspondence that has ensued on this matter, and the public interest at the same time in it, that there are a great many matters arising with the ordinance. I am sure that other members of the Committee will have a number of questions which they wish to direct to you. Perhaps I may be permitted to start. Mr Penketh, is it not reasonable to expect the person who is buying the house to cover himself by making his contract with all parties who have an interest in the property?

Mr Penketh - Mr Chairman, the basis for this legislation arose out of representations, of course, to the Minister.

Senator WRIGHT - By one or several?

Mr Penketh - Two Ministers.

Senator WRIGHT - No, one or several persons?

Mr Penketh - To answer your question specifically, to the best of our knowledge 2 people. As a result of the second representation we were asked to endeavour to find some answer to the particular problem which is the subject of this legislation. Namely, a finance company held title to land, and a builder - or vendor, as mentioned in the ordinance - received finance from the lessee, as the title holder, and contracted with a person to sell a house. They were the basic circumstances which existed before

December 1973. At that time, in December 1973, the legislation - that is the City Areas Leases Ordinance - was amended to enable a builder to obtain a title to the land on which to build a property to sell to a purchaser, as distinct from the situation before December where the title was held, in the circumstances of which we are speaking, by the finance company.

CHAIRMAN - Just to clarify this for my purposes, you say the builder was able to get a title to a piece of property upon which the home was to be built?

Mr Penketh - Since December 1973.

CHAIRMAN - Where would he get that title from?

Mr Penketh - By purchasing the land from the Department, or by going to an auction he could purchase the land and become the true title holder.

CHAIRMAN - And this did not happen with the builder and the lessee as we know it, the finance company? In fact, direct with the Department?

Mr Penketh - That is correct, and that is the particular circumstance with which this legislation deals.

CHAIRMAN - Yes.

Mr Penketh - The second representation received was that a person had contracted with a builder, who was financed by a finance company which held the title, to sell this house for a particular price. That was in the contract. However the title holder, namely the finance company, held the title, refused to pass the title, even though the house had been completed and the purchaser was prepared to pay the purchase price according to the terms of the contract.

Senator WRIGHT - Can you tell us if the provisions permitted a lease to be held by a finance company but not by a builder before December 1973?

Mr Penketh - I cannot. Do you know the background to that, Mr Douglas?

Mr Douglas - Before December 1973 there was a restriction in the City Area Leases Ordinance which until a building was completed, if there was a building covenant in the lease, prohibited effectively a person mortgaging the lease for the purposes of financing it, so if the builder did not have the finance to purchase the lease, and this was at the time when leases were going fairly high, he could not raise the money by mortgaging the lease so the finance companies would purchase the lease from the Department and would then finance the builder on that block of land by providing him with finance, and it may not-----

Senator WRIGHT - But my question was simply this: You have told us now that the finance company could purchase the lease. Was there anything that disentitled the builder if he wished to purchase the lease?

Mr Douglas - No.

CHAIRMAN - We are dealing only with the circumstance in which a builder is dealing with the lessee, which is a finance company? That is the only circumstance that this ordinance covers?

Mr Douglas - Yes.

Senator WRIGHT - I am sorry, Mr Chairman, but I just wanted that specific point, as you went on to explain.

CHAIRMAN - Would you like to proceed, Mr Penketh?

Mr Penketh - As a consequence, our understanding is that when the purchaser offered the price to the builder or the vendor in accordance with the contract this was refused, because we further understand that the finance company then said: 'We are not prepared to pass the title; we shall put the house on the market'. This is, as far as we can see, in spite of the fact that there was a contract

between the purchaser and the builder. So the legislation, after discussion with the Attorney-General's Department, was drafted to ensure that the title would pass to the purchaser on the payment of the amount in accordance with the terms of the contract. If this was not agreed to by the title holder, that is the lessee, then there was a claim before the Supreme Court of the Australian Capital Territory.

CHAIRMAN - To what extent is the retrospectivity involved here?

Mr Douglas - In relation to retrospectivity, the ordinance is applied to contracts made before or after the ordinance came into effect, but the operation of the ordinance, insofar as someone has a right under the ordinance to go to court and ask the court for an order that titles be transferred to him, certainly would not arise until the ordinance came into force; so in that sense of the operation it is not retrospective although it does apply to contracts entered into before the ordinance came into force.

Senator WRIGHT - On the face of it, it applies whether a contract was entered into before or after the commencement of this ordinance.

Mr Douglas - In one example that came to the notice of the Department, the person involved certainly would not have the right under this ordinance to go to court and demand that the title be transferred to him because there was no contract with the vendor, the builder, on foot at the time the ordinance was brought into operation, and there are possibly other examples that have subsequently come to notice.

CHAIRMAN - Can you give any idea to the Committee as to the extent of this practice? How widespread was it?

Mr Penketh - No, we do not know the extent of the practice. All we do know - perhaps we are unprepared here - is that before December 1973 there were many finance companies purchasing land and financing builders to build houses to sell to purchasers. We do not know the precise number of cases that this legislation will affect at the moment.

CHAIRMAN - Was it widespread or was it relatively minor in extent. Can you give the Committee some idea?

Mr Penketh - In answer to Senator Wright's question, I only know of 2 representations.

Senator WRIGHT - Of them your colleague said one was not covered by the ordinance, as I understood him.

Mr Douglas - There were other cases.

Senator WRIGHT - I thought you were only referring to one or, to be specific, two.

Mr Douglas - They were cases which had involved representations to the Minister.

Senator EVERETT - Prior to December 1973, why was it that the 3 parties who had interests in these matters did not jointly enter into contractual arrangements? Do you follow what I mean by that?

Mr Penketh - Yes. Mr Douglas will answer.

Mr Douglas - If I might quote an example - this came to my knowledge subsequently, some years ago when this situation was prevalent in Canberra, not the situation at which the ordinance is aimed but the situation of the finance company/builder relationship. At least one person, I know, endeavoured to have his contract joining the finance company and pinning the price down to the price offered by the builder. The finance company refused to do so. I have had other examples of this where the finance company would not become a party to this contract.

Senator EVERETT - If you have a look at new section 36 (1) (b) which provides that where the purchaser pays or tenders to the lessee finance company a sum equal to the aggregate of all moneys passes by the purchaser to the vendor - that is the builder - under the contract and remaining unpaid; and requests an assignment of the lease from the lessee, the lessee is required, to assign the lease. If he does not court proceedings can be taken. How can it be established unless you tread on the rights of the builder what sum is owing from the purchaser to the builder, the vendor?

Mr Douglas - I think that this is of an administrative nature rather than a legal nature. Administrative details of this kind are not commonly included in an ordinance and it is left to the discretion of the parties concerned to work this out there are methods of doing this: Possibly by statutory declarations, certainly solicitors statements could be checked bank evidence.

Senator EVERETT - But the builder has no rights under this ordinance, does he, under 36 (1) (b)? I am thinking of the case which not infrequently arises between builder and home owner of disputes arising from the quality of workmanship and the like. Often there is at the end of the building of a home a dispute between the builder and the home owner as to how much money is owing pursuant to the contract. What I would like you to indicate if it is possible to do so is: Where in this ordinance is there any protection to the builder as to the amount owing to him?

Mr Penketh - The ordinance was

framed on the basis that 2 parties had signed a contract and there was a purchase price and that when the building was completed and the contract price paid the title passed to the purchaser. The question of quality or completion is covered by our general building ordinance and regulations and no building would be granted approval in the form of completion or certificate of occupancy unless our building people actually approved that the building had been completed in accordance with the ordinance and regulations.

Senator EVERETT - But in the course of a building contract would you not agree, there are frequently, cases in which the original purchase price is varied because of extras added or sometimes deleted and general variations within the framework of the contract?

Mr Penketh - I would agree with that.

Senator EVERETT - And would there not, in your experience, be areas of dispute at the end of the performance of the contract as to just what sum was owing to the builder?

Mr Penketh - There could be, and my understanding of these situations is that they are covered by a contract which generally speaking, allows for some form of arbitration.

Senator EVERETT - But the builder is in no way protected so far as that provision is concerned, is he, because 36 (1) (b) simply impounds the purchaser to say to the finance company: 'I owe the builder \$7,000 to complete this contract. Here it is. Give me a lease.' It is as simple as that.

Mr Douglas - If the purchaser did, in fact, renege on part of his payments under a contract and there was an area of dispute the Supreme Court rules require notice to be given to all parties affected by the notice of motion and this would, I think, include the builder. The rules further go on to say that if the court finds in a notice that the parties are not informed it can discharge the notice without proceeding further or adjourn. So in this context the builder would certainly be called to the court and would certainly - it being now in the court's arena - have an opportunity to raise this sort of question.

Senator EVERETT - But that would be only in the event of the lessee refusing to comply with the request to assignment in the first place and being taken to court, would it not?

Mr Douglas - Certainly.

Senator EVERETT - Leaving that I pass to the new section 36(13) which requires in effect that the lessee is taken to have consented to the original contract unless the contrary is proved. That clearly means, does it not, that oral evidence is admissible?

Mr Douglas - I think we must go into the laws of evidence with which I am not completely familiar at the moment. I do not think I can answer the senator's question.

Senator EVERETT - You have mentioned that 2 instances brought to the notice of 2 separate Ministers were really the genesis of this ordinance.

Mr Douglas - That is true.

Senator EVERETT - You have referred to some details of

each of them. Could you go back and give us the details of the facts of the first instance, in a general way.

Mr Penketh - I have no paper work on the first instance.

A woman approached the Minister's office-----

CHAIRMAN - Which Minister was this?

Mr Penketh - Mr Bryant's office. It was in relation to a house at Hawker for which she contracted to buy from a certain builder - I think the name was * - for, I think, \$44,000 to \$48,000; this is from memory, as I have no papers here. She was in a desperate plight with her husband and children living in a flat, and said that on the advice of her solicitors the title could not be transferred to her - this title was held by a finance company - even though her husband and herself had the money available to discharge or pay the purchase price. She said the house had been advertised for \$65,000. They are the bare facts of the case.

Senator EVERETT - In that case, as you know, the lessee - the finance company - refused to assign the lease presumably because there was an opportunity, perhaps involving collusion with the builder, to obtain on a rising market a significantly enhanced price.

Mr Penketh - That is the way I understood it. We looked at it at that time and on our advice we could not see any answer. When the second representation came through the Minister asked us to have a very, very close look at the case.

Senator EVERETT - What were the facts of the second case?

* Name omitted at the direction of the Committee

Mr Penketh - The facts of the second case are: In March 1973 a contract was entered into with * whereby * was to build a house for Mr X on land, the title for which was held by * and the contract price was \$46,000. The contract contained a stipulation that the sale of the land and building would be subject to the builder first obtaining title from * I understand he employed solicitors on this.

When the Department granted the certificate of completion, the builder refused to accept the \$46,000. Since then, as a result of correspondence to Mr Enderby, Mr Bryant and, I think, the Treasurer, they refused offers of up to something like \$50,000 or \$51,000. I understand the price asked for was in the region of - and I cannot be committed to this - \$62,000.

Senator WOOD - What is the price they were asking for it?

Mr Penketh - I am sorry-----

CHAIRMAN - Perhaps the extreme detail is not necessary.

Mr Penketh - The figures are not 100 per cent.

Senator EVERETT - Finally, I did not understand the distinction Mr Douglas drew on the question of retrospectivity between some contracts that appear to be covered by this ordinance and others. As Senator Wright pointed out, new section 36 (12) provides this section applies whether a contract was entered into before or after the date of commencement of this ordinance. Is not that giving complete retrospectivity to this ordinance?

Mr Douglas - Sub-section 2 of the ordinance is where a lessee has failed to comply with a request made in accordance with sub-section 1-----

* Names omitted by direction of the Committee

CHAIRMAN - From where are you reading?

Mr Douglas - Sub-section 2 in section 36. The person may apply to the Supreme Court for action. As a prerequisite, there has to be a contract, and he has to tender all moneys remaining unpaid under the contract. If, first of all, there is no contract, he cannot fulfil those prerequisites. So, in the situation I have mentioned, if this first person who, on the advice of her solicitors, had accepted her deposit back and on the advice, I believe, of counsel from Sydney was advised there is now no contract on foot, she would have no action under this ordinance.

Senator WRIGHT - Nobody has any rights under this ordinance except under a contract, have they? A properly proved legal contract?

Mr Douglas - Yes.

Senator WRIGHT - The assumptions made in respect of it just seem to be the words. Look at section 36 (1) - Where a person in this section called the vendor has, with the consent of the lessee, entered into a contract for the purchase with a person called the purchaser, for the assignment of the lease.

How do we presuppose that a person with the consent of the lessee enters into a contract for the assignment of the lease? That presupposes, if you are thinking of the finance company as the lessee, some third person, maybe a builder, maybe a pastoralist, maybe a grocer, maybe anybody who has entered into a contract with the purchaser to assign the lease to the purchaser with the consent of the lessee. It is not restricted to the case of finance companies, is it? Or builders?

Mr Douglas - No.

Senator WRIGHT - What commercial circumstances can you think of in which a person, hereinafter called the vendor, with the consent of the lessee enters into a contract for the assignment of the lease to a purchaser? You are thinking of a tripartite arrangement, surely, where A is a lessee and B is going to build on it and C enters into a contract to pay the builder and buy the lease, and it is only to that case that you intend the ordinance to apply, is it not, where you have a contract between the lessee, who is supposed to be the finance company in the mind of the order of this regulation, a builder with the consent of the finance company, and he enters into a contract to assign the lease with a fully constructed house on it? That is the situation to which this regulation is addressed, is it not?

Mr Penketh - Yes.

Senator WRIGHT - You see, it only applies where you have a contract for the assignment of a lease, which is a legally binding contract. Can you tell me, if you have a legally binding contract to that effect, that the law is not sufficient to oblige whoever agreed to sell the lease, on payment of the money

stipulated, to transfer the lease? If you have a contract binding the finance company and the builder, can you tell me that the law without the aid of this ordinance is not effective to require an assignment of the lease on payment of the money stipulated?

Mr Douglas - I think the simple answer to that is that the best legal advice that the person who complained of, as far as I am aware, was that the present law did not cover this situation because the finance company had never become a party to the contract and could not be bound by the contract.

Senator EVERETT - But that is a different situation to the one that Senator Wright is quoting. That was a case in which there had not been, as I understand it, consent of the lessee. In other words it did not fall within 1(a). Senator Wright is dealing with the position under this ordinance.

Senator WRIGHT - Which, as I thought you agreed to Mr Everett, presupposed a legally binding contract in relation to the 3 parties.

CHAIRMAN - Can I get this clear for myself as a layman trying to understand what is intended?

Senator WRIGHT - It is a layman's ordinance.

CHAIRMAN - Yes, a layman's ordinance certainly. A person has with the consent of the lessee entered into a contract. Are you suggesting-----

Senator WRIGHT - For the assignment of the lease?

CHAIRMAN - Yes, but I am talking about-----

Senator WRIGHT - There is a third person-----

CHAIRMAN - Yes.

Senator WRIGHT - It is not the lessee entering into a

contract for the assignment of the lease, that is a third person, assumed to be the builder but under terms of the ordinance may be a grocer, may be a pastoralist or anybody who has perhaps some expectancy to get the lease, or got a contract to get the lease.

CHAIRMAN - I am directing my question to the meaning of the expression 'with the consent of the lessee', who may not be a party to the contract but gives a consent which cannot be enforced. Is there any significance in this particular point?

Mr Douglas - In relation to the contract that I said was on foot between the parties, I was referring - and I think we have been referring - to paragraph 36(1)(a) which refers to a 'contract with a person', the vendor and purchaser contract, which is the only contract that is referred to in paragraph (a).

Senator WRIGHT - The vendor is the vendor of a lease, and the regulation presupposes that he is not the lessee, does it not? The contract that you are referring to is a contract to assign a lease and the vendor is a person who is not the lessee?

Mr Douglas - Yes, correct.

Senator WRIGHT - Then the obligation of this section is that the lessee shall thereupon assign that lease to the purchaser after payment of all money due to the lessee. He pays the money to the lessee and all moneys that are due to the vendor. Does it not strike you that the way the thing is framed it is based upon an assumption that may apply to a whole variety of cases? It is not restricted to the case that is put, of a finance company and a builder?

Mr Douglas - No, it is not.

Senator WRIGHT - And there, I think it has been admitted - except this requirement of the Supreme Court to give notice to a person called the vendor so that he will have an opportunity to prove the moneys that are payable to him - there is no recognition of his rights at all?

Mr Douglas - In the situation that arose, the vendor was obligated to a finance company, we believe, for a deal of money, and in this situation his rights would be protected as between himself and the purchaser by the payment of the moneys to the finance company.

Senator WRIGHT - Take the case of builder Smith who owes \$100,000 to a finance company, and the finance company says: 'Here, I have got block 10 and you want to build on it for Mrs Jones'. How are you going to get that title out of the finance company, through a contract by the builder, except on payment of what moneys the builder owes to the finance company? The builder puts all the money into the house, he owes the finance company much more than the original value of the contract of the price of the lease. What court in the world would compel the finance company to give over that lease except on payment of such amount of money owing as the court fixed?

Mr Douglas - In the situation you envisage, I think the finance company would be refusing fairly enthusiastically to transfer the lease.

Senator WRIGHT - And it was not bound by a contract that the builder made; it would be bound by the contract, though, if it had made the contract, would it not? If the finance company said, as a party to the building contract: 'I and the builder agree on building a house to these specifications for \$46,000 to transfer it to the lease', there would be no need for this ordinance to get the title to the woman, would there, at \$46,000?

Mr Douglas - No, certainly not, but in that situation the finance company is joined as a party to the contract, which finance companies would not do under the situation of land and building in the Territory at that time.

Senator WRIGHT - What right have you to ask the court to compel it to give away the title that it holds for security for this building contract and maybe others, except on terms of repayment of its money? No court in the world would do it, would it?

Mr Douglas - No, and I would sincerely hope not. It is for that reason that it goes straight into the Supreme Court for decision.

Senator WRIGHT - In accordance with the law.

CHAIRMAN - Senator Everett.

Senator EVERETT - Senator Wright has put the question I almost began with, Mr Douglas. As a matter of sound conveyancing practice would not this situation be completely overcome if each contract in relation to a house had as its parties: The finance company - if there was one - the builder, and the prospective home owner, because each has an interest of a different kind in the land and the improvements on it? I just ask you is not that the pure and proper way to do conveyancing?

CHAIRMAN - Mr Penketh, would you like to answer that?

Mr Penketh - I would agree.

Senator EVERETT - Why is it not done?

Mr Penketh - I do not know.

CHAIRMAN - Is there any reason why it could not be done?

Mr Penketh - To the best of my knowledge there is no reason why it should not be done.

Senator EVERETT - If that was done, then all area of disputation would be removed, and if the lessee for some reason - let us say it was pure greed and bluff - wanted to try to get a

bigger price, the purchaser has the normal remedies of law pursuant to that contract which is binding on the lessee and on the builder.

Mr Penketh - Yes.

CHAIRMAN - Any further questions? Senator Brown.

Senator BROWN - Going back to the first sample that you gave us, would that \$44,000 to \$48,000 - I think you said the figure was roughly - include the price of the home and the land?

Mr Penketh - Yes.

Senator BROWN - And the contract would have been taken out between the purchaser - the buyer of the home - and the builder?

Mr Penketh - Yes.

Senator BROWN - How would the contract be drawn in those circumstances, because it would have to include the purchase price of the land, would it not?

Senator WRIGHT - It would have to include the lessee.

Mr Penketh - It should include the lessee.

Senator BROWN - But how would that be drawn if there is a contract between the purchaser of the home and the builder? I cannot envisage how it would happen, but there would have to be some reference to the block of land that the home was being built on, if that \$48,000 for instance represented the total cost to the purchaser of the home including the block of land.

Mr Penketh - I do not want to put all the questions over to Mr Douglas, but Mr Douglas did cite a contract. May I ask Mr Douglas if he recalls the details of the contract?

CHAIRMAN - Mr Douglas?

Mr Douglas - As far as I am aware, in one of the contracts in point the finance company certainly was mentioned in the contract as being the title holder to the block of land, and at that point one would have thought that perhaps the purchaser's solicitors might have written to the finance company and said: 'Where do you stand?' That does not appear to have been done. The finance company, from what I can gather, would not have joined the contract anyway under these circumstances. And it is mentioned in the contract, apparently, as a complete stranger to the contract.

Senator WRIGHT - It is wholly unsatisfactory to take the terms of the contract, most of which would be in writing, without the production of the writing. It is wholly unsatisfactory to take the terms of this contract from an officer who only knows it by hearsay. We should have the 3 parties - the finance company, the vendor, the purchaser. I just make that intervention because for my part, if we are going into this, it is wholly unsatisfactory to rely on any evidence of the contract except the best - the writing and the actual parties to it.

Senator BROWN - That is fair comment as far as I am concerned.

Senator BUTTON - The finance company appeared in the recitals to the contract, not as a party, I understand.

Mr Douglas - There was a clause in the contract to the effect that title would not be passed until the finance company, which was mentioned by name, received certain moneys, I think, from the builder. It was in those terms.

Senator WRIGHT - That would be seen as a contract between the builder and the purchaser. He may have thought that the lessee would have passed over the title at that sum, but if the lessee was a finance company and there was much more due on it, you could imagine immediately that if the price goes up he wants to get the benefit of it to pay the debt that is outstanding.

CHAIRMAN - Mr Douglas, have you any knowledge of what happens, how the contract is entered into, who is involved in the preparation of them and the execution of the contract? Is it in fact a contract in the full sense of the word? I imagine that a contract is something that is enforceable but it seems

to me the situation before us involves a contract that is not enforceable.

Senator WRIGHT - I may have my title mortgaged to the National Bank for \$100,000 and in good faith I say to you: 'I'll sell you this land with a house to those specifications on it for \$46,000'. I go along to the bank manager and he says: 'What about the other \$54,000?' My contract with you does not bind the bank.

Mr Douglas - No.

CHAIRMAN - This is why I asked the question about contracts.

Mr Douglas - The difference is that the title here was, in the senator's analogy, never with the bank. The title is with the vendor.

Senator EVERETT - This is where the whole problem arises. I suggest that the title in the true sense is not with the vendor-----

Senator WRIGHT - Nor in this regulation.

Senator EVERETT - Because he does not get the title.

Senator WRIGHT - Where the person called the vendor has with the consent of the lessee entered into a contract for the assignment of the lease. That presupposes that the finance company is the title holder and the vendor has never had the title.

CHAIRMAN - That is right. Is that a correct assessment of the situation, Mr Douglas. It certainly seems to be.

Mr Douglas - It certainly is but on that basis there have been many 'contracts' for the sale of many houses for vast sums of money in the Australian Capital Territory.

Senator EVERETT - Are solicitors normally involved, at least for the purchaser, at the time of entering into these contracts?

Mr Penketh - To the best of our knowledge, yes.

CHAIRMAN - Gentlemen, are there any further observations you would like to make to the Committee?

Mr Penketh - No, Mr Chairman.

CHAIRMAN - Gentlemen, I extend the Committee's thanks to you for making yourselves available at such short notice. I am very grateful to you for doing that and also for helping the Committee to a better understanding of what is attempted to be achieved by this ordinance. Thank you very much indeed.

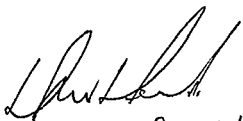
Mr Penketh - Thank you, Mr Chairman.

For Senator Devitt

AT TABLING OF PAPERS

I present the Forty-ninth Report from the Standing Committee on Regulations and Ordinances, relating to the A.C.T. City Area Leases Ordinance (No.2) 1974, and I move:

That the Report be printed.


16. 8. 74