IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C5 of 2018

BETWEEN:

GLEN RICHARD WILLIAMS
Appellant

and

WRECK BAY ABORIGINAL COMMUNITY COUNCIL
Respondent

THE ATTORNEY-GENERAL FOR THE AUSTRALIAN CAPITAL TERRITORY
Second Respondent

APPELLANT'S SUBMISSIONS

PART 1: PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The issues in this appeal are:

   a. whether ss 8 & 9 of the *Residential Tenancies Act 1997* (ACT) ("**RT Act**"), as applied as laws in force in the Jervis Bay Territory ("**JBT**"), are, in accordance with s 46 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ("**Land Grant Act**"), capable of operating concurrently with the Land Grant Act to the extent that those sections deem cl 55 of Schedule 1 of the RT Act (requiring the landlord to make repairs) to be a term of a residential tenancy agreement;

   b. whether cl 55 of Schedule 1 of the RT Act applies as a term in a residential tenancy agreement of premises located on "Aboriginal Land" under the Land Grant Act.

PART III: SECTION 78B NOTICE

3. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and is of the view that no such notice is required.

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PART IV: CITATIONS

4. Reasons for judgment of the primary court: *Wreck Bay Aboriginal Community Council v Williams* (2016) 312 FLR 60; reasons for judgment of the intermediate court: *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207.

PART V: RELEVANT FACTS

5. A statement of facts was agreed between the appellant (as the other active party) and the first respondent (as the initiating party) as part of the amended special case before the Supreme Court of the ACT (CAB 7-8). The pertinent facts for this appeal are:

   a. the appellant is a registered member of the respondent (CAB 7 at [5]);

   b. since 1989, the appellant has been (and still is) the tenant of premises - known as 10 Dhugan Close, Wreck Bay Aboriginal Community Council, Jervis Bay Territory, 2540 (the "**Premises**") - leased to him pursuant to a residential tenancy agreement by the respondent (CAB 7 at [6] & [11]);

   c. the Premises is located on Aboriginal Land, that is, land which has been granted to the respondent pursuant to s 8 of the Land Grant Act (CAB 7 at [6]).

PART VI: ARGUMENT

Introduction

6. The JBT is a territory of the Commonwealth, surrendered by New South Wales in 1913 and administered under s 122 of the Constitution. Its legal regime[1] currently includes the following elements:

   a. Under s 4A(1) of the *Jervis Bay Territory Acceptance Act 1915* (Cth) ("**JBT Act**"), the statute laws in force in the Australian Capital Territory (**ACT**) apply, in so far as they are applicable to the JBT, as if that territory formed part of the ACT.

   b. Under s 4F of the JBT Act, the Governor-General may make Ordinances for the peace, order and good government of the JBT.

   c. Under s 4C of the JBT Act, a law in force under s 4A may be amended or repealed by an Ordinance (or a law made under an Ordinance).

[1] Following amendments made by the *ACT Self-Government (Consequential Provisions) Act 1988* (Cth).

d. The Parliament may of course enact laws for the JBT directly under s 122. The Land Grant Act is an example.

7. With certain specific exceptions, the statute laws picked up by s 4A(1) do not include any provision of an "Act", and are therefore limited to "enactments" as defined in the *Australian Capital Territory (Self-Government) Act 1988* ("**Self-Government Act**"). Commonwealth Acts of nationwide application therefore apply in the JBT directly rather than pursuant to s 4A(1). Further, s 28 of the Self-Government Act, which subordinates enactments to Acts of the Commonwealth Parliament, is not part of the law of the JBT. (However, any part of an ACT enactment that was inoperative by reason of s 28 would not be part of the law "in force" in the ACT and would not be picked up by s 4A for that reason.)

8. It will also be noted that s 4A(1) refers to the principles and rules of the common law and equity. In this it departed from the former s 4(2) of the JBT Act and followed precedents in the laws dealing with two external territories (where the express extension of the common law might have been thought necessary).[2] In the case of the JBT it was strictly unnecessary because those principles and rules, to the extent they are not modified by statute, are confirmed as part of the law of the ACT by s 6(1) of the *Seat of Government Acceptance Act 1909* (which is picked up by s 4A(1): see s 4A(2)(a)). And such confirmation is itself probably unnecessary in any event, in respect of territory which formed part of New South Wales and now forms part of an internal Territory: the common law applies until excluded (c.f. *Western Australia v Commonwealth* (1995) 183 CLR 373 at 486-487).[3] Further, to the extent that s 4A purported to give principles of the general law statutory force, it would be ineffective (*ibid*).

9. Relevant provisions of the RT Act apply in the JBT, as if it were part of the ACT, by operation of s 4A(1).[4] There is no suggestion that these provisions fall foul of s 28 of the Self-Government Act. The question is whether ss 8 and 9 apply so as to imply terms requiring the landlord to make repairs into a residential tenancy agreement in respect of Aboriginal Land.

10. That question turns on s 46 of the Land Grant Act. This is so whether the RT Act is to be understood as having a status subordinate to that of a Commonwealth Act (as the Court of Appeal held at CAB 34-36 at [30]-[43]) or as having a coordinate status. That issue does not need to be resolved because, although s 4A(1) is a later enactment than the Land Grant Act, the Appellant accepts that its general language would not be construed as intending to effect any implied repeal of the Land Grant Act. To the extent

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[2] *Australian Antarctic Territory Act 1954* (Cth) s 6 (and see s 5 repealing the pre-existing legal regime); *Heard Island and McDonald Islands Act 1953* (Cth) s 5 (and see s 4).

[3] See also *Gumana v Northern Territory* (2007) 158 FCR 349 at [102].

[4] The only Ordinance of potential relevance to the application of the RT Act to the JBT is the *Leases Ordinance 1992* (Jervis Bay Territory) ("**Leases Ordinance**"). Rather than being inconsistent with the RT Act, the Leases Ordinance contemplates that the RT Act generally applies in the JBT: s 23AA(3). Also see the Explanatory Statement to the *Leases Amendment Ordinance 2009 (No. 1)* (Jervis Bay Territory), which inserted s 23AA into the Leases Ordinance.

that any provision of an ACT enactment (such as the RT Act) is not "capable of operating concurrently with" the Land Grant Act, its operation is therefore excluded. The question is not one of resolving a conflict between enactments but one of construction of the Land Grant Act. However, the legal regime outlined above may have some relevance to the applicability of cases dealing with the ostensibly similar language of s 28 of the Self-Government Act (as explained below).

Section 46 of the Land Grant Act

11. Section 46, and specifically, the criterion it adopts - "capable of operating concurrently" - does the following:

    a. first, it embodies a statement of Parliament's intention[5] that the Land Grant Act is not to be understood as displacing any other law in force in the JBT except where the application of that law would prevent the provisions of the Land Grant Act from operating;

    b. second, as a matter of construction, it alludes to a limit on the "universe" of provisions of the Land Grant Act in that it counts against giving any provision of the Land Grant Act an implied negative penumbra[6] that it is exclusive of laws in force in the JBT;

    c. third, it plays a role in determining constructional choices that may need to be made in respect of the provisions of the Land Grant Act. That is, where a provision of the Land Grant Act is open on the text to more than one construction, s 46 would tend to suggest that the "purpose and policy"[7] reasonably attributable to the Land Grant Act is that the construction that enables the law in force in JBT to operate concurrently with the Land Grant Act ought to be preferred.

12. Cases exploring the concept of inconsistency in s 109 of the Constitution may be of assistance here, but are not to be applied automatically. This is so for at least three reasons.

13. First, s 46 does not borrow the language of "inconsistency" from s 109. Inability to operate concurrently is a narrower concept.[8]

14. Secondly, the principle that provisions in a Commonwealth law cannot displace the operation of s 109 of the Constitution, so as to give operation

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[5] The relationship between one statute and another is a question of legislative intention, see *Commissioner of Police v Eaton* (2013) 252 CLR 1 at [46] per Crennan, Kiefel and Bell JJ; *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553-554.
[6] *Burns v Corbett* [2018] HCA 15 per Gageler J at [88]-[92].
[7] *Esso Australia Pty Ltd v The Australian Workers' Union* [2017] HCA 54; 92 ALJR 106, per Gageler J at [71]; c.f. *Lacey v A-G (Queensland)* (2011) 242 CLR 573 at [44]; *Certain Lloyd's Underwriters Subscribing to Contract No IHooAAQS v Cross* (2012) 248 CLR 378 at 389 [24]–[25] per French CJ and Hayne J; *Thiess v Collector of Customs* (2014) 250 CLR 664 at [23], per French CJ, Hayne, Kiefel, Gageler and Keane JJ.
[8] *Northern Territory v GPAO* (1999) 196 CLR 553 at [60] per Gleeson CJ and Gummow J.

to an inconsistent State law, has no operation here. Section 46 concerns the relationship between the Act of which it forms part, and other laws of the Commonwealth, and is able to operate according to its terms.

15. Thirdly (and relatedly), s 46 is not a constitutional provision like s 109, or like s 28 of the Self-Government Act. It does not appear in a statute defining the powers of a new legislature or govern the relationship between laws enacted by different legislatures. Thus, while a Commonwealth law and an ACT enactment cannot "operate concurrently" where the former is "*a complete and exhaustive statement of the law governing some relation or thing*",[9] one Commonwealth law cannot be described in that way in relation to other Commonwealth laws. In this regard it is relevant that, although s 4A(1) of the JBT Act is subjected to a Henry VIII clause (s 4C) (and traditional notions of repugnancy presumably govern the relationship between Ordinances and other Commonwealth Acts), nothing in the JBT Act directs that laws picked up by s 4A(1) be regarded as delegated or subordinate legislation. In any event, the location of s 46 within the Land Grant Act serves to confirm that that Act is *not* a complete and exhaustive statement of the law on any subject; rather, it is an Act that in its terms allows other laws in force in the JBT to operate to the greatest extent possible.

16. The Court of Appeal therefore erred in approaching the issue in this case using the language of "repugnancy" (CAB 37 [47]). Even if that concept can usefully describe the relationship between the Land Grant Act and a law picked up by s 4A(1), the object of s 46 is to manage and minimise the extent to which repugnancy arises; and it is s 46 that calls for construction and application.

17. The words "capable of operating concurrently" should therefore be given their ordinary meaning. On that basis, the question asked by s 46 is whether the particular law in force in the JBT can work together, in conjunction or in cooperation with the Land Grant Act. The Court of Appeal also erred by identifying the question as whether the RT Act would "alter, impair or detract from" the operation of the Land Grant Act – language borrowed from s 109 jurisprudence (CAB 37 [45]). Section 46 does not call for an evaluative analysis of whether application of the RT Act would "impair" or "detract from" the achievement of the objectives of the Land Grant Act; rather, it asks the simpler question whether their provisions are capable of simultaneous application. Further, the words "capable of" indicate that the provisions of the Land Grant Act should not be construed as giving rise to a negative stipulation or penumbra that implicitly excludes provisions of other laws in force in the JBT. Rather, they suggest that the provisions of the Land Grant Act are intended to be cumulative of or work together with the other laws in force in the JBT.

18. Thus, error can also be seen in the Court's identification of "*the proper interpretation of the provisions of the [Land Grant] Act*" as something

[9] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [51]-[61].

anterior to the application of s 46 (CAB 40 [61]-[62]). Section 46 forms part of the Land Grant Act, which must be construed as a whole. The section does not merely guard against "assumptions" (c.f. CAB 40 [61]); it is relevant to any question that arises as to whether Aboriginal Land or the activities of the Respondent were intended to be subject to, or exempt from, the ordinary law governing (relevantly) relationships between landlords and tenants.

19. This understanding is supported by the Explanatory Memorandum to the Bill for the Land Grant Act, which relevantly observed:

> Any law in force in the Territory will apply to Aboriginal Land to the extent that that law is capable of operating concurrently with this Act. This provisions is inserted to make clear that the granting of the Aboriginal Land to the Council has no other effect on the applicability of the general law of the Territory than as provided by specific legislative enactment in this Act.

Are relevant provisions of the RT Act capable of operating concurrently with the Land Grant Act?

20. The Land Grant Act effectively does four things:

a. First, it establishes the first respondent as a body corporate (s 4). Parts II and IV endow the first respondent with functions and make provision relating to its administration.

b. Second, Part III provides for land to be declared "Aboriginal Land" whereupon it "is vested in" the respondent (s 10).

c. Third, the Act provides, in Part V, that only certain dealings with "Aboriginal Land" are permitted (s 38(1)). It also requires the grant of leases to persons already in occupation and makes some specific provisions in relation to subleases (ss 40 & 41).

d. Fourth, the Act confers on the respondent the power to make by-laws with respect to the matters set out in s 52A(2). However, pursuant to s 52A(5), a by-law must not be inconsistent with "*a law of the Commonwealth or a law in force in the Territory*".

21. As to the second of these elements, land which becomes Aboriginal Land is not thereby placed outside the scope of the laws of Australia, including the law of real property. The language of "vesting" makes clear that what is being effected is a transfer of proprietary (rather than, eg, governmental) rights. The transfer is envisaged as being capable of registration (s 11). The feudal language of estates is not used; but if a property lawyer needed a label for the interest held by the respondent it would readily be described as freehold: the largest interest in land capable of recognition in Australian law (See *Fejo v Northern Territory* (1998) 195 CLR 96 at [44] and the cases there referred to; see also Megarry & Wade, *The Law of Real Property* (6th Ed, 2000), at [3-041]).

22. Correspondingly, the Land Grant Act does not create a statutory source (outside the ordinary law of real property) of rights of the respondent as proprietor of Aboriginal Land. Section 38(1) *prevents* the respondent dealing with or disposing of estates or interests in the land otherwise than as permitted by Part V, reflecting an assumption that such dealing would otherwise be legally possible as a function of ownership. Provision is then made in s 38(2)-(4) for the grant of certain leases and licenses, evidently using those terms in their ordinary senses. Two points should be noted about these provisions: while in their terms permissive, they are exceptions from s 38(1); and they evidently assume the existence of a body of property law governing the nature and incidents of "leases" and "licenses". Other provisions in Part V *direct* the respondent to grant leases (on certain terms) in specific circumstances (s 40) and effect certain modifications of the rights of lessees and sub-lessees (ss 41-42).

23. In taking this approach the Land Grant Act follows the example (albeit not the precise language: c.f. CAB 41-42 [68]) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("**Land Rights Act**"), which itself followed from reports of the Royal Commission chaired by Justice AE Woodward. The second of those reports had considered whether a form of statutory "Aboriginal Title" should be created, but recommended that land should be granted in fee simple subject to statutory qualifications.[10] The Full Court of the Federal Court in *Gumana v Northern Territory* [11] observed that the title thereby granted was not a statutory creation; rather, the Land Rights Act was the source of authority to grant an estate which, once granted, had the characteristics of a fee simple under the general law, subject to restrictions in the Act itself.

24. These submissions are confirmed by the Explanatory Memorandum for the Bill of the Land Grant Act which, consistent with the observations in the Woodward Report, describes the purpose of the Bill to provide a grant of "*inalienable freehold title*" to the respondent.[12]

25. Manifestly, there is no collision between these provisions of the Land Grant Act and the provisions of the RT Act in issue here:

    a. Section 38(2) does not create any special leasing power whose efficacy would be compromised by application of the ordinary law of landlord and tenant. It carves out certain leases from the general prohibition in s 38(1), thereby restoring the ordinary capacity of a landowner to grant such leases.
    b. Some lease terms are dictated by ss 38(3) and 40; others are not. These provisions clearly assume the existence of a general body of

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[10] Parliamentary Paper No. 69, "Second Report". 'Aboriginal Land Rights Commission', A.E. Woodward, April 1974 (the "Woodward Report No.2") pages 13 (at [72]) and 17 (at [101]-[102]).
[11] *Gumana v Northern Territory* [2007] FCAFC 2, at [24]-[25].
[12] Explanatory Memorandum to the Aboriginal Land Grant (Jervis Bay Territory) Bill 1986 (No. 86, 4636) at page 2. c.f. the Second Reading of the Bill, in which the Honourable Minister Holding said "*the purpose of the...Bill is to provide for the grant of inalienable freehold title...*", House Hansard, 29 May 1986 at page 4193.

contract and property law. Except where it does so expressly (as in ss 41-42), the Land Grant Act does not purport to displace the common law pertaining to implied covenants between landlord and tenant. Thus, a law of general application which modifies the common law in this respect is capable of concurrent operation except in so far as it collides with a specific prescription.

c. The implication of a lease term requiring repairs by the landlord (pursuant to s 8 of the RT Act) does not create any inconsistent right or obligation. To argue that it does, the respondent must contend that something in the Land Grant Act exempts leases of Aboriginal Land from the laws that otherwise apply to leases of land in the JBT; or (to put it another way) that it has a right pursuant to the Land Grant Act to lease land for residential purposes without the inclusion of any statutory implied term. No such exemption, or right, can be found in the simple language of s 10 or in the restrictive regime of Part V – *a fortiori* when these provisions are read in the light of the policy apparent from s 46 itself.

26. The point is emphasised by the contrasting position of the standard term preventing sub-leases without the consent of the landlord (cl 79 of Schedule 1 to the RT Act). If that term applied it would prevent acts that s 41 of the Land Grant Act expressly permits (eg a sublease to another registered member); so that to that extent the RT Act cannot operate concurrently with the Land Grant Act. The contrast with cl 55 is clear.

27. Even if s 46 were understood to embody a broader concept of inconsistency (eg that a law would not be capable of operating concurrently if it were to "alter, impair or detract from" the scheme of the Land Grant Act), the result would be the same. The Land Grant Act does not erect any scheme whose operation would be compromised by the application of the ordinary laws protecting tenants against exploitation. Nor does it manifest any intention to exclude the operation of such laws:

a. As outlined above, the vesting of an interest in Aboriginal Land does not in itself make the first respondent anything more than a landowner. Its capacity to deal with that land is constrained, rather than enhanced, by Part V. Use of the label "Aboriginal Land" does not set that land apart from the operation of the laws of Australia.

b. The Court of Appeal erred in characterising the power to grant leases as a statutory power granted by s 38(2) (CAB 44 [80]). The factors that it regarded as leading to that conclusion (at CAB 43-44 at [76]-[79]) simply do not do so. In any event, the conclusion does not take matters very far. The power must be construed as a power to grant leases on such terms and conditions as the first respondent thinks fit (even to the exclusion of laws which would require particular

terms be included in particular kinds of leases),[13] if it is to be "altered", "impaired" or "detracted from" in any material way by the implication of terms that protect the tenant. Neither the terms nor the context of s 38(2) provide support for that construction. In particular, s 38(2) itself only identifies the persons to whom and purposes for which leases may be granted; and to the extent that other provisions deal with the terms of leases, they are restrictive rather than permissive.

c. The Court of Appeal placed some emphasis on the consideration that the first respondent "is controlled by its members in a reasonably direct manner" (CAB 44 [79]). That degree of "community control" does not provide any sound basis for construing or characterising the powers of the organisation. The reasoning would seem to be that Parliament intended tenants of the first respondent not to have the ordinary protections of the law because the first respondent was to be a democratic organisation of which many tenants would be members. That takes no account of the position of a registered member who cannot garner the support of a majority of the executive committee or a majority at a general meeting – let alone a lessee who is not a member (c.f. s 38(2)(d) and (e)).

d. The Court of Appeal also emphasised features of Part V that make it inconvenient for the first respondent to be subjected to obligations under the RT Act as it stands from time to time – in particular the very long terms of leases under s 40 (at CAB 43 at [76]) – and provisions which were said to make those leases akin to ownership under a Crown lease in the ACT (at CAB 44 at [77]). To reason from these policy concerns to a conclusion about the breadth of the (supposed) power in s 38(2), and thence the exclusion of other laws, is to fall into the error identified in *Australian Education Union v Department of Education* (2012) 248 CLR 1 at [28] and *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26].

Conclusion

28. The appellant submits that the provisions of the RT Act upon which his claim for relief rests are capable of operating concurrently with the LG Act, in relation to leases granted by the first respondent under s 38(2)(a) of the Land Grant Act which meet the definition of a residential tenancy agreements for the purposes of the RT Act. The consequence is that those provisions are not prevented, by anything in the LG Act, from applying to the residential tenancy agreement in the present case.

PART VII: RELEVANT LEGISLATION

See Annexure A.

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[13] *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 per Mason J at 260-261.

PART VIII: ORDERS

The appellant seeks the following orders:

1. The appeal be allowed.

2. The orders made by the Court of Appeal be set aside, and in lieu thereof it be ordered:

   (a) that Question 3 of the Amended Special Case filed on 22 August 2016 be answered as follows:

   Section 8 of the RT Act, in so far as it deems cl 55 of Schedule 1 to be a term of a residential tenancy agreement, is capable of operating concurrently with the Land Grant Act in respect of a lease of the Aboriginal Land. Otherwise unnecessary to answer.

   (b) that Question 4 of the Amended Special Case filed on 22 August 2016 be answered as follows:

   Section 8 of the RT Act, in so far as it deems cl 55 of Schedule 1 to be a term of a residential tenancy agreement, is applicable. Otherwise unnecessary to answer.

3. That the respondent pay the appellant's costs of the application for special leave to appeal, and the appeal to this Court.

PART IX: ESTIMATE OF ORAL PRESENTATION

The appellant estimates that he will need approximately 2 hours for presentation of oral argument.

Dated: 9 May 2018

Geoffrey Kennett
Tenth Floor Chambers
Sydney
Counsel for the appellant

ANNEXURE A - RELEVANT LEGISLATION

***Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth)**

(These sections remain unchanged during all relevant times)

10 Vesting of land

Where, because of section 8, 9 or 9A, land becomes Aboriginal Land, that land (including all rights, title and interests in that land) is vested in the Council without any conveyance, transfer or assignment.

38 Dealings in Aboriginal Land by Council

(1) Except as provided by this Part, the Council shall not deal with or dispose of, or agree to deal with or dispose of, any estate or interest in Aboriginal Land.

(2) Subject to this section, the Council may grant a lease of Aboriginal Land (other than land within the Booderee National Park or the Booderee Botanic Gardens):

(a) to a registered member or registered members for use for domestic purposes;

(b) to a registered member or registered members for use for business purposes;

(c) to a registered member or registered members for use for the benefit of the members, or of a significant number of the members, of the Community;

(d) with the consent in writing of the Minister—to a person other than a registered member, or to persons at least one of whom is not a registered member, for use for domestic purposes;

(e) with the consent in writing of the Minister—to a person other than a registered member, or to persons at least one of whom is not a registered member, for use for business purposes; or

(f) to the Commonwealth or an Authority.

(3) Except with the consent of the Minister, the term of a lease shall not exceed:

(a) in the case of a lease to which paragraph (2)(a) applies—99 years;

(b) in the case of a lease to which paragraph (2)(b) or (c) applies—25 years; or

(c) in any other case—15 years.

(4) The Council may grant a person a licence to use Aboriginal Land (other than land within the Booderee National Park or the Booderee Botanic Gardens).

(5) Where the Council grants a lease of, or a licence to use, Aboriginal Land to the Commonwealth or to an Authority under this section, the rent and other amounts payable under the lease or licence shall be determined by the Minister.

(6) The *Lands Acquisition Act 1989* does not apply to the grant of a lease under this section.

40 Rights of existing occupiers

Where, immediately before land became Aboriginal Land, a registered member was in occupation of the land with the consent, express or implied, of the Commonwealth or of an Authority, the Council shall, in accordance with section 38, grant that person a lease of that land, being a lease:

(a) the term of which:

(i) commences at the time at which the land became Aboriginal Land; and

(ii) is for the maximum period permitted for the lease by subsection 38(3);

(b) the terms and conditions of which do not provide for any payment by the person in respect of a building or improvements erected on the land solely at the expense of the person; and

(c) the terms and conditions of which may include terms and conditions approved by the Minister in writing under which the person is to pay to the Council in respect of buildings and improvements on the land (other than buildings or improvements to which paragraph (b) applies) amounts amounting in the aggregate to the value of those buildings and improvements at the time at which the land became Aboriginal Land.

41 Dealings in land leased from Council

(1) Subject to this section, where the Council has granted a lease of Aboriginal Land to a person, that person, or a person who has been granted a sub-lease of the land under this section, may grant a sub-lease of the whole of the land.

(2) Except with the consent in writing of the Minister, a person shall not grant a sub-lease of Aboriginal Land to a person other than a registered member, the Commonwealth or an Authority.

(3) Except with the consent in writing of the Minister, a person shall not grant a sub-lease of Aboriginal Land for use for purposes other than the purposes for which the land is required to be used by the lease in respect of the land.

42 Devise of interests in Aboriginal Land etc.

(1) Where a registered member has the benefit, or a share in the benefit, of a lease or sub-lease of Aboriginal Land for use for domestic purposes, that benefit or share is capable of transmission, by will or under a law relating to intestacy in force in the Territory, to a relative of the member.

(2) Where the benefit, or a share in the benefit, of a lease or sub-lease of Aboriginal Land is transmitted because of subsection (1), the purposes for which

the land is required to be used by the lease or sub-lease, as the case may be, shall not be taken to be altered.

46 Application of laws of Territory to Aboriginal Land

This Act does not affect the application to Aboriginal Land of a law in force in the Territory to the extent that that law is capable of operating concurrently with this Act.

***Jervis Bay Territory Acceptance Act 1915* (Cth)**

(These sections remain unchanged during all relevant times)

4A Laws of Australian Capital Territory to be in force

(1) Subject to this Act, the laws (including the principles and rules of common law and equity) in force from time to time in the Australian Capital Territory are, so far as they are applicable to the Territory and are not inconsistent with an Ordinance, in force in the Territory as if the Territory formed part of the Australian Capital Territory.

(2) Subsection (1) extends to:

(a) sections 6 and 7 of the *Seat of Government Acceptance Act 1909*; and

(b) the whole of the *Seat of Government (Administration) Act 1910* except sections 9 and 12 of that Act;

but does not extend to any other Act or provision of an Act.

4C Ordinance may amend or repeal adopted laws

A law in force in the Territory because of section 4A may be amended or repealed by an Ordinance or by a law made under an Ordinance.

4F Ordinances

(1) The Governor-General may make Ordinances for the peace, order and good government of the Territory.

(2) Notice of the making of an Ordinance shall be published in the *Gazette*, and an Ordinance shall, unless the contrary intention appears in the Ordinance, come into operation on the date of publication of the notice.

***Residential Tenancy Act 1997* (ACT)**

(Presently in force at the date of this submission, Version R52. The changes between this version and previous versions are not material to the issues to be decided under this appeal)

8 Standard residential tenancy terms

(1) A residential tenancy agreement—

(a) must contain, and is taken to contain, terms to the effect of the standard residential tenancy terms mentioned in schedule 1; and

(b) if the lessor and tenant agree—may contain a fair clause for posted people; and

(c) if the agreement is a fixed term agreement and the lessor and tenant agree—may contain a break lease clause; and

(d) may contain any other term—

(i) that is consistent with the standard residential tenancy terms; or

(ii) that is inconsistent with a standard residential tenancy term if the term has been endorsed by the ACAT under section 10.

(2) In this section:

break lease clause means the following clause:

Termination before end of fixed term—fee for breaking lease

(1) If the tenant ends a fixed term agreement before the end of the fixed term (other than for a reason provided for by the Residential Tenancies Act or the agreement), the tenant must pay a fee (a ***break fee***) of the following amount:

(a) if the fixed term is 3 years or less—

(i) if less than half of the fixed term has expired—6 weeks rent; or

(ii) in any other case—4 weeks rent;

(b) if the fixed term is more than 3 years—the amount agreed between the lessor and tenant.

(2) The lessor agrees that the compensation payable by the tenant for ending a fixed term agreement before the end of the fixed term is limited to the amount of the break fee specified in subclause (1).

fair clause for posted people means the following clause:

Termination because of posting

(1) The tenancy agreement may be terminated—

(a) if the lessor is posted to Canberra in the course of the lessor's employment—by the lessor giving the tenant at least 8 weeks written notice; or

(b) if the tenant is posted away from Canberra in the course of the tenant's employment—by the tenant giving the lessor at least 8 weeks written notice.

(2) A notice under subclause (1) must be accompanied by evidence of the posting (for example, a letter from the employer of the lessor or tenant confirming the details of the posting).

(3) The tenancy ends—

(a) 8 weeks after the day a notice is received under subclause (1); or

(b) if a later date is stated in the notice—on the stated date.

9 Inconsistent tenancy terms void

(1) A term of a residential tenancy agreement is void if—

(a) it is inconsistent with a standard residential tenancy term; and

(b) it has not been endorsed by the ACAT under section 10.

(2) A term of a residential tenancy agreement is void if it is inconsistent with this Act (other than a standard residential tenancy term).

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***Residential Tenancy Act 1997* (ACT)**

(As in force between 11 November 2014 and 16 April 2015, Version R44)

8 Standard residential tenancy terms

(1) A residential tenancy agreement—

(a) must contain, and is taken to contain, terms to the effect of the standard residential tenancy terms mentioned in schedule 1; and

(b) if the lessor and tenant agree—may contain a fair clause for posted people; and

20 (c) may contain any other term—

(i) that is consistent with the standard residential tenancy terms; or

(ii) that is inconsistent with a standard residential tenancy term if the term has been endorsed by the ACAT under section 10.

(2) In this section:

fair clause for posted people means the following clause:

Termination because of posting

(1) The tenancy agreement may be terminated—

(a) if the lessor is posted to Canberra in the course of the lessor's employment—by the lessor giving the tenant at least 4 weeks written
30 notice; or

(b) if the tenant is posted away from Canberra in the course of the tenant's employment—by the tenant giving the lessor at least 4 weeks written notice.

(2) The tenancy ends—

(a) 4 weeks after the day a notice is received under subclause (1); or

(b) if a later date is stated in the notice—on the stated date.

9 Inconsistent tenancy terms void

(1) A term of a residential tenancy agreement is void if—

(a) it is inconsistent with a standard residential tenancy term; and

(b) it has not been endorsed by the ACAT under section 10.

(2) A term of a residential tenancy agreement is void if it is inconsistent with this Act (other than a standard residential tenancy term).

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