IN THE TENANCY TRIBUNAL)
OF THE)
AUSTRALIAN CAPITAL TERRITORY) No: TT 102 of 1997

In the matter of:

CANBERRA AERO CLUB
(applicant)

And:

FEDERAL AIRPORTS CORPORATION
(respondent)

DECISION OF PRESIDENT BURNS RELATING TO THE QUESTION OF THE JURISDICTION OF THE TRIBUNAL TO DEAL WITH THE MATTER, DELIVERED ON 11 JUNE 1998

The applicants, Canberra Aero Club, by a Notice of Dispute dated 2 February 1997 notified the Registrar of the Tenancy Tribunal of a dispute with the respondent, the Federal Airports Corporation. The applicant was the tenant of the respondent. The premises the subject of the dispute are Site 283, Canberra Airport. The particulars of the dispute as outlined by the applicant are as follows:

> "[The applicant] entered into a written lease commencing 16 June 1966 with the respondent. On or about 22 December 1986 the tenancy became a monthly tenancy incorporating terms including that the [respondent] would give the [applicant] adequate time after termination of the lease to remove [the applicant's] building, fixtures and fittings.
>
> [The respondent] terminated the monthly tenancy by notice expiring on 31 July 1996.

> [The applicant] entered discussions/negotiations with [the respondent] on a number of matters, including being reimbursed for the market value of the applicant's on site improvements.....
>
> The [respondent] made representations on which the [applicant] relied, that it would provide compensation for its improvements."

The applicant alleges that the respondent resiled from its representations in failing to allow the applicant adequate time to remove its building, fixtures and fittings and in failing to provide compensation for the improvements which the applicant had made to the premises. As a result, the applicant claims it lost opportunity and business income. The applicant alleges that the conduct of the respondent in that regard was harsh and oppressive. The applicant submits that the Tribunal has jurisdiction to deal with this dispute pursuant to paragraphs 6(1)(b) and 6(1)(g) of the *Tenancy Tribunal Act* 1994 (ACT).

The respondent submits that the Tribunal has no jurisdiction to hear the dispute, as a result, inter alia, of sections 27 and 28 of the *Australian Capital Territory (Self Government) Act* 1988 ("the Self Government Act"). The respondent has other grounds upon which it denies that the Tribunal has jurisdiction to hear this dispute but they require the Tribunal to receive evidence in order to determine them. The parties accepted that the present objections to jurisdiction could conveniently be dealt with separately to the remainder of the grounds, which could await further hearing if necessary.

JURISDICTION

The parties were notified by the Registrar of the Tenancy Tribunal by a letter dated 24 March 1997 that submissions as to the ability of the Tribunal to deal with the matter under section 13 of the *Tenancy Tribunal Act* 1994 would be required. Written submissions were filed by the respondent on 24 April 1997 and by the applicant on 16 May 1997. Due to the complexity of the issues relating to jurisdiction the Registrar decided, pursuant to section 15(1) of the *Tenancy Tribunal Act*

1994 to refer the matter to the Tribunal to determine the issue of jurisdiction. The parties were notified of this decision by letter dated 19 May 1997.

Notices under section 78B of the *Judiciary Act* 1903 were served on the Commonwealth, State and Territory Attorneys-General. Surprisingly, the Australian Capital Territory Attorney-General declined to make any submissions on the ambit or effect of section 27 of the *Self Government Act*.

Further written submissions were filed by the applicant and respondent with respect to sections 27 and 28 of the *Self Government Act*. Those submissions were orally addressed on 22 December 1997. The Commonwealth and ACT Attorneys-General declined to make any submissions to the Tribunal on the interpretation of s 27.

A first draft of this decision was completed by early February 1998. However, in completing that draft the issue arose as to whether the relationship between s 64 of the *Judiciary Act* 1903 and s 27 of the *Self Government Act* could illuminate the meaning of the latter provision, albeit that s 64 of the *Judiciary Act* 1903 has no direct application to the present proceedings. The Tribunal therefore directed the Registrar of the Tribunal to write to the ACT Attorney General to again request submissions from the Territory on the interpretation of s 27 of the *Self Government Act*. The forwarding of this letter was delayed by the ACT elections until 31 March 1998. The ACT Government Solicitor provided written submissions on 21 May 1998 which merely pointed out that s 64 of the *Judiciary Act* 1903 did not apply to this dispute, and unfortunately did not address the interpretation of s 27 of the *Self Government Act*.

The Tribunal is thus called upon to consider a provision of the *Self Government Act* of potentially considerable significance to the Territory and its citizens with no guidance or assistance from the Government of the Territory.

The respondent submits that this Tribunal has no jurisdiction to deal with this dispute, and relies in that regard upon the provisions of sections 27 and 28 of the *Australian Capital Territory (Self Government) Act* 1988 ("the Self Government Act"). These sections provide:

"s 27 Except as provided by the regulations, an enactment does not bind the Crown in right of the Commonwealth."

"s 28 (1) A provision of an enactment has no effect to the extent that it is inconsistent with a law defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.

(2) In this section:

"law" means:

(a) a law in force in the Territory (other than an enactment or a subordinate law); or

(b) an award, order or determination, or any other instrument of a legislative character, made under a law falling within paragraph (a)."

"Enactment" is defined in section 3 of the *Self Government Act* as, inter alia, ".. a law (however described or entitled) made by the Assembly under this Act."

It is common ground that the *Tenancy Tribunal Act* 1994 is an "enactment" as defined in section 3 of the *Self Government Act*. It is also common ground that the *Tenancy Tribunal Act* 1994 has not been prescribed by regulation as an enactment that binds the Crown in the right of the Commonwealth.

The respondent contends that it enjoys the privileges and immunities of the Crown in the right of the Commonwealth, and as such the provisions of the *Tenancy Tribunal Act* 1994 do not apply to give this Tribunal jurisdiction to hear a dispute to which it is a party.

DOES THE FEDERAL AIRPORTS CORPORATION ENJOY THE PRIVILEGES AND IMMUNITIES OF THE CROWN IN THE RIGHT OF THE COMMONWEALTH?

This question has already been judicially determined. In Ventana Pty Ltd v Federal Airports Corporation & Ors (1997) 147 ALR 200 Ryan J sitting as the Federal Court determined that the Federal Airports Corporation was entitled to the immunities of the Crown in the right of the Commonwealth.

Whilst it may be argued that this Tribunal is not strictly bound by the rules of precedent that govern the operation of the Courts, as a question of policy relevant decisions of Superior Courts should be treated as determining the relevant issue.

This is particularly so in the instant case, as an appeal lies from this Tribunal to the ACT Supreme Court, which would be bound by the Federal Court decision in Ventana.

For this reason the Tribunal accepts that the Federal Airports Corporation enjoys the privileges and immunities of the Crown in the right of the Commonwealth.

SUBMISSIONS WITH RESPECT TO S 27 SELF GOVERNMENT ACT

The respondent submitted that the effect of s 27 of the *Self Government Act* was to deny to this Tribunal the jurisdiction to hear this dispute. Were it not for the existence of s 27 of the *Self Government Act* the legal issue of the jurisdiction of this Tribunal would have been elucidated by the decision of the High Court in Re Residential Tenancies Tribunal of New South Wales & Ors; Ex Parte Defence Housing Authority (1997) 146 ALR 495 ("the Defence Housing Case"). It is convenient to examine the principles examined in that case.

In the Defence Housing Case the High Court considered whether the *New South Wales Residential Tenancies Act* 1987 applied to premises leased to the Defence Housing Authority. The majority of the High Court (Brennan CJ, Dawson, Toohey and Gaudron JJ), relying upon Commonwealth v Cigamatic Pty Ltd (In Liq.) (1962) 108 CLR 372, drew a distinction between the "... capacities and functions of the Crown in the right of the Commonwealth and the transactions in

which that Crown may choose to engage in exercise of its capacities and functions." (per Brennan CJ at p 497). The Chief Justice further stated:

> "By 'capacities and functions' I mean the rights, powers, privileges and immunities which are collectively described as the 'executive power of the Commonwealth' in s 61 of the Constitution." (at p 497).

Section 61 of the Constitution provides:

> "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

The position of the States with respect to the ability to bind the Crown in the right of the Commonwealth in the exercise of its capacities or functions is clear. In a joint judgment Justices Dawson, Toohey and Gaudron said:

> "In Cigamatic it was held that a State legislature had no power to impair the capacities of the Commonwealth Executive, but at the same time it was recognised that the Commonwealth may be regulated by State laws of general application in those activities it carried on in common with other citizens." (at pages 508-509)

The respondent submits that when s 27 of the *Self Government Act* provides that an ACT enactment does not "bind the Crown" it is intended that such an enactment will not bind the Crown whether in the exercise of its functions or capacities, or in the transactions in which the Crown chooses to engage in the exercise of those functions or capacities. The applicant submits that s 27 of the *Self Government Act* is only intended to preclude ACT enactments "binding the Crown" in the former of those two senses, so that the Commonwealth Crown would be subject to Territory enactments of general application when engaging in ordinary transactions.

The language of some earlier cases was such as to suggest that an enactment only sought to "bind" the Crown if it sought to modify what Brennan CJ referred to as the functions and capacities of the Crown. Enactments that affected the Crown in the wider sense of regulating the transactions in which the Crown chose to engage in the exercise of its functions and capacities were referred to as "affecting" the Crown: see Commonwealth v Bogle (1959) 84 CLR 229. It is difficult to see any real distinction in those concepts. As Dawson, Toohey and Gaudron JJ said in the Defence Housing case:

> "But it is impossible to say what is meant by "affected by State laws" if it does not mean that the Crown in the right of the Commonwealth is bound by them." (at p.515)

Thus whilst a State has no power to bind the Crown in the right of the Commonwealth in the exercise of its capacities and functions, the Commonwealth Crown may be bound by State laws of general application regulating transactions into which the Commonwealth Crown may choose to enter.

For the applicant's submission on s 27 to be correct, it follows that there must be some circumstance in which it was envisaged by the Commonwealth Parliament that the enactment of the Australian Capital Territory could bind the Crown in the right of the Commonwealth in the exercise of its capacities and functions. Otherwise the provision is otiose, which should not lightly be inferred of a provision of an Act of Parliament.

Little assistance in the interpretation of s 27 of the *Self Government Act* can be gleaned from the Explanatory Memorandum of the *Self Government Act*. In common with virtually all Explanatory Memoranda of Commonwealth Acts since the passing of the provisions of s 15 AB of the *Acts Interpretation Act* 1901 the Explanatory Memorandum of the *Self Government Act* merely paraphrases section 27 of the Act.

I have also referred to the Second Reading speech of the then Minister for the Arts and Territories in the House of Representatives on 19 October 1988. Slightly more assistance is available from this document. The Minister frequently emphasises the fact that the Territory is the national capital

and the seat of government. With respect to Part III of the *Self Government Act* the Minister said:

> "The Assembly will have the power to make laws for the peace, order and good government of the Territory. Most ordinance law in place in the Territory will become Assembly law on the commencing day. The Governor General will, as occurs in the Northern Territory, have the power to disallow any Assembly law within six months of the law being made. Commonwealth law will prevail over Assembly law. Protections such as these are essential in the national capital."

The reference to Commonwealth law prevailing over Assembly law is very likely a reference to the provisions of s 28 of the *Self Government Act* rather than to s 27, but the Minister's statements reflect an attitude that the position of the Territory as the national capital was a significant consideration for the Parliament. This lends some slight support to the respondent's submission in that it may explain why the Parliament in enacting s 27 (if one accepts the respondent's submissions as to the interpretation of this section) was placing the Territory in a different position to the States and the Northern Territory (there being no equivalent to s 27 of the *Self Government Act* to be found in the *Northern Territory (Self Government) Act* 1978).

It is axiomatic that no other body politic within the Commonwealth may modify the executive power of the Commonwealth: see Re Residential Tenancies Tribunal of New South Wales & Ors; Ex Parte Defence Housing Authority (1997) 146 ALR 495 at pp 497-498 per Brennan CJ. As their Honours Dawson, Toohey and Gaudron JJ said in that case:

> "The States ... do not have specific legislative powers which might be construed as authorising them to restrict or modify the executive capacities of the Commonwealth. The legislative power of the States is an undefined residue which, containing no such authorisation, cannot be construed as extending to the executive capacities of the Commonwealth. No implication limiting or otherwise giving power is needed; the character of the Commonwealth as a body politic, armed with executive capacities by the Constitution by its very nature places those capacities outside the legislative power

> of another body politic, namely a State, without specific powers in that respect." (at page 509)

As noted above the position with respect to State legislation binding the Crown in the right of the Commonwealth in the exercise of its capacities and functions is clear. If the Territory is to have such a power, which is not enjoyed by the States, it must arise from the fact that the Territory is a territory, and not a State. Logically, the only manner in which it could be suggested that the Territory as a territory could differ from the States in its ability to pass laws binding the Crown in the right of the Commonwealth in the exercise of its capacities and functions, is if the Territory is exercising the same legislative power as the Commonwealth. In other words, the Territory must be exercising delegated Commonwealth legislative power.

THE NATURE OF SELF GOVERNMENT IN THE ACT

The question of the nature of the ACT's legislative power has also been considered by the High Court. In Capital Duplicators Pty Ltd v Australian Capital Territory (1992) 177 CLR 248 the majority (Brennan, Dean and Toohey JJ with whom Gaudron J agreed) with reference to s 22 of the *Self Government Act* stated:

> "(ACT) Enactments are made under a power to make laws "for the peace, order and good government" of the Australian Capital Territory. Such a power has been recognised as a plenary power...The terms in which s 22 confers power on the Legislative Assembly show - to adopt the language of Powell v Apollo Candle Co. (1885) 10 App. Cases at p 289 - that the Parliament did not intend the Legislative Assembly to exercise its powers "in any sense (as) agent or delegate of the ... Parliament, but... intended (the Legislative Assembly) to have plenary powers of legislation as large, and of the same nature, as those of Parliament itself." (at page 281)

Their Honours continue:

> "The Legislative Assembly of the Australian Capital Territory has been erected to exercise not the Parliament's powers, but its own, being powers of the same nature as those vested in the Parliament." (at page 282)

At page 283 their Honours conclude:

> "The question is not whether the Parliament has abdicated its legislative powers: it cannot abdicate and it has not abdicated its powers under s 122 of the Constitution. Nor is the problem whether Parliament could delegate its legislative powers: it can, but it has not done so. The question is whether Parliament has purported to create a legislature with its own legislative powers concurrent with, and of the same nature as, the powers of the Parliament: that is what the Parliament has done, and what it has

> done is of a radically different constitutional character form either abdication or delegation."

The legislative power of the ACT Legislative Assembly is not a delegated Commonwealth power. The Commonwealth Parliament has created a new body politic (see s 5 of the *Self Government Act*) with legislative powers concurrent with, and of the same nature as, the powers of the Parliament. It must follow that the Legislative Assembly of the ACT, similar to State legislatures, has no power to bind the Crown in the right of the Commonwealth in the exercise of its functions and capacities by enactment.

SECTION 64 JUDICIARY ACT 1903

The applicant submitted that in the event that the respondent was found to be entitled to the privilege and immunities of the Crown in the right of the Commonwealth, section 64 of the *Judiciary Act* 1903 (Commonwealth) operates to make the respondent subject to the provisions of the *Tenancy Tribunal Act* 1994.

Section 64 provides:

> "In any suit in which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same, and judgement may be given and costs awarded on either side, as in a suit between subject and subject."

The term "suit" "includes any action or original proceedings between parties": s 2 of the *Judiciary Act*. It is arguable that a dispute between parties in the Tenancy Tribunal is a "suit" as defined. But section 64 of the *Judiciary Act* only applies to proceedings in a Court exercising federal jurisdiction: see Re Residential Tenancies Tribunal of New South Wales & Ors; Ex Parte Defence Housing Authority (1997) 146 ALR 495, at pp 515-516 (Dawson, Toohey and Gaudron JJ), 525-6 (McHugh J), 536 (Gummow J) and 566-7 (Kirby J). See also China Ocean Shipping Co. v South Australia (1979) 145 CLR 172 at pp 223-4. Leaving aside the issue whether the

Tenancy Tribunal is a "Court" for this purpose, it is unarguable that the Tenancy Tribunal does not exercise federal jurisdiction.

In order to elucidate which of the two possible interpretations of s 27 of the *Self Government Act* was that which was intended by the Parliament, it is legitimate to examine the repercussions of the different alternatives. A matter of some concern in that regard was the submission by the respondent that s 27 of the *Self Government Act* impliedly repeals s 64 of the *Judiciary Act 1903* to the extent that s 64 would otherwise apply the provisions of ACT enactments to entities such as the respondent that are within the shield of the Crown in the right of the Commonwealth.

For the reasons I have given it is unnecessary to determine finally whether s 27 of the *Self Government Act* would have any such effect in proceedings before a Court exercising federal jurisdiction. But it appears unlikely that any such consequence is inevitable if one accepts the interpretation of s 27 of the *Self Government Act* urged by the respondent. Both s 27 of the *Self Government Act* and s 64 of the *Judiciary Act* can be given effect. There will be many suits in which the Commonwealth is a party brought before Courts exercising federal jurisdiction in the Territory in which the executive capacities of the Commonwealth are not sought to be bound in either sense referred to. However, as I have said, the exact relationship between s 27 of the *Self Government Act* and s 64 of the *Judiciary Act* does not require definition in these proceedings.

THE COMMONWEALTH PLACES (APPLICATION OF LAWS) ACT 1970

Section 3 of the *Commonwealth Places (Application of Laws) Act* 1970 defines "Commonwealth place" to mean:

> " a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution has, subject to the Constitution, exclusive powers to make laws for the peace, order and good government of the Commonwealth."

Section 4(1) of the Act provides:

> " The provision of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time and in relation to each place in that State that is or was a Commonwealth place at that time."

As Toohey J observed in Svikart v Stewart (1994) 181 CLR 548 at p 569: "Section 4 applies only to the laws of a state; it has nothing to say as to the laws of a Territory."

The *Commonwealth Places (Application of Laws) Act* 1970 therefore cannot assist the applicant's case.

SECTION 27: CONCLUSION

The proposition that the executive power of the Commonwealth under section 61 of the Constitution can only be exercised by the Commonwealth and is beyond the reach of any other body politic within the Federation is so fundamental that it is impossible to believe that the Commonwealth Parliament felt it necessary to restate this principle, and nothing more, in enacting s 27 of the *Self Government Act*.

It follows from this proposition that it is inherently unlikely that the Commonwealth Parliament would enact a provision (s 27 *Self Government Act*) to prohibit the ACT Legislative Assembly from doing something it never had the power to do.

Inevitably, the Tribunal concludes that s 27 of the *Self Government Act* is not intended to merely provide that ACT enactments are not to bind the Commonwealth Crown in the exercise of its functions and capacities unless such an enactment is specified by Regulation. It is the clear intention of s 27 that ACT enactments are not to bind the Commonwealth Crown in any capacity, including regulating ordinary transactions into which the Crown may choose to enter, unless the enactment is specified by regulation.

Accordingly, the Tribunal has no jurisdiction to hear the dispute between the applicant and the respondent.

SECTION 28: SELF GOVERNMENT ACT

In view of my decision with respect to s 27 of the *Self Government Act* it is strictly unnecessary for me to consider whether s 28 of the *Self Government Act* applies to deprive the Tribunal of jurisdiction to hear this dispute. However, it is desirable to deal with the issue, if only to allow all issues to be ventilated on appeal, if such should eventuate.

The respondent in its submissions referred to the provisions of the *Federal Airports Corporation Act* 1986. The respondent submitted that the land in Federal Airports was a major Commonwealth asset. The respondent submitted it is in nature of airports that competing land uses must be planned and coordinated and the *Federal Airports Corporation Act* 1986 confers that function on the Federal Airports Corporation. It was submitted that the *Federal Airports Corporation Act* provides a detailed scheme for the management and coordination of planning of airports including conferring on the corporation a power to make by-laws. It was the submission of the respondent that the *Federal Airports Corporation Act* covers the field of decision making about how the land within Federal Airports should be used and who should be granted leases over land within those

airports and leaves no room for the subjection of land use decisions to discretionary orders under the *Tenancy Tribunal Act*. The applicant, supported by the ACT Attorney-General, submitted that s 28 of the *Self Government Act* did not deprive the Tribunal of jurisdiction to hear this dispute. The interpretation of s 28 of the Self Government Act has been the subject of a decision in the Administrative Appeals Tribunal in the matter of Peter John Jacob v Discrimination Commissioner and Attorney General, a decision of 9 August 1996. In that matter President Curtis sitting as the ACT AAT stated: "the effect of this section is that a law of the Territory is inconsistent with a law of the Commonwealth only to the extent to which the two laws are not able to operate concurrently.... This clearly represents an intention by the Commonwealth Parliament that the "covering the field test" should not apply as between the Commonwealth and Territory law."

As President Curtis stated in that decision it is only at the point of direct inconsistency where Commonwealth law and Territory law deal with the same subject matter and it is not possible to comply with both laws that the Commonwealth law prevails over the Territory law.

Some assistance is gained by referring to a similar provision being s 75(1) of the *Trade Practices Act* 1974. This provides:

> "Except as provided by subsection (2), this part is not intended to exclude or limit the concurrent operation of any law of a State or Territory."

In the *Queen v Credit Tribunal Ex Parte GMAC* (1977) 137 CLR 545, His Honour Justice Murphy in considering this section stated:

> "Section 75 of the Act expresses the intent that state laws on the subject dealt with in "Part V - Consumer Protection" are not to be precluded except where they directly collide with the provisions of the Act. As there is no direct collision .... there is no inconsistency." (In that regard see also the decision of Gummow J in Grace Brothers v Magistrates, Local Court of NSW (1988) 84 ALR 492.)

The covering the field test does not apply to s 28 of the *Self Government Act*. There is nothing in the *Federal Airports Corporation Act* which is directly inconsistent with the provisions of the *Tenancy Tribunal Act*. There is no point at which it is not possible to comply with both laws.

Therefore I am satisfied that s 28 of the *Self Government Act* does not preclude the Tribunal from dealing with the dispute.

SUMMARY

Section 28 of the *Self Government Act* does not preclude the Tribunal from hearing this dispute. However, section 27 of the *Self Government Act* does operate to deny jurisdiction to the Tribunal to hear the dispute. The applicant is therefore required to bring any claim it may have against the respondent before the ordinary Courts of the Territory.