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Community Land Trust leases in Australia: the legal principles
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Important information you should know before you read this paper

The paper is intended to provide Australian Community Land Trust (“CLT”) proponents and their legal advisors with the legal principles that support Australian CLT leases. The information is current at the time of publication, for general informational purposes only. The information in this paper may not apply to all jurisdictions or to all needs of a particular CLT.

The paper does not constitute legal advice, and is not intended to be a substitute for legal advice and should not be relied upon as such. Australian CLT proponents should seek legal advice before entering into a CLT lease. In particular, proponents should consider the possible effect of residential tenancy legislation and the unfair contract provisions of the *Australian Consumer Law* under the *Competition and Consumer Act 2010*.

We prepared this paper on the understanding that it will be disseminated to the public without fee (other than postage).

The opinions expressed in this paper are those of DF Mortimer & Associates.

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Contents

- Contents** 2
- 1. Property: social and economic conceptions** 4
 - 1.1 Social relationships** 4
 - 1.2 Economic value** 5
 - 1.3 Property concepts evolve** 6
- 2. Legal Definitions of Property** 6
- 3. Comparison of fee simple rights and a CLT lessee’s rights** 9
- 4. Using a lease agreement to separate ownership of land and fixtures: the Australian approach for CLTs** 9
 - 4.1 To avoid confusion: a brief note on terminology** 9
 - (a) “Homeowner” 9
 - (b) “Premium” 9
 - (c) “Reversion Price” 10
 - 4.2 Our approach** 11
 - 4.3 The Homeowner’s security: the Torrens system of title by registration** 11
 - 4.4 Residential tenancies legislation** 13
 - (a) Historical background to legislation 13
 - (b) Residential tenancies legislation-a warning for CLT proponents 15
 - (c) An exception: the NSW *Residential Tenancies Act* (2010) 17
 - 4.5 The Homeowner’s equity: leases and tenants fixtures** 18
 - (a) Definition of tenant’s fixture 18
 - (b) Statutory recognition of tenant’s fixtures: some examples 19
 - (c) Court recognition of tenant’s fixtures: some examples 20
 - 4.6 Mortgages of leases** 22
 - 4.7 The Homeowner’s legacy: providing a new CLT lease for next of kin** 23
 - 4.8 Transfer of leases** 24
 - 4.9 Disclosure and agreements to lease** 24
 - 4.10 Change of Homeowner: a new lease** 25
- 5. Distinguishing the USA approach to CLTs** 26
 - 5.1 The “deed of warrant”** 26
 - 5.2 Enforcing a Pre-emptive Right and Sale Price** 27
- 6. Acknowledgments** 27
- 7. Who we are** 27

The classic Community Land Trust (“CLT”) involves a not for profit organisation holding fee simple (freehold) title to land. The CLT leases this land for residential use. Unusually, the leases are designed to give lessees a legally recognised sense of ownership, whilst keeping the land affordable for future lessees. The CLT achieves this by:

- Permitting the lessee to capture the value of improvements they make on the land by way of compensation from the CLT when the lease expires
- Agreeing (generally) to provide a new lease to the lessee’s next of kin when the lessee dies.

Hence a CLT lease can really challenge popular concepts of what it means to “own” or “rent” housing. So before we begin our discussion of the legal principles that support CLT leases, we think it helpful to acknowledge concepts of “property”.

1. Property: social and economic conceptions

1.1 Social relationships

Property rights help to develop and define relationships; relationships between people, and relationships between people and place. This idea is perhaps most clearly expressed by indigenous connections to land. Justice Woodward for example considered that Aboriginal land rights would:

- Be a first essential for people who are economically depressed;
- Preserve a spiritual link with their own land which gives Aboriginals their sense of identity.¹

Conversely but making the same point, at least one commentator has argued that private property views land as a tradeable “bundle of rights” that can be divided up and sold. This trade separates the rights holder from relationship to the land.²

Aboriginal land trusts are connected with a particular place. However there is no reason to suppose that this social or spiritual connection to land remains only with indigenous persons. A “desire for community” can be attractive to persons in general and appears to be one reason why the CLT concept is of interest.³

Private property is also an expression of individual will, as a commentator on Hegel wrote:

The appropriation of things as private property is one of the important ways in which the individual will objectifies itself and realises external freedom; hence private property is an institution essential for the realisation of liberty. If ... individuals own things in common, freedom is limited since no one of them of can direct those things entirely according to his will.....⁴

¹ cited in *Northern Land Council v Commissioner of Taxes* [2001] NTSC 115 by Justice Angel at [9].

² Peter Burdon “What is good land use? From rights to relationship” *Melbourne University Law Review* MULR vol 34, no 3; Laura S Underkuffler, “On Property: An Essay” (1990) 100 *Yale Law Journal* 127, pp 128 – 9.

³ Property developers market new developments as for example “a Delfin community” which illustrates how attractive the idea of community is to property purchasers: http://www.delfinlendlease.com.au/llweb/delfin/main.nsf/all/news_dli_200080108 ; <http://www.newland.com.au/communities>

⁴ Richard Schlatter, “Private Property: The History of an Idea (1951), pp 256 – 8.

The sentiment expressed above has perhaps been expressed more colourfully as:

“From the earliest moments of childhood we feel the urge to assert ourselves through the language of possession against the real or imagined predations of others. “Property” as an assertion of oneself and control of one’s environment provides human beings with a place of deep psychological refuge.”⁵

It is not surprising then that a desire to own property in some form or another is a strong part of how people define not only themselves but also their relationships to others and the land itself.

1.2 Economic value

The laws surrounding private property create economic value. An example is the income tax laws that allow fee simple title holders to build wealth by capital gain.⁶

In Australia, taxation statute permits a taxpayer to disregard for income tax purposes, any capital gain they make from disposal of the taxpayer’s “main residence”.⁷ The statute however does not permit the taxpayer to disregard capital gain if the residence is used to produce assessable income.⁸

There is an irony however as the concepts are not mutually exclusive; a tax payer does not either use their residence for “main residential purposes” or use it to “produce assessable income”. Even a cursory survey of financial adviser marketing material displays the (quite correct) claim that a main residence is contemporaneously a taxpayer’s “tax free” wealth creation asset to be sold eventually to capture that capital growth.

The main residence exemption arguably encourages an owner to use their main residence to acquire wealth. This wealth is built up from efforts of the owner to improve their home, and also from surrounding value. Because the exemption is contained in statute it is not unreasonable to say that the owner of a main residence has a “right” to income tax free capital gain.⁹

On this point Henry George (drawing on the “Locke labour theory”) provides a helpful distinction between land and labour. In his book “Progress and Poverty”¹⁰ George first chastises lawyers who draw a distinction between “personal property” and “real property”. George then considers the real distinction to be between:

- the produce of labour such as houses (to which one is rightfully entitled to claim ownership); and
- the gratuitous offerings of nature (to which one has no claim of ownership such as unimproved land).

⁵ Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (2003), 1.

⁶ A capital gain for the purposes of Australian tax statute is defined as being the excess of capital proceeds one can receive for the disposal of an asset (such as land), over the total costs of owning that asset: *Income Tax Assessment Act 1997* (Cth) s100-35; *South Australia v Commonwealth* (1992) 174 CLR 235.

⁷ *Income Tax Assessment Act 1997* (Cth) s118-100.

⁸ *Income Tax Assessment Act 1997* (Cth) s118-100, note 1.

⁹ This argument is similar to that advanced by John Davis and others of a “right to speculate” in the USA, except that it does not imply land may lie idle whilst accruing capital gain: see John Emmeus Davis(ed) *Community Land Trust Reader 2010*

“Reallocating equity: A land trust model of land reform”, pp362-385, 366.

¹⁰ (1953) (condensed edition), The Hogarth Press Ltd.

Henry George states:¹¹

A house and the lot on which it stands are alike property, as being the subject of ownership and are alike classed by the lawyers as real estate. Yet in nature and relations they differ widely. The one is produced by human labour, and belongs to the class in Political Economy styled wealth. The other is a part of nature, and belongs to the class in Political Economy styled land.

Henry George's insights provide the theoretical basis for CLT leases.

1.3 Property concepts evolve

Property rights are not static; they evolve over time to address particular needs and resolve particular societal conflicts.¹² An example is the evolution of residential tenancy legislation in Australia.

Australian residential tenancy legislation is generally driven by consumer protection policy which sees the tenant in a weak bargaining position. The legislation imposes obligations on landlords, such as an obligation to maintain and repair the home.

However the updated NSW Act, the *Residential Tenancies Act 2010* provides for "long term leases" which are leases over 20 years duration. The legislation permits a tenant in a long term lease to take responsibility for some of the landlord's traditional rights and obligations, such as home maintenance and repair. The intention is to give some sense of ownership for tenants.¹³

2. Legal Definitions of Property

Legal definitions of property focus on *rights* and *obligations*.¹⁴ One legal definition of "ownership" is:

"a right recognised by law over a piece of property"¹⁵

The emphasis is on the "rights", not the subject matter of those rights (eg the land, or fixtures or both). That is why it makes sense legally, to describe someone as a "leasehold owner". The leaseholder has *rights* and *obligations* as a consequence of that ownership.

Accordingly, it is important to be clear as to what legal rights a lessee has if they are to "own" their home on land owned by a CLT. Consider comments of Justice Brennan in *Mabo (No2)*:¹⁶

"... it may be confusing to describe the title of the Meriam people as conferring "ownership", a term which connotes an estate in fee simple or at least an estate of freehold."

The High Court in *Mabo (No2)* of course recognised that the Meriam people had legally enforceable native title rights, even though those particular rights did not accord with the ordinary connotation of the word "ownership".

¹¹ *Progress and Poverty* (1953) (condensed edition), p156.

¹² Laura S Underkuffler, "The Idea of Property; its Meaning and Power" (2003), p21

¹³ See *Residential Tenancies Act 2010* (NSW) s20; *Residential Tenancy Law Reform; a New Direction*, NSW Office of Fair Trading 2007, pp25-27.

¹⁴ For an academic discussion see Felix Cohen "Dialogue on Private Property" 9 *Rutgers Law Review* 357 (1954).

¹⁵ *Concise Australian Legal Dictionary* (4th edn) LexisNexis.

¹⁶ (1992) 175 CLR 1, [96].

Judicial consideration of leases and “ownership”: *State of Victoria v Tymbook Pty Ltd*¹⁷ (“the *Palais Theatre Case*”)

This case concerns the famous Palais Theatre at St. Kilda beach, Melbourne. The State of Victoria held the land upon which the Theatre stood. The land was let to the Theatre operators in 1926 under an “occupancy agreement”, and later in 1956, under a lease. Rent was calculated on the unimproved value of the land.

The occupancy agreement permitted the Theatre operator to hold an auction prior to expiration of the agreement, to sell the Theatre building to the next operator.

The lease did not have the occupancy agreement “auction clause”. Instead the lease permitted the Theatre operator to remove fixtures it owned (including fixtures erected during the occupancy agreement). That is, under the lease the Theatre operator had a right to remove the Theatre building.¹⁸

These rights to auction or to remove fixtures his Honour Justice Harper observed were in recognition that the Theatre building was built and paid for by successive Theatre operators.

In 2006 in anticipation of the expiry of the lease, the State of Victoria as landlord sought access to the Theatre to prepare a condition report. It asserted that it owned the Theatre building, in addition to owning the land. The Theatre operator refused the request for access and counterclaimed that it owned the Theatre.

The case was enlivened by a heritage order over the Theatre which prevented the Theatre operator from exercising its lease rights to remove the Theatre building.

In coming to his decision, his Honour relied on the lease terms at [37], rather than the understandings of the parties subsequent to execution of the lease. His Honour stated at [51] “....it does not concern me that [the Theatre operator] referred to itself as the owner of the Palais Theatre, The epithet was appropriate. The [Theatre operator] was the owner of the Theatre, although the rights attached to that ownership were restricted....”.

His Honour¹⁹ observed that both parties had engaged in a search for the “true owner of the Palais Theatre” but added “... the entire controversy [regarding who owns the Palais Theatre] is pointless.” The real question in his Honour’s opinion was the substance of the Theatre operator’s rights under the lease and whether those rights extended beyond the expiration of the lease.

His Honour found that the Theatre operator ownership rights were extinguished at the expiration of the lease. The State was entitled to possession of the Theatre.

As you will see from the *Palais Theatre Case* summary his Honour considered that ownership may be absolute or may be restricted. In the case of the Palais Theatre his Honour found that ownership was restricted by the terms of the lease.

¹⁷ [2007] VSC 140 (9 May 2007).

¹⁸ The Theatre operators were content not to have an auction clause as the lease was of sufficient duration to amortise the Theatre building costs: *State of Victoria v Tymbook Pty Ltd (Palais Theatre)(Retail Tenancies)* [2006] VCAT 2298,[123].

¹⁹ [2007] VSC 140 (9 May 2007) at [55].

This case illustrates how irrelevant the concepts of ownership can be in relation to questions of entitlements, rights and obligations. A better legal question to ask is: “what are the legal consequences of that ownership?”.

Nonetheless his Honour accepts that it is reasonable for a lessee to describe their relationship to the improvements as being one of qualified ownership, particularly if the lessee has incurred expenditure on those improvements.

Whilst it is a truism that a CLT lessee “owns” the fixtures, this ownership is not quite the same “ownership” as the rights an owner of a fee simple title may have to realise capital gain. The lessee’s rights may be more akin to that of the tenant in the *Palais Theatre Case*.

So what does it mean to “own” an interest in land?

In *Milirrpum v Nabalco Pty Ltd*²⁰ Justice Blackburn gave what we think is a helpful list of rights to land that is consistent with the idea of ownership, namely:

- Right to use and enjoy
- Right to exclude others
- Right to alienate (ie pass to others by sale or under a will).

Justice Blackburn’s decision in *Milirrpum v Nabalco Pty Ltd* was to *not* recognise claims of indigenous Australians to land and led eventually to the High Court recognising native title in *Mabo*. However Justice Blackburn’s analysis of what it means to have ownership in relation to land is still useful when we consider “ownership” in relation to CLT leases.

For example, in the USA the CLT model is seen as providing persons who live on CLT land with:

- Security – that is a private place to call a home that has continuity;
- Equity – meaning whatever value a person has put into their homes through cash or labour is retained;
- A reasonable legacy – meaning that the property from which one derives security and has created value through equity can be passed from one generation to another.²¹

The CLT criteria seem broadly similar to the analysis of Justice Blackburn. The idea that “security” is a “private place” implies that the lessee has a right to exclude others and “equity” seems consistent with the lessee’s right to use and enjoy especially where such right comes about from their own personal efforts. The “legacy” seems consistent with the right to alienate, albeit the right to alienate is restricted.

²⁰ [1971] 17 FLR 141, at 270-273.

²¹ John Emmeus Davis (ed) *Community Land Trust Reader* 2010, “Land and Property: Individuals and Communities”, p232.

3. Comparison of fee simple rights and a CLT lessee's rights

The table below compares the rights of the owner of fee simple title with the rights of a typical CLT lessee.

Rights of the owner of fee simple	Rights of the owner of a CLT lease
Right to sell the land and fixtures attached to that land	CLT determines who is to be the next lessee, but sometimes this is done in consultation with the current lessee
Right to realise full value of capital gain (main residence is exempt from CGT)	Right to realise value of improvements and possibly, some limited capital gain
Right to leave estate under will (but must bear in mind family maintenance claims)	Right of lessee's next of kin to enter into a new lease for a term equal to the remaining term of the lease of the deceased.
Right to waste (ie allow to fall into disrepair)	No right to waste and perhaps positive obligations to maintain
Right to improve, subject to planning rules	Right to improve, subject to CLT consent and planning rules
Right to exclude others	Right to exclude others (must permit CLT a yearly right of inspection)

Such an analysis of rights may be familiar to legal practitioners. However we suggest it is also vitally important for CLT proponents to understand what rights a CLT and a lessee may have under the terms of their relationship.

4. Using a lease agreement to separate ownership of land and fixtures: the Australian approach for CLTs

4.1 To avoid confusion: a brief note on terminology

(a) "Homeowner"

Throughout the balance of this paper we will describe the person or persons who reside on CLT land as the "Homeowner". We think, following a comment of Justice Harper in the *Palais Theatre Case* that the term is appropriate.²²

However, the Homeowner's legal relationship to the CLT is strictly speaking, a relationship between tenant and landlord. We use the term "Homeowner" rather than "tenant" to avoid the (understandable) perception that a person who resides on CLT land has no right to recover their investment in the improvements on that land and no right to provide their home for next of kin when the tenant dies.

(b) "Premium"

The Premium is the up-front payment the Homeowner makes upon entering into the lease for the so described "purchase" of the fixtures.²³ The term reflects the position at law that payments other than rent are capital.

²² *State of Victoria v Tymbook Pty Ltd* [2007] VSC 140 (9 May 2007), [51].

²³ See National Community Land Trust Network (USA) 2011 *CLT Technical Manual* Model lease 01/2011, cl 10.10.

Upfront payment for a lease: *Matthews v Timothy*²⁴

Mr Matthews entered into a lease that required him to pay an up-front “capital sum” of \$16,000 to the landlord “in consideration for” the leasehold. The lease agreement did not require Mr Matthews to pay a periodical sum by way of rent. The Commissioner of Stamp Duties sought to charge duty on the \$16,000 payment because the Commissioner considered the payment to be a “premium” rather than “rent”. The relevant duty statute made duty payable on premiums.

Mr Matthews submitted that his \$16,000 payment, although described as a capital sum, was actually rental payment in advance.

His Honour Justice Wright noted he had no evidence to explain how the landlord had calculated the \$16,000 payment. Accordingly His Honour was not satisfied that that sum represented a weekly or monthly rental payment, or rent discounted in consideration of payment in advance.

His Honour then considered whether the payment was a “premium”.

His Honour stated:

'premium' ... means a cash payment made to the lessor, and representing or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained. It is in fact the purchase money which the tenant pays for the benefit which he gets under the lease."²⁵

His Honour accordingly held that the Commissioner’s characterisation of the sum as a premium to be correct and duty was payable.

(c) “Reversion Price”

The Reversion Price is the maximum amount a Homeowner may receive upon termination of their lease. The Reversion Price is calculated with reference to the Premium.²⁶

We use the term “Reversion Price” as in our opinion it reflects the true nature of the transaction in Australia. Effectively, this is the price that the Homeowner receives when their leasehold interest in the property reverts back to the CLT as landlord.

It is conceivable that the Reversion Price paid to a Homeowner when their lease terminates could be the same as the Premium paid by a new Homeowner upon signing their lease. However in practice there may be differences to allow for costs such as “adjustments” (ie the pro-rata adjustment for services such as electricity and ground lease fees), fees the CLT may charge for its involvement in the lease transaction and statutory charges for lodging documents at the Titles Office.

²⁴ [1987] TASSC 33 (5 May 1987).

²⁵ *Matthews v Timothy* [1987] TASSC 33, [9].

²⁶ The “Reversion Price” is analogous to the “Purchase Option Price” in the USA. The term “Purchase Option Price” arguably would be confusing even in the USA as the transaction occurs when an existing Homeowner is said to be “selling” the Home: Note the Purchase Option Price is defined as the price the Homeowner receives on sale *and* “the homeowners right to possess, occupy and use the leased land...”. Conceptually we think words in inverted comma’s should be form part of the definition of Premium and not Purchase Option Price.

4.2 Our approach

Our previous discussion has shown “ownership” to be a flexible concept which on its own does not tell us much about an “owner’s” particular rights. So it is helpful if we remind ourselves what rights are needed for the Homeowner:

CLT Homeowner’s rights – a wish list
Right to realise the value of the home and (possibly) some limited capital gain
Right to use the home as a residence
Right to leave home under will to next of kin
Right to improve the home, subject to CLT consent and planning rules
Right to exclude others from the home (must permit CLT a yearly right of inspection)

A CLT must be able to limit a Homeowner’s rights to prevent the Homeowner realising a capital gain from appreciation of the land upon which they reside. This restriction will permit the incoming Homeowner to acquire rights similar to home ownership for a price that does not include such capital gain.

The goal is to ensure the Homeowner’s rights and the CLTs rights are legally recognisable and if necessary, enforceable. Our approach to give effect to this goal under Australian law involves consideration of:

- Security: the Torrens system of title by registration
- The impact of residential tenancies legislation
- Equity-leases and “tenants fixtures”
- Mortgage of leases
- Legacy: providing for next of kin
- Conveyance of leases.

4.3 The Homeowner’s security: the Torrens system of title by registration²⁷

In Australia the Torrens system applies to real property. The Torrens System is a system of “title by registration”. That is, until an interest is registered, legal title is not created. There are exceptions to this general rule²⁸ but overall the objective is to provide a central register whereby a prospective purchaser with an interest in land may conveniently see those other interests that may affect their purchase.²⁹

Once registered and subject to exceptions (such as fraud), the registered proprietor of the interest gains an “indefeasible title”. That is, their title overrides any other person’s claim to their interest.

²⁷ The Torrens system of title registration is currently state based. The Law Council of Australia supports a draft Uniform Torrens Title Act prepared by Professor Peter Butt: *The New Lawyer* “Lawyers call for national property laws” 22 March 2012.

²⁸ See s42(2)(e) of the *Transfer of Land Act* (Vic) is that a tenant *in possession* has an indefeasible interest.

²⁹ See Peter Butt *Land Law* (2010) 6th edition at [2002] – [2003] and [2012].

Without registration on title a person may only have what is called an “equitable interest” in land. An equitable interest may arise by signing a contract for the sale of land, or by having an unregistered lease, or by reliance on promises made by the landowner to another, amongst other things. This presents difficulties with enforcing that interest against other persons who may also have an unregistered interest.

Where a person seeks to enforce an equitable interest over land, courts may award damages, rather than specific performance of the contract or promise from which the equitable interest arises.

The Problems of an Unregistered Agreement: Giumelli v Giumelli³⁰

This case concerned an “imperfect gift” where the parents promised the son (“**Son A**”) some land that had not been subdivided and an orchard. Son A built a house on that land. The orchard was worked by Son A and another son (“**Son B**”) in a partnership with the parents. Amongst other things, Son B built a substantial cool-room on the land.

There was a falling out between the parents and Son A. Son A sought to enforce the promise his parents had made to give him the land. The Supreme Court of Western Australia held that the parents were to do what was necessary to subdivide the land and convey it to Son A. This was on the basis that Son A had incurred expenditure and would suffer detriment if he was not given legal title to the land.

The High Court however considered that whilst Son A had a “prima facie” case for subdivision of the land, to require this to be done would create injustice for Son B. This was because Son B had also incurred expenses on the land. On the basis that “equity does not always oblige the making good of a promise”, the High Court ordered that damages were appropriate to be paid to Son A and that the land not be subdivided.

The case of *Giumelli v Giumelli* shows that agreements over land are not necessarily going to be enforced by a court where a person not party to the agreement may suffer detriment. In this case, “Son A” could not obtain a title to land upon which he had already built his home because of his brother’s interest.

Accordingly, to give the Homeowner security of tenure a CLT must give them more than such an equitable interest. Instead, the CLT needs to provide the Homeowner with legally recognised indefeasible title to rights over the CLT land. Legal recognition of a Homeowner’s rights to fixtures on the land is only achieved through the title registration system.

Presently there is no explicit means to separately register fixtures through the title registration system.³¹ However the land registry offices (“the Titles Office”) in each jurisdiction will register fee simple, leases, mortgages and covenants on a central registry.

³⁰ [1999] 196 CLR 101.

³¹ In Australia it is technically possible through the subdivision process to convey a separate title to fixtures. A lease will still be required to give the title holder to the fixtures access to the land.

Lease registration requirements vary between jurisdictions. In the Australian Capital Territory, Northern Territory and Queensland the relevant legislation does not specify a minimum term at which a fixed term lease must be registered. In South Australia fixed term lease for a period exceeding one year must be registered.³² In Tasmania registration of leases for less than 3 years is not permitted. Practice in Victoria is to not register leases of 3 years or less.³³

The effect of registration is to give “indefeasible title” to the Homeowner as their leasehold is effectively established beyond most disputes.

4.4 Residential tenancies legislation

Generally speaking, residential tenancies legislation applies to “residential tenancy agreements”. This is an agreement where the landlord grants to the tenant for a fee, a right to occupy residential premises.³⁴

Because CLTs grant residential rights to Homeowner’s it is vitally important to consider this legislation. The legislation is found in each Australian jurisdiction.³⁵
³⁶ We will call the legislation collectively the “residential tenancies’ legislation”.

(a) Historical background to legislation

Residential tenancies’ legislation according to one commentator³⁷ had their genesis in the *Report for the Commonwealth Commission of Inquiry into Poverty* (1975). The Report concluded that tenants in a residential tenancy arrangement often are not in an equal bargaining position with the landlord. Residential tenancies legislation was developed as a response to provide tenants with rights and protections in relation to their landlord.

Residential tenancies’ legislation provides a “standard form” residential tenancy agreement with mandatory terms. The legislation permits “additional terms” to be added to the standard form agreements, providing those additional terms do not conflict with the mandatory terms. Mandatory terms include:

- restrictions on how a residential tenancy agreement may be terminated
- the process by which the landlord can increase rent
- limitations on fees other than rent that the landlord may charge
- division of duties between landlord and tenant regarding liability for certain expenses such as utilities.

³² *Land Titles Act 1925* (ACT) s82(1); *Real Property Act 1900* (NSW) s53(1); *Land Title Act 2000* (NT) s65; *Land Title Act 1994* (Qld) s64; *Real Property Act 1886* (SA) s116; *Land Titles Act 1980* (Tas) s64(1); *Transfer of Land Act 1958* (Vic) s66(1); *Transfer of Land Act 1893* (WA) s91.

³³ See s 66, *Transfer of Land Act 1958* (Vic)

³⁴ see *Residential Tenancies Act 2010* (NSW) s13 (1) which states: “A ‘residential tenancy agreement’ is an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence.”; see also RTA 1997 (ACT) s6A(1); RTA 1999 (NT) s4; RTA 1994 (Qld) s8; RTA 1995 (SA) s3; RTA 1997 (TAS) s10 (1); RTA 1997 (Vic) s3 (“tenancy agreement”); RTA 1987 (WA) s3.

³⁵ *Residential Tenancies Act 1997* (ACT); *Residential Tenancies Act 2010* (NSW); *Residential Tenancies Act 1999* (NT); *Residential Tenancies Act 1994* (Qld); *Residential Tenancies Act 1995* (SA); *Residential Tenancy Act 1997* (Tas); *Residential Tenancies Act 1997* (Vic); *Residential Tenancies Act 1987* (WA).

³⁶ For brevity, we adopt acronyms eg *Residential Tenancies Act 2010* (NSW) is RTA 2010 (NSW).

³⁷ Anthony Moore (ed) *Commercial and Residential Tenancies* (2008) [28.9.200 and following].

In addition, residential tenancies' legislation provides for an independent tribunal to resolve disputes between landlords and tenants (eg the Victorian Civil and Administrative Tribunal in Victoria).

As will be appreciated the legislation and standard form leases are a challenge for CLT proponents. Challenges include:

- difficulties for the CLT to charge an incoming Homeowner a Premium for the improvements. This in turn may impact on the CLT's ability to compensate an outgoing Homeowner for work the Homeowner has made to upgrading the improvements.
- a requirement that the CLT undertake repairs and maintenance, even though the Homeowner may wish to assume such responsibility.
- a CLT lease must be in the "standard form" where such a standard form is required.³⁸
- A CLT lease could not introduce additional terms that were inconsistent with either the standard form lease or the relevant residential tenancies legislation.³⁹ Such terms are, for example, invalid in Victoria.⁴⁰

It is tempting but ill advisable to try to avoid the legislation all together.

³⁸ Not required in WA.

³⁹ *Australian Maritime Safety Authority v Quirk* (1998) NSW ConvR 55-858 [1998] NSW SC147 (30 April 1998).

⁴⁰ RTA 1997 (Vic) s94.

(b) Residential tenancies legislation-a warning for CLT proponents

Courts accept that residential tenancies' legislation applies even where the landlord and tenant genuinely believe the tenant "owns" the fixtures or where the lease is understood to be one of the "bare ground" and not a lease of "premises". The courts willingness to do so is supported by residential tenancy legislation that prohibits arrangements that purport to not be residential tenancy agreements.

Termination of Lease Problems: *May v Ceedive Pty Ltd*⁴¹

This case concerned an action by Ceedive to evict Mr May as a tenant of Ceedive's land. At issue was whether lease termination notices sent to Mr May were subject to the process for serving notices under landlord and tenant legislation. The legislation applied to residential leases of "premises".

It was common ground between the parties that Mr May "owned" the house. This house was a substantial brick structure and was "bought" by Mr May from a local real estate agent many years prior to the case. Ceedive said accordingly, that its lease with Mr May must be a lease of "bare land" rather than a lease of "premises".

The Court found that the house was a fixture and fell under the definition of "premises" in the relevant landlord and tenant legislation. Accordingly Mr May was entitled to proper notice required under that legislation for termination of his tenancy.

The Court considered that the presumptions of Mr May and the real estate agent from whom Mr May purchased the house could not prevail over the position at law as to whether the house was necessarily leased with the land on which it stands. The Court found that there was no evidence of an agreement that the house could be dealt with separately from the underlease. Nor did it matter that Mr May had acquired the house for value.

In *May v Ceedive* neither party denied that Mr May was the owner of the house. What was in issue were the circumstances in which Mr May as lessee was required to terminate his lease. The case highlights the dependency upon the terms of the lease to a claim for ownership of the fixtures. It also shows how "premises" includes land and buildings. Finally, the case illustrates how landlord and tenancy legislation can impact upon an arrangement where at least one party asserts the lease is a ground lease of bare land only.

⁴¹ [2006] NSWCA 369.

A residential tenancy regardless: Australian Maritime Safety Authority v Quirk⁴²

Mrs Quirk occupied a lighthouse keeper's cottage at Barranjoey Head, first under a deed and then under a lease. The Commonwealth Government or a statutory authority held the land as landlord. The deed and lease documents permitted Mrs Quirk to occupy the premises for her lifetime and make improvements to the cottage. The deed required Mrs Quirk to maintain and repair the cottage without cost to the landlord. Mrs Quirk was required to pay a "ground lease" for use of the land. The documents also provided that Mrs Quirk could not assign the lease. However the lease permitted Mrs Quirk's son to exercise an "option" to acquire the lease after the death of his mother.

Much of the litigation involved discussion on fixing a price for the ground rent. The lease documents did not provide for valuation of the ground rent over time. His Honour Justice Bryson expressed apparent frustration by stating "I have not been presented with any cogent valuation logic based on principle..."

His Honour held that the documents "do not take effect according to their terms". His Honour held that the documents were in nature of a residential tenancy agreement under the *Residential Tenancies Act 1987* (NSW) and pointed out that the landlord is obliged to provide and maintain the residential premises. Accordingly his Honour held that the Mrs Quirk's obligation to repair was void and that the prohibition against assignment to her son was also void.

His Honour observed that the "terms of the [Act] show no sign that those who drafted it adverted to problems and injustices which can result from its application to a building lease for residential premises". ("A building lease" recognises that the lessee builds the improvements and is responsible for maintaining those improvements). His Honour made orders that the terms of the documents are subject to the residential tenancy legislation, in addition to orders for the terms of payment of ground rent.

Based on the case summaries above and broad definition of "residential tenancy agreement" we think a CLT lease will be caught by residential tenancies' legislation.

It is important we hasten to add, that residential tenancies' legislation does create exemptions from the legislation for certain types of leases. These exemptions are certainly worth considering by CLT proponents.⁴³ The Victorian legislation for example exempts tenancy agreements exceeding 5 years, providing the agreement prohibits the landlord or tenant from terminating the agreement before the end of 5 years.⁴⁴

⁴² *Australian Maritime Safety Authority v Quirk* (1998) NSW ConvR 55-858; [1998] NSW SC 147 (30 April 1998).

⁴³ The exempting provisions are found as follows: RTA 1987 (WA) s5; RTA 1997 (Vic) ss 6,8,9-13; RTA 1997 (Tas) s6; RTA 1995 (SA) s5; RTA 1994 (Qld) part 4 division 2; RTA 1999 (NT) s6; RTA 1997 (ACT) s6.

⁴⁴ RTA 1997 (Vic) s6 (1).

However, exemptions from residential tenancies' legislation may not always be suitable for CLT proponents nor do the exemptions apply uniformly across jurisdictions. For example, a prohibition on terminating a Victorian lease for the first 5 years may be too restrictive for CLT proponents. The exemption under residential tenancies' legislation to agreements related to giving a person the right to occupy premises for the purposes of a holiday may also be of little use for CLT proponents.⁴⁵

(c) An exception: the NSW *Residential Tenancies Act* (2010)

Residential tenancies' legislation could be described as one of tenant *consumer protection*. But in the current NSW legislation one can see a move towards *empowerment* of tenants to negotiate leases that suit their circumstances.

The NSW legislation gives greater flexibility by permitting the parties to long term leases over 20 years to abandon certain residential tenancy legislation mandatory terms.⁴⁶ A policy driver for this legislation is the recognition that tenants want a greater sense of ownership from their long term leasehold tenure.⁴⁷

Mandatory terms that need not be mandatory and of relevance for CLT proponents are:

- (i) A tenant may pay more than 2 weeks rent in advance if the tenant wishes to do so.⁴⁸
- (ii) A landlord's obligations relating to health or safety, including obligations relating to swimming pools.⁴⁹
- (iii) The prohibition against the landlord receiving from a tenant upon entering into a residential tenancy agreement a payment other than rent.⁵⁰
- (iv) The landlord's obligation to maintain residential premises in a reasonable state of repair (but not the obligation to provide the premises in a state of repair at commencement of the lease).⁵¹
- (v) The right of a tenant to remove tenant's fixtures – this may be amended to provide for the CLTs payment of the Reversion Price.⁵²
- (vi) The right of a landlord to withhold consent to installation of minor fixtures "whether or not it is reasonable to do so".⁵³

In our opinion, the NSW legislation offers flexibility to draft leases to address the CLT Homeowner's wish-list.

The longer term remedy to overcome the challenges of residential tenancies' legislation throughout Australia in our opinion is to introduce changes in line with the more flexible NSW *Residential Tenancies Act* (2010).

⁴⁵ RTA 2010 (NSW) s8(1)(h).

⁴⁶ RTA 2010 (NSW) s20.

⁴⁷ *Residential Tenancies Law Reform: A New Direction* NSW Office of Fair Trading 2007.

⁴⁸ RTA 2010 (NSW) s33 (2)

⁴⁹ RTA 2010 (NSW) s52 (3)

⁵⁰ RTA 2010 (NSW) s23(1)

⁵¹ RTA 2010 (NSW) s63.

⁵² RTA 2010 (NSW) s67.

⁵³ RTA 2010 (NSW) s66.

4.5 The Homeowner's equity: leases and tenants fixtures

There has been a good deal of conjecture in Australia⁵⁴ on the question whether fixtures can legally be separated from land. In a sense this conjecture is a distraction.⁵⁵ What is important is ensuring a Homeowner has sufficient rights to the fixtures, including a right to be paid for improvements they make, irrespective of whether the fixtures legally form part of the land.

This part of the paper discusses examples of statute and case law that permit a tenant to have certain rights to fixtures on the land of their landlord.

These "tenant's fixtures" as they are called⁵⁶ are not strictly the same rights as the Homeowner's rights under a CLT lease. However for present purposes we simply want to show that there is ample precedent for tenants having property rights over fixtures, despite legal title to those fixtures being held by the landlord. The statute and cases below also provide guidance on the practical ramifications for CLTs that create rights in fixtures for the Homeowner.

(a) Definition of tenant's fixture

A useful standard definition of a tenant's fixture is:

"...a chattel which the tenant annexes to the land for the purposes of ... domestic convenience ... [so that] the thing becomes a fixture and ... during the period of its annexation is properly to be regarded as part of the land. It will therefore be the property of the owner of the land, subject to the right which may be secured by agreement to the tenant to remove the chattel ...[from] the land during or upon the expiration of the term, or within a reasonable time thereafter."⁵⁷

Hence, the fixtures are deemed to be part of the land and are owned *by the landowner*. However, the tenant has a right to remove those fixtures at which point, the fixtures become a chattel, owned by the tenant.

Importantly to note is the idea that a tenant's rights to the tenant's fixtures ends at the lease termination or a reasonable time thereafter. The right does not exist independently of the lease. As we will see, the right to remove the fixtures may be waived by the tenant in return for payment of compensation by the landlord.

⁵⁴ see DF Mortimer & Associates "Community Land Trusts – Legal frequently asked questions" October 2010.

⁵⁵ In the same context as observed by Justice Harper in relation to "ownership" *State of Victoria v Tymbook Pty Ltd* [2007] VSC 140 (9 May 2007), [55].

⁵⁶ *Concise Legal Dictionary* LexisNexis (2010).

⁵⁷ *National Dairies WA Ltd v Commissioner of State Revenue* [2001] WASCA 112 (11 April 2001) (regarding liability for stamp duty on certain "goods") [26] per Murray J summarising the trial judge.

(b) Statutory recognition of tenant's fixtures: some examples

In Victoria the former section 28(2) *Landlord and Tenant Act 1958* (Vic)⁵⁸ described tenant's fixtures as being the tenant's "property"... :

"If any tenant ... at his own cost and expense erects ... or puts in any building ... (which are not erected or put in pursuance of some obligation in that behalf) then, unless there is a provision to the contrary in the lease or agreement constituting the tenancy, all such ... fixtures shall be the property of the tenant and shall be removable by him during his tenancy or during such further period of possession by him as he holds the premises but not afterwards; notwithstanding ...any part thereof may be built in or permanently fixed to the soil; ..."

In NSW the legislation⁵⁹ prohibits a tenant from removing a fixture where the landlord has provided a "benefit" (such as compensation) for the fixture:

(1) A tenant may, at the tenant's cost and before the tenant gives vacant possession of the residential premises, remove any fixture that was installed by the tenant in accordance with this Act or the residential tenancy agreement.

...

(3) Despite subsection (1), a tenant is not entitled to remove a fixture without the consent of the landlord if the fixture was installed at the landlord's expense or the landlord provided the tenant with a benefit equivalent to the cost of the fixture.

(4) This section is a term of every residential tenancy agreement.

In Queensland the legislation⁶⁰ requires a tenancy agreement to provide for compensation to the tenant for tenant's fixtures, if removal is not permitted:

...

(2) For an agreement about attaching a fixture to premises, the terms may include terms about—

(a) whether the tenant may remove the fixture; and

...

(c) if removal by the tenant is not allowed--the obligation of the lessor to compensate the tenant for any improvement the fixture makes to the premises.

⁵⁸ Section 28 is now repealed but was cited in *State of Victoria v Tymbook Pty Ltd* [2007] VSC 140, [57]; see also *Property Law Act 1958* (Vic) s154A.

⁵⁹ RTA 2010 (NSW) s67.

⁶⁰ RTA 1994 (Qld) s118.

(c) **Court recognition of tenant's fixtures: some examples**

In *Hallen v Runder*⁶¹ the tenant had purchased fixtures which he had a right to remove during his tenancy. He agreed with the landlord to refrain from removing the fixtures. Instead the landlord agreed to take the fixtures at price to be determined from a valuation by two brokers.

The Court held that the tenant was entitled to receive for the fixtures, the price determined by the valuation. However, the Court held that the transaction was not one for "goods sold". It also held that the transaction was not a "sale" of any interest in land and accordingly, a conveyance in writing was not required under the *Statute of Frauds*.

Baron Parke said at p276: "The plaintiff, therefore, cannot recover the price fixed for these effects as for goods sold and delivered; but the question is, whether he cannot as for fixtures bargained and sold, or sold and delivered. The real nature of the contract between the plaintiff and the defendant was, that the plaintiff should waive his right of removal, and thereby give up to the defendant all his interest in and right to enjoy these effects as chattels."

And at p277:

"We are quite satisfied that this is not a sale of any interest in land, for the reasons given in the course of the arguments."

As can be seen from the *Hallen v Runder*, agreements between tenants and landlords regarding payment for fixtures is not new. In modern Australian society such agreements can also be found in relation to mining leases and mining equipment fixed to the land,⁶² or in the case of franchise agreements.

The Franchise Agreement: *McDonalds Australia Limited Case*⁶³

McDonalds and its holding company operated restaurants under franchise using licence and lease agreements. A deed of termination was used to terminate leases and permit transfer of certain kitchen plant and equipment from the franchisee back to McDonalds.

The Chief Commissioner of Revenue contended that the deed of termination attracted the payment of duties under the *Duties Act 1997* (NSW). There was argument whether the deeds of termination constituted a "surrender of the lease" or an "agreement for sale of goods" or a "waiver of the rights of the tenant to remove fixtures". The Court concluded the proper characterisation of the deeds of termination transaction was that contained in *Hallen v Runder*.

⁶¹ (1834) 1 CM & R 266 (149 ER 1080).

⁶² See *Commissioner of State Revenue v TEC Desert Pty Ltd* [2009] WASCA 128 which concerned liability for stamp duty on the disposal of an interest in unsevered fixtures.

⁶³ *McDonalds Australia Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 6.

We have reprinted certain clauses in the *McDonalds Australia Limited Case* deeds of termination below. You will see that the clauses are very similar to standard CLT lease clauses. The clauses require McDonalds Properties (as franchisor) to pay to the lessee a “Purchase Price” when the lease ends and lessee transfers title to its interests in the plant and equipment.

- “3.1 On or prior to the Restaurant handover date Properties shall pay to the Lessee in consideration of the transfer to it of the Plant and Equipment, the Purchase Price.
- 3.2 In consideration of the payment of the Purchase Price to the Lessee in accordance with clause 3.1 the Lessee hereby transfers title to and delivers to Properties free from all mortgages, charges, encumbrances and other security interests the Plant and Equipment and Properties hereby takes possession of the Plant and Equipment.”

The Palais Theatre Case⁶⁴

See the case summary at section 2 above which recognised the Theatre operator’s rights to the Theatre building.

May v Ceedive Pty Ltd⁶⁵

See the case summary section 4.4 (b) above where there was no contest that the tenant owned the house.

Unfortunately *May v Ceedive* did not address the issue of what was to become of the house when the ground lease for the land upon which the house was affixed expired. It seems from the informal nature of the House “purchase” and long use of the home that no-one contemplated such an event occurring.

For the purposes of the CLT lease, conclusions that we may reasonably draw are:

- It is appropriate to use the word “ownership” where a Homeowner can either remove or be compensated for fixtures they have paid for or constructed at their own expense (the obiter from the *Palais Theatre Case*).
- As to what rights attach to ownership of fixtures, the terms of the lease are to be relied on, not the understandings of parties (the *Palais Theatre Case*)
- A Homeowner neither purchases nor sells the fixtures, as strictly speaking legal title to the fixtures always remains with the CLT (from the cases *Hallen v Runder* and *McDonalds Australia Limited*).
- A Homeowner’s statutory right to remove fixtures can be waived in return for compensation paid by the CLT (see residential tenancies’ legislation).

⁶⁴ [2007] VSC 140 (9 May 2007).

⁶⁵ [2006] NSWCA 369.

- The Homeowner has rights to compensation or to removal of the fixtures but those rights are extinguished on termination of their lease or a reasonable time thereafter (the *Palais Theatre Case*).

In our opinion it is not correct to say that a Homeowner has a “title” to the home in which the Homeowner lives, separately from the land owned by the CLT. However it is correct to describe the Homeowner as the “registered legal proprietor of a leasehold interest” if the lease is registered on title

4.6 Mortgages of leases

Mortgages of leases are an unusual but not unheard of practice in Australia. However mortgages of CLT leases have yet to be tested and are unlikely to be tested until workable CLT lease agreements are developed.

It is useful for present purposes to outline some perspectives:

- It is likely a Homeowner will need a mortgage to finance purchase of their lease. This is because of the Premium the Homeowner must pay upfront for use of the improvements. The Homeowner should be able to discharge their mortgage when they terminate their lease by using some of the Reversion Price (ie the price the Homeowner receives for the improvements).
- A CLT must give its consent to a lease mortgage to protect the CLT’s underlying title to the land and its purpose of providing affordable homeownership in perpetuity. A CLT does not want a badly drafted lease mortgage to jeopardise that interest.
- A lender will want sufficient security to enable it to make the loan and to recover the loan amount if the Homeowner defaults. In practice CLTs tend to step in and “buy out” a mortgage, effectively acting as a guarantor for the Homeowner’s loan. It may be necessary for the CLT to then terminate the lease to recover its own costs.

We suggest CLTs develop a checklist to enable it to come to a decision as to whether it will consent to a Homeowner taking out a lease mortgage. Our suggested checklist is:

1. The mortgage document is expressed to be over the leasehold interest (and not the fee simple title).
2. The loan contract term does not exceed the lease term.
3. The amount loaned under the loan contract does not exceed a specified percentage of the Reversion Price.⁶⁶
4. The mortgagor (ie the lender) undertakes to notify the CLT when the Homeowner is in default of loan repayments or, at the least, the mortgagor undertakes to notify the CLT if it intends to exercise a power of sale of the lease. This will give the CLT an opportunity to “buy out” the mortgage.

⁶⁶ Typically 80% of the Reversion Price but methodology may vary, depending on the type of Reversion formula.

5. The lease agreement should specify the order in which creditors are to be paid by the Homeowner at lease termination, with the mortgagor first in line and the Homeowner last, with the CLT in between.
6. Homeowner covenants under the mortgage are not in conflict with the Homeowners covenants in the lease, such as covenants to insure the Premises or covenants to maintain the Premises in good repair.

4.7 The Homeowner's legacy: providing a new CLT lease for next of kin

A key "ownership" concept is the ability of the owner to leave their property to the next generation. The classic CLT lease expresses this concept by requiring CLTs to enter into a new lease with a Homeowner's next of kin (possibly subject to certain criteria) after the death of the Homeowner.

In Australia there should not in principle be an impediment for a landlord (such as a CLT) and tenant (such as a CLT Homeowner) to agree to provide a new lease for the tenant's next of kin in the event of the tenant's death.

However Australian legislation may affect the process by which a new lease for the deceased tenant's next of kin may occur. Victorian residential tenancy legislation for example has a statutory lease termination process⁶⁷ whereby after the death of a sole tenant, the tenant's lease is *automatically* terminated, either:

- after a 28 day notice period between the deceased tenant's legal personal representative and the landlord, or
- by agreement between the landlord and the deceased tenant's legal personal representative.

After this statutory process has completed the relationship between the CLT and the deceased Homeowner's legal personal representative would end. Accordingly the CLT would not be obliged to enter into a new lease with next of kin, even if the deceased Homeowner had specified such in their will.

So where a CLT is caught by such a statutory termination process it is important for the CLT to enter into a new lease with the Homeowner's next of kin *before* that statutory termination process concludes.

⁶⁷ RTA 1997 (Vic) s 228 "Termination after Death of Sole Tenant".

4.8 Transfer of leases

Sale of land legislation⁶⁸ in each jurisdiction relates to the sale of land with “land” being defined to include “any tenure, and buildings or parts of buildings....and also any estate or interest in land”.⁶⁹

Accordingly the question arises as to whether a transfer by a Homeowner of a lease to another Homeowner would be caught by the legislation.

As it turns out however, it is not necessary to answer this question. The Australian CLT lease follows the USA model and does not transfer a lease by sale. Instead when a Homeowner decides to leave they terminate their lease by agreement with the CLT. The CLT effectively then holds the land (if only briefly) free of any lease. The CLT then enters into a new lease with an incoming Homeowner.

4.9 Disclosure and agreements to lease

It is worth considering some key protections for purchasers under the various State sale of land acts and the utility of those protections may offer CLTs, namely:

- Mandatory disclosure of a range of issues that may affect the land in a disclosure statement that is to accompany a contract for the sale of land;
- Presence of a “cooling off” period after signing a contract of sale;
- The holding of deposit monies and settlement process.

Legislation in relation to retail leases has disclosure requirements. For example, the NSW legislation requires a copy of the proposed lease to be made available to a prospective tenant as soon as the person enters into negotiations concerning the lease.⁷⁰ A copy of a disclosure statement in standard form must be provided no later than 7 days before the lease is entered into⁷¹ and if the lease is to be registered, it must be registered within 1 month after stamping and payment of duty.⁷²

Some residential tenancies’ legislation has such disclosure requirements.⁷³

A Homeowner who enters into a lease of many years duration may well want advance warning from the CLT as to matters that may affect enjoyment of their lease. An obvious example springs to mind being the presence of heritage orders over the land that may impact on the nature of improvements that the Homeowner may make to their home.

Hence it is worth considering whether the CLT should provide a prospective Homeowner with disclosure documents even if this is not mandatory under the relevant legislation.

⁶⁸ Eg *Conveyancing Act 1919* (NSW); *Sale of Land Act 1962* (Vic); *Sale of Land Act 1970* (WA).

⁶⁹ See for example *Sale of Land Act 1962* (Vic) s2; The *Conveyancing Act 1919* (NSW) s7 defines land to include freehold and leasehold interests.

⁷⁰ *Retail Leases Act 1994* (NSW), s9.

⁷¹ *Retail Leases Act 1994* (NSW), s11(1)

⁷² *Retail Leases Act 1994* (NSW), s15.

⁷³ RTA 2010 (NSW) s26(1) effectively requires disclosure of certain matters that may affect the lease; see also for example, RTA 1997 (Tas) s14.

It is not uncommon for parties negotiating a lease to enter into a contractual “agreement for lease”. This agreement commits both parties to execution of a lease, subject to the occurrence of certain events.

There is merit in developing a CLT agreement for lease to ease the uncertainty of what could be a complex transaction involving outgoing and incoming Homeowner and mortgagees. The agreement for lease could provide for some of the process found in standard form contracts for the sale of land, such as a cooling off period, holding of Premium deposit monies and lease settlement process.

Alternatively these types of provisions (eg cooling off), could simply be included in the standard lease. This latter approach may reduce the complexity of documentation between the CLT and prospective Homeowners. In any event, the provisions are reasonably standardised. With some assistance from a legal practitioner they could be adapted to a CLTs purposes without difficulty.

4.10 Change of Homeowner: a new lease

The Australian CLT lease involves a lease only (as distinct from a lease and warranty deed as is found in many USA jurisdictions). In addition but following contemporary USA practice, the Australian CLT lease reverts back to the CLT at lease termination. The CLT pays the outgoing Homeowner the Reversion Price. The CLT then issues a new lease to the incoming Homeowner.⁷⁴

This arrangement reduces the complicated series of transactions in the USA where the fixtures are sold to an incoming Homeowner who must also concurrently sign a new ground lease with the CLT.

We envisage the changeover process would be as follows:

1. Homeowner notifies CLT and Homeowner’s mortgagee that it seeks to surrender the lease by agreement.
2. Homeowner (either with or without the CLT) locates a new Homeowner.⁷⁵
3. CLT prepares new lease and disclosure statement (or agreement to lease) for new Homeowner.
4. CLT and Homeowner agree on Reversion Price (including amounts owing to the CLT plus adjustments for certain expenses)
5. Homeowner’s mortgagee agrees to termination of mortgage and payout amount.
6. CLT receives deposit for Premium from new Homeowner.
7. CLT prepares surrender of lease documentation to remove lease from title (if the lease is registered on title) and sends to Homeowner for checking and signature.

⁷⁴ National Community Land Trust Network (USA) 2011 *CLT Technical Manual*, Chapter 22 “CLT Real Estate Transactions” draft 01/2011, p3.

⁷⁵ The extent the present Homeowner *must* be involved in locating a new Homeowner needs to be considered in the light of law relating to unfair contracts under the Australian Consumer Law, *Competition and Consumer Act 2010*.

8. At settlement, mortgagee provides CLT with discharge of mortgage, Homeowner provides CLT with fully executed surrender of lease and CLT provides Homeowner and mortgagee with settlement cheques.
9. CLT arranges for discharge of mortgage and removal of lease from title with the relevant titles office.
10. Incoming Homeowner pays the CLT the Premium, and signs the new lease.
11. CLT registers new lease on title (if registrable).

The process is similar to that for the conveyance of fee simple title. The lack of standardised documentation could be remedied by developing a standard agreement for a CLT lease and a standardised settlement process.

5. Distinguishing the USA approach to CLTs

5.1 The “deed of warrant”

In certain USA jurisdictions CLTs may separately convey title to fixtures by way of a “warranty deed”. This deed is registered at a land records deed registry. These warranty deeds are remarkable if only for their lengthy attempt to list all improvements that are to be conveyed to the Homeowner, distinct from the land to which the improvements are affixed.

The “warranty deed” is a conveyance of title to the fixtures, free of restrictions on the price that may be obtained for sale of that title and free of the restrictions as to who may purchase the fixtures. CLTs in the USA give effect to the price resale restrictions and requirements that fixtures be transferred to income qualified persons in the lease. The Homeowner is also the title holder of the fixtures.

The warranty deed approach in the USA could be summarised as being “giving with one hand and taking back part with the other”. That is, the fixtures are conveyed absolutely to the Homeowner free of sale restrictions, but the Homeowner is then prevented by covenants in their lease from selling those fixtures on the open market.

Hence a lease is still required to implement sale price restrictions on the fixtures. In those jurisdictions that may not permit a conveyance of fixtures by a deed of warrant, the practice for CLTs is to dispense with the deed of warrant entirely and provide for ownership of fixtures in the lease document.⁷⁶

In Australia warranty deeds are not applicable due to the Torrens system of title registration. The Torrens system of title registration does not permit registration of deeds of warrant and only permits registration of for example, leases. In the end, arguably whether all the rights to fixtures are conveyed by means of a lease as in Australia, or by means of a warranty deed and lease in the classic USA situation does not really matter. The rights of the Homeowner effectively remain the same.

⁷⁶ National Community Land Trust Network (USA) 2011 *CLT Technical Manual* Chapter 8 “Implementing Restrictions on Ownership” draft 01/2011, p4.

5.2 Enforcing a Pre-emptive Right and Sale Price

CLTs in the USA that use the warranty deed approach to fixtures are faced with a particular problem not faced by CLTs that only use a lease.

The problem is whether the lease covenants that purport to restrict the price for transfer of warranty deed are enforceable. Developers of CLTs in the USA were concerned to ensure that the CLT could through the lease, “pre-empt” the right of the fixtures owner to freely sell the fixtures to anyone else. Hence CLT proponents developed a body of documentation regarding rights of first refusal to purchase the fixtures.⁷⁷

In Australia, rights to fixtures and those rights are all embodied in the lease document. This is necessary because the land registration system in Australia and non-existence of a central deed registry means only interests that are registrable at law, such as certain types of leases, can be registered on title.

In Australia a CLT does not need a first right of refusal to the fixtures, because by operation of law, the lease and Homeowner’s rights to the improvements revert back to the CLT on termination of the lease.

6. Acknowledgments

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The opinions expressed in this paper are those of DF Mortimer & Associates.

7. Who we are

DF Mortimer & Associates is a boutique law firm based in Melbourne Australia that specialises in the law relating to not-for-profit organisations and charities. Principal of the firm, Derek Mortimer, commenced his legal career with a study tour in 1993 of CLTs and revolving loan funds in the USA. At that time CLTs were practically unheard of in Australia. Derek is now recognised as a passionate advocate and Australia’s leading legal expert on Community Land Trusts.

⁷⁷ See National Community Land Trust Network (USA) 2011 *CLT Technical Manual* Chapter 8.