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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**PLANNING AND DEVELOPMENT (CONCESSIONAL
LEASES) AMENDMENT BILL 2010**

EXPLANATORY GUIDE

Circulated by authority of
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Minister for Planning

**PLANNING AND DEVELOPMENT
(CONCESSIONAL LEASES) AMENDMENT BILL 2010**

To comment on the exposure draft

This is the explanatory guide to the exposure draft of the Planning and Development (Concessional Leases) Amendment Bill 2010 (exposure draft). Comments are invited on the exposure draft. The closing date for comments is COB 11 June 2010.

A copy of the exposure draft is available online at the following website:

www.legislation.act.gov.au/ed/annual/2010.asp

Alternatively, a copy can be obtained through the contacts below.

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Terms used in this Explanatory Guide

- “the Act” means the *Planning and Development Act 2007*;
- “the Regulation” means the *Planning and Development Regulation 2008*;
- “the bill” means the *Planning and Development (Concessional Leases) Amendment Bill 2010* that is the subject of this explanatory guide and which amends both the Act and the Regulation;
- “clause ...” or similar is a reference to a section of the bill;
- “section ...” or “existing section ...” or similar is a reference to an existing section in the Act unless otherwise indicated;
- “new section ...” or similar is a reference to a new section inserted into the Act by the bill whether as an entirely new section or as a substitution of a new section in the place of an existing section; and
- “revised section ...” or “modified section ...” or similar is a reference to a section of the Act as modified by the bill.
- “ACTPLA” means the ACT Planning and Land Authority
- “schedule of *not concessional* leases” means Part 5.2 of new schedule 5 inserted by clause 30
- “schedule of *possibly concessional* leases” means Part 5.3 of new schedule 5 inserted by clause 30

Overview of Bill

1. This bill amends the *Planning and Development Act 2007* (“the Act”) and is about “concessional leases”. In summary, concessional leases are leases granted by the Territory for less than market value. Concessional leases are granted in the expectation the lessee will provide a community or economic benefit to the Territory in return for obtaining the lease at a discount. The term “Concessional lease” is defined in detail in existing s235 of the Act. A concessional lease cannot be sold without ACTPLA permission (s265).
2. This bill deletes the existing definition of “concessional lease” in s235 and substitutes new s235 and s235A (clause 4).
3. The bill is intended to make it easier to identify whether a particular lease is concessional. Buyers, sellers, conveyancing lawyers and others should be able to look at a lease in the Land Titles Register and tell immediately whether the lease is not concessional, concessional or one that might prove to be concessional after further research. In order to achieve this, the bill groups all leases into the following categories:
 - **concessional leases** - leases deemed to be concessional, an already existing category amended in this bill
 - **not concessional leases** - leases deemed to be not concessional, an already existing category amended in this bill (new s235A(1), Part 5.2 of new schedule 5)
 - **possibly concessional leases** - leases deemed to be possibly concessional, a new category created in this bill (new s235A(1), Part 5.3 of new schedule 5)

4. The new category “possibly concessional” includes leases that might or might not be concessional. The location of a lease in this category is intended to serve as a flag or warning that the lease might prove to be concessional if further research shows that the lease was in fact granted for less than market value.
5. A lease that is of a type that is identified in the Act as “not concessional” cannot be “concessional” and cannot be “possibly concessional”. A lease that is of a type that is not identified in any of the above three categories is deemed to be “not concessional”.
6. A concessional lease cannot be sold without ACTPLA consent (s265). The bill also includes amendments to confirm that the sale of a concessional lease contrary to this restriction is nonetheless valid once registered in the Land Titles Register. This amendment recognises existing provisions as to validity and paramountcy of title in the *Land Titles Act 1925* as interpreted by the courts. This amendment is necessary to make explicit and put beyond any doubt the effectiveness of the registration of such sales. The greater clarity as to the concessional status of leases introduced in this bill should minimise the number of occasions in which concessional leases are unwittingly sold contrary to s265. Sales of leases specifically identified as concessional will not be able to be registered in the Land Titles Register without ACTPLA consent.

Concessional, not concessional, possibly concessional leases

New section 235A Meaning of *concessional lease etc* – Act (clause 4)

7. New s235A groups all leases into the following categories:

- *concessional leases* - leases deemed to be concessional (new definition of “concessional lease” in new s235A, clause 4)
- *not concessional leases* - leases deemed to be not concessional (new definition of “not concessional” in new s235A, (clause 4) supplemented by the schedule of not concessional leases in Part 5.2 of new schedule 5 (clause 30))
- *possibly concessional leases* - leases deemed to be possibly concessional (new definition of “possibly concessional” in new s235A (clause 4) supplemented by the schedule of possibly concessional leases in Part 5.3 of new schedule 5 (clause 30))

New section 235A definition of “Concessional leases” (clause 4)

8. These are leases of a type caught by the definition of “concessional lease” in new s235A (clause 4). New s235A states that a lease is a concessional lease if it:

- was granted for less than market value; and
- is not a “not concessional” lease.

Concessional leases include consolidated, subdivided, regranted and further leases if one of the original leases was a concessional lease (new s235A(3)).

9. Importantly, under the new s235A definition a lease cannot be a concessional lease if it is a lease that is “not concessional”. In other words, the “not concessional” category takes precedence over the “concessional” (new s235A(1) definition of concessional lease para (c) (clause 4)). This means that any lease of a type listed in the schedule of “not concessional” leases (part 5.2 of schedule 5) is “not concessional” even if the definition of “concessional lease” otherwise applies. This has a number of important implications including the following.

- leases granted under the Act after 30 March 2008 can only be “concessional” if explicitly identified as concessional at the time of grant. If, contrary to new s238(2)(a) (clause 5), the lease is not identified as concessional (or not concessional) at the time of grant, then it is deemed to be “not concessional” (item 19 of Part 5.2 of new schedule 5).
- leases identified as “not concessional” at the time of grant are deemed to be “not concessional” (item 11 of Part 5.2 of new schedule 5)
- leases granted before 30 March 2008 under the repealed *Land (Planning and Environment) Act 1991* might be concessional even if they were not identified as such at the time of grant (item 19 of Part 5.2 of new schedule 5)
- leases granted after 30 March 2008 but granted under the repealed Land (Planning and Environment) Act under s458 or s459A of the Act also might be concessional even if not identified as such at the time of grant (new s459B, clause 28).

New section 235A definition of leases that are “not concessional” (clause 4)

10. These are leases of a type caught by the definition of “not concessional” in new s235A(1).

11. New s235A(1) states that a lease is “not concessional” if it is of a type listed in the schedule of “not concessional” leases (Part 5.2 of new schedule 5). The Regulation can add to the schedule (item 22 of Part 5.2).

12. Existing s235(1)(c) already specifies a number of lease types that are deemed to be not concessional eg rural leases. Section 99 of the Planning and Development Regulation 2008 made under s235(1)(c)(v) of the Act adds to this existing list. New Part 5.2 of new schedule 5 replaces these existing lists with a new consolidated schedule to the Act. This new schedule of not concessional leases incorporates all of the lease types that are currently deemed to be not concessional with clarifications and additions to ensure that all leases that are clearly not concessional are identified as such. The list has been prepared in the light of legislative and investigative experience relevant to concessional leases. All known lease types have been incorporated into either this schedule or the schedule of “possibly concessional” leases in Part 5.3 of new schedule 5.

13. The wording of the descriptions of the listed categories in new Part 5.2 has been framed to permit easy identification. The intention is that anyone should be able to tell whether a lease is of a type listed in this schedule simply by looking at the lease and without any further historical or background research.

14. Leases that are granted after 30 March 2008 under the Act but which are not identified as concessional or not concessional contrary to new s238(2)(a) are deemed to be “not concessional” (item 19 of Part 5.2 of new schedule 5). Leases granted before 30 March 2008 or granted after this date but granted under the repealed Land (Planning and Environment) Act under s458 or s459A of the Act might be concessional even if not identified as such at the time of grant (new s459B, clause 30).

15. The new s235A(1) definitions of “not concessional”, “possibly concessional” and “concessional lease” together have the following effect. A lease that is listed in the schedule of “not concessional” leases (Part 5.2 of new schedule 5) is “not concessional” and cannot also be a:

- “possibly concessional” lease (new s235A(1) definition of “possibly concessional” para (c), clause 4).
- “concessional lease” (new s235A(1) definition of “concessional lease” para (c), clause 4).

In other words the category of “not concessional” takes precedence over the categories of “concessional” and “possibly concessional”.

16. Leases of a type that are not:

- listed in items 2-22 of the schedule of “not concessional” leases (part 5.2 of new schedule 5); and
- listed in the schedule of “possibly concessional” leases (part 5.3 of new schedule 5); and
- expressly identified as concessional

are deemed to be “not concessional” (item 1 of part 5.2 of new schedule 5).

New section 235A(1) definition of leases that are “possibly concessional” (clause 4)

17. These are leases of a type caught by the definition of “possibly concessional” in new s235A(1) (clause 4).

18. A “possibly concessional” lease is not necessarily a “concessional lease”. Whether such a lease is concessional depends on whether it is caught by the definition of concessional lease in new s235A(1). Under this definition, a lease in the “possibly concessional” category might be concessional depending on whether further research establishes that:

- the lease was granted for less than market value and
- is not a “not concessional” lease ie a lease of a type described in Part 5.2 of new schedule 5 (clause 30)

19. The “possibly concessional” category is intended to serve as a flag or warning that the lease might prove to be concessional if it turns out that the lease was in fact granted for less than market value. In the light of such a flag, the lessee (perhaps in consultation with a prospective buyer) might choose to conduct further research to determine whether the lease is in fact concessional. Alternatively, the lessee could apply to ACTPLA for a declaration ie confirmation as to the concessional status of the lease. Refer also to paragraphs 24, 25 of these guidelines.

20. The new s235A(1) definition of “possibly concessional” (clause 4) states that a lease is “possibly concessional” only if it meets all of the following requirements. A lease is “possibly concessional” if it is:

- a lease that was granted before 31 March 2008
- of a type listed in the schedule of “possibly concessional” leases in Part 5.3 of new schedule 5 (clause 30)
- not a “not concessional” lease
- not a lease that expressly states that it is not concessional (new s235A(1) definition “possibly concessional” para (b))
- not a lease that expressly states that it is concessional (new s235A(1) definition “possibly concessional” para (b)).

21. The schedule of “possibly concessional” leases in new Part 5.3 of new schedule 5 (clause 30) lists lease types that have characteristics which suggest that there is a possibility that the lease might be concessional if further research establishes that the lease satisfies the criteria in the definition of concessional lease in new s235A(1). The list has been prepared in the light of legislative and investigative experience relevant to concessional leases. All known lease types have been incorporated into either this schedule or the schedule of “not concessional” leases in new Part 5.2 of schedule 5. The wording of the descriptions of the listed categories in new Part 5.3 has been framed to permit easy identification. The intention is that anyone should be able to tell whether a lease is of a type listed in Part 5.3 simply by looking at the lease and without any further historical or background research.

New section 238(2)(a) (clause 5 Granting leases)

22. Amends existing s238 to make it clear that when a new lease is granted it must include a statement that the lease is concessional or not concessional as appropriate.

If in future a lease is granted and by mistake it is not identified as required by s238 then the lease will be deemed to be not concessional (item 19 of Part 5.2 of new schedule 5, clause 30). Similar amendments are made by clause 7 which inserts new s254(3).

Deciding whether lease is concessional, not concessional or possibly concessional

23. Refer to paragraphs 24, 25 of these guidelines.

**Applications for initial declaration as to
whether lease is concessional**

Deciding whether a lease is concessional, not concessional or possibly concessional

AND

New section 259D Concessional status guidelines (clause 14)

24. The owner, seller or buyer of a lease that is not clearly marked “concessional” or “not concessional” could decide to do their own research as to whether a lease is concessional, not concessional or possibly concessional. New section 259D (clause 14) gives ACTPLA the power to publish guidelines to assist people to do this research. The guidelines are a notifiable instrument and as such must be posted online on the ACT Legislation Register. In doing this research, the parties may need to consider, for example:

- new s259D guidelines
- definition of “not concessional” new s235A(1), Part 5.2 of new schedule 5 (clause 30) and indicia on the lease relevant to this
- definition “possibly concessional” new s235A(1), Part 5.3 of schedule 5
- definition of “concessional” new s235A(1)
- price paid for original lease and circumstances around the grant
- legislation under which lease granted

25. The lessee (perhaps in consultation with a prospective buyer) may instead elect to apply to ACTPLA for a “declaration” ie confirmation as to whether the lease is concessional. The lodgement fee for such applications is \$1035. Such an application is made under s256. The process for such applications is as follows.

- ACTPLA must give notice to all holders of a registered interest in the lease of the application and allow at least 15 working days for comment (s257(2)).
- ACTPLA has a further 15 working days to decide the application. If ACTPLA fails to make a decision within 15 days following the end of the consultation period then ACTPLA is deemed to have decided that the lease is concessional (s257(3)).
- ACTPLA must give notice of decision to the applicant and all holders of a registered interest in the lease (s257(5)) and also to the Registrar-General of Land Titles new s259 (clause 14).

New section 257(2A) (clause 8 Decision about whether lease concessional)

26. In deciding a s256 application for a declaration, ACTPLA must consider whether the definition of “concessional lease” (new s235A(1), clause 4) or the definition of “not concessional” (new s235A(1), clause 4) applies to the lease. This will require

consideration of whether the lease is of a type listed in the schedule of “not concessional” leases (Part 5.2 of new schedule 5, clause 30). If it is then the lease is not concessional, if it is not then the lease might be concessional depending on whether it was in fact granted for less than market value.

27. New s257(2A) (clause 8) requires ACTPLA to declare the lease to be not concessional unless ACTPLA is satisfied that the lease is concessional. In other words, if the necessary evidence is missing, unclear or equivocal then ACTPLA must declare the lease to be not concessional.

New section 259 (clause 14)

28. New s259 (clause 14) requires ACTPLA to also give notice of the decision on concessional status to the Registrar-General of Land Titles for registration under the Land Titles Act. This requirement applies both to decisions that the lease is not concessional as well as to decisions that the lease is concessional. (Existing s259 only applies to decisions that the lease is concessional).

Deemed decisions as to concessional status

New note for section 257(3) (clause 9 new note)

New section 257(4) (clause 10)

29. If ACTPLA fails to decide a s256 application for declaration as to concessional status within the required period, ACTPLA is deemed to have decided that the lease is concessional (s257(3)).

30. Existing s257(4) gives ACTPLA the power to change a s257(3) deemed decision at any stage. New s257(4) sets a time limit on this power. Under new s257(4) ACTPLA has 20 working days to reverse the deemed decision. After this, ACTPLA does not have the power to change the deemed decision under s257. However, the deemed decision can still be reversed in certain circumstances:

- on appeal to ACAT (item 19 of schedule 1, s407 and new s409A (clause 23))
- on a new application by the lessee pointing to further evidence or evidence of a formal error (new s258A clause 13, new s258B clause 13)
- by ACTPLA if ACTPLA is satisfied that there is new evidence or evidence of a formal error (new s258C clause 13)

31. New s259A (clause 14) requires ACTPLA to give notice of a s257(3) deemed decision on concessional status to the Registrar-General of Land Titles for registration under the Land Titles Act. This requirement applies both to deemed decisions that the lease is not concessional as well as to decisions that the lease is concessional. The notice must be given to the Registrar-General after expiry of the period allowed for ACTPLA to reverse the deemed decision (20 working days) (new s259A(1)(b)).

32. Clause 9 inserts a new note to highlight the point that the time frame for applying for ACAT merit review of a deemed decision is 20 working days commencing at the end of the period set out in new s257(4) noted above. Refer to new s409A ACAT review-time for making application for deemed decisions (clause 23).

New section 257(6) (clause 11)

33. Section 12 of the *ACT Civil and Administrative Tribunal Act 2008* (reproduced below) deems a failure to do a thing required under law within the required time

frame to be a decision to not do the thing. New s257(6) makes it clear that section 12 of the ACT Civil and Administrative Tribunal Act does not apply to section 256 applications. Section 256 has its own default position in that a failure to decide the application within the required time frame is deemed to be a declaration that the lease is concessional. Given this default mechanism there is no need for the ACT Civil and Administrative Tribunal Act default mechanism to apply.

Section 12 of the ACT Civil and Administrative Tribunal Act:

12 When no action taken to be decision

- (1) This section applies if—
 - (a) an entity (the *decision-maker*) is required or allowed to do something under an authorising law; and
 - (b) the decision-maker has not done the thing within the period for doing the thing under the authorising law or, if no period is stated under the authorising law, a reasonable period for doing the thing; and
 - (c) the authorising law provides that a person may apply to the tribunal for review of a decision under the authorising law in relation to doing the thing.
- (2) The decision-maker is taken to have decided, at the end of the period for doing the thing, not to do the thing.

New section 258(2A) (clause 12)

34. ACTPLA may decide whether a lease is concessional and make a declaration on its own initiative ie without an application from the lessee (s258). In practice, the possibility of a declaration is assessed on this basis when the lessee applies for a lease variation or a further lease. In deciding this matter under s258, ACTPLA must consider whether the definition of “concessional lease” (new s235A(1), clause 4) or the definition of “not concessional” (new s235A(1), clause 4) applies to the lease. This will require consideration of whether the lease is of a type listed in the schedule of “not concessional” leases (Part 5.2 of new schedule 5, clause 30). If it is then the lease is not concessional, if it is not then the lease might be concessional depending on whether it was granted for less than market value.

35. New s258(2A) imposes an additional test that must be applied by ACTPLA in considering this s258 issue. New s258(2A) requires ACTPLA to declare the lease to be not concessional unless ACTPLA is satisfied that the lease is concessional. In other words, if the necessary evidence is missing, unclear or equivocal then ACTPLA must declare the lease to be not concessional. New section 258(2A) mirrors new s257(2A) (clause 8).

**Applications for a second or subsequent decision as to whether
a lease is concessional**

New section 258A Application for decision about whether certain leases are concessional (clause 13)

AND

New section 258B Making other decisions about concessional status of certain leases (clause 13)

36. New s258A and new s258B apply only to leases that have already been declared to be a concessional lease under the process set out in amended ss 257, 258 and the decision is confirmed in a memorial to the lease registered in the Land Titles Register (new s258A(1)(c),(d)). New ss258A, 258B in effect give ACTPLA the power to make a second or further assessment and decision on concessional status but only in limited circumstances.

37. Importantly, new ss258A, 258B do not apply to leases that at the time of grant included a statement confirming that it is concessional. The concessional status of such leases cannot be altered by new ss258A, 258B. The status of such leases can only be altered by lease variation under division 9.4.2 which requires among other things payment of the market value of the lease minus any payments already made.

38. A lessee can apply under new s258A to ACTPLA for a fresh decision and declaration as to the concessional status of a lease. However, new s258B precludes ACTPLA from making such a decision unless ACTPLA is satisfied that:

- there is additional relevant information that was not available at the time of the previous decision and declaration of concessional status
- there is new information suggesting that a “formal error” was made. “Formal error” is defined in the Dictionary to the Act as a “(a) clerical error, (b) an error arising from an accidental slip or omission, (c) a defect of form”.

If ACTPLA is not satisfied of either of the above, then it is not required to make any decision and is not required to take the matter any further.

39. If ACTPLA decides that there is additional relevant information, then it must proceed to decide the application. In this case, the process is similar to the process for an original application for a declaration under amended s257 (clauses 8-10) and new s258C (clause 13). The process includes:

- notice of the application to all holders of interests registered in the Land Titles Register (new s258B(2)(b))
- 15 working days for notified persons to comment (new s258B(2)(b)(ii))
- then 15 working days for ACTPLA to make the decision – if a decision is not made then ACTPLA is deemed to have declared the lease to be a concessional lease (new s258B(4)). ACTPLA then has 20 working days to make a decision contrary to the deemed decision (new s258B(5))
- notice of decision on concessional status must be sent to the applicant and holders of an interest registered in the Land Titles Register (new s258B(6))
- notice of decision must also be sent to the Registrar-General of Land Titles for registration under the Land Titles Act (new s259 clause 14). Notice of a

deemed decision under new s258B(4) must also be sent to the Registrar-General (new s259A clause 14)

40. In making its decision on the s258A application, ACTPLA must take account of the definition of concessional lease and not concessional lease (new s235A(1)). New s258B(3) also requires ACTPLA to declare the lease to be not concessional unless ACTPLA is satisfied that the lease is concessional. In other words, if the necessary evidence is missing, unclear or equivocal then ACTPLA must declare the lease to be not concessional. New s258B(3) mirrors new s257(2A) (clause 8) and new s258C(4) (clause 13).

New section 258C Authority may make another decision about whether certain leases concessional on own initiative (clause 13)

41. New s258C applies only to leases that have already been declared to be a concessional lease under the process set out in amended sections 257, 258. New s258C in effect gives ACTPLA the power to make a second or further assessment and decision on concessional status but only in limited circumstances. New s258C mirrors section 258B, except in this case the second or further decision is one which ACTPLA makes on its own initiative.

42. Importantly, new s258C does not apply to leases that at the time of grant included a statement confirming that it is concessional. The concessional status of such leases cannot be altered by new s258C. The status of such leases can only be altered by lease variation under division 9.4.2 which requires among other things payment to the Territory of the market value of the lease minus any payments already made.

43. New s258C(2) permits ACTPLA to reassess and decide afresh whether the lease is concessional. However, ACTPLA can only do so if satisfied that:

- there is additional relevant information that was not available at the time of the previous decision and declaration of concessional status (new s258C(3)(a)(i))
- there is new information suggesting that a “formal error” was made. “Formal error” is defined in the Dictionary to the Act as a “(a) clerical error, (b) an error arising from an accidental slip or omission, (c) a defect of form” (new s258C(3)(a)(ii)).

If ACTPLA is not satisfied of either of the above, then it is not required to make any further decision and is not required to take the matter any further.

44. If ACTPLA decides that there is additional relevant information, then it can proceed to make a new decision as to the concessional status of the lease. In this case, the process is similar to amended s257 (clauses 8-10) and new s258B (clause 13).

This includes:

- notice of the application to all holders of interests registered in the Land Titles Register (new s258C(3)(b))
- 15 working days for notified persons to comment (new s258C(3)(b)(ii))
- then 15 working days for ACTPLA to make the decision – if a decision is not made then ACTPLA is deemed to have declared the lease to be a concessional lease (new s258C(5)).
- notice of decision on concessional status must be sent to the applicant and holders of an interest registered in the Land Titles Register (new s258C(6))

- notice of decision must also be sent to the Registrar-General of Land Titles for registration under the Land Titles Act (new s259 clause 14).

45. In making its decision afresh, ACTPLA must take account of the definition of “concessional lease” and “not concessional” lease (new s235A(1)). New s258C(4) also requires ACTPLA to declare the lease to be not concessional unless ACTPLA is satisfied that the lease is concessional. In other words, if the necessary evidence is missing, unclear or equivocal then ACTPLA must declare the lease to be not concessional. New s258C(4) mirrors ss257(2A) (clause 8) and 258B(3) (clause 13).

ACAT merit review of declarations that a lease is concessional

New section 409A (clause 23)

AND

Schedule 1, new item 19A Reviewable decisions, eligible entities and interested entities (clause 29)

46. A lessee can apply to ACAT for merit review of an ACTPLA declaration that a lease is concessional (item 19 of schedule 1, s408). New item 19A of schedule 1 (clause 29) extends an equivalent right of ACAT merit review to declarations made under new ss258B, 258C, that is, to second or subsequent declarations by ACTPLA.

47. Under s257(3) and new s258B(4) (clause 13) ACTPLA must decide applications or second applications for a declaration of the concessional status of a lease within the prescribed period (15 working days in addition to the 15 day consultation period). If a decision is not made within the prescribed period then ACTPLA is deemed to have decided that the lease is concessional. After such a deemed decision ACTPLA has a further 20 working days to make a final decision contrary to the deemed decision (new ss257(4), 258B(5)). New s409A (clause 23) sets out the time window for making an application to ACAT for merit review of a deemed decision on concessional status. The time permitted for making such an application is 20 working days commencing at the end of the 20 working days that ACTPLA has to make a final decision contrary to the deemed decision under new ss257(4), 258B(5). The ACAT rules can set a longer period for making an application (*ACT Civil and Administrative Tribunal Act 2008* s25(1)(e)).

Decisions as to concessional status of lease cannot be changed except in limited circumstances

New section 259B Non-concessional status of leases (clause 14)

48. When a lease is granted it must include a statement as to whether the lease is concessional (new s238(2)(a) clause 5). If this statement affirms that the lease is not concessional, then the not concessional status is irrevocable and cannot later be changed or revisited in any circumstance by ACTPLA (new s259B clause 14).

49. If a lease is declared to be not concessional sometime after the initial grant ie through the declaration processes set out in amended s257, new ss258A, 258B, 258C

then the not concessional status of the lease is irrevocable and cannot be later changed or revisited in any circumstance by ACTPLA (new s259B clause 14).

New section 259C Concessional status of leases (clause 14)

50. When a lease is granted it must include a statement as to whether the lease is concessional (new s238(2)(a) clause 5). If this statement affirms that the lease is concessional, then this concessional status cannot later be changed by ACTPLA except through an application by the lessee for a lease variation to de-concessionalise the lease under ss260-266 of Division 9.4.2 (new ss259C(2), 259C(3)(b) clause 14). This is the only avenue for changing the status of such a lease (new s259C(3)(b), clause 16). In summary, such a step requires:

- a development application for approval of the lease variation
- assessment by the Minister as to whether it is in the public interest to consider the application
- assessment of the development application by ACTPLA in the impact track and a decision to grant the application
- payment to the Territory of the full market value of the lease minus any payment already made;

51. If a lease is not affirmed to be concessional at the time of grant but was later declared to be concessional sometime after the initial grant ie through the declaration processes set out in amended s257, new ss258A, 258B, 258C then the concessional status of the lease cannot later be changed by ACTPLA (new s259C(2) clause 14) except in limited circumstances. The status of such a lease can only be changed by ACTPLA as a result of:

- an application by the lessee for a lease variation to de-concessionalise the lease (new s259C(3)(b) clause 14);
- a revisiting of the original declaration as sought by the lessee (new s258A, 258B) or by ACTPLA on own initiative (new s259C(3)(a)). Revisiting of a declaration is only possible if there is new evidence as to concessional status or new information pointing to a formal error (new ss258B(2)(a), 258C(3)(a))

**Effect of registration of the sale of a concessional lease
in the Land Titles Register**

New section 251(7) Restrictions on dealings with certain leases (clause 6)

New section 265(3) Restrictions on dealings with concessional leases (clause 20)

52. Section 265 prohibits the sale of a concessional lease (or other dealing) without the consent of ACTPLA and states that any such purported sale “has no effect” (s265(2)). “Deal” is defined in s234 of the Act to include assign, transfer, sublet, part with possession.

53. Section 265 appears to be at odds with section 58 of the *Land Titles Act 1925*. Section 58 of that Act (and related sections) affirms that the holder of a certificate of title registered in the Land Titles Register has valid title that is paramount over other interests.

54. Judge made law has confirmed that provisions like s265(2) do not impair the guarantees that apply to sales and titles registered in the Land Titles Register. A NSW court of appeal case, *Koompahtoo Local Aboriginal Land Council v KLACL Property Investment Pty Ltd & Ors* [2008] NSWCA 6, confirmed that registration of sales (or other dealings) in the Land Titles Register is valid and effective notwithstanding contravention of other legislation like s265. This case confirms that once a sale is registered in the Land Titles Register it is legally valid and acquires the protections and guarantees of the Land Titles Act notwithstanding any breach of s265(2) of the Planning and Development Act.

55. New s265(3) (clause 20) makes explicit the above existing law. The new section confirms that subsection 265(2) does not apply to dealings registered in the Land Titles Register.

56. New s251(7) (clause 6) makes a similar amendment for the same reasons. This amendment is about the registration of a the sale of a lease that is subject to sale restrictions under s251 (refer to paragraphs 57 to 64 of this guide)

57. The greater clarity as to the concessional status of leases introduced in this bill should minimise the number of occasions in which concessional leases are unwittingly sold contrary to s265 and so reduce if not eliminate the number of occasions in which new s265(3) would operate. Also sales of leases specifically identified as concessional will not be able to be registered in the Land Titles Register without ACTPLA consent. Sales of leases which are caught by the 251 restriction will also not be able to be registered where this restriction is confirmed in a memorial to the lease.

Leases subject to section 251
sale restriction only applies if stated in memorial
and section 275 restrictions on lease variations

58. Existing s251 imposes restrictions on selling or other dealings in specified leases. For example, leases granted by way of direct grant under s238(1)(d) (ie other than through a ballot, tender, auction) cannot be sold for five years without the consent of ACTPLA (ss251(1)(c), 251(3), 251(8)(c)). This restriction recognises the fact that the recipient of the lease received a benefit by not having to go through a market competitive process. For similar reasons, s275 prohibits lease variations of such leases for a period of five years after the date of grant.

New sections 251(3) to (7) (clause 6 Restrictions on dealings with certain leases)

59. Clause 6 deletes existing ss251(3) to (7) and substitutes new sections.

60. New s251(3) requires ACTPLA to tell the Registrar-General of Land Titles if a s251 restriction applies to a lease. If ACTPLA informs the Registrar-General then a memorial noting the restriction must be included with the lease (s72D *Land Titles Act 1925*).

61. New s251(4) states that the s251 restriction only applies if it is evidenced by a memorial as noted above. If there is no memorial then it does not apply. If the

memorial is made and the restriction does apply then the lease cannot be sold, transferred etc during the restricted period without the consent of ACTPLA.

62. New s251(6) indicates that any dealing contrary to the s251 restrictions “has no effect”. This section is the same as existing s251(5). New s251(7) confirms the fact that notwithstanding s251(6) a sale or other dealing that is registered in the Land Titles Register is legally effective even if the sale agreement is contrary to s251 (refer to paragraphs 52-56 of this guide). It is important to note, however, that if the s251 restriction is evidenced in a memorial as required by new s251(3),(4) then the Registrar-General of Land Titles will decline to register any sale of the lease without the required ACTPLA consent.

New section 275(4),(5) No variation of certain leases for 5 years (clause 21)

63. Section 275 prohibits lease variations of leases to which section 251 restriction applies for a specified period. The period is five years from the date of grant. This restriction also applies to leases granted to which s241 applies (sale of lease to restricted class where there is only one eligible recipient).

64. As noted above, such lessees received an advantage ie they were able to obtain the lease without going through a market competitive process. In return for this advantage, the legislation requires the lessee to operate the lease for a certain period ie five years. This means that the lessee cannot sell the lease for a five year period (s251) and cannot vary the lease for a five year period (s275).

65. New ss 275(4),(5) create an exception to the five year ban on lease variations. A variation can be made if it does not “limit, add or remove” an existing use authorised by the lease. Such variations should be allowed as they do not reduce the lessee’s existing obligations to operate the lease for the five year period.

Transitional provisions

New section 456B (clause 25)

66. Section 18 of the repealed *City Area Leases Act 1936* reduced the rent payable for leases in the city area to a nominal amount (5 cents per annum payable on demand). This provision applied to rent payable after 1 January 1971 under leases granted under the *City Area Leases Act* before 11 April 1974. The repealed *City Area Leases Act 1974* stopped the abolition of rent for leases granted after this date.

67. The above legislation was repealed by the *Land (Planning and Environment) Act 1991* and the *Land (Planning and Environment) Act* was repealed by the *Planning and Development Act* in 2008. The above abolition of rent was preserved for relevant leases under the general provision of s84 of the *Legislation Act 2001* despite the repeal of the *City Area Leases Act*. To underline this point and make it immediately clear, new s456B explicitly states that the abolition of rent for the relevant leases was preserved notwithstanding the repeal of the *City Area Leases Act*.

Other clauses

68. Clauses 24, 26, 27, 28 insert other transitional provisions.

Consequential changes to dictionary and regulations

Dictionary

69. Clauses 31, 32, 33 amend the Dictionary as a consequence of new provisions or to make minor modifications such as for reasons of consistency of terminology.

Planning and Development Regulation

70. Clauses 34-44 include amendments to the Regulation as a consequence of new provisions or to make minor modifications to existing definitions for consistency or clarity.