2009

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT AMENDMENT BILL 2009

EXPLANATORY STATEMENT

Presented by
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This Explanatory Statement relates to the *Planning and Development Amendment Bill 2009* (the Bill) as introduced into the Legislative Assembly.

Background

The purpose of the Bill is to amend the *Planning and Development Act 2007 (*the Act) and the *Planning and Development Regulation 2008* (the regulation).

The Act commenced on 31 March 2008 and introduced, amongst other things, leading practice for the assessment of development applications; provided clarity and consistency in the management of leasehold land; and strengthened compliance mechanisms. Through monitoring during the initial implementation phase, and in consultation with Government, Agencies, industry and the community, a number of Act modifications were made in order to respond to issues identified. Further fine tuning has also occurred in some areas following operational review of the particular sections of the Act.

The Act modifications were made through the regulation making power in section 429 of the Act. Section 431 of the Act requires section 429 and regulations made under section 429 to cease two years after the commencement of the Act (i.e. two years after 31 March 2008). Section 429 and the regulations under this section are not saved by section 88 of the *Legislation Act 2001* (because of the exception in section 88(2) of the Legislation Act).

The Bill is composed, of those modifications to the Act, that it is considered should be made permanent. Not all modifications made are required to be made permanent however. This is because they were transitional and are no longer required.

The modifications covered the following general areas:
- lease variations in designated areas and conversion of Commonwealth leases of National land to territory leases upon revocation of National Land status;
- development assessment processes including transitional provisions;
- use as development;
- granting of leases and payment; and
- extension of time to commence or complete building and development.

The table below sets out the section of the Act that is amended, details of the amending regulation and the clause of this Bill that amends the Act so as to entrench the modification.

Item	**Act Section**	**Clause in Bill**	**Latest Amendment**
Application of assessment tracks to development proposals ▪ PCO - Technical, clarity (refer s114(2), clause 5)	113 (2)	4	Refer to clause 5
Application of assessment tracks to development proposals ▪ Technical, clarity	114 (2) refer 113 (3)	5	No: 04, S/L2008/41 Sept 2008, clause 14, 20.1 new section 429AA
Development proposal for lease variation in designated area ▪ Defines 'merit' track as applicable	131A	6	No: 04, S/L2008/41 Sept 2008, clause 14, 20.1 new section 131A

Item	Act Section	Clause in Bill	Latest Amendment
assessment track			
Applications to amend development approvals ▪ Technical refer new section 198C	197 (1)	7	No: 03, S/L2008/33 Aug 2008, clause 21, 5.1 section 429A
Deciding applications to amend development approvals ▪ Technical refer new section 198B	198 (4)	8	No: 03, S/L2008/33 Aug 2008, clause 21, 5.1 section 429B
Exception to referral requirement under s198 (1) (b) ▪ Technical, consistency	198A	9	No: 03, S/L2008/33 Aug 2008, 21, 5.1 section 429C new section 198A
Exception to notification requirement under s198 (1) (b) ▪ Waiver notification	198B	9	No: 03, S/L2008/33 Aug 2008, clause 21, 5.1 section 429C new section 198B
When development approvals do not require amendment ▪ Deemed compliance	198C	9	No: 03, S/L2008/33 Aug 2008, clause 21, 5.1 section 429C new section 198C
Development other than use lawful when begun ▪ Clarity	203 (1) (c)	10	No: 03, S/L2008/33 Aug 2008, clause 21, 5.1 section 429D
Use as development lawful when begun ▪ Clarity	204 (1) (c)	11	No: 03, S/L2008/33 Aug 2008, clause 21, 5.1 section 429E
Payment for leases Previous amendments: No: 04, S/L2008/41, clause 15, Scrutiny 02/2009. No: 06 S/L2009/18, clause 4, Scrutiny 08/2009. ▪ Payment in-kind	246 (2) (c) & (d) 246 (3) (b) & (c) 246, 3A	12 13 14	No: 09, S/L2009/38, July 2009, clause13, New sections 429EAA and 429EAB
Payment for adjoining concessional leases ▪ Technical, payment regime	246A	15	No: 06, S/L2009/18, May 2009, clause 5, 20.9 New sections 461B
Grant of further leases ▪ Payment	254 (1) (e)	16	No: 04 S/L2008/41 Sept 2008, clause 15, 20.1 new section 429EB
Grant of further leases includes authorised use ▪ Clarity	255 (4)	17	No: 04, S/L2008/41 Sept 2008, clause 15, 20.1 new section 429EC
Determination of amount payable for further leases-rural land ▪ Allows payment by instalments	280	18	No: 04, S/L2008/41 Sept 2008, clause 15, 20.1 new section 429ED
Application for extension of time to	298A (3), (4)	19	No: 08, S/L2009/35, June

Item	Act Section	Clause in Bill	Latest Amendment
commence or complete building and development Previous amendments: No: 01, S/L2008/08, Scrutiny 54/2008, No: 03, S/L2008/33, Scrutiny 58/2008, No: 04, S/L2008/41, Scrutiny 02/2009 ▪ Clarity, Government policy	& (5)		2009, clause 21, Section 298A
Extension of time to commence or complete building and development ▪ Removes limit on extensions allowed	298B (5) & (6)	20	No: 04, S/L2008/41, Sept 2008, clause 17, New section 429G
Conversion of Commonwealth leases – revocation of National Land status ▪ Technical, omission	312A	21	No: 03, S/L2008/33, Aug 2008, clause 23, 459B New section 312A
Transitional – Expiry - excluded provisions (from 2010 ending)	431 (2) (a) & (b)	22	No: 02, S/L 2008/27 June 2008, clause 4, 5.1A
Transitional – applications (DA) lodged before commencement day ▪ Technical, process	442 (1)	23	No: 01, S/L2008/08 March 2008, clause 5, 5.2 substitute
Transitional – applications (DA) lodged before commencement day ▪ Technical, process	442 (4)	24	No: 01, S/L2008/08 March 2008, clause 5, 5.3 New section 442 (4)
Transitional – DA lodged on or after commencement – EDP ▪ Technical, process	442C	25	No: 02, S/L2008/27 June 2008, clause 5, 5.3A new section
Transitional – approvals under repealed Act ▪ Technical, process	444	26	No: 01, S/L2008/08 March 2008, clause 5, 5.4
Transitional – commencement of DA under repealed Act ▪ Technical, process	444A	26	No: 02, S/L2008/27 June 2008, clause 6, 5.4A New section 444A
Transitional – approval in force with uncommenced extension ▪ Technical, process	445 (2) (a)	27	No: 01, S/L2008/08 March 2008, clause 5, 5.5
Power to make lease and development conditions ▪ Technical, process	446	28	No: 02, S/L2008/27 June 2008, clause 7, 5.5A
Transitional – application for development approval if lease and development condition ▪ Technical, process	446A	28	No: 02, S/L2008/27 June 2008, clause 7, 5.5A
Transitional – extended meaning of development approval – s199 ▪ Technical, process	447	29	No: 01, S/L2008/08 March 2008, clause 5, 5.6

Item	Act Section	Clause in Bill	Latest Amendment
Transitional – applications for certain grants before commencement day ▪ Technical, process	458	30	No: 04, S/L2008/41 Sept 2008, clause 18, 20.6A
Transitional—applications for certain grants decided after 6 months ▪ Technical, process	459	31	Original Act provision
Transitional – contracts before commencement day to grant leases ▪ Technical, process	459A	32	No: 03, S/L2008/33 Aug 2008, clause 22, 5.7 new section 459A
Payment for leases to community organisations ▪ Technical, payment regime	461A	33	No: 06, S/L2009/18, May 2009, clause 5, 20.9 New sections 461A

The majority of the provisions are a literal translation of the provision as it appeared in the regulation (that made the modification). However there are some minor wording variations. This is because drafting styles change; different drafters adopt different ways of delivering the same outcome and in some instances the Parliamentary Counsel's Office have clarified previous drafting. These variations may appear as simple as using a different format to set-out the same words as in clause 8; or terminology as in clause 7 where the word 'application' is changed to 'proposal' which better reflects the stage that the proposed development is at in the assessment process; or the inclusion of a new sub-section, within the existing provision, that articulates the intent of the provision and removes doubt about the intended outcome. This drafting style is used consistently within the Act to assist persons, including industry and community members, to understand the intent of the provision. However, despite these minor drafting inconsistencies there is no change in the policy or application of the provisions.

Because of the nature of the Bill, that is, a translation of an already existing provision, the explanation of the amendments contained in this explanatory statement need to be read with this in mind. For instance where the explanatory statement states 'new section' as it does at clause 6 this does not mean that the provision is in fact new. Rather it means that the provision is new to the Act but has in fact been in operation since the relevant regulation containing the provision was notified. For this example clause 6 was introduced through *Planning and Development Amendment Regulation 2008 No: 4, S/L 2008/41* and has been in operation since September 2008.

Each amending regulation has had an explanatory statement prepared which is available on the ACT Legislation Register. The regulation is republished each time it is amended and all versions of the regulation (and the amending regulation) are available also on the ACT Legislation Register. The *Planning and Development Regulation 2008,* Schedule 5 list modifications to the Act made up-until June 2008 and has been renumbered to Schedule 20 in republications post July 2008.

Because the proposed Bill seeks to translate these Act modifications, as permanent amendments to the Act, schedule 20 needs to reflect these changes. The effect of this amendment will mean that there will be no provisions listed in schedule 20, subsequently it will be redundant. The Bill therefore amends the *Planning and Development Regulation 2008* to remove these provisions.

Outline of Provisions

Part 1 Preliminary

Clause 1 Name of Act
Names the Act as the *Planning and Development Amendment Act 2009*.

Clause 2 Commencement
Provides the commencement provisions, noting that this Act will commence 7 days after its notification day. The naming and commencement provisions automatically commence on the notification day (see Legislation Act , s75(1)).

Part 2 Planning and Development Act 2007

Clause 3 Legislation amended—pt 2
Declares that it is the *Planning and Development Act 2007* that is being amended.

Clause 4 Relationship between development proposals and development applications New section 113 (3)
Inserts a new clause 113(3) to clarify subsection (2) is subject to section 123 (Impact track applicability). This amendment ensures consistency in the Act, through reference to s123. Section 123 requires a development application to be assessed in the impact track in the specified circumstances. Therefore, the development tables are not the sole determinant of the required assessment track. The amendment makes this clear.

Clause 5 Application of assessment tracks to development proposals Section 114 (2)
Omits subsection 114 (2) as this provision is encompassed by section 113 (2). The modification of section 113 in clause 4 ensures the omitted section 114 (2) remains in force.

The original intention of 114 (2) was to specify that a development application for a development proposal must be assessed in the assessment track determined by the Act development table. The provision also inserted a new subsection (3) and stated that the section is subject to section 123 of the Act.

This amendment ensured consistency in the Act, through reference to s123. Section 123 requires a development application to be assessed be in the impact track in the specified circumstances. Therefore the development tables are not the sole determinant of the required assessment track. The original amendment made this clear.

The original intentions of this amendment are now provided for in section 113.

Clause 6 New section 131A
Provides that div 7.2.5 of the Act should be read as if new section 131A were inserted. New section 131A determines how a development proposal for approval of a lease variation in a designated area must be assessed and dealt with under the Act. The interrelationship of territory land and designation under Commonwealth law is a complex matter. A designated area is defined in the Dictionary to the Act – see the *Australian Capital Territory (Planning and Land Management Act 1988* (Cwlth) (PALM), section 4 - *Designated Area* means an area of land specified in the National Capital Plan under

section 10 of PALM. The Territory has exempted effectively all development in a designated area from requiring any territory approvals, requiring only lease variations to be subject to approval processes. The Act is amended to apply merit track provisions to the processing of an application of a development proposal for a lease variation in a designated area. The amendment also excludes any reference to the territory plan in determining such applications, as Commonwealth law provides that the territory plan does not apply to designated areas.

Clauses 7, 8 and 9
The intention of these clauses is to overcome delays caused by minor contraventions of development approvals (DAs) by inserting a range of provisions that will remove the need to seek further development approvals or amendment to an existing development approval. The provisions prescribe the tolerances within which development under a DA may lawfully contravene the DA without the need for another DA or a DA amendment.

Historically, there have been significant levels of minor contravention of DAs, for example, the height of floors are not constructed to the exact millimetre dimensions stated in the DA, sometimes varying by +/- 300mm or more. Also, many people building their home often visit the site during construction and discover that construction could benefit from minor variations, such as altering windows or door or making certain rooms larger, etc.

Under the *Land (Planning and Environment) Act 1991* (the repealed Act), such contraventions and variations were readily regularised by way of a regularising DA amendment after the fact. Such amendments, depending on their nature, were approved relatively quickly. Any significant delay in obtaining the relevant DA amendment can result in delayed lawful occupation of completed buildings which adds to development holding costs.

Sectors of the ACT construction industry expressed concern with increased delays during implementation of the *Planning and Development Act 2007* and new territory plan. These sectors expressed the view that a tolerance on allowable changes to construction under a DA would benefit all stakeholders, including home-owners without significant detriment.

Clause 9 also permits minor DA amendments to be assessed and processed quickly without further public consultation on the development or further referral to a government agency for advice. The ability to proceed without these steps is tightly circumscribed and is consistent with the approach already taken in the Act with amendments to development applications

Clause 7 Applications to amend development approvals Section 197(1)
Substitutes a new section 197(1) in the Act which adds paragraph (c) to the section. The additional paragraph (c) is necessary because of the insertion of new section 198C into the Act by this Bill. New section 197(1) provides that the section applies if:

(a) the planning and land authority has given development approval for a development proposal; and
(b) the development proposal changes so that it is not covered by the development approval; and
(c) section 198C (When development approvals do not require amendment) does not apply to the changed development proposal.

The effect of section 197(1)(c) and section 198C is summarised below (see clause 9).

Clause 8 Deciding applications to amend development approvals Section 198(4)
Substitutes a new section 198(4) in the Act. New section 198(4) is necessary because of the insertion of new section 198B by this Bill (see clause 9). New section 198(4) continues to provide that if public notification of a proposed development is required then only the application for the amendment need be publicly notified. The only change to s198(4) is to state that s198(4) is not relevant if the requirement for public notification is removed by the operation of new section 198B.

Clause 9 New sections 198A to 198C
Inserts new sections 198A, 198B and 198C in the Act.

Section 198A Exception to referral requirement under s198(1)(b)
New section 198A specifies that, despite section 198(1)(b), the authority need not refer an application to amend a development approval to an entity if satisfied that the amendment does not affect any part of the development approval in relation to which the entity made a comment. This provision is consistent with the approach taken in section 145(4) with respect to changes to development applications.

Section 198B Exception to notification requirement under s198(1)(b)
New section 198B specifies that, despite section 198(1)(b), the planning and land authority (the authority) need not publicly notify an application for the amendment of a development approval if satisfied that:

(a) no-one other than the applicant will be adversely affected by the amendment; and

(b) the environmental impact caused by the amendment will do no more than minimally increase the environmental impact for the development.

New section 198B is consistent with the approach taken in existing section 146(3) with respect to changes to development applications.

Section 198C When development approvals do not require amendment
New section 198C specifies that the section applies if:

(1) (a) the authority has given development approval for a development application; and

(b) the development is changed so that it is not covered by the approval; and

(c) a circumstance prescribed by regulation under subsection (3) applies.

(2) the changed development proposal is taken to be in accordance with the development approval

(3) A regulation may prescribe circumstances for subsection (1)(c).

Under new section 198C(3), a regulation may prescribe the circumstances in which a development in accordance with the changed development is taken to be in accordance with the development approval.

New section 198C applies in the situation where a development is authorised by a development approval but the actual development as built (or part built) turns out to exceed some of the dimension parameters in the development approval. If the built form exceeds the approval parameters but is still within the tolerance range specified in the

regulation under 198C(3), the building is deemed to still comply with the requirements of the development approval and a new or amended approval is not required. Similarly, if the building includes a new feature outside the terms of the development approval (such as a new door or window) and the new feature is authorised under 198C(3), then again the building is deemed to comply with the approval.

For example, if the building is a class 1 building (e.g. a house) and the internal arrangement of the house's walls, ceilings, kitchen and bathroom fit outs are varied so they are outside the terms of the development approval, the building is deemed to comply with the approval if the variation is authorised under 198C. The provision effectively permits the regulation to exempt specified matters from requiring a development approval amendment in the same way as the existing regulations exempt specified matters from requiring development approval.

Amended section 197, section 198 and new section 198C are intended to work as follows. Section 198C must be considered to determine whether an amendment to a development approval is necessary. If an amendment is necessary then amended section 197 gives the proponent the ability to apply for an amendment. Section 198 sets out the process for deciding such an application.

Clause 10 Development other than use lawful when begun Section 203 (1) (c)
Adds the words “because of an amendment of this Act” to the end of section 203(1)(c). The addition of these words clarifies that the provision only applies if the Act changes but not if the development, of itself, changes so that it is no longer exempt development. As the provision stands, it could perhaps be interpreted as making lawful a development that started out being an exempt development under schedule 1 of the regulation but, because of a change to the nature of the development during construction, it stops being exempt. This was not the intention of the provision and the modification clarifies the intent.

Clause 11 Use as development lawful when begun Section 204 (1) (c)
The new section 204(1)(c) adds the words “because of an amendment of the development table or regulation” to the end of s204(1)(c). The addition of these words clarifies that the provision only applies if a development table or regulation changes but not if the development, of itself, changes so that it is no longer exempt development. As the provision stands, it could perhaps be interpreted as making lawful a development that started out being an exempt development under schedule 1 but, because of a change to the nature of the development during construction, it stops being exempt. This was not the intention of the provision and the modification clarifies the intent.

Clause 12 Payment for leases Section 246 (2) (c) and (d)
Substitutes new sections 246 (2) (c) & (d) in the Act. New section 246(2)(c) omits the specific reference to “rural leases” because it is not necessary because of the operation of amended s254 and s280 of the Act (see clauses 16 and 18 of this Bill). The amendments allow a further grant of a rural lease to be made where an undertaking to pay rent and/or for payment by instalments is made.

New section 246(2)(d) extends the operation of the former charging policies under the repealed Act (section 169). Section 246 (1) of the Act states that the authority may not grant a lease for less than market value. Section 246 (2) states that subsection (1) does not apply in particular circumstances, that is, there are specific conditions under which the authority may grant a lease for less than market value. A lease to which the new section

461A (inserted by Clause 33 of this Bill) or new section 246A (inserted by clause 15 of this Bill) applies are leases which the authority may grant for less than market value.

Clause 13 Section 246(3) (b) and (c)
Substitutes new paragraphs (b) and (c) in section 246(3). Under section 246 the planning and land authority must not grant a lease other than for payment of an amount that is not less than the market value of the lease. New paragraphs (b) and (c) of s246(3) clarify when an entity is taken to have paid not less than the market value for a lease. The present s246(3) makes it clear that payment for a lease can include a combination of money and infrastructure or works. However, the infrastructure or works must be provided on the sale lease and not another lease. New paragraphs (b) and (c) expand section 246(3). Under amended s246(3), an entity pays an amount that is not less than the market value of a lease if:

> "(a) the entity pays less than the market value of the lease (the monetary component); and
>
> (b) the entity provides another component (a non monetary component) comprising:
>
> > (i) infrastructure or other work in relation to the lease or another lease; or
> >
> > (ii) 1 or more of the following under a deed or agreement with the Territory or Territory authority:
> >
> > > (A) goods;
> > >
> > > (B) services;
> > >
> > > (C) works; and
>
> (c) the total value of the monetary component and the non monetary component is not less than the market value of the lease."

Clause 14 New section 246 (3A)
Inserts section 246(3A) in the Act for similar reasons to those mentioned above in Clause 13. Under section 246(2)(e), s246(1) does not apply to the grant of a lease prescribed by regulation for which the amount prescribed by regulation has been paid. New section 246(3A) makes it clear that the amount prescribed by regulation can be comprised of a monetary component and a non monetary component as described in new s246(3A)(b).

Clause 15 New section 246A
New section 246A specifies the conditions under which a person may apply for the grant of a new lease where the new lease adjoins another lease granted to the person. The granted lease must be a concessional lease. Payment for the new lease may be calculated in the same way the granted concessional lease was calculated. If, for example, payment for the granted concessional lease was calculated under repealed Act provisions, payment for the new lease may also be calculated using the repealed Land Act provisions.

Clause 16 Grant of further leases Section 254 (1) (e)
Amends section 254 of the Act to provide for rural leases that are rental leases. New subsection 254 (1) (e) provides that the section applies if the amount determined under section 280 of the Act for a rental rural lease has been paid or for a rural lease, that is not a rental lease, that any amounts, determined under section 280, allowed to be paid by instalments has been paid.

Clause 17 Grant of further lease includes authorised use New section 255 (4)
Amends section 255 of the Act to insert new subsection 255 (4) which provides that a further lease may include provisions that are different to those in the original lease. This is a 'to remove any doubt' provision. However, the further lease must retain all existing authorisations of use of the land under the lease as required by section 255 (2). The provision includes an example that suggests that a restriction on the number of dwellings permitted on the lease may be included in the further lease where no restriction had been in the original lease. The example provided is not exhaustive and may extend, but does not limit, the provision.

Clause 18 Section 280
Amends section 280 of the Act so that the section reflects the amendments made under clauses 12 and 16 of this Bill and provides that the amount payable for a further rural lease may be paid in instalments.

Clause 19 Application for extension of time to commence or complete building and development Section 298A (3) to (5)
Substitutes new sections 298A(3) to (5) in the Act. *Planning and Development Amendment Regulation 2008 (No 4)* - SL2008-41 modified the requirements in the Act and amended the regulation in relation to applications for extensions of time to commence or complete development provisions in a lease to provide for a reduced fee regime; removal of a maximum extension period; to make provision for hardship; and allowed for delays in obtaining statutory approvals to be taken into account.

In December 2008 the planning and land authority published a *Guide to fees for extending building and development provisions*, which provided a detailed explanation on the intended application of section 298A of the Act and Division 5.7.2 of the regulation. In practice, industry expressed concerns that the regulation did not necessarily provide for the scaling of fees over time in the manner intended.

The amendments made by this Bill (made through amendment regulation SL 2009/35) make it clear that the fee for an extension of time is scaled over time (lower fee for the first 12 months extension and a higher fee for second extension, etc) and that this scaling applies whether an extension of time is sought in one or multiple applications.

The amendments are as follows:
Sub-section (3)(b) makes it clear that in defining the ***required fee*** that this is to be worked out using the formula specified for each year, or part year, of the period of extension of time sought. A clear worked example of how the required fees should be calculated is also provided.

Sub-section (4) inserts clarification about how earlier extensions of time which have been approved are taken into account in working out the required fee, in particular:

> "(4)(a)(i) and (ii) require the period of extension be taken to include each earlier period of extension granted, other than extensions for which the required fee was waived under s131 of the *Financial Management Act 1996*, or an earlier extension prescribed by regulation; and
>
> (4)(b)(i) and (ii) require the fee is to be reduced by the amount of fee paid for each earlier extension and by any amount waived for an earlier extension under the *Financial Management Act."*

Note: the removal of extensions granted where the fee is waived under section 131 of the *Financial Management Act 1996* from the calculation of fees for future extensions of time is a new element to the Act but is consistent with the approach taken to zero fee extensions of time already set under ss205, 206, and 207 of the regulation.

Sub-section (5) more clearly defines the variables used in the formula for calculating the required fee under (3)(b) – this formula remains unchanged. Sub-section (5) states that:

> ***"A*** is the figure, being not more than 5, as prescribed by regulation (i.e. as listed in column 3 of the Tables 203 and 204 in the regulation) for the relevant year of the period of extension (definition reworded);
>
> ***B*** is the amount of land rates payable under the *Rates Act 2004* in the financial year of the application (definition unchanged);
>
> ***D*** is the lesser of
> (a) 365 [if extension is for a whole year]; and
> (b) The number of days for which the extension is sought in the relevant year."

Sub-section (5) also inserts the definition of ***period of extension*** (s298A) in the Act – which was previously in the regulation.

Clause 20 Extension of time to commence or complete building and development Section 298B (5) and (6)
Omits sections 298B(5) and (6). This means that there is no upper limit on the number of extensions that can be granted provided the required fee is paid.

Clause 21 New section 312A
Section 291 of the repealed Act provided for the conversion of Commonwealth leases. This section was applied in circumstances where under section 27(1) of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cwlth), (PALM), a declaration classifying land as National Land had been rescinded, revoked, amended or varied. Consequently, land that had been National Land ceased to be National Land.

PALM, section 27, states that the Minister may declare land to be National Land only where it is, or is intended to be, used by or on behalf of the Commonwealth. In this section, the Minister may rescind, revoke, amend or vary land that is National Land. Furthermore, section 28 of PALM states that at any time when any land in the Territory is not National Land, that land is Territory Land for the purposes of PALM. In the event that National Land becomes Territory Land, section 291 of the repealed Act allowed for a lease that was in force immediately before the declaration to be taken as having been granted under the repealed Act. In this way, the continuity of these leases and their continued management under Territory legislation was assured.

The Act does not have a provision similar to section 291 of the repealed Act. The new section 312A corrects this omission.

Clause 22 Expiry – ch 15 Section 431 (2) (a) and (b)
Modifies the Act by inserting new sections 431(2) (a), (b) and (c) to reflect changes in headings.

Clause 23 Transitional—applications lodged before commencement day Section 442 (1)
Substitutes a new section 442(1). The amendment expands section 442 to include an application for an amendment of an approval under the repealed Act. Under new section 442(1), the section applies, if before the commencement day of the Act:

(1) a person applied for an approval under the repealed Act, section 226 (Application to undertake development); or

(2) an amendment of an approval under the repealed Act, section 247 (Minor amendments); and

(3) immediately before commencement day, the authority had not finally decided the application.

Clause 24 New section 442 (4)
Inserts new section 442(4) which specifies the meaning of "finally decided" and "reconsideration period" for the section. An application for approval under the repealed Act is "finally decided" if:

(a) the period for making an application under the repealed Act, section 246 for reconsideration of the authority's decision on the application for approval has ended and no application for reconsideration has been made; or

(b) If an application for reconsideration of the authority's decision on the application for approval is made within the reconsideration period – the authority has made a decision on the application for reconsideration under the repealed Act, section 246(1)(b); or the authority is taken to have confirmed the original decision under the repealed Act, section 246B.

"Reconsideration period" means the period within which an application must be made under the repealed Act, section 246(3).

Under sections 442 (2) and (3), the repealed Act continues to apply in relation to the application despite its repeal and if the application is approved, the approval is taken to be a development approval under this Act.

Clause 25 New section 442C
Inserts new section 442C which sets out the transitional position for development applications for approval of an estate development plan (EDP) where processes were begun before the commencement of the Act but the application is lodged after commencement of the Act .The intention is that the repealed Act and old territory Plan apply to the assessment of all development applications for EDP's that were submitted to the authority for comment prior to the commencement date of the Act.

This section applies to a development application that relates to an Estate Development Plan (EDP) that is lodged on or not later than 6 months after commencement day of the Act and the EDP was given to the authority before commencement day for consideration. The development application may be made and decided in accordance with the repealed Act as if that Act had not been repealed.

If the development application is approved, the approval is taken to be under the Act and unless extended under the Act, continues in force until the time when it would have ended under the repealed Act. The development application is taken to be a merit track proposal for section 198(2) (Deciding applications to amend development approvals) of the Act.

Under section 5(4), the repealed Act applies in relation to any application for reconsideration, or of review, of the decision on a development application to which this section applies.

Section 5(5) sets out what the authority must consider in deciding whether a document is an EDP. The authority must consider whether the document is identified, by itself or another document, as an EDP; the document appears to be a document to which government publication Guidelines for Estate Development Plans- Greenfields Land Subdivision-September 2007 applies; and whether the document includes plans or a proposal for the subdivision of land and related infrastructure development.

Section 5 (6) states that an EDP (the final plan) is taken to have been given to the authority for consideration if the EDP (the initial plan) was given to the authority and the final plan is identifiable as a revised version of the initial plan.

Clause 26 Section 444

Section 444

Substitutes a new section 444. New section 444(1) specifies that the section applies not only when a person has an approval immediately before the commencement day of the Act but also when the authority gives an approval under the repealed Act after the commencement of the Act. Under section 444 (2) the approval:

(a) is taken to be a development approval under the Act;

(b) unless extended under the Act, continues in force until the time when it would have ended under the repealed Act; and

(c) for the Act, section 198 (2) (Deciding applications to amend development approvals) is taken to relate to a proposal in the merit track.

Pursuant to new section 444 (3), if the application to which the approval relates was not required to be publicly notified under the repealed Act, an application under the Act for the amendment of the approval need not be notified under the Act.

Section 444A

This clause also inserts new section 444A. This section applies to development approvals under section 442, 442B, 442C, 443 or 444 of the Act unless the development approval commenced before commencement day. The development approval in relation to these types of approvals commences, or is taken to have commenced, when the development approval would have commenced under the repealed Act, if the repealed Act had not been repealed.

Section 444A corrects an omission from the transitional provisions of the Act. The transitional provisions in the Act indicated when a development approval ends under the transitional arrangements but did not indicate when the approval commences. New section 444A makes it clear that the approval commences in accordance with the repealed Act and not the Act.

Clause 27 Transitional—approvals in force with uncommenced extension Section 445 (2) (a)

Substitutes a new section 445 (2) (a) in the Act. When an approval has been given under the repealed Act and an extension of the approval has been granted but has not commenced on commencement day of the Act, the approval is taken to be a development

approval under the Act and ends at the end of the period for which the approval was extended under the repealed Act before commencement day.

Clause 28 Sections 446 and 446A
Substitutes new sections 446 and 446A.
These provisions relate to "lease and development conditions". The repealed Act and the old Territory Plan permitted the creation of "lease and development conditions" to apply local specific rules to the relevant area. Under the repealed Act, lease and development conditions played a role in informing the market prior to release of land. The conditions were prepared prior to release of land and contained information to assist the prospective buyers. The lease and development conditions were able to vary the Territory Plan through local, specific planning and development conditions, planning control plans, set backs, block details etc. The authority applied the lease and development conditions to the assessment of subsequent individual projects following the release of the land.

The new provisions set out more clearly the transitional arrangements for these matters and confirms their application in areas covered by relevant EDPs.

New section 446A permits the application of lease and development conditions in geographical areas that were the subject of a relevant EDP. The new section permits both the application of existing lease and development conditions (that is, conditions made prior to the commencement date) as well as the application of new lease and development conditions. New section 446 gives the authority the power to make new lease and development conditions for application as noted above.

New section 446A makes it clear that the new Territory Plan can require lease and development conditions (existing or new) to apply in the assessment of development applications in geographical areas that were the subject of an EDP submitted to the authority for comment prior to the commencement date (provided that the relevant development application for the EDP has been granted). This ability applies to all such geographical areas irrespective of whether the development application for the EDP was lodged prior to or after the commencement date. To be clear, such lease and development conditions do not apply to the assessment of the EDP but apply to the assessment of subsequent development applications for individual projects in the geographical area that was covered by an already approved EDP.

These arrangements are for transitional purposes only. The intention is for the lease and development conditions to apply only in respect to land covered by EDPs submitted prior to the commencement date. For the future, all planning rules including local specific planning rules are to be incorporated, as necessary, into the relevant codes of the new Territory Plan.

New section 446
This section gives the authority the ability to make new lease and development conditions in certain circumstances. The authority may make such conditions in relation to the following geographical areas, that is, land that:

- is covered by an EDP that is the subject of a development approval given under new section 442C (that is, EDPs submitted prior to the commencement date but the development application for the EDP was not lodged until after this date; or
- is covered by an EDP that is the subject of a development approval given under the provisions of the repealed Act in relation to an "earlier application" whether the

approval was given before or after the commencement date (that is, EDPs submitted prior to the commencement date and the development application for the EDP was also lodged prior to this date).

On or after the commencement day, the authority may make a lease and development condition in relation to the above land, or part of the land.

Section 446(3) sets outs definitions for the section.

"defined land" means land identified in the old territory plan for the repealed Act, subdivision 2.3.4

"earlier application" means an application for development approval if the application–

(a) was made under the repealed Act before the commencement day; and

(b) relates to land that was defined land (which means land identified in the old territory plan for the repealed Act subdivision 2.3.4); and

(c) is for approval to subdivide whether or not it is also for approval of something else.

"earlier approval" means a development approval under the repealed Act of an earlier application.

"lease and development condition" means a lease and development condition that could have been made under the repealed Act, but for its repeal.

"old territory plan" means the territory plan under the repealed Act.

Section 446(4) states that section 88 of the Legislation Act (Repeal does not end effect of transitional laws, etc) does not apply.

New section 446A
This section provides for existing lease and development conditions to be considered when assessing some development applications. The section applies to a development application if the application is:

"(i) not in the code track; or

(ii) for development on land to which a lease and development condition -

a. under section 446 applies; or

b. made under the repealed Act applied immediately before the commencement day."

The authority (or the Minister, if the Minister has exercised the power to "call in") must consider the lease and development condition in making a decision under section 162 (Deciding development applications) in relation to the application if-

(a) the territory plan provides that the lease and development condition may vary the plan; and

(b) the condition is relevant to assessing the application and granting the approval.

Clause 29 Section 447
Omits the transitional definition for the extended meaning of development approval.

Clause 30 Section 458
Substitutes a new section 458. New section 458 provides for where an applicant (potential lessee) has applied for a grant of a lease under the repealed Act, section 161 (granting of leases), or section 163 (Leases to community organisations) or section 164 (Special leases), and the lease is not granted before commencement day. In this case the lease may be granted either under the repealed Act or if agreed to by the applicant, the Act. Importantly this applies irrespective of when the application was 'decided'.

Previously, the relevant transitional arrangements were determined by reference to the date of the decision on the application. This approach is simplified so the transitional arrangements are determined solely by the date of application.

This means that a lease applied for but not granted before 31 March 2008 may be granted under the repealed Act or the Act. The potential lessee (the person) must agree in writing to a lease being granted under the Act if that person applied for the grant before 31 March 2008.

Subsection 458 (3) provides that the lease may be registered under the *Land Titles Act 1925*, as if the repealed Act had not been repealed, and is taken to have been granted under this Act.

New section 458 also removes the requirement for deciding the application, for the grant of the lease, within 6 months of commencement day.

Clause 31 Section 459
Clause 31 deletes section 459 because the amendments to section 458 (see Clause 30 of this Bill) no longer makes the distinction of whether or not an application, for the grant of a lease, has been decided within 6 months or not of commencement day. Section 459 had provided for the grant of a lease applied for before commencement day but not decided within 6 months of commencement day.

Clause 32 New section 459A
Inserts a new section 459A. Previously, sections 458 and 459 of the Act set out transitional arrangements for the granting of a lease. Under these sections, a lease may be granted under the repealed Act where an application for a lease was made but not decided before the commencement of the Act on 31 March 2008.

There was some doubt as to whether these transitional provisions cover the scenario where a contract for the sale of the lease was entered into before 31 March 2008 but the lease is not granted until after this date. This is because it is arguable that in this scenario the decision to grant the lease was made before 31 March, that is, when the contract for sale was entered into and as such, existing sections 458 and 459 do not apply.

New section 459A removes this doubt by inserting transitional provisions that authorise the granting of leases in these cases. Under the new section 459A, the lease may be granted under the repealed Act (i.e. in the old format with references to the repealed Act etc) or, if the potential lessee agrees in writing, under the Act. Where a lease is granted under the repealed Act using this provision, the lease (like other leases granted under the repealed

Act) is taken to have been granted under the Act and it can still be registered at the Land Titles Office.

This provision has retrospective application in that it applies from 31 March 2008. For the amendment to apply to all relevant leases, it needs to be operational from 31 March 2008.

Section 76 of the *Legislation Act 2001* - Non–prejudicial provision may commence retrospectively - prohibits statutory instruments from including retrospective provisions that are prejudicial unless specifically authorised by the relevant Act. New section 459A does not contravene this requirement because it is non –prejudicial. The effect of new section 459A is to confirm that the:

- authority or land development agency is able to meet obligations for the grant of leases under contracts for sale entered into prior to 31 March 2008;
- the potential lessee has the right to elect to have the lease granted in terms consistent with granting under the repealed Act or in terms consistent with granting under the Act; and
- relevant leases acquire the same status and protections afforded other leases covered by the Act and can be registered at the Land Titles Office (consistent with the underlying approach in existing transitional provisions in Part 15.6 of the Act).

These effects are not prejudicial but operate to the benefit of the parties concerned.

Clause 33 New section 461A

Inserts new section 461A in the Act. New section 461A specifies the payment conditions for a lease to a community organisation. In this, a person may apply for the grant of a lease. If the application was made under the repealed Act before it was repealed, the authority may grant the lease under the repealed Act. The repealed Act section 163 allowed for leases to be granted to community organisations. Clause 33 extends the operation of the former charging policies under section 163 (2) of the repealed Act. The repealed Act allowed the authority to grant a lease for less than market value by direct grant (section 161 (1) (d)), to a community organisation (section 163), as a special lease (section 164), as a further lease (section 171), as a further rural lease (section 171A) or as a further lease for purposes other than residential or rural (section 172). The new section 461A equates to the repealed Act section 163(2).

Part 3 Planning and Development Regulation 2008

Clause 34 Legislation amended—pt 3

Declares that it is the *Planning and Development Regulation 2008* that is being amended.

Clause 35 Section 410

Omits section 410. Section 410 specifies that chapter 15 of the Act is modified by schedule 20 of the regulation. Because the Act modifications contained in schedule 20 have now been inserted permanently into the Act section 410 is no longer required.

Clause 36 Schedule 20

Omits Schedule 20. Schedule 20, the schedule that listed Act modifications, is no longer required because the modifications have now been inserted permanently into the Act by this amendment Bill.

Clause 37 Dictionary, definition of period of extension

The definition of *period of extension* is omitted as it has been moved into s298 of the Act.