

2019

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**PLANNING AND DEVELOPMENT (COMMUNITY CONCESSIONAL LEASES) AMENDMENT BILL
2019**

EXPLANATORY STATEMENT

**Presented by
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EXPLANATORY STATEMENT

Introduction

This explanatory statement (the Statement) relates to the Planning and Development (Community Concessional Leases) Amendment Bill 2019 (the Bill) as presented in the Legislative Assembly for the Australian Capital Territory (the Assembly). It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Background

The *Planning and Development Act 2007* (the Act) provides a planning and land system that contributes to the orderly and sustainable development of the ACT, consistent with the social, environmental and economic aspirations of the people of the ACT, and in accordance with sound financial principles.

The new framework for the sale of non-contiguous land to not for profit community organisations at less than market value aims to provide greater social value, transparency and accountability when land is granted for community uses.

Until this time, concessional community land has been provided for on a 'first come, first served' and non-competitive 'case-by-case' basis via the direct sales mechanism. The original intent of community direct sales was to support Canberra's early development so an appropriate level of community services and facilities were available to attract new residents to the Territory.

However, as Canberra has grown and matured as a city, the availability of land for community facilities has come under increasing pressure. This imperative, coupled with the need for a more compact city and more efficient utilisation of land, as per the ACT Planning Strategy (2018), calls for a more proactive and strategic identification of sites for community uses that align with identified need.

The foundation of aligning need with available community land releases recognises the importance of maintaining a diverse range of community services across the Territory. In particular, a balance needs to be achieved between the well-established frameworks for obtaining the highest monetary return for land, and the provision of broader ongoing non-monetary benefits to the community.

The provision of concessional community land for 'lower order' not for profit uses such as Men's Sheds, scout halls and community centres recognises the importance of creating opportunity and equity for all community organisations that need land. The reforms contained in the Bill are in recognition of the inherent social value provided by not for profit organisations that would not otherwise be able to purchase land at full market price.

Social value is the term used to describe the additional value (non-monetary in nature) created in the delivery of a service which has a wider community or public benefit. This extends beyond the social value delivered as part of the primary service or activity. 'Social value' captures the concept of the positive impacts on the economic, social and environmental well-being of the area.

The concept of social value has most notably been enshrined in legislation in the United Kingdom, through the *Public Services (Social Value) Act 2012*. While this Act relates specifically to the connection with public service contracts, the principles underpinning the legislation call for the public sector to have regard to economic, social and environmental well-being.

This holistic approach to community well-being is in essence an expansion of the triple bottom line approach to policy development taken by the ACT Government and forms the basis of the policy framework actualised in this Bill.

The policy framework for the sale of land to not for profit community organisations at less than market value:

- proactively identifies and aligns community need with land availability
- maximises the benefits of the land for the whole community
- provides procedural transparency and accountability when assessing tenders
- provides more equitable access to land for new community organisations and those without existing land holdings in the ACT
- promotes the more efficient use of land already held by community organisations, by taking in to account their existing landholdings when applying for additional land
- promotes the innovative and collaborative provision of a diverse range of community services, by encouraging different organisations to collaborate, co-locate, and share facilities
- provides certainty for community organisations about the timing of land release and the opportunities and constraints on each site
- provides concessions on the purchase price of land to community organisations in recognition of their not for profit status and the social value they will deliver to the community through their use of the land
- seeks to retain concessional community use land for the benefit of the whole community in keeping with its use, and
- enhances land management, monitoring and compliance mechanisms to ensure that land continues to deliver community benefits and social value in the long-term.

Overview

The purpose of the Bill is to amend the *Planning and Development Act 2007* and *Planning and Development Regulation 2008* to establish the new policy framework for the sale of land to not for profit community organisations at less than market value. The policy framework supersedes the prior mechanism of directly granting land at less than market value to community organisations.

The objective of the amendments is to set the mechanism to release the land via a two-stage tender process, unless subject to a Territory Executive agreed exception. The grant of a concessional Crown lease to a not for profit community organisation cannot be made unless both the grant process and the lease content is consistent with the policy framework, as recognised in the regulation.

The evaluation criteria for assessing the successful community organisation, which takes account of whole of community benefit (social value model), and efficient land use is set out in the regulation. A community concessional lease granted under the framework cannot be transferred unless the proposed purchaser satisfies the applicable requirements. These requirements for transfer are identified in the regulation.

The amendments also assist with compliance and enforcement by requiring that the relevant land, post initial grant, is used by the community organisation consistent with the approved purposes identified in the community concessional lease. Transfers of these leases cannot occur unless the proposed purchaser meets the relevant requirements of the policy framework.

The Bill requires a community concessional lease to include a range of specific provisions and required community uses. The amendments also require lessees to report on the authorised use.

The amendments support the planning and land authority to strategically identify land suitable for 'lower order' uses across the Territory, thus providing greater transparency for the community. This strategic identification of land will also inform the assessment of future applications to deconcessionalise any concessional lease.

The holder of a concessional Crown lease (or community concessional lease as per the Bill), irrespective of whether the lease was granted before or after the commencement of the Bill, will still be able to apply for deconcessionalisation of their lease. However, the amendments require the Minister to consider the framework in deciding whether the proposed deconcessionalisation is in the public interest. Transitional provisions have included in the Bill which enable existing applications to vary the concessional status of a lease to continue to be assessed under the prior parameters of the public interest test.

For procedural fairness and equity, the Bill puts in place transitional legislative provisions for a number of community organisations to continue to progress, as they submitted community direct sale applications under the prior policy regime. These transitional legislative provisions also preserve the Territory Executive's decisions to support a number of other community direct sale applications for which leases have not yet been issued.

Human rights implications

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. Section 6 of the *Human Rights Act 2004* (HRA) notes that only individuals have human rights.

It is anticipated that most of the not for profit community organisations subject to the new policy framework under this Bill will be incorporated bodies and therefore not subject to the HRA, however this analysis considers the potential human rights impacts and the impact on personal rights and liberties on individual members of these organisations, and the community more broadly. To the extent that any provision of this Bill limits an individual's human rights, it is considered that any limitation is reasonable and justified.

Section 28 of the HRA provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the HRA provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

It could be argued the Bill engages the following human rights:

- Section 12: Right to privacy and reputation
- Section 14: Right to freedom of thought, conscience, religion and belief
- Section 16: Right to freedom of expression
- Section 17: Right to participate in public life
- Section 27: Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

The right to privacy and reputation

The Bill may affect the right to privacy and reputation, as it requires the community organisation to make all records relating to the use of the land available to the auditor, when requested, and these records may include personal information.

This requirement is reasonable as the auditor will be subject to the *Information Privacy Act 2014*, and the audit is necessary to ensure the integrity of the community use reports, and to confirm that the land is being used for the required use.

Right to freedom of thought, conscience, religion and belief

Right to freedom of expression

Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

The Bill may impact the above rights in a positive way. The new framework safeguards the remaining finite community concessional land, and gives an opportunity to express interest in the land to a broader range of not for profit community organisations.

This positive impact is further demonstrated by the requirement for the Minister to consider the broader public interest when reviewing an application to deconcessionalise a lease, and by the mandatory lease conditions and transfer restrictions which aim to ensure that the land continues to be used for community use. The Territory Executive retains the ability to depart from the policy framework to meet any unanticipated community needs that are not adequately covered in the framework.

The Bill may also impact the above rights in a negative way. The Bill includes the ability to terminate the lease if the required uses are not provided, or reporting and auditing is not completed.

This impact is balanced against the broader aim of the Bill to ensure that the finite remaining community use sites are used for maximum community benefit. If a community concessional lease is not being used for the required purpose, or is being underutilised, then it is required to be returned to the pool of community land to be available for another community organisation in the future.

Right to participate in public life

The Bill supports the right to properly participate in public life by making the community land grant process more transparent. For example, the regulation sets out the available land and the needs analysis, and the notifiable instrument will include specific blocks of land identified for specified purposes and subject to the proposed tender process.

Impact on personal rights and liberties

In addition to the rights impacted under the HRA, the Bill also requires the lease to state the minimum requirements for how frequently, and for how long, the service must be provided. This may present difficulties for some community organisations that have premises that are set up a certain way, and have limited flexibility to be used for other purposes or for longer hours. This impact is offset by the aim of the new policy framework to use the limited remaining community sites for maximum usage and community benefit.

The Bill sets out the requirements for the expression of interest process and the tender process, with no guarantee that all proposals will move to the tender stage. An initial assessment will be undertaken by the planning and land authority to determine whether the organisation meets the mandatory criteria. This will ensure that organisations that are not eligible for a certain site will not waste time preparing a tender, and instead can consider future sites where they meet the eligibility criteria.

Scrutiny of bills terms of reference

The Bill has been assessed against the terms of reference of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), which ask whether any clause of the Bill:

- unduly trespasses on personal rights and liberties
- makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers
- makes rights, liberties and/or obligations unduly dependent upon nonreviewable decisions
- inappropriately delegates legislative powers, or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The Bill does not unduly impact on the above rights, liberties, obligations, delegations or scrutiny.

Outline of provisions

Part 1 Preliminary

Clause 1 Name of Act

This clause names the Act

Clause 2 Commencement

This Act commences by Ministerial notice.

Clause 3 Legislation amended

This clause states the legislation that is to be amended, namely the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008*

Part 2 Planning and Development Act 2007

Clause 4 Restriction on direct sale by authority

Section 240 (2) (a) and (b)

This clause states that a community concessional lease must meet the grant objective to be considered eligible for a direct sale of land.

Clause 5 New section 240 (2A) and (2B)

This clause allows the Executive to grant a community concessional lease not by tender. If the Executive makes such a decision, a statement of reasons must be notified with the lease use specified.

Clause 6 Section 240 (4), definition of grant objective, new paragraph (f)

This clause adds a further grant objective, to deliver a service that provides ongoing benefits to the community.

Clause 7 Payment for leases

New section 246 (2) (ca)

This clause allows the planning and land authority to grant a lease for less than market value by granting a community concessional lease by direct sale under section 253C or tender under section 253F.

Clause 8 Section 246 (2) (e)

Subsequent to clause 7, this clause omits the existing provision which allowed the planning and land authority to grant leases mentioned in section 461A (Payment for leases to community organisations).

Clause 9 New part 9.2A

This new part includes the following provisions to establish the new policy framework for the sale of land to not for profit community organisations at less than market value.

New section 253A Meaning of community concessional lease etc

This section provides definitions of “community concessional lease”, “community concessional lease provisions”, “future community land”, “potential use”, “required use”, and other terms.

New section 253B Meaning of community concessional lease use

This section sets out the permitted community uses in a community concessional lease. These uses have the same meaning as in the territory plan.

New section 253C Grant of community concessional lease by direct sale

This section allows the planning and land to grant a community concessional lease by direct sale, if the Executive approves it under section 240(2) and the lease includes the required community concessional lease provisions.

New section 253D Statement of future community land for stated districts

This section allows the planning and land authority to notify a statement about the government’s priorities for community use land in the district.

New section 253E Notification of future community land for grant of community concessional lease by tender

This section allows the planning and land authority to determine areas of territory land as future community land. The determination is a notifiable instrument.

New section 253F Grant of community concessional lease by tender

This section allows the planning and land authority to grant a community concessional lease by tender if the requirements set out in the regulation are complied with.

New section 253G Meaning of community concessional lease provisions

This section identifies the provisions that must be included in a community concessional lease.

For subsection (e) (ii) it should be noted that the exact frequency and duration of non-continuous service(s) to be specified in the community concessional lease will not be unilaterally imposed by the planning and land authority. Rather, the exact frequency and duration of service will match those proposed in the prospective lessee's expression of interest and tender response.

New section 253H Community use reports

This section requires the lessee to provide reports on the use of the land, which covers the matters stated in the regulation.

New section 253I Audit of community concessional lessee's use of land

This section allows the planning and land authority to audit the lessee's use of the community concessional lease.

Clause 10 No decision on application unless consideration in public interest

New section 261 (2) (b)

This section adds a new criterion for the Minister to consider to determine whether an application to vary a concessional lease to remove the concessional status is in the public interest. The Minister must consider the potential uses of the land under any statement of future community land for stated districts.

Clause 11 New section 261 (2) (f)

This clause adds a new criterion for the Minister to consider to determine whether an application to vary a concessional lease to remove the concessional status is in the public interest. The Minister must consider any statement of future community land for stated districts, and any notifications of community land available by tender.

Clause 12 Restrictions on dealing with concessional leases

Section 265 (1), new note

This clause adds a new note on the definition of dealing with a lease.

Clause 13 Section 265 (3) and note

This clause is about planning and land authority consent to dealing with concessional leases, and provides that this consent is not affected by the transfer of land subject to a building and development provision, certain matters under the *Land Titles Act 1925*, court orders, bankruptcy, or other matters prescribed by regulation.

Clause 14 Consent to s 265 dealings

Section 266 (1) (a)

This clause allows the community concessional lease to be transferred or otherwise dealt with, if the applicant is an eligible person and satisfies the grant criteria.

Clause 15 Section 266 (1), new note

This clause adds a new note on the definition of dealing with a lease.

Clause 16 Termination of leases

Section 382 (1) (a)

This clause clarifies the application of section 382 to terminate leases.

Clause 17 New section 382 (6)

This section allows the planning and land authority to terminate the community concessional lease if the lessee fails to comply with a compliance reminder notice within the stated timeframes to report on the use of the lease, provide additional requested information or commission a required audit.

Clause 18 New chapter 26

This chapter sets out the transitional provisions for direct sale applications from community organisations that have not been completed.

New section 510 Meaning of commencement day – ch 26

This section provides that the chapter commences on the day the amendment Act commences.

New section 511 Application by community organisation for direct sale before 6 December 2017

This section provides that the provisions of the previous Act apply to direct sale applications from a community organisation prior to 6 December 2017.

New section 512 Certain development applications made before the commencement day

This section provides that the provisions prior to the commencement of the Act continue to apply to development applications to vary concessional leases to remove concessional status.

New section 513 Transitional regulations

This section permits transitional regulations be made to cover further transitional matters. This section is necessary to cover minor unforeseen issues to ensure the amendments operate as intended.

New section 514 Expiry – c26

This section states that chapter 26 expires five years after it commences.

Clause 19 Dictionary, new definitions

This clause provides a number of new definitions, including “community concessional lease”, “community concessional lease provisions”, “community concessional lease use”, “community use report”, “future community land”, “potential use” and “required use”.

Part 3 Planning and Development Regulation 2008

Clause 20 Direct sale criteria for community organisations, section 112 (1)

This clause clarifies that the existing criteria for the direct sale of a lease to a community organisation applies to market value leases, as the new framework will apply to community concessional leases.

Clause 21 Section 112 (1), new notes

This clause updates the notes for section 112 (1).

Clause 22 Direct sale criteria for supportive accommodation, section 113 (1)

This clause clarifies that the existing criteria for the direct sale of a lease for supportive accommodation applies to market value leases, as the new framework will apply to community concessional leases.

Clause 23 Section 113 (1), new note

This clause updates the note for section 113 (1).

Clause 24 New part 5.2A

This new part sets out the new process and requirements for granting a community concessional leases by tender.

New section 143 Definitions – pt 5.2A

This section defines “additional use”, “proposed use” and “threshold criteria”.

New section 144 Tender process – expressions of interest – Act, s 253F (b)

This section sets out that an expression of interest process must occur prior to the tender process to assess suitability of community organisations to submit a tender.

New section 145 Grant by tender – threshold criteria – Act, s253F (c)

This section provides the threshold criteria for community organisations to demonstrate in tendering for community concessional leases. This includes threshold criteria such as financial capacity and relevant experience and expertise.

New section 146 Tender process – content of tenders – Act, s253F (b)

This section sets out the information to be included in a tender.

New section 147 Tender process – assessment of tenders – Act, s253F (b)

This section sets out the tender assessment process.

New section 148 Community concessional lease provisions – Act s 253G, def community concessional lease provisions, par (h)

This section states that a provision stating the additional uses for the land is prescribed.

Clause 25 New section 152

This clause provides the criteria for the grant of a further community concessional lease, that all reporting is up to date, and any required audits have been undertaken.

Clause 26 Dictionary, note 3

This clause amends the note to refer to further definitions under the new framework.

Clause 27 Dictionary, new definitions

This clause defines “additional use”, “proposed lease” and “threshold criteria”.

Schedule 1 Consequential amendment

Part 1.1 Land Titles Act 1925

This clause adds a new example in section 69A of the *Land Titles Act 1925*.