

2010

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

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

EXPLANATORY STATEMENT

Circulated by authority of
Andrew Barr MLA
Minister for Planning

PLANNING AND DEVELOPMENT (CONCESSIONAL LEASES) AMENDMENT BILL 2010

Terms used in this Explanatory Statement

- “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 statement and which amends both the Act and the Regulation.
- “the amendment Act” is a reference to the amendment Act which this Bill will become if passed. If passed this bill will become the *Planning and Development (Concessional Leases) Amendment Act 2010*;
- “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 (or Regulation) unless otherwise indicated;
- “new section ...” or similar is a reference to a new section inserted into the Act (or Regulation) 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 (or Regulation) as modified by the bill.

In addition, unless otherwise indicated:

- “concessional lease” means a concessional lease as defined in new s235A (clause 4)
- “market value lease” means a market value lease as defined in new s235B (clause 4) (including but not limited to all leases of a type listed in Part 5.2 of new schedule 5 (clause 37)).
- “possibly concessional lease” means a lease that is possibly concessional as defined in the definition of “possibly concessional” in new s235C (clause 4) (including only leases that are both listed in Part 5.3 of new schedule 5 (clause 37) and meet all of the other requirements of new s235C)
- “identified as a concessional lease” or “identified as a market value lease” refers to an express identification of the status of the concessional/market value lease whether through a:
 - written statement or condition in the wording of the lease itself;
 - stamp or notation on the lease; or
 - note in a memorial in the Register of Land Titles attaching to or pertaining to the relevant lease. Refer to clause 41 on *memorial*.Note the identification of a lease as “not concessional” is in this bill equivalent to an identification that the lease is a “market value lease” (eg new s235C(1)(b) Examples-statement to effect that lease is a market value lease clause 4)
- “ACTPLA” means the ACT Planning and Land Authority
- “ACAT” means the ACT Civil and Administrative Tribunal

Overview

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 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 ss235, 235A, 235B, 235C (clause 4). New s235A defines “concessional lease”.

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 Register of Land Titles 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 (new s235A (clause 4))
- **market value leases** - leases deemed to be not concessional (new s235B (clause 4))
- **possibly concessional leases** - leases deemed to be possibly concessional (new s235C (clause 4)).

4. The new category “possibly concessional” includes leases that might or might not be concessional. 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 and therefore is a concessional lease.

5. A lease that is of a type that is identified in the Act as a “market value lease” 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 a “market value lease” and therefore not concessional.

6. A concessional lease cannot be sold without ACTPLA consent (s265). The bill includes amendments to confirm that the sale of a concessional lease contrary to this restriction is nonetheless valid once registered in the Register of Land Titles. 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. In practice, sales of leases specifically identified as concessional will not be able to be registered in the Register of Land Titles without ACTPLA consent.

7. A number of other amendments are made in this Bill related to the above new definitions of concessional, market value and possibly concessional leases.

8. The bill also makes a number of technical corrections to provisions in the Transitional Chapter of the Act (Chapter 15) to remove some inconsistencies. These are not related to the new provisions concerning concessional leases.

Part 1 Preliminary

Clause 1 Name of Act

9. Clause 1 indicates the name of the amendment Act. This Bill, if passed, will become the *Planning and Development (Concessional Leases) Amendment Act 2010*.

Clause 2 Commencement

10. Clause 2 indicates the time of commencement of the amendment Act.

Clause 3 Legislation amended

11. Clause 3 notes that the Bill amends both the Act and the Regulation. The amendments to the Act are in “Part 2 - Planning and Development Act 2007”. The amendments to the Regulation are in “Part 3 – Planning and Development Regulation 2008”.

Part 2 Planning and Development Act 2007

Clause 4 Section 235

12. Clause 4 deletes s235 and inserts new ss235, 235A, 235B, 235C.

Sections 235A, 235B, 235C - overview

13. Together new ss235A, 235B, 235C group all leases into the following categories:

- *concessional leases* - new s235A (clause 4)
- *market value leases* - new s235B (clause 4)
- *possibly concessional leases* - new s235C (clause 4).

235 Meaning of lease - Act

14. New s235 defines “lease” for the purposes of the Act. The wording of new s235 is the same as the wording of the existing definition of “lease” in existing s235(1). New s235 is simply a relocation of the existing definition for clarity and as a consequence of new ss235A, 235B, 235C.

235A Meaning of concessional lease - Act

15. These are leases of a type described in the definition of “concessional lease” in new s235A (clause 4).

16. New s235A states that a lease is a concessional lease if it was granted for less than market value (new s235A(1)) or for free. This principle applies whether the relevant payments were in the form of a lump sum or rent. This is the main element of the definition. There are a number of qualifications as follows.

17. The concessional lease status of a lease can be removed by a development application under s139 for a lease variation as described under Division 9.4.2 (ss260-264) and assessed in accordance with the requirements in Division 9.4.2. If the concessional lease status is removed, then the lease variation can be effected by surrender of the existing lease and grant of a replacement lease. The replacement lease must be identified as a market value lease (new s238(2)(a) clause 5). A lease identified as a market value lease is a market value lease (new s235B(b), item 9 of Part 5.2 of new schedule 5) and therefore is not a concessional lease (new s235A(2)).

18. A transitional like provision applies. The following leases are not concessional. Leases granted for less than market value and granted prior to the commencement of the Act on 31 March 2008 are not concessional in the following circumstance. The leases are not concessional if the outstanding balance of the market value was paid sometime after grant or if the rent was reduced to nominal rent under s186 of the repealed *Land (Planning and Environment) Act 1991* (new s235A(1)(a)(ii)). This provision recognises such leases and the fact that such payments had the effect of removing the concessional status of the lease under the repealed Act. This provision has particular relevance to a number of existing leases and future lease sales. As such the provision is located in new s235A rather than in Chapter 15 Transitional.

19. Concessional leases include consolidated, subdivided, regranted and further leases but only if one or more of the original leases was a concessional lease (new ss235A, 235B(b), item 1 of Part 5.2). A consolidated, subdivided, regranted or further lease is not a concessional lease only because it was granted (as a result of the consolidation, subdivision etc) for no payment or for less than market value. Such a lease is only a concessional lease if one of the original or parent leases was a concessional lease (new ss235A(4), item 1 of Part 5.2).

20. A lease is not a concessional lease if it is a market value lease (new s235A(2)). In other words, the market value lease category takes precedence over the “concessional”. Refer to definition of *market value lease* in new s235B (clause 4).

235B Meaning of market value lease – Act

20. These are leases of a type described in the new definition of a “market value lease” in new s235B. All leases that are market value leases are not concessional (new s235A(2)).

21. New s235B states that the following leases are “market value leases”:

- all leases of a type listed in the schedule of “market value leases” (Part 5.2 of new schedule 5) (new s235B(b))
- other leases not listed in Part 5.2 except for:
 - leases identified as a concessional lease; and
 - possibly concessional leases (new s235B(a))

22. This definition means, for example, that all of the following leases are market value leases, including leases of a type:

- that are not identified concessional and are not possibly concessional
- that are:

- not listed in the schedule of “market value leases” leases (part 5.2 of new schedule 5); and
- not listed in the schedule of “possibly concessional” leases (part 5.3 of new schedule 5); and
- not expressly identified as a concessional lease
- that are identified as a “market value lease” or a lease that is “not concessional” (item 9 of Part 5.2 of new schedule 5)
- that are granted after 30 March 2008 under the Act but not identified as a concessional or market value lease contrary to new s238(2)(a) (item 19 of Part 5.2 of new schedule 5). There is one exception. Leases granted after 30 March 2008 under the repealed Land (Planning and Environment) Act under transitional provisions (s458 or s459A) and granted before commencement of the amendment Act might be concessional even if not identified as such at the time of grant (new s235C(1)(a)(ii)).
- that are listed in the Regulation under item 20 of Part 5.2

23. 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 Regulation made under s235(1)(c)(v) of the Act adds to this 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 market value 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.

235C Meaning of possibly concessional-Act

24. These are leases of a type described in the definition of “possibly concessional” in new s235C.

25. A lease that is not a possibly concessional lease and is not identified as a concessional lease is a market value lease (new s235B(a)). All market value leases are not concessional (new s235(2)). In other words an unidentified lease cannot be a concessional lease if it is not a possibly concessional lease.

26. 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 under s257.

27. A possibly concessional lease is not necessarily a concessional lease. Whether such a lease is a concessional lease depends on whether it falls within the parameters of the definition of a concessional lease in new s235A. Under s235A, a lease in the “possibly concessional” category might be concessional depending on whether it was:

- granted for less than market value and

- is not a “market value lease” ie is not a lease of a type described in Part 5.2 of new schedule 5 (clause 37)

28. The new s235C definition of “possibly concessional” (clause 4) states that a lease is “possibly concessional” only if it meets each and every one of the following requirements. The lease must be one that:

- was granted:
 - before 31 March 2008 (new s235C(1)(a)(i)); or
 - after 30 March 2008 but before the commencement of this Amendment Act and granted under the repealed *Land (Planning and Environment) Act 1991* under ss458, 459A (new s235C(1)(a)(ii))
- is not identified as a concessional lease (new s235C(1)(b)(i))
- is not identified as a market value lease or a lease that is not concessional (new s235C(1)(b)(ii))
- is not listed in the schedule of market value leases in new Part 5.2 (new s235C(2))
- is of a type listed in the schedule of “possibly concessional” leases in Part 5.3 of new schedule 5 (new s235C(1)(c)).

29. The schedule of “possibly concessional” leases in new Part 5.3 of new schedule 5 (clause 37) 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. The list has been prepared in the light of legislative and investigative experience relevant to concessional leases. 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 new Part 5.3 simply by looking at the lease and without undertaking further historical or background research.

Clause 5 Granting leases **Section 238(2)(a)**

30. Clause 5 deletes s238(2)(a) and substitutes new s238(2)(a).

31. New s238(2)(a) makes it clear that when a new lease is granted it must be appropriately identified ie include the appropriate statement. If the lease is a concessional lease (ie granted for less than market value) it must include a statement that the lease is a concessional lease. If the lease is granted for market value it must include a statement that the lease is a market value lease or a statement to this effect. This requirement ensures that the concessional or market value status of any such leases is immediately clear. (“Identified” – refer to dictionary of terms at the front of this explanatory statement).

32. Similar requirements are made in new s254(3) (clause 7) in respect to the grant of further leases and in new s459A(3)(aa) (clause 33) for leases granted after 30 March 2008 but granted under the repealed *Land (Planning and Environment) Act 1991* under transitional provisions (s458, 459A). This requirement is also consistent with the approach taken in relation to declarations as to concessional status in new s259(2) (clause 16), new s259A(2) (clause 16).

33. If in future a lease is granted under the Act and by mistake it is not identified as required by new s238 then the lease will be deemed to be a market value lease (new s235B(a)) and as such will be deemed to be not concessional (new s235A(2)). There is one exception to this. Leases granted after 30 March 2008 under the repealed Land (Planning and Environment) Act under transitional provisions (s458 or s459A) and granted before commencement of the amendment Act might be concessional even if not identified as such at the time of grant (new s235C(1)(a)(ii)).

Clause 6 Restrictions on dealings with certain leases
Sections 251(3) to (7)

34. Clause 6 deletes existing ss251(3) to (7) and substitutes new sections 251(3) to (7).

Sections 251(3) to (7) - background.

35. 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.

Section 251(3)

36. 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*).

Section 251(4)

37. New s251(4), like existing s251(3), prohibits dealing in the specified leases for the specified period. “Deal” is defined in existing s234 to include assign, transfer, sublet and part with possession. New s251(4) departs from the existing s251(3) in the following way. Under new s251(4) the restriction on dealing only applies if it is evidenced by a memorial as required under new s251(3). If there is no memorial then the restriction does not apply. If the memorial is made attesting to the restriction then the lease cannot be sold, transferred etc during the restricted period without the consent of ACTPLA. If the memorial is not made then the lease can be sold etc without ACTPLA consent.

Section 251(5)

38. New section 251(5) permits the regulation to exempt a lease (or a lease in relation to a specified type of dealing) from section 251. New s251(5) is the same as existing s251(4).

Section 251(6)

39. New s251(6) indicates that any dealing contrary to new s251 restrictions “has no effect”. New s251(6) is worded the same as existing s251(5). However, there is an exception to s251(6) in new s251(7).

Section 251(7)

40. New section 251(7) is similar to and made for the same reasons as new s265(3) (clause 22).

41. New section 251(4) (like existing s251(3)) prohibits the sale of leases (or other dealings) during the period prescribed in existing s251(8) without the consent of ACTPLA under existing s252. New section 251(6) (like existing s251(5)) states that any dealing entered into without the required consent “has no effect”.

42. New section 251(6) (like existing s251(5)) appears to be at odds with section 58 of the *Land Titles Act 1925* headed “Estate of registered proprietor paramount”. Section 58 of that Act affirms that the holder of a certificate of title registered in the Register of Land Titles (eg as a result of a property sale) has valid title that is paramount over other interests.

43. A NSW court decision has confirmed that provisions like new s251(6) do not impair the guarantees that apply to sales and titles registered in the Register of Land Titles. 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 Register of Land Titles is valid and effective notwithstanding contravention of other legislation like new s251(6). This case confirms that once a sale is registered in the Register of Land Titles it is legally valid and acquires the protections and guarantees of the Land Titles Act notwithstanding any breach of a provision like new s251(6).

44. New s251(7) makes explicit the principle set out in the above NSW case. The new section confirms that new s251(6) does not apply to dealings registered in the Register of Land Titles.

45. New s265(3) (clause 22) makes a similar amendment for the same reasons. Section 265(2) states that any dealing in a concessional lease without ACTPLA consent required under s265(1) “has no effect”. New s265(3) states that s265(2) does not apply to dealings registered in the Register of Land Titles.

46. The greater clarity as to the s251 status of leases introduced in this bill (ie by requiring the restriction to be evidenced by a memorial) should minimise if not eliminate the number of occasions in which new s251(7) would need to operate. If the s251 restriction is evidenced in a memorial as required by new s251(3) then it will not be possible to register a dealing in such leases without the requisite ACTPLA consent.

Section 275(4), (5) (clause 23)

47. New sections 275(4), (5) inserted by clause 23 are relevant to the operation of s251. Refer to the notes on clause 23.

Clause 7 Grant of further leases
Section 254(3) and note

48. Clause 7 deletes s254(3) and inserts new s254(3) and a new note.

49. New s254(3) makes it clear that when a further lease is granted it must include the appropriate statement ie it must be identified “concessional” or identified “market value lease”. If the lease is a concessional lease (ie granted for less than market value) it must be identified as a concessional lease. If the lease is granted for market value it must be identified as a market value lease or include a statement to this effect. This requirement ensures that the concessional or market value status of any such leases is immediately clear. (“Identified” – refer to dictionary of terms at the front of this explanatory statement).

50. Similar requirements are made in new s238(2A) (clause 5) in respect to the grant of further leases and in new s459A(3)(aa) (clause 33) for leases granted after 30 March 2008 but granted under the repealed *Land (Planning and Environment) Act 1991* under transitional provisions (s458, 459A). This requirement is also consistent with the approach taken in relation to declarations as to concessional status in new s259(2) (clause 16), new s259A(2) (clause 16).

51. If in future a further lease is granted under the Act and by mistake it is not identified as required by 254(3) then the lease will be deemed to be a market value lease (new s235B clause 4) and as such will be deemed to be not concessional (new s235A clause 4). There is one exception to this. Leases granted after 30 March 2008 under the repealed Land (Planning and Environment) Act under transitional provisions (s458 or s459A) and granted before commencement of the amendment Act might be concessional even if not identified as such at the time of grant (new s235C(1)(a)(ii)).

Clause 8 Decision about whether lease concessional
Section 257(1)

52. Clause 8 makes minor editorial changes only for clarity.

Clause 9 Section 257(2) and (3)

53. Clause 9 omits ss257(2) and (3) and substitutes new ss257(2), (2A), (3).

Sections 257(2), 257(2A), 257(3) - Background

54. The owner, seller or buyer of a lease that is not clearly marked as a “concessional” or “market value lease” may need to assess whether the lease is a concessional or market value lease.

55. The lessee could decide to do their own research as to whether a lease is concessional. New section 259D (clause 16) 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:

- published guidelines (new s259D)
- definition of “market value lease” new s235B, Part 5.2 of new schedule 5 (clause 37)
- definition “possibly concessional” new s235C, Part 5.3 of schedule 5
- definition of “concessional” new s235A
- price paid for original lease and circumstances around the grant

56. The lessee (perhaps in consultation with a prospective buyer) may instead of doing their own research elect to apply to ACTPLA for a “declaration” ie confirmation as to whether the lease is concessional or a market value lease. The lodgement fee for such applications is \$1035 (as at 17 June 2010). Such an application is made under s256. The process for such applications is as follows.

- lessee lodges application to ACTPLA under s256
- ACTPLA must give notice to any holders of a registered interest in the lease of the application and allow 15 working days for comment (new s257(2)).
- ACTPLA has a further 15 working days to decide the application.
- If ACTPLA fails to make a decision within the required period then ACTPLA is deemed to have decided the lease is concessional (new s257(3) (clause 9)).
- ACTPLA may reverse a deemed decision that a lease is concessional but only if it does so within 20 working days (new s257(4) clause 9)
- ACTPLA must give notice of decision on the application to the applicant and all holders of a registered interest in the lease (new s257(5))
- ACTPLA must also give notice of the decision to the Registrar-General of Land Titles new s259(2) (clause 16)
- the decision is reflected in a memorial to the lease by the office of the Registrar-General of Land Titles

257(2), 257(3)

57. New s257(2) and new s257(3) together make the time frames for ACTPLA decision on s256 applications more clear.

58. If there is a holder(s) of a registered interest other than the lessee, then ACTPLA must give the holder(s) notice of the application and at least 15 working days to comment (new s257(2)). If there is no holder of a registered interest other than the lessee then this step is not required. A “registered interest” is an interest registered in the Register of Land Titles under the *Land Titles Act 1925* (Dictionary).

59. If there is a holder(s) of a registered interest other than the lessee, then ACTPLA, ACTPLA has 15 working days from the end of the required consultation period to decide the application (new s257(3)(b)). If there is no holder of a registered interest other than the lessee, then ACTPLA has 15 working days from the date of the application to decide the application (new s257(3)(a)). If ACTPLA fails to decide the matter within the required period then ACTPLA is deemed to have decided that the lease is concessional (new s257(3)). Refer also to new s257(4) on reversing the deemed decision.

257(2A)

60. New s257(2A) requires ACTPLA to decide that the lease is not concessional unless ACTPLA is satisfied that the lease is concessional. If the necessary evidence is missing, incomplete, unclear or equivocal then ACTPLA must decide that the lease is not concessional. The same approach is taken in new s258(2A) (clause 13), new s258B(3) (clause 15) and new s258C(4) (clause 15).

61. New section 257(2A) also deems any lease found to be not concessional under s257 to be a “market value lease”. This rule applies irrespective of whether the lease meets all of the requirements of the definition of “market value lease” in new s235B.

Put another way, in deciding a s256 application under s257 ACTPLA must consider only the definition of a “concessional lease” in new s235A. If the conclusion is that the lease is not a concessional lease as per this definition then the lease is deemed to be a “market value lease”. The same approach is taken in new s258(2A) (clause 13), new s258B(3) (clause 15) and new s258C(4) (clause 15).

Clause 10 Section 257(4)

62. Clause 10 omits s257(4) and substitutes new s257(4).

63. New section 257(3) requires ACTPLA to decide an application within the required time. If a decision is not made within the required time then ACTPLA is deemed to have decided that the lease is a concessional lease.

64. 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.

65. However, the deemed decision can still be reversed under other provisions in certain limited circumstances:

- on appeal to ACAT (new item 19 of schedule 1 (clause 36), s408 and new s409A (clause 25))
- on a new application by the lessee pointing to further evidence or evidence of a formal error in the original decision (new s258A clause 15, new s258B clause 15)
- by ACTPLA on its own initiative if it is satisfied that there is new evidence or evidence of a formal error (new s258C clause 15)

Clause 11 Section 257(5)

66. Clause 11 amends s257(5). Existing s257(5) requires notice of decision under s258 to be given to all holders of an interest in the lease. New s257(5) requires notice to be given only to holders of a “*registered* interest” consistent with existing s257(2)(a). This corrects an inconsistency. “Registered interest” is defined in the Dictionary as an interest registered under the *Land Titles Act 1925*. Similar changes are made in new s258(4) (clause 14).

Clause 12 New section 257(6)

67. Clause 12 inserts new s257(6).

68. 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 time set under that law 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 and decisions under s257. Section 257 has its own default position. 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 and for it to do so would be contrary to the intended operation of s257.

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.

Clause 13 Authority may decide whether lease concessional on own initiative

New section 258 (2A)

69. Clause 13 inserts new s258(2A).

70. 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 and the lease status is checked in the course of considering the variation/further lease. In deciding the concessional status of a lease under s258, ACTPLA must consider whether the definition of “concessional lease” (new s235A) applies to the lease.

71. 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 9), new s258B(3) (clause 15) and new s258C(4) (clause 15).

72. New section 258(2A) also deems any lease found to be not concessional under s258 to be a “market value lease”. This rule applies irrespective of whether the lease meets all of the requirements of the definition of “market value lease” in new s235B. Put another way, in deciding this matter under s258 ACTPLA must consider only the definition of a “concessional lease” in new s235A. If the conclusion is that the lease is not a concessional lease the lease then becomes a “market value lease”. The same approach is taken in new s257(2A) (clause 9), new s258B(3) (clause 15) and new s258C(4) (clause 15).

Clause 14 Section 258(4)

73. Clause 14 amends s258(4). Existing s258(4) requires notice of decision under s258 to be given to all holders of an interest in the lease. New s258(4) requires notice to be given only to holders of a “registered interest” consistent with existing s258(2)(a). This corrects an inconsistency. “Registered interest” is defined in the

Dictionary as an interest registered under the *Land Titles Act 1925*. Similar changes are made in new s257(5) (clause 11).

Clause 15 New sections 258A to 258C

74. Clause 15 inserts new sections 258A, 258B and 258C.

258A Application for decision about whether certain leases are concessional

75. Refer to notes on new section 258B.

258B Making other decisions about concessional status of certain leases

76. New s258A and new s258B apply 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 Register of Land Titles (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.

77. 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 a development application for a lease variation consistent with division 9.4.2.

78. 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(2)(a) 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.

79. If ACTPLA decides that there is additional information satisfying s258(2)(a), 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 8-12) and new s258C (clause 15). The process includes:

- notice of the application to any holders of interests registered in the Register of Land Titles (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)).
- notice of decision on concessional status must be sent to the applicant and holders of an interest registered in the Register of Land Titles (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 16).

80. In making its decision on a s258A application, ACTPLA must take account of the definition of concessional lease (new s235A). New s258B(3) 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, incomplete, unclear or equivocal then ACTPLA must declare the lease to be not concessional. New s258B(3) mirrors new s257(2A) (clause 9) and new s258C(4) (clause 15).

81. New section 258B(3) also deems any lease found to be not concessional under s258B to be a “market value lease”. This rule applies irrespective of whether the lease meets all of the requirements of the definition of “market value lease” in new s235B. Put another way, in deciding this matter under s258B ACTPLA must consider only the definition of a “concessional lease” in new s235A. If the conclusion is that the lease is not a concessional lease the lease then becomes a “market value lease”. The same approach is taken in new s257(2A) (clause 9) and new s258C(4) (clause 15).

258C Authority may make another decision about whether certain leases concessional on own initiative

82. 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.

83. 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.

84. 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.

85. 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 Register of Land Titles (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 Register of Land Titles (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).

86. In making its decision afresh, ACTPLA must take account of the definition of “concessional lease” (new s235A). 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, incomplete, 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).

87. New section 258C(4) deems any lease found to be not concessional under s258B to be a “market value lease”. This rule applies irrespective of whether the lease meets all of the requirements of the definition of “market value lease” in new s235B. Put another way, in deciding this matter under s258C ACTPLA must consider only the definition of a “concessional lease” in new s235A. If the conclusion is that the lease is not a concessional lease the lease then becomes a “market value lease”. The same approach is taken in new s257(2A) (clause 9) and new s258B(3) (clause 15).

Clause 16 Section 259

88. Clause 16 deletes existing s259 and substitutes new ss259, 259A, 259B, 259C, 259D.

259 Lodging notice of decision about concessional status of lease

89. New s259 applies after a decision is made as to the concessional/market value status of a lease under amended ss257, 258, new s258B, new s258C and any merit review process in ACAT has completed. New s259 requires ACTPLA to 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 applied to decisions that the lease is concessional).

90. Once the Registrar-General of Land Titles receives the notice, the status of the lease as a concessional or market value lease must be recorded on the Register of Land Titles (s48 *Land Titles Act 1925*). In practice this is achieved by a new memorial to the lease.

91. New s259 does not apply to the identification of a lease as concessional or market value when the lease is granted. Such an action is not “a decision” about an existing lease and is therefore not an action to which s259 applies.

259A Lodging notice of deemed decision about concessional status of lease

92. Under new ss257(3), 258B(4) if ACTPLA fails to decide an application for declaration of concessional status within the required period, ACTPLA is then deemed to have decided that the lease is a concessional lease. New s259A requires ACTPLA to give notice of such a deemed decision to the Registrar-General of Land Titles for registration under the Land Titles Act. 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) and after any merit review process in ACAT (new s259A(1)).

93. Once the Registrar-General of Land Titles receives the notice, the status of the lease as a concessional or market value lease must be recorded on the Register of Land Titles (s48 *Land Titles Act 1925*). In practice this is achieved by a new memorial to the lease.

94. All leases identified as a market value lease (including leases identified as “not concessional”) become, by virtue of this identification, market value leases (new s235B(b), item 9 of Part 5.2 of new schedule 5).

259B Non-concessional status of leases

95. New s259B applies to leases identified as a market value lease.

96. When a lease is granted it must be identified as a concessional lease or as a market value lease as appropriate (new s238(2)(a) clause 5, new s254(3) clause 7, new s459A(3)(aa) clause 34). Leases that are not specifically identified at the time of grant can be later identified following a decision to declare the status of the lease under amended ss257, 258 and new ss258B, 258C. An identification to the effect that a lease is “not concessional” is the equivalent of an identification to the effect that a lease is a “market value lease” (new s259B(1)(a) Examples).

97. All leases identified as a market value lease (including leases identified as “not concessional”) are, by virtue of this identification, market value leases (new s235B(b), item 9 of Part 5.2 of new schedule 5).

98. New s259B(2) states that the market value status of the lease can be relied on. New s259B(3) prohibits ACTPLA from changing this market value status in any circumstance.

259C Concessional status of leases

99. When a lease is granted it must be identified as a concessional lease or as a market value lease as appropriate (new s238(2)(a) clause 5, new s254(3) clause 7, new s459A(3)(aa) clause 34). Leases that are not identified can be later identified as concessional/market value following a decision to declare the status of the lease under amended ss257, 258, new ss258B, 258C.

100. If a lease is identified concessional at the time of grant, then this concessional status cannot later be changed except in the following circumstance. Such a lease can only be changed through a development application by the lessee for a lease variation to de-concessionalise the lease consistent with ss260-266 of Division 9.4.2 (new

ss259C(2), 259C(4)(b) (clause 16); 260A (clause 18)). In summary, consistent with ss260-266 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;

101. A different approach applies to leases that are not identified as a concessional lease at the time of grant but later declared to be concessional sometime after the initial grant through the declaration processes set out in amended s257, 258, new ss258A, 258B, 258C. In this case, the concessional status of the lease cannot later be changed by ACTPLA (new s259C(2) clause 16) except in limited circumstances. The status of such a lease can only be changed as a result of:

- an application by the lessee for a lease variation to de-concessionalise the lease (new s259C(4)(b) clause 16, new s260A (clause 18)); or
- a revisiting of the original declaration as sought by the lessee or by ACTPLA on own initiative (new s259C(4)(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))

259D Concessional status guidelines

102. New section 259D (clause 16) gives ACTPLA the power to publish guidelines to assist people to research the concessional/market value status of a lease. The guidelines are a notifiable instrument and as such must be posted online on the ACT Legislation Register.

Clause 17 Application-div 9.4.2 **Section 260**

103. Clause 17 amends s260. This is an editorial amendment. New s260 makes it explicitly clear that this section applies to applications for lease variations that are solely for the removal of the concessional status of a lease as well as to applications that would both remove the concessional status of the lease and make other changes.

Clause 18 New section 260A

104. Clause 18 inserts new s260A. New s260A makes it clear that the concessional status of a lease can only be removed by a development application for a lease variation consistent with Division 9.4.2. This section is subject to new ss258B, 258C (clause 15).

Clause 19 Development approval of application about concessional lease subject to condition **Section 262**

105. Clause 19 amends s262. New s262 makes it clear that the payment required for de-concessionalisation of a lease can be made to the Territory or a Territory agency or entity. The term “Territory entity” is defined in a new Dictionary definition (clause 41) as:

- a territory authority; or
- a territory instrumentality; or
- a territory-owned corporation

106. “Territory authority”, “territory instrumentality” and “territory-owned corporation” are terms defined in the *Legislation Act 2001*.

Clause 20 New section 262(2)

107. Clause 20 inserts new s262(2). New s262(2) applies to cases where the amount required to be paid for removal of the concessional status of a lease is waived or part waived under s131 of the *Financial Management Act 1996*. New s262(2) removes any doubt that the removal of the concessional status of the lease can proceed in this circumstance as though the required amount had been physically paid in full as though there had been no waiver.

Clause 21 Working out amount payable to discharge concessional leases
Section 263(1)

108. Clause 21 amends s263(1). The amendment is similar to and made for the same reasons as the amendment in new s262 (clause 19).

Clause 22 Restrictions on dealings with concessional leases
New section 265(3)

109. Clause 22 inserts new section 265(3). New section 265(3) is similar to and made for the same reasons as new s251(7) (clause 6).

110. Section 265(1) prohibits the sale of a concessional lease (or other dealing) without the consent of ACTPLA. Section 265(2) states that any such purported sale “has no effect”. “Deal” is defined in s234 of the Act to include assign, transfer, sublet, part with possession.

111. Section 265(2) appears to be at odds with section 58 of the *Land Titles Act 1925*. Section 58 of that Act (headed “Estate of registered proprietor paramount”) affirms that the holder of a certificate of title registered in the Register of Land Titles has valid title that is paramount over other interests.

112. A NSW court decision has confirmed that provisions like s265(2) do not impair the guarantees that apply to sales and titles registered in the Register of Land Titles. The NSW court of appeal in *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 Register of Land Titles is valid and effective notwithstanding contravention of other legislation like s265(1) and provisions like s265(2). This case confirms that once a sale is registered in the Register of Land Titles it is legally valid and acquires the protections and guarantees of the Land Titles Act notwithstanding a breach of s265 of the Planning and Development Act.

113. New s265(3) makes explicit the principle stated in the above court decision. The new section confirms that subsection 265(2) does not apply to dealings registered in the Register of Land Titles.

114. The greater clarity as to the concessional status of leases introduced in this bill should minimise the number of occasions in which new s265(3) would need to operate. Sales of leases specifically identified as concessional will not be able to be registered in the Register of Land Titles without ACTPLA consent.

Clause 23 No variation of certain leases for 5 years
New section 275(4) and (5)

115. Section 275 prohibits 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)).

116. As indicated in the notes on amended s251 (clause 6), the restriction on dealing imposed by s251 recognises the fact that the lessee received an advantage in obtaining the relevant lease without going through a market competitive process. In return for this advantage, s251 requires the lessee to operate the lease for a specified period and not sell it during this time. In addition, the lessee cannot vary the lease for a five year period (s27(3)).

117. 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 or remove an existing use authorised by the lease or add a new authorised use. For example, a lease variation to modify an existing authorised use to increase the permissible gross floor area of a building would be allowed under new s275(4). Such variations should be allowed as they do not reduce the lessee's existing obligations to operate the lease for the five year period.

Clause 24 Transfer of land subject to building and development provision
Section 298(6)

118. Clause 24 deletes s298(6). Section 298(6) is replaced by a new Dictionary definition of *Commonwealth entity* (clause 38) and a new Dictionary definition of *Territory entity* (clause 41). The new definition of *Commonwealth entity* is the same as in existing s298(6) except it makes it clear that this definition includes entities in which the Commonwealth or a Commonwealth company have a controlling interest. The definition of "Territory entity" in clause 41 is the same as in existing s298(6).

Clause 25 New section 409A

119. Clause 25 inserts new section 409A.

120. A lessee can apply to ACAT for merit review of an ACTPLA declaration that a lease is concessional (amended item 19 of schedule 1 (clause 36), s408). New item 19A of schedule 1 (clause 36) extends an equivalent right of ACAT merit review to declarations made under new ss258B 258C (clause 15), that is, to second or subsequent declarations by ACTPLA as to concessional status.

121. Under new ss257(3) (clause 9), 258B(4) (clause 15) ACTPLA must decide applications or second applications for a declaration of the concessional status of a lease within the prescribed 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 that the lease is a market value lease (ie not concessional) contrary to the deemed decision (new ss257(4), 258B(5)).

122. New s409A sets out the time window for making an application to ACAT for merit review of a deemed decision on concessional status. Such an application must be made within a 20 working day period commencing at the end of the 20 working days that ACTPLA has to make a final decision contrary to the deemed decision. The ACAT rules can set a longer period for making an application (*ACT Civil and Administrative Tribunal Act 2008* s25(1)(e)).

Clause 26 Transitional effect - Legislation Act, s88
Section 430

123. Clause 26 amends s430.

124. Section 430 states that Chapter 15 Transitional is a law to which s88 of the Legislation Act applies. Section 88(1) of the Legislation Act states that the continuing operation of a transitional law or validating law is not affected only because the law is repealed.

125. Section 430 is inconsistent with ss446(4) and 467(4) which state that s88 does not apply to ss446, 467. This inconsistency is removed in new s430 which preserves the exceptions for ss446, 467.

126. Refer also to clause 28 in relation to s446.

Clause 27 Expiry - ch 15
Section 431(2)

127. Clause 27 amends s431(2).

128. Section 431(1) states that Chapter 15 Transitional expires 3 years after commencement of the Act. This means the chapter expires on 31 March 2011 (the Act commenced on 31 March 2008). There are some exceptions.

129. Section 431(1) is inconsistent with section 458(4) which states that s458 expires 5 years after commencement of the Act. This inconsistency is removed in new s431(2) which preserves the later expiry date in s458(4).

Clause 28 Power to make lease and development conditions
Section 446(5)

130. Section 431(1) states that Chapter 15 Transitional expires 3 years after commencement of the Act. This means the chapter expires on 31 March 2011 (the Act commenced on 31 March 2008). Section 446(5) states that section 446 expires five years after commencement of the Act. This is inconsistent with s431.

131. Clause 28 resolves this inconsistency by deletion of s446(5). The deletion of s446(5) means that section 446 will expire three years after commencement of the Act ie on 31 March 2011 – consistent with s431(1) - instead of five years after commencement. Operational experience indicates the five year time frame is not necessary. This amendment is consistent with the deletion of s446A(3) (clause 29).

132. Refer also to new s430 (clause 26).

**Clause 29 Transitional-application for development approval if lease and development condition
Section 446A(3)**

133. Section 431(1) states that Chapter 15 Transitional expires 3 years after commencement of the Act. This means the chapter expires on 31 March 2011 (the Act commenced on 31 March 2008). Section 446A(3) states that section 446A expires five years after commencement of the Act. This is inconsistent with s431.

134. Clause 29 resolves this inconsistency by deletion of s446A(3). The deletion of s446A(3) means that section section 446A will expire three years after commencement of the Act ie on 31 March 2011 – consistent with s431(1) - instead of five years after commencement. Operational experience indicates the five year time frame is not necessary. This amendment is consistent with the deletion of s446(5) (clause 28).

**Clause 30 Transitional-extended application of s275
Section 453(2)**

135. Clause 30 deletes s453(2). The deletion is made because section 453(2) is redundant. The explicit application of s88 of the Legislation Act in s453(2) is unnecessary as it is already explicitly applied by s430.

Clause 31 New sections 456B and 456C

136. Clause 31 inserts new sections 456B, 456C.

456B Transitional-certain City Area Leases Act 1936 leases

137. New section 456B is similar to new section 456C and is made for similar reasons.

138. 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.

139. The above legislation was repealed by the *Land (Planning and Environment) (Consequential Provisions) Act 1991*. The *Land (Planning and Environment) Act 1991* 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 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.

456C Transitional-certain Leases (Special Purposes) Act 1925
leases

140. New section 456C is similar to new section 456B and is made for similar reasons.

141. Section 5AB of the *Leases (Special Purposes) Act 1925* reduced the rent payable for relevant leases 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 *Leases (Special Purposes) Act*.

142. The above legislation was repealed by the *Land (Planning and Environment) (Consequential Provisions) Act 1991*. The *Land (Planning and Environment) Act 1991* 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* despite the repeal of the *Leases (Special Purposes) Act*. To underline this point and make it immediately clear, new s456C explicitly states that the abolition of rent for the relevant leases was preserved notwithstanding the repeal of the *Leases (Special Purposes) Act*.

Clause 32 Transitional-applications for certain grants before commencement day
New section 458(3)(aa)

143. Clause 32 inserts new s458(3)(aa).

144. Section 458 is a transitional provision which applies to applications for leases made before but not granted before commencement of the Act. Section 458(2) states that ACTPLA can grant the lease under the repealed *Land (Planning and Environment) Act 1991* or, if the applicant agrees in writing, under the *Planning and Development Act*.

145. New section 458(3)(aa) requires any lease granted under the repealed *Land (Planning and Environment) Act* under section 458 to be identified as a concessional lease or a market value lease as appropriate. This requirement will ensure that the concessional or market value status of any such leases is immediately clear. This requirement is consistent with the approach in new s238(2)(a) (clause 5), new s254(3) (clause 7), new s259(2) (clause 16), new s259A(2) (clause 16).

146. If in future a lease is granted under the Act and by mistake it is not identified as required by new s458(3)(aa) then the lease will be deemed to be a market value lease (new s235B clause 4) and as such will be deemed to be not concessional (new s235A clause 4).

Clause 33 Section 458(4)

147. Clause 33 omits s458(4). Omitted s458(4) is redundant because of new s431(2) (clause 27).

Clause 34 Transitional-contracts before commencement day to grant leases
New section 459A(3)(aa).

148. Clause 34 inserts new s459A(3)(aa).

149. Section 459A is a transitional provision. The provision applies to contracts entered into before commencement of the Act for the grant of a lease if the lease was not in fact granted before commencement. Section 459A(2) states that ACTPLA can

grant the lease under the repealed *Land (Planning and Environment) Act 1991* or, if the applicant agrees in writing, under the Planning and Development Act.

150. New section 459A(3)(aa) requires any lease granted under the repealed Land (Planning and Environment) Act under section 459A to include a statement that the lease is a concessional lease or a market value lease as appropriate. This requirement will ensure that the concessional or market value status of any such leases is immediately clear. This requirement is consistent with the approach in new s238(2)(a) (clause 5), new s254(3) (clause 7), new s259(2) (clause 16), new s259A(2) (clause 16), new s458(3)(aa) (clause 32).

151. If in future a lease is granted under the Act and by mistake it is not identified as required by new 459A(3)(aa) then the lease will be deemed to be a market value lease (new s235B clause 4) and as such will be deemed to be not concessional (new s235A clause 4).

**Clause 35 Transitional – plans of management
Section 467(5)**

152. Section 431(1) states that Chapter 15 Transitional expires 3 years after commencement of the Act. This means the chapter expires on 31 March 2011 (the Act commenced on 31 March 2008). Section 467(5) states that section 446A expires on 1 January 2012. This is inconsistent with s431.

153. Clause 35 resolves this inconsistency by deletion of s467(5). Deleted s467(5) is replaced by new s430 (clause 26). New section 430 indicates that section 467 expires five years after commencement of the Act ie on 31 March 2013 as opposed to existing s467(5) which expires the section on 31 March 2012. Operational experience indicates that the later expiry date is appropriate. This is particularly so as this is a section to which s88 of the Legislation Act does not apply (new s430 (clause 26)).

**Clause 36 Reviewable decisions, eligible entities and interested entities
Schedule 1, item 19**

154. Clause 36 deletes item 19 from schedule 1 and inserts new items 19, 19A.

155. Existing item 19 of schedule 1 (with s408) gives the lessee a right to apply to ACAT for merit review of an ACTPLA declaration that a lease is or is not concessional. The right of review of a declaration that a lease *is not* concessional is illogical as such a decision is necessarily always to the benefit of the lessee. New item 19 incorporates a change of wording to make it clear that this right of review applies to declarations that a lease is concessional and does not apply to declarations that a lease is not concessional.

156. New item 19A of schedule 1 extends this right of review to declarations made under new ss258B (clause 15), 258C (clause 15), that is, to second or subsequent declarations by ACTPLA as to concessional status.

Clause 37 New schedule 5

157. Clause 37 inserts new schedule 5.

Schedule 5 Market value leases and leases that are possibly concessional

158. New schedule 5 has three parts:

- Part 5.1 Interpretation (explains certain key terms)
- Part 5.2 Market value leases (lease types deemed “market value leases”)
- Part 5.3 Possibly concessional leases (lease types deemed “possibly concessional” subject to new s235C (clause 4))

Part 5.1 Interpretation

159. Notes the definition of certain key terms used in new schedule 5.

Part 5.2 Market value leases

160. New Part 5.2 lists 20 types or classes of leases that are deemed to be “market value leases”. All leases that meet the description in one or more of these 20 types or classes are market value leases (new s235B(b) (clause 4)).

161. All leases of a type not mentioned in new Part 5.2 and also

- not mentioned in new Part 5.3 (schedule of Possibly concessional leases); and
- not identified as a concessional lease

are deemed to be market value leases (new s235B(a) clause 4).

162. A market value lease cannot be a concessional lease (new s235A(2) clause 4) and cannot be a lease that is possibly concessional (new s235C(2) clause 4).

163. Refer also to definition of “concessional lease” (new s235A), definition of “market value lease” (new s235B), definition of lease that is “possibly concessional” (new s235C) for more detail on how these concepts interact.

164. The 20 items in new Part 5.2 include lease types that were deemed to be not concessional under s231(1)(c) including all items in s99 of the Regulation made under s235(1)(c)(v). New Part 5.2 also includes the following items. The wording of the descriptions of the listed categories in new Part 5.3 has been framed to permit easy identification.

165. Item 1 of new Part 5.2 includes all consolidated, subdivided, further or regranted leases other than such leases mentioned in new s235A(1)(b). In other words consolidated, subdivided leases etc are deemed to be market value leases unless one of the original leases involved in the consolidation subdivision etc was a concessional lease as defined in s235A(1). Put another way, this item makes it clear that a lease is not a concessional lease only because it is the product of a consolidation subdivision etc and no payment was made for the lease.

164. Item 17 of new Part 5.2 includes all leases granted after 30 March 2008 other than leases identified as a concessional lease subject to the following exception. In other words, any lease granted after 30 March 2008 that does not include a statement that the lease is concessional is deemed to be a market value lease. This rule does not apply to leases granted under the repealed *Land (Planning and Environment) Act 1991* under transitional provisions s458, 459A after 30 March 2008 and before commencement of this amendment Act (item 17 of Part 5.2, new s235C clause 4). Under new s235A, s235B (clause 4) a lease granted on or before 30 March 2008

might still be a concessional lease but only if it is of a type that is not identified elsewhere in new Part 5.2 and meets other requirements of the definition of a concessional lease (s235A (clause 4)).

Part 5.3 Possibly concessional leases

166. For a lease to be “possibly concessional” it must meet the requirements of s235C. This means that the lease must:

- not be identified as a concessional or market value lease;
- be granted before 31 March 2008 (or be granted under the repealed *Land (Planning and Environment) Act 1991* under transitional provisions s458, 459A after 30 March 2008 and before commencement of this amendment Act).
- be of a type listed in new Part 5.3;
- not be of a type listed in new Part 5.2.

167. All leases that are not “possibly concessional” and are not identified as concessional are market value leases (new s235B(a), 235C clause 4).

168. A “possibly concessional” lease is not necessarily a “concessional lease”. Whether such a lease is in fact a concessional lease depends on whether it falls within the parameters of the definition of a concessional lease in new s235A. 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.

169. The schedule of “possibly concessional” leases in new Part 5.3 of new schedule 5 (clause 37) 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. 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 new Part 5.3 simply by looking at the lease and without undertaking further historical or background research.

170. New Part 5.3 (item 12) includes leases of a type prescribed by regulation with the following exception. This item does not include leases that were the subject of a dealing registered in the Register of Land Titles after the commencement of this amendment Act and before the commencement of this regulation. Leases that have been the subject of such a dealing are not subject to this item 12. This item is intended to permit the regulation to add to the list in new Part 5.2 should the necessity for an additional item become apparent in the light of operational experience following the commencement of this amendment Act. This item is transitional in the sense that it expires three years after commencement of the amendment Act (new s235C(3) clause 4).

Clause 38 **Dictionary, new definitions**

171. Clause 38 inserts new definitions of the terms *Commonwealth entity* and *community organisation* into the Dictionary to the Act.

172. The term *Commonwealth entity* is used in existing sections:

- 235(2) as defined in s235(3)
- 298(2)(b)(v) as defined in s298(6)
- 99(i) of the Regulation as defined in s99(2) of the Regulation
- 99(j) of the Regulation as defined in s99(2) of the Regulation
- 105(a)(ii) of the Regulation as defined in s100 of the Regulation
- 107(1) of the Regulation as defined in s100 of the Regulation.

173. The new definition of *Commonwealth entity* replaces the existing multiple definitions with a single, consolidated definition applying wherever the term is used in the Act or the Regulation. This consolidation makes the Act more readable and consistent.

174. The new definition of *Commonwealth entity* is consistent with the use of the term in the abovementioned existing sections except for the following instance. The new definition makes it clear that *Commonwealth entity* includes companies in which a controlling interest is held by the Commonwealth or a Commonwealth company under the *Commonwealth Authorities and Companies Act 1997* (Cwlth). This element is consistent with existing ss100, 105 and 107 of the Regulation but is not present in the term as used in the other abovementioned sections. There is no material reason for this difference. The new global definition corrects this inconsistency.

Clause 39 Dictionary, definition of *concessional lease*

175. Clause 39 deletes the existing definition of the term *concessional lease* and substitutes a new definition. The new definition refers to the definition of concessional lease in new s235A (clause 4).

Clause 40 Dictionary, definition of *market value lease*

176. Clause 40 deletes the existing definition of the term *market value lease* and substitutes a new definition. The new definition refers to the new definition of market value lease in new s235B (clause 4).

Clause 41 Dictionary, new definitions

177. Clause 41 inserts new definitions of the terms *memorial*, *possibly concessional* and *territory entity*.

Memorial – meaning of

178. The phrase “in a memorial to the lease” or similar appears frequently in the Bill. For example:

- new s235B (clause 4) defines a *market value lease* as “a lease other than a lease that states, in the lease or a memorial to the lease, that the lease is concessional ...”
- new s235C(1)(b) (clause 4) defines a lease as being *possibly concessional* if it “does not include a statement, in the lease or a memorial to the lease that the lease is a concessional lease or to the effect that the lease is a market value lease ...”
- new s258C (clause 15) applies only to leases that ACTPLA has declared to be a concessional lease and the status is “stated in a memorial to the lease” (new

s258C(1)(d)). New s258C permits ACTPLA to re-consider this conclusion on its own initiative in certain limited circumstances.

- new s259 (clause 16) requires ACTPLA to lodge a notice of any ACTPLA declaration as to the market value or concessional status of a lease with the Register-General of Land Titles. The notice is to be lodged for registration under the *Land Titles Act 1925*. The note under new s259 indicates that the Registrar-General must register an instrument lodged in registrable form under s48(1) of the Land Titles Act. New s259B(1)(a) (clause 16) and other sections assume that such an instrument will be registered as a memorial to the lease.
- new s259B (clause 16) applies to leases that include “a statement, in the lease or a memorial to the lease, to the effect that the lease is a market value lease ...”. New s259B prohibits ACTPLA from making a decision that would alter the market value lease status of the lease.

179. The new definition of *memorial* indicates that the meaning of this term is as defined in the Dictionary to the Land Titles Act. The Land Titles Act states that a memorial “means a notation, entered in the register, or endorsed on a document.”.

Possibly concessional – meaning of

180. The new definition refers to the new definition of *possibly concessional* in new s235C (clause 4).

Territory entity – meaning of

181. The term *Territory entity* is used in existing sections:

- 235(2)(a) as defined in s235(3)
- 298(2)(b)(v) as defined in s298(6)
- 318 (definition of *technical variation* of a plan of management)
- 99(g) of the Regulation as defined in s99(2) of the Regulation
- 99(h) of the Regulation as defined in s99(2) of the Regulation
- 105(a)(i) of the Regulation as defined in s100 of the Regulation
- 106 of the Regulation as defined in s100 of the Regulation
- Dictionary to the Regulation – referring to the definition in s100 of the Regulation for Part 5.1

182. The new definition of *Territory entity* replaces the existing multiple definitions with a single, consolidated definition applying wherever the term is used in the Act or the Regulation. This consolidation makes the Act more readable and consistent.

183. The new definition of *Territory entity* states that this term means “a territory authority or a territory instrumentality or a territory-owned corporation”. All of these three elements are defined in the Dictionary (Part 1) to the Legislation Act. The new definition is consistent with the use of the term *territory entity* noted in the above existing sections except for the following instance. The definition of *territory entity* in existing s99(2) of the Regulation for the purposes of ss99(g), (h) includes a territory authority or territory instrumentality but not to a territory-owned corporation. There is no material reason for this difference. The new definition corrects this inconsistency. The content of s99 of the Regulation (list of lease types or classes

deemed to be not concessional) has been incorporated into Part 5.2 of new schedule 5 by clause 37 and s99 of the Regulation is deleted as a consequence by clause 42.

Part 3 Planning and Development Regulation 2008

184. In the following notes, section references are references to the Regulation (existing or new), not the Act unless otherwise specified.

Clause 42 Concessional leases Part 5.1A

185. Clause 42 deletes Part 5.1A (section 99).

186. Section 235 of the Act defines *concessional lease*. Section 235(1)(c) of the Act lists types or classes of leases that are deemed to be not concessional notwithstanding the definition. Section 235(1)(c)(v) of the Act permits the Regulation to add to this list of types deemed not concessional. Section 99 of the Regulation lists a number of lease types that are deemed to be not concessional under s235(1)(c)(v) of the Act.

187. The list of leases in s99 is deleted because it is replaced by Part 5.2 of new schedule 5 (clause 37). Leases of a type listed in new Part 5.2 are deemed to be “market value leases” (new s235B(b) (clause 4)). All market value leases are not concessional leases (new s235A(2) (clause 4)) and are not leases that are “possibly concessional” (new s235C(2) (clause 4)).

Clause 43 Definitions – pt 5.1 Section 100, definition of *Commonwealth entity*

188. Clause 43 deletes section 100. This definition is replaced by Clause 38 which inserts a new definition of *Commonwealth entity* in the Dictionary to the Act.

Clause 44 Section 100, definition of *territory entity*

189. Clause 44 deletes the s100 definition of *territory entity* and substitutes a new definition. The new definition consists of the new definition of *territory entity* inserted into the Dictionary to the Act (clause 41). The new definition is qualified by the statement in this new s100 to the following effect. For the purposes of Part 5.1 Direct sale of leases *territory entity* does not include the housing commissioner. This qualification is not new, it was already in existing s100.

Clause 45 Direct sales requiring approval by Executive- Act, s240(1)(a) Section 105(a)(i), note

190. Clause 45 deletes the note under s105(a)(i) and substitutes a new note. The new note refers to the new definition of *Territory entity* inserted into the Dictionary to the Act (clause 41).

Clause 46 Section 105(a)(ii), note

191. Clause 46 deletes the note under s105(a)(ii) and substitutes a new note. The new note refers to the new definition of *Commonwealth entity* inserted into the Dictionary to the Act (clause 38).

Clause 47 Section 105(e), note

192. Clause 47 deletes the note under s105(e) and substitutes a new note. The new note refers to the new definition of *community organisation* inserted into the Dictionary to the Act (clause 38).

**Clause 48 Direct sale criteria for territory entities -
Act, s240(1)(a)(i)
Section 106, note**

193. Clause 48 deletes the note under s106 and substitutes a new note. The new note refers to the new definition of *Territory entity* inserted into the Dictionary to the Act (clause 41).

**Clause 49 Direct sale criteria for Commonwealth entities -
Act, s240(1)(a)(i)
Section 107(1), note**

194. Clause 49 deletes the note under s107(1) and substitutes a new note. The new note refers to the new definition of *Commonwealth entity* inserted into the Dictionary to the Act (clause 38).

**Clause 50 Direct sale criteria for community organisations -
Act, s240(1)(a)(i)
Section 112(1), note**

195. Clause 49 deletes the note under s112(1) and substitutes a new note. The new note refers to the new definition of *community organisation* inserted into the Dictionary to the Act (clause 38).

**Clause 51 Direct sale criteria for supportive accommodation -
Act, s240(1)(a)(i)
Section 113(1)(a), note**

196. Clause 51 deletes the note under s113(1)(a) and substitutes a new note. The new note refers to the new definition of *community organisation* inserted into the Dictionary to the Act (clause 38).

Clause 52 Section 142 heading

197. Clause 52 deletes the heading to s142 and substitutes a new heading. The new heading refers to new s251(5) (clause 6). The new section of the Act referred to is the same as the existing section referred to in the existing heading except it has been renumbered. The renumbering is a consequence of other amendments to s251 of the Act (clause 6).

**Clause 53 Increase of change of use charge for concessional
leases -
Act, s279(1) and (2)
Section 181(3), definition of *consolidated or subdivided
concessional lease***

198. Clause 53 amends s181(3).

199. Section 181(3) indicates that the meaning of the term *consolidated or subdivided concessional lease* is as defined in s235(3) of the Act. This reference is now incorrect due to amendments to s235 of the Act (clause 4). New section 181(3) points to the

relevant new definition in new s235A (clause 4). The wording of the new definition is the same as the wording of the existing. The renumbering of the relevant section in the Act is a consequence of other amendments to s235 of the Act (clause 4).

**Clause 54 Increase of change of use charge for recently
 commenced leases – Act, s279(1) and (2)
 Section 182(1)(b), note**

200. Clause 54 amends the note under s182(1)(b) as a consequence of amendments to s235 of the Act (clause 4). The new note refers to the new definition of concessional lease in new s235A of the Act (clause 4).

**Clause 55 Amount of refund on surrender or termination of certain
 leases – Act, s300(2)
 Section 210(1)(b), note**

201. Clause 55 deletes the note under s210(1)(b) and substitutes a new note. The new note refers to the new definition of *community organisation* inserted into the Dictionary to the Act (clause 38).

Clause 56 Dictionary, note 3

202. Clause 56 inserts new references to the terms “community organisation”, “concessional lease” and “territory entity” in note 3 to the Dictionary in the Regulation. These terms are now defined in new definitions in the Dictionary to the Act by the following clauses:

- *community organisation* (clause 38)
- *concessional lease* (clause 39)
- *territory entity* (clause 41)

**Clause 57 Dictionary, definitions of *Commonwealth entity*,
 community organisation and *territory entity***

203. Clause 57 deletes the definitions of *Commonwealth entity*, *community organisation* and *territory entity* from the Dictionary as these terms are now defined in new definitions in the Dictionary to the Act (clauses 38, 41).