KLα Australia Pty Ltd

Report on the Granting and Administration of Concessional Leases in the Australian Capital Territory

Volume I

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1 EXECUTIVE SUMMARY

Since the inception of the Australian Capital Territory the land tenure system and its parallel the planning system have been two of the most contentious issues for the ACT community. The concessional lease legislation and its administration is no exception.

As a result of some recent redevelopments involving concessional leases the Government decided to undertake a review of the legislative support, the administration and the procedures associated with dealings in concessional leases. The full scope of the review is set out in the introduction. The Minister for Planning, Mr Simon Corbell, said the review would examine all aspects of the policy and administration of concessional leases.

The very rationale for adopting a leasehold system of land tenure for the ACT comprised four elements of social and planning objectives:

- avoiding speculation in undeveloped land;
- allowing unearned increments in land value to be retained by the Australian people;
- defraying the expenses of establishing the National Capital; and
- ensuring orderly development by lease purpose clauses.

Throughout the ACT's short history, a succession of Federal and Territory Governments has relied on the ability to use the tool of granting leases of land for less than market value to support, over time, a wide range of policies and objectives, including:

- supporting military recruitment incentives during WWI through soldier settlement grants;
- for a period of at least 5 decades, providing incentives to attract people to move to Canberra to live and work to support the creation and development of Canberra as the nation's capital; and
- for the whole period of the ACT's existence, providing incentives for people to stay in Canberra to live and work by encouraging them to support and augment the ACT's core community and social infrastructure which is provided and funded directly by Government.

Consequently, the rationale for the existence of a concessional lease regime is simply that it has afforded Government a tool to achieve social, economic and community objectives according to the prevailing policies of Government, from time to time, without the having to rely solely on its own fully funded portfolio services.

The ability of Governments to grant leases at less than market value has been important in providing assistance to new industries and businesses and in supporting community service providers across a wide range of community facilities to establish and operate.

This review supports the continuation of the concessional lease scheme and proposes new legislation and procedures which will enhance the strategic directions of the Government and meet the communities expressed concerns with the ongoing administration of the scheme. The recommendations in this report provide support to the strategic work on identifying new industry and community needs, enhance certainty for lessees and provide greater public processes for community lease variations. All of these matters are important in the strategic approaches by the Government to accountability and equity in land asset management, certainty in the leasehold system and community input to land use variations.

In the review, a major public consultation campaign was undertaken, a discussion paper was prepared and widely circulated, ten public workshops were held, 42 public submissions were received and analysed. Background material included an analysis of the legislative history and case studies of leasing files held by ACT Planning and Land Authority ("ACTPLA").

For the purposes of this report the definition of a "concessional lease" is that based on Regulation 22 of the Land (Planning and Environment) Regulations as being a lease which has been granted for less than market value or market rent. The definition in the current legislation is too broad and only relates to the change of use charge calculation. To give certainty to the process the report recommends that the definition of a concessional lease be included in the *Land (Planning and Environment) Act 1991* ("Land Act") and that the class of leases not intended to be included should be specifically excluded from the definition. These exclusions would include residential leases, rural leases, leases granted following land development etc. all of which could currently fall within a strict interpretation of the statutory definition. To add certainty for future lessees all concessional leases would be granted under a new section of the Land Act and their status endorsed in the Land Title Register.

A major cause for complaint has been that there is no system enabling the public to identify a concessional lease, and the determination of a lease as concessional only arises when an interested party asks ACTPLA if the lease is concessional. The administrative decision is based on a review of the files and advice from the Government's valuation advisers. This is not an easy or certain process and the older the lease, the less reliable the evidence and the harder the decision becomes. To overcome the problem initially two proposals were suggested i.e. undertake a review of all lease files to clearly identify all concessional leases or declare all leases granted before a stated date to be non-concessional. Neither of these options appears acceptable as the first involves too great a resource commitment for the result and the second would see many leases relieved of obligations which the community generally considered should continue. A different process has been recommended which allows a lessee to seek a declaration from ACTPLA as to the status of the lease and to have a right of appeal to the ACT Administrative Appeals Tribunal ("AAT") if dissatisfied. The outcome of the process would be registered in the Land Titles

Register, thereby allowing all to ascertain the status of the lease once the process had been completed.

With respect to the granting of new leases, the report notes that there has been continuing work in ACTPLA and in the Land Development Authority ("LDA") to develop a comprehensive needs assessment of community services while the ACT Business Incentive Scheme continues to monitor commercial development potential. Both these processes will allow a determination of the need for leases to enable community services commercial initiatives to be determined. The report recommends ongoing support for these processes as well as support for a whole of Government approach to the evaluation of community lease applications with greater emphasis on whether the need for an identified community service can only be provided through the grant of a concessional lease.

Discussion took place in the community forums as to whether the current concessional lease process should be replaced with direct capital funding to the lessee who would then pay full market value for the lease. Direct funding was opposed by a majority of the community representatives and has not been recommended.

The extent of subsidies is described in the report and there was little comment on this issue in the forums or the submissions. In the main the recipient groups seem satisfied with the current level of subsidy but there is a need to review the position of subsidies having regard to the implementation of any of the recommendations.

The three major issues relating to the administration of concessional leases were:

- transferability;
- change of use; and
- deconcessionalisation.

Under the present legislative scheme, almost all concessional leases are restricted from being transferred, subleased or being parted with possession without the consent of the Government. The exception is a lease for community uses granted under section 163 for which an absolute prohibition exists. The report recommends that the prohibition in section 163 be replaced with a requirement for transfer with consent and that the requirement for consent to subletting and parting with possession be abolished.

The issue of change of use for community concessional leases was by far the most contentious issue. Some respondents argued that a community concessional lessee should not be permitted to change the use to a non community use and that if the lessee can not or does not wish to continue the community use, then the lease should be surrendered to the Government. The report does not adopt this approach but recommends a much stricter regime

for the change of use of community concessional lease to non community uses and recommends that the stricter process should apply to all community use leases.

The forums and the submissions expressed the view that there was insufficient community input and that there was a lack of assessment of community needs before a decision to change the use was made. To meet those concerns the report recommends that the Territory Plan be changed to include in all areas subject to Land Use Policies which permit, or have, leases with concessional community uses, a requirement that for any proposal which would have the effect of depleting the range of community or recreational facilities available within the area, mandatory Preliminary Assessment in accordance with Appendix II of the Plan may be required and that unless the Preliminary Assessment confirms that there are sufficient community facilities, the change of use is not permitted.

The policy of deconcessionalisation and its administration is only marginally supported by legislation. Deconcessionalisation relates only to the removal of the right to transfer and in no way affects the obligation on the lessee to continue to use the lease for the community purpose described in the lease. Deconcessionalisation is effected by a payment of the current value of the lease. The report recommends a statutory process of deconcessionalisation with assistance to the decision maker as to the matters to be considered in reaching a decision; a right of appeal against the decision and the valuation; and the recording of the decision and payment in the Land Titles Register.

Under the current legislation, concessional leases for business purposes granted pursuant to section 164 of the Land Act are subject to the limitation on transfer only for a period of 5 years from the date of their grant. This appears to be based on an assessment in part that sufficient of the subsidy has been returned to the ACT in community benefit within that period. No such recognition is given to community concessional leases. The report recommends that community concessional leases should be released from the transfer limitation after 20 years.

The report also reviews the resource implications of the recommendations and in the process has noted that there is considerable work to be undertaken in ACTPLA to update, record and publish the policy, processes and procedures not only for concessional leases but more widely for leasehold processes.

It is intended that the implementation of the recommendations will result in greater certainty for the leasehold system, greater input from the community in lease variations, a better balance between the lessee's property rights and the community's rights to continued community services, greater support and direction for the Government decision makers, a more equitable appeal system, and a more accountable system in the granting and administration of concessional leases.

2 RECOMMENDATIONS

The recommendations have been developed from an analysis of the history of leasing generally; the history and present position of concessional leases; the information supplied at the workshops; and the analysis of the submissions. The recommendations listed below are divided into two classes, those that are strategic in nature and those that are procedural. It should be noted that part of the consultancy requires a procedural statement to be prepared once the way forward has been determined by the Government.

STRATEGIC RECOMMENDATIONS

Recommendation 1
IT IS RECOMMENDED THAT the definition of a concessional lease should be the same as the one contained in Regulation 22 of the Land (Planning and Environment) Regulations (as qualified) and that it should be included in the Act. (Page No 35)

Recommendation 2
IT IS RECOMMENDED THAT the following classes of leases are excluded from the definition of concessional lease:

a. a standard residential lease, being a lease granted for residential purposes only (section 159 of the Land Act);

b. a lease granted over a block of land which has been developed, under a holding lease, as part of a Private Enterprise land development, unless the lease is over a block which has first been returned to the Australian Capital Territory;

c. a lease regranted as a consequence of a variation of a lease where the prior lease was not a "concessional lease";

d. a lease granted to a government organisation or a Territory owned corporation;

e. a lease for rural purposes;

f. a further lease provided that the original lease was not a concessional lease;

g. a lease granted after 11 April 1974 [the reintroduction of the ability to charge land rent under the *City Area Leases Act 1936* ("CALA")] which required as an annual land rent payment more than 5 cents and in respect of which the land rent requirement had been extinguished by a lump sum payment to the Government; and

h. a lease belonging to a class of leases which the Executive has declared by disallowable instrument to be non-concessional.

(Page No 36)

Recommendation 3

IT IS RECOMMENDED THAT the Land Act should continue to empower the Government to grant leases for less than market value subject to the conditions contained in the later recommendations in this report. (Page No 39)

Recommendation 4

IT IS RECOMMENDED THAT the Land Act be amended to include the right of a Lessee or party with a registered interest in a lease to make an application to ACTPLA for a declaration as to whether or not a lease is a concessional lease. The declaration is to be registered in the Land Titles Register and the applicant or person with a registered interest would have a right of appeal. If the declaration is not made within 30 days of lodgement of the application, the lease is deemed to be non-concessional and the lessee has a right of appeal. (Page No 43)

Recommendation 5

IT IS RECOMMENDED THAT the Government make no immediate change to the subsidies provided in association with concessional leases but that after the other recommendations of this review have been considered, resolved and implemented, the Government conduct a review of those subsidies. (Page No 51)

Recommendation 6

IT IS RECOMMENDED THAT concessional leases granted for a community use (not including leases for licensed clubs) should be excluded from the definition of concessional lease after 20 years from the date of grant. (Page No 58)

Recommendation 7

IT IS RECOMMENDED THAT the Territory Plan be varied:

a to include in all areas subject to Land Use Policies which permit or have leases with concessional community uses a requirement that for any proposal which would have the effect of depleting the range of community or recreational facilities available within the area, mandatory Preliminary Assessment in accordance with Appendix II of the Plan may be required;

b to include a requirement that for a concessional lease for community purposes, the permissible uses within the Plan for that Land Use Policy area only are permissible uses, if the Preliminary Assessment confirms that a change of use to non-community permissible uses will not unreasonably deplete the community facilities available in the area. (Page No 61)

Recommendation 8
IT IS RECOMMENDED THAT the *change of use charge* for concessional leases should remain at 100% for changes to non community uses. (Page No 60)

PROCEDURAL RECOMMENDATIONS

POLICY AND RESOURCES

Recommendation 9
IT IS RECOMMENDED THAT as soon as the Government's response to this report is known, ACTPLA authorise the adoption of the procedure statements produced earlier by the consultants and which are based on the current requirements of the Land Act and subordinate legislation, as an interim measure pending the introduction of new arrangements. Those procedure statements are to be read in conjunction with the guideline. (Page No. 30)

Recommendation 10
IT IS RECOMMENDED THAT as soon as the Government's response to this report is known, the Land Development Agency ("LDA") and ACTPLA take urgent action to review, revise and publish their respective policies and procedures to enable the ACT Executive to satisfy its statutory responsibilities, with respect to concessional leases, under the provisions of section 29(2)(a) of the *Australian Capital Territory (Planning and Land Management) Act 1988* (C'wlth) ("PALM Act"). (Page No 30)

Recommendation 11
IT IS RECOMMENDED THAT as soon as the Government's response to this report is known, the LDA and the ACTPLA commit to a program of staff training with respect to its policies and procedures relating to concessional leases. (Page No 30)

Recommendation 12
IT IS RECOMMENDED THAT a new section be included in the Land Act under which, all future concessional leases are to be granted. The new section will contain any restrictions as decided and the class of use and lessee will be determined by disallowable instrument. The section under which the lease is granted will be noted on the title. (Page No 43)

COMMUNITY CONCESSIONAL LEASES

Recommendation 13
IT IS RECOMMENDED THAT section 163(8) should be amended to allow a transfer of the lease with the consent of ACTPLA. (Page No 46)

Recommendation 14
IT IS RECOMMENDED THAT the needs assessment of community services undertaken in ACTPLA should be supported on a whole of Government basis and that particular attention should be given to the identification of those services which will require support through the grant of concessional leases. (Page No 48)

Recommendation 15
IT IS RECOMMENDED THAT the Land Act and subordinate legislation continue to require consent for any assignment or transfer of a community concessional lease but not for a sub-lease or a parting with possession and that the criteria for consent to transfer should be:

a that the transferee is an organisation which would have been eligible to be granted the concessional lease;

b that the transferee is able to demonstrate its capacity to satisfactorily continue to operate the lease in accordance with the purpose clause; and

c that the transferee is able to demonstrate that there will be no loss of public benefit arising from the transfer.

(Page No 55)

Recommendation 16
IT IS RECOMMENDED THAT the Land Act be amended to include a deconcessionalisation process that requires an application, the payment of a capital sum and the registration of notice of the deconcessionalisation in the Land Titles Register. (Page Nos 62 & 70)

Recommendation 17
IT IS RECOMMENDED THAT the heads for consideration for determining an application to deconcessionalise should be:

a does the Government wish to continue to monitor the owners of the lease through granting consents to a transfer etc?

b is there any community dis-benefit through the deconcessionalisation of this lease?

c is the application a prelude to a lease variation application and if so, has the change and the potential development been identified? and

d should the Government buy back or acquire this lease?

(Page No 63)

Recommendation 18
IT IS RECOMMENDED THAT the payment required to deconcessionalise a community concessional lease should be as defined in Regulation 22 subject to

a deduction for any capital sum paid towards the grant of the lease calculated in values as at the date of the payment. (Page No 63)

Recommendation 19
IT IS RECOMMENDED THAT only the lessee applicant and any party with a registered interest in the lease should have a right to appeal a decision on deconcessionalisation including a right to appeal against the amount payable to deconcessionalise. (Page No 64)

BUSINESS CONCESSIONAL LEASES

Recommendation 20
IT IS RECOMMENDED THAT if the Government decides to provide support to "business leases" through direct financial grants rather than by granting leases at less than market value, section 164 should be repealed. (Page No 65)

Recommendation 21
IT IS RECOMMENDED THAT the Land Act and subordinate legislation continue to require consent for any assignment or transfer of a business concessional lease but not for a sub-lease or a parting with possession and that the criteria for consent be:

a that the transferee is an organization which would have been eligible to be granted the concessional lease; and

b that the transferee is able to demonstrate its capacity to satisfactorily continue to operate the lease in accordance with the purpose clause. (Page No 68)

Recommendation 22
IT IS RECOMMENDED THAT the Land Act should be amended to provide that all commercial concessional leases not granted pursuant to section 164 should have their status as concessional leases lifted after a period of 5 years. (Page No 68)

Recommendation 23
IT IS RECOMMENDED THAT the application of Regulation 22 to leases granted under section 164 of the Land Act should be limited to 5 years from the date of the grant of the lease. (Page No 69)

Recommendation 24
IT IS RECOMMENDED THAT the *change of use charge,* for business concessional leases, should remain at 100% for the first five years of the lease, after which the normal rate should apply. (Page No 69)

Recommendation 25
IT IS RECOMMENDED THAT the heads of consideration for determining an application to deconcessionalise a business concessional lease should be:

a does the Government wish to continue to monitor the owners of the lease through granting consents to a transfer etc?

b is such a transfer in line with Government policy and objectives?

c will the transfer etc enhance the economic position of the ACT?

d is there any community dis-benefit through the deconcessionalisation of this lease?

e is the application a prelude to a lease variation application and if so, has the change and the potential development been identified? and

f should the Government buy back or acquire this lease?

(Page No 71)

Recommendation 26
IT IS RECOMMENDED THAT the payment required to deconcessionalise a business concessional lease should be as defined in Regulation 22 subject to a deduction for any capital sum paid towards the grant of the lease calculated in values as at the date of the payment. (Page No 71)

Recommendation 27
IT IS RECOMMENDED THAT only the lessee applicant and any party with a registered interest in the lease should have a right to appeal a decision on deconcessionalisation including a right to appeal against the amount payable to deconcessionalise. (Page No 72)

3 INTRODUCTION

Of recent years there have been a number of occasions when the administration of concessional leases has caused concern in the community. As a result, the government decided to undertake a review of the arrangements for the grant and administration of concessional leases.

THE REVIEW – SCOPE AND OBJECTIVES

The objectives and the scope of the review are to:

(1) review the legislation, policies and processes relating to concessional leases in the ACT

(a) propose an integrated and comprehensive package which allows the rights, obligations and processes for change relating to concessional leases to be clearly understood; and

(b) the package is to consider the arrangements.

(2) develop a policy framework for the management of concessional leases to ensure greater transparency and accountability including:

(a) improved guidance for Department officers assessing leasing and development proposals;

(b) notification of lease transfers or other sensitive leasing decisions to the Legislative Assembly where those leases have been granted on a concessional basis; and

(c) a Guidance Note to assist decision-makers in circumstances where there may be dealings between related parties.

(3) Specific tasks include:

(a) the identification, so far as is possible, of the categories of current concessional leases and any particular conditions applying to those leases;

(b) advice on the possible approaches to dealing with a concessional lease when there is little or no evidence of the value of the original grant and having regard to the history of the leasehold system; and

(c) advice on the effect of a payment under the legislation in changing the status of a concessional lease, having regard to the Land Act Regulations which define 'concessional' leases in terms of the original grant.

(4) In developing a policy framework consider:

(a) assistance mechanisms available to community organisations;

(b) re-use of existing concessional leases;

(c) effective utilisation of existing concessional leases; and

(d) the supply and demand of concessional leases.

CONCESSIONAL LEASES – DEFINITION

Concessional leases are generally described as those which have been granted for less than market value. There is no definition of concessional lease in the Land Act but a legislative definition is contained within Regulation 22 for the specific purpose of dealing with *change of use charges* for concessional leases. That definition has been used by ACTPLA for the ongoing administration of concessional leases and has been adopted for the purpose of the review. It provides as follows:

> *A lease granted for a consideration less than the full market value of the lease, whether any such consideration was paid as a lump sum for the grant or is payable under the lease as rent, and in relation to which neither of the following payments have been made to the Territory:*
>
> *(i) a capital sum or sums in respect of its grant equal to the market value of the lease at the time of the payment, or at the time of the last such payment, as the case may be;*
>
> *(ii) a capital sum or sums to reduce the rent payable under the lease to a nominal rent under the Act, section 186.*

Leases granted for less than market value also attract legislative restriction through the application of section 167 of the Land Act which empowers the Executive through a disallowable instrument to specify a class of leases to which the section applies. The relevant disallowable instrument specifies "any lease granted for the payment of an amount that is less than the market value of the lease, including all leases granted for the purposes of schools, youth, benevolent and welfare organisations, sporting and social clubs (including licensed clubs), community organisations, churches and religious organisations, national and local associations". Sub-section 5 of section 167 restricts assigning, transferring, sub-letting or parting with possession of the lease without the consent of ACTPLA. (The full terms of the relevant legislation are at Appendix A).

Through the consultation processes and discussions with the staff of the organisations granting and administering concessional leases there has been no acceptable alternative approach to defining concessional leases put forward. There have been some suggestions of abolishing restrictions on some of the leases but the concept of concessional leases to which some restrictions might attach is a generally accepted concept.

To date, the administration of those leases which could fall within the definition has been on a case to case basis and there are many leases which would strictly fall within the definition but which have not been accepted administratively as being subject to the applicable restrictions. This report identifies those classes of leases and recommends that they be specifically and formally excluded from the definition.

When considering the issues and recommendations canvassed in this report, it is important to bear in mind that concessional and community leases are not synonymous. Community leases are those which have a purpose clause restricting the use to community type services. Not all community leases are concessional leases and not all concessional leases are community leases. While it follows that this report does touch on community leases it is a report confined to concessional leases.

LEASEHOLD HISTORY

The manner in which land grants have been made since the inception of leasehold in the ACT has been designed to satisfy social, financial or planning objectives. The very rationale for adopting a leasehold system of land tenure for the ACT comprised four elements of social, financial and planning objectives:

- avoiding speculation in undeveloped land;
- allowing unearned increments in land value to be retained by the Australian people;
- defraying the expenses of establishing the National Capital; and
- ensuring orderly development by lease purpose clauses.[1]

The leasehold system enabled the government to specify the use to which the leased land could be put; the minimum expenditure upon the buildings to be erected, and the period for their completion.[2] This provided a specific control over urban planning and did not rely on any statutory plan for its efficacy or application.

Government ownership of land allowed the government to use land grants to achieve social objectives by providing specific uses of land and applying differential rates of rent across the spectrum of categories of lease which generally reflected the nature of the permitted use of the leased land and whether it was:

- a commercially profitable use; or

[1] ACT Board of Inquiry into the Administration of ACT Leasehold, Report into the Administration of ACT Leasehold, November 1995 (Chair: P Stein), Publications and Public Communications, Canberra – p26, para 4.5.
[2] ACT Board of Inquiry into the Administration of ACT Leasehold, Report into the Administration of ACT Leasehold, November 1995 (Chair: P Stein), Publications and Public Communications, Canberra – p26, para 4.7.

- a use of social or community benefit.

The history of the leasehold in the ACT and the use of legislative means to support the development of the ACT through the leasehold system has been summarised in Appendix B.

PREVIOUS REVIEWS

This review follows a long line of reviews and reports on the leasehold system in the ACT. To a large extent these reports did not deal with or recognise concessional leases, as a lease which had been granted for less than market value. A concessional lease was only identified as such with the commencement of the Regulations under the Land Act were introduced. The major reports on the leasehold system since that time were those of the ACT Board of Inquiry into the Administration of ACT Leasehold, Report into the Administration of ACT Leasehold, November 1995 (Chair: Justice P. Stein) ("the Stein Report") and A Study of Betterment and The Change of Use Charge in the Australian Capital Territory by Professor Des Nicholls ("the Nicholls Report").

The Stein Inquiry was wide ranging with wide terms of reference to inquire into the administration of the leasehold system in the ACT. As part of that exercise the inquiry did review a number of concessional leases and the administration with regard to those leases and made some general comments and recommendations concerning concessional leases.

The Stein Report discusses Concessional Leases at Chapter 17.264-275 at Pages 220-223. The issues raised relate mainly to a review of particular examples of "concessional leases" being redeveloped for uses different or in addition to those for which the leases were originally issued. The report does not deal with identification, recognition of community benefit or the security of those leases. Generally these issues might be seen to have been outside the focus of the Stein Review.

The Stein Report says:

> *"17.264 The granting of leases for community purposes without charge or for a charge which is less than the market value of the lease, has the capacity to confer great benefit on the people of the ACT. Indeed, the Executive's ability to make land available for worthy community and sporting causes is one of the advantages of the public leasehold system. It is, however, possible for the privilege to be abused. Unfortunately, there appear to be increasing examples of land leased for community purposes being put to uses other than the community use for which the original lease grant was made.*
>
> *17.265 The proposal to develop part of the land leased (or the whole and acquire a new lease of alternate land) is often motivated by the desire to*

improve facilities to attract more members. Such developments however have the distinct capacity to engender community concern as recent history has shown. This is particularly so when a concessional lease has only recently been granted and the lessee is in breach of the development covenants."

The report then reviews a number of examples and expresses concern in "*the considerable weakness of the leasehold administration of the day in defending the public interest."*

The Stein Report also quotes the Report of the Standing Committee on Planning and Environment of the ACT Legislative Assembly when reviewing a proposed ACT Territory Plan Variation for the redevelopment of part of the Yowani Golf Club Lease. The Committee said:

"*The committee is aware that the issue of whether concessional lease holders should be allowed to develop all or part of their lease has a long history in the ACT - and that significant public' controversy has occurred in the past. The committee notes that successive ACT Administrations have not disallowed the practice and that the current matter before the committee is not contrary to past government policies.*

In the committee's view there is an urgent need to review the policy on renewing concessional leases in order to ensure that the community does not lose important public revenue and options for land development."

The Stein Report then concludes:

"These three illustrations of disputes relating to the redevelopment of concessional leases are but a few of many similar examples drawn to the Board's attention. They appear to demonstrate how the public leasehold system can be compromised and public disquiet exacerbated. An examination of concessional leases has led us to the view that such leases should not qualify for any remission from betterment and this is recommended in chapter 15. There are significant arguments that concessional leaseholders should not be permitted to develop any part of the land leased for the community purpose for a commercial purpose. On balance, however, the Board would not go so far as to require surrender provided full betterment is paid and the proceeds of such development be dedicated to member facilities."

The Stein Report does not recommend the compulsory surrender of concessional leases when a change of use from community to commercial is proposed. In the event of a change of use, the lessee should pay 100% *change of use charge* and ensure that the financial returns for such a change are returned to members (or possible the community) through increased facilities.

The Stein Report recommended that 100% betterment (*change of use charge*) should be payable on any change of use of a concessional lease. That recommendation was adopted and is framed in Regulation 22.

The discussion paper, the workshops and a number of the submissions have canvassed the issues raised by the Stein Report and these issues together with others have been reviewed in this report.

The Nicholls Report dealt only with *change of use charge* and made no reference to concessional leases as such. Other reports such as the 1995 Mant and Collins Review of ACT Planning Functions and Structures (dealt with planning issues) and the 1998 Ernst and Young, *Review of the Planning and Land Management (PALM) Group* dealt more with organisational arrangements and did not canvass concessional leases.

LEASEHOLD REVIEW – OUTCOMES

In proposing any change to the current system relating to concessional leases the new arrangements must be:

- open;
- transparent;
- equitable;
- certain;
- accountable; and
- timely in application.

Those principles were all supported in the consultation process and are reflected in the public submissions received by ACTPLA. The outcomes therefore need to support one or more of those principles and any derogation from them must only be pursued if there is no possible or practicable alternative.

IDENTIFICATION OF CONCESSIONAL LEASES

One of the first issues that arise is the identification of the concessional lease. As the history shows certain leases which may qualify as being a lease issued for less than market value have been around since the inception of the land tenure system in the ACT. The issue to be resolved is whether market value was paid for the grant of the lease having regard to its terms and conditions and any legislative restrictions applying at the time. This determination requires a review of the documents held by the Government and the application of a professional valuer's skill. Obviously, the earlier the date of the lease

grant, the more difficult that determination becomes. The Case Study Review in Appendix C clearly supports this conclusion.

Because the classification of leases as concessional only arose or became relevant to dealings in such leases in April 1991 with the introduction of the City Area Leases (Betterment Charge Assessment) Regulations, leases granted prior to 1991 have nothing on their title which identifies them as concessional. In addition, not all leases granted after 1991 are clearly identified as such or registered as such in the Land Titles Register.

Because of these difficulties in identification, a number of submissions suggested that we remove any restriction on concessional leases granted before an identified time e.g. before 2 April 1992 (when the Land Act commenced); before the commencement of self-government (1989); from the day any legislative changes resulting from any recommendation of this report take effect - while other submissions suggested reviewing all Crown leases and government files to enable the identification and declaration of leases as concessional or otherwise. Other options are discussed in the paper and a process is recommended which will provide a mechanism to have leases identified as concessional.

NEW CONCESSIONAL LEASES

The question of whether concessional leases should continue to be granted was raised in the original discussion paper and extensively discussed in the workshops. While some submissions supported their abolition, there was major support for the continuation of the system. Whether the support should be by way of a direct grant of a concessional lease to a prospective lessee or by way of a capital sum funding arrangement which would allow the prospective lessee to pay market value for the land was also canvassed and attracted opposing views. The view was expressed of the possibility of funds not being provided to respective agencies or agencies keeping funds for their own use.

The basis for determining what commercial or community uses should be supported with the grant of a concessional lease and in where that land might be located, raised the principles of transparency, equity and accountability. An appropriate assessment process was viewed by many commentators as vital for the efficacy of the grant program.

Any new concessional lease needs to be clearly identified as such and be able to be so recognised by a search of the Land Titles Register. This can be achieved by endorsement at the time of grant and inclusion of the concessional status in the computerised Land Titles Register.

MANAGING CURRENT CONCESSIONAL LEASES

While new conditions and restrictions can be imposed on new concessional leases, this is not the case for existing concessional leases where any new restriction can be classified as the diminution of existing rights. Such actions could be seen as an acquisition of rights by the Government without just compensation and so, invalid. On the other hand, the removal of restrictions would present no such problems.

The need for certainty in establishing the concessional status of existing leases has been supported in a number of submissions. The options presented have ranged from abolishing their status and so restrictions for all leases granted prior to a date to be determined, to reviewing of all leases to identify and declare those which have been granted for less than market value. If the abolition approach is not adopted, to create certainty, there needs to be a statutory process for determining the status of the lease and a notation process. Any such process needs to impose time constraints on the decision maker to meet the principle of timeliness. A right of appeal for the lessee should be available.

If the restrictions applying to concessional leases are to be retained, there must be a certain, simple and accountable process for decisions concerning those restrictions with defined criteria and timelines. A number of submissions have referred to the process of transfer and to a change of use. Most of these focussed on a change of use from community use to a residential or commercial use. Many of the comments related to community use issues which were wider than concessional lease matters but where the comments overlapped between community and concessional they have been taken into account.

The capacity of concessional lessees to deconcessionalise their leases is also an issue reviewed in this report. This process is currently an administrative one which operates through the reverse application of the legislation. That is, the lease is no longer regarded as concessional if the lessee pays the current value for the lease. This has been managed through an administrative process of deconcessionalising a lease by payment of the current market value. The legislation providing for this only applies to the calculation for the payment of *change of use charge* and is not directly relevant to the status of the lease as far as the restrictions on transfer etc. The Government has administratively accepted this payment as altering the status. A number of submissions have commented on deconcessionalisation and the process by which this should occur.

MEETING THE OBJECTIVES

The report reviews the previous and current legislation controlling and affecting concessional leases and proposes a legislative regime to provide certainty and transparency for the future management and understanding of concessional leases. The package of legislative change will not adversely affect the existing

rights of lessees and allow future lessees to clearly understand their rights and responsibilities.

The policy framework for the administration of concessional leases and the procedural steps required to be taken by the administrators will be clearly supported by the legislation. A procedural manual for dealing with potential concessional leases under the current legislative regime has been provided to assist the understanding of the steps decision makers would need to following processing applications for transfer, change of use etc. A further manual will be prepared once the Government's decisions on the recommendations are known and the legislation is amended to implement those decisions.

The question as to whether the legislation should require proposed lease transfers and other potentially sensitive matters to be referred to the ACT Legislative Assembly has been considered. The grant of concessional leases will be tabled in the Assembly and the Policies and Procedures surrounding the administration of concessional leases will be publicly notified. With regard to the administrative processes of transfer, deconcessionalisation or change of use, the need to refer any such matter to the Assembly would only arise in very few cases and there are means for such a referral without the need to provide a requirement in the legislation.

The report has reviewed the current legislative definition of concessional leases and concluded that the general approach of defining a concessional lease as one which has been granted for less than market value should be retained. This has been the test which has applied to concessional leases for some time and which has determined rights and responsibilities attaching to the individual leasehold estate. However, the report does propose a large number of categories of leases which have not been regarded as concessional but which do fall strictly within the current statutory definition, should be specifically excluded.

The report also recognises that it is extremely difficult to classify leases as concessional without a review of ACTPLA's leasing files and the information surrounding the grant but recommends a process which allows that decision to be made with appeal and registration rights.

The report examines the lease variation and deconcessionalisation process and recommends a more stringent approach to a change to non-community uses of concessional leases and a proper legislative base for deconcessionalisation.

The report has considered:

- assistance mechanisms available to community organisations;
- re-use of existing concessional leases;
- effective utilisation of existing concessional leases; and

- the supply and demand of concessional leases.

in its analysis of a proper needs assessment for future grants and the requirement for a more extensive review of alternative community needs before a change of use of a concessional community lease is supported.

4 LEGISLATIVE BACKGROUND

Public ownership of land in the ACT has offered both the Commonwealth and Territory Governments a unique opportunity to use the leasehold system of land tenure as one tool to achieve social and planning objectives. Land grants have been commonly used to this end. In many cases these grants have contained a concession to the lessee in recognition of the public benefit returned to the community through the use of the land to deliver services.

As earlier mentioned, a legislative base for and the characteristics of, concessional leases first arose in April 1991 with the introduction of the City Area Leases (Betterment Charge Assessment) Regulations. Those regulations had a fairly brief life until they were repealed by the Regulations under the Land Act. Even with the introduction of the Land Act in April 1992, "concessional leases" were not defined in the Act and the definition of "concessional leases" in the Regulations, only related to the determination of the *change of use charge*. The definition in the Regulations describes a "concessional lease" as:

> *(a) a lease granted for a consideration less than the full market value of the lease, whether any such consideration was paid as a lump sum for the grant or is payable under the lease as rent, and in relation to which neither of the following payments have been made to the Territory:*
>
> *(i) a capital sum or sums in respect of its grant equal to the market value of the lease at the time of the payment, or at the time of the last such payment, as the case may be;*
>
> *(ii) a capital sum or sums to reduce the rent payable under the lease to a nominal rent under the Act, section 186;*
>
> *except a further lease, a consolidated lease, a subdivided lease, a regranted lease, or a lease over land that, immediately prior to the grant of the lease, was owned, controlled or held by the commissioner for housing under the Housing Assistance Act 1987;*
>
> *(b) a consolidated or subdivided concessional lease;*
>
> *(c) a further concessional lease;*
>
> *(d) a regranted concessional lease.*

Sections 163 and 164 of the Land Act provide directly for the opportunity to grant leases at less than market value.

Section 163 provides for grants to a *community organisation*, being a body corporate that:

(a) has as its principal purpose the provision of a service, or a form of assistance, to persons living or working in the Territory; and

(b) is not carried on for the pecuniary profit or gain of its members; and

(c) does not hold a club licence under the *Liquor Act 1975.*

A lease granted pursuant to this section would generally be for the purpose of providing some form of social benefit to the Canberra community and would generally be granted at less than market value. Section 163 contains a prohibition against transfer.

Section 164 of the Act provides for the grant of *special leases*.

Leases granted under this section are generally leases for commercial purposes and the prerequisite of the Government for granting a lease under this section is that "it is desirable and in the public interest to do so in order to facilitate:

(a) the economic development of the Territory; or

(b) the development of business in the Territory."

The Government can only grant a lease under this section if it is in accordance with criteria specified in a disallowable instrument. The assistance provided through these types of leases is in line with support given to new industries and other commercial ventures by both the State and Local Governments. Lessees holding leases granted under this section are, for a period of 5 years, required to obtain ACTPLA's consent if they wish to assign, transfer, sub-let or part with possession and such consent can only be given if the assignee, transferee etc is a person who satisfies the criteria for the original grant.

Section 161(1)(d) provides for the direct grant to an applicant for a lease. Section 169 prohibits the granting of a lease for less than market value unless the lease is for full market rent, or has been granted under section 161(1)(d), 163, 164, 171 (a renewed residential lease), 171A (a renewed rural lease), 172 (a renewed commercial etc lease). Leases granted under sections 171, 171A, and 172 have been excluded from the definition of a concessional lease for the purposes of this review.

Leases granted under section 161(1)(d) may be for less than market value. Such a lease may only be granted in accordance with criteria specified in a disallowable instrument (see section 161(6)). There have been a number of disallowable instruments made to allow for grants under these sections.

The specific provisions of the current legislative regime are contained in Appendix A.

5 CURRENT POLICIES AND PROCEDURES

Some discussion is warranted on the relevant current policies and procedures, to assist an understanding of the manner in which concessional leases are presently handled by the:

- LDA, with respect to the grant of concessional leases; and
- ACTPLA, with respect to the administration of concessional leases.

POLICIES

In December 1990, Trevor Kaine, then Chief Minister of the Alliance Government, announced wide ranging changes to the granting and administration of free and concessional leases in the ACT.

In announcing the changes he said:

"Our policy review has confirmed the continuing need to provide for direct allocation, on a free or on concessional terms, of lease to ACT organisations that augment social and community services provided by the Government.

But it is necessary to re-examine concessions from time to time to ensure they remain appropriate."

Those policies remain largely intact today, with the exceptions noted below.

GRANTS OF CONCESSIONAL LEASES

Grants of concessional leases are now made by LDA in response to an application from a prospective service provider. An applicant needs to be able to satisfy eligibility criteria either for the grant of:

- a lease to a community organisation (section 163 of the Land Act); or
- a special lease (section 163 of the Land Act).

The relevant provisions of the Land Act and the associated disallowable instruments are discussed in detail in Appendix A.

The process leading to the grant of a concessional lease is essentially driven by the applicant. LDA receives applications from eligible prospective grantees and deals with them on a "first come first served basis". LDA does not have any mechanism for distinguishing between "competing" applications and treats each application on its merits.

There is a process of site selection which involves input from ACTPLA and when a suitable site has been identified, the basis of an offer of a lease is developed and considered by the Board of LDA; the Planning Minister; and the ACT Government. Only when the proposal to offer a lease have been endorsed can an offer of (generally) a 99 year lease be made to an applicant, subject to the following payment/charging policies:

STANDARD CONCESSIONAL LEASE OF VACANT LAND for non-profit incorporated associations, including clubs (other than clubs which hold a club licence under the *Liquor Act 1975*.

An annual land rent equivalent to 5% the current site value applies and there is no option, at the time of the grant, to pay a once only premium to dispense with the payment of land rent.

CHARITABLE AND SOCIAL WELFARE ORGANISATIONS including Nursing Homes, Hostels for the Aged, Smith Family and St Vincent de Paul and like organisations.

A nominal rent of 5 cents per annum, if and when demanded applies except where the lease is to permit any commercial component - a once only premium equivalent to the current market value of that component is charged.

Note: Under the Aged Persons Initiatives – July 2001, leases to community providers for aged persons self-care units is 50% of the cost of the land.

AGED PERSONS SELF-CARE UNITS FOR COMMERCIAL PROVIDERS

In recent times, concessions have been available to commercial providers of aged persons self-care units but those are not specified and are assessed on the individual merits of each application.

CHURCHES AND PLACES OF WORSHIP including on-site residences serving only those persons working with the congregation.

Payment of a once only premium equivalent to the land development cost for the site is required with 10% payable upon acceptance of the offer and the balance payable (without interest) within 90 days.

RESIDENCES FOR CLERGY other than those provided for on-site with the place of worship and restricted to use by those persons working with the congregation.

Payment of a once only premium equivalent to the current market value is required.

SCHOOLS (REGISTERED) only where the school is in receipt of a capital subsidy under a Commonwealth or a Territory program.

A nominal rent of 5 cents per annum, if and when demanded applies.

YOUTH ORGANISATIONS where the organisation caters for 100% youth membership.

Vacant land

A nominal rent of 5 cents per annum, if and when demanded applies.

Land plus Territory owned improvements.
Generally this category will be subject to Executive leases. The charges shown are for exceptional cases where a lease is granted direct to the organisation.

An annual rental equivalent to 2½% of the value of the improvements applies.

SPORTING FACILTIES AND OTHER SITES WITH IMPROVEMENTS.
Only in exceptional circumstances where the Minister is satisfied that the public interest is best served by granting a lease to a particular organisation rather than using the Executive lease mechanism, an annual rental equivalent to 2½% of the current site value including the improvements applies.

ADMINISTRATION OF CONCESSIONAL LEASES

The essence of the 1990 Alliance Government's policy changes to the administration of free and concessional leases in the ACT has also been retained; some being incorporated into the legislation; some included in disallowable instruments; and some still relying on policy or practice direction for their implementation. The 1990 policies included:

TRANSFERABILITY
Concessional community leases granted after the introduction of the Land Act are not transferable (section 163(8)). Where a community group wishes to relinquish its lease, it is able to surrender it to the Government, receiving a fair and agreed return for its buildings and other improvements. The lease could then be re-offered to another community body eligible for a concessional lease. There does not presently appear to be a clear policy statement on what constitutes "a fair and agreed return for its buildings and other improvements".

OWNERSHIP OF COMMUNITY LEASES
As a general principle it appears to be still held that ownership of leases granted under the *City Area Leases Act 1936* ("CALA")or the *Leases Act 1918* ("LA") on concessional terms and containing a community purpose clause should not be owned by individuals or commercial bodies (see Disallowable Instrument Nos. 2003-193 and 2003-205).

The Government recognises that circumstances may arise where the transfer of a community lease to commercial interests is warranted and in that instance, a fee is charged that is considered to recover to the Government the prospective value of the concessional element of the lease. By *a round about* way described elsewhere in this report, the amount of money paid to deconcessionalise a lease (provided for under an administrative policy) is considered to remove this restriction on transfer – more is said of this later.

REMOVAL OF THE CONCESSIONAL STATUS OF A LEASE
The holder of a concessional lease may remove the concessional status of that lease for purposes of determining a different level of change of use charge by

paying a once only fee equal to the prospective value of the concession. Regulation 22 currently provides for a reduction in the level of a change of use charge from 100% of added value to 75% of added value where such a fee has been paid.

Under the provisions of section 11(1)(a) of the *Planning and Land Act 2002* ("PALA"), ACTPLA must ask for and consider, the advice of the Planning and Land Council ("Council") before exercising a function prescribed under the Planning and Land Regulations 2003. Regulation 4(2)(g) prescribes "deciding applications to change concessional leases into leases that are not concessional". Regulation 4(3) prescribes circumstances in which ACTPLA need not ask advice from the Council and those include circumstances where the Council has already given advice in relation to a matter that is substantially the same. It is understood that ACTPLA will continue to refer to the Council applications to "deconcessionalise" a lease until a sufficient body of Council advice has been accumulated.

PROCEDURES

The *Australian Capital Territory (Planning and Land Management) Act 1988* (C'wlth) ("PALM Act") is the Federal law under which, amongst other matters, the Government of the ACT is vested with the responsibility for managing the ACT leasehold estate (of *Territory* but not *National*) land on behalf of the Commonwealth.

Section 29(2)(a) of that Act requires the ACT Executive to administer estates in land in accordance with procedures that are notified to the public.

In March 2003, early in the review process, the consultants asked to be provided with a copy of the procedures which are notified with respect to the grant and administration of concessional leases and were given a copy of:

a *Policies and Procedures Relevant to Section 29 of the Australian Capital Territory (Planning and Land Management) Act 1988 Used in the Administration of the ACT Leasehold System* – 1 September 1993;

b *The Alliance Government's Lease Allocation Policies for Associations, Welfare and Community Organisations For New Allocations* – 14 December 1990 (mentioned above);

c *Revised Draft Land Act Leasing Procedures* – 27 May 1992; and subsequently

d *Guideline For The Assessment Of Applications To Pay Out The Concession Applying To A Leases Or To Transfer A Concessional Lease To Another Person* – July 2003.

The review revealed that the:

- documents mentioned in (a) and (c) above were more than 10 years out of date;
- the document mentioned in (b) was historically correct but changes had occurred in practice with respect to the grant of leases for aged persons self-care housing; and
- the document mentioned in (d) above was not considered by ACTPLA staff or the consultants to be particularly helpful on its own.

GUIDELINE FOR THE ASSESSMENT OF APPLICATIONS
TO PAY OUT THE CONCESSION APPLYING TO A LEASES OR
TO TRANSFER A CONCESSIONAL LEASE TO ANOTHER PERSON

In July 2002, ACTPLA issued the above guideline:

> "to assist in determining whether it is both desirable and appropriate to approve:
>
> a) the payment, by the holder of a concessional lease, of a capital sum that has the effect of discharging ("paying out") the concessional that applies to the lease; or
>
> b) the transfer of a concessional lease to another person or body."

The guideline contained the statement:

> "While this guideline is intended to assist in making a decision to approve or refuse an application to payout a concession, or to transfer a concessional lease to another person or body, each application should be considered on its merits."

The guideline was reproduced in the discussion paper included in Appendix D of this report.

When the review commenced, most ACTPLA staff responsible for making a decision to approve or refuse an application to payout a concession, or to transfer a concessional lease to another person or body, were experiencing some difficulty in applying the current legislation and the guideline.

To assist those staff, the consultants produced procedure statements based of the requirements of the Land Act and subordinate legislation but it appears they were either not adopted for use or not circulated to the responsible staff. ACTPLA has explained that this is because they had no status.

In practice, the manner in which ACTPLA decision makers respond to such applications, if indeed they are made, is on a case by case basis.

Some applications are not made either because the lessee is unaware that an application needs to be made or because the lessee simply chooses not to do so.

There is every likelihood that concessional leases have been transferred to another person, including commercial interests, without an application for approval having been made and without payment to the Government of the amount of the concession.

The consultants are of the view that reviewing and keeping up to date statements of policy and procedure is critical to any credible organisation operating in either the public or private sectors. The failure to produce documentation which an organisation is required to notify to the public under a Federal law does nothing to assist its staff or customers in understanding the policies and procedures pertaining to concessional leases.

IT IS RECOMMENDED THAT as soon as the Government's response to this report is known, ACTPLA authorise the adoption of the procedure statements produced earlier by the consultants and which are based on the current requirements of the Land Act and subordinate legislation, as an interim measure pending the introduction of new arrangements. Those procedure statements are to be read in conjunction with the guideline. (Recommendation 9)

IT IS RECOMMENDED THAT as soon as the Government's response to this report is known, LDA and ACTPLA take urgent action to review, revise and publish their respective policies and procedures to enable the ACT Executive to satisfy its statutory responsibilities, with respect to concessional leases, under the provisions of section 29(2)(a) of the *Australian Capital Territory (Planning and Land Management) Act 1988* (C'wlth). (Recommendation 10)

IT IS RECOMMENDED THAT as soon as the Government's response to this report is known, LDA and ACTPLA commit to a program of staff training with respect to its policies and procedures relating to concessional leases. (Recommendation 11)

6 CONSULTATION PROGRAM

The consultation program has been extensive and has generated a large number of thoughtful and helpful comments.

PUBLIC CONSULTATION

In commissioning this review, the Government made it clear that it had no fixed position and was keen to canvass the broadest possible community views on concessional leases.

Under the terms of the consultancy, ACTPLA assumed responsibility for undertaking the public consultation program around a discussion paper prepared by the consultants which was designed to stimulate interest and discussion on the subject.

Initially an article appeared in the Canberra Times on 22 July 2002.

Notices were inserted in the Canberra Times on 17 January 2004 and 14 February 2004 and in the Chronicle on 20 January 2004 and 17 February 2004. The notice, a copy of which forms part of Appendix D, invited people to comment on the discussion paper and provided information on where the paper could be obtained. As a result a further article appeared in the Canberra Times on 23 February 2004 quoting the Minister and again calling for comment.

The discussion paper was sent to 131 organisations and individuals; it was made available on the ACTPLA website; and it was available in hard copy from the ACTPLA Customer Services Centre in ACTPLA's Challis Street, Dickson Offices.

ACTPLA arranged 10 workshops involving a large number of interested groups at which a presentation was made and questioning and comment ensued. Notes of the workshops were taken and form part of Appendix D. One or more members of the consultancy review team attended the workshops.

42 written submissions have been received and these have been analysed, summarised and commented upon. This work is included in Appendix D. Where appropriate, the comments have been taken into account in developing the recommendations of this review.

GOVERNMENT AGENCY CONSULTATION

A draft of the discussion paper was provided to relevant Government agencies for comment and the normal Government circulation processes applied prior to the paper being approved for public release.

A draft of this report was provided to relevant Government agencies for comment.

There have been meetings with members of the review team and representatives of ACTPLA to discuss issues of common interest.

7 CONCESSIONAL LEASES GENERAL ISSUES AND OPTIONS FOR CHANGE

IDENTIFYING CONCESSIONAL LEASES

DEFINITION

What is a concessional lease?

The term concessional lease appears only in the Regulations under the Land Act, and then only for the purposes of determining the percentage of change of use charge to be applied. Whilst it does not define a concessional lease as such, Disallowable Instrument DI 2003-193 describes a particular class of leases that are restricted in their dealings by section167 of the Land Act. These sub-ordinate legislative instruments define the leases as "…*a lease granted for a consideration less than the full market value of the lease …*" (Regulation 22 (4)) and " *any lease granted for the payment of an amount that is less than the market value of the lease…*" (DI 3003-193). While regulating different aspects of lease administration the approaches are almost identical and use the principle of a lease granted for less than market value.

Market value is defined in section 159 of the Land Act as meaning *"the amount that could be expected to be paid for the lease on the open market if it were sold by a willing but not anxious seller to a willing but not anxious buyer"*. This is the generally accepted definition of "market value" which has been applied in the Courts and universally used in valuations. There was no suggestion in any of the submissions that this definition of market value should be changed. One matter which does arise is the difficulty of determining market values for leases granted in the past, especially where the only seller was the Government which fixed either the rental to be paid or the sale price. Some aspects of this difficulty are identified in the case studies at Appendix C. The question of what is market value in these cases remains hypothetical at this stage, but if tested will ultimately be resolved through the ACT Administrative Appeals Tribunal or the Courts. Having regard to its universal application, the willing buyer and seller, should continue to be the test of "market value".

For the purposes of the consultation process, the definition of concessional lease contained in Regulation 22 was adopted. That definition is recited in full in Chapter 4.

The prescribed exclusions, where the payment of a capital sums has been made, are actions applying after a lease has been granted. If either payment was made the leases would no longer be regarded as concessional for the purposes of Regulation 22 but no such exclusions are contained in Disallowable Instrument DI 2003-193. This issue is dealt with later in the report.

There appears to have been no objection to this basic definition of concessional lease, it adopts the generally understood concept of a concessional lease and it has been legislatively prescribed since the introduction of the Land Act.

Accordingly, this report adopts the definition of concessional lease as:

> *"A lease granted for a consideration less than the full market value of the lease, whether any such consideration was paid as a lump sum for the grant or is payable under the lease as rent, and in relation to which neither of the following payments have been made to the Territory:*
>
> *(i) a capital sum or sums in respect of its grant equal to the market value of the lease at the time of the payment, or at the time of the last such payment, as the case may be;*
>
> *(ii) a capital sum or sums to reduce the rent payable under the lease to a nominal rent under the Act, section 186;*
>
> *including a further lease, a consolidated lease, a subdivided lease, a regranted lease.*

Additional definitions as follows are also adopted as they define terms used in the basic definition:

> *consolidated or subdivided concessional lease means a lease granted in the course of a consolidation or subdivision involving the surrender of 1 or more previous leases where—*
>
> *(a) each surrendered lease was a concessional lease; or*
>
> *(b) if more than 1 lease was surrendered, and any (but not all) of the surrendered leases was a concessional lease—*
>
> *(i) the surrendered leases were not over parcels of land of equal area; and*
>
> *(ii) the surrendered lease that was over the largest parcel of land was a concessional lease.*
>
> *further concessional lease means a further lease where the surrendered lease was a concessional lease.*
>
> *regranted concessional lease means a regranted lease where the surrendered lease was a concessional lease.*

It would be desirable for greater certainty and clarity to have the definition in the Act rather than in the Regulations and the disallowable instrument. This would enable the term and the definition to be applied to both the Act and any Regulations and other subordinate legislation. Later recommendations in this report propose the creation of processes which, in accordance with Government legislative policy, would be included in the Act and would need the supporting definition of concessional lease.

IT IS RECOMMENDED THAT the definition of a concessional lease should be the same as the one contained in Regulation 22 of the Regulations (as qualified above) and that it should be included in the Land Act.
(Recommendation 1)

EXCLUSIONS

The current definition in Regulation 22 only excludes certain leases granted to the Commissioner of Housing and the class of leases specified in Disallowable Instrument DI 2003-193 has no exclusions. This means that a strict interpretation of the characteristics of a concessional lease i.e. granted for a payment or rent less than market value or rent would encompass a large number of leases which were never intended to be included. Examples of these are residential leases granted to the public housing sitting tenants at 80% of their value in accordance with the then Government policy; many rural leases; and leases granted out of a holding and development lease under the private sector land development program. In theory, all these leases would be subject to the restrictions in section 167 and they could not be transferred, sublet etc. without consent. That section provides that a transfer, sublease etc. without consent shall have no effect.

To date ACTPLA and its predecessor have not been applying the provisions of the section to those leases which had not been understood to be concessional. It is, however, necessary to formally exclude the classes of leases not intended to fall within the definition and, subject to legal advice, validate the past dealings which could be considered to be of no effect as a result of the application of section 167.

The classes of leases to be excluded from the definition have been developed in discussions between ACTPLA and the consultants. There is no list of leases which might fall within the definition and the list below represents the most comprehensive within the corporate knowledge available. To further enhance the list would require an analysis of all types of leases granted since the inception of leasehold and, in the opinion of the consultants, this exercise would be too costly. The legislation could include a catch all exclusion being leases of a class declared by the Executive not to be concessional leases.

It should be noted that some of the classes intended to be excluded from the definition of concessional lease may still have restrictions imposed on them through processes specific to that class.

IT IS RECOMMENDED THAT the following classes of leases be excluded from the definition of concessional lease:

a. a standard residential lease being a lease granted for residential purposes only [section 159 of the Land (Planning and Environment) Act 1991];

b. a lease granted over a block of land which has been developed, under a holding lease, as part of a Private Enterprise Land development, unless the lease is over a block which has first been returned to the Australian Capital Territory;

c. a lease regranted as a consequence of a variation of a lease where the prior lease was not a "concessional lease";

d. a lease granted to a government organisation or a Territory owned corporation;

e. a lease for rural purposes;

f. a further lease provided that the original lease was not a concessional lease

g. a lease granted after 11 April 1974 (CALA reintroduction of the ability to charge land rent) which required a an annual land rent payment more than 5 cents and in respect of which the land rent requirement had been extinguished by a lump sum payment to the Government; and

h. ***a lease belonging to a class of leases which the Executive has declared by disallowable instrument to be non-concessional.***

(Recommendation 2)

If the recommendations in relation to the definition and exclusions are accepted, then the leases to which the definition would apply are:

- leases granted prior to the Land Act for a capital sum or rent which was less than market value (capital or rent);
- leases granted under section 163 of the Land Act;
- leases granted under section 164 of the Land Act; and
- leases granted under section 161(1)(d) of the Land Act for a capital sum or rent which was less than market value (capital or rent);

except a lease of a class which falls within the exclusions.

Applying the definition and exclusions results in the concessional leases falling into two classes:

- those which are granted to community organisations for community purposes; and
- those which are granted to commercial organisations for economic development.

Some of the issues and recommendations are generic to both classes of concessional lease but in the workshops there was a clear view that these classes should be considered separately. The report therefore considers the issues as they apply to the two classes separately.

RETENTION OR ABOLITION

The first issue to be considered after defining a concessional lease is whether the concessional lease regime should be retained. The Minister, in his press statement calling for public comment, said the discussion paper asked some fundamental questions – "For example, should the Government continue to grant leases at less than market value and if so at what level should the concession be fixed.". This issue was again raised in the workshops and a number of the written submissions have addressed it.

The retention or abolition of concessional leases in this chapter relates to future leases. While the abolition of the restrictions applying to existing leases has also been raised, it is dealt with later in this report.

Since the establishment of the land tenure system in the ACT, successive Governments both Commonwealth and Territory have granted leases for differential rents and premiums to assist lessees in establishing in the ACT. Over that time, assistance has been provided for a wide range of leases for commercial, residential, community, social and rural purposes. The mechanism of granting concessional leases has been facilitated by reason of the fact that the Government was the sole owner of the freehold land and had in its power the right to grant leases on any terms that it saw fit. Greater legislative control over the granting of leases has been developed over time to provide a more accountable system, however, Governments have sought to retain the right to make direct grants of leases at, or below, market value for what have been regarded as creating a benefit for the community. The earliest leases directly granted for less than market value for community purposes were those granted to churches but wider social service providers were assisted as the ACT grew and the needs for those social services developed. Appendix B catalogues the history of the legislative and administrative framework of leasehold in the ACT and demonstrates the legislation which has been enacted to provide for leases granted for community services.

With the enactment of the Land Act recognition was given specifically to two classes of lease which could be granted at less than market value. Section 163 provided for leases to community organisations while section 164 provided for leases which facilitated the economic development of the Territory or the development of business in the Territory. Section 161 also provided for the direct granting of leases in accordance with criteria specified in a disallowable instrument. Not all leases granted pursuant to these legislative provisions are concessional leases as some may well have paid market value for the grant of the lease.

The discussion paper raised the question of abolishing concessional leases in two ways:

- ceasing to grant them altogether; or
- granting leases only for market value but provide assistance to purchase the lease through a cash grant from the Government.

Not surprisingly, there seemed to be little support for the abolition of the concessional lease concept as it applied both to community concessional leases and to commercial concessional leases. The program is seen as a way for the Government to support the establishment of social service providers or new business without the direct input of funds. While this system may be seen to be less accountable than one in which the grant funds are clearly reflected in the Territorial Accounts, the details of the directly granted leases are tabled in the ACT Legislative Assembly. The Stein Report recommended the establishment of a Land Management Account which would better reflect the dealings in concessional leases. Such an arrangement for concessional leases would be a small part of any land accounting system and it is outside the scope of this review to canvass a land accounting system which covers all land in the ACT. This is a matter for a whole of Government approach. If such a system was proposed, nothing recommended in this review would inhibit the inclusion of concessional lease elements.

To abolish the concessional lease program altogether without providing other support, would result in the ongoing economic development of ACT being inhibited and a reduction in the social services provided to the Canberra community. This could result in a reduction in employment and a shifting onto the Government of the responsibility for providing those social services which would no longer be available from community organisations.

Accordingly it is not recommended that the concessional lease program be abolished altogether.

The second approach is to provide funds to assist lessees to purchase leases through a cash grant arrangement. The reaction and application to this approach varied for the two classes of concessional lease.

COMMUNITY

If such a scheme was to be introduced then future concessional leases would not be created because market value would be paid for each lease. Grants would be made available from Government Departments with the general responsibility for the delivery of the various programs. Where no clear responsibility was evident, it was accepted that Chief Minister's Department would establish and manage such a grants program. Additional funds would have to be provided to Departments to provide and manage the grants program. There would also need to be a strengthening of policy and process

across Government in relation to the establishment of need and the determination of priorities. Grants used to purchase leases would be returned to the Government through payments from the LDA.

This proposal gained a low level of support in some areas but was strongly opposed by community groups and social service providers. There was a clear lack of confidence on the part of the community and service provider groups in the ability of different Departments to gain the necessary funds or to apply them equitably, especially in areas where the Government provided similar services e.g. education. Because of this substantial objection and because a system is to be recommended for dealing with future concessional leases which will overcome the current difficulties, it is proposed to retain concessional leases as a program available to the Government and the community.

BUSINESS

The area were the second proposal is under consideration is for leases granted pursuant to section 164 of the Land Act. The continuation of grants under section 164 is under review by the Government through ACT Business Incentive Scheme following issues arising from a recent case. The possibility of providing assistance by way of monetary grant to assist a prospective lessee to purchase a lease for market value is being considered. If this proposal is adopted then the need for section 164 would disappear. All controls would be effected through the grant conditions and the lease could be directly granted pursuant to section 161(1)(d).

IT IS RECOMMENDED THAT the Land Act should continue to empower the Government to grant leases for less than market value subject to the conditions contained in the later recommendations in this report. (Recommendation 3)

DECLARATION

One of the major complaints directed to the current processes surrounding concessional leases, both community and commercial, is the ability for the lessee, anybody with an interest in the lease or indeed the public at large to identify whether a lease is concessional or not. In land tenure terms, any restriction on dealing with a property can be ascertained by a search of the property's details in the Land Titles Register. This is especially important where the restriction might affect the validity of a transfer or sub-lease etc. The current system surrounding concessional leases does not provide and has not provided the means whereby concessional leases or the restrictions associated with concessional leases can be reliably recognised from the Land Titles Register. There is currently no statutory process for the identification of a lease as a concessional lease. The existing situation relies on a system, triggered by:

- a lessee seeking an ACTPLA consent required either under a provision of a lease or as the consequence of the interaction of section 163 or 164 of the Land Act and various disallowable instruments made under the Act, to transfer, mortgage, assign, sublet or otherwise part with its lease; or
- a lessee seeking to vary a lease, which would cause the concessionality of the lease to be investigated, if only to establish the level of change of use charge to be applied.

The Registrar-General highlighted this problem in his submission and indicated his support for a mechanism to be developed to overcome the problem.

Some other submissions have suggested that a complete review of the existing leases be undertaken and there be a register, or other means of identification, created which would record concessional leases. The case study work undertaken by the consultants at the request of ACTPLA, which listed in Appendix C, clearly indicates the difficulty of this task. Such an exercise would prove a very time consuming, resource intensive and expensive exercise. Many concessional leases would remain in the hands of churches or other service organisations which have no intention of transferring, subleasing or changing the use of the lease. In addition, an equitable process would mean that a lessee whose lease was declared to be concessional should be able to challenge that finding. Attempting to identify all such leases now would force lessees not satisfied with the outcome into an appeal process immediately even though they may have no intention of dealing with their lease.

Other submissions have suggested that because of the difficulty in administering past leases, the classification of past leases as concessional should be abolished. If this principle was accepted then the definition of concessional lease would exclude all leases granted before a nominated date and no restrictions would apply to them. The lessees would not be required to obtain consent to a transfer, assignment or sub-lease. *Change of use charges* would be the same as for any normal lease and there would be no requirement to make any payment to deconcessionalise the lease. This would mean a loss of revenue for the Government, however the proponents of this position suggest the freeing up of processes and the ability of lessees to deal in their leases would save administrative costs to the Government and would result in increased revenue in other areas such as stamp duty etc.

Neither the proposal to review all leases, nor that of abolition of concessional lease classification, appears practical or universally acceptable at this stage. The first, would involve greater resources and expense than can be justified at this time, although at the end all concessional leases would be endorsed as such in the Land Titles Register. The second does away with the controls which are generally deemed necessary but avoids a major work effort. Both would provide certainty for future dealings.

There is a middle road which, while it does not provide the same level of certainty, does provide a process of arriving at certainty for an individual lease.

All new concessional leases, whether granted under the existing legislative provisions or under a new section proposed in the next chapter, would be endorsed on their grant with the classification as concessional leases and this endorsement would be indicated on the title and show up on a search of the Land Titles Register.

For existing leases, not already endorsed, the concept is as follows:

- the lessee or an interested party would be able to make an application to ACTPLA for a declaration as to whether a lease is a concessional lease, the criterion being whether the lease was granted for market value;
- ACTPLA would be required to declare within a specified time (suggested 30 days) as to whether or not the lease is a concessional lease;
- that declaration would be registered at the Land Titles Office in a manner similar to a Registrar-General's caveat and would show up on a search of the Land Titles Register;
- in the event of ACTPLA not making the declaration within thirty days of the application, the lease would be deemed not to be concessional. The lessee would have a right of appeal. On the lessee providing sufficient evidence to the Registrar-General of the application and the failure on the part of ACTPLA to make a declaration, the Registrar-General would endorse the lease in the Land Titles Register as being non-concessional; and
- it would be appropriate for the applicant for a declaration to have a right of appeal to the AAT against the ACTPLA's decision and the onus of proof on the appeal should lie with ACTPLA. That is, if the declaration was that the lease was concessional, ACTPLA would be required to satisfy the AAT that the lease was granted for less than market value. The usual time frames for appeals to the AAT should apply.

For existing lessees, this process would allow them to obtain a decision and certainty about their leases in a relatively short period of time. The process of determining whether or not a lease is concessional will require a review of the papers concerning the grant and advice from the Government's valuation advisers as to whether the original grant was for less than market value. It is reasonable to expect that this can be completed within the nominated time frame. Having regard to where the onus of proof will lie on any appeal, if for any reason, it cannot be substantiated that the lease was granted for less than market value then ACTPLA should declare the lease to be non-concessional.

It is not anticipated that a large number of lessees will flood ACTPLA with applications. Those lessees or transferees of leases that are potentially concessional will seek to have certainty before they proceed with any project or transfer concerning the lease. Those would be ones in respect to which a declaration will be sought. The resolution of the status of the lease might also be sought by potential lenders. It would be reasonable to charge a fee which reflects, to some extent the effort involved in making the declaration, and at a level which would discourage applications for the declaration becoming an automatic request in the conveyancing enquiry process.

Consideration has been given as to whether or not there should be an entitlement for third parties to appeal the declaration. None of the submissions has suggested that third parties should have such a right. The issue under review on the appeal is really one directly between the lessee and ACTPLA. Third parties would still retain the right of appeal in respect of any variation to the lease and in particular any variation to the purpose clause. What should be the process with respect to the purpose clause variation of a concessional lease is discussed later in this chapter. A reference to third parties does not include parties with a registered interest in the lease. Such registered persons should have a right of appeal and should be joined in any appeal.

The process outlined above does not provide certainty until a declaration is made but it does meet the principles of timeliness, transparency, accountability and certainty.

IT IS RECOMMENDED THAT the Land Act be amended to include the right of a Lessee or party with a registered interest in a lease to make an application to ACTPLA for a declaration as to whether or not a lease is a concessional lease. The declaration is to be registered in the Land Titles Register and the applicant or person with a registered interest would have a right of appeal. If the declaration is not made within 30 days of lodgement of the application, the lease is deemed to be non-concessional and the lessee has a right of appeal.
(Recommendation 4)

NEW SECTION IN THE LAND ACT

While leases granted under section 163 and section 164 are concessional leases not all leases granted under these sections have been identified as such. Also, because section 163 is headed *"Leases to community organisations*", confusion has arisen between the notions of "concessional" and "community" leases. Many leases with a community type use have been granted under section 161(1)(d) even though they may have been granted at less than market value.

In order to avoid confusion in the future, it is considered desirable to create a new section under which all leases granted for less than market value will be issued. This new section could encompass all concessional leases including commercial and community. The class of use of lease and the class of lessee to which the new section applies could be determined by the Government by disallowable instrument. The fact that the lease is granted under this section, will result in an endorsement which will appear in the Land Titles Register, and will signal immediately that it is a concessional lease and therefore subject to the restrictions prescribed in the new section.

There are recommendations later in this report which suggest amendments to current sections of the Land Act e.g. section 163, if these recommendations are accepted then the varied conditions would be incorporated in this new section.

If this proposal is accepted there will be a need to continue some of the conditions applying to leases granted under the current regime. The rights of lessees will have to be protected but any relaxation of the rules for new lessees which flow from the adoption of recommendations in this report should be passed on to existing lessees. Generally speaking the concept of a new lease is related to future leases and is designed to overcome the current problems associated with leases being granted under section 161(1)(d) and there being no recognition of them being concessional leases.

IT IS RECOMMENDED THAT a new section be included in the Land Act under which all future concessional leases are to be granted. The section will contain any restrictions as decided and the class of use and lessee will be determined by disallowable instrument. The section under which the lease is granted will be noted on the title.
(Recommendation 12)

REFERENCE TO THE ASSEMBLY

One of the matters which the terms of reference required to be considered was the role of the ACT Legislative Assembly in respect to the granting and administration of concessional leases.

Concessional leases which are directly granted to an applicant are tabled in the Assembly. While the legislation does not prevent the allocation of a concessional lease by auction, ballot etc, to date, concessional leases have been allocated by direct grant and the details of those grants are tabled in the Assembly.

As for the administration of concessional leases, the areas which might be considered to be relevant to a political process are the transfer, change of use or deconcessionalisation of the lease.

A transfer of a concessional lease and the restrictions already applied are in the Land Act and the disallowable instruments which identify the class of lessee. This process has already been before and approved by the Assembly.

With respect to a deconcessionalisation, the legislation already requires that process to be reviewed by the Planning and Land Council and the Government is required to publish its policy and procedures pursuant to section 29 of the Commonwealth's PALM Act, as mentioned in Chapter 5. That would include the policy guidelines for consideration and approval of a deconcessionalisation application. As the approval to deconcessionalisation only eliminates the need for a lessee to obtain ACTPLA's consent to a transfer, sublease or parting with possession (and not any change of use) there does not appear to be a need for a statutory requirement to refer such applications to the Assembly.

As for the change of use of a concessional lease, many such changes may be of little consequence and not in any way controversial. All applications for a change of use are notified under the development application provisions of the Land Act and knowledge of the proposal is therefore within the public domain. If a matter is regarded as being one which should be considered by the Assembly, either the Minister or an Assembly member can raise the issue and refer it to an Assembly Committee for consideration. Accordingly, there does not appear to be a need to have the legislation require a change of use application for a concessional lease to be referred to the Assembly.

8 COMMUNITY CONCESSIONAL LEASES ISSUES AND OPTIONS FOR CHANGE

This chapter deals with leases which are granted to community organisations for community purposes.

EXISTING GRANT PROVISIONS

SECTION 163 OF THE LAND ACT

As stated above, not all leases for community purposes or leases to community organisations are concessional leases however a large proportion of concessional leases have been granted for social and community purposes.

Section 163 provides for the direct grant of a lease to a community organisation without charge or for a charge that is less than market value. Accordingly all leases granted under this section are concessional leases. A "community organisation" is defined in the section as meaning a body corporate that:

> *(a) has as its principal purpose the provision of a service, or a form of assistance, to persons living or working in the Territory; and*
>
> *(b) is not carried on for the pecuniary profit or gain of its members; and*
>
> *(c) does not hold a club licence under the* Liquor Act 1975.

Such a grant must be in accordance with criteria specified in a disallowable instrument. Two such instruments are currently in force, DI2003-231 and DI2003-233. The revoked instruments had similar provisions. Copies of the current instruments are in Appendix A. Sub-section (8) of section 163 imposes an absolute restriction on transfer for a lease granted under this section. This provision has caused some concern for mortgage security and a Bank has suggested that the provision be changed to transfer with consent as opposed to the absolute prohibition. Reportedly there have been few leases granted under this section because of objection to this prohibition on transfer and leases for community purposes for less than market value have been granted under section 161(1)(d) in lieu. A lease granted to a community organisation for less than market value under section 161(1)(d) would still attract the restriction of not being able to be transferred, sub-leased etc. without consent.

Representations have been made to vary the absolute prohibition on transfer contained in section 163(8) to make it a requirement for consent to transfer. This change is sought for existing leases granted under section 163 as well as future leases which might be granted under that section.

In the event of a lessee being unable to carry on operating under a lease granted under section 163, the absolute prohibition would force the Government, politically if not legally, to buy back the lease. There has been some support in the submissions for the notion that the Government should buy back any lease granted for community purposes and which is no longer able to be operated by the lessee. Other submissions propose that the failure of a lessee to be able to continue operating under a lease indicates a loss of demand for the use described in the lease and the lessee should be entitled to change the use and transfer the lease. Yet others hold more draconian views and call for termination of the lease in such cases. Many of the submissions in this area appear to propose solutions directed to keeping the land in community use rather than having a concern about which community group might operate the service delivery. In this context the report recommends that the transferee must satisfy established criteria and that there be a more stringent approach to purpose clause change.

Leases granted under section 163 should be clearly marked as such and this notation should appear on the title.

Having regard to:

- the later recommendations of this report providing for all new concessional leases to be granted under a new section;
- the recommendations also requiring existing concessional leases to be subject to a stronger process for lease change;
- the limited number of leases granted under this section; and
- the apparent difficulties with regard to the security value of the lease;

it would appear sensible to vary the section 163(8) restriction to allow a transfer with consent. The lifting of the prohibition against transfer applies only in the case of leases granted under section 163 as this is the only legislative provision which contains an absolute prohibition against transfer etc. The criteria for consent should be those applying to all other concessional leases.

IT IS RECOMMENDED THAT section 163(8) be amended to allow a transfer of the lease with the consent of ACTPLA.
(Recommendation 13)

ASSESSMENT OF NEED

One of the major issues, which arose both in the workshops and the submissions, was the identification of land for community use and the protection of that land for ongoing community purposes. It is recognised that community services can be delivered from premises in a variety of locations and from premises held under a variety of occupational arrangements. It is also recognised that not all community uses require the grant of land and not

all community uses need a grant being made for less than market value. However, a substantial proportion of leases on which community services are provided are concessional leases therefore in reviewing this area community and concessional are closely linked.

Considerable work has been undertaken over the years by successive planning authorities to identify community needs and locational guidelines for community facility provision. In the development of the Territory Plan, both the general needs assessment and the location of community services and facilities relevant to the population base were taken into account. Areas of land were identified as being subject to "Community Facilities Land Use Policies". These policies contain Land Use Controls and specify permissible uses in the areas identified in the Plan.

A number of the submissions supported the concept that a community needs assessment should be developed and that new leases for community purposes, especially those granted for less than market value should only be granted if the proposed use satisfies an identified prioritised need. Recent work undertaken by ACTPLA on Community Facility Needs has shown that determining community needs for all types of facilities permissible under the Community Facilities Land Use Policies of the Territory Plan is extremely difficult. Various Government agencies undertake a range of assessments for the services and facilities that they provide; such as education, health, recreation, arts and community services. However, there is no one formula that can adequately be applied across the vast array of services and facilities that may or may not be required by the community. However, the current work being undertaken within ACTPLA on community facilities will result in a base document which identifies the current provision of facilities in each district, some of the perceived gaps, and the need to apply the precautionary principle to residual vacant community facility land, which is now quite limited. The work already undertaken suggest that a cross-agency approach to prioritising community needs for facilities and services may assist in determining future use of such land, while market forces will determine those facilities and services that are commercially run.

Changing demographics, population projections and community values often result in changing needs for community facilities and services. In some instances, it is apparent when a demand for particular type of service or facility is required eg residential aged care facilities. However, it is less straightforward to determine the need for Places of Worship.

Where a need is identified, the amount of land necessary to satisfy that need would be identified and either a program put in place to target organisations who could best provide the services, or undertake a release program which invites potential service providers to apply for the grant of a lease of land from which to operate. It is anticipated that further investigation to identify a cross-government program that identifies service and facility needs based upon reviews of current service provision, and identifying gaps would be developed

with contributions from all Government bodies and a measure of public consultation.

Some submissions suggested that the community type use concessional leases should have much wider purpose clauses so that a change of use within the wide parameter of community uses is possible without a change of purpose clause process. Other submissions have sought the retention of tight development and use restrictions. Obviously any such approach involving wider purpose clauses must be made within the permissible uses defined in the Territory Plan. Such an approach benefits the lessee at the expense of the Government's ability to maintain tight planning controls and the potential loss of *change of use charge*. The community would also lose the opportunity to comment and appeal against the change of use. There is some merit in the argument that some previous leases contained user covenants which are just too specific. This problem does not appear to be widespread and while greater attention might be given to what should be the extent of the purpose clause in future concessional leases, it does not appear to be a matter which warrants a formal recommendation in this report.

The part of the overall needs assessment process which is most relevant to concessional leases is the determination of which services warrant the grant of a lease of a new parcel of land and to what extent a reduction of the market value of that lease is necessary to encourage/enable the provider to establish and deliver the service on an ongoing basis.

No formal recommendation is made with regard to this issue as it is much wider than a matter relating only to concessional leases but the comments and the submissions may be helpful to a wider analysis of community leasing.

IT IS RECOMMENDED THAT the needs assessment of community services undertaken in ACTPLA be supported on a whole of Government basis and that particular attention be given to the identification of those services which will require support through the grant of concessional leases. (Recommendation 14)

ASSESSMENT OF PROSPECTIVE LESSEE

Once the priority of need is established and it has been determined that that need will best be met if a provider is granted a lease at less than market value, the question arises as to who should be the provider.

In the past, the process has often been triggered when a potential provider has requested the grant of a lease and appropriate land has been identified in response to that request.

On the basis that the assessment suggested in the Recommendation 14 has been carried out, then the criteria for assessment should include the following elements:

- does the applicant meet the criteria contained in the disallowable instrument?
- is there land available to meet the applicant's request?
- does the application meet the requirements of the Land Act and the Territory Plan and other guidelines such as the "Location Guidelines for Community and Recreational Facilities"?
- is the service to be provided an established priority need?
- is this applicant the only provider?
- does the applicant have a history in providing the identified service? and
- does the applicant have the financial support to establish the infrastructure and maintain service delivery?

One means of improving the current land allocation process would be that the applicant be assessed by a panel of interdepartmental officers with the necessary mix of skills and knowledge in the proposed community service delivery.

Some submissions suggested that where there were equally competing priorities and well qualified providers a ballot or auction be conducted. A ballot would seem to be possible but an auction would appear to be contrary to the concept of concessional leasing. The likelihood of this occurring without being able to be resolved through the identification of other land or a different mechanism of service delivery appears so slight as not to warrant the development of a separate process.

It is recognised that some of these processes are already in place and others are being developed. What is noted here reflects the comments in the workshops and matters raised in the submissions. The report notes that work is currently being undertaken in LDA review its procedures and processes in the area of lease grants including concessional leases. It is considered that the principles noted in this report which emanate from the consultation process should be considered in the resolution of those procedures.

ASSESSMENT OF SUBSIDY

Since the inception of the land tenure system in the ACT successive Governments have provided subsidies to organisations to establish services through the grant of free or less than market value leases. Up until 1971, this principally took the form of subsidies in the level of rents paid. Since 1971, the subsidy has been in the form of forgoing some or all the market value premium payable for the grant of the lease. The subsidy currently applicable to the grant of community concessional leases is that which was adopted in 1990 at the time the Land Act provisions were being developed. The full details of the

current policies are described in the Chapter 5 dealing with Current Policies and Procedures.

A number of the submissions touched on the level of subsidy both as a question of premium and change of use charge. Those submissions which raised the need for support for aged accommodation and affordable housing are noted in the analysis of all submissions; however, these issues are outside the terms of this report. The Government will need to decide separately how best it will support these issues and while some support could be provided through the concessional lease program the process would be no different from support for other community programs.

Many of the submissions which supported the retention of the concessional lease program also supported the extent of the subsidy being 100% of the market value of the lease. Two submissions which took a different approach were that of the Law Society and the Catholic and Anglican Churches. The Law Society suggested that the extent of the subsidy should be in accordance with clearly specified criteria including the assets of the applicant, its expected profits, and the expected value of the benefit to the community. The Churches suggested that leases for community infrastructure should be granted free, leases granted to build social capital e.g. churches and religious associated use should pay the cost of site servicing as should leases granted to promote social objectives e.g. aged accommodation on a loan and licence basis.

The current arrangements provide the majority of concessional leases with a subsidy of 100% and are generally in line with the church proposal save that depending on the terms of the lease for the promotion of social objectives, the full market value would be chargeable. The Law Society proposal raises the requirement for subjective assessments of each proposal and involves a change from the existing policy. Having attended the workshops and having reviewed the submissions the consultants do not believe that the community has had a sufficient understanding or given sufficient consideration to the issue of the extent of subsidisation of concessional leases. For this reason no change to the present regime of subsidies for concessional leases is proposed. The Government should give consideration to a review of the subsidies after the other recommendations of this review have been considered, resolved and implemented.

IT IS RECOMMENDED THAT the Government make no immediate change to the subsidies provided in association with concessional leases but that after the other recommendations of this review have been considered, resolved and implemented the Government conduct a review of those subsidies.
(Recommendation 5)

ADMINISTRATION OF EXISTING LEASES

The administration of existing concessional leases provided the most discussion in the workshops and the most comment in the submissions. Many of the submissions were from groups who currently hold concessional leases or who were involved in recent proposals to vary concessional, or more accurately, community leases.

As a result, some of the comments are applicable to community leases as a whole and are not solely referable to concessional leases.

In dealing with existing leases, it must be borne in mind that the Government is inhibited in the extent to which it can impose further regulation where that regulation might be interpreted as diminishing the rights of the lessee. A relaxation of regulation is acceptable and supported by a number of the submissions.

LINE IN THE SAND

Contrary to the position put by those who proposed a complete review and identification of all existing leases, a number of submissions proposed the abolition of the restrictions on existing leases. That would involve the fixing of a date and all leases granted before that date would be excluded from the definition of a concessional lease. That would mean that all leases granted before the determined date for less than market value would be treated as ordinary leases able to be transferred and sub-let without restriction, subject to a change of use charge of 75% and not required to pay any moneys to deconcessionalise the lease. The requirements for a lease change of use would apply with the application of the usual restrictions contained in the Territory Plan and the associated public processes.

The Law Society, in its submission, suggested the date for drawing the line in the sand should be the date of the introduction of the Land Act (2 April 1992). That position was also supported in the submission from the Property Council of Australia, which saw this position as supporting its principle of unlocking land for development by removing unnecessary and archaic restrictions. The Australian Property Institute also agreed that the cut off should occur at 1991 (sic) as it allowed a fresh start. The introduction of the Land Act was seen as an appropriate date before which concessional leases should not be subject to any restriction because the Land Act was the first legislation which identified and recognised classes of lease as concessional leases. Before that date some leases had provisions restricting transfer contained in the lease document itself and leases granted under the *Leases Act 1918* were subject to a Regulation preventing transfer without consent. In those cases there was no distinction made as to whether market value or market rents had been paid for the grant of the lease.

Other possible dates identified in the discussion paper and at the workshops prior to which leases should be excluded from the definition of concessional leases were 1971 being the date on which the land rent payable under the

leases of most urban land was reduced to a nominal level ("the Gorton Gift") and 2004, being the date of this report. Neither of these alternative dates has received much support and therefore they have not been considered as realistic opportunities.

If any of these proposals were to be adopted, a large number of potential concessional leases would be excluded from the concessional lease requirements. This would remove the uncertainty concerning those leases which were granted before the determined date and which have or may have paid less than market value for the lease. This would also relieve the Government of a major administrative exercise in identifying these leases, either now or over a period of time, depending on whether the submissions calling for an immediate review and identification of all leases are adopted. Such an action would relieve doubts as to the efficacy of any transfers or sub-leases of these leases which had been undertaken without consent.

There would be an effect on the Government's revenue from a reduction in the change of use charge from 100% to 75% and a reduction in receipts for deconcessionalisation. The quantum of revenue loss is impossible to estimate with any degree of accuracy because it relies on future decisions in a variety of changing circumstances, however the loss could be less than the cost of administration if the major exercise of reviewing all leases were to be undertaken. The financial implications are dealt with in more detail in Chapter 11.

Against this there is a general concern that concessional leases (and in particular community leases) should not be released from any measure of control presently applicable.

Many of the submissions sought greater controls where a concessional (also community) lessee wished to vary its lease and this aspect is discussed below. Suffice to say that the proposition of drawing a line in the sand and relieving a large number of concessional leases from the current restrictions would be opposed by a large number of the community and social groups within the ACT community.

Having regard to the fact that there will be a mechanism for lessees to gain certainty and the general community concern about relieving concessional lessees from the current restrictions, this report does not recommend the adoption of a drawing a line in the sand approach.

RETENTION OF RESTRICTION ON TRANSFER

If a new section is created in the Land Act for the granting and administration of concessional leases, should that section retain the restriction against transfer, sub-lease etc without consent and what should be the criteria for giving or refusing consent?

As indicated above, the restriction on transfer, sub-leasing or parting with possession without consent has long been a provision included in leases and legislation. Generally speaking there has been some relaxation of these controls measures and today a large proportion of the leases in the ACT are readily transferable and lettable without any consent required.

With regard to community concessional leases, the Alliance Government released its policy on leases to community organisations, concessional leases and leases to national and local associations in 1990. As to concessional community leases the transferability policy was:

> "The Government has reaffirmed its earlier assessment that concessional community leases issued after the commencement of the proposed land administration Act in July 1991 will not be transferable. Where a community group wishes to relinquish its lease it will be able to surrender it to the government, receiving a fair and agreed return for its buildings and other improvements. The lease could then be re-offered to another community body eligible for a concessional grant."

This policy is reflected in section 163 of the Land Act which has been discussed. The absolute prohibition in section 163 has been seen as being too proscriptive and there are many cases of community leases both concessional and otherwise being granted under section 161(1)(d) to avoid the absolute prohibition against transfer. This aspect of lease administration is dealing with the transferability of the lease not the change of use. It appears too drastic to require the surrender of the lease when a transfer subject to the criteria below will allow the services provided pursuant to the lease to be continued by a different eligible and qualified lessee. This report recommends that all concessional leaseholders not be barred from transferring leases but be required to obtain consent before transferring.

Generally the submissions supported the retention of this restriction although some did wish to have the restriction lifted for earlier leases. The necessity to retain the requirement of consent to the transfer derives from the fact that, in principle, the lease was granted for less than market value and any subsequent lessee should only be an organization which would have been eligible to receive the concession on the original grant. Again, there was general support for the requirement that the transferee be an eligible organisation.

This principle is currently implemented by the provisions of section 167 of the Land Act and Disallowable Instrument DI2003-193. Some of the submissions raised either directly of indirectly the issue of the legality of the practice of the Land Act and subordinate legislation such as regulations, disallowable instruments and the Territory Plan potentially restricting or acquiring, without adequate compensation, rights which vest in the lessee. This aspect is pertinent to Disallowable Instrument No DI2003-193, which together with the supporting provisions of the Land Act restricts the right to freely transfer a

lease (granted at less than market value) without the consent of ACTPLA even though no such restriction is contained in the lease or in the legislation under which the lease is granted. This issue appears to involve a difficult legal question which cannot be resolved in this review. Accordingly, the recommendations assume the continuing legality of Disallowable Instrument DI2003-103.

Some concern has been expressed in ACTPLA as to the wording of that disallowable instrument in that the original criteria for the initial grant of the lease might be quite different from the criteria which now apply under the nominated section. Also, it is not clear whether the transferee has to meet the criteria required under any one of the sections nominated or, as logic would suggest, the criteria aligning with the type of use contained in the lease. It is therefore desirable to review and reword the provisions of the disallowable instrument to better reflect the policy as recommended below.

Again, it is important to note here that consent to a transfer does not mean consent to a change in use.

Apart from the eligibility criterion referred to above, the transferee should be required to demonstrate its capacity to continue to operate the lease in accordance with the purpose clause and to demonstrate that there will be no loss of public benefit arising from the transfer.

The current Government policy on consent to transfer is outlined in ACTPLA's *Guideline for the Assessment of Applications to Pay Out the Concession Applying To a Lease or to Transfer a Concessional Lease to Another Person.* This guideline concentrates on change of use and deconcessionalisation and does not clearly set out the criteria to be applied when deciding whether or not to consent to a transfer.

The next issue is whether there should continue to be a requirement to consent to a sub-lease and a parting with possession. Section 167(6) of the Land Act provides:

> *"(6) The Executive shall not consent to the lessee under a lease to which this section applies, or to any other person having an interest in such a lease—*
>
> *(a) assigning or transferring the lease; or*
>
> *(b) subletting the land comprised in the lease or any part of it; or*
>
> *(c) parting with possession of the land comprised in the lease or any part of it;*
>
> *unless it is satisfied that the person to whom it is proposed that the lease should be assigned or transferred, the person to whom it is proposed that a sublease should be granted or the person to whom it is proposed that possession of the land should be given, as the*

case may be, is a person who satisfies the criteria of eligibility specified pursuant to subsection (1)(b) in respect of the class of leases in which the lease is included."

The criterion designated in the legislation that the transferee must be eligible for the original grant is clearly applicable to an assignee and transferee but not as directly so to a sub-lessee or an action to part with possession. The lessee still retains the lease and remains responsible for its operation. Any use of the lease outside the purpose clause or any failure to continue to use the lease for the purpose for which it is granted has serious consequences for the lessee. While there may be some disquiet where a concessional lessee sub-leases or parts with possession of the whole of the lease, the lessee and the sub-lessee or occupier are required to comply with the lease conditions. There do not appear to have been cases where there have been sub-lettings or partings with possession which have resulted in loss of community benefit. While there is no information available in ACTPLA, the consensus is that for sub-leases for less than the whole of the premises on the leased land, the requirement for consent is honoured in the breach.

Very few of the submissions referred to sub-leasing and it is not clear what additional major benefit the Government and the community receive from requiring the lessee to obtain consent before subleasing or parting with possession of the lease. If the provision was to be applied strictly and observed by all concessional lessees, there would be a substantial increase in administrative work within ACTPLA.

On that basis while the requirement to obtain consent for an assignment or transfer is considered necessary, it is not considered necessary to continue to require consent for sub-letting or parting with possession.

IT IS RECOMMENDED THAT the Land Act and subordinate legislation continue to require consent for any assignment or transfer of a community concessional lease but not for a sub-lease or a parting with possession and that the criteria for consent to transfer be:

a that the transferee is an organization which would have been eligible to be granted the original concessional lease;

b that the transferee is able to demonstrate its capacity to satisfactorily continue to operate the lease in accordance with the purpose clause; and

c that the transferee is able to demonstrate that there will be no loss of public benefit arising from the transfer.

(Recommendation 15)

RECOGNITION OF SERVICE

One of the issues raised in the discussion paper was whether community concessional leases should be treated in a similar manner to commercial

special leases. Section 164 of the Land Act relieves the lessee of the restrictions applying to the lease after 5 years from the date of grant. The basis of this assessment appears to be that the lessee will have returned to the ACT Government/community the value of the concession after 5 years.

Under the current concessional regime, no such recognition or assessment is made with respect to community leases. Where the lease has been granted to meet an identified social need, the contribution to the community through service or the development of social capital is not currently recognised. The issue was also raised in the workshops but did not appear to generate much enthusiasm.

However a substantial number of the submissions supported the concept.

The opposite view is that the lease is granted for a maximum term of 99 years and the community need might well exist for the whole of that period and possibly beyond. It should be remembered that the restriction which might be lifted after a number of years, is the restriction on transfer without consent and the requirement to pay an additional 25% change of use charge for purpose clause changes to non community uses (while it remains a concessional lease). In addition, if the lease was to be excluded from the definition of a concessional lease after the expiry of the designated term the requirement to deconcessionalise would disappear and no capital sum would be required.

Arguably, as the community use of a concessional lease is not highly valuable commercially, what real benefit is to be obtained by the lessee by the removal of these restrictions? If the lease becomes non-concessional, there is greater opportunity to sell as consent is not necessary. However, the use remains the same and the lessee is required to continue that use. This is equally so for the commercial special concessional leases.

It is argued that community concessional leases would be bought up once the period of concessional restriction expired and held as a land bank for future commercial or residential development.

If as a result the opportunity to vary the lease to a commercial or residential use is seen to increase, it is argued that there may be a depletion of community use land in a location where such land is at a premium. This is an issue which is dealt with more fully later in this report. It should be noted that the process for a change of use of concessional community leases is to be tightened substantially, requiring a more stringent approach to satisfying authorities of the absence of need for community services before approval to a purpose change to commercial or residential use is accepted.

There are checks and balances as a concessional lease moves out of its concessional status and further checks and balances if its use is sought to be changed.

The current provision in relation to commercial/special concessional leases clearly defines a policy of automatic release after five years and there appears to be little reason why the same policy should not apply to community concessional leases especially as we are only discussing lifting the restriction on transfer etc and a loss of 25% of the change of use charge in the unlikely event that the lease is to be changed to non community uses while it still remains concessional.

It may be more difficult to evaluate when a community lease has returned to the ACT the value of the original concession in granting the lease, although at least one submission would dispute this statement. Some community services will return value to the ACT quicker than others but this can be equally so for commercial/special concessional leases. Because of this difficulty and because the return to the ACT from community concessional leases might take longer than a commercial operation it would be appropriate to have a longer period than the 5 years applying to section 164 leases.

On balance, it is considered that concessional lessees who have provided a service to the community over a twenty year period should have that service recognised by excluding the lease from the definition of concessional after the expiration of that period.

Licensed clubs have been removed from the ambit of concessional leases and if there are any licensed clubs able to qualify as concessional leases they should be excluded from this recommendation.

IT IS RECOMMENDED THAT concessional leases granted for a community use (not including leases for licensed clubs) should be excluded from the definition of concessional lease after 20 years from the date of grant.
(Recommendation 6)

CHANGE OF USE
(LEASE VARIATION)

This area of the review is the one which has caused most concern and it is directed to the community leases in general. In this chapter, where the report mentions community leases and community uses it assumes that a substantial number of those leases will be concessional (although not all) and the comments are directed to concessional leases because of their community nature. Community leases or uses are also intended to include recreational leases and purposes. Concessional leases which are not held by community organisations and do not have community uses are dealt with separately.

The question is what is to happen to community leases when a lessee wishes to change the use of the lease. The submissions had a variety of approaches from that of the Property Institute of Australia of allowing unrestricted use variations to enhance the general land bank, to that of the Old Narrabundah Community Council of keeping existing concessional leases in perpetuity to be

available to accommodate the changing needs of future generations. There were all shades in between. Both approaches and the others in between have valid arguments to support their cases however both cannot be accepted and a balanced response is needed.

There is little doubt that the community will continue to require the provision of community services and while those may change from time to time, sufficient land needs to be available in all locations to accommodate the service providers. At the same time, it is difficult, and costly, to keep vacant land available on the off chance that it may be needed at some future but indefinite time.

The Stein Review also dealt with this issue and concluded:

> *"There are significant arguments that concessional leaseholders should not be permitted to develop any part of the land leased for the community purpose for a commercial purpose. On balance, however, the Board would not go so far as to require surrender provided full betterment is paid and the proceeds of such development be dedicated to member facilities."*

The existing leases already have a bundle of rights attaching to their operations and there are some limitations on the extent to which those rights can be abolished. The opportunity exists for providing checks and balances, where it is proposed to change the permitted use of a lease for community purposes.

The Territory Plan contains provisions which are designed to protect against the depletion of community resources by providing:

> *"2.2 Depletion of Community and Recreation Uses*
> Proposals, which would have the effect of depleting the range of community or recreational facilities available within the centre, may be subject to mandatory preliminary assessment in accordance with Appendix II of The Plan.

This provision applies in Civic Centre and Town Centres and similar requirements are partly applicable in areas covered by the Community Facilities Land Use Policies but not in other areas of Canberra. If this principle was to be applied to all areas of Canberra where leases for community use exist, ACTPLA would be able to require a Preliminary Assessment to be carried out before consideration could be given to a lease variation to a non-community use. The Preliminary Assessment would be required to analyse the extent of community facilities or recreational facilities in the area and an assessment of the needs, both present and future, would be canvassed. This assessment would clearly indicate the status of facilities in the area and the capacity of the area to meet those needs with the current community service infrastructure. This would inform ACTPLA on whether or not the proposed change of use should be approved.

While many comments in the workshops and the submissions suggested that this assessment should be carried out by the Government, this would place an immense burden on ACTPLA both in resources and cost. Consistent with the current practice, when a lessee wishes to promote a change, the Preliminary Assessment is commissioned by the lessee and reviewed and assessed independently by ACTPLA.

This approach would provide a major review and public notification mechanism at the commencement of the process to change the use of a lease which has a community use as its permitted purpose.

The Territory Plan could also provide, with respect to leases for community purposes, that permissible uses under particular Land Use Policies are only permissible uses if the Preliminary Assessment confirms that a change of use to non-community permissible uses will not unreasonably deplete the community facilities available in the area.

If those amendments to the Territory Plan were implemented, the protection of the continuation of community services in all areas of Canberra would be enhanced but there would not be an absolute prohibition on community (concessional) leases being varied to commercial or residential uses.

While the recommendation is directed only to concessional leases, it is considered desirable that all leases with community and recreational uses should be subject to the suggested Territory Plan provisions. It should be noted that any change of use application will, in addition to the Preliminary Assessment process, be required to proceed through the development application public process involving comment, objection and appeal mechanisms.

ACTPLA has advised that a review of the planning process is being undertaken with a view to streamlining some of those processes. Such a review may seek to reduce the occasions when a Preliminary Assessment is required. If so, then any alternate process for assessment of a change of use of community leases should ensure that an analysis of current and continuing community needs is a prerequisite for any change and that the decision maker must be satisfied that a continuing community use is not required for that lease. Alternatives such as an amendment of section 231 of the Land Act to require a social impact statement to be considered or the inclusion in the Territory Plan of a requirement to provide social impact statement when an application is made to change the community use to a non community use have been stated as being considerations for the future.

IT IS RECOMMENDED THAT the Territory Plan be varied:

a to include in all areas subject to Land Use Policies which permit or have leases with concessional community uses a requirement that for any proposal which would have the effect of depleting the range of community or recreational facilities

available within the area, mandatory preliminary assessment in accordance with Appendix II of The Plan may be required;

b to include a requirement that for a concessional lease for community purposes the permissible uses within the plan for that Land Use Policy area only are permissible uses, if the Preliminary Assessment confirms that a change of use to non-community permissible uses will not unreasonably deplete the community facilities available in the area.

(Recommendation 7)

CHANGE OF USE CHARGE

The current *change of use charge* applicable to a concessional lease is 100% where the change is to a non community use as provided by Regulation 22.

This level is in generally in line with that recommended in the Stein Report which recommended at page 142:

> *"There be no remissions for concessional leases and free of charge lessees who propose changes to lease purpose clauses which add value to the land and are for a purpose different from the original grant"*

In considering this issue the Stein Report stated at page 141:

> *"We do say , however, that if a concessional lessee wishes to redevelop the whole or part of its lease for a new use unassociated with the concessional lease use, and which increases the land value by reason of the new use, then the lessee should be required to pay full betterment without being entitled to any remission."*

While the Stein comment does not directly align with the current provision in that there may be community uses which are unassociated with the current use, the current provision appears to follow the spirit of the Stein Report.

A number of submissions expressed concern at recent valuations associated with change of use to aged care housing proposals where the current use was for church purposes. If the Government wishes to support the development of aged care housing and affordable housing it should do so separately from the concessional lease regime as not all proposals for that form of housing will be concessional. Accordingly, there does not appear to be a need to vary the current position and the change of use charge for concessional leases should remain at 100% for a change to non community use.

IT IS RECOMMENDED THAT the change of use charge for concessional leases should remain at 100% for changes to non community uses.
(Recommendation 8)

DECONCESSIONALISATION

RETENTION OR ABOLITION

Deconcessionalisation is an administrative process whereby a lessee pays to the Government an amount equal to the market value of the lease at the date of payment and the lease is thereafter regarded as non-concessional. Consequently, the restrictions on transfer and the requirement to pay 25% extra on a change of use no longer apply. The process is supported by Regulation 22(4) which excludes from the definition of concessional lease a lease for which "*neither of the following payments have been made to the Territory:*

(i) a capital sum or sums in respect of its grant equal to the market value of the lease at the time of the payment, or at the time of the last such payment, as the case may be;

(ii) a capital sum or sums to reduce the rent payable under the lease to a nominal rent under the Act, section 186".

The regulation only relates to the calculation of the amount of a change of use charge and does not mean that the regulation has removed the restrictions imposed by the provisions of the Act and the disallowable instruments. In order to provide some certainty to the process the Government have deemed a payment of the nature described above as relieving the lessee from future restrictions on transfers, sub-leases and parting with possession.

It is of concern that a strict application of the wording of the Act and the disallowable instruments would still leave the lease as one to which section 167 and the disallowable instruments made under that section applies. This would place uncertainty on the effectiveness of transfers, sub-leases and parting with possession of the lease for which less than market value was paid for the original grant even though a later payment as described in Regulation 22 had been paid.

It is therefore necessary to give further statutory support to the process of deconcessionalisation. As a definition of concessional lease is recommended to be included in the Act, that definition could exclude a lease for which a payment in the terms of Regulation 22 has been made. However, as the concessional lease to which the payment relates will have been recorded in the Land Titles Register as a concessional lease, it is necessary to provide a mechanism to register notice of the deconcessionalisation. The process should therefore be a statutory process providing for registration of notice of deconcessionalisation in the Land Titles Register.

Whether a process for deconcessionalisation is necessary is linked to the change of use process in that if a change of use of a concessional lease to a commercial or residential use occurs there will be a desire and in many cases, a need, to remove the restrictions on transfer etc. There may also be cases

where the concessional lessee wishes to transfer a concessional lease to a non-eligible transferee without proposing any change of use. For example under the current legislative arrangements, if a licensed club was granted a concessional lease some years ago, it would need to deconcessionalise that lease before it could be transferred to another licensed club. Some submissions suggest that if an organisation has been granted a concessional lease and the organisation no longer wishes to, or is unable to, retain the lease it should surrender the lease to the Government rather that be allowed to transfer it or deconcessionalise it. This is the policy adopted by the Alliance Government in 1990 and which is reflected in section 163. Unfortunately, the legislation did not impose a corresponding requirement on the Government to buy back the lease, nor did it state how the value of the lease was to be determined on buy-back. This leaves concessional lessees with leases granted under that section 163 in limbo and this report recommends that the absolute restriction be replaced with one of transfer only with consent.

If the Government is to buy back concessional leases, it has been argued that it will obtain a financial benefit by changing the lease purpose clause and term and reselling the lease at a higher sum than that for which it purchased the lease. In many cases of concessional leases, the improvements on the land are often specific to the original use and are not easily modified. In those circumstances, the Government becomes the sole arbiter of the process and this can cause disquiet and concern within the community especially as there would be no rights of appeal against any change of use undertaken through the issue of a new lease.

The Government has the power to acquire a lease for a public purpose and the level of compensation is provided for in the *Lands Acquisition Act 1994*. In addition, the Government can negotiate to purchase the concessional lease as it is proceeding to do in the case of Phillip Oval.

For these reasons it is considered that the deconcessionalisation process should be retained.

IT IS RECOMMENDED THAT the Land Act be amended to include a deconcessionalisation process that requires an application, the payment of a capital sum and the registration of notice of the deconcessionalisation in the Land Titles Register.
(Recommendation 16)

CRITERIA

The criteria for determining whether ACTPLA should accept or reject a payment for the purpose of deconcessionalising a lease are currently outlined in the *Guideline for the Assessment of Applications to Pay Out the Concession Applying to a Lease or To Transfer a Concessional Lease to Another Person.* Many of the provisions therein relate to a potential change of use which is not a direct effect of deconcessionalisation. Remembering that deconcessionalisation only goes to

restrictions on transfer etc. without consent, the criteria for determining consent to deconcessionalisation should be:

- does the Government wish to continue to monitor the owners of the lease through granting consents to a transfer etc?
- is there any community dis-benefit through the deconcessionalisation of this lease?
- is the application a prelude to a lease variation application and if so, has the change and the potential development been identified? and
- should the Government buy back or acquire this lease?

In the event of the application to deconcessionalisation being related to a lease variation, the application to deconcessionalise should be considered together with the application to vary the lease.

IT IS RECOMMENDED THAT the criteria for determining an application to deconcessionalise should be those outlined above.
(Recommendation 17)

PAYMENT VALUE

The issue of what should be paid to deconcessionalise a lease is in part resolved by the provisions of Regulation 22 where it is described as a capital sum or sums equal to the market value of the lease at the time of the payment, or a capital sum or sums to reduce the rent payable under the lease to a nominal rent. Basically, this means that a lessee should pay the market value in today's values for the lease. This seems to be the generally accepted position. Equity would suggest that from the current market value should be deducted any capital sum paid to acquire the lease. Those sums should be adjusted to present day values at the date of deconcessionalisation.

If the concept for recognition of service which results in an automatic deconcessionalisation after 20 years for community leases is adopted, there may be an argument to provide a sliding scale for the amount required to be paid to deconcessionalise a lease. Generally speaking, a lease for community uses will have a limited value and the amount required to deconcessionalise will be likewise limited. In those circumstances, it is unnecessary to provide for a sliding scale.

The applicant should have a right to appeal against the determination of the amount.

IT IS RECOMMENDED THAT the payment required to deconcessionalise a lease should be as defined in Regulation 22 subject to a deduction for any capital sum paid towards the grant of the lease calculated in values as at the date of the payment.

(Recommendation 18)

PUBLIC PROCESS

A number of submissions have proposed that an application to deconcessionalise a lease should be a public process with the right of third party appeals. Many of the submissions did not differentiate between deconcessionalisation and the change of use of a lease. This was particularly relevant to comments concerning the development of the Hungarian Club. It is necessary to draw the line between the proper dealings between two parties to a lease and the entitlement of the public to intervene in those dealings.

Deconcessionalisation is a similar process to the process of declaring a lease as concessional and goes to the nature of the tenure between the lessor, (the Government) and the lessee. The issue is really one directly between the lessee and ACTPLA. Third parties would still retain the right of appeal in respect of any variation to the lease and in particular any variation to the purpose clause. What should be the process with respect to the purpose clause variation of a concessional lease is discussed in previous chapters.

In these circumstances the report comes down on the side of allowing the two parties to deal without providing third party appeal rights.

A lessee should be required to make a formal application for approval to deconcessionalise. A lessee or any person with a registered interest in the lease should be the only parties having a right to appeal the decision to the AAT. The appeal rights will include a right to appeal against the amount require to be paid to deconcessionalise the lease.

IT IS RECOMMENDED THAT only the lessee applicant and any party with a registered interest in the lease should have a right to appeal a decision on deconcessionalisation including a right to appeal against the amount payable to deconcessionalise.
(Recommendation 19)

9 COMMERCIAL/SPECIAL CONCESSIONAL LEASES – ISSUES AND OPTIONS FOR CHANGE

This chapter deals with concessional leases granted for commercial or non community uses and include leases granted under section 164 of the Land Act.

EXISTING GRANT PROVISIONS

SECTION 164 OF THE LAND ACT

Section 164 of the Land Act provides for the granting of leases for a charge that is less than market value where the Executive is satisfied that it is desirable and in the public interest to do so in order to facilitate the economic development of the Territory; or the development of business in the Territory. Again these concessional leases can only be granted in accordance with criteria designated in a disallowable instrument. Two such instruments are currently in force DI2003-194 and DI2003-217. Copies of those instruments are in Appendix A. The previous (revoked) instruments had similar provisions.

As indicated above, the question of replacing concessional leases with cash grants is under consideration and such a decision would remove the need for section 164 as direct grants of leases for business or economic purposes for market value could be made under section 161(1)(d).

If no change is proposed to the current arrangements then the restriction on transfer for the first five years of the lease would remain. Leases granted under this section should be clearly marked as such and this notation should be recorded on the title.

IT IS RECOMMENDED THAT if the Government decides to provide support to "business leases" through direct financial grants rather than by granting leases at less than market value, section 164 should be repealed. (Recommendation 20)

ASSESSMENT OF NEED

With concessional leases granted for business purposes ("Special leases" under section 164), the need for the leases arises from a Government decision to promote and encourage a class of business to establish in the ACT or an approach by a business which the Government considers should be supported.

In the first case the Government has determined the need and seeks to fill that need by incentives, including offering a lease at less than market value, to attract a business to establish in the ACT.

In the second case the approach would be supported if it provided a unique opportunity for the ACT. This second case would be the exception.

Generally, the business will be offered land in an identified area and the constraints imposed by section 164 will apply for 5 years from the date of the grant. In both cases there has to be a clearly identified need which can only be met by the grant of a new lease at less than market value and a demonstrated public benefit flowing from the establishment of the new business. The grants under section 164 are not tied or assessed against the general population base and are not subject to location guidelines requiring them to be located close to the residential areas.

For section 164 leases, the current processes incorporate a satisfactory prior assessment of need before granting a concessional lease.

ASSESSMENT OF LESSEE

Once the need has been established through Government supporting the establishment of new industry or through a recognition arising from approaches by commercial entities it is necessary to apply criteria to potential recipients of concessional leases.

The heads of consideration for assessment should include the following elements:

a is there land available to meet the applicant's request?

b does the application meet the requirements of the Land Act and the Territory Plan?

c does the applicant meet the criteria contained in the disallowable instrument?

d does the applicant have the demonstrated expertise in undertaking a business of this type and size?

e does the applicant have the financial support to establish the infrastructure and maintain service delivery?

f is the grant of a lease at less than market value necessary to ensure that the business will establish in the ACT?

There was virtually no response on this issue in the submissions and it appears that the process of identification of concessional leases in the business/special regime is working satisfactorily.

ASSESSMENT OF SUBSIDY

Since the inception of the land tenure system in the ACT successive Governments have provided subsidies to organisations to establish services through the grant of free or less than market value leases.

The current arrangements for business concessional leases are that each proposal is considered on its merits. No submissions dealt directly with this issue for business type leases. The current system for the section 164 leases appears to be working satisfactorily as far as the subsidy is concerned and if the system changes to a funding grant to pay for the market value of the lease this matter will no longer be an issue for concessional leases.

ADMINISTRATION OF EXISTING LEASES

In dealing with existing leases, it must be borne in mind that the Government is inhibited in the extent to which it can impose further regulation where that regulation might be interpreted as diminishing the rights of the lessee. A relaxation of regulation is acceptable and supported by a number of the submissions.

LINE IN THE SAND

A number of submissions proposed the abolition of the restrictions on existing leases. That would involve the fixing of a date and all leases granted before that date would be excluded from the definition of a concessional lease. The concern which related to the commercial concessional lease was directed at the restriction on transfer, subletting and parting with possession and the effect this might be seen to have on the value of the lease as security.

For leases granted under section 164 this restriction was applicable only for a period of 5 years from the grant. For any commercial concessional leases granted prior to the Land Act or other than under section 164 the restriction on dealings would not be automatically abolished after 5 years.

Having regard to the rejection of the concept for drawing the line in the sand for community concessional leases, having regard to the fact that the current restriction for section 164 leases is 5 years and that there is a possibility that new business concessional leases might be discontinued in its present form, it is not recommended that a date be fixed by legislation before which business leases granted for less than market value should be excluded from the definition of concessional lease.

RETENTION OF RESTRICTION ON TRANSFER

If a new section is created in the Land Act for the granting and administration of concessional leases both commercial and community, should that section retain the restriction against transfer, sub-lease etc without consent? The current restriction in section 164 is limited to a period of application of 5 years.

If this limitation is retained then it should be extended to any non-community concessional lease not granted under section 164. This would place all commercial (non community) concessional leases on the same footing.

The restriction on transfer is seen as providing a measure of control over lessees who have been given an advantage in establishing their business in the ACT for a period by which the Government believes the community will start to reap the benefit, namely 5 years. This would appear a reasonable restriction and should be retained.

The difficulties with the application of section 167 and Disallowable Instrument DI 2003-193 have been discussed in the chapters dealing with the transfer of community concessional leases and the same comments apply.

Many commercial operations will offer sub-leases or part with possession of their leases even thought they will still be offering the seme services to the community or operating similar businesses from the lease. Like the community concessional lease there have been few requests for consent to sub-lease or part with possession and different controls are placed on the lessee through the agreement for support entered into between the lessee and the Government at the time of the original grant. Accordingly, it seems appropriate to delete the requirement to gain consent to a sub-letting or parting with possession.

IT IS RECOMMENDED THAT the Land Act and subordinate legislation continue to require consent for any assignment or transfer of a business concessional lease but not for a sub-lease or a parting with possession and that the criteria for consent be:

a that the transferee is an organization which would have been eligible to be granted the concessional lease; and

b that the transferee is able to demonstrate its capacity to satisfactorily continue to operate the lease in accordance with the purpose clause.

(Recommendation 21)

IT IS RECOMMENDED THAT the Land Act should be amended to provide that all commercial concessional leases not granted pursuant to section 164 should have their status as concessional leases lifted after a period of 5 years.

(Recommendation 22)

CHANGE OF USE
(VARIATION OF LEASE PURPOSE)

For business concessional leases (non community) uses there should be no special requirements for a change of use application. Such an application

would be subject to the standard processes involving comment, objection and appeal mechanisms.

However, a lease granted under section 164 is not released from the application of Regulation 22 even though 5 years has expired as is the case for the restriction on transfer. It appears that there was no correlation between the application of section 164 and Regulation 22. On the assumption that there was not an intention to continue to apply the requirement to pay 100% change of use charge on leases granted under section 164 for the term of the lease the application of Regulation 22 should only apply for the first 5 years of the term.

IT IS RECOMMENDED THAT the application of Regulation 22 to leases granted under section 164 of the Land Act should be limited to 5 years from the date of the grant of the lease.
(Recommendation 23)

CHANGE OF USE CHARGE

The current *change of use charge* applicable to a concessional lease is 100% as provided by Regulation 22.

This level is in line with that recommended in the Stein Report which recommended at page 142:

> *"There be no remissions for concessional leases and free of charge lessees who propose changes to lease purpose clauses which add value to the land and are for a purpose different from the original grant"*

Section 164 does not appear to apply the release term of 5 years to the *change of use charge* provisions of Regulation 22. Accordingly if a business lease was granted for less than market value (including a lease granted under section 164) Regulation 22 would continue to apply through the term of the lease.

If the previous recommendations are adopted applying the 5 year limit to all lessees of business concessional leases then the requirement to pay 100% *change of use charge* should only apply to that period after which the normal rate (currently 75%) should apply

Accordingly, there does not appear to be a need to vary the current position and the *change of use charge* for concessional leases should remain at 100% during the first 5 years of the lease.

IT IS RECOMMENDED THAT the *change of use charge* for business concessional leases remain at 100% for the first five years of the lease after which the normal rate should apply.
(Recommendation 24)

DECONCESSIONALISATION

RETENTION OR ABOLITION

The question of retention or abolition of the deconcessionalisation process for a commercial concessional lease has different aspects to that of the community concessional leases and also whether or not the commercial concessional lease was granted under section 164.

If the lease was granted under section 164 then the restriction on transfer would only apply for the first 5 years during. During that period if the lessee wished to transfer then the Government would release the lessee from the restriction on transfer if the lessee paid the current value of the lease. This would also release him from the provisions of Regulation 22 and the change of use charge would revert to 75%. After the expiration of 5 years the lessee would not need to deconcessionalise for the purposes of transfer but without a payment the lessee would still be subject to paying 100% change of use charge according to a strict application of Regulation 22.

If the lease was granted other than under section 164 then a payment of the value of the lease would strictly only provide relief from Regulation 22 in a similar manner to community concessional leases but may be regarded as having become non-concessional.

As each case of deconcessionalisation is considered on its merits and as there has been no call for its abolition in the case of business concessional leases it is considered it should be retained.

IT IS RECOMMENDED THAT the Land Act be amended to include a deconcessionalisation process that requires an application, the payment of a capital sum and the registration of notice of the deconcessionalisation in the Land Titles Register.
(Recommendation 16)

CONSIDERATIONS

The criteria for determining whether ACTPLA should accept or reject a payment for the purpose of deconcessionalising a lease are currently outlined in the *Guideline for the Assessment of Applications to Pay Out the Concession Applying to a Lease or To Transfer a Concessional Lease to Another Person*. Virtually all the provisions are directed to community leases and provide little guidance for business concessional leases.

Considerations which should be applicable are:

a does the Government wish to continue to monitor the owners of the lease through granting consents to a transfer etc?

b is such a transfer in line with Government policy and objectives?

c will the transfer etc enhance the economic position of the ACT?

d is there any community dis-benefit through the deconcessionalisation of this lease?

e is the application a prelude to a lease variation application and if so, has the change and the potential development been identified? and

f should the Government buy back or acquire this lease?

In the event of the application to deconcessionalisation being related to a lease variation, the application to deconcessionalise should be considered together with the application to vary the lease.

IT IS RECOMMENDED THAT the heads of consideration for determining an application to deconcessionalise a business concessional lease should be those outlined above.
(Recommendation 25)

PAYMENT VALUE

The issue of what should be paid to deconcessionalise a lease is in part resolved by the provisions of Regulation 22 where it is described as a capital sum or sums equal to the market value of the lease at the time of the payment, or a capital sum or sums to reduce the rent payable under the lease to a nominal rent. This seems to be the generally accepted position. Equity would suggest that from the current market value should be deducted any capital sum paid to acquire the lease. Those sums should be adjusted to present day values at the date of deconcessionalisation.

As the period during which deconcessionalisation might occur is only 5 years the possible application of a sliding scale is not considered appropriate.

The applicant should have a right to appeal against the determination of the amount.

IT IS RECOMMENDED THAT the payment required to deconcessionalise a lease should be as defined in Regulation 22 subject to a deduction for any capital sum paid towards the grant of the lease calculated in values as at the date of the payment.
(Recommendation 26)

PUBLIC PROCESS

A number of submissions have proposed that an application to deconcessionalise a community concessional lease should be a public process with the right of third party appeals. There was no suggestion in so far as a commercial concessional lease was concerned. The issue is really one directly between the lessee and ACTPLA.

A lessee should be required to make a formal application for approval to deconcessionalise. A lessee or any person with a registered interest in the lease should be the only parties having a right to appeal the decision to the AAT. The appeal rights will include a right to appeal against the amount require to be paid to deconcessionalise the lease.

IT IS RECOMMENDED THAT only the lessee applicant and any party with a registered interest in the lease should have a right to appeal a decision on deconcessionalisation including a right to appeal against the amount payable to deconcessionalise.
(Recommendation 27)

10 RESOURCES

There are really two separate issues needing to be addressed:

- the impact of holding the review on existing resources; and
- the impact of adopting the recommendations of the report on existing resources.

THE IMPACT OF HOLDING THE REVIEW

NEW CONSCIOUSNESS

There is no doubt that simply holding the review has brought to the attention of people and organisations who are potentially the holders of a concessional lease that there are provisions of the law and subordinate legislation which may affect their ability to deal in their leases in a manner that they were not previously aware. This has no doubt also been a revelation to some potential lenders and other practitioners in the related sectors and professions.

APPLICATION FEE TO DETER FRIVOLOUS APPLICATIONS

This new consciousness may generate an increase in enquiries to the ACTPLA about the concessionality or otherwise of leases, that are not necessarily related to a proposal to transfer or mortgage the property. To understand the status of their property holding is fairly fundamental to any prudent person or organisation and enquiries may increase simply to satisfy this need. The report recommends charging a realistic fee for applications for a declaration of concessionality, so this should militate against a flood of applications.

LEVEL OF APPLICATION FEE

An application fee should be introduced and set at a level designed to deter frivolous applications and also to recover the cost of dealing with an application. The cost of dealing with an application will include:

- registering applications and monitoring their progress;
- obtaining valuation advice as necessary;
- the process of making a declaration and facilitating its registration on the Land Titles Register; and
- responding to an appeal to the ACT Administrative Appeals Tribunal against a declaration.

Whether or not the Registrar-General's registration fees should be included in the application fee is an administrative matter for consideration.

VALUATION SERVICES

If the rate of applications does increase, there will be a need for additional valuation service. This should be considered by ACTPLA in the context of its current and future arrangements for the provision of valuation services.

THE IMPACT OF ADOPTING THE RECOMMENDATIONS

When addressing the issue of resources, it is considered that the principal impact, in terms of any changes flowing from the recommendations of this report, will be with respect to the *human resource* because other costs and cost savings are likely to flow from the effective and efficient use of the human resource. The costs of accommodation, systems hardware/software/support, consumables, training and development, superannuation, work cover, long service leave, technical facilities and support etc are probably accounted for in terms attributable to a unit of human resource.

NEEDS ASSESSMENT AND DETERMINING PRIORITIES FOR GRANTS
(Recommendation No. 14)

The recommended whole of Government approach to establishing the needs for community services and the merits of a potential concessional leaseholder forms part of a process much larger than one relating solely to concessional leases. Intuitively, it is felt that the additional resources generated as a consequence of the recommendations of this report would be small accounting for perhaps, 5% to 10% of the total resources needs to support the larger process. Discussions with relevant ACTPLA staff have not shed to any light on what order of resource is involved.

INDENTIFICATION/DECLARATION AND APPEALS
(Recommendation No. 4)

The consultants have no evidence, at the time of writing the report, of the extent to which applications for a declaration of concessionality will increase the need for resources beyond those which are needed to support the informal arrangements which exist today for informing lessees as to whether their leases are considered to be concessional.

Experience suggests however, that an additional 1 to 1.5 FTE at the ASOC 6 level may be needed to adequately resource the new application, declaration and appeal proposals.

The consultants' view of the existing human resource responsible for the grant and administration of concessional leases *per se* in LDA and ACTPLA it is a very small part of a multi-tasked resource spread thinly across a range of leasehold functions, of which, concessional leases form one very small but complex, part.

The decision as to whether it would be best to dedicate a particular resource to concessional leasing issues in both the LDA and the ACTPLA is probably best left to managers who will, in any event, have to decide on workload allocation priorities as and when they change.

CONSENT TO ASSIGN OR TRANSFER
(Recommendation Nos. 15 & 21)

At this time it is not possible to estimate what order of resource would be required because there is no evidence of the likely number of applications for consent.

DECONCESSIONALISATION
(Recommendation Nos. 16, 17, 18, 19, 25, 26 & 27)

At this time it is not possible to estimate what order of resource would be required because there is no evidence of the likely number of applications for deconcessionalisation. Additionally, formalisation of the process may limit any need for additional resource.

STAFF TRAINING AND DEVELOPMENT
(Recommendation No. 11)

Multi-skilling has its benefits but it also has its costs. One of those costs is in the area of training and development, where the costs may be potentially much higher if spread across a number of staff. Then again, the benefits, in terms of the flexibility and scope of the workforce may also be greater.

In recent years, there has been a noticeable decline in the knowledge and skills in the history, legislation and administration of leasehold in the ACT. The ACT system is unique and its relationship with planning is different from any other jurisdiction. This lack of understanding and staff skill creation in the legislation, procedures and management of the leasehold estate has led to errors in administration which have caused concern in the community.

This report highlights the difficulty in administering the concessional lease program which has called on staff to make administrative decisions which are correct in logic and reasonableness but most likely bad in law. Until this deficiency in general leasing skills is remedied and the legislation amended to provide a system which is coherent and logical ACTPLA will struggle to properly administer the leasehold system according to the current legislation.

Part of the deliverables of this consultancy, once Government has responded to the recommendations, is the provision of a set of procedures by which leasing competent staff will be able to properly and confidently deal with applications for declarations etc.

It is estimated that the direct cost training of training staff in the new procedures, based on 3 sessions of 2 hours each would be in the order of $5 000 to $10 000. Those costs do not include the cost of absences from the workplace to attend training because the decision as to how many staff would be trained would have to be determined by ACTPLA managers.

DEVELOPMENT OF NEW POLICIES AND PROCEDURES
(Recommendation No. 10)

It is understood that ACTPLA will want to further develop and refine the policy and procedural issues delivered by this report in order to facilitate their implementation. That will have some set up resource cost and certainly some on-going cost in reviewing and keeping up to date those statements. The consultants feel that an additional 0.35 to 0.5 FTE at the SOC C or ASOC 6 level may be needed by both ACTPLA and LDA to adequately meet the set up requirements.

With respect to reviewing and keeping the policies and procedures up to date, maybe 0.1 FTE at the SOG C or ASOC 6 level might be adequate.

Although it is outside the purview of this report, it is respectfully suggested that both LDA and ACTPLA devote some resource as a matter of some urgency to reviewing, revising and publicly notifying its procedures in connection with administering estates in land as required by section 29(2)(a) of the PALM Act. This matter was raised in Chapter 5 in relation to concessional leases but the requirement under the Federal law applies to all leases of Territory land.

Remedying the existing situation may have significant resource implications for LDA and ACTPLA but as indicated earlier, the broader problem is outside the scope of this report.

APPLICATION FEE TO RECOVER COSTS

As indicated above, it is expected that the application fee for a declaration would be set at a level sufficient to recover the costs of any new process. So, largely, those additional resource costs may be recovered.

11 FINANCIAL IMPLICATIONS

POTENTIAL REVENUE FORGONE

As the actual number of concessional leases issued and the value of the concession provided at the time of issue are not fully recorded in any data base we are unable to provide an estimate value of likely revenue forgone by the changes in policy recommended.

Any revenue forgone as a result of recommendations of this report would only relate to the deconessionalisation of the lease.

APPLICATION FEE

ACTPLA should introduce a fee for deconesssionalising a lease. The fee should cover the following components:

- Application component, which should be equivalent or calculated similarly to the current change of use application fee, for assessing the application;
- Valuation component being a fee to recover the valuation costs or to cover the cost of reviewing an independent valuation provided by the applicant; and
- Registration component, which should cover the cost of notifying Land Titles (consideration should be given to including the Land Titles registration fee).

COST OF ADMINISTRATION

The cost of administration has been assessed under the following tasks as set-out below.

NEEDS ASSESSMENT AND DETERMINING PRIORITIES FOR GRANTS

It is considered that additional resources for this task should be minimal as the task is part of a greater process.

INDENTIFICATION/DECLARATION AND APPEALS

The cost of supporting this function is likely to be in the order of $110,000 per annum. This being the full employee cost (salary, superannuation and comcare) of 1.5 ASO6. It is assumed that accommodation and non-employee costs are already accounted for as this task will be spread across many staff.

CONSENT TO ASSIGN OR TRANSFER

The resources required to carry out this function will depend on the number of applications. As there is no evidence to likely number of applications it would be appropriate to fund this activity from a fee charge assess the transfer.

DECONCESSIONALISATION

The resources required to carry out this function will depend on the number of applications. As there is no evidence to likely number of applications it would be appropriate to fund this activity from a fee charge to remove the concession.

STAFF TRAINING AND DEVELOPMENT

Costs will be incurred in developing the training and providing the training. The cost in the first year will be greater than the subsequent years. It is estimated that the cost will be in the $10,000 in year one and $5,000 in subsequent years. This excludes staff costs for preparing and attending training.

DEVELOPMENT OF NEW POLICIES AND PROCEDURES

The development of policies and procedures and the publicly notifying those procedures will have initial set-up costs and ongoing costs. The cost in the first year of reviewing revising and publicly notifying those policies procedures is likely to involve staff time and some external assistance. In subsequent years the revision and updating of policies and procedure should be performed by staff.

The estimated staff time is considered to be 0.1 FTE at the SOC/ASO6 level which equates to approximately $8,000. In addition, in the first year, external assistance or additional staff resources will be required to fully document all policies and procedures. It is estimated that this cost will be in the order of $25,000.