2009

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Planning and Development (Concessional Leases) Amendment Regulation 2009 (No 1) SL2009-41

EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
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Planning and Development (Concessional Leases) Amendment Regulation 2009 (No 1) - Explanatory Statement

This Planning and Development (Concessional Leases) Amendment Regulation 2009 (No 1) (the amendment regulation) changes the *Planning and Development Regulation 2008* (the regulation). The amendment regulation is made under section 235(1)(c)(v) of the *Planning and Development Act 2007* (the Act).

Background

The purpose of the amendment regulation is to expand on the list of lease types excluded from the definition of "concessional lease". "Concessional lease" is defined in section 235 of the Act. Section 240 of the regulation lists lease types that are to be excluded from this definition. (Note: Clause 6 of the amendment regulation renumbers section 240 as section 99 so as to put the section into a more appropriate position in the regulation).

In summary, a concessional lease is a lease granted for a consideration less than the full market value of the lease, or for no consideration. A concessional lease may be granted at a reduced price in the expectation that the lessee will provide a community service or benefit through the operation of the lease. To ensure a continued benefit to the community of such a lease, the sale or transfer of concessional leases is prohibited unless it has the approval of the Planning and Land Authority (the Authority) under sections 265 and 266 of the Act. Under these sections, the Authority may not approve a transfer unless the potential buyer is an entity that would satisfy the criteria for the original grant of the lease.

The definition of "concessional lease" in section 235 of the Act includes a range of lease types such as a consolidated or subdivided concessional lease, a further concessional lease and a regranted concessional lease. The definition also excludes specified lease types such as a rural lease or a lease over land that, immediately before the grant of the lease, was owned, controlled or held by the housing commissioner under the *Housing Assistance Act 2007* or a lease granted to the Territory. Section 235(1)(c)(v) of the definition section permits the regulation to list additional lease types that can be excluded from the definition of concessional lease. The amendment regulation is made under this provision.

Section 240 of the regulation currently excludes the following lease types from the definition of concessional lease:

- a residential lease;
- a lease granted to a Territory-owned corporation; and
- a rental lease granted for commercial purposes after 1 January 1974 if the rent was paid out in accordance with a law in force in the Territory or by agreement between the Commonwealth or Territory and the lessee.
- a lease granted under the *City Area Leases Act 1936* before 1 January 1971 if the lease was not subject to a restriction on dealing with the lease under the lease when granted or under that Act immediately before its repeal.

Section 240 of the regulation also states that if a lease was granted for no consideration it is excluded from the definition of concessional if the individual lease is granted following the subdivision of a lease (the head lease) held by the person to

whom the individual lease is granted and the person has provided infrastructure on the land leased under the head lease.

Overview

The amendment regulation excludes from the definition of "concessional lease", leases that "state that the lease is not concessional". This provision is included to make it clear that once a lease is identified in this way, the status of the lease cannot be changed by a later contrary decision of Government. This provision is to introduce greater certainty into the status of such leases.

The amendment regulation also excludes from the definition of concessional lease, leases that are granted to a "territory entity" (new section 240 (g)). "Territory entity" is defined in new section 240 (2) to mean a "territory authority" (defined in the *Legislation Act 2001* – refer to detailed notes below) or a "territory instrumentality" (also defined in the Legislation Act). This provision builds on existing exclusions of leases to the Territory (section 235(1)(c)(iv) of the Act) and to Territory-owned corporations to extend this exclusion to most leases granted to a Territory government entity. The provision reflects the intention that leases granted to a government entity are meant to form part of the resources of government and to be able to be utilised as such, irrespective of whether the grant was for full market value.

New section 240 (h) extends the above principle to cover the following scenario. There are instances where a government entity occupied land for a period prior to the formal granting of a lease and the lease reflects this with a commencement date prior to the date of grant. New section 240 (h) provides that in such a case, the lease is to be deemed not concessional on the basis that the land was initially occupied by a government entity, irrespective of whether the lease was granted later to a Territory entity.

The amendment regulation also excludes from the definition of concessional lease, leases that are granted to a "Commonwealth entity" (new section 240 (i)).

"Commonwealth entity" is defined in new section 240 (2) to include:

(a) the Commonwealth;

(b) a Commonwealth authority under the *Commonwealth Authorities and Companies Act 1997* (Cwlth); or

(c) a Commonwealth company under the *Commonwealth Authorities and Companies Act 1997* (Cwlth).

The addition of the above Commonwealth entities from the definition of concessional lease is consistent with the approach taken to Territory entities. Also similar to the approach to Territory entities, new section 240 (j) extends this exclusion to cover instances where land is occupied by a Commonwealth entity prior to the granting of the relevant lease, irrespective of whether the lease was granted later to a Commonwealth entity.

New section 240 (k) adds specified leases granted under the now repealed *City Area Leases Act 1936* to the list of exclusions. The City Area Leases Act was repealed by the *Land (Planning and Environment) (Consequential Provisions) Act 1991* in 1992. The exclusion only applies to leases that as at 1 July 2009 were operating as a

commercial operation with diverse (or potentially diverse) commercial operations including the use of the land for a licensed club under the *Liquor Act 1975*. In summary, this exclusion is intended to cover long-standing operations with multiple commercial activities. There is little reason to continue to treat such leases differently to standard commercial leases. Any public social or economic advantage in treating such leases differently would have been realised some time ago. The removal of the concessional status of the lease will remove the need for the lessee to obtain the approval of the Authority of any proposed sale under sections 265 and 266 of the Act. However, given the commercial nature of such operations and the fact that any buyer is also likely to be a commercial operation, it is difficult to envisage any circumstances in which such a sale would not be approved in any event.

Outline of Provisions

Clause 1 – Name of Regulation –states the name of the regulation, which is the *Planning and Development (Concessional Leases) Amendment Regulation 2009 (No 1).*

Clause 2 – Commencement –states that the regulation commences on the day after its notification.

Clause 3 – Legislation amended – states that the regulation amends the *Planning and Development Regulation 2008.*

Clause 4 – New section 240 (f) to (k)
This clause inserts a range of additional types of leases that are to be excluded from the definition of "concessional lease" in section 235 of the Act. The additional exclusions are made under section 235(1)(c)(v) of the Act.

New section 240 (f) excludes from the definition of "concessional lease" in section 235 of the Act each lease "that expressly states that it is not a concessional lease". This provision is to put the status of such leases beyond any doubt.

New section 240 (g) excludes from the definition of "concessional lease" in section 235 of the Act all leases that are granted to a "territory entity" (new section 240 (g)). "Territory entity" is defined in new section 240 (2) to mean a "territory authority" or "territory instrumentality". The term "territory authority" is defined in Part 1 of the Dictionary in the Legislation Act to mean:

> "a body established for a public purpose under an Act, but does not include a body declared by regulation not to be a territory authority."

The term "territory instrumentality" is defined in Part 1 of the Dictionary in the Legislation Act to mean:

> "a corporation that (a) is established under an Act or statutory instrument, or under the Corporations Act; and (b) is a territory instrumentality under the *Public Sector Management Act 1994*.

"Territory instrumentality" is defined in the Dictionary in the Public Sector Management Act as:

> "a body corporate that is established by or under an Act, or under the Corporations Act, and—
>
> (a) is comprised of people, or has a governing body comprised of people, a majority of whom are appointed by a Minister or an agency or instrumentality of the Territory; or
> (b) is subject to control or direction by a Minister; or
> (c) is declared under section 3A [of the Public Sector Management Act] to be a territory instrumentality; but does not include—
> (d) an administrative unit; or
> (e) a body declared under section 3A [of the Public Sector Management Act] not to be a territory instrumentality."

New section 240 (h) excludes from the definition of "concessional lease" in section 235 of the Act all leases that:

- include a statement that it [the lease] commenced or is taken to have commenced on a date before the grant of the lease; and
- cover land that was occupied by a territory entity on this commencement date.

In this circumstance, the lease is deemed to be not concessional irrespective of whether the actual lease was granted to a territory entity. This provision complements new section 240 (g).

New section 204(i) excludes from the definition of "concessional lease" in section 235 of the Act all leases granted to a "Commonwealth entity". "Commonwealth entity" is defined in new section 240 (2) to include:

> (a) the Commonwealth;
> (b) a "Commonwealth authority" under the *Commonwealth Authorities and Companies Act 1997* (Cwlth);
> (c) a "Commonwealth company" under the *Commonwealth Authorities and Companies Act 1997* (Cwlth).

"Commonwealth authority" is defined under s7 of the Commonwealth Authorities and Companies Act as follows:

> "***7 Meaning of Commonwealth authority***
> (1) In this Act, Commonwealth authority means either of the following kinds of body that holds money on its own account:
> (a) a body corporate that is incorporated for a public purpose by an Act;
> (b) a body corporate that is incorporated for a public purpose by:
> (i) regulations under an Act; or
> (ii) an Ordinance of an external Territory (other than Norfolk Island) or regulations under such an Ordinance;

and is prescribed for the purposes of this paragraph by regulations under this Act.

(2) None of the following are Commonwealth authorities:
(a) Corporations Act companies;
(b) corporations registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006;
(c) associations that are organisations (within the meaning of the Fair Work (Registered Organisations) Act 2009).

(3) For the purposes of subsection (1), all money that a body holds is taken to be held by it on its own account, unless the money is public money as defined in section 5 of the Financial Management and Accountability Act 1997."

"Commonwealth company" is defined under s34 of the Commonwealth Authorities and Companies Act as follows:

34 Meaning of Commonwealth company, wholly owned Commonwealth company and related terms

Meaning of *Commonwealth company*

(1) In this Act, Commonwealth company means a Corporations Act company that the Commonwealth controls. However, it does not include a company that is a subsidiary of a Commonwealth authority or Commonwealth company.

Meaning of *controls*

(1A) For the purposes of this Act, the Commonwealth controls a company if, and only if, it:
(a) controls the composition of the company's board; or
(b) is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the company; or
(c)holds more than one half of the issued share capital of the company (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital).

(1B) Without limiting paragraph (1A)(a), the Commonwealth is taken to control the composition of a company's board if the Commonwealth can appoint or remove all, or the majority, of the directors of the company.

(1C) For the purposes of subsection (1B), the Commonwealth is taken to have power to appoint a person as a director of a company if:
(a) the person cannot be appointed as a director of the company without the exercise by the Commonwealth of such a power in the person's favour; or
(b) the person's appointment as a director of the company follows necessarily from the person being:
(i) an Agency Head; or
(ii) a statutory office holder."

New section 240 (j) excludes from the definition of "concessional lease" in section 235 of the Act all leases that:

- include a statement that it [the lease] commenced or is taken to have commenced on a date before the grant of the lease; and
- cover land that was occupied by a Commonwealth entity on this commencement date.

In this circumstance, the lease is deemed to be not concessional, irrespective of whether the actual lease was granted to a Commonwealth entity. This provision complements new section 240 (i).

New section 204 (k) excludes from the definition of "concessional lease" in section 235 of the Act all leases that are granted under the *City Area Leases Act 1936* and as at 1 July 2009:

(i) were let by a lessee that held a club licence under the *Liquor Act 1975*; and

(ii) were for land at least 75% of which was located in a:
   a. commercial zone under the territory plan; or
   b. designated area under the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cwlth); or
   c. combination of both; and

(iii) did not include any restriction on "dealing" written into the lease. "Deal" is defined in the dictionary of the Act by reference to section 234 of the Act. Section 234 of the Act states:
   "*deal* with a lease, means—
   (a) assign or transfer the lease; or
   (b) sublet the land comprised in the lease or part of it; or
   (c) part with possession of the land comprised in the lease or any part of it."; and

(iv) authorised the land to be use for both a:
   a. licensed club under the *Liquor Act 1975*; and
   b. commercial purpose unrelated to the club.

The requirement in (iv) above for the lease to be one that authorises "a *licensed club under the Liquor Act 1975*" does not require the lease to expressly refer to "a licensed club under the Liquor Act". It would be sufficient in this regard for the lease to simply have the legal effect of authorising such a club, irrespective of whether the lease included a description of a club of this type and irrespective of what other types of club it might authorise. Similarly, it would be sufficient if the lease permitted, allowed, or simply did not prohibit the land to be used for such a club, irrespective of whether the lease included such a description. For example, a lease that simply permitted the land to be used as a "club" without detailing what type of "club" would meet this criteria. A lease that permitted the land to be used a "club" and also for the purpose of retail shopping unrelated to the club would satisfy both aspects of the criteria in (iv). Of course, the lease cannot provide all the requisite legal authority to operate the club. Other authorisations are required, for example, a club licence under the Liquor Act.

Clause 5 – New section 240 (2)
This new section defines "Commonwealth entity" and "territory entity" for the purposes of new sections 240 (i), (j) and 240 (g), (h) respectively.

Clause 6 – Section 240 (as amended)
This clause renumbers s240 as section 99. This relocation puts this section into a more logical position, close to other provisions related to leasing.

Clause 7 – Chapter 6
This clause relocates Chapter 6 of the regulation, *Concessional leases*, to a more logical position in Chapter 5 *Leases generally*, close to other provisions related to leasing.

Clause 8 – Dictionary, note 2
Inserts *territory instrumentality* into note 2 of the Dictionary to the Regulation. Note 2 lists some examples of terms that are defined in the Legislation Act.