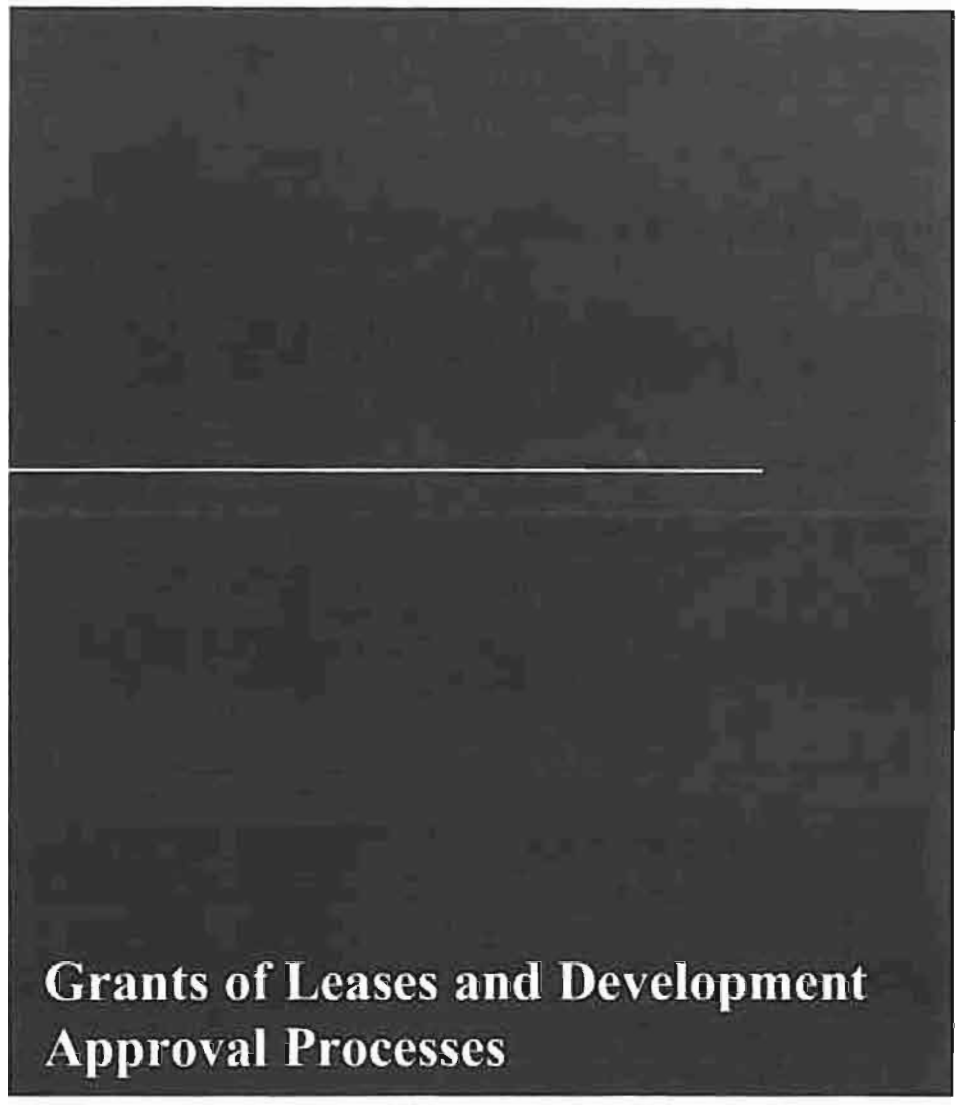

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Final Report

Grants of Leases and Development Approval Processes

A National Competition Policy Review of the ACT's *Land (Planning and Environment) Act 1991*

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Preface

This report has been prepared on behalf of the Government of the Australian Capital Territory but does not necessarily represent the views of the Government.

The Allen Consulting Group offers its thanks to:

- all those parties who took the time to participate in the review's formal and informal consultation processes, and particularly those who provided written comments;
- the Steering Committee officers who oversaw the review; and
- the review secretariat for their significant assistance in the provision of information and support.

Table of Contents

PART E — APPENDICES

Abbreviations

ACT	Australian Capital Territory
ACTBIS	ACT Business Incentive Scheme
BEPCON	Building, Electrical and Plumbing Control
CCSERAC	Conservation Council for the South East Region and Canberra
CPA	*Competition Principles Agreement*
DA	development application
DAP	Development Appraisal Panel
DI	Disallowable Instrument
ESD	ecologically sustainable development
FOI	Freedom Of Information
IAM	Infrastructure and Asset Management
IC	Industry Commission
IPART	Independent Pricing and Regulatory Tribunal of New South Wales
Land Act	*Land (Planning and Environment) Act 1991*
LAPAC	Land and Planning Advisory Committee
NCA	National Capital Authority
NCC	National Competition Council
NCP	National Competition Policy
OECD	Organisation for Economic Co-operation and Development
PALM	Planning and Land Management
RIS	regulatory impact statement
s.	section
SRD	New South Wales Department of State and Regional Development
ss.	sections
sub-cl.	sub-clause
sub-s.	sub-section
US	United States of America
UVR	unimproved value for rating

A

Part A

Summary and Background

Chapter One

Summary and Overview

As part of its commitments under National Competition Policy (NCP), the Government of the Australian Capital Territory (ACT) undertook to review:

- provisions of Parts V and VI of the *Land (Planning and Environment) Act 1991* (ie, the *Land Act*); and
- related subordinate legislation;
- relating to grants of leases and development approval processes.

The review is to be conducted in light of the commitment to ensure that these provisions:

> "... should not restrict competition unless it can be demonstrated that:
>
> a) the benefits of the restriction to the community as a whole outweigh the costs: and
>
> b) the objectives of the legislation can only be achieved by restricting competition."
>
> *Competition Principles Agreement*, Sub-clause 5(1).

This *Final Report* has been prepared in accordance with these principles.

1.1 The ACT Land System and the Scope of this Review

1.1.1 The Regulation of Land in the ACT

The regulation of land[1] in the ACT is fairly unusual in comparison to the rest of Australia because:

- the Commonwealth owns the land;
- there is a system of leasehold land tenure;
- the leasehold system is managed on behalf of the Commonwealth by the ACT through the *Land Act*.

Although the ACT's leasehold system appears unusual to freehold land systems in other jurisdictions, the leasehold land system has evolved to share many of the attributes of freehold. As in a freehold system, the ACT makes rules about the use of its land, controls building, levies of rates and taxes. The administration retains the right, as with freehold tenure, to compulsorily acquire a lease required for public purposes upon payment of compensation. In effect, the ACT planning system operates in a similar manner to systems in other jurisdictions.

[1] The ACT's system of leasehold land is not particularly unusual with respect to rural land as pastoral leases comprise over 76 percent of all land held for private use — Roberts, *The Quest for Sustainable Agriculture and Land Use*, UNSW Press, Sydney, 1995, p.91.

While the ACT's regulatory regime adopts a different course to other jurisdictions, the Stein Inquiry determined that the system of public leasehold — with regulation of uses in leases, approvals and orders — is justified as being in the public interest.[2] As such, the Review Team considers that its conclusion as to the overall public interest in such a regulatory system satisfies any broad NCP-related concerns regarding the concept of a leasehold system.

As a result of this earlier assessment, the legal framework that underpins the ACT's planning system has not been at issue in this review. Rather, the review has considered the appropriateness of particular instruments and approaches to the granting of leases and development approval processes.

1.1.2 The Review's Scope with Respect to Parts V and VI of the Land Act

Parts V and VI of the *Land Act* address a diverse range of issues such as:

- the processes by which leases are granted, varied, consolidated and recovered (including with respect to rural leases);
- designation and management of public land (including the development of Plans of Management);
- the processes by which planning restrictions are enforced (ie, approvals, inspections and orders); and
- the role of the Commissioner for Land and Planning.

A strategic decision was taken, however, to restrict the breadth of the review in line with the ACT Government's view that: "The Government's National Competition Policy commitment to review legislation needs to be considered alongside other regulatory and micro–economic reforms, both ACT and national, impacting upon the regulatory process."[3]

Legislation dealing with the regulation of land in the ACT has been the subject of review numerous times since 1973. Subsequent and ongoing legislative changes — including the introduction of the 1991 *Land Act* — have significantly changed the processes of planning and land administration in the ACT.

Furthermore, a number of reviews of the *Land Act* are currently underway or will commence shortly. These reviews have addressed (or are in the process of addressing) reform of the planning and land administration system's interactions with business and the community more generally. To the extent that these reviews result in legislation they will automatically be assessed for compliance with NCP.

As a result of these earlier and current reviews, and not wishing to duplicate review processes, this NCP review of the *Land Act* has been limited to those provisions of Parts V and VI which deal with grants of leases and the

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[2] See ACT Board of Inquiry into the Administration of Leasehold, *Report into the Administration of the ACT Leasehold*, ACT Government Printer, Canberra, 1995.

[3] ACT Government as quoted in National Competition Council, *Legislation Review Compendium*, AGPS, Melbourne, 1997, p.261.

development approval process, and which are not (or have not been) considered in other review fora.[4]

1.2 The Objectives Underlying Parts V and VI of the *Land Act*

For many decades planning has been rationalised as the means to deal with the problems of market failure. That is, planning is the means by which governments intervene in the market to:

- maximise positive externalities (eg, employment creation, community services, environmental sustainability, aesthetics, etc); while
- minimises negative externalities (eg, noise, visual and physical pollution, local disputes, etc).

These externalities have been addressed in part by:

- provision of leases by direct grants — the aim has been to encourage commercial and social development through the provision of particular leases to a range of organisations (at market value or less than market value) with the aim of creating positive economic or social externalities; and
- regulating development — by regulating the spread of development and the locations suitable for particular community activities. In effect, the externalities rationale is the economic explanation of 'ensuring orderly planning'.

A number of parties to the review suggested that the appropriate objective is best encapsulated by the concept of ecologically sustainable development (ESD). ESD's objectives are:

- to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations;
- to provide for equity within and between generations; and
- to protect biological diversity and maintain essential ecological processes and life-support systems.[5]

While ESD tends to be viewed as an environmental concept, it is important to stress that it acknowledges that development is necessary and in the community's interests, but that development should be within a sustainable framework.

The Review Team agrees that this broad approach sufficiently incorporates an externalities-based perspective and suggests that ESD (broadly understood) is the underlying objective for Parts V and VI of the *Land Act* (if not for the *Land Act* as a whole).

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[4] The review's terms of reference are provided in Appendix A.

[5] *National Strategy For Ecologically Sustainable Development*, December 1992, p.8.

1.3 The Nature of NCP Concerns

1.3.1 NCP's Broad Focus

NCP seeks to ensure that legislation is effective (ie, achieves its legitimate objectives) and is efficient (ie, achieves the objectives in the most cost–effective and least restrictive manner). To this end, NCP is not simply about ensuring that there is a 'level playing field' between parties, but also that the regulatory system as a whole is appropriate and not an undue burden on particular groups or the community as a whole.

In effect, one of the implicit goals of the legislation review process is to create 'better' regulation.[6] This may mean:

- greater regulation if pro-competitive frameworks need to be established, market imperfections corrected or the public interest maintained; or
- less regulation where market forces provide appropriate outcomes.

Thus, the focus of NCP is on the appropriateness of regulatory regimes rather then the traditional black and white issues of 'more' or 'less' regulation. This point has been forcefully made by the Deputy Executive Director of the National Competition Council:

> "it needs to be emphasised that the NCP legislation review program is <u>not</u> about deregulation for deregulation's sake, nor that it allows no room for (so-called) non-economic considerations, and nor that it sees no role for government. ...
>
> Rather, the NCP legislation review program is about:
>
> — ensuring that, where government does regulate, that regulation is necessary, effective and well designed;
>
> — ensuring that regulation is not used to prop up the incomes and conditions of vested interest groups, at the expense of the rest of us; and
>
> — replacing the 'maximum visible regulation' of the past with 'minimum effective regulation', which can pass the test of 'net public benefit'.
>
> So we are talking about reorienting and refining, rather than rejecting, the regulatory role of government."
>
> Cope, "National Competition Policy: Rationale, Scope and Progress, and Some Implications for the ACT and the Role of Government" at the *ACT Department of Urban Services' Summer Seminar Series*, Canberra, 20 March 1998, p.17. Emphasis in original.

1.3.2 Broad Concerns that Arise with Respect to the Land Act

Parts V and VI of the *Land Act* (and the related subordinate legislation) raise a number of *prima facie* concerns under NCP.

Firstly, the current land and planning system entails significant and ongoing regulatory costs that are made up of the following three main components:

- fiscal costs to government — the cost of administering the regulatory regime itself, including compliance and adjudication;
- compliance costs to business and consumers — including both the capital and administrative (paperwork) costs; and

[6] See sub-cl.5(9) of the *CPA*.

- dynamic costs to economic performance resulting from regulation which indirectly impacts on competition, innovation, and investment. This includes regulation which diverts resources from highest value use (allocative costs), and regulation which detracts from least cost production (productive costs).

There is tendency for the burden of costly regulatory regimes to fall on different groups/people/competitors in different ways, and hence to distort competition in a range of different markets.

Secondly, there is some concern that too much regulatory oversight is applied to minor developments that are unlikely to entail problems. This problem manifests itself in two forms:

- excessive government and public resources are devoted to compliance when there are few public benefits; and
- the complexity and cost associated with the system means that many people are willing to operate outside the system (ie, to not seek development approval when they are required to). As a result, lawyers representing both developers and community groups suggest that over fifty percent of ACT leases are in breach of planning laws (and hence are non-compliant leases). Although this is probably not unique to the ACT, there is something clearly wrong with a system in which the majority of people contravene the legislative requirements and rely on ignorance and acknowledged under-enforcement to maintain the system's stability.

Thirdly, a number of provisions associated with the direct granting of leases involve subsidies to particular groups. In general, economic theory suggests that efficiency will be maximised when the price that goods are purchased reflects the true costs of those goods. However, there may be a range of reasons why governments may wish to provide subsidies to particular groups (eg, to encourage new investment, to facilitate the provision of community services, etc). NCP does not necessarily stand in the way of such subsidies being provided, but suggests that any such subsidies should be provided in an efficient and transparent manner (so that the community can judge if the subsidy is in the public interest).

1.4 Major Review Issues

1.4.1 The Provision of Concessional Leases

Part V of the *Act* prescribes processes for the direct granting of leases by non-competitive means (ie, not through a competitive process such as an auction, tender or ballot).

In this report the Review Team refers to both direct (ie, non-competitive) grants:

- at full market value; and
- at less than market value;

as 'concessional leases' because:

- a direct grant at full market value is concessional because of the restricted bargaining process. That is, because the lease is not available to

all, the party receiving the direct grant is provided an advantage not available to others;

- a direct grant at less than market value is additionally concessionary in nature because of the subsidy provided; and
- both direct grant approaches are concessional in that the administrative processes involved in assessing a direct grant application are subsidised by the Government.

The whole regime of directly granted leases has as its basis the concept that the benefit which flows to the community by supporting the establishment of a community organisation or a special industrial/tourism corporation outweighs any detriment which flows from a non-competitive process. In many cases this benefit is difficult (although not impossible) to measure in economic and financial terms.

The major NCP concerns with these processes are:

- the possible inefficient use of land — a potential problem with the current system of direct grants may be that land is not necessarily put to its most 'productive' use (ie, the person using the land is not likely to be the person who could have derived the most utility from the land, as measured by a willingness to pay). This criticism may apply equally to direct grants to commercial and community service organisations — even though there may be a public interest in providing a direct grant the risk is that the most appropriate organisation will not be chosen;
- that the grant of a lease at less than market value (or a lease at full value where the direct grant fees does not cover the government's cost of the consideration of the application) involves the provision of a subsidy to the lessee. This has a number of possible NCP consequences:
  - there may be a concern that the subsidy associated with the concessional lease distorts competition in downstream markets because the subsidy is not available to other similar firms (ie, competitors);
  - while the government revenue foregone associated with a community lease may be offset by reduced outlays from other community support programs, and the loss from special leases may be offset by higher tax revenue, a decline in revenue from one sector (keeping aggregate spending constant) must be offset by higher taxation on other sectors. This is likely to stifle the competitiveness (ie, efficiency) of other firms and sectors; and
  - lack of transparency — by directly granting a lease at less than market value the Government is providing a subsidy to the recipient of the lease. There is nothing wrong with such a subsidy, but NCP generally requires that the value of any such subsidy be made transparent. The Review Team feels that the value of the subsidy could be made more transparent when directly granting leases at less than market value.

While these are legitimate concerns, the number of direct grants provided now is significantly less than in previous years, and hence the ongoing NCP concerns are also lower.

However, to overcome the identified NCP concerns and to assist the public to better understand why a concessional lease has been provided, the Review Team has recommended a range of reforms that focus on making the

provision of concessional grants more transparent. The major reforms seek to ensure that:

- the value of any subsidies associated with direct grants — whether the subsidy is in the form of subsidies in the administration processes or subsidies associated with the provision of the land at less than market value — should be made transparent and accounted for in departmental budgets;
- the administrative processes that are used to assess whether it is in the public interest to provide a concessional lease should be clearly articulated (eg, through flowcharts) and made publicly available; and
- existing disallowable instruments associated with concessional leases should be assessed to determine if they are still needed and whether they remain appropriate against NCP principles. Furthermore, new disallowable instruments associated with concessional leases should be made in accordance with best-practice regulatory procedures (ie, a formal regulatory impact assessment process and then sunsetted after five years). This is to ensure that the subordinate legislation continues to conform with NCP principles and remain relevant.

1.4.2 The Development Application Process

The majority of Part VI of the *Act* deals with approvals. It is an offence to undertake a development otherwise than in accordance with an approval.

The Review Team is concerned that the extensive regulation of development is excessive. This is demonstrated by the historic level of non-compliance (estimated to include greater than 50 percent of all ACT leases) with development controls. This non-compliance tends to be associated with relatively minor developments (eg, pergolas, garden sheds, etc).

While there is probably continued scope for increasing the range of development exceptions which do not require approval,[7] the Review Team is conscious of the strong community support for the retention of a system of development control and the claimed public benefits.

As a result, the Review Team recommends that consideration should be given to introducing a notification scheme for those types of development that are relatively minor and which are unlikely to be refused or require conditions. Extending recent legislative reforms, this system would acknowledge that there are a range of developments which are unlikely to raise problems, but which may in some cases require intervention. A notification scheme would be simpler than a full development application, and allow the minor development to proceed after a defined short time unless PALM (or other relevant agencies) consider that a full development application is warranted. This process will encourage compliance with the *Land Act* (increasing the integrity of development control) and continues the process of focusing PALM's oversight onto those developments that may raise real concerns.

[7] Amendments to the *Regulations* were recently gazetted and commenced. These amendments exempt certain minor classes of development from requiring development approval.

1.4.3 The Orders Regime

Division 3 of Part VI deals with orders. Order systems are based on criteria that prescribe standards or procedures for performing certain conduct. In the event control criteria are breached orders may be made.

The Minister may make orders:

- on the application of a member of the public; and
- of its own motion.

Failure to comply with an order is an offence punishable by a court imposed fine. The Minister may, in the event of non–compliance:

- authorise the place to be entered and carry out work or conduct an activity to which the order relates; or
- apply to the Supreme Court for an injunction to restrain a person from breaching an order or a mandatory injunction to carry out the terms of an approval.

While the orders regime is more flexible than seeking to have a lease rescinded, it is nevertheless rather inflexible because the range of remedies are limited and in some cases overly legalistic. To enhance the existing orders regime the Review Team recommends that it should be extended by the inclusion of:

- on-the-spot fines for minor land use infringements; and
- interim orders for circumstances where irreversible actions would otherwise take place.

1.4.4. Other Matters

The Review Team has considered a further series of matters raised during this NCP review, and made recommendations with respect to:

- matters that should be considered in the current review of the Territory Plan in order to streamline the regulation of lease purpose restrictions;
- the creation of a process by which developers can confidentially put development proposals to members of the Legislative Assembly in order to determine the prospects for a change to the Territory Plan;
- the reassessment of the term 'development' as it applies to rural leases; and
- the development by PALM of a system by which parties can obtain a comprehensive listing of regulatory restrictions that may apply to a particular lease.

1.5 Recommendations

RECOMMENDATION 3.1

Whether or not explicitly stated in the legislation, the Land Act should focus on ensuring the use and development of land is conducted in a manner that is consistent with acknowledged principles of ecologically sustainable development (ESD).

RECOMMENDATION 4.1	*To improve the transparency of information tabled in the Legislative Assembly regarding leases granted, the dollar value of any concessions given in the sale of property should be included in the documentation.*
RECOMMENDATION 4.2	*To ensure transparency of recording of cost centre information, the application fee for a direct grant of land should not be used as a 'deposit' toward payment for the land.*
RECOMMENDATION 5.1	*To ensure transparency and facilitate efficient outcomes the processes used to assess direct grant applications should be clearly detailed (eg, through flowcharts, etc) and made readily available to the public.*
RECOMMENDATION 5.2	*Where a party has land requirements that can be obtained in the marketplace, rather than providing a direct grant at less than market value, the Government should provide direct funding to assist in the purchase of the land.*
RECOMMENDATION 5.3	*All direct grants of land should be at market value, with any subsidies provided to assist in the purchase of land provided directly from the ACT Budget.*
RECOMMENDATION 6.1	*Fees for direct grants should reflect the costs associated with the direct grant process and implicit subsidies should be recognised.*
RECOMMENDATION 6.2	*Disallowable instruments should only be made following the completion of an abbreviated regulatory impact assessment process (ie, it need not include public consultation) and its tabling in the Legislative Assembly as part of an explanatory memorandum.*
RECOMMENDATION 6.3	*Existing disallowable instruments should be reviewed to determine which are unnecessary or obsolete, and new instruments should be automatically sunsetted after five years.*
RECOMMENDATION 7.1	*PALM should take steps to develop a system whereby a lessee can gain access to a comprehensive outline of the restrictions that apply to their lease.*
RECOMMENDATION 7.2	*Generic lease purpose clauses should be encouraged and these should reflect the range of land uses which may be permitted within each land use policy of the Territory Plan.*
RECOMMENDATION 8.1	*Consideration should be given to introducing a notification scheme for those types of development that are relatively minor and which are unlikely to be opposed by PALM or require conditions.*
RECOMMENDATION 8.2	*Consideration should be given to further tailoring the definition of development to ensure that it is appropriate for rural purposes.*
RECOMMENDATION 9.1	*The existing orders regime should be extended by the inclusion of:* • *on-the-spot fines for minor land use infringements; and* • *interim orders for circumstances where irreversible actions would otherwise take place.*

RECOMMENDATION 10.1

Consideration should be given to establishing a formal process through which developers' proposals can be presented to the Legislative Assembly Standing Committee on Planning and Urban Services for non-binding and confidential feedback.

1.6 Structure of this Report

The remainder of this *Final Report* is set out in the following manner

- Part A (Chapters One to Three) provides an overview of the NCP framework underlying this review and discusses the objectives underlying Parts V and VI of the *Land Act* and comments on the broad approach adopted in the ACT to meet these objectives;
- Part B (Chapters Four to Six) discusses how leases are granted in the ACT;
- Part C (Chapter Seven) considers the restriction of uses included in leases;
- Part D (Chapters Eight and Nine) discusses issues relating to development applications and orders;
- Part E (Chapter Ten) considers a range of issues raised during the consultation process that either fall outside the Review terms of reference or are more appropriately considered on their own; and
- Part F includes a number of appendices.

Chapter Two

Principles Underlying the Review — National Competition Policy and the Public Interest

This chapter describes the policy frameworks that underlie this review. In particular, it explains the 'competition test' and the complementary assessment of the public interest.

2.1 The 'Competition Test'

In April 1995, the Commonwealth, State and Territory Governments signed the inter-governmental *Competition Principles Agreement* (*CPA*), committing themselves to ensuring that new and existing legislation does not impose undue competitive restrictions:

> "The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
>
> a) the benefits of the restriction to the community as a whole outweigh the costs; and
>
> b) the objectives of the legislation can only be achieved by restricting competition."[8]

This test — the 'competition test' — is intended to establish whether particular restrictions on competition remain necessary, through an assessment of the costs and benefits of current and alternative means of achieving policy objectives.

Legislation may restrict competition if it:

- establishes an outright prohibition of business activity;
- establishes or protects a monopoly;
- provides for the licensing or registration of participants in a business activity;
- allocates quotas/franchises;
- requires specific quality/technical standards for specific equipment;
- establishes price controls (including direct and indirect controls);
- nominates preferred customers or suppliers;
- confers differential benefits on particular persons/entities;
- provides for natural resource access licensing;
- establishes participation limits (on overseas/interstate participants);
- establishes barriers to entry or exit (often through licensing/registration);
- imposes restrictions on business structure, form or ownership;

[8] Sub-cl. 5(1) *CPA*.

- imposes restrictions on business conduct;
- imposes potential impediments to innovation (eg, through quality standards);
- promotes inefficient cross–subsidies between classes of goods and services; and
- promotes efficiency losses through excessive regulation.

As the competition test is built on the presumption that restrictions to competitive economic behaviour impose costs on the community, the burden of proof is on governments, and those who benefit from competitive restrictions, to establish the public interest case for the retention or enactment of legislation which restricts competition.[9] Even where the public benefit in retaining anti-competitive legislative provisions outweighs the cost, the competition test requires that the least anti-competitive alternative regulatory approach be implemented.

2.2 Public Interest Justifications for Restrictive Legislation

NCP acknowledges that competition is not an end in itself; that while, in general, the introduction of competition will deliver benefits to the consumer, there are situations where community welfare will be better served by not effecting particular competition reforms. That is, competition is to be implemented to the extent that the benefits that will be realised from competition outweigh the costs.

NCP also recognises that where anti-competitive behaviour is acceptable to achieve a public good, there must be a transparent process for assessing the balance between benefit and costs, and the behaviour must be subject to review.

Sub-clause 1(3) of the *CPA* provides for considerations other than strictly economic criteria in assessing public benefit in circumstances where, on balance, there is a net benefit for the community. It sets out the circumstances in which the weighing up process is called for, and also some of the factors which need to be taken into account in making the decision:

> "Without limiting the matters that may be taken into account, where this Agreement calls:
>
> (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
>
> (b) for the merits or appropriateness of a particular policy or course of action to be determined; or
>
> (c) for an assessment of the most effective means of achieving a policy objective;
>
> the following matters shall, where relevant, be taken into account:
>
> (a) government legislation and policies relating to ecologically sustainable development;
>
> (b) social welfare and equity considerations, including community service obligations;

[9] See The Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993, p.206.

> (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
>
> (d) economic and regional development, including employment and investment growth;
>
> (e) the interests of consumers generally or of a class of consumers;
>
> (f) the competitiveness of Australian businesses; and
>
> (g) the efficient allocation of resources."

This is called the 'public interest' test.

It is through the consideration of possible public benefits that consideration can be given to broader non-economic issues that arise in the regulation of the granting of leases and the development approval process.

The NCC emphasises that the public interest test is not exclusive or prescriptive. Rather, it provides a list of indicative factors a government could look at in considering the benefits and costs of particular actions, while not excluding consideration of any other matters in assessing the public interest.

Neutze suggests that the public interest test for this review should also include a number of further factors:

> "Section 2.2 [of the *Discussion Paper*] reports that Sub-clause 1(3) of the CPA provides for considerations other than strictly economic criteria in assessing public benefit. It lists many non-economic benefits and could have listed others that are just as important such as residential amenity, community development and cohesion. All of these are benefits that result from collective achievement of objectives and include the provision of public and semi-public goods."
>
> Neutze, submission, p.3.

The Review Team agrees that these further factors can legitimately be considered as public benefits.

Chapter Three

Legislative Objectives

This chapter provides an overview of the commonly advanced rationale for government regulation and considers what the objectives of Parts V and VI of the *Land Act* may be.

3.1 When is Regulation Appropriate?

The Council of Australian Governments has publicly agreed that government interventions in markets should generally be restricted to situations of market failure and that each regulatory regime should be targeted on the relevant market failure or failures.[10]

Market failures may arise under a number of conditions including:

- *public goods* — will tend to be under–produced because they are non–excludable (ie, people who have purchased the good cannot stop others using it up) and non–rivalrous (ie, the good is not used up with use). Common examples include aspects of the natural environment and national defence;
- *externalities* — positive or negative impacts of market transactions which are not reflected in prices, and so lead to non-optimal levels of production and consumption. Pollution is commonly cited as a negative externality (because third parties suffer from its production) and education is often cited as an example of a positive externality (because third parties can benefit from another person's increased knowledge);
- *natural monopolies* — where the costs of establishment, resources or infrastructure mean that setting up competition is socially wasteful. Because a natural monopoly is socially optimal but not necessarily in the interests of all players in the market, governments may decide to regulate in the public interest; and
- *information asymmetries* — where information is not evenly distributed throughout the community.

However, other reasons why governments have tended to regulate or intervene in markets include: the desire for universal provisions of particular goods and/or services; to allocate public resources to particular community/industry groups; and to protect consumers, employees and the environment. These three 'distributional' rationales may or may not be related to a market failure.

3.2 The Objectives of the *Land Act*

The *Land Act* does not contain an express statement of objectives of Parts V and VI.

[10] Council of Australian Governments, *Report of Task Force on Other Issues in the Reform of Government Trading Enterprises*, released as part of the first CoAG communique, 1991, p.22.

The Stein Inquiry into the ACT leasehold system identified four original objectives of the ACT leasehold system and recommended they be included as the guiding principles of the *Land Act*.[11] Two of these objectives were identified in the *Discussion Paper* as relevant to Parts V and VI, namely:

- avoiding land speculation; and
- ensuring orderly planning by lease purpose clauses.

These objectives were strongly criticised by the Property Council of Australia. While acknowledging that these may have been realistic objectives at the time the ACT was established, the Council was of the view that they are no longer legitimate objectives. In particular, the Council was of the view that:

- land speculation is an inherent feature of all land systems (and of market-based economies more generally). As such it is not clear why NCP should be concerned about restricting land speculation now (although there may have been legitimate reasons at the time of the ACT's establishment); and
- it is not necessary to use lease purpose clauses to ensure orderly planning. Thus, the objective identified by Stein inappropriately confuses regulatory objectives (orderly land planning) with regulatory outcomes (lease purpose clauses).

The Review Team agrees that the two objectives formulated by Stein should be reconsidered, and has identified two alternative objectives which are discussed in the following sections.

3.2.1 Objectives Addressing Market Failures

The *Discussion Paper* suggested that the *Land Act* should seek to:

- maximise positive externalities (eg, employment creation, community services, environmental sustainability, aesthetics, etc); while
- minimise negative externalities (eg, noise, visual and physical pollution, local disputes, etc).

Presumably referring to this objective, Neutze was critical of the treatment of the legislative objectives in the *Discussion Paper*. For example, he stated that: "The Discussion Paper gives far too much attention to externalities, as would be expected in a paper that is based heavily on neoclassical economics and sees non-economic objectives as subsidiary."[12] He described the objectives/rationales of Part VI in these terms:

> "Development approval is a technical process responsive to the desire of citizens for a good place to live and work. Development approval should constrain lease administration just as it constrains land use by private land owners under freehold tenure."
>
> Neutze, submission, p.2.

The Review Team considers that the difference of opinion really only is a matter of clarifying the language.

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[11] ACT Board of Inquiry into the Administration of Leasehold, *Report into the Administration of the ACT Leasehold*, ACT Government Printer, Canberra, 1995, pp.114-115.

[12] Neutze, submission, p.3.

The concept of externalities includes both factors that tend to be considered in purely economic terms (eg, financial impacts on third parties) but also extends to the consideration of a range of factors that are often referred to as non-economic (eg, the impacts of pollution on third parties) although only tend to be difficult to quantify in financial terms.

A number of parties during the consultation process — eg, the Royal Australian Planning Institute, the Conservation Council for the South East Region and Canberra (CCSERAC), the Environmental Defenders Office (EDO) suggested that the language that encompasses these divergent descriptions are best found in the discussion of ecologically sustainable development (ESD). A description of ESD is provided in Box 3.1.

Box 3.1

Australia's Goal, Core Objectives and Guiding Principles for the Strategy

"The Goal is:

Development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.

The Core Objective is:

- to enhance individual and community well–being and welfare by following a path of economic development that safeguards the welfare of future generations
- to provide for equity within and between generations
- to protect biological diversity and maintain essential ecological processes and life–support systems

The Guiding Principles are:

- decision making processes should effectively integrate both long and short–term economic, environmental social and equity considerations
- where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
- the global dimension of environmental reasons of actions and policies should be recognised and considered
- the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised
- the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised
- cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms
- decisions and actions should provide for broad community involvement on issues which affect them.

These guiding principles and core objectives need to be considered as a package. No objective or principle should predominate over the others. A balanced approach is required that takes into account all these objectives and principles to pursue the goal of ESD."

Source: *National Strategy For Ecologically Sustainable Development*, December 1992, pp.8-9.

Building upon the description of ESD contained in Box 3.1, Box 3.2 suggests how ESD should specifically be applied to land use regulation.

Box 3.2

ESD as it Relates to Land Use Planning and Decision Making

"Challenge

To ensure land use decision making processes and land use allocations at all levels of government meet the overall goal of ESD and are based on a consideration of all land values, uses and flow–on effects, while avoiding fragmentation, duplication conflict and unnecessary delays.

Strategic Approach

This will be pursued through: developing methods to enable land use planners and decision makers to place risk–weighted values on goods and services; further developing mechanisms to integrate non–economic and economic considerations into decision making processes; promoting multiple and sequential land use; and streamlining planning and decision making processes while ensuring effective public input.

Objective 13.1

To encourage environmental and economic land use decision making which takes full account of all relevant land and resources values (including down–stream aquatic resources) and to establish and operate systems of land use decision making and dispute resolution. ...

Objective 13.2

To achieve clarity, certainty and accountability in the processes used to clarify access to land and to determine change of use..."

Source: *National Strategy For Ecologically Sustainable Development*, December 1992, pp.60-61.

Support for the incorporation of ESD as an explicit objective is obtained by looking at:

- similar legislation in other jurisdictions — for example, in Victoria, "The State's planning objectives are specified in the Act and focus on ensuring the strategic and orderly use and development of land with regard to environmental, social, heritage and community interests."[13]
- the objectives of the Territory Plan — while there is no express statement of objectives in the *Land Act*, sub-s.7(1) of the *Land Act* uses ESD language when referring to the objectives of the Territory Plan:

  > "the object of the *Territory Plan* shall be to ensure, in a manner not inconsistent with the National Capital Plan, that the planning and development of the Territory provides the people of the Territory with an ecologically sustainable, healthy, attractive, safe and efficient environment in which to live, work and have their recreation."

- other ACT legislation — at the public hearing the representative of the Environmental Defenders office stated that, "if we look at more recent legislation [than the *Land Act*] such as the *Environment Protection Act 1997* and the *Water Resources Act 1998*, they clearly show a government policy of fully implementing ESD principles," and "We also note government policies, such as the ACT and Sub-region Planning Strategy, the ACT Greenhouse Strategy, and the proposed Integrated Land Use and Planning Strategy, all incorporate ESD principles".

This externalities/ESD objective creates a sense of equity that manifests itself in the *Act*'s support for the provision of community services through the direct grant process, and ensuring that impacts associated with a modern economy are equitably shared through orderly development.[14]

[13] Victorian Auditor General, *Land Use and Development in Victoria: The State's Planning System*, Performance Audit Report 62, 1999, available at http://www.audit.vic.gov.au/sr62/ags62cv.htm.

[14] See Thorne, submission, p.1.

It is important to stress that ESD — as acknowledged by the CCSERAC — is not solely focused on environmental issues which seek to retard development. Rather, while ESD tends to be viewed as an environmental concept, it acknowledges that development is necessary to support the community and is in the community's interests, but that development should be in a sustainable framework.[15]

RECOMMENDATION 3.1

Whether or not explicitly stated in the legislation, the Land Act should focus on ensuring the use and development of land is conducted in a manner that is consistent with acknowledged principles of ecologically sustainable development (ESD).

3.2.2 Objectives Addressing Transparency

Another objective suggested in the *Discussion Paper* related to transparency and accountability.

The Financial System Inquiry (the Wallis Inquiry) — one of the first NCP legislative reviews — described the twin requirements of 'transparency' and 'accountability' in the following way:

- transparency — requires that all legislation and associated structures and practices are transparent and understood by the industry (and the community more generally); and
- accountability — regulatory practices should operate independently of sectional interests with appropriately skilled staff.[16]

These objectives were broadly endorsed during the consultation program.

However, Neutze suggested that a further objective of the *Act* is for the Government to act as a wealth maximiser in its role as land owner (on behalf of the Commonwealth):

> "In granting of leases and of additional rights to existing lessees the ACT Government is acting as lessor and its primary objective—subject to land use planning constraints and to not exploiting its position as a monopolist owner of development rights—should be to maximise the collective wealth of the ACT."
>
> Neutze, submission, p.2.

To some degree this is consistent with an externalities-based approach — by taking into account the impact of positive and negative externalities a decision-maker is seeking to maximise total community worth.

The trouble with a wealth criterion is that it does not assist to any degree in deciding how the Government should act. Almost any activity can be justified on the basis that it will maximise the community's worth.

Given this lack of agreement the Review Team suggests that an appropriate regulatory goal is to ensure that decisions are made in a transparent and accountable manner. This will ensure that people are free for themselves to

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[15] This importance of sustainable development is increasingly being understood by the business community — see Bourne, "Why Sustainable Development is a Top Priority" (2000) 2(1) *BCA Papers* 48.

[16] Financial System Inquiry, *Final Report*, AGPS, Canberra, 1997, pp.196-197.

judge if the actions of the Government will maximise the public interest (ie, wealth broadly defined).

While transparency and accountability are appropriate regulatory goals, they relate to the manner of the regulatory response and are not regulatory objectives. That is transparency and accountability are not in and of themselves the reason for government regulation.

3.3 The ACT's Broad Approach to Achieving the Objectives

The way in which the *Land Act* — as part of the broader land system — seeks to achieve the objectives outlined in section 3.2 appears, on the surface, to be somewhat unique in Australia because:

- the Commonwealth owns the land;[17]
- there is a system of leasehold land tenure;[18]
- the leasehold system is managed on behalf of the Commonwealth by the ACT through the *Land Act*.[19]

The principal differences between private freehold and public leasehold are that the lessor is the Government on behalf of the community, and that the Government owns all of the use rights in land. By granting a lease, the Government permits the lessee to use the land for the use or uses specified in the lease but no more.[20]

While leasehold systems of land tenure are rare in urban Australia, leasehold systems are a common form of land tenure in Australia; pastoral leases comprise over 76 percent of all land held for private use.[21]

Furthermore, the ACT leasehold system has evolved to share many of the attributes of freehold. As in a freehold system, the ACT makes rules about the use of its land, controls building, levies of rates and taxes. The administration retains the right, as with freehold tenure, to compulsorily acquire a lease required for public purposes upon payment of compensation.

While the leasehold nature of the land system (and the resulting regulation of uses through leases) appears different to other jurisdictions' statutory planning systems, in effect the ACT planning system operates in a similar manner to systems in other jurisdictions. The only real difference is that the ACT doesn't use the terms 'zones' and 'zoning', but rather, 'land use policies' and imposes a more clearly defined use control through the specifically described use covenants in the lease.

The current legislative regime includes a variety of policy mechanisms to ensure transparency and accountability:

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17 s.125 *Commonwealth Constitution.*

18 s.9 *Seat of Government (Administration) Act 1910 (Cth).*

19 s.29 *Australian Capital Territory (Planning and Land Management) Act 1988 (Cth).*

20 However, there is an expectation that a lessee can change the land's use as long as this is consistent with the Territory Plan.

21 Roberts, *The Quest for Sustainable Agriculture and Land Use*, UNSW Press, Sydney, 1995, p.91.

- the publication of guidelines and processes (although some parties to the review suggested that the Government does not disclose tests and the guidelines and processes are not clear or transparent although they are published);
- the publication or notification of decisions and the reason for making such decisions. The publication may be by way of press release, in the *Gazette*, in the Legislative Assembly or by advice to applicants and objectors;
- the use of regulations, disallowable instruments and approvals that are tabled in the Legislative Assembly
- the use of an independent decision-maker;
- access to information under Freedom of Information (FOI) laws;
- the capacity to object to, or comment upon, a proposal; and/or
- an appeals process.

While the ACT's regulatory regime adopts a different course to other jurisdictions (particularly the addition of a layer of regulation directed at the regulation of land use through lease purpose clauses), the Stein Inquiry determined that the system of public leasehold — with regulation of uses in leases, approvals and orders — can be justified as being in the public interest.[22] Although the Stein Inquiry emphasised the betterment issue, it was a thorough assessment of the *Land Act* and potential competitive advantages and disadvantages provided by the administration of the leasehold system. As such, the Review Team considers that its conclusion as to the overall public interest in such a regulatory system satisfies any broad NCP-related concerns regarding the concept of a leasehold system.

As a result, the legal framework that underpins the ACT's planning system has not been at issue in this review. Rather, the review considers the appropriateness of particular instruments and approaches to the granting of leases and development approval processes. These issues are discussed in the following chapters.

[22] See ACT Board of Inquiry into the Administration of Leasehold, *Report into the Administration of the ACT Leasehold*, ACT Government Printer, Canberra, 1995.

B

Part B

The Granting of Leases

Chapter Four

Processes for the Granting of a Lease

Part V of the *Land Act* dictates how leases are granted. This chapter provides an overview of the grant processes.

4.1 Land Release in the ACT

In order to meet the normal demand for land as a result of Canberra's growth the ACT Government has an ongoing land release program.[23]

The priorities under the land release program include providing adequate choice across all market segments, conserving the ACT's natural resources, maintaining an appropriate level of release and encouraging greater flexibility in land usage.

The Government has suggested that these priorities will be achieved through:

- the support of established communities and community facilities;
- provision of choice — to meet consumer demand by ensuring land with different attributes is available (ie, blocks of different sizes) in different locations with a range of prices. For commercial land, emphasis is given on more flexible land use through generic purposes clauses;
- maintaining a balance between supply and demand — to ensure land for different market segments is supplied in a balanced way so as to avoid over/under supply;
- making the most effective use of existing infrastructure — to encourage use of vacant sites in established areas and sites adjacent to existing services;
- encouraging consolidated development and increased use of public transport;
- encouraging public participation when making decisions for developing a shared urban environment;
- minimising time-lags between release and development; and
- maintaining a viable and stable development and building industry — balanced land releases and land development package sizes will support the industry and sustainable development.[24]

Following this approach:

> "The residential land release program aims to ensure balanced supply and demand. The normal provision is 'three years demand' in the developers' and builders' pipelines. Analyses of population growth, housing demand and commencement relations, suggest that dwelling requirement in the next five years will vary between 1,750 and 2,000 per year. Analyses suggested that, in 1999–00, there will be a demand for 1,750 dwellings. After assessing market conditions and recent

[23] For a broader summary of land release procedures before and after self-government see Bourassa, Neutze and Strong, *Leasehold Policies and Land Use Planning in Canberra*, Urban Research Program Working Paper No.44, Australian National University, Canberra, 1994.

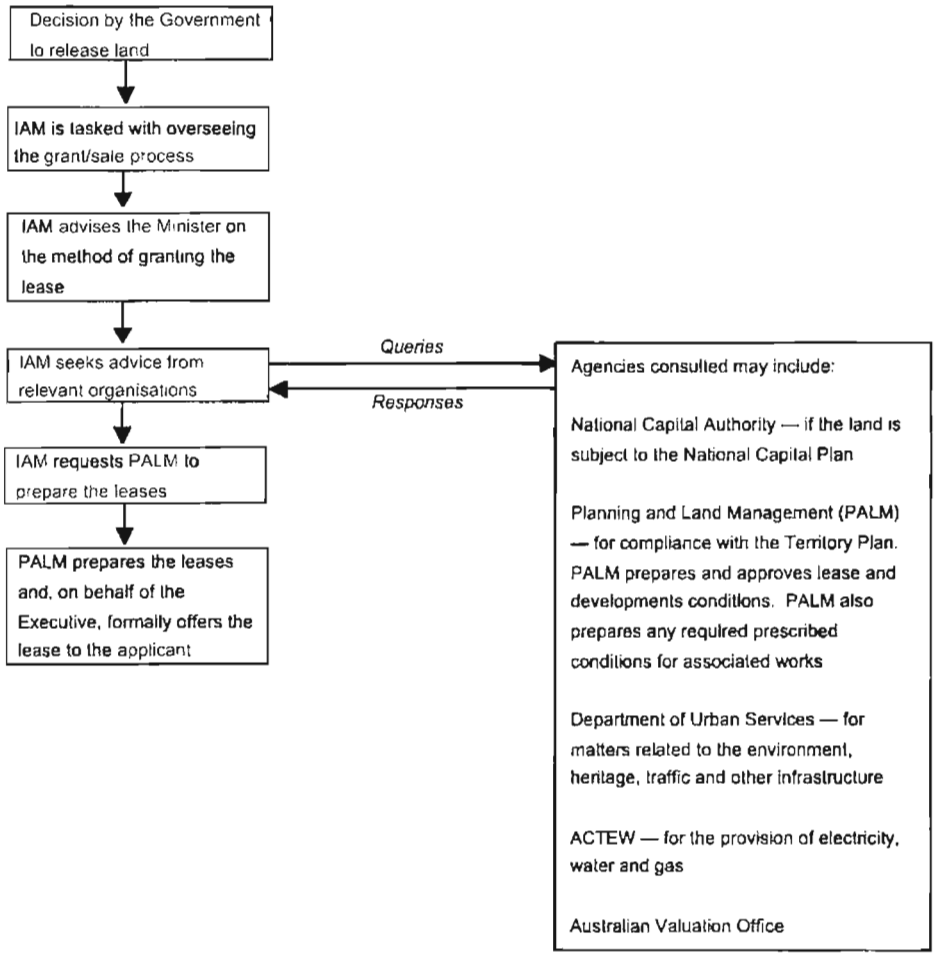
[24] See Department of Treasury and Infrastructure, *Residential and Commercial Land Release in the ACT, 1999–2004*, pp.2-3.

> changes in demographic structure and population growth rate, the Residential Advisory Group has supported 1,500 dwelling commencements in 1999-00."
>
> Department of Treasury and Infrastructure, *Residential and Commercial Land Release in the ACT, 1999-2004*, p.18.

The parties involved in the grants of leases and the land release process are shown in Figure 4.1.

Figure 4.1

Parties Involved in the Granting of Leases



Note: If the release of land is referred to the Executive then other departments will also be consulted.

In addition to the planned release program, the Government is approached for assistance in identifying land that can be developed for individual purposes. The requests for the sale of land by direct grant are received from industry, clubs and community organisations.

4.2 Competitive Versus Non-Competitive Grant Processes

The Government must, among other things, decide what process to adopt for the issuing of leases (see step three in Figure 4.1).

Section 161 of the *Land Act* provides for four methods of granting a lease of Territory Land. These are by:

- auctioning the lease — land is auctioned, and although there is a reserve price this is no-longer disclosed to bidders. On some occasions there may be a restricted auction when the Government wants to ensure that a qualified person will operate the land for a specified use (eg, a child care centre, funeral parlour, etc). In such a reserved auction only suitably qualified people (eg, a licensed child care operator) are entitled to bid for the lease;
- calling tenders for the grant of the lease — tender processes have been used when only the broader parameters of the land's use has been identified and so interested parties lodge expressions of interest/tenders based both on the lease price and the manner in which the lease will be used;
- conducting a ballot for the right to the grant of the lease — ballots were conducted when demand for residential blocks outstripped supply. None have been conducted in recent years; or
- making a direct grant to an applicant for a lease.

The majority of leases are granted through auctions, and to a lesser degree through tenders and direct grants. During the consultation program a number of parties commented that there are significantly fewer direct grants provided now than there were a few years ago.

In its recent report the ACT Property Advisory Council noted that:

> "The first three methods of granting a lease — namely by auction, tender or ballot — are, by their nature, open, transparent and competitive. The fourth method, a direct grant, is not. However, section 161(4) of the Land Act provides that the Executive shall not grant a lease by direct grant otherwise than in accordance with criteria specified in a Disallowable Instrument. ...
>
> Leases of land are granted either pursuant to an open and competitive process, or pursuant to a direct grant process in accordance with criteria specified in a Disallowable Instrument, and where the Legislative Assembly has had the opportunity to consider, and if it so decides, to disallow, the Disallowable Instrument. In effect, scrutiny by the Legislative Assembly has been substituted for an open and competitive process."
>
> Property Advisory Council, *Appropriateness of Dealing with Developers Outside a Competitive Process*, 1999, p.4.

The auction, tender and ballot methods should produce NCP consistent competitive outcomes (ie, providing the land to the party that is willing to pay the most) albeit limited by the terms of the lease on offer and the terms of the tender.

The remainder of this chapter addresses the granting of leases in manners that may be said to be *prima facie* inconsistent with NCP.

4.3 Concessional Grant Processes

Part V of the *Act* prescribes processes for the direct granting of leases by non-competitive means. These leases are offered only to a single party; and may in some prescribed cases be without charge or for a charge that is less than market value. The market value for an unimproved lease is the current

site value (CSV) if sold as a premium lease, or, if sold as a rental lease, a rent of ten percent of the CSV per annum.

In this report the Review Team refers to both direct grants:

- at full market value; and
- at less than market value;

as 'concessional leases' because:

- a direct grant at full market value is concessional because of the restricted bargaining process. That is, because the lease is not available to all, the party receiving the direct grant is provided an advantage not available to others;
- a direct grant at less than market value is additionally concessionary in nature because of the subsidy provided; and
- both direct grant approaches are concessional in that the administrative processes involved in assessing a direct grant application are subsidised by the Government (ie, the fee is less than the cost to the Government).[25]

This section describes the processes leading to the grant of a concessional lease.

4.3.1 Direct Grants

The *Land Act* empowers the Government to directly grant leases. This is done in order to meet a perceived need in the community which might not be available if the organisations and corporations who could meet that need were required to obtain leases through the competitive process.

A direct grant occurs when the Government, rather than adopting a competitive allocation process, provides a lease to an applicant following direct negotiation as to the land's availability. Direct grants have been used for a range of lease purposes (eg, commercial, industrial, residential, tourism, community organisations, etc). While many of the leases granted through this process are at full market value, the competitive issue is that no one else had the opportunity to obtain this lease because it was directly granted.

Sub-section 161(1)(d) allows for leases to be directly granted. Leases can be directly granted in a number of ways:

- sub-section 161(4) provides that leases may be granted if the applicant meets the criteria set out in a disallowable instrument. This gives effect to the general provision of sub-s.161(1)(d) to direct grant a lease;
- section 163 provides for the granting of leases to community organisations if the applicant meets the criteria set in the disallowable instrument; and

[25] While it is common for governments to subsidise a range of administrative fees in a number of administrative areas, this is less likely where the benefits associated with the administrative procedures are likely to be captured by an identifiable person or persons (ie, the 'public good' aspect of the administrative process is not dominant). In such circumstances there is an increasing move across jurisdictions to charge fees that reflect the costs of the administrative processes.

- section 164 provides for the granting of leases to facilitate the economic development of the ACT or the development of business in the ACT and at a charge less than market value. The *Act* restricts the granting of these leases to circumstances that satisfy the condition that it is desirable and in the public interest to do so, and the criteria set out in a disallowable instrument.

Disallowable instruments under the above sections establish criteria which give effect to the objectives of these sections. The application of sub-s.161(1)(d) is general, and disallowable instruments under this sub–section may have criteria which are broader than under s.163 or s.164.[26]

Currently there are 32 disallowable instruments related to grants of leases under sub-s.161(1)(d). Most require full payment for the lease.

Disallowable instruments include the following:

- eight disallowable instruments provide for grants at nil value. These include grants of leases to Government authorities that already occupy and control the land (eg, ACT Housing), international reciprocal arrangements for diplomatic leases, and three block-specific grants of leases to non-Government former lessees or current land occupiers. A further two disallowable instruments require payment of an 'agreed' amount (for land transferring from National Land to Territory Land, and DI 228/1997 for commercial, industrial, residential and/or tourism purposes);
- one disallowable instrument provides for granting holding leases to developers at a 'negotiated' price. This instrument can be used to grant a lease following an expression of interest process (in the case where an 'expression of interest' is not regarded as a 'tender' under sub-s.161(1)(b));
- the disallowable instrument for granting leases for aged care accommodation provides for grants at fifty percent of the market value where the applicant is both a community organisation and hostel or nursing home facilities are to be provided;
- the disallowable instrument provides for sale of land for self care accommodation units at either 100 percent, or 50 percent where the units are part of a retirement complex and one of the occupants of the units is assessed as qualifying for hostel care; and
- another disallowable instrument provides for direct grants of rural leases. It is restricted to land immediately adjacent to existing holdings, or where the applicant has had a licence over the land for at least 15 years. The lessee must pay "the amount determined for the lease", which is generally based upon a rural production value, rather than a market value.

4.3.2 Direct Grants at Less than Market Value

A variety of other leases granted through this process can also be at a value less than the market value.

[26] An example of this is disallowable instrument 228 of 1997 which sets out criteria for granting leases for residential, commercial industrial or tourism purposes — see Appendix D.

Community Leases

Under s.163 the Government may grant a lease to a community organisation if the applicant meets the criteria in the disallowable instrument:

> "'community organisation' means 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;
>
> (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."
>
> Sub-s.163(1) *Land Act*.

Such a lease may be without charge, or for a charge less than market value — defined by reference to s.159. These leases must be granted in accordance with specified criteria identified by a disallowable instrument.

There are three current disallowable instruments related to Community Leases:

- DI 225/98 (Applies only to part Section 20 Gungahlin, Burgmann Anglican College) — "must agree to pay a nominal rent, if and when demanded";
- DI 22/92 (Community Organisations) — "must pay for the lease in accordance with the approved leasing policy for the particular type of community lease; and ... must pay the fees and charges for the time being notified by the Minister as being applicable"; and
- DI 12/98 — educational institution, university, etc.

The current leasing policies for DI 22/92 have varying payment terms depending upon the organisation and whether the lease is a rental or premium lease — see Table 4.1.

Table 4.1

Payment Terms and Concessions Associated with Community Leases

Organisation	Payment Terms	Concession
163-A. Non-profit incorporated (without liquor or gaming licences)	Premium: n/a Rental: 5% of CSV	50%
163-B. Charitable and social welfare (nursing homes, hostels for the aged, etc)	Premium: nil (with full payment for commercial component including self care aged persons' units)	100% on non-commercial component
163-C. Churches	Premium: 100% of local land development costs (ie. no contribution to major physical infrastructure)	Varies, however would likely be of the order of up to 35%
163-D. Registered schools	Premium: nil (if in receipt of Territory or Commonwealth capital subsidy)	100%
163-E. Youth organisations	Premium: n/a Rental: 2.5% of CSV	75%
163-F. Sporting facilities and other sites with improvements (if not an Executive lease)	Premium: n/a Rental: 2.5% of CSV and improvements. Lessee responsible for maintenance of facility.	75%

Source: PALM

Where an organisation has received a directly granted lease under s.163, sub-s.163(8) provides that a community organisation, "shall not transfer a lease granted under this requirement".[27] This restriction aims to ensure that the lease is used for the purposes for which the lease was granted, and that the community organisation does not unduly benefit from a concession.

Special Leases

The ACT Government may directly grant a Special Lease under s.164. The ACT Government may directly grant such a lease for less than market value where it is, "satisfied that it is desirable and in the public interest to do so," to facilitate economic development or business development in the ACT. These leases must not be transferred, sub-let or parted with possession in the first five years without consent. Again, criteria for the granting of these leases is by a disallowable instrument.

There are two current disallowable instruments related to Special Leases. The disallowable instrument identifiers, and payment terms are as follows:

- DI 20/92 (Special Crown leases) — "must pay the agreed value for the lease; and ... must pay the fees and charges notified by the Minister as being applicable";
- DI 148/95 (Block 17 Section 112 Symonston only) — "The Executive may grant the lease for a nominal rent without payment of any premium"; and
- DI 32/92 — similar to 20/92 however it requires payment of market value.

The ACT Business Incentive Scheme (ACTBIS) provides incentives to assist the development of significant new business investment in the ACT, including the provision of land. Applications for assistance are assessed against a set of evaluation criteria which include: suitability of the industry to the ACT; soundness of the business case; contribution to the ACT economy. In addition, there must be no undue detriment to existing ACT businesses.[28] The precise nature of these evaluation criteria is not publicly available.

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[27] This prohibition is subject to sub-s.163(9): "Nothing in this section shall be taken to derogate from the power of the Executive to grant a lease of Territory Land to a community organisation otherwise than under this section." Even if a lease is granted to a community organisation other than under s.163, the land use would be subject to whatever controls were applicable to the grant of that lease.

[28] These criteria may themselves raise a number of potential problems under NCP principles:

- it is not clear what is meant by 'undue'. While there will be a concern if the Government subsidises one competitor but not another, detriment may come about in less direct ways. For example, a new firm may soak up skilled employees in a particular field, making it more difficult for existing firms to recruit, even though the two firms do not directly compete; and
- the Review Team notes that these criteria do not address the concept of 'footlooseness': "Footlooseness is the notion that the project proponents have some genuine choices regarding the location of the project. If a project would locate in NSW without assistance, it is not footloose and any assistance provided will be an unnecessary transfer of funds from taxpayers to shareholders" — Audit Office of New South Wales. *Department of State and Regional Development: Provision of Industry Assistance*, Performance Audit Report, Sydney, 1999, p.42.

4.4 NCP Concerns Regarding Concessional Grants

This chapter provides an overview of the major NCP concerns that *prima facie* arise because of the direct grant processes.

4.4.1 Possible Inefficient Use of Land

A potential problem with the current system of direct grants may be that land is not *necessarily* put to its most 'productive' use.

In a market environment the productive use of land is normally determined by its price. The higher land is valued the more productive it is assumed to be. However, where there are externalities (or other market failures) the price will not necessarily reflect the productivity of the land. For example, governments often regulate to provide parks in circumstances where the natural environment would not be adequately valued through a market process (ie, there are positive externalities). A direct grant will maximise the productive use of the land where the Government can identify that the allocation of the land via the market will not take into account relevant negative and positive externalities.

Recognising that the Territory Plan limits the use to which land can be put, a party who values a certain parcel of land highly will be willing to pay more for that lease than someone who values it less. While a government *may* be able to identify the person who values the land the highest, it is more likely than not that the government will be unsuccessful in this assessment.[29] In such circumstances use of the land may not be maximised (as the person using the land is not likely to be the person who could have derived the most utility from the land).

This concern was supported by the Weston Creek Community Council:

> "There is also anti-competitiveness in the fact that not all potential 'buyers' of a lease are aware that the lease is available. This restricts information and therefore limits the possible opportunities for the purpose to which a block of land could be put."
>
> Weston Creek Community Council, submission, p.1.

This criticism may apply equally to direct grants to commercial and community service organisations; even though there may be a public interest in providing a direct grant the risk is that the most appropriate organisation will not be chosen.

4.4.2 Subsidies Involved in Concessional Leases

The Review Team suggests that concessional leases may result in a subsidy to the party receiving the concessional lease if:

- the lease is provided at less than market value;[30]

[29] Identification of the person who values the land the most would require an extensive search which is unlikely to be conducted.

[30] The Australian Valuation Office estimates the market value on the basis of the lease purpose clause.

- the lease is provided at an estimated market value, however the valuation in some instances may be low if the market is volatile or the lease is difficult to value; or
- the fees associated with the grant of the concessional lease do not represent the full cost to the Government of granting the lease.[31] Staff time involved in providing assistance, such as facilitation and liaison, has a cost in terms of salaries, on–costs and opportunity costs.[32] In a 1999 review of the NSW industry assistance the Audit Office identified several instances where this kind of assistance was material relative to the financial assistance provided to proponents. It may be the same with respect to the ACT;[33]

Any such subsidies create a range of distortions and inefficiencies:

- while the government revenue foregone because of a concessional lease may be offset by reduced outlays from other community support programs, and the loss from special leases may be offset by higher tax revenue (eg, payroll tax), a decline in revenue from one sector (keeping aggregate spending constant) must be offset by higher taxation on other sectors. This is likely to dampen competition and innovation in the 'penalised' sectors and is likely to impose a net cost on the economy as a whole;[34]
- if large enough (ie, if large enough to shift resources to the ACT from other jurisdictions rather than large in relative terms), subsidies may have costs in terms of economic efficiency that may flow onto other jurisdictions;[35]
- in addition to indirect costs (and their negative multiplier effects), there may also be negative consequences flowing from providing assistance to a particular firm — such as a loss of revenue or jobs for other competing firms; and
- there may be costs associated with any effort undertaken to ensure that the subsidy continues to be 'enjoyed' by the group for whom the subsidy was provided. For example, there may be costs in ensuring (ie, monitoring) that the lease continues to be used for the purpose for which it was granted.

4.4.3 Transparency

By directly granting a lease at less than market value the Government is providing a subsidy to the recipient of the lease.

There is nothing wrong with such a subsidy, but NCP generally requires that such a subsidy be valued and made transparent.

Table 4.2 (starting on page 33) lists part of a sample of 31 direct grants made from 1994 to 1999. Shown in the table are lease details including the amount paid for the lease (sale price, or rental details) and the unimproved

[31] This criticism may apply equally to leases granted at market value as well as those granted at less than the market value.

[32] Victorian Auditor-General's Office, *Promoting Industry Development — Assistance by Government*, Special Report No.37, October 1995, p.52.

[33] This is impossible to determine unless activity based costing is implemented in ACTBIS, IAM and PALM.

[34] Industry Commission, *Inquiry into State, Territory and Local Government Assistance to Industry*, AGPS, Canberra, 1996, p.573.

[35] Industry Commission, *Inquiry into State, Territory and Local Government Assistance to Industry*, AGPS, Canberra, 1996, p.572.

value of the lease for rating purposes (UVR). Eleven leases in the sample had a UVR equal to the amount paid for the lease, and are not shown in the table.

The UVR is the assessed value of a fully serviced block without the value of any improvements (eg, buildings, etc). Quite often blocks are sold with incomplete servicing, requiring lessees to complete the servicing of the site. As the Government is selling an incomplete product (ie, a block that is not yet fully serviced), the sale price would be less than that if the block was fully serviced. The price of the block can also be reduced if there is any requirement to demolish existing structures.

Conversely, if the lease has existing improvements included for sale, the sale price increases.

If a block is fully serviced with no improvements, it could be expected that the UVR and sale price paid for premium leases would be equivalent, or at least closely related.

On a quarterly basis, PALM tables in the Legislative Assembly a list of leases granted. The amount paid for each lease is listed in the tabling document. As legitimate adjustments (compared with the unimproved value) made, due to any associated works, demolition and existing improvements are not stipulated, the value of the fully serviced lease (ie, unimproved value) is not necessarily clear.

As can be seen from Table 4.2, although all leases had a different sale price from the UVR, only three of the twenty leases granted involved any concession against the market value. The concessions granted were all in accordance with the relevant policy at the time. Overall, then, three of the 31 lease sales involved a concession. Discounting the pre-self government grant, only two of the remaining 30 leases (or 6.7 percent) have been granted at less than market value.

As a result of the lack of clarity in the components of the sale price of leases, any concessions granted on the sale of the land are, therefore, not necessarily transparent. In the case of rental leases, the lack of transparency is compounded, as there is no immediately apparent price to compare with the UVR.

Therefore, the leases granted tabling document should include the dollar amount of any concession granted, as compared to the current market value of the site or property. If necessary, the land information database and accounting system should be modified to record any concession granted.

RECOMMENDATION 4.1

To improve the transparency of information tabled in the Legislative Assembly regarding leases granted, the dollar value of any concessions given in the sale of property should be included in the documentation.

Table 4.2

A Sample of Direct Grants 1994-1999

Address	5 Angas Street, Ainslie	Chamwood Pl, Chamwood	3 Phipps Close, Deakin	8 Albany St, Fyshwick
Block/ Section	19/26	42/95	35/35	53/32
Lessee	Ainslie Football and Social Club	Anglican Church Property Trust	Soccer Australia Limited	Paper Merchan Holdings
Purpose	Sports-Ground	Place of worship	National Assoc.	Light Industry, Warehouse
Granted	24/6/96	26/3/98	5/6/97	18/4/96
UVR	$180,000 @1/1/96	$60,000 @1/1/97	$515,000 @1/1/97	$475,000 @1/1/96
Policy	161 CMV	163-C	161 CSV	161 CSV
Lease type	Premium	Premium	Premium	Premium
Serviced block price/ value	$331,000	$39,350	$570,000	$475,000
Improvements	$174,000			
Property value	$505,000	$39,350	$570,000	$475,000
Less				
Application fee as deposit		$700		$4,050
Demolition	$118,240			
Associated works required	$88,085	$21,500	$5,000	$160,000
Sale price (if applic)	$298,675	$17,150	$565,000	$310,950
Rent (if applic.)				
Concession from CMV/CSV	Nil	$20,650	Nil	Nil

Table 4.2 (Continued)

A Sample of Direct Grants 1994-1999

Address	10 Bennetts Cl, McKellar	12 Bennetts Cl, McKellar	52 Vicars St, Mitchell	29 O'Hanlon Pl, Nicholls	71 Pethebridge St, Pearce
Block/ Section	16/50	6/52	13/38	10/2	13/30
Lessee	Tokich Homes Pty Ltd	Tokich Homes Pty Ltd	Canberra Sand and Gravel	Dungell Pty Ltd	The Commissioner for ACT Housing
Purpose	Residential	Residential	Recycling facility	Tourist facility	Residential
Granted	10/9/98	10/9/98	18/8/98	8/8/97	31/3/99
UVR	$100,000 @1/1/98	$100,000 @1/1/98	$225,000 @1/1/98	$1,050,000 @1/1/97	$560,000 @ 1/1/99
Policy	161 CSV	161 CSV	161 CSV	161 CSV	161 CSV
Lease type	Premium	Premium	Premium	Rental	Premium
Serviced block price/ value	$100,000	$100,000	$225,000	$1,050,000 (n/a)	$600,000
Improvements					
Property value	$100,000	$100,000		$1,050,000 (n/a)	$600,000
Less Application fee as deposit			$4,375	$4,150	
Demolition Associated works required	$52,250	$58,000	$4,000	$8,500	
Sale price (if applic)	$47,750	$42,000	$216,625	$1,037,350 (n/a)	$600,000
Rent (if applic.)				$92,350 yr1,then $105,000 pa	
Concession from CMV/CSV	Nil	Nil	Nil	Nil	Nil

Table 4.2 (Continued)

A Sample of Direct Grants 1994-1999

Address	4 Taubman St, Symonston	87 Nemarang C, Waramanga	Mc Bryde Cr, Wanniassa	2 Wyselaskie Cl, Kambah	154 Mawso Mawson
Block/ Section	2/116	1/40	9/126	31/364	23/47
Lessee	TKJ Industries Pty Ltd	Commissioner for ACT Housing	Tuggeranong Valley RU & ASC	Commissioner for ACT Housing	FABCOT Pt
Purpose	Advanced technology Development	Residential	Enclosed oval	Residential	Service Sta
Granted	28/2/97	24/2/98	3/4/98	8/8/94	11/9/98
UVR	$150,000 @1/1/97	$375,000 @1/1/99	$75,000 @ 1/1/98	$510,000 @1/1/96	$600,000 @1/1/98
Policy	161 CSV	161 CSV	161 CSV	1988 policy 80% of CMV	161 CSV
Lease type	Premium	Premium	Premium	Premium	Premium
Serviced block price/ value	$150,000	$250,000	$75,000	$265,000	$600,000
Improvements			$275,000		
Property value		$250,000	$350,000	$265,000	$600,000
Less Application fee as deposit	$1,600				
Demolition **Associated works required**		$7,500			$5,630
Premium due (if applic)	$148,400	$242,500	$350,000	$265,000	$594,370
Rent (if applic.)					
Concession from CMV/CSV	Nil	Nil	Nil	$66,250	Nil

Note: Waramanga — Difference with UVR- At the time Revenue Office (UVRs) was using different valuer. Now AVO used by both IAM and Revenue Office.

Kambah — ACT Housing paid for land in June 1988 (pre self government). Lease not required immediately. This explains difference in policy and UVR.

Source: PALM

This recommendation does not apply to land that has previously been granted, but for which a formal lease must now be created. The recommendation does apply for all leases directly granted to new transfers of land to Government agencies (ACTEW, Sport & Recreation, ACT Housing, etc).

It is also noted that on a number of occasions the application fee has been used as a 'deposit' on the sale price of a successful application for a lease. As the purpose of the application fee is distinct from the purchase of the lease, this practice should cease.

RECOMMENDATION 4.2

To ensure transparency of recording of cost centre information, the application fee for a direct grant of land should not be used as a 'deposit' toward payment for the land.

4.5 Discussion

4.5.1 Direct Grants to Support Commercial Development

All governments have an interest in attracting and competing for mobile investments because of perceived employment and income generation benefits.

Governments generally compete for mobile investments in two ways. They:

- attempt to contribute to the establishment of an economic environment which attracts such investments. This is often referred to as 'getting the fundamentals right'; and
- provide firms/project specific assistance. The hope is that for relatively small outlay, a jurisdiction might be able to secure a long–term, substantial addition to its tax base. However, the IC has observed that in practice competition between jurisdictions can cause the incentives to be increased, and the addition to the tax base to tend to zero. Investors are aware of this dilemma for the jurisdictions and it is in investors' interests to encourage competitive bidding between jurisdictions for their investment.

In this environment, firm/project specific industry assistance is often justified as a response to market failure, and relies heavily on the promise of positive externalities arising from the investment projects.

The ACT is not alone among leasehold jurisdictions in having a system of concessional leases as a means of providing firm/project specific assistance. For example, when commenting upon Hong Kong's system of concessional leases Hong stated that, "Because the objective of issuing these treaties [ie, leases] is to encourage the development of key industries ... officials will ask for no payment or a premium below market value from lessees."[36] Furthermore, the practice of providing land for industrial purposes is adopted to varying degrees by governments across Australia:

[36] Hong, "Transaction Costs of Allocating Increased Land Value Under Public Leasehold Systems: Hong Kong" (1998) 35(9) *Urban Studies* 1577 at 1578-1579.

> "There are few instances where businesses are provided with goods free of charge as an inducement to relocate or expand. In general the only good provided free is industrial land by some State/Territory governments."
>
> South East Economic Development Strategy as quoted in Economic Priorities Advisory Committee of the ACT, *ACT Business Development Strategy*, 1993, Appendix 3.

While project/firm assistance may be a legitimate tool of industry/development policy, as noted by the IC, the provision of such project/firm specific assistance in Australia has been marked by a range of problems:

- most significant industry assistance provided by the states and territories is firm–specific, discretionary and undesirable from an economy-wide perspective;
- evaluation techniques are often misused in estimating the net benefits of assistance;
- inter–state competition for new investments through the offer of financial incentives may not be in the overall national interest, if it results in a sub–optimal location decision;
- there is a strong case for states and territories to consider creating an agreement to cease or limit firm or project specific assistance; and
- jurisdictions should observe guidelines on transparency and monitoring of any assistance.[37]

While firm/project specific assistance may be in the public interest, given the potential concerns and limitations noted by the IC, it is important that such assistance is provided in a manner that allows any assessment to be made by third parties.

4.5.2 Direct Grants to Support Community Projects

While assistance in the provision of land — either as a direct subsidy or by facilitating its purchase — is not unusual for governments across Australia (and indeed the world), what sets the ACT apart is the manner in which direct grants are used to assist community organisations.

To the Review Team's knowledge, no other Australian jurisdiction has a legislative scheme for the provision of subsidised land for community organisations. In other jurisdictions, support can be provided to community organisations in a number of ways — whether it be facilitation through planning processes, the sale of government land or financial assistance to purchase land — but not in the formal and prescribed nature evident in Part V of the *Land Act*.

The initial rationale for this approach appears to have been to encourage the development of a wide range of social services for the residents of the ACT during formative years.

Given that Canberra is now an established city, the Review Team questions whether the initial need to explicitly support the establishment of

[37] See Industry Commission, *Inquiry into State, Territory and Local Government Assistance to Industry*, AGPS, Canberra, 1996.

community organisations through the provision of land remains as strong today in comparison to earlier years.

Indeed, it may be that the development of community organisations may be better facilitated through other support programs. Unfortunately, as the subsidy is not clearly identified in financial terms it is often difficult to compare such subsidies with alternative forms of community subsidies. The next chapter aims to identify reform approaches that may better enable the Government to identify the existing level of subsidies and facilitate a better comparison of subsidy approaches.

Chapter Five

Possible Reform of Concessional Leases

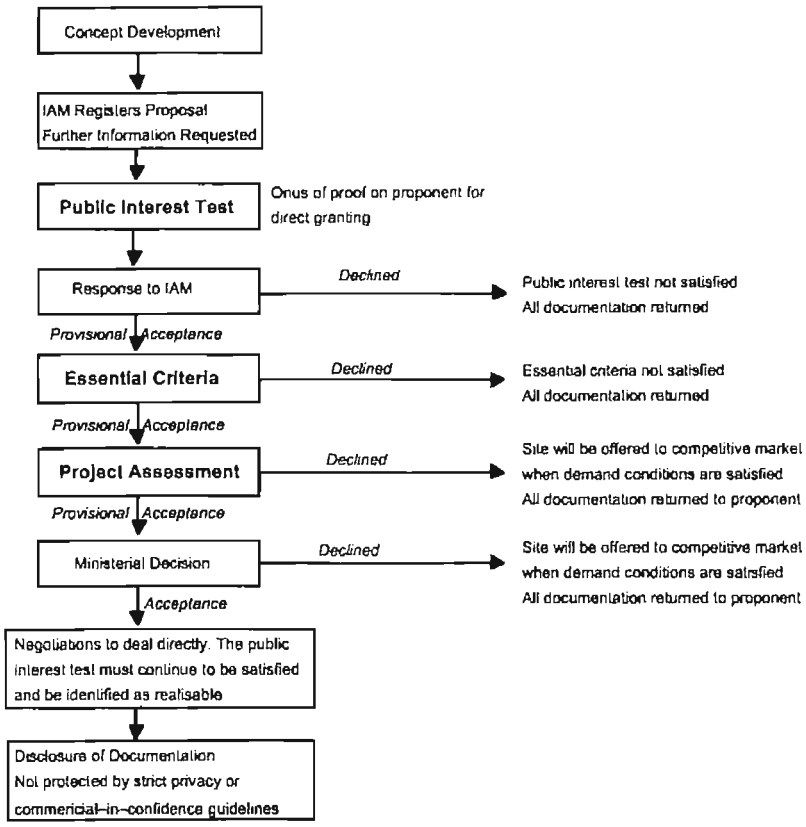
5.1 The Assessment of Direct Grant Applications

The ACT Property Advisory Council recently considered the process by which applications for direct grants of commercial leases are considered by the Government.

The Council suggested moves to streamline and make more transparent the process for direct grants of commercial leases — see Figure 5.1. This approach is said to be employed by ACTBIS.

Figure 5.1

Property Advisory Council's Suggested Process for Consideration of Direct Dealing with Respect to Commercial Leases



Source: Property Advisory Council, *Appropriateness of Dealing with Developers Outside a Competitive Process*, 1999, p.26

An issue for this review is whether these guidelines should be incorporated within the legislation.

The EDO stated its position in these terms:

> "We also believe that they [public interest benefits] can only be achieved by legislative approaches. We reject reliance on other laws, guidelines or codes of practice in this context. The EDO believes that the Land Act is so intrinsic to planning and environmental outcomes in the ACT, that provisions for public benefit should be located within that Act."
>
> Environmental Defenders Office, presentation to the public hearing, 24 March 2000.

Similarly, the Weston Creek Community Council supported legislative requirements in place of guidelines:

> "A legislative process needs to be used, because a non-legislative process would not trigger community consultation mechanisms. ... The granting of a concessional lease should be legislative as it confers on all the same 'rule book' under which to deal with the ACT Government, the developer and the community. Non-legislative approaches can be at the direction of ill-defined Ministerial guidelines."
>
> Weston Creek Community Council, submission, pp.3&6.

While acknowledging these concerns, the Review Team considers that decisions to fund organisations (explicitly or implicitly) should be the right of government. The Review Team is concerned that the establishment of formal processes within legislation would give rise to administrative law and other legal obligations, potentially placing an onus on the Government to establish why it had chosen a competitive process over a non-competitive (ie, direct grant) process. The Review Team considers that any such development would run counter to the principles of NCP.

In return for the potentially lower level of transparency associated with the use of guidelines rather than legislation, the Review Team suggests that the direct grant assessment processes used by IAM should be clearly detailed and made readily available to the public. While the disallowable instrument mechanism is used to make the criteria employed public, such instruments shed little light on the practicalities of the assessment processes. The need for such publication is demonstrated by the Weston Creek Community Council's uncertainty regarding the processes used to assess direct grant applicants and their applications:

> "Concerns have been raised by residents that organisations can request of Planning and land management (PALM) in the Dept of Urban Services consideration for a block of land for a particular use. Such organisations are offered a choice of blocks based on their claim that they are who they are eg community group for a community lease. There appears to be no checking by PALM of their credentials."
>
> Weston Creek Community Council, submission, p.1.

Community understanding of, and support for, the direct grant process would be enhanced by increased disclosure of the assessment processes currently used by IAM.

RECOMMENDATION 5.1

To ensure transparency and facilitate efficient outcomes the processes used to assess direct grant applications should be clearly detailed (eg, through flowcharts, etc) and made readily available to the public.

5.2 Methods for Providing Grants at Less Than Market Value

5.2.1 Identification of the Financial Subsidy Associated with the Direct Grant

Overview and Possible Benefits

A key issue in the provision of public assistance is to ensure that the public has received value for money from the assistance; value for money is about proving that public expenditure on a program has generated the best possible outcomes. The accepted approach is to demonstrate — through the relationship between inputs and outputs, and between outputs and outcomes — that the program objectives have been achieved in an efficient and effective manner. However, this comparison of inputs and outputs is not really feasible unless the value of the subsidy provided through the concessional lease (ie, the input) is quantified.

It is a well established principle under the Westminster system of government that accountability to the Legislative Assembly and the taxpayers for the use of public funds is paramount, and that the issue of commercial confidentiality and sensitivity should not override the Government's obligations to be accountable for financial arrangements involving public moneys (or moneys foregone). In this light, the Review Team shares the views of the Senate Finance and Public Administration References Committee in relation to commercial confidentiality:

> "The Committee is concerned that the mantra of commercial confidentiality will increasingly be used to deny Parliament access to the detail of contracting arrangements. The Committee accepts that there are limited aspects of contracts which may be legitimately commercially confidential. However, whenever information is denied Parliament, there will be suspicion that it is to hide sloppy administration, extravagance, incompetence — or worse — in the expenditure of public money."
>
> Senate Finance and Public Administration References Committee, *Contracting Out of Government Services*, Second Report, Chairman's Tabling Statement, May 1998.

Consistent with these views, the IC suggested that in relation to firm/project specific assistance each firm or project should be reported in the following terms:

- the duration of assistance;
- estimates of the value of any concessions;
- details of legislation or regulatory changes and re–zoning; and
- any guarantees of future Government contracts.[38]

Clearly, establishing the value of any subsidy is a key basis for the IC's recommendations and is consistent with good public policy.

As previously noted, a schedule of leases directly granted (including those at market value) is tabled in the Legislative Assembly on a quarterly basis. This

[38] Industry Commission Report, *Inquiry into State, Territory and Local Government Assistance to Industry*, AGPS, Canberra, 1996, p.84.

schedule includes the value of the lease (ie, the premiums/rental paid) but not the market value of the lease at its highest and best use (or any other use).

An option to provide greater accountability regarding the subsidy associated with concessional grants is to:

- identify the value of the subsidy provided by the direct grant at less than market value (ie, the market value minus the actual rental/premium paid);
- provide reasons for the provision of this level of subsidy; and
- table before the Legislative Assembly the lease, the identified value of the subsidy and the reasons for such a level of subsidy.

This approach is not dissimilar to the cost-based process (ie, identify the market price and then provide specific subsidies) employed when determining rents for Crown land in NSW:

> "The principles to be applied in determining the rent for future leases ... vary from the previous provisions in that in all cases the rent will be based on the market rent for the land having regard to any restrictions, conditions or terms to which the lease ... is subject, instead of the productive capacity of the land under fair average seasons, prices and conditions where that basis has applied in the past. ...
>
> The new Act provides for the introduction of a rental rebate system whereby rents payable under leases granted for certain purposes, e.g. community or charitable purposes, can be rebated to reflect the extent of any Government concessions or subsidies. The same system will be utilised in determining pensioner concessions and concessions applying to other groups of Crown land holders."
>
> Department of Land, *Reform of N.S.W. Crown Land Laws — A New Approach to Crown Land Management and Administration in New South Wales*, Bathurst, 1989, p.7.

This approach has the advantage of being consistent with the ACT's accrual budgeting process.[39] Under this process, the identification of the current implicit subsidy makes the subsidy explicit and it should be accounted for under budgetary processes:

> "Grants and Purchased Services are expenses that an entity incurs on behalf of the Territory. The entity responsible for the funding transfers to third parties might determine to whom the funds are paid, how much each recipient receives and under what conditions. The responsible entity does not have the authority to divert those funds into an alternative use ..."
>
> Department of Treasury and Infrastructure, *ACT Accounting Policy Manual*, August 1999, pp.10-29.

A further advantage of this approach is that the identified subsidies can be allocated to relevant departments. For example, a subsidy for a golf course could be allocated to the Department of Education and Community Services (or any other department which wishes to provide such a subsidy). This process of accountability for the subsidy will place pressure on departments to determine whether such a subsidy is truly in the public interest.[40]

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[39] See Department of Treasury and Infrastructure, *ACT Accounting Policy Manual*, August 1999, ch.10.

[40] If individual departments are to take responsibility for any subsidy then they will need to have a significant input into the grant process outlined in section 5.1.

Costs

This approach will require that a market valuation is undertaken for every concessional lease. These extra costs will vary depending on the complexity (ie, size, nature of use, etc) of the land.

A further concern (ie, potential cost) is that it is difficult to put an accurate value on land outside of a competitive allocation process. While somewhat out of date now (ie, because of changes created by self–government and the right to renew a lease providing greater certainty), Brennan's 1971 observations remain relevant and highlight the impact that the ACT Government directly and indirectly has on land values and further describes potential valuation difficulties:

> "There are several special difficulties in the valuation of land in Canberra.
>
> Firstly, in the case of residential blocks the Commonwealth [now the ACT Government] directly controls the number available for purchase. It can therefore make them relatively scarce or plentiful. This variation in the supply must cause fluctuations in market values — if residential blocks are scarce prices will rise. ... This is not the only factor influencing premiums but it is a significant one. ...
>
> Secondly, the authority who is valuing the land is also the land owner and the receiver of rents and rates based on this valuation. This is, to say the very least, an anomalous situation.
>
> Thirdly, there is no land market in the same sense as there is in a freehold area.
>
> Fourthly, nowhere else are land values so markedly affected by town planning decisions."
>
> Brennan, *Canberra in Crisis: A History of Land Tenure and Leasehold Administration*, Dalton Publishing Company, Canberra, 1971, p.182.

The problem of land valuation was also noted by the ACT Auditor General in the concept of determining a land value for the purpose of the change of use charge,[41] and Neutze has made similar observations with respect to the valuation of land to be used in a relatively unique manner by non-profit organisations:

> "Grants of leases at less than market value for non-profit organisations raise quite different questions from those for commercial purposes. For many if not most not-for-profit activities it is difficult if not impossible for the market value of the lease for its specified use to be determined because there are few if any transactions."
>
> Neutze, submission, p.4.

This was a problem identified by the Review Team when trying to determine the value of land that had been earmarked for the construction of an aquatic centre.[42] The approach adopted then, and the one which remains correct today, is to value the opportunity cost of the land. In this case, the land should be valued at the 'highest and best use'.

[41] See Auditor General, *Lease Variation Charges— Follow-Up Review*, Canberra, 1997.

[42] See The Allen Consulting Group, *Belconnen Aquatic Centre — 'Public Benefit' Assessment and Feasibility Study*, 1999.

5.2.2 Fund Applicants Directly

Overview

Another option is to stop using a non-cash subsidy (ie, land) as the principal means of subsidising certain firms and community organisations. Rather, the Government could fund such organisations from the Budget so that they can purchase a lease on the open market.[43]

This approach has been endorsed by Neutze. Commenting on the Stein review he noted that:

> "the board did not include the encouragement of investment in the territory as one of either the original objectives or one of the current benefits of the leasehold system. This is not because the board regarded encouragement of investment as an illegitimate objective of the ACT government. Rather it was because they believed (correctly in my view) that promotion of investment should be carried out in an open and accountable way through the budget rather than by providing development rights at less than their market price. The board even commended (par 13.24) the use of s 164 of the Land Act to provide special leases at less than market value where it is "satisfied that it is desirable and in the public interest to do so". The fact that disallowable instruments for the granting of such leases must be tabled in the Legislative Assembly makes such actions open. In my view the fact that the cost is not reflected in budget expenditures is a disadvantage of the use of this section."
>
> Neutze, "The Stein Report on Leasehold Administration in the Australian Capital Territory: Some Observations on Land Tenure and Systems in Other States" (1996) 1(4) *Local Government Law Journal* 211 at 213.

Funding applicants is called 'purchaser support' and is employed on a piecemeal basis by Governments throughout Australia to assist both industry[44] and community organisations. While such purchaser support schemes can take many forms, they all share two basic features:

- a transparent ceiling on the amount paid to the organisation (ie, as opposed to a sometimes difficult to quantify subsidy in the form of land); and
- a requirement that the support be non-transferable and used solely for the purchase of specific goods or services (ie, the land).

Purchaser support is most applicable when:

- there is a well developed market from which the purchaser can choose;
- the product being purchased is relatively uniform; and
- there is an incentive for parties to use the subsidy.[45]

In this case there is clearly an incentive for the subsidy recipient to spend the subsidy on the purchase of a lease. However, this option will not be very effective if the organisation needs land with certain characteristics that are not generally available in the market.

To counter such circumstances it is necessary to maintain the ability for the Government to make a direct grant of land (at the market price or a reduced

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[43] Under this option there would still be a degree of planning control because the lease could be made available subject to specific use and development controls.

[44] See Industry Commission, *Inquiry into State, Territory and Local Government Assistance to Industry*, AGPS, Canberra, 1996, pp.84-85.

[45] See Organisation for Economic Co-operation and Development (1993), *Managing with Market-Type Mechanisms*, OECD, Paris, 1993.

price) once the party has searched the marketplace and found no suitable land. In this case the treatment will be little different from the approach outlined in section 5.2.1 because a department will have to account for the subsidy.

Costs

The major limitations with this approach is that:

- there will be extra financial costs associated with the valuation of the land;
- the Budget process may be insufficiently flexible to facilitate speedy direct grants of land; and
- there are likely to be higher transaction and search costs because they would have to go and seek out suitable land on the open market before approaching the Government.

5.2.3 Allow Parties to Bid for Concessional Treatment

Overview

A third option is to establish a mechanism to allow parties to competitively bid for concessional lease arrangements.

Further with respect to the *Land Act*, the bidding would be with respect to the concessional granting of land leases at some value below the market value. For example, the Government may be of the view that there is a need for a recreational facility in a newly developing area and may invite parties to bid for the right to a direct grant at less than market value. The bid assessment criteria could include:

- the public benefit associated with the particular proposal; and
- the discount that the party wishes to obtain from the Government.

A similar process could be established for industry assistance.

Bidding for concessions is an approach that has been adopted widely in a number of countries with respect to a range of goods and services and allows the government to use greater bargaining strength to maximise community benefit.[46]

An issue in the adoption of this approach relates to how often concessions should be awarded? That is, should concessions continue to be awarded in its current case-by-case fashion, albeit in a competitive process, or should there be a periodical bidding process for concessions, say every three to six months? This issue was raised by the NSW Audit Office in its review of provision of industry assistance by SRD:

> "A case by case approach means that proponents are not required to compete for a limited pool of industry assistance resources. The absence of a competitive process reduces the negotiating leverage which SRD would otherwise have. Conversely, it actually may increase the leverage of a proponent which is able to identify several competing locations for its investment.

[46] See Klein, *Bidding For Concessions*, World Bank Policy Research Working Paper No. 1957, August 1998, p.1.

> A different approach involving some form of competitive bidding process would enable more effective prioritisation by SRD based on maximising net economic benefits. For example, SRD could call for expressions of interest on a periodic basis (say every three months) for a limited pool of industry assistance funds. These funds could then be provided to those proposals which offer the greatest economic benefits in net present value terms. The Audit Office recognises that a simplistic tendering arrangement would not cater for the full range of industry assistance objectives and situations. However, the principle of generating competition to select the proposals offering greatest benefit to NSW can be implemented in a variety of ways."
>
> The Audit Office of New South Wales, *Department of State and Regional Development: Provision of Industry Assistance*, 1998, p.25.

The main benefit of a periodic bidding process is the increased competitive pressures that are generated by presenting bidders with a limited pool of concessions for which they have to compete. A further benefit is that it provides some consistency and certainty for potential bidders. On the down side, it may unnecessarily restrict the Government from moving quickly to grant concessional leases when required.

Costs

The major argument against the use of a competitive bidding process to allocate concessions concerns the technical (in)ability of parties to prepare bids and the transaction costs associated with an auction process:

> "Advocates of negotiation tend to argue that a formal competition may take too much time, that costs of preparing bids may be excessive and that innovation may be discouraged. Proponents of competitive bidding tend to argue that there are ways to address many of these concerns without sacrificing the bidding process. In addition, with competition the conceding authority may get a better deal and transparency of the process may be enhanced rendering a deal more sustainable politically."
>
> Klein, *Bidding For Concessions*, World Bank Policy Research Working Paper No. 1957, August 1998, p.8.

With respect to the concessional leasing of land, many of these arguments against competitive bidding are not overly compelling. While some time inflexibilities are introduced, unlike bids for major infrastructure privatisation, the time needed to run the bidding process and the costs of preparing bids for a concessional lease are unlikely to be excessive. Furthermore, innovation is unlikely to be stifled provided there are adequate means for proponents to articulate the additional benefits that may accrue from adopting an innovative approach. In any case, the concessional leasing of land is unlikely to be a hotbed of innovation.

The key cost of a competitive bidding process is the decreased flexibility for the Government's to grant concessional leases speedily. The nature of organising a competitive process requires time for other bids to be prepared. This inflexibility would be exacerbated if a periodical process were rigidly imposed.

5.2.4 Establish an Inventory of Unleased Territory Land

Overview and Possible Benefits

As discussed earlier, a problem with the current concessional grants is that there is often no transparent means of determining the value of the land provided to the applicant.

The ACT currently has a patchwork land inventory, but IAM is moving to improve the land stock register.

An option to address this transparency concern is to establish a comprehensive inventory of unleased land and its value. A comprehensive inventory of unleased Territory land that could be provided as a direct grant, possibly valuing the land at its highest and best use, could be a compliment to the two previous options as it would make transparent the value of any in-kind subsidy, and the cash payment in option two could be 'spent' on a direct grant of land up to an equivalent value.

> "In granting of leases and of additional rights to existing lessees the ACT Government is acting as lessor and its primary objective - subject to land use planning constraints and to not exploiting its position as a monopolist owner of development rights—should be to maximise the collective wealth of the ACT. Unfortunately, as a result of the failure of the ACT Government to publish land development accounts (they were said to be in preparation in evidence before the Langmore Inquiry in 1988), it is not possible to judge how far this is being achieved. It is lessened each time the Government assets represented by the development rights in ACT land are sold at less than their full market value."
>
> Neutze, submission, p.2.

Costs

There are some potentially significant problems with this option:

- it would likely involve considerable expense. This is particularly so if the land valuations are updated:
  - regularly (ie, every three years) to ensure currency; and
  - simultaneously for every lease (ie, rather than on a lease by lease basis) to ensure comparability between different leases; and
- land valuations are inherently imprecise and so the value of the inventory may be questioned (see the discussion in section 5.2.1).

5.2.5 Assessment of Approaches

A difficulty with a review such as this is that it is necessary to consider a wide range of social, economic and environmental costs and benefits associated with different reform options. This problem, and a possible solution, was highlighted by a recent Senate Select Committee:

> "The Committee continues to be concerned about the application of 'public interest' given the confusion that exists over what the term means or allows under NCP. The confusion, when combined with the administrative ease of simply seeking to measure outcomes in terms of price changes, encourages the application of a narrow, restrictive, definition. *The Committee considers that it is important to devise a method of assessment of the policy which attributes a numerical weighting to environmental and social factors to avoid the over-emphasis on dollars merely because they are easy to measure.*"

Senate Select Committee of the 39th Parliament of Australia on the Socio-Economic Consequences of the National Competition Policy, *Riding the Waves of Change*, Canberra, 2000, p.35. Emphasis added.

Consistent with these comments the Review Team has considered these alternatives using a 'balanced scorecard'. The methodology underlying Tables 5.1 and 5.2 is outlined in Appendix C.

An unweighted assessment of possible reforms is provided in Table 5.1.

Table 5.1

An Unweighted Assessment of Alternative Approaches to the Provision of Concessions

	Identify the Financial Subsidy	Fund Applicants Directly	Bid for Concessions	Inventory of Unused Land
Efficiency	1.5	1.5	1	-2
Effectiveness	1.5	1.5	1	1
Transparency and clarity	1.5	2	1.5	2
Commercial and community development	0	0	0	0
Broader community interests	0	0	0	0
TOTAL	4.5	5	4.5	1

Note: A score of zero represents no significant change from the status quo, while a negative score means a worsening outcome and a positive score means a better outcome.

The key factors in allocating the scores in Table 5.1 were that:

- the only real difference between the first and second options is that the second received a higher score for transparency and clarity. This was adjudged to arise because the use of the existing market as a first option sought to use a real market price in the first instance rather than an estimated market price;
- the 'bidding for concessions' approach was scored more favourably than the status quo because it established a competitive process for the allocation of a subsidy and land, but was discounted somewhat because of the costs involved in establishing a bidding process;
- while there is an inherent transparency associated with a land inventory that allows the community to know precisely which land is not leased and the value of the land, the practical difficulties and associated costs make this option unviable and meant that it received a low efficiency score; and
- as all of the options were directed at increasing transparency and accountability, and hence improving efficiency and effectiveness, it was considered that this would not impact upon development opportunities or broader community interests to any meaningful degree.

The weighted scores are shown in Table 5.2.

Table 5.2

A Weighted Assessment of Alternative Approaches to the Provision of Concessions

	Weight	Identify the Financial Subsidy	Fund Applicants Directly	Bid for Concessions	Inventory of Unused Land
Efficiency	15%	0.225	0.225	0.15	-0.3
Effectiveness	15%	0.225	0.225	0.15	0.15
Transparency and clarity	20%	0.3	0.4	0.3	0.4
Commercial and community development	25%	0	0	0	0
Broader community interests	25%	0	0	0	0
TOTAL	*100%*	*0.75*	*0.85*	*0.6*	*0.25*

As shown in Table 5.2, the Review Team's preferred approach is to fund from the budget all parties who currently would receive direct grants at less than market value. This process maximises transparency and seeks to rely on the established ACT land market for appropriate locations for development.

RECOMMENDATION 5.2

Where a party has land requirements that can be obtained in the marketplace, rather than providing a direct grant at less than market value, the Government should provide direct funding to assist in the purchase of the land.

In circumstances where there are no suitable sites available on the market the Government would still need to rely on a direct grant process. Such a direct grant would be at full market value, but the organisation receiving the direct grant would pay some of the market value with the subsidy explicitly provided by the Government.

This second stage will require that all land that is to be directly granted should have its (estimated) market value calculated.[47]

RECOMMENDATION 5.3

All direct grants of land should be at market value, with any subsidies provided to assist in the purchase of land provided directly from the ACT Budget.

If a non-cash subsidy is to be provided (ie, the land is to be provided at less than market value) then the subsidy should be explicitly noted. This approach still allows the Government to support particular organisations, but makes that support explicit. In effect, this approach would require that an estimate of the value of the land be obtained for every direct grant.

[47] If the land is to be used for a relatively unique use then the land should be valued at its highest and best use.

The Review Team was attracted to the concept of providing a direct grant following a process that allowed parties to bid for the subsidy:

- the key benefit of competitive bidding is the greater bargaining strength available to the Government to maximise community benefit, regardless of whether that benefit satisfies a purely economic or non-economic goal;
- this benefit is increased when a periodical bidding process is employed, as an element of scarcity is introduced; and
- such an approach would also add predictability and transparency to the grant process.

However, the Review Team is conscious that this is a radical approach and that it is difficult to recommend as a general principle. The Review Team does suggest, however, that consideration may be given to trialing this approach when a generic demand has been identified and there may be a range of alternative options for meeting the demand.