LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

# REVIEWS OF AUDITOR-GENERAL'S REPORT NO 10, 1997

***Public Interest Disclosures - Lease Variation Charges***

**and**

# AUDITOR-GENERAL'S REPORT NO 2, 1998

## Lease Variation Charges - Follow-up Review

**STANDING COMMITTEE FOR THE CHIEF MINISTER'S PORTFOLIO (INCORPORATING THE PUBLIC ACCOUNTS COMMITTEE)**

Public Accounts Committee Report Number 8

September 1998

## RESOLUTION OF APPOINTMENT

The Standing Committee for the Chief Minister's Portfolio was appointed by the Legislative Assembly on 28 April 1998 to examine any matter under the responsibility of the Chief Minister's portfolio. The Assembly also resolved that the committee perform the duties of a public accounts committee, specifically:

(a) to examine:

- (i) the accounts of the receipts and expenditure of the Australian Capital Territory;
- (ii) the financial affairs of authorities of the Australian Capital Territory; and
- (iii) all reports of the Auditor-General which have been laid before the Assembly;

(b) to report to the Assembly, with such comments as it thinks fit, on any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed; and

(c) to inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question.

## MEMBERSHIP OF THE COMMITTEE

Mr Ted Quinlan MLA Committee Chair

Mr Trevor Kaine MLA Deputy Committee Chair

Mr Greg Cornwell MLA

Secretary: Bill Symington

# 1. INTRODUCTION

### *Background*

1.1. Auditor-General's Report No 10, 1997 was presented to the Assembly on 4 September 1997. It contains two reports on performance audits conducted as a result of Public Interest Disclosures. One report dealing with corrective services was reviewed separately by the committee in its report no 2 of June 1998.

1.2. This committee report reviews the second matter dealing with lease variation charges and, in that context, it should be noted that review of this audit report by the Public Accounts Committee (PAC) in the previous Assembly had not been completed before the Assembly was dissolved prior to the February 1998 election. In accordance with the resolution of the Assembly this committee has exercised its power to consider and make use of the evidence and records of the Public Accounts Committee in the previous Assembly.

1.3. The 1997 audit report presented the results of an audit of certain lease variations executed between 1990 and 1995 and arose from several communications from the public on the processing and calculation of lease variation charges (betterment) and a detailed allegation under the Public Interest Disclosure Act 1995. Disclosable conduct was alleged in four cases and that audit objective was to determine whether the allegations were sustained and, if so, whether there had been a material amount of betterment foregone as a result.[1]

1.4. Auditor-General's Report No 2, 1998 which was presented to the Assembly on 25 June 1998, is a follow-up of Auditor-General's Report No 10, 1997, the objectives of this audit being to establish whether procedures required by relevant legislation are being followed and whether changes in use charge calculations are being based on appropriate valuations.

# 2. AUDIT FINDINGS

2.1. The findings of the 1997 audit were:[2]

(i) a variation of the lease purpose for the Belconnen Golf Club was incorrectly treated as a pre-1990 application and, because of failure to follow the provisions of the Land (Planning and Environment) Act 1991 and Regulations, betterment of $917,000 was foregone

(ii) the Department incorrectly regarded itself as bound by earlier advice as to remission of betterment in relation to variation of the lease purpose for the Kingston Bowling Club (also known as the Canberra Women's Bowling Club at Kingston) and, as a result, revenue of $1,229,968 was foregone

[1] Audit report no 10, 1997,p1
[2] ibid pp2-4

(iii) the Department incorrectly treated the redevelopment proposal for the Forrest Bowling Club as a pre 1990 application. The provisions of the Land (Planning and Environment) Act 1991 and Regulations were not followed when a remission of 50% betterment was made. As a result revenue of $1.446,020 was foregone

(iv) betterment was incorrectly calculated by taking into account off-site works at the Bocce Club and this resulted in revenue foregone of $140,000.

2.2. An examination of two other lease variations as a check found that the same approach had been followed in these cases which suggested the cases examined were not one-off but were indicative of the general approach at the time. The audit concluded that the total amount of revenue foregone through incorrect betterment charges may well be greater than the $3.7m identified by the audit report.[3]

2.3. The audit expressed concern about the failure to have appropriate procedures in place, the absence of any attempt to obtain legal advice relating to the status of applications or the correct approach to the calculation of betterment and the failure to recognise that a preferred policy could not be followed if the relevant legislation provided to the contrary.[4]

2.4. The 1998 follow-up audit reviewed a sample of 11 applications for lease variation changes being finalised in 1996-97 (the sample representing about 20% of all such lease variations in that period). The report found that processing of applications for lease variations were consistent with the relevant legislation and change of use charges have been based on appropriate valuations. Nevertheless, the audit noted two significant findings, one where a Change of Use Charge of $3,750 for a dual occupancy in Downer was imposed incorrectly due to an incorrect interpretation of the law, the other where a restricted purpose on part of a lease in Mawson was not carried through to the instrument of variation resulting in an undercharge to the lessee of $26,250.[5]

2.5. The audit suggested that the Downer case indicated that the Department of Urban Services (DUS) should assess the amount of Change of Use Charges which have been levied incorrectly on older leases and determine a policy in relation to reimbursement.

2.6. With regard to the Mawson case, the audit suggested DUS should determine whether the lease error can be corrected, and noted that the Department would seek legal advice on possible action to correct the lease.[6]

[3] ibid p4
[4] ibid
[5] Audit report no 2, 1998, pp3,4
[6] ibid, p7

### *Committee approach*

2.7. Comment on the 1997 audit finding was sought by the PAC in the previous Assembly from the responsible Minister and a Government submission was subsequently provided to the PAC.[7]

2.8. This committee also discussed the 1997 audit with the Auditor-General on 12 June 1998 and was briefed on developments with the follow-up audit which was then underway and was sufficiently progressed to enable conclusions to be drawn. Those conclusions were essentially what was reported subsequently in Auditor-General's Report No 2, 1998.

2.9. The committee sought comment from the Minister for Urban Services on Audit report no 2 and an Action Plan was provided.[8]

2.10. For the record it should be noted that the 1997 audit found that appropriate procedures had been put in place to avoid recurrences of the matters disclosed by that audit. It should be further noted that the audit found that legal assistance should be obtained at the outset wherever there is doubt about the application of the procedures.[9]

## 3. COMMENT BY GOVERNMENT ON THE ISSUES

### The 1997 Audit Report

3.1. With regard to the 1997 audit report, the then Minister for the Environment, Land and Planning, by way of background, advised there were (now) satisfactory procedures for lodging and recording applications under the Land (Planning and Environment) Act 1991 and improved procedures had been established for providing pre-application advice for lessees seeking a variation of the purpose for which a lease was originally granted.

3.2. The Minister advised that the Land (Planning and Environment) Act 1991 which came into effect on 2 April 1992 repealed the various land and leasing legislation and replaced them with a single statute covering all aspects of land and lease administration.

3.3. The Minister advised that the Land (Planning and Environment) Act 1991 established new procedures for the assessment of an application to vary a lease and the subdivision and consolidation of land. The Minister further advised that processes for accountability and transparency had been initiated through the public notification requirements and the rights of affected parties to object and appeal, that provision had been made for applications to be made in a formal manner and that the Government

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[7] Minister for the Environment, Land and Planning , undated letter to the PAC circa December 1997
[8] Minister for Urban Services, letter dated 24 August 1998
[9] Audit report No 10, 1997, pp8,9

was required to keep, maintain and provide public access to a register of applications, approvals and orders. Statutory time frames within which applications are to be approved or refused had also been established.

3.4. The Minister further noted that the Planning and Land Management Group (PALM) within the Department had been formed on 1 July 1996 to bring together all planning and land management functions under new senior management. The view was put that the new management structure and organisational culture together with the refined legislative environment and new procedures within PALM would avoid the occurrence of the situations addressed in the (1997) audit report.

3.5. Addressing the issues, the Minister advised that the Government Solicitor's opinion was that an incorrect remission rate to the Change of Use Charge for the Kingston Women's Bowling Club had been applied and that it is not possible to recover any of the charge underpaid as the Act does not create a debt due to the Territory and there is no provision for an amended assessment. The Government Solicitor examined the option of declaring the variation void but concluded this would create claims for damages.

3.6. The Minister advised that recommended changes to the administration and management of the leasehold estate arising from The Inquiry into the Administration of the ACT Leasehold (Stein Inquiry) have been addressed organisationally with the formation of PALM and administratively and legislatively with amendments to the Land (Planning and Environment) Act and Regulations. The Minister further advised there is now a process within PALM to seek legal advice where there is any suggestion that an issue may arise and that PALM has agreed to regular audits of Change of Use Charge.

**The 1998 Audit Report**

3.7. The Minister for Urban Services commented on the two cases from the sample where the audit noted significant errors in the application of procedure.[10]

3.8. The Downer case was an application to increase the number of residential dwellings on a "residential purposes only" lease from one to two. Legal advice obtained by DUS is that such leases allow for dual occupancy on a single block and a variation to the lease is not required. The Minister advised there have been approximately 17 cases where a lease variation and the Change of Use Charge have been applied and the issue (of reimbursement) is still under consideration.

3.9. With regard to the Mawson case the Minister advised that legal advice has been sought to determine possible action to correct the lease. The Minister further advised that DUS has taken steps to implement quality assurance/audit procedures and a staff training program that will mitigate the potential for this type of error in the future.

[10] Minister for Urban Services, op cit

# 4. COMMITTEE COMMENT

**The 1997 Audit Report**

4.1. It is a matter of considerable concern to the committee that, as noted by the audit, officials appeared to have consistently incorrectly interpreted the legislation to the considerable loss of Territory revenue. The committee notes that the audit was unable to conclude whether this had been due to incompetence, negligence, over commitment to ensuring developments proceeded, Ministerial influence or other reasons. [11]

4.2. Issues related to the redevelopment of the Kingston Women's Bowling Club were raised with the Minister for the Environment, Land and Planning in the Assembly in June 1995 and again in June 1996.[12] In light of the Minister's statements on those occasions, and the audit findings, the Minister on 4 September 1997[13] informed the Assembly that Departmental advice relied upon in 1995 and 1996 about approvals to develop the site needed to be reviewed. As a consequence, the Minister indicated that the earlier Departmental advice would be reviewed and if that advice had caused an inadvertent misleading of the Assembly a statement would be made to the Assembly when it next sat. The Minister has yet to advise the Assembly the outcome of this review.

4.3. The committee is also concerned with the lack of detail provided by the Department in relation to legal advice it has since obtained about the Territory's capacity to recover revenue foregone. In the absence of such detail upon which the committee might arrive at an informed opinion, and noting that the audit finding that legal advice would almost certainly have indicated that undertakings contrary to the law would not have been enforceable, the committee's preliminary conclusion is that there has been an apparent lack of commitment to follow this matter through with vigour.

4.4. The committee's concern extends to the implications of incorrect application of the law in respect to other lease variations beyond those examined by the audit. Accordingly, the committee will recommend action be taken in this matter.

**The 1998 Audit Report**

4.5. The advice of the Minister for Urban Services that the issue of reimbursement in those cases where change of use charges have been levied incorrectly is still under consideration is a rather less than satisfactory indication of progress in this matter.

4.6. The committee is also concerned at the lack of an indication as to whether the Mawson undercharge of $26,250 is recoverable or can be recovered.

4.7. A further matter of concern to the committee is the potential for conflicts of interest arising from officers of PALM leaving that organisation to work with

[11] Audit report No 10, 1997, p8
[12] Debates of the Legislative Assembly, 1 June 1995, pp726-728 and 19 June 1996, pp1902,1903
[13] Debates op cit, 4 September 1997, p2951

developers. The committee will keep this matter under review with a possibility that it may seek to have the implications reviewed in depth at a later time.

## 5. RECOMMENDATIONS

**5.1. The committee recommends that the Government advise the Assembly on:**

**(i) details of the review of advice tendered the former Minister for the Environment, Land and Planning and referred to by the Minister in a statement to the Assembly on 4 September 1997;**

**(ii) legal advice provided by the Government Solicitor in relation to the recovery of revenue foregone through the incorrect application of lease variation charges the subject of the 1997 audit report;**

**(iii) details of the extent to which the incorrect application of the law in respect to lease variations not covered by the present audit have impacted upon the Territory revenue;**

**(iv) progress in determining the issue of reimbursement in those cases similar to the Downer case discussed in the 1998 audit report where Change of Use Charges have been levied incorrectly; and**

**(v) what action is being taken to recover the undercharge of $26,250 in the Mawson case discussed in the 1998 audit report.**

Ted Quinlan MLA
Chair