Preliminary Draft
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REPORT OF THE COMMITTEE ON LAND AND PERSONAL RIGHTS

REPORT NO. 7: ARTICLE 12, RESTRICTIONS ON ALIENATION OF LAND

The Committee met on June 12, 1995; June 14, 1995; July 10, 1995; July 12, 1995; July 14, 1995; July 17, 1995; July 18, 1995; July 19, 1995; July 20, 1995; and July 21, 1995 before first reading on July 22, 1995. The Committee also had public hearings on June 16, 1995 at the House Chambers; on June 26, 1995 at the Garapan Elementary School; on June 27, 1995 at the San Vicente Elementary School; on June 30, 1995 on Rota; and on July 7, 1995 on Tinian. In addition, the Committee sent members of the legal team to consult with lawyers who work with Article 12 cases on both plaintiff and defendant sides, collected all the relevant opinions in court cases, and reviewed leases. Former Justice Jose Dela Cruz consulted with the delegates about certain aspects of the language used in drafts discussed by the delegates.

Article 12 contains 6 sections. The Committee recommends amendments with respect to 5 of the 6 sections. The Committee's amendments do not affect the fundamental purpose of Article 12. The amendments are for the purpose of strengthening Article 12 so that its purposes can be achieved with a minimum of litigation, expense, family disputes, and division in the community.

ARTICLE 12 - SECTION 1

No language has been deleted from Section 1. There is no change to the fundamental requirement that the acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

The language added to Section 1 requires disclosure by the buyer to the seller. This has no effect on the fundamental requirement that only persons of Northern Marianas descent can own land. The seller has no additional obligations of disclosure under Section 1 beyond any statutory or common law obligations that already exist or are created in the future. The disclosure requirement applies to all land sales, not just those in which persons who are not of Northern Marianas descent are or may be involved. Disclosure applies only to sales. It does not apply to leases up to 55 years. Leases within the 55 year limit are not transfers of permanent or long-term interests.

Disclosure is a statement made by a means that is effective for communication with the recipient; it may be oral or written. The Committee recommends that this requirement follow

current Commonwealth law. 2 CMC Section 4534. If the disclosure statement is provided in writing in either Chamorro or Carolinian (depending on the language used by the recipient) as well as in English, the statement is effectively communicated for purposes of this constitutional provision.

Fairness: The requirement of disclosure is limited. The buyer is not required to disclose all the facts known to the buyer about the transaction. Disclosure is required to the extent that it ensures fairness as described in this legislative history. The Committee has found in its public hearings and other fact investigations that disclosure of four facts will ensure fairness.

Agent: There is concern that when a buyer is acting for a third person, that the seller may be misled if the seller does not know that the agent is acting at the request, behest, or direction of a third person. The term "agent" as used in this context may mean the the buyer or a person acting on behalf of the buyer, such as a broker or "middleman". This rule does not require the buyer to disclose the identity of the third person for whom he or she is acting. If the owner wants that information, he or she can request it. If the buyer refuses further disclosure, the owner may decide not to sell.

For example, the statement: "The buyer is acting for another person in acquiring the land described in this document." would satisfy this requirement.

Commission, fee or profit: If the buyer has or intends to have an arrangement under which any interest in the land purchased from the owner will be the subject of a subsequent transaction in which the buyer will obtain a commission, fee, or profit, the fact of such commission, fee, or profit should be disclosed. This provision does not require the buyer to disclose the amount to be paid. If the owner wants that information, the owner can ask for it. If the buyer is unwilling to provide the requested information, then the owner may decide not to go ahead with the transaction.

For example, the statement: "The buyer will earn a commission, fee, or profit in connection with this transaction." would satisfy this requirement.

Purchase money: There has been a considerable amount of litigation in the Commonwealth about situations in which the purchase money was provided to the buyer by a third person. Many people regard this arrangement as a critical fact to the owner. Therefore, the Committee recommends that if the buyer has obtained the purchase money, or any part of it, from a third person that fact should be disclosed. This provision does not require the buyer to disclose the amount of purchase money that was obtained from a third party. If the owner wants that information, the owner can ask for it. If the buyer is unwilling to provide the requested information, then the owner may decide not to go ahead with the transaction.

For example, the statement: "The money necessary to purchase the real property that is the subject of this transaction has been obtained by the buyer from another person." would satisfy

this requirement.

Subsequent transactions: In some cases, land is purchased so that it can be leased or sold to others. In the event that the buyer has any intent of using the land for this purpose in the foreseeable future, that intent should be disclosed.

For example, the statement: "The buyer may decide, based on circumstances and considerations prevailing now or in the future, to sell or lease this property to another person. This sale or lease may occur immediately after the acquisition of the real property that is the subject of this transaction." would satisfy this requirement if the buyer wanted to turn around and sell or lease the property the same day or within a few days.

The intent of the addition to Section 1 is to require only the information from the buyer that is necessary for the seller to know in order to achieve a basic fairness. The buyer will always know more about his or her plans for the land or possible developments than the seller will know. It is the intent of Section 1 to put the seller in a position to make a reasonable judgment about the proposed sale. It is not intended to give the seller perfect knowledge or as much knowledge as the buyer has. The disclosure required is limited to these types of information that the delegates considered in voting on this change.

Timely enforcement: Section 6 permits a six year period during which transactions may be challenged. The buyer must provide the seller with the information as to when this period begins, when it ends, what rights the owner has to bring an action, and what the consequence is of not acting before the expiration of the time period.

For example, the statement: "This transaction is governed by a provision of the Constitution of the Commonwealth of the Northern Mariana Islands that provides a six-year period in which transactions such as this one may be challenged in the courts. The six year period begins to run on [INSERT DATE] and the six year period ends on [INSERT DATE]. Actions brought after the ending date will be barred." would satisfy this requirement when the correct dates are inserted.

Transactions which comply with these straightforward disclosure requirements as to basic facts about the circumstances in which the transaction is done will be safe from attack.

For example, a U.S. citizen, who is not a person of Northern Marianas descent, wishes to lease land in the Commonwealth. That U.S. citizen requests a person of Northern Marianas descent to purchase the land and then to turn around and give a 55 year lease. The U.S. citizen provides all of the money to purchase the land, and that purchase money plus a $20,000 fee is the total price for the lease. The person of Northern Marianas descent contacts the owner of the land. The owner of the land is willing to sell.

Prior to the time that the owner of the land formally agrees to sell (which means sign or

otherwise enter any enforceable agreement requiring transfer of the land), the person of Northern Marianas descent who is proposing to buy the land provides the owner with a document that includes the statements set out above:

(1) "The buyer is acting for another person in acquiring the real property described in this deed."

(2) "The buyer will earn a commission, fee, or profit in connection with this transaction."

(3) "The money necessary to purchase the real property that is the subject of this transaction has been obtained by the buyer from another person."

(4) "The buyer may decide, based on circumstances and considerations prevailing now or in the future, to sell or lease this property to another person. This sale or lease may occur immediately after the acquisition of the real property that is the subject of this transaction."

(5) "This transaction is governed by a provision of the Constitution of the Commonwealth of the Northern Mariana Islands that provides a six-year period in which transactions such as this one may be challenged in the courts. The six year period begins to run on [INSERT DATE] and the six year period ends on [INSERT DATE]. Actions brought after the ending date will be barred."

The landowner then has an opportunity to consider this disclosure and, in light of those facts, decide whether he or she still wants to sell. The disclosure requirement is intended to give the landowner adequate opportunity to consider the facts disclosed. Some landowners may not want to sell to someone who is going to turn around and lease the land. In that case, the landowner might refuse to go ahead with the deal. Some landowners may not care whether the land will be leased. In that case, the landowner would go ahead with the deal.

The document that is signed by the landowner will be used as evidence that the landowner had the necessary disclosure before the transaction was completed. That evidence can be defeated only by the traditional common law means such as a showing of fraud or undue influence. The Committee believes this will limit the litigation about these transactions.

While the lease is in effect, the land is owned by a person of Northern Marianas descent, and after the lease is over, the land will be returned to that person of Northern Marianas descent. This fulfills the requirements of Section 1.

This disclosure provision also gives the owner an opportunity to ask for more facts, if the owner thinks he or she needs more facts. For example, the owner could ask the person of Northern Marianas descent who wants to buy the land to tell the owner who will be leasing the

land and how much is being paid as a fee to the buyer. If the owner makes that request, the buyer has the option to provide the information or to refuse to provide the information and take the risk that the owner will refuse to sell. If the buyer provides the additional information, the seller is in a position to decide whether to go ahead with the transaction. The seller may decide, at his or her sole option, not to go ahead with the transaction. The purpose of Section 1 is to give the landowner that option.

Prospective effect: The disclosure requirement is new. It takes effect upon ratification of these amendments and has no retroactive application.

ARTICLE 12 -SECTION 2

Section 2 defines the term "acquisition" as used in Section 1. The changes to this section do not disturb the current jurisprudence about what is an acquisition other than to revise the exceptions. The structure of the section has been changed to make clear that there are only three exceptions. All other acquisitions of any sort are covered.

Transfer by inheritance to a child or grandchild. Transfers by testate or intestate succession to a child or grandchild is not an acquisition. If the child or grandchild does not qualify as a person of Northern Marianas descent because he or she is not 25% Northern Marianas Chamorro or Carolinian under Section 4, that child or grandchild can still acquire permanent and long-term interests in real property in the Commonwealth, so long as the transfer is by inheritance. The terms "child" and "grandchild" have the normal meaning.

A child or grandchild who inherits land and takes title under this exception can also leave this land to his or her children or grandchildren, regardless of whether they qualify as persons of Northern Marianas descent. The intent of this exception is that persons of Northern Marianas descent as of the date of this amendment may ensure that their land remains in their family regardless of whether their children and grandchildren decide to marry persons who are not of Northern Marianas descent.

Children may inherit land through either parent or both parents.

It is important to understand that children who are not qualified as persons of Northern Marianas descent cannot take title from their parents by gift or transfer while the parents are living. They can only take title after their parents die. That means that children who are 25% Northern Marianas Chamorro or Carolinian can take land by gift or sale from their parents while their parents are alive. Children who are 12 1/2% Northern Marianas Chamorro or Carolinian cannot take land by gift or sale from their parents. They can only take by inheritance after their parents die.

This exception does not cover brothers, sisters, nieces, nephews, aunts, uncles, or any relatives other than children and grandchildren. A person of Northern Marianas descent may designate by will a brother, sister, niece, nephew, aunt, uncle or other relative as the person to whom lands should go, but those persons must qualify as persons of Northern Marianas descent under Section 4 in order to own the land. A transfer to one of these relatives who is not of Northern Marianas descent would be of no effect.

Transfer by inheritance to an adopted child: An adopted child who is adopted before the age of six years is treated the same for purposes of this exception as a natural child. An adopted child who is not a person of Northern Marianas descent does not become a person of Northern Marianas descent by virtue of the adoption. However, children and grandchildren who are not

persons of Northern Marianas descent can inherit land under this exception.

As is the case with natural children, the adopted child can leave land to his or her children and grandchildren regardless of whether they are persons of Northern Marianas descent. As is the case with natural children, no other relatives are included in the exception.

Under current law, all adopted children are treated the same as natural children for purposes of inheritance. 8 CMC Section 2107(c), 8 CMC Section 1703(c). All children, natural and adopted, can inherit a fee simple interest from their parents. The proposed constitutional amendment will treat adopted children differently. Those who were adopted before age 6 will be able to inherit; those who were adopted after their 6th birthday will not be able to inherit.

Transfer by inheritance to a spouse: A spouse who is not a person of Northern Marianas descent may obtain a life interest in real property, but may not obtain fee simple title. A life interest would allow the spouse to lease the land and to use the funds from the lease for the spouse's support. However, it is important to understand that the spouse will not be able to give a 55-year lease, which probably would extend beyond the spouse's life and therefore beyond the spouse's life interest. A life estate has absolutely no commercial value as its indeterminate length prohibits any leasing whatsoever. The spouse will only be able to lease what he or she has, and that is an interest for an indeterminate number of years. If the spouse dies one year after getting the life interest, then the life interest is extinguished.

Under the current statute, 8 CMC Section 2601, spouses are permitted to obtain fee simple title to the primary home and lot. If this constitutional provision is adopted, the courts will continue to hold this statute unconstitutional and will deprive spouses who are not of Northern Marianas descent of the benefit under the statute. This may result in equal protection problems because spouses are treated differently based on Northern Marianas descent.

Under the current statute, 8 CMC Section 2903, spouses get a ½ interest in property other than the primary home and lot. The other ½ goes to the children. If a spouse takes a life estate under the constitution (instead of the ½ interest in fee simple under the current statute), then the children get a ½ interest in the land other than the primary home and lot in fee simple, and they get the remainder interest (after the life estate is over) in fee simple. In this case, no one will have an interest that can be sold or leased in the part of the land covered by the life estate. The spouse cannot lease a life estate because it has no definite term. It ends when the spouse dies and no one knows when that will be. The children cannot lease their reversionary interest (which comes into being after the spouse dies and the life estate ends) because no one knows when that will occur. It is, of course, possible for the spouse and children to get together and lease all of their collective interest for 55 years. This may lead to intra-family difficulties, however.

[Note: the proposed change in the language to "a transfer by inheritance to a spouse who is not of Northern Marianas descent as provided by law" which would make a 55-year

lease possible.]

[Alternative: It is the intent of the Committee to allow the Legislature to provide that a spouse may receive a permanent interest or may receive a life interest plus the power to grant a 55-year lease. That power would allow the spouse to provide for his or her old age and general support. Without specific authorization from the Legislature, however, this would not be possible. Under the current statute, 8 CMC Section 2601, the primary home and lot goes in fee simple to the spouse automatically.

The class of persons who are affected by this provision is relatively small. There is a concern about fairness with respect to spouses who are not of Northern Marianas descent. These people may have worked for 30 years with their spouses who are of Northern Marianas descent and invested all their work and earnings in the jointly occupied real property which is the family home. If the spouse who is of Northern Marianas descent dies, and the surviving spouse who is not of Northern Marianas descent takes nothing, after a lifetime of work and sacrifice, this is not a result that brings credit to the Commonwealth.

The 1976 Constitution allowed spouses to inherit permanent and long-term interests in real property. Transfers to spouses by inheritance were excepted. The 1985 amendments to the Constitution changed the rule so that spouses could not inherit unless there were no children qualified to inherit. The rule adopted by the 1985 amendments also works a hardship. If the spouse who is not of Northern Marianas descent does not inherit anything, then he or she can be removed from the land by one of the children who may be acting for personal reasons unrelated to anything that supports this result as a matter of public policy. The language added by the 1985 amendments was as follows: "if the owner dies without issue or with issue not eligible to own land in the Northern Mariana Islands." That language has been deleted.

The Convention recognizes that there may be abuses. A spouse who is not of Northern Marianas descent may marry just to gain access to valuable land and may have been married only a short time before the spouse who is of Northern Marianas descent dies. A spouse who is not of Northern Marianas descent may not get along with children and grandchildren because of past unfairness to those children and grandchildren.

In order to achieve the best result under circumstances of these conflicting possibilities, the Convention has provided that the surviving spouse who is not of Northern Marianas descent can take whatever the Legislature, in its wisdom, permits. That might be a permanent interest; it might be a life estate, that is, the use of the property for life, but not title; and it might be nothing at all. This provision would allow the Legislature the flexibility to curb specific abuses. That kind of detail is beyond the capability of a constitutional provision. The Legislature can provide that ultimate ownership of the land must stay with a person of Northern Marianas descent or a child or grandchild of a person

of Northern Marianas descent or their heirs. The surviving spouse would thus have the choice of living on the land in the family home until he or she died; or the choice of leasing the land for up to 55 years and using the money from the lease for support and to ensure a comfortable old age. The surviving spouse could leave the money obtained in connection with the lease to any person. Inheritance or use of those proceeds is not restricted.]

Transfer by foreclosure on a mortgage: The provisions for transfer by foreclosure on a mortgage were in the 1976 Constitution and were amended by the 1985 amendments. The only change from these 1985 amendments is to substitute the phrase "for more than 10 years after foreclosure" for the phrase "for more than 10 years beyond the term of the mortgage." Foreclosure is an event that has a date certain. The period of 10 years beyond that date certain is easy to measure. It is likely that the event of foreclosure was the marker date for measuring the 10 year period under the 1985 amendments, but this is not entirely clear and, for that reason, the substitute language should be better.

None of these exceptions, which permit permanent and long-term interests in real property to be owned by persons who are not qualified under Section 4, are contrary to the requirements of the Covenant. Section 805 of the Covenant permits the Commonwealth Constitution to define the term "acquisition" and these exceptions are a reasonable exercise of that power.

Prospective effect: The exceptions provided in Section 2 have prospective effect only. They do not affect pending litigation or inheritance from persons deceased before the effective date of these amendments.

ARTICLE 12 -- SECTION 3

This section defines the term "permanent and long-term interests in real property" used in Section 1. This section deals with two general kinds of interests -- freehold interests and leasehold interests. These are common law terms.

Freehold interest: One matter raised with the delegates was the problem perceived by some to arise if one person acts for another. If one person obtains title to property at the request of another, some have asserted that the person making the request is the real owner. If, setting Article 12 aside, a person who is not of Northern Marianas descent has an enforceable legal right to compel a person of Northern Marianas descent to transfer a freehold interest in real property, then the person who is not of Northern Marianas descent is the owner of the property. An unrecorded deed, a power of attorney, a power of appointment, a power of substitution or succession (allowing a qualified person to take title in place of the lessee), a lien in favor of the lessee that may be foreclosed to force a sale of the landowner's interest, a joint venture or other side agreement may give this power. In these cases, transfers violate Article 12. If, setting Article 12 aside, a person who is not of Northern Marianas descent cannot compel directly or use enforceable obligations to compel indirectly a person who is of Northern Marianas descent to dispose of real property in a certain way, then the person of Northern Marianas descent who acts at the request of a person who is not of Northern Marianas descent is still the owner and the person who is not of Northern Marianas descent does not become the owner. This is the result under current law.

For example, if a U.S. citizen, who is not a person of Northern Marianas descent, requests a Chamorro, who is a person of Northern Marianas descent, to buy land and grant a lease, and the Chamorro buys the land, the Chamorro is the owner. If the U.S. citizen asks the Chamorro to transfer the land to someone else, but cannot compel the Chamorro to do so, then the Chamorro is still the owner. If the U.S. citizen provides a loan to the Chamorro, and asks the Chamorro to transfer the land to someone else providing that if the Chamorro does not do what is asked then the loan will become due, then the U.S. citizen is the owner because the U.S. citizen has a legally enforceable means of forcing the Chamorro to transfer the land.

If, however, the person of Northern Marianas descent acts on a consensual basis and the person who is not of Northern Marianas descent has no means of compulsion whatsoever to get the person of Northern Marianas to act or not act, then the person of Northern Marianas descent is the real owner and the person who is not of Northern Marianas descent is not the owner, no matter how the person of Northern Marianas descent decides to act.

Leasehold interests: The only change with respect to Section 3 as it applies to leasehold interests is to add the term "and related obligations" to add to the definition of the 55 year lease term.

The 1976 Constitution provided for a 40 year lease term including renewal rights. The 1985 amendments provided for a 55 year lease term including renewal rights. The phrase "and related obligations" has been added to cover any contractual or other obligations that might be used to require or pressure the landowner to extend the lease. The intent is to cover any and every kind of obligation.

From 1978 through 1985 there were a number of clauses used in lease agreements that had the practical effect of extending the term of the lease. These included buy-back clauses requiring the landowner to buy the improvements on the property made during the term of the lease; change of law provisions requiring the landowner automatically to surrender title if the law changed to permit persons who are not of Northern Marianas descent to own land in the Commonwealth; and other similar measures. These are all efforts to extend the lease and therefore fall within the term "renewal rights." They are rights that the lessee has that are intended to force or persuade the landowner to go beyond the 55 year term of the lease. They are all violations of Section 3 as it stands, without amendment. And to the extent these types of lease clauses are not violations of the "renewal rights" provision, they certainly are violations of the "related obligations" standard.

The Committee recommends that the litigation about past lease clauses of this sort be ended by a general provision in the Schedule on Transitional Matters that allows all lease clauses up through the date of ratification to be severed and to be of no further force and effect, without any court action. This rule, allowing severability in past leases, would apply to all leases, regardless of when executed, and the result is that the provision is automatically severed from the lease. The language would be self-executing. These matters will not be brought into court cases. This could be thought to be an impairment of contract. It is not. These lease clauses never were effective because they violated Article 12 when they were written. For that reason, nothing is being taken away from lessees except the dubious pleasure of being sued. This result would not impact any rights of the landowner, because that person or his heirs will get the land back after the 55 year term without any of the possible problems and claims attendant to these clauses.

The Committee's recommendation is based on current law. The court held in Diamond Hotel v. Matsunaga [INSERT CITE] that these provisions are severable if they are not essential to the lease. The Committee's recommendation is also consistent with a change from a "void ab initio" standard to a "voidable" standard in Section 6.

The principal question addressed by the "related obligations" language is the extent to which agreements outside the lease itself can be used to get beyond the 55 year term. The intent is to reach all unrecorded deeds, powers of attorney, agreements, contracts, or arrangements that could be or are used to get beyond the 55 year term. The constitutional rule is very simple. A lease agreement may have a term of up to 55 years. The landowner may not grant more than that, and the lessee may not take more than that. After 55 years, the land must be returned to an owner who is a person of Northern Marianas descent or a child or grandchild of a person of Northern Marianas descent or their direct lineal descendents. Those persons, after the 55 years

are up, must have an unfettered opportunity to decide what they want to do with the land. They must not be obligated in any way, by the lease agreement or by any other contract or enforceable form of agreement, to make a particular decision about keeping or disposing of their interests in the land.

For example, a landowner and a U.S. corporation that does not qualify as a person of Northern Marianas descent enter a lease for 55 years. The lease agreement requires that the landowner buy back all improvements at fair market value at the end of the lease and requires the landowner to mortgage the fee interest for the lessee to obtain construction financing. A contract, entered at the same time, requires the landowner to leave the land by will to a second son under condition that the second son maintain all improvements on the property. Another contract, entered at the same time, is an agreement to employ the second son for life at a certain monthly salary. The landowner dies 2 years after the lease is signed and there has been nothing done with the land as yet because the corporation acquired the land for speculation. The first son claims that the transaction violates Article 12.

This transaction violates Article 12 in several respects. First, the lease clause that requires a buy back of improvements is a violation because it falls under the "renewal rights" clause and is an attempt to get beyond the 55 years. If the landowner has to buy back the improvements and does not have the means to do so, then it is likely the landowner will grant another lease. Otherwise, the lessee could sue to get the value of the improvements and, if successful, attach the landowner's property and force another lease for a time period commensurate with the value of the improvements.

Second, the lease clause that requires the landowner to mortgage the fee interest to finance construction costs is a violation because it involves a permanent interest. If the mortgage is foreclosed, the mortgagee can take title and hold it for 10 years after the foreclosure. This also involves renewal rights. A bank that held the mortgage would have an opportunity to foreclose, hold title, lease the property for another 55 year term while holding title, and then dispose of title to a person of Northern Marianas descent subject to the lease. Under some circumstances, the most likely recipient of the second lease would be the corporation that held the first lease, albeit after reorganization due to the financial difficulties that caused the foreclosure in the first place.

Third, the side agreement about the will is a violation of the "related obligations" clause. The purpose of the limit on the lease term is to ensure that after the 55 years is over, the land goes back to a person of Northern Marianas descent under circumstances that give the landowner an unfettered, unrestricted, and unobstructed opportunity to use the land or dispose of the land as the landowner sees fit. Requiring the landowner to dispose of the property by will in a certain way imposes restrictions on the use of the land after the 55 years are up, and these restrictions are in contract that is "related" to the lease. The limit on the lease term is important. The Covenant restricts the acquisition of permanent and long-term interests in real property to persons of Northern Marianas descent. If the application of the "long-term interests" under Commonwealth law is not consistent with the intent of the Covenant, then they must fall. A term of 55 years

cannot be extended in any way without going over the boundary into "permanent and long-term interests in real property" as provided in the Covenant.

Lease clauses that are completed within the 55 year maximum term and do not affect the landowner's decisions upon return of the land do not violate Section 3. For example, provisions that assign to the lessee any compensation for improvements or the value of the remaining leasehold taken by eminent domain do not violate Section 3. Provisions that permit insurance proceeds to be paid to the lessee in the event of damage to the improvements by fire or natural disasters do not violate Section 3. Provisions that require a subsequent lease for the remainder of the 55 year term in the event that the lessor breaches the lease agreement do not violate Section 3 because this provision will be accomplished within the 55 year term and will not extend it.

A lessee who is not of Northern Marianas descent can have no claim upon the reversionary interest of the landowner. The purpose of Article 12 is to allow the landowner and his or her heirs to obtain complete control of the land after the 55 year maximum lease term is over and to be able to make a fresh decision about what to do with the land at that time.

Successive leases may be an evasion of the 55-year limit and as such may violate Section 3. If the lessee regularly enters successive leases with the landowner, for example every year or every five years, each of which is 55 years long, then the true nature of the transaction is a not a 55 year lease. It is a longer lease and violates Section 3. If the lessee enters a new lease with the landowner after 45 years have elapsed and for the purpose of building a new office building on the property which needs to be amortized over a period of more than the 10 years remaining on the lease, then the new lease is not in violation of Section 3 because it is not for the purpose of evading the 55-year limit. The Committee intends that the courts would scrutinize successive leases to determine whether there is a necessary business purpose or other circumstances to support a conclusion that it is not evasion of Article 12.

The control of the maximum term of a lease of land in the Commonwealth is very important. The Covenant requires protection with respect to permanent and long-term interests in land. If the 55-year term is not strictly enforced, longer terms would get into the protected area of "long-term interests" and Article 12 itself would not be consistent with the Covenant.

Condominiums: The 1985 amendments added the following language to Section 3: "except an interest acquired above the first floor of a condominium building. Any interests acquired above the first floor of a condominium building is restricted to private lands. Any land transaction in violation of this provision shall be void. This amendment does not apply to existing leasehold agreements." This language has been deleted.

It is unclear why the delegates to the 1985 Convention thought that an interest above the first floor would be useful if the owner of the land and the ground floor decided to deny access or whether they had in mind permanent transfers of easements that would protect the owners above the first floor. This amendment apparently was urged on behalf of those who wanted to develop

condominiums and thought that they would be more marketable to persons who are not of Northern Marianas descent if this provision were included in the Constitution. The Committee recommends that this language be deleted. Condominium units can be marketed and sold under Article 12 without this exception, and the exception is probably not workable.

This deletion would not affect rights obtained in condominium units above the first floor after the effective date of the 1985 amendments and prior to the effective date of these amendments, if those rights exist or have any value under Commonwealth law.

ARTICLE 12 -- SECTION 4

The 1976 Constitution provided that an adopted child, if adopted under the age of 18, could become a person of Northern Marianas descent. That language has been deleted.

Adopted children are provided inheritance rights under Section 2 if they are adopted under the age of 6. Those rights are explained under Section 2 above.

The deletion of the language with respect to adopted children in Section 4 means that they are not eligible for homesteads and they do not acquire any rights accorded under the Constitution to persons of Northern Marianas descent.

ARTICLE 12 -- SECTION 5

Section 5 permits corporations to qualify as persons of Northern Marianas descent so that they are able to hold title to permanent and long-term interests in real property.

Corporate location: Under the 1976 Constitution, in order to qualify, a corporation had to be incorporated in the Commonwealth and have its principal place of business in the Commonwealth. This subjects the corporation to the Commonwealth's laws and regulations. This requirement was not changed in the 1985 amendments, and is not changed by the proposed 1995 amendments.

Corporate ownership: Corporate ownership is accomplished through the ownership of shares. Shares may be voting or nonvoting. Voting shares govern the corporation. The owners of voting shares are entitled to cast one vote for every share when questions are put to the shareholders. Nonvoting shares often have equity interests. For example, if the corporation earns money, dividends may be paid to nonvoting shares. If the corporation sells assets, like its equipment or patents or trademarks, and the proceeds of the sale are distributed to shareholders, the nonvoting shareholders may receive shares in these proceeds. The way that these voting and nonvoting shares are structured is set out in the incorporation papers. The incorporation papers must be filed in the Commonwealth and therefore the information about voting and nonvoting shares is available within the Commonwealth.

Percentage of shares: The 1976 Constitution required the owners of 51% of the voting shares to be persons of Northern Marianas descent. The 1985 amendments changed this to 100%. The Committee recommends that this be returned to 51%.

The issuance of voting shares is one of the important ways that corporations raise capital to expand their facilities or their business. It is not the only way to raise money. An alternative to "equity" interests, which are the ownership of voting or nonvoting shares, is "debt" financing which usually means borrowing from a bank or from private sources.

The 100% requirement enacted in 1985 works well for persons of Northern Marianas descent who have ample cash resources because they generally do not need to raise money by selling shares. The 100% requirement does not work well, however, for persons of Northern Marianas descent who have limited cash resources. When 100% of the voting shares of the corporation must be held by persons of Northern Marianas descent, then the people who can be turned to for additional investments in voting shares are other persons of Northern Marianas descent. One alternative is to offer non-voting shares, which may not be attractive to potential investors. Another alternative is to get a bank loan or some other debt financing.

The 51% requirement allows some leeway, up to 49%, for investment by persons who are not of Northern Marianas descent. This means that the persons of Northern Marianas descent who want to expand their corporation have a larger pool of potential investors. They can raise

capital by selling some shares to persons or corporations who are not of Northern Marianas descent. The Committee believes that this additional opportunity for investment will benefit individual entrepreneurs who are persons of Northern Marianas descent and will also benefit the overall economic development of the islands.

An important factor in the Committee's consideration is the ease with which well-financed foreign corporations can compete with local corporations owned by persons of Northern Marianas descent. These foreign corporations are not hampered by the 100% restriction. They take their leases from individual landowners who are persons of Northern Marianas descent. The real impact of the 100% restriction is on local owners who want to expand their corporate activities by attracting investment from persons who are not of Northern Marianas descent. In order to do that, under the current restrictions, they have to divest the corporation of any land so that the corporation does not fall under Article 12 at all.

For these reasons, the Committee recommends going back to the requirement in the 1976 Constitution of 51% ownership.

Degree of "ownership": The 1976 Constitution said that the voting shares had to be "owned" by persons of Northern Marianas descent. This was a clear statement that 51% of those who exercised votes with respect to the corporation's affairs by virtue of their ownership shares had to be persons of Northern Marianas descent. If anyone other than a person of Northern Marianas descent had any power at all to vote shares, they counted in the 49% that could be owned by persons not of Northern Marianas descent. When the "voters" who were not persons of Northern Marianas descent reached more than 49%, the corporation no longer qualified under this Section and could not own land.

The 1985 amendments said the voting shares had to be "actually owned" by persons of Northern Marianas descent. This was an effort to give more guidance to corporations as to how to comply.

The 1985 amendments provided further that "trusts or voting by proxy by persons not of Northern Marianas descent" were not permitted. Trusts are a device in which the owners of shares put their shares in a trust, which is a legal entity, and empower the trust to vote the shares. Then the directors of the trust, who may or may not be persons of Northern Marianas descent, vote the shares. Proxies are an agreement under which a who owns the shares allows another person to vote in his or her place. This use of trusts and proxies was permitted under the 1976 Constitution, if persons who are not Northern Marianas descent vote through the trust device or the proxy device, only up to the level of 49% of the votes. The delegates to the 1985 convention, however, thought that it would be useful to provide a flat rule on trusts and proxies. Again, their purpose was to give guidance to corporations as to how to act.

The 1985 amendments also provided that "beneficial title shall not be severed from legal title." This amendment was addressed to a variety of arrangements under which those who

owned the voting shares were under obligations to others to vote them in a particular way. This use of contract or other arrangements to impair or limit the owner's right to vote shares was also covered by the 1976 all-encompassing requirement that 51% of the shares be "owned" by persons of Northern Marianas descent. Such obligations could be used only up to the limit of 49% that was permitted to persons who were not of Northern Marianas descent under the 1976 formulation..

The amendment proposed to this section deletes the language added by the 1985 amendments and substitutes new language. The new language requires that 51% of the shares be actually, completely, and directly owned and voted by persons of Northern Marianas descent. This is a "control" test. It applies only to 51% of the voting shares. As to the remaining 49% of the voting shares, many other ownership arrangements are permitted. Trust arrangements and proxy votes are not permitted within the 51%, although they are permitted within the 49% ownership.

The intent of this amendment is that actual, complete, and direct control of 51% of the shares be with persons of Northern Marianas descent. Control of the shares is different from control of the outcome. On any question put to the shareholders, some of those in the 51% Northern Marianas descent group may vote with or against those in the 49% group not subject to the Northern Marianas descent requirement. The decision of the shareholders is valid either way.

For example, the question put to the shareholders may be whether to approve a lease of part of the corporation's land. If the corporation has 100 shares, then the ownership of 51 shares must be held by persons of Northern Marianas descent. And the ownership of 49 shares may be held by others. There are five persons who hold the 51 shares, four of whom own 10 shares each and 1 of whom owns 11 shares; and there are seven persons who own the 49 shares, each of whom owns 7 shares. When the question of the lease approval is voted on, all the shareholders attend the meeting, two of the five persons of Northern Marianas descent, holding 10 shares each, vote for the lease; and all seven of the others, holding seven shares each, vote for the lease. So the proponents win, because 69 shares out of 100 shares voted for the lease. But only two of the five persons of Northern Marianas descent voted for the lease, which is not a majority within that group. That approval of the lease is effective.

The intent of the 51% requirement is to put control in the hands of the persons of Northern Marianas descent if they choose to exercise it voting together.

Corporate governance: The governance of corporations may be vested in the same persons who own the shares or in different persons. The highest level of corporate governance is the voting power of the shareholders. But most corporate actions are not subjected to a shareholder vote. The next highest level of corporate governance is the directors. A corporation that owns land in the Commonwealth must be governed by a board of directors. There may be other ways to govern corporations that do not own land, but there is no option for a corporation that qualifies as Northern Marianas descent. In most corporations, the shareholders elect the

board of directors who govern under the corporate bylaws. If a corporation is to be qualified as Northern Marianas descent, then at least 51% of its directors must be individual natural persons who are of Northern Marianas descent. The other 49% of its directors may be other persons who do not qualify as persons of Northern Marianas descent. Each director may have only one vote because the intent of Section 5 is that 51% of the directors and 51% of the voting power be with persons of Northern Marianas descent.

The 1976 Constitutional Convention selected the 51% requirement to allow leeway for locally-owned corporations to have persons who are not of Northern Marianas descent as directors in order to get special expertise or special knowledge that is important to the success of the corporation.

For example, if a corporation is formed to develop a mining operation and the corporation is to own the land where the mining operation is conducted, then the corporation must qualify as Northern Marianas descent. In order to make informed decisions about investments in mining equipment and hiring a knowledgeable president and operating officers, the board of directors needs to know a lot about the mining business. But because this mining opportunity is new, there is no one of Northern Marianas descent who has the necessary knowledge. The leeway allowed by the 51% limitation would permit the owners to put on the board of this company a mining expert from Utah who has excellent credentials and who is also serving on the board of directors of Anaconda Inc., one of the world's largest mining corporations. This mining expert would have one vote as a director. So long as there are three or more directors, there is compliance with Section 5 of Article 12. Although the mining expert is not a person of Northern Marianas descent, at least 51% of the director positions and at least 51% of the votes on matters within the powers of the directors are in the hands of persons of Northern Marianas descent.

The intent of this amendment is that actual, complete, and direct control of 51% of the votes on the board of directors be with persons of Northern Marianas descent. Control of the votes on the board of directors is different from control of the outcome. On any question put to the shareholders, some of those in the 51% Northern Marianas descent group may vote with or against those in the 49% group not subject to the Northern Marianas descent requirement. The decision of the board of directors is valid either way.

In the example given above, the question before the board of directors may be whether to lease part of the corporation's land to another corporation that is not of Northern Marianas descent as a part of the development of the mining operation. If there are nine members of the Board, at least five must be persons of Northern Marianas descent and four may be persons who are not of Northern Marianas descent. Commonwealth law requires adequate notice of meetings. The corporation's bylaws provide that a majority is a sufficient quorum. At the meeting to consider the question of the lease, 1 of the 5 directors of Northern Marianas descent vote attends and votes no and all 4 of the other directors attend and vote yes. Five directors are present, which constitutes a quorum, and four of the five voted yes, which constitutes a majority of the quorum. The lease is approved. That operation of the board is consistent with the intent of

Section 5. A corporation operates under Commonwealth law as a participatory democracy. If those who hold voting power fail to use it, then their votes do not count. Any abuses that result from the operation of Commonwealth law as it applies to corporations can be corrected by the Legislature.

The intent of the 51% requirement is to put control in the hands of the persons of Northern Marianas descent if they choose to exercise it voting together.

Corporate officers: The requirements of Northern Marianas descent apply to directors not to officers. The normal functions of officers and directors under corporate law are not affected by Article 12.

Age limits: The directors who are of Northern Marianas descent must be at least 21 years of age. This is to ensure that no minors serve as directors. The owners of shares, however, may be minors. The person who acts for a minor must himself or herself be a person of Northern Marianas descent unless the minor's voting power is to be considered a part of the 49% that may be held by others.

Conditions imposed by lenders: Lenders who are financial institutions may impose conditions on a corporation in order to lend the corporation money. Those conditions, if made as a part of normal lending procedures, should not be construed to take complete control out of the hands of the persons of Northern Marianas descent so as to have the effect of disqualifying the corporation. Normal lending procedures are not affected by Article 12. Article 12 specifically allows transfers in foreclosure of mortgages and that exception has been maintained since 1976.

Paper records: The Committee has heard a great deal of testimony and received comments about the paper records of corporation transactions and relying on the paper record rather than allowing a court to look behind the paper record and determine what are the facts. If the corporation abides by Article 12, then the fact record and the paper record should be the same and the corporation will have no problem. If the fact record and the paper record are different, then the corporation should not be permitted to rely on a correct paper record. The purpose of Article 12 is not to create perfect paper records; it is to keep the ownership of land with persons of Northern Marianas descent. It is evident that while paper records may say that a person of Northern Marianas descent is a shareholder who owns and votes his or her shares, that may not be the case in fact. The Northern Marianas descent shareholder may be required, by legally enforceable obligations, to follow the wishes of a person who is not of Northern Marianas descent. In that case, the person who has legally enforceable control is the real owner.

The Committee recognizes that allowing plaintiffs to go behind the corporate paper record may involve additional costs for corporations. The Committee recommends, however, that the balance of interests between those who want to save money and rely on the paper record and those who want to enforce Article 12 should be made in favor of enforcement of Article 12. The amendments recommended by the Committee permit a court to examine how the corporation

actually works in order to make a fair determination. The court will control discovery and will be sensitive to costs in this regard, but will have the flexibility to allow whatever discovery is reasonably necessary to assist in the presentation of relevant facts so that the decision to be made by the court will be an informed one. This is a constitutional requirement.

For example, a corporation has three shareholders. One is a U.S. citizen who is not a person of Northern Marianas descent who owns 34 of 100 shares. Two are persons who are of Northern Marianas descent each of whom owns 33 shares. Each of the three shareholders pays $1 for each share they own. The corporation is formed to purchase land, develop the land, and perhaps lease a portion of the land to others. The U.S. citizen provides all of the money to purchase the land. The U.S. citizen has no control over the two shareholders who are persons of Northern Marianas descent. They may vote their shares in any way that they want. The two persons of Northern Marianas descent respect the wishes of the U.S. citizen, and generally vote to do what she wants because she has put up all the money. The corporation buys land and develops it. This transaction is permitted under Article 12.

If, however, the U.S. citizen has side agreements, powers of attorney, or other legally enforceable (Article 12 aside) mechanisms to force the two persons of Northern Marianas descent to vote the way the U.S. citizen wants, then the U.S. citizen is the owner of those shares and the transaction violates Article 12 because more than 49% of the shares are held by a person who is not of Northern Marianas descent.

Northern Marianas descent qualifications: The Committee has considered a number of proposed changes to the definition of "Northern Marianas descent" which were supported by those who are concerned about persons born here, raised as Chamorros, and who honestly believed they were persons of Northern Marianas descent but, because one or both of their parents were moved by the Japanese from Saipan and did not make it back to the Northern Marianas by 1950, are not within the constitutional definition.

For example, if some of those persons serve on the boards of corporations or own shares and, when the true facts of the date on which their parents returned to the Marianas come to light, they are disqualified from being a part of the 51% (formerly 100%) that is required to be of Northern Marianas descent. If an honest mistake has been made about qualification, the acts of the corporation that were done while this person was a shareholder or director are voidable by the corporation itself and can be rescinded and done over again when a person who does qualify replaces the person who does not qualify. Such actions, if subsequently repeated or ratified by a group of shareholders or board of directors that does qualify under Section 5, would not be vulnerable to challenge in the courts.

Subsequent changes in ownership: Some delegates are concerned about a situation in which a corporation is set up, with 51% of the owners and directors who are persons of Northern Marianas descent, so that the corporation can own land. Then, after the land is acquired and subsequently leased out for 55 years, the 49% shareholders who are not of Northern

Marianas descent somehow get rid of the Northern Marianas descent persons and take over the corporation. In that event, when the corporation is in the hands of persons who are not of Northern Marianas descent, the corporation ceases to be qualified by deliberate effort and the corporation's interests in the land would be forfeited to the Commonwealth.

Sham corporations: The Committee expects that the courts will be vigilant in dealing with corporations to ensure that the corporate form is not hiding transactions that otherwise would violate Article 12. If the directors and shareholders are not persons of Northern Marianas descent and there is no honest mistake involved, then the Committee expects that the courts will use the strictest standard and make the actions of the corporation void ab initio. The corporate lands would be returned to the Commonwealth government. The directors and shareholders of Northern Marianas descent must be able to exercise independent judgment in acting or voting, and must have done so. If persons who are not of Northern Marianas descent are using a corporation in order to accomplish land transactions and the actions of directors and shareholders have been predetermined or controlled in a legally enforceable way for this purpose, then the corporate form will not shield the transaction from enforcement under Section 6. The Committee expects that the courts will return the lands of such a corporation to the government.

Prospective effect: The Committee's recommendation as to the language on corporations would be given effect prospectively, not retroactively. Corporations and corporate transactions in the period from the effective date of the 1976 Constitution through the 1985 amendments would continue to be governed by the rules in the 1976 Constitution; and corporations and corporate transactions in the period from the effective date of the 1985 amendments through the effective date of these amendments in February 1996 would be governed by the rules in the 1985 amendments. Corporations and corporate transactions in the period after these amendments are ratified would be governed by these rules.

ARTICLE 12 -- SECTION 6

This section deals with enforcement of the requirements of Section 1. The new language has three parts, each of which is explained below.

Remedy: Transactions that violate Section 1 are voidable. This means that a court that finds a violation of Section 1 has a range of remedies that may be applied. One remedy is to declare the transaction void ab initio. The voidable standard includes the prior standard of void ab initio and this would be applied by the court in cases where that remedy was appropriate. Another remedy is to declare parts of the transaction void and to uphold other parts. Restitution may be ordered in connection with any remedy. The courts may reform the transaction to make it comply with Section 1. Or the courts may elect to divest the person who violated Article 12 of the profits brought about by the violation and require payments to plaintiffs or others. The voidable standard includes all prior remedies with respect to corporations, including the return to the government of land owned by a corporation that violates Article 12. These are only examples. The courts may exercise the full range of their powers to achieve an effective and fair enforcement of Article 12. No particular remedy is required under the Constitution. The Committee intends that the courts reach fair results.

Nothing in the changes to Section 6 in any way authorize the courts to allow persons who are not of Northern Marianas descent to own land in the Commonwealth. No remedy can reach that result, as that is prohibited by the Covenant and by Section 1.

The 1976 Constitution required that if the court found a violation of Section 1, then the only remedy available was to declare the transaction void ab initio. The 1985 amendments left this single remedy in place. The void ab initio remedy provided certainty of outcome when Article 12 first came into existence. At that time, there were no Commonwealth courts. There was a High Court of the Trust Territory staffed by judges from the United States appointed by the Department of the Interior. In 1976, there were very few persons of Northern Marianas descent who were qualified as lawyers, and there were none who had been appointed as judges. The void ab initio rule provided a specified result that could not be changed by judges who were not themselves persons of Northern Marianas descent. The void ab initio rule came into effect in January 1978 with the first Constitution.

By 1985, there had been only seven years of experience with land transactions under Article 12. The void ab initio rule was then being applied by the Commonwealth Superior Court. Appeals from the Commonwealth Superior Court were being heard by the United States Circuit Court for the Ninth Circuit, sitting in California. When the void ab initio rule was applied, it typically unraveled only one layer of transactions. For example, if the landowner sold to a person who was not of Northern Marianas descent, and that transaction were determined to be void ab initio, the transaction was of no effect and the original landowner was vested with the title once again.

After 1985, however, there were an increasing number of instances in which a bona fide purchaser took title after the first transaction. This might be the second, third, or fourth layer of transactions, which is to say that the person who was not of Northern Marianas descent had sold all or part of the land acquired from the original landowner to others who did qualify as persons of Northern Marianas descent, and they in turn had sold the land to yet more people. None of the people after the initial transaction knew that the buyer in the first transaction was not a person of Northern Marianas descent. Yet when the transaction was challenged and the void ab initio rule was applied, every layer of transaction after the first one was undone and bona fide purchasers of Northern Marianas descent stood to lose their land and their investment.

After 1985, the Commonwealth Supreme Court was created, and it was given the authority to review decisions of the Commonwealth Superior Court. Every justice of the Supreme Court was a person of Northern Marianas descent. Under the Covenant, the appellate authority of the Ninth Circuit will expire in 2004, fifteen years after the creation of the Commonwealth Supreme Court. After that time, appeals from the Commonwealth Supreme Court will go only to the United States Supreme Court. That is the same arrangement as pertains to all state Supreme Courts. The United States Supreme Court is not required to hear cases coming from the Commonwealth. That court hears only the cases it selects as having considerable importance to the system of justice in the United States. Therefore, within 8 years after these constitutional amendments are ratified, the Commonwealth Supreme Court will be, in effect, the last stop for appeals on Commonwealth matters.

Under these circumstances, with judges of Northern Marianas descent making the decisions, and with challenged transactions increasingly involving innocent purchasers who are of Northern Marianas descent, the Committee recommends that a more flexible standard be adopted. The void ab initio standard is not flexible enough for current circumstances. There can be no subsequent bona fide purchasers under the void ab initio standard. Once an Article 12 violation comes into the chain of title, that and everything after that is void ab initio. The voidable standard places the responsibility for effective and fair enforcement of Article 12 with the Commonwealth courts. It allows the court to use the void ab initio standard when that is appropriate; and it allows the court to fashion other remedies when it is not.

Transfers to cure defects: Because there may be honest mistakes made about the status of Northern Marianas descent, and because the policy underlying Article 12 is to keep land in the hands of persons of Northern Marianas descent, transfers to cure defects should be allowed if the court finds they are not part of any scheme to evade the requirements of Article 12. A person whose status as Northern Marianas descent is questioned should be permitted to transfer land to a person whose status as Northern Marianas descent is not questioned, thus keeping the land in the hands of persons with the required status.

Severance: Under the voidable standard, clauses in existing leases that violate Article 12 are void and may be severed from the rest of the lease. The court is permitted to sever prior to determining whether the interest is a permanent or long-term interest. The purpose of

Article 12 is not to punish. It embodies a social policy and it is not intended to make land transactions uncertain. To the contrary, Article 12 is part of a Constitution that seeks to make the Commonwealth a secure and beneficial place in which to live and conduct business activities.

In the future, it is the intent of the Committee that the courts will apply a stringent test for severing clauses that violate Article 12. There should be no misunderstandings after the amendments made to Article 12 that any device of any kind that attempts to get beyond the 55 year term in any way is in violation of Article 12. The Committee expects that the courts will use the void ab initio standard to deal with leases in the future that contain clauses of this kind, unless unusual circumstances lead the court to conclude that the clause was included in the lease in good faith. There is no reason for any such clause to appear in any lease in the future. The term of leases is 55 years. No device may be used to pressure, influence, or predetermine the actions of a landowner when land is returned after the 55 year term is completed.

Many leases executed prior to 1995 contain severability provisions. These clauses typically provide that if any clause in the lease agreement is deemed unlawful or in violation of Article 12 or any other law that the clause shall be stricken and the lease continued as if no such clause was ever made a part of the lease agreement. Under the voidable standard, the courts may give effect to severance clauses. But, in the future, the determination should not be automatic. No severance clause should defeat a deliberate attempt to get around the requirements of Article 12. The courts may apply the full range of remedies made available under the voidable standard regardless of whether the lease at issue contains a severability clause. It is very important that lawyers have an incentive to live up to the requirements of Article 12. Lawyers are the primary enforcers of Article 12. If lawyers require the documents they draft to comply completely with Article 12, then the enforcement process will be much less expensive, time consuming, and difficult for all concerned. In order that the incentives be in the right place, lawyers must be aware that a severance clause in their lease agreement will not necessarily save the lease agreement. A severance clause written after 1995 will not be given effect, under the voidable standard, when it protects clauses that were plain violations when written. This is not intended to be applied with respect to honest mistakes or genuine questions as to the state of the law.

Effect of failure to disclose: If title to the real property involved in the transaction in which there was a failure to disclose remains in the hands of the person who failed to disclose, the court may find the transaction void ab initio or may order payment of money damages. If the title to the real property in which there was a failure to disclose is no longer in the hands of a person who failed to disclose, the remedy is payment of money by the person who failed to disclose to the person to whom disclosure should have been made. It is difficult to ascertain from title searches whether the proper disclosures have been made. The Committee does not intend uncertainty with respect to titles to flow from the adoption of a disclosure requirement.

Prospective effect: The voidable standard applies only to actions brought after the effective date of these amendments.

Forfeit of land held by corporations: In the event that a corporation is divested of land for violation of Section 1, that land is forfeited to the government. A provision for forfeiture to the government has been in the Constitution since 1976. If a corporation that is ineligible to own land actually manages to acquire a permanent or long-term interest in land, and the court divests the corporation of that land, then the land is returned to the government. The same result occurs if a corporation buys land while it is eligible to do so and then becomes ineligible because persons who are not of Northern Marianas descent push out the persons of Northern Marianas descent or persuade them to leave. Title should not go back to the original owner of the land because the purchase was legal when it was made. Therefore, since 1976, the Constitution has provided that title to the land should pass to the government. These amendments do not affect this long-standing rule that when corporations are divested of land, the land goes to the government.

If a corporation knowingly and intentionally becomes ineligible to own land by forcing out the owners and directors who are persons of Northern Marianas descent or allowing them to voluntarily resign without replacing them with other qualified persons of Northern Marianas descent who actually, completely, and directly govern the affairs of the corporation, then the government has standing to bring an action to obtain the land that the corporation owns because that land will be forfeited to the government if the corporation has intentionally acted illegally. No amount of good works in the community, payment of taxes, or contribution to the economic development of the Commonwealth would allow such a corporation to continue to hold its land.

Deletions: The proposed provision deletes the following language: "Whenever a corporation ceases to be qualified under Section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the effective date of this amendment shall be immediately forfeited without right of redemption to the government of the Commonwealth of the Northern Mariana Islands. The Registrar of Corporations shall issue regulations to ensure compliance, and the legislature may enact enforcement laws and procedures." This provision was included in the Section 6 to deal with situations created by the void ab initio standard. If that standard is changed, this language is not needed. The courts have the power to order land owned by corporations returned to the government if that is the appropriate remedy. Deletion of this language does not imply that land may no longer be forfeited or escheat to the government.

Attorney General: Section 6 requires the Attorney General to set up an office to assist landowners, to monitor land transfers, and to assist in enforcement.

Landowner assistance: The intent of this amendment is that landowners have an office where they can go to get free legal advice with respect to land transactions affected by Article 12. Many of the current problems in litigation could have been avoided if landowners had had competent legal advice before entering the transaction. The lawyers staffing this office must be Chamorro speakers. Effective advice cannot be given to Chamorro speaking landowners of Northern Marianas descent without Chamorro speaking lawyers. Landowners should be able to bring sale documents and lease documents to be analyzed and explained. Because the

Attorney General's office has no stake in land transactions between one Chamorro owner and another under Article 12, the advice will be neutral and informed. The Attorney General's office may give advice to landowners, but may not represent any private landowner in any transaction.

Monitoring land transfers: The Attorney General's office on land matters would monitor land transfers occurring in the Commonwealth, from public records and other sources, to determine whether there were legal problems that might affect the effective and efficient enforcement of the intent of Article 12. The Attorney General's office may publish such handbooks or guidelines as it believes might be helpful for those involved in land transactions.

Assisting in enforcement: The government has an interest in land transactions as it is the landowner of last resort. If there is no one to inherit or a corporation that owns land fails to qualify in a way that brings with it the result that its land is lost, then land is forfeited or escheats to the Commonwealth. The Attorney General's office would act in cases where the government has this kind of interest to protect those interests. The Attorney General may seek leave to intervene in pending actions, may appear as amicus curiae in trial or appellate matters, and may bring declaratory judgment actions as permitted under court rules or Commonwealth law. The Attorney General's office does not replace private rights of action in any way. Any landowner who has a cause of action under Article 12 may pursue that action with the lawyer of his or her choice.

Statute of limitations: This section provides a six year statute of limitations for Article 12 actions. The purpose of constitutionalizing the statute of limitations is to import common law considerations of fairness into this aspect of Article 12 enforcement.

Fraud exception: If there has been fraud in a transaction, the statute of limitations does not start to run until the fraud has been discovered or reasonably could have been discovered.

Disability exception: If a party who has a cause of action under Article 12 is disabled in a way that prevents bringing the cause of action through no fault of that party, the statute of limitations does not run during the period of disability.

The Commonwealth courts would apply existing and future common law to determine the exact limitations under Article 12.

The disclosure requirement in Section 1 provides that the six year statute of limitations must be explained to the landowner prior to the completion of a sale transaction. The landowner must be told when the statute starts to run and when the six year period will be up. With this focus from the beginning, the Committee believes that the six year period will not be a barrier to the effective enforcement of the rights of persons of Northern Marianas descent under Article 12.

At the same time, there will be a point at which land transactions become final and beyond challenge. This stability is important in the Commonwealth. The economic well being of all resident citizens is improved when investments are made that create jobs and opportunities for persons of Northern Marianas descent.

DRAFT

7/27/95

ARTICLE XII: RESTRICTIONS ON ALIENATION OF LAND

Section 1: Alienation of Land

The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent. Disclosure sufficient to ensure fairness and timely enforcement under this article shall be provided.

Section 2: Acquisition

The term acquisition used in Section 1 includes acquisition by sale, lease, gift, inheritance or other means except a transfer by inheritance to a child or grandchild or a person who was adopted before age six [sixteen], a transfer by inheritance [of a life interest] to a spouse who is not of Northern Marianas descent [as provided by law], and a transfer to a mortgagee by means of foreclosure if the mortgagee is a full service bank, federal agency or governmental entity of the Commonwealth and does not hold the permanent or long-term interest in real property for more than ten years after foreclosure.

Section 3: Permanent and Long-Term Interest in Real Property

The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights and related obligations.

Section 4: Persons of Northern Marianas Descent

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations

A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors at least fifty one percent of whom are persons of Northern Marianas descent over the age of 21 years who actually, completely, and directly govern the affairs of the corporation, and has voting shares at least fifty one percent of which are actually, completely, and directly owned and voted by persons of Northern Marianas descent.

Section 6: Enforcement

Any transaction made in violation of Section 1 shall be voidable. If a corporation is divested of land for violation of Section 1, the land shall be forfeited to the government. The attorney general shall establish an office to assist landowners, to monitor land transfers, and to assist in enforcing this article. Any action challenging a transaction shall be filed within six years of the transaction.

SECOND READING
COMMITTEE DRAFT

7/29/95

ARTICLE XII: RESTRICTIONS ON ALIENATION OF LAND

Section 1: Alienation of Land

The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 2: Acquisition

The term acquisition used in Section 1 includes acquisition by sale, lease, gift, inheritance or other means except a transfer by inheritance or gift to a child or grandchild or a person who was adopted before age six, a transfer by inheritance to a spouse who is not of Northern Marianas descent as provided by law, and a transfer to a mortgagee by means of foreclosure if the mortgagee is a full service bank, federal agency or governmental entity of the Commonwealth and does not hold the permanent or long-term interest in real property for more than ten years after foreclosure.

Section 3: Permanent and Long-Term Interest in Real Property

The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights and related obligations.

Section 4: Persons of Northern Marianas Descent

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations

A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors at least fifty one percent of whom are persons of Northern Marianas descent over the age of 21 years who actually, completely, and directly govern the affairs of the corporation, and has voting shares at least fifty one percent of which are actually, completely, and directly owned and voted by persons of Northern Marianas descent.

Section 6: Enforcement

Any transaction made in violation of Section 1 shall be voidable. If a corporation is divested of land for violation of Section 1, the land shall be forfeited to the government. The attorney general shall establish an office to assist landowners, to monitor land transfers, and to assist in enforcing this article. Any action challenging a transaction shall be filed within six years of the transaction.