

# ANTaR ACT

Attention: ACT Environment, Planning and Sustainable Development Directorate

Dear Sir/Madam

I write in response to the opportunity to comment on the Consultation Draft Planning Bill for the ACT. ANTaR ACT is the local chapter of a 30 year old voluntary national organisation which works to support the rights of First Nations Peoples.

Our guiding framework is the United Nations Declaration on the Rights of Indigenous Peoples and we work for the right of Indigenous peoples to self-determination. Across Australia planning laws intersect strongly with Indigenous peoples' rights, including land rights, native title rights and cultural heritage matters. For this reason we have examined this Bill in terms of its relationship to Indigenous peoples' knowledge, culture and traditions and particularly the treatment of cultural heritage in the Bill.

We welcome the fact that Section 7 ( 3) (a) of the Bill recognises the knowledge, culture and traditions of the traditional custodians of the land. It does not, sadly, commit to protecting and promoting that knowledge, culture and traditions, and this is a major omission from the objects of the Draft Planning Bill. We urge that the objects of the Bill be amended to include these intentions.

We also urge that the words "the Ngunnawal people" included in that section 7 (3) (a) be removed. As you would be aware there are several claims to custodianship of lands of the ACT, and our view is that at the present time it would be best for the ACT government to be open to the possibility that Ngunnawal people *as well as others* may have a claim to traditional custodianship of parts of the ACT. Currently the Minister has invited Dr Kerry Arabena to work with local peoples to try to heal some of the tensions about custodianship and treaty making for the ACT and that work is progressing, no doubt slowly. It would be best if the government of the ACT could allow that process and at least one upcoming announced native title claim to progress before it names in legislation the traditional custodians of the ACT. We agree that the Ngunnawal people have a strong claim to traditional custodianship of the ACT but as the ACT region was also a meeting place, it is possible that Ngambri and Ngarigo, to name two groups, may also have claims to custodianship over parts of the ACT. The Federal Parliament, for example recognises the Ngambri people who welcome each new Parliament. The Australian Institute of Aboriginal and Torres Strait Islander Studies, which has a great deal of expertise in these matters, does not name any group when acknowledging country in the ACT quite deliberately. By just referring to the traditional custodians rather than naming any group, the planning system can be inclusive of all the traditional custodians until any further information is revealed or determination made about traditional custodianship in this region.

We would also point out that the concept of 'traditional custodian' is not one generally used in legal matters in Australia. It is not defined in ACT or Commonwealth law or to our knowledge in other jurisdictions – where terms such as 'Traditional Owner' or 'Native Title holder' are more common,

depending on the jurisdiction and statute. How exactly is it to be defined in the ACT if it is to be used in this legislation?

Furthermore, under the ACT Human Rights Act 2004, S 27 (2), Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied them, including to maintain, control, protect and develop their cultural heritage and to have their relationships with their lands and waters and other resources with which they have a connection under traditional laws and customs recognised and valued. In line with the UN Declaration on the Rights of Indigenous Peoples which is the source of this right (reflecting Article 31 of the Declaration), the ACT government also has an obligation to consult in good faith with Indigenous peoples through their own representative institutions to obtain their free, prior and informed consent before adopting legislative or administrative measures that may affect them (UNDRIP, Article 19). This Bill deals with matters that will surely affect all those claiming traditional connection to the ACT so proper consultation with them regarding how the Bill affects their land, waters and cultural heritage and seeking their consent is required before this Bill becomes law.

Another matter of concern is the treatment of Aboriginal cultural heritage in the draft Bill. Across Australia, including in the ACT, Aboriginal cultural heritage is being destroyed at a shocking rate. The Bill's Policy Overview states that 'proposed developments that are likely to have a significant adverse impact on a protected matter' would be referred to 'the Conservator of Flora and Fauna'. This does not appear to be consistent with the ACT Human Rights Act S 27(2) above in relation to Aboriginal cultural heritage being controlled by Aboriginal people. In fact, the ACT and NSW are the only jurisdictions in Australia that do not have stand-alone Aboriginal cultural heritage legislation. NSW is undergoing a cultural heritage reform process to correct this, but there is no similar movement in the ACT. The First Nations Heritage Protection Alliance, a national alliance formed following the tragic destruction of Juukan Gorge in 2020, argues that cultural heritage laws should be based on the empowerment of Aboriginal and Torres Strait Islander people, who have a right to make decisions about their own cultural heritage (as indicated in UNDRIP). The ACT Planning Bill should be aligned with the ACT Human Rights Act s 27 (2) and the UNDRIP to ensure that Aboriginal people are responsible for decisions on matters concerning their cultural heritage in the ACT.

We would be happy to assist in any way we can to ensure that the ACT Planning Bill being developed in 2022 is of a twenty first century standard in relation to First Nations Peoples, their land and water interests, and their cultural heritage.

Yours sincerely

Janet Hunt on behalf of ANTaR ACT.