ACT BAR ASSOCIATION

7 December 2022

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Environment, Planning and Sustainable Development Directorate
ACT Government
GPO Box 158
Canberra ACT 2601

Dear [redacted],

ACT Planning Law Review 2022 – ACT Bar Submission

Thank you for the opportunity to make a submission in respect of the Planning Bill presently before the Assembly.

Please find **attached** the ACT Bar Association's submission.

Yours sincerely
[redacted]

[redacted]
President

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ACT BAR ASSOCIATION

ACT PLANNING LAW REVIEW 2022

ACT BAR ASSOCIATION SUBMISSION

1. The ACT Bar Association welcomes the opportunity to make a submission in respect of the Planning Bill presently before the Assembly.
2. This document seeks to highlight certain key issues, in the hope of providing insight and, where appropriate, fostering dialogue.

Moving from a quantitative to a qualitative assessment process

3. The current planning process is based on a number of quantitative assessment measures which, if satisfied, allows a planning application to proceed in a streamlined fashion. It is apparent that a goal of the planning reforms is the introduction of a review process that is qualitatively based and therefore more flexible.
4. A concern of the Bar is that the move to a qualitative process, if combined with a continuation of the current appeals/review process, will lead to a much higher appeal rate, especially by third parties.
5. This may also increase uncertainty in planning outcomes, as reasonable minds may differ significantly on the application of qualitative standards. In other words, a development which is considered approvable by ACTPLA may be overturned on appeal simply because a different view is taken by the members of the Tribunal applying the same criteria.
6. The Bar submits that these implications call for consideration of the extent to which qualitative measures should be used to assess development applications. In the alternative, the Bar submits that the scope and extent of ACAT review should be confined to avoid excessive third-party reviews and increase the predictability of planning outcomes.

Standing to seek review in ACT of planning decisions in the merit track

7. As noted by the Tribunal in cases such as *Village No 22 Pty Ltd v ACTPLA & Anor* [2021] ACAT 43, the provisions in the current *Planning and Development Act* purporting to limit the scope of review of planning decisions in the merit track – specifically section 121(2) and associated provisions in Schedule 1 – are confusingly worded, have led to extensive litigation, and do not appear to achieve their intended outcome.
8. The Bar Association submits that the opportunity to clarify these provisions and avoid further unnecessary and expensive litigation should be taken as part of the planning review process.

Approval of entities

9. Under the current version of the planning legislation, depending on the applicable assessment track, ACTPLA has a statutory obligation to consult with a number of other government entities in respect of development applications. Those bodies have a specified period in which to respond, failing which they are deemed to support the relevant development application.
10. An approved DA may then be subject to a range of conditions, including conditions requiring approval from one or more of those bodies.
11. Whilst the rejection of a development application is appellable, as is the imposition of conditions in respect of an approved application, the current review process does not afford an appeal from a decision of another body to reject an application, in circumstances where acceptance by that body is imposed by ACTPLA as a condition of an approved application.
12. As part of the consideration of appeal rights implemented under the new legislation, the Bar Association submits that applicants should have a right to review decisions made by entities other than ACTPLA pursuant to a condition imposed by ACTPLA as part of a development approval.

Lease variation charges

13. The Bar considers that the appeal provisions in respect of such charges are unduly complex and difficult to act upon. The complexity of these provisions and the degree to which they differ from other revenue legislation is apparent from the decision of

Kennett J in *Zapari Property Coombes Pty Ltd v Commissioner for ACT Revenue* [2022] ACTSC 189, particularly the discussion at paragraphs 68 and following.

14. There is a need for careful review of these provisions, as their complexity makes them difficult to apply and can yield unpredictable outcomes for both landowners and the revenue. Bringing these provisions into line with the general tax administration scheme set out in the *Tax Administration Act 1999* would significantly improve their operability. The Bar Association submits that careful consideration should be given to this and other potential measures to address the difficulties presented by the current LVC scheme.

Jurisdiction for administration of planning laws

15. The Bar proposes the creation of a single jurisdiction for the administration of the new planning scheme in the ACT.
16. At present the administration of the scheme rests heavily upon ACAT, but that body is not empowered to enforce compliance with its own orders. A party seeking to enforce compliance is required to issue an originating process in the Supreme Court. Other aspects of the planning management process including prosecutions are administered through the Magistrates Court.
17. It is submitted that a single body should be empowered to deal with all aspects of the administration of the Territory planning laws including merits review, enforcement orders and prosecutions. That body need not take the form of an additional or specialist Court such as the NSW Land and Environment Court but may be a division of an existing one. In this respect the Bar Association notes the specific expertise of certain judges presently sitting on the ACT Supreme Court, namely Mossop and Kennett JJ and McWilliam AJ, and submits that their expertise would be well suited to review of planning decisions.
18. The introduction of such a body has the potential to significantly streamline the administration of the planning scheme, to build specialist expertise in the jurisdiction and to improve stakeholder confidence in the ACT planning process.

Recognition of Traditional Owners

19. The present draft of the legislation proposes to recognise only the Ngunnawal people as the traditional owners of the ACT.
20. The Bar is aware of litigation commenced by Ngambri traditional owners[1] challenging the ACT Government's policy of recognising only the Ngunnawal as the traditional owners of the land now known as the ACT, and that there is evidence which suggests that other tribe or tribes also have a connection to this land.[2]
21. Implementing legislation recognising only the Ngunnawal people in the face of this challenge is, in the Bar's submission, premature, given that the Court may determine that there are other tribe(s) which have a traditional connection to the ACT and ought be recognised alongside the Ngunnawal. The Bar submits that the appropriate course is for any reference to a specific group to be removed pending the determination of that litigation.

Conclusion

22. The Bar welcomes any questions which may arise in relation to the above and is available to provide clarification of any of the points raised.

Dated 7 December 2022

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President, ACT Bar Association

[1] *House v Chief Minister of the ACT.*
[2] See, for example, Ann Jackson-Nakano's book *The Kamberri*.