

The Australian Capital Territory Bar Association

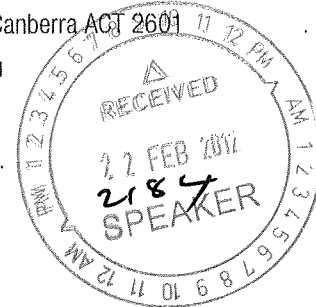
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21 February 2012

Mr S Rattenbury
Chairman
Standing Committee on Administration and Procedure
ACT Legislative Assembly
London Circuit
CANBERRA 2601

Dear Mr Chairman

Review of the *Australian Capital Territory (Self-Government) Act 1988*

The ACT Bar Association is aware of the review by the Standing Committee on Administration and Procedure into the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (the Self-Government Act) and associated regulations. The Association intends to make a submission to this inquiry in due course.

One might, with some confidence, assume that the review which the Committee is conducting will not simply be a review as to the legal form of the Act in question but will go to broader issues of what is appropriate in a fully fledged self-governing jurisdiction. If that is the case, I respectfully request that the Committee give some consideration as to whether it should widen its terms of reference to include the *Australian Capital Territory (Planning and Land Management Act) 1988* (PALM Act).

Although a separate Act, the PALM Act can be viewed just as “constitutional” in its effect as the Self-Government Act. Each constrains the legislative competence of the Australian Capital Territory Legislative Assembly albeit in different ways. The PALM Act does so in the important area of land.

The Committee may wish to consider whether some of the matters that I list below are consistent with what I have described as a “fully fledged” self governing jurisdiction. I am of course not debating the underlying policy merits of the issues. I merely raise whether some of all of these matters should continue to be regulated by the Commonwealth in the manner they now are.

National Capital Authority and the National Capital Plan

The National Capital Authority is most frequently associated with works which are of a truly national character. This is consistent with the object of the National Capital Plan set out in

section 9 of the PALM Act. However, the National Capital Plan and the reach of the National Capital Authority are much greater than this.

The National Capital Plan affects matters the length and breadth of the Territory. To give one small example, some years ago there was a prolonged dispute between the Australian Capital Territory and the National Capital Authority in respect to the reconstruction of the Uriarra Village following the 2003 bushfires. The National Capital Authority wished to constrain the number of houses at the village to the number which had previously existed. The ACT wished to expand the number of houses to make servicing the village a more economic proposition. Irrespective of the views of the policy positions taken by either of the protagonists, it must be a real question whether matters such as this can be viewed as a legitimate National Capital interest.

The Territory Plan

Section 25 of the PALM Act imposed an obligation on the ACT Legislative Assembly to establish a Territory Planning Authority and to confer functions on it. Sub-section 25(3) further required that the Territory Plan shall define the planning principles and policies for giving effect to the objects of the plan and that it may include detailed conditions of planning and design. The laws which the Assembly was required to enact were to include procedures for making of the Territory Plan, for just and timely review and procedures for changing that plan. There has been one case taken to the ACT Supreme Court on the basis that procedures for review enacted by the ACT did not meet the requirements of the section 25 of the PALM Act.¹ There has been another in the Federal Court in which these issues were raised. For other reasons that case was not prosecuted to a conclusion.

Role of the Executive in the administration of Territory Land

Part 5 of the PALM Act divides the land in the Territory into National land and Territory land. Although all land remains owned by the Commonwealth, this division has been made to determine which government administers which land.

Section 29 commits the management of Territory land to the Executive on behalf of the Commonwealth. That provision has the capacity to constrain the powers of the ACT Legislative Assembly in respect of the responsibility for the administration of Territory land. As Higgins J said in *Blicharz v Minister for Urban Services* (2000) 155 FLR 419, 426:

57. It therefore follows that the "principles" expressed in s 29(2) of the ACT (PALM) Act apply to limit the powers of the Assembly and the Executive in relation, not only to matters relating to interests in land, but also to the planning and land management issues covered by the Land Act.

58. However, those "principles" are broadly expressed. They leave considerable scope for discretionary judgments. What is an "appropriate" class of decision or "just and timely" review thereof is a matter of policy and judgment on which minds might reasonably differ. It would, therefore, be unlikely that a decision by the Assembly or the Executive to exempt some

¹ See *Capital Property Projects (ACT) Pty Ltd and Ors v Planning and Land Authority and Ors* (2006) 206 FLR 328, par. 6 and 13-19

classes of decision from review would, in itself, offend the principles contained in s 29(2)(b) ACT (PALM) Act. It might be otherwise if the exemption was, for example, only for a particular developer or development (not relevantly distinguishable from any other) or if no meaningful notification was required for any proposal. It is possible to conceive of provisions which unquestionably would offend those principles. It does not seem to me that exemption of lease variation applications, whilst requiring notification of the physical development proposal the (sic) facilitate, offends s 29(2)(b).^[1]

Limitation on the Terms of Leases

Sub-section 29(3) of the PALM Act imposes a 99 year limit on the estates which can be granted in Territory land subject to extension by a Commonwealth subordinate instrument. As it happens Regulation 3 of the *Australian Capital Territory (Planning and Land Management) Regulations* has extended the term to 999 years for certain tertiary education and church purpose leases.

Conclusion

As stated above, it is not the purpose of this letter to debate the merits of any particular policy position which has been adopted by the Commonwealth or any which might be adopted in substitution. It is rather to direct the Committee's attention to the fact that there are other Commonwealth provisions which have both constitutional force within the ACT and which can be described as going to the Assembly's competence as a truly self-governing legislature.

I commend the issue of whether the terms of reference of the inquiry should be extended for your consideration.

Yours faithfully



Philip Walker
President

^[1] 155 FLR at p. 426