

Planning and Land Bill 2002 and Associated Legislation

Report No 9

Standing Committee on Planning and the Environment

November 2002



Committee membership

Mrs Vicki Dunne MLA Chair

Ms Katy Gallagher MLA

Ms Roslyn Dundas MLA

Secretary: Derek Abbott

Administration: Judy Moutia

Resolution of appointment

- (1) (f) a Standing Committee on Planning and Environment to examine matters related to planning and land management, conservation and heritage, transport services and planning, environment and ecological sustainability. ...
- (3) If the Assembly is not sitting when the Standing Committee on Planning and Environment has completed consideration of a report on draft plan variations referred pursuant to section 25 of the *Land (Planning and Environment) Act 1991* or draft plans of management referred pursuant to section 204 of the *Land (Planning Environment) Act 1991*, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.¹

¹ Minutes of Proceedings, No 2, Tuesday 11 December 2001

Terms of reference

That the Standing Committee on Planning and the Environment inquire into and report by 12 November 2002, on the operation of the Planning and Land Bill 2002.²

Notwithstanding the provision of standing order 174, the Planning and Land (Consequential Amendments) Bill 2002 be referred to the Standing Committee for Planning and Environment for inquiry and report by 12 November 2002.³

On 12 November 2002 the committee was given an extension of time to report until 14 November 2002

² Legislative Assembly, Minutes of Proceedings No. 28, paragraph 9, 22 August 2002

³ Legislative Assembly, Minutes of Proceedings No. 34, paragraph 12, 26 September 2002

Table of contents

Summary of Conclusions and Recommendations vii

1. Introduction

2. The Planning and Land Bill 2002 & consequential amendments 1

- the Planning & Land Authority 1
- the Planning & Land Council 3
- the Land Development Agency 3
- associated legislation 4

3. Public comment on the legislation 5

- general comment 5
- the Planning & Land Authority 6
- the Planning & Land Council 9
- the Land Development Agency 9
- Planning & Land (Consequential Amendments) Bill 2002 10
- Administrative Appeals Tribunal Amendment Act 2002 12

4. The committee's findings 14

- general 14
- ministerial call-in powers 15
- the Planning & Land Authority 15
- the Planning & Land Council 17
- the Land Development Agency 18
- the Administrative Appeals Tribunal 19
- community participation 19

Appendix 1 – Conduct of the committee's inquiry

Summary of conclusions & recommendations

The committee recommends to the Assembly that this legislation not be rushed through to meet artificial deadlines. The committee understood that the government originally wished to have its new structure in place on 1 January 2003. It has been advised that 1 July 2003 is a more realistic starting date. Para 1.10

There are a significant number of areas of uncertainty with regard to these bills. The committee believes, that on a matter of such fundamental importance to the future of the ACT, a measured approach to consideration of the legislation is vital. Therefore if the later starting date has been adopted by government then more time should be given for the Assembly and the community to consider the detail of the legislation. Para 1.10

The committee shares some of the concern that this legislation may add a further layer of complexity to an already complex and sometimes cumbersome process. (see paras 3.2-3.7) There appear to be a number of areas of overlap between existing and new legislation and also a lack of clarity with regard to the interaction of existing and new processes. Even definitions of terms used in the legislation differ from those for the same terms in other territory acts. The committee considers it vital that the minister clarifies these matters before the legislation proceeds. Para 4.1

The committee recommends that clause 75 of the Planning and Land Bill 2002 be amended to require the Minister to initiate a review of the operation and effectiveness of the Act no later than 31 December 2005. Para 4.5

The committee recommends that the primacy of the Territory Plan should remain and that new legislation should reflect this. Para 4.8

The minister should clarify the use to which the statement of planning intent can be put; the frequency with which it might be used and, generally, how it differs from a ministerial direction under clause 11 (1)(a). Para 4.9

The committee recommends that sections 11 and 13 of the Planning and Land Bill 2002 be amended to require that a direction of the minister and a statement of planning intent be tabled in the Assembly on the next sitting day after they have been given to the Authority. Para 4.10

The committee recommends that the relationship between the Authority and the Assembly be formalised by requiring the Authority to report on its activities to the appropriate Assembly committee at least once every six months. Para 4.14

The committee recommends that the government consider establishing a Planning Ministry which would:

- (a) provide the Planning minister with administrative support and advice; and**
- (b) assume some of the routine administrative functions proposed to be given to the Planning and Land Authority. Para 4.18**

The committee recommends that the bill make some reference to the general experience and qualifications expected of any appointee; for example, high level urban planning experience in one or more major cities and senior management experience. Para 4.21

The committee recommends that clause 17(2) be deleted from the bill and clause 17(1) be amended to make explicit that the power to grant leases cannot be delegated to another agency. Para 4.23

The committee therefore recommends that the government provide secure funding to the community sector to facilitate effective participation in the planning process. Para 4.24

The committee is concerned with the lack of detail available with regard to the structure and operations of the new bodies, particularly the Authority. It is also concerned that the process of transition to the new system has not been adequately considered. The committee trusts that, if the new system is not to be introduced until 1 July 2003, detail on these matters will be forthcoming. Para 4.29

The committee recommends that advice the Planning and Land Council gives to the Authority or the minister should be made public when a decision or determination is made. Para 4.31

The committee also recommends that where the appropriate Assembly committee is examining a matter that has been the subject of advice from the Council that advice should be available to the committee. Para 4.32

The committee recommends that internal guidelines and procedural manuals developed by the Authority, the Council and the Land Agency be tabled in the Legislative Assembly and be freely available to the public. Para 4.35

The committee recommends that the category ‘land development’ be extended to include ‘construction’. Para 4.37

The committee supports the proposal of the Planning Institute and therefore recommends that it be made explicit in the legislation that the Land Development Agency is bound by the same general planning principles as the Authority. Para 4.39

To ensure accountability the committee recommends that the Land Development Agency maintain separate accounts for its various activities. For example, the existing Kingston Foreshore Development Authority and the Gunghalin Development Authority’s activities should be clearly identifiable. Para 4.41

The committee recommends that directions by the Treasurer under section 47 of the Planning and Land (Consequential Amendments) Bill should be notifiable instruments. Para 4.44

The committee recommends that a review of the place of community participation in this proposed planning structure be undertaken. Para 4.52

This report should not be considered an endorsement of this package of legislation. The committee has raised a number of issues that it believes require further debate and discussion before the legislation is finalised. The restrictions in the time available to the committee, which are described in chapter 1, have inhibited its ability to conduct a thorough analysis of the proposals. Para 4.53

The committee reaffirms its view that the long term outcome of the government's reform process will be improved if more time is allowed for consideration of this legislation. The committee reserves it right to comment further on any aspect of these bills. Para 4.54

1. Introduction

1.1. This legislation gives effect to the Territory government's policy of vesting land development and planning responsibility for the ACT in agencies which are at arm's length from government.

1.2. The committee recognises the right of government to seek to implement its policies. It also takes the view that debate on the merits or otherwise of the policy to which the legislation seeks to give effect is better carried on in the full Assembly. Thus the committee has restricted its examination of the legislation to the actual terms of the bill and consequential amendments.

1.3. The committee's report draws attention to clauses of the legislation which it believes lack clarity or may otherwise compromise the objectives of the legislation. This report also summarises the views expressed in submissions and evidence to the committee at public hearings.

1.4. The committee wishes to draw the attention of the Legislative Assembly to the fact that this is an extremely complex legislative proposal involving the creation of new executive agencies and procedures and involving the integration of significant existing legislation, particularly the *Land (Planning and Environment) Act 1991*, with the new legislation.

1.5. The Committee has been hampered by a tight timeframe and by Government delays in making the complete suite of proposed legislation available. Indeed, the Administrative Appeals Tribunal Amendment Bill remains in Exposure Draft form, having not yet been tabled, and the Committee has yet to view any proposed Regulations that are to accompany the functioning of the Acts.

1.6. The Planning & Land Bill was presented to the Assembly on 27 June 2002 and referred to this committee on 22 August 2002. The Planning & Land (Consequential Amendments) Bill was presented to the Assembly and referred to the committee on 26 September 2002. The exposure draft of the Administrative Appeals Tribunal Amendment Bill and a draft outline of matters to be included in the regulations were provided to the committee on 1 October 2002.

1.7. At the committee's public hearing on 8 October 2002 it was clear that a number of witnesses had not had the opportunity to consider the supplementary legislation and other information. Thus the committee had to seek supplementary submissions on that part of the legislative scheme.

1.8. As a result, the committee's consideration of the legislation has been hurried. If the Committee had more time available, it may have been able to complete a more thorough investigation and have been better informed, as well as being able to propose more alternatives where necessary.

1.9. The effort of community, business and professional groups to respond to the committee's request for public input is greatly appreciated. However the lack of access to documents has also meant that submissions to the Committee may have been

hurriedly prepared, and there is the distinct possibility that some problems may have been overlooked.

1.10. For these reasons **the committee recommends to the Assembly that this legislation not be rushed through to meet artificial deadlines.** The committee understood that the government originally wished to have its new structure in place on 1 January 2003. It has, subsequently, been advised that 1 July 2003 is a more realistic starting date.

1.11. There are a significant number of areas of uncertainty with regard to these bills. The committee believes, that on a matter of such fundamental importance to the future of the ACT, a measured approach to consideration of the legislation is vital. Therefore, if the later starting date has been adopted by government then more time should be given for the Assembly and the community to consider the detail of the legislation.

2. The Planning and Land Bill 2002 & consequential amendments

2.1. The Legislative Assembly referred the Planning and Land Bill 2002 to this committee for investigation and report on 22 August 2002. The Planning and Land (Consequential Amendments) Bill 2002 was referred on 26 September 2002. The exposure draft of amendments to the Administrative Appeals Tribunal Act was provided on 1 October 2002.

2.2. The object of the Bill 'is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT-

(a) consistent with the social, environmental and economic aspirations of the people of the ACT; and

(b) in accordance with sound financial principles' ⁴

2.3. The Bill establishes:

- an independent Planning and Land Authority;
- a Planning and Land Council; and
- a Land Development Agency.

1.4. Other legislation makes consequential amendments to existing laws of the Territory, particularly the *Land (Planning and Environment) Act 1991* and activates the Land and Planning Division of the ACT Administrative Appeals Tribunal.

The Planning and Land Authority

2.4. The Planning and Land Authority is a body corporate that is an agent of the Territory and is constituted solely by the chief planning executive.

2.5. The chief planning executive is appointed for a term not exceeding five years, though the person may be reappointed. The minister must first consult the Planning and Land Council about the appointment. The term of the chief planning executive can be suspended only by misbehaviour or physical or mental incapacity. Were the minister to suspend the chief planning executive, the minister must table a statement of reasons for the suspension on the first sitting day after the suspension. The Assembly then has seven sitting days to resolve to require the Executive to end the appointment, or else the suspension ends.⁵

⁴ Planning and Land Bill 2002, chapter 2, cl 5

⁵ *ibid.*, cl 18-21

2.6. The staff of the Authority is employed under *Public Sector Management Act 1994*.⁶

2.7. The functions of the Planning and Land Authority are:

- to administer the Territory Plan and to propose amendments to the Plan;
- to plan, and regulate, the development of land;
- to advise on planning and land policy, including the spacial planning framework,
- to maintain, the ACT digital cadastral database and to make available land information, whether generated by the Authority or acquired from another source;
- to grant, administer, vary and terminate leases on behalf of the Executive;
- to grant licences of unleased Territory land;
- to determine development applications;
- to regulate the building industry;
- to provide planning services within or outside ACT, but only if the minister gives written approval of such services;
- to review its own decisions, and
- to provide support to the Planning and Land Council.⁷

2.8. The Authority has the power to delegate its functions to a public servant on the staff of the Authority. It may also delegate the function of granting leases to the Land Agency.⁸

2.9. In discharging its functions the Planning Authority must have regard to “sustainable development”.⁹

2.10. The Minister may give directions to the Authority. Directions must be in writing and may relate to general policies or to a requirement to revise any, or all, of the Territory Plan. Before giving a direction, the minister must tell the Authority about the proposed direction and allow the Authority to comment on the proposed direction. The minister must consider the Authority’s comments.

2.11. The minister’s direction must be presented to the Assembly within six sitting days after it is made, or else the direction is revoked ¹⁰ The Assembly may

⁶ *ibid.*, cl 22-23

⁷ *ibid.*, cl 8(1)

⁸ *ibid.*, cl 17

⁹ *ibid.*, cl 8(2). Sustainable development is defined at clause 73 of the Bill.

¹⁰ *ibid.*, cl 11

recommend that the minister issue a direction to the Authority, in which case the minister must consider the Assembly's recommendation.¹¹

2.12. The Authority is required to comply with ministerial directions and the statement of planning intent. This statement "sets out the main principles that are to govern planning and land in the ACT". The statement must also be presented to the Legislative Assembly within six days of its presentation to the Authority.¹²

The Planning and Land Council

2.13. A Planning and Land Council is to be established to give advice to the Minister and the Authority, as requested, on matters arising under the legislation. The Council consists of a chairperson and up to six other members (who cannot be staff of the Planning and Land Authority), with expertise in specific areas. Members' terms are limited to four years.¹³

2.14. The Authority must seek the Council's advice before exercising a function prescribed under regulations.¹⁴

The Land Development Agency

2.15. The Land Development Agency is a corporation that consists of the Land Agency Board which comprises a chairperson, deputy chairperson and three to five other members (which must not include the chief planning executive). The membership is expected to represent a range of relevant expertise. Like the Council, membership of the Agency board is limited to a term of four years.

2.16. The functions of the Land Development Agency are:

- to develop land;
- to carry out works for the development and enhancement of land;
- to carry out strategic or complex urban development projects.

2.17. The Land Development Agency may exercise its functions alone, through subsidiaries, joint ventures or trusts; or by holding shares in, or other securities of, corporations. However it cannot invest in a corporation without the Executive's prior written approval and the minister must tell the Assembly, within six sitting days, about the Agency's action in this regard.¹⁵

2.18. The Agency must comply with the 'urban management objectives' set out in the Territory Plan and in accordance with sound business practice.¹⁶ The Agency's income will be derived from the sale or lease of land. It is expected to operate as a

¹¹ *ibid.*, cl 12

¹² *ibid.*, cl 13

¹³ *ibid.*, chapter 3, cl 24-27

¹⁴ *ibid.*, chapter 2, cl 10

¹⁵ *ibid.*, chapter 4, cl 37-42

¹⁶ *ibid.*, cl 38

business and must have a business plan, which must be presented to the Assembly within five sitting days of being accepted by the minister.¹⁷

2.19. The Agency will be subject to ministerial supervision and direction. The Agency must comply with directions by the minister with regard to general policies and objectives, or principles applying to the exercise of the its functions. Before the minister gives a direction, the minister must tell the Agency about the proposed direction and consider the Agency's comments. The Territory must compensate the Agency for the net cost of complying with ministerial directions.¹⁸

2.20. A direction is a notifiable instrument and must be notified within 14 days after it is made, or else it is taken to have been revoked.¹⁹

2.21. The Treasurer may, in writing, direct the Agency to pay specified amounts to the Territory. The Agency cannot guarantee the payment of money, or the performance of an obligation, without the Treasurer's prior written approval.²⁰

Associated Legislation

2.22. The major bill is accompanied by the Planning and Land (Consequential Amendments) Bill, and exposure draft of legislation to amend the Administrative Appeals Tribunal (AAT) Act and an indicative list of matters to be dealt with by regulation.

2.23. The consequential amendments legislation is primarily concerned with amendments to the existing *Land (Planning and Environment) Act 1991*. Most of the amendments are routine. However a number of significant changes are discussed in the following chapters.

¹⁷ *ibid.*, cl 44-45.

¹⁸ *ibid.*, cl 51-52

¹⁹ *ibid.*, cl 51-52

²⁰ *ibid.*, cl 47, 49

3. Public Comment on the Legislation

3.1. The committee received nine submissions on the bill and three supplementary submissions dealing with the consequential amendments arising from it. A list of those who made submissions and/or participated in the committee's public hearings is in Appendix 1.

General comment

3.2. A number of submissions identified complexity and delay as major issues with the existing development process and were concerned that the new legislation would compound rather than simplify this.

3.3. The **Property Council of Australia** suggests that a new legislative framework was not the most desirable starting point for reform of planning and land development in the ACT. The Council favoured a comprehensive review of the existing Land Act as a first step²¹ rather than adding what it believes will be another layer of complexity. It also believes that there is insufficient detail on the interaction between this Bill and other planning instruments.

3.4. **The Master Builders Association (MBA)** expressed similar concerns. While supportive of a 'well-resourced and administratively simpler Planning and Appeals process within the Territory',²² the MBA is concerned that this proposal does not address those central concerns. In particular the MBA while welcoming the minister's commitment, questions whether any government is willing to put adequate resources into the planning approvals process.²³

3.5. The MBA is also concerned that the costing of the proposal is inadequate both in terms of the costs of establishing and operating the new system and, from the industry's side, the costs of compliance with the new regulatory regime.²⁴ While welcoming the expert nature of the boards of the new bodies, the MBA believes that, given their autonomy in establishing their own procedures, there is the risk of inconsistent approaches emerging between the various bodies.

3.6. Similarly, the **Law Society of the ACT** notes that the existing Territory Plan and the Land (Planning & Environment) Act aspires to '...to set out in a relatively coherent and self-contained and easily accessible way the laws for planning and development of land in the ACT.'²⁵ The Society believes that the objective should be, '... a clear, transparent and readily accessible planning framework'.²⁶

3.7. The Society is concerned that,

²¹ The Property Council of Australia, submission, 27 September 2002, p.1

²² Master Builders Association, submission, p.2

²³ *ibid.*, p.3

²⁴ *ibid.*, p.3

²⁵ The Law Society of the ACT, submission, 2 October 2002, p.1

²⁶ *ibid.*, p.1

Legislation that introduces new decision making powers in a separate Act, or heralds another layer of planning “policy”, “directions” and “statements” adds complexity to the planning regime that is likely to make it more difficult to understand and less readily available.²⁷

3.8. The **National Capital Authority (NCA)**, the agency responsible for the Commonwealth’s role in ACT planning, has noted that the legislation fails to make any mention of the Commonwealth *Australian Capital Territory (Planning and Land Management) Act 1988*. That act states that, ‘...The Territory Plan has no effect to the extent that it is inconsistent with the National Capital Plan ...’. The NCA believes that it is important that powers of direction contained in the Bill need to reflect the provisions of the Commonwealth legislation.

3.9. The NCA is also concerned at the potential for confusion between the Commonwealth’s power to,

... set out the general policies to be implemented throughout the Territory being policies of:

- (i) land use (including the range and nature of permitted land use); and
- (ii) the planning of national arterial road systems;

and the proposed functions of the Planning and Land Authority. Again the NCA believes that the Commonwealth’s powers and responsibilities should be referred to in the legislation.

3.10. The **Planning Institute Australia (PIA)** proposes that a Planning Ministry be created. The PIA does not believe that the demands made on the minister responsible for planning and land development can be met adequately or appropriately by his or her personal staff and liaison officers provided by the public service.

3.11. The PIA favours the establishment of a small planning ministry with appropriate skills and experience to support the minister. The Institute believes that a ministry would also ensure that decisions were transparent.²⁸

Planning and Land Authority

3.12. Generally speaking, the public response was supportive of the objective of making planning more independent of government through the establishment of the Planning and Land Authority.

3.13. The **Housing Industry Association (HIA)** welcomed the creation of the Authority believing that, particularly by directing the neighbourhood planning process, it will be better able, ‘... to provide this necessary leadership and give a strong planning direction for the long term benefit of all Canberrans.’²⁹

²⁷ *ibid.*, p.1

²⁸ Planning Institute of Australia, submission. P.4

²⁹ HIA, submission, p.1

3.14. **The Association of Professional Engineers, Scientists and Managers Australia (APESMA)** is concerned that clause 17(2) of the bill permits the Planning Authority to delegate its power to grant leases to the Land Agency. APESMA believes that the separation of the lease-granting power from the development agency, however described, has been an important mechanism to ensure quality control over the constructed services. APESMA recommends that clause 17(2) be deleted.³⁰

3.15. The submission from **Planning the ACT Together (PACTT)** dwells on the issue of community involvement in the work of the Planning and Land Authority. PACTT is concerned that both the Authority and the Planning and Land Council would ‘... very much bureaucratic and expert in nature’.³¹

3.16. To balance this, PACTT favours the creation of a Planning Advisory Council supported by Neighbourhood Planning Groups that are genuinely representative of the residents. PACTT also believes that community participation in the planning process can only be productive if community groups are properly resourced and therefore believes that it would be appropriate for government to provide a grant-in-aid to citizens’ groups.

3.17. PACTT also stated that, in its opinion, the

...role of the Assembly in planning may become too limited if this Bill becomes law unchanged. PACTT is of the view that the Assembly should have greater power in relation to directions to the Authority.³²

3.18. As noted above the **Property Council** favours a comprehensive review of existing legislation as a starting point for reform. With regard to the Planning and Land Authority, the Council has expressed concern about the qualifications and independence of the Chief Planning Executive. The legislation gives no guidance as to the qualifications and experience required of the Chief Planning Executive.

3.19. In contrast, the minister, in making appointments to the Planning and Land Council and the board of the Land Development Agency must have regard to the expertise of the appointees. The Council would also like to see specific reference to industry representation on the Planning and Land Council.

3.20. The Property Council also queries the extent to which the Chief Planning Executive will be genuinely independent. It notes that the minister will have extensive powers of direction with regard to the Authority and that the Authority will be limited by the Statement of Planning Intent.

3.21. The PIA, while generally supportive, believes that the Authority ‘...would not be independent in any real sense of the word. It might however achieve a position of being at arm’s length to Government Departments and the Executive ...’.³³ The PIA does note that complete independence of government is an unrealistic expectation.

³⁰ APESMA, submission, p.7

³¹ PACTT, submission, p.1

³² *ibid.*, p.1

³³ Planning Institute of Australia, submission, p.1

3.22. The PIA shares the concern of the Property Council that the bill gives no guidance as to the professional and personal qualities required of the Planning Authority. It believes that an appropriate preamble should be included to part 2 of the bill setting out those qualities. Such a preamble would also have the advantage of strengthening the hand of the Authority in any dispute with the executive.

3.23. The legislation states that the staff of the Authority will be employed under the *Public Sector Management Act 1994*. The PIA is concerned with this on two grounds;

- that this would compromise the independence of the authority particularly if staff levels are subject to government funding controls; and
- that it would inhibit the Authority from developing the flexibility and range of skills and experience necessary to respond to changing demands in the planning environment.

This concern is shared by the Property Council.

3.24. With regard to the Planning and Land Authority the **Law Society of the ACT** identifies two areas of potential confusion between the new legislation and existing planning provisions. The existing Land Act and the Territory Plan already provide for an ACT Planning Authority to administer the Territory Plan. The new Authority proposed by this legislation also has that function.

3.25. Similarly the new bill defines ‘sustainable development’ in different terms from the definition of the same words in the Territory Plan.

3.26. The Law Society believes that procedures for the public notification of ministerial directions are inadequate. In recent years efforts have been made to clarify the force of general policies or guidelines with regard to Territory planning and procedures have been developed with regard to the registration of such general directions. Clause 11 of this Bill allows the minister to give directions which must be presented to the Assembly. However further public notification is limited to inclusion in the Authority’s annual report.³⁴

3.27. The Society believes that the notification procedures need to be improved. It also needs to be made clear whether ministerial directions will be subject to the procedures for inclusion of general policy guidelines in the Territory Plan.

3.28. Section 13 of the Bill provides for the minister to give the Authority a statement of planning intent setting out broad principles with regard to planning and land development. The statement has the force of a direction. The Law Society is concerned that, with regard to planning, a statement may be in conflict with the Territory Plan. The Property Council shares this concern.

3.29. There is also confusion as to whether a statement of planning intent would be subject to section 8 of the *Land (Planning and Environment) Act 1991*. Section 8

³⁴ Law Society, submission, p.2

prevents the executive, a minister or a Territory authority from doing anything inconsistent with the Territory Plan.

3.30. The Law Society's comments on public notification of ministerial directions also apply to notification of a statement of planning intent.

The Planning and Land Council

3.31. The Council is set up to advise the minister and the Authority. **The Property Council** expressed concern at the lack of clarity with regard to the role of the Council, particularly the criteria which might be applied in a decision to seek the Council's opinion on a development proposal.

3.32. The Property Council also believed that the processes which the Council might adopt in examining a development application need to be clarified. Of particular concern were opportunities for access to the Council for proponents and objectors.

3.33. The **MBA** considered it extremely important that the Council's activities be transparent and recommended that the Council's minutes be published in its annual report.

Land Development Agency

3.34. Organisations representing the development and construction sector were generally unenthusiastic about the creation of a public Land Development Agency.

3.35. The **HIA** takes the view that government agencies are not equipped to handle the risk associated with land development and ACT taxpayers should not be required to underwrite it. It also believes that government organisations are not sufficiently flexible in their structure or mode of operation to respond to the demands of providing a land development service.³⁵

3.36. The **MBA** is concerned that the Agency will be anti-competitive and believes that the existing approach to land development is to be preferred. It notes that government objectives in relation to affordability, sustainability and design can be met without the government assuming the role of land developer.

3.37. **APESMA** does not oppose the creation of a Land Development Agency. However it is concerned to ensure that the Agency be sufficiently independent to ensure that it insists on high standards for capital works and infrastructure being provided by the developer. As APESMA notes, 'There is an inverse relationship between capital investment and ongoing maintenance costs'.³⁶ It is in the interests of the Territory that that potential conflict be resolved in favour of the Territory, as the body which will carry the ongoing costs.

³⁵ HIA, submission, p.1

³⁶ APESMA, submission, p.3

3.38. APESMA is also concerned that the engineering profession is not specifically identified as one of the ‘disciplines and areas of expertise’ required to be represented on the board of the Land Agency.³⁷

3.39. As mentioned above (para 3.14) APESMA wishes to see the Planning and Land Authority’s power to delegate its responsibility for the granting of leases to the Agency to be removed.

3.40. The Planning Institute is concerned that the legislation in its current form will create tension between the Authority and the Agency. The Agency is required to operate as a business and the Institute foresees it being reactive –responding to strong pressure from private sector developers to make land available rather than taking the initiative in developing land.

3.41. If this is the case the Property Council believes the Agency will tend to favour industry’s agenda in an attempt to meet its own commercial objectives at the expense of planning requirements. To resolve this potential problem the PIA suggests that the Agency should be subject to the same statement of planning intent as the Authority.

3.42. The PIA does not believe that the reference to ‘urban management objectives’ in clause 38(4)(a) or the Agency’s own statement of intent (required by clause 44) are sufficient to ensure the Agency achieves an appropriate balance between planning and commercial objectives.

3.43. In the PIA’s opinion an explicit statement by the minister that the planning function takes precedence over the land development function is necessary.³⁸

3.44. The Law Society shares the PIA’s concern that clause 38(4) is insufficient as a guide to the way in which the Agency will perform its functions. The Society believes that there is also a need to clarify whether the Agency, and ministerial directions to the Agency, are bound by section 8 of the Land Act, i.e. that it cannot do, or be required by the minister to do, anything inconsistent with the Territory Plan.³⁹

Planning and Land (Consequential Amendments) Bill 2002

3.45. As with any significant legislative change a large number of consequential amendments flow from this Bill. For the most part they are relatively minor, substituting new terminology for old. However the committee did invite public comment on this bill.

3.46. The consequential amendments insert a power in the *Land (Planning and Environment) Act 1991* enabling the minister to ‘call in’ a development application and related papers where that application has not been decided by the Authority and make the decision him or herself.

³⁷ *ibid.*, p.5-6

³⁸ PIA, submission, p.3-4

³⁹ Law Society, submission, p.3

3.47. PACTT stated its general opposition to the presence and use of ministerial call-in powers, but commented that the new provisions seemed ‘ marginally better than the existing provisions because of the wider range of matters required to be considered’.⁴⁰

3.48. The Property Council is concerned that, in making a decision under this power, the minister is required to seek the comments of the Authority and the Planning and Land Council. The Property Council is opposed to this requirement on two main grounds:

- it may be seen to limit the range of advice the minister may consider in making a decision; and
- it may negate the whole purpose of the proposed power which is assumed to be to enable the minister to make urgent decisions on proposals of significance by imposing delay and uncertainty.

3.49. By requiring the comments of the Authority and the Council to be published in such situations the legislation almost preordains political conflict where the minister acts against the advice of either or both those bodies.⁴¹

3.50. The Property Council has emphasised throughout its submissions to this committee that, in introducing this new structure, the government should take the opportunity to deal with delay and duplication within the development application process.

3.51. It is concerned that part 1.107 of the Consequential Amendments misses the opportunity to provide incentives for the Planning and Land Authority to deal expeditiously with appeals against decisions of the Authority. Under that section it is proposed to amend the Land (Planning and Environment) Act to provide that where the Authority does not make a decision with regard to an application for reconsideration within 4 weeks then the original decision by the Authority is taken to be confirmed.

3.52. The Property Council would prefer an approach, already adopted in Commonwealth legislation, where the an application for reconsideration was deemed to be approved if the Authority failed to make a decision within the prescribed time limit. It believes that this would provide an incentive to the Authority to act quickly and would remove the burden on the appellant of having to resubmit applications that had not been dealt with within the prescribed time period.⁴²

3.53. It has also raised two matters which it believes it would be desirable to review. It favours repeal of section 181 of the Land Act, which provides that ‘... a lease cannot be mortgaged where a certificate of compliance has not been issued for the

⁴⁰ PACTT, supplementary submission, p.4

⁴¹ Property Council, supplementary submission, p.3

⁴² *ibid.*, p.3

land.’⁴³ It is the Council’s view that that is a private matter between a lessee and a potential financier and should not involve government.

3.54. The second matter goes to the powers and processes of the Legislative Assembly. The Land Act in various of sections prescribes a number of sitting days of the Assembly as time limits on its proceedings; for example five sitting days to move disallowance of a variation to the Territory Plan. The Assembly sits on a limited number of days and a period of five sitting days can easily extend over several months. This delay can impose serious costs on developers who are dependent on the outcome of the process. For example, this year five sitting days could have run from late August to mid-November.

3.55. The Council suggests that alternative processes be examined which might streamline these procedures.

3.56. PACTT has a number of concerns with various changes which appear to reduce public consultation and rights of appeal against planning decisions. PACTT’s principal concerns relate to proposed new section 232(1A), which appears to exempt the Authority from giving notice of a development application, and s.282A which, PACTT suggests, introduces an element of subjectivity with regard to appeal rights to the AAT by substituting the phrase ‘believes to be affected’ for the phrase ‘are affected’ in the current legislation.⁴⁴

3.57. PACTT also drew the attention of the committee to the new section 166A, which allows the minister to grant , or refuse to grant, a proposed lease. PACTT notes that ‘this effectively becomes a call-in power in relation to granting leases’ and that ‘the creation of this call –in power seems to derogate from the independence of the Authority.’⁴⁵

3.58. PACTT offered comment on proposed subdivision 6.2.4, which ‘allows applicants but not objectors to seek reconsideration of a decision by the Authority.’ PACTT considered that it appeared that ‘the Authority is enabled to sit in judgement on its own original decision’ and that ‘the procedure appears to unfairly favour applicants over objectors to a proposal, because objectors to a proposal are denied the option to seek a reconsideration.’

3.59. In addition PACTT noted the new section 275A appears to introduce a new ground of appeal.

Administrative Appeals Tribunal Amendment Act 2002

3.60. As part of the new planning structure the government has introduced legislation to improve the planning appeals process by activating the AAT jurisdiction over planning. Generally this initiative has been welcomed. A small number of suggestions for improvement have been made in submissions to the committee.

⁴³ *ibid.*, p.4

⁴⁴ PACTT, supplementary submission, p.1

⁴⁵ *ibid.*, p.3

3.61. Various measures are proposed particularly to encourage resolution through mediation and to streamline procedures through the introduction of time limits for decisions by the AAT. The Land and Planning division of the AAT will use three member panels having appropriate skills and experience to hear appeals.

3.62. The ACT Administrative Appeals Tribunal raised a matter that it is not the subject of an amendment. The President of the AAT, Mr Peedom, is concerned that s.279 of the Land Act ‘... requires an objector to notify the applicant for approval of the development application of any appeal where the objector is the appellant’.

3.63. The AAT’s experience is that s.279 is not always adequately satisfied. Mr Peedom therefore proposes that the responsibility for providing notice of an appeal to the development applicant be transferred to the decision maker, that is the Tribunal itself. This would ensure that the notice was given and also bring the process into line with that which applies when an applicant for development approval appeals against a decision.⁴⁶

3.64. PACTT expressed some concern that ‘... more thought has not been given to making AAT proceedings more accessible and less legalistic and threatening.’ PACTT also believes that a broadly representative nomination committee be responsible for selecting a panel of members of the Tribunal to hear planning appeals.

3.65. PACTT is also concerned that the “Role and Main Object” statement in the bill may be seen to compromise the Tribunal’s independence; that there is insufficient detail with regard to the use of mediation by the Tribunal and that the Tribunal has been given the power to impose costs on parties in certain circumstances.

3.66. The Property Council raised an issue with regard to costs. The Council, as a general policy wishes to see measures introduced to discourage frivolous or vexatious appeals. It has suggested a further amendment to the Tribunal’s power to enable it to award costs against an appellant where ‘the Tribunal determines that an appeal... has been

(a) frivolous or vexatious; or

(b) without substantial merit; or

(c) represents an abuse of process.’⁴⁷

⁴⁶ Australian Capital Territory Administrative Appeals Tribunal, submission, p.1

⁴⁷ Property Council of Australia, letter to the committee, 31 October 2002

4. The committee's findings

General

4.1. The committee shares some of the concern that this legislation may add a further layer of complexity to an already complex and sometimes cumbersome process. (see paras 3.2-3.7) There appear to be a number of areas of overlap between existing and new legislation and also a lack of clarity with regard to the interaction of existing and new processes. Even definitions of terms used in the legislation differ from those for the same terms in other territory acts. The committee considers it vital that the minister clarifies these matters before the legislation proceeds.

4.2. Various organisations also questioned why this new structure was being established outside the existing Land (Planning and Environment) Act. The committee is advised that this was largely a matter of legislative drafting. That act is now quite 'old' and to graft new concepts, new language and new structures on to the old legislation would be unworkable.

4.3. The committee notes that the Government plans to hold a thorough review of planning laws in the ACT next year. This raises the obvious question of why such a major restructuring of the administration of planning and land management has been undertaken before the review was carried out.

4.4. The new bill requires the legislation to be reviewed in 2007. The committee believes that that is too long a delay. It can be anticipated that proposals for change will come out of next year's general review which will have implications for the new legislative scheme. Thus it may be appropriate to review the new scheme relatively early in its life.

4.5. **The committee recommends that clause 75 of the Planning and Land Bill 2002 be amended to require the Minister to initiate a review of the operation and effectiveness of the Act no later than 31 December 2005.**

4.6. The separation of policy making, which will sit with the Executive government and the Legislative Assembly, and administration, which will be the responsibility of the Authority, is put forward as one of the great advantages of the new structure. However there appear to be a number of constraints on that separation.

4.7. The relationship between the minister and the Authority is not clear. The minister's power's of direction under proposed s.11 and the impact of the statement of planning intent (s.13). The minister may give directions with regard to general policy or requiring the Authority to vary the Territory Plan or a provision therein. The statement of planning intent, which has the force of a direction, will set out the principles that will govern planning in the ACT.

4.8. It is assumed that the minister's powers are still limited by s.8 of the Land Act and that he may not act inconsistently with the Territory Plan. However the committee is concerned that the minister's powers of direction may enable him to change land use in the ACT. ***The committee recommends that the primacy of the Territory Plan should remain and that new legislation should reflect this.***

4.9. The committee is concerned about the lack of clarity as to the purpose of the ‘statement of planning intent’. It is described as ‘setting out the main principles that are to govern planning and land development in the ACT’.⁴⁸ The minister should clarify the use to which the statement can be put; the frequency with which it might be used and, generally, how it differs from a ministerial direction under clause 11 (1)(a).

4.10. *The majority of the committee remains concerned that the independence of the Authority may potentially be undermined by the powers of ministerial direction and the Statement of Planning Intent. **The committee recommends that sections 11 and 13 of the Planning and Land Bill 2002 be amended to require that a direction of the minister and a statement of planning intent be tabled in the Assembly on the next sitting day after they have been given to the Authority.***

Ministerial call-in powers

4.11. The minister will have the power to ‘call-in’ any development application not decided by the Authority where the application ‘raises a major policy issue’, ‘may have a substantial effect on the achievement or development of objectives of the Territory Plan’ or where the decision ‘would provide a substantial public benefit’. The grounds on which the call-in power is to be exercised are largely subjective.

4.12. The committee recognises the need for such a power and notes that the exercise of it is a notifiable instrument. In addition where the minister makes a decision having exercised the power he must inform the Assembly of all the details of the development and the grounds for his decision. Thus both the process and the decision are open to public scrutiny.

The Planning and Land Authority

4.13. In seeking to create an ‘independent’ planning authority the government has sought to strike a balance between ensuring that the Authority is accountable and providing it with real autonomy. The committee believes that, both to improve the Authority’s accountability and to offer it a measure of protection against executive interference, the relationship between the Authority and the appropriate committee of the Assembly should be specifically recognised.

4.14. **The committee recommends that the relationship between the Authority and the Assembly be formalised by requiring the Authority to report on its activities to the appropriate Assembly committee at least once every six months.**

4.15. The functions of the Planning and Land Authority are vast, ranging from long term strategic planning for the Act through the administration of the planning and land development process down to the maintenance of information data bases, regulation of the ACT building industry and being the first ‘court of appeal’ for its own decisions. The functions also foreshadow the Authority marketing its services outside the ACT.

⁴⁸ Planning and Land Bill 2002, cl.13

4.16. The effective discharge of this range of functions implies the creation of a significant bureaucratic structure which could be at odds with the wish of many of those who made submissions to this committee for an organisation that is flexible, adaptable to changing circumstances and innovative.

4.17. The committee believes that it may be wise to review the proposed functions of the Authority and vest some of them, particularly the more purely administrative, in the Planning Ministry proposed by the Property Council (para 2.9)

4.18. The committee recommends that the government consider establishing a Planning Ministry which would:

(a) provide the Planning minister with administrative support and advice; and

(b) assume some of the routine administrative functions proposed to be given to the Planning and Land Authority.

4.19. The success of the Authority will depend heavily on the qualities that the Chief Planning Executive brings to the position. The committee recognises that to seek to define those qualities to specifically may limit the choice of potential appointees. However it believes that the legislation should give some indication of the experience and professional qualifications appropriate to the position.

4.20. The Planning Institute proposed a preamble to part 2 of the bill (para 2.19) to include such a statement. The legislation does set out the range of experience and professional competence expected of appointees to the Planning Council and the Land Agency Board.

4.21. The committee recommends that the bill make some reference to the general experience and qualifications expected of any appointee; for example, high level urban planning experience in one or more major cities and senior management experience.

4.22. The committee shares the concern expressed by APESMA (see para 3.14) that the proposal to allow the Planning and Land Authority to delegate its power to grant leases to the Land Agency is an unnecessary and unwise blurring of the distinction between the roles of the two bodies. The committee agrees with the view that the power to grant leases ensures that the Authority has the leverage to ensure that the Land Development Agency maintain high standards in land development.

4.23. The committee is also concerned that such a delegation could have the appearance of a conflict of interest and might compromise the standing of the Land Agency. **The committee recommends that clause 17(2) be deleted from the bill and clause 17(1) be amended to make explicit that the power to grant leases cannot be delegated to another agency.**

4.24. The committee is sympathetic to PACTT's view that community participation in the planning process needs to be properly funded if it is to be effective. **The committee therefore recommends that the government provide secure funding to the community sector to facilitate effective participation in the planning process.**

4.25. *The committee agrees that a Planning Advisory Council or similar peak community planning body may be a useful vehicle to promote community based planning and represent the views of multiple community organisations.*

4.26. The committee considered whether staffing the Authority under the Public Sector Management Act was appropriate. There were two grounds for concern raised in submissions;

- that a public service structure would militate against the flexibility and responsiveness the Authority will require; and
- that career public servants would not be sufficiently independent in their approach to enable the Authority to achieve the level of independence it should aspire to.

4.27. *The committee considers that the appropriate balance between long term and contracted employees is a management issue for the Authority to consider. The committee does not believe that the career interests of individual officials will compromise the independence of the Authority.*

4.28. The committee notes that the Authority will have the power to employ consultants (s.23(1)) but may not enter into contracts of employment. The committee is advised that this clause does not preclude the Authority from employing staff on short term contracts or for specific purposes. It merely ensures that such employment complies with the Public Service Management Act.

4.29. The committee is concerned with the lack of detail available with regard to the structure and operations of the new bodies, particularly the Authority. It is also concerned that the process of transition to the new system has not been adequately considered. The committee trusts that, if the new system is not to be introduced until 1 July 2003, detail on these matters will be forthcoming.

The Planning and Land Council

4.30. The Planning and Land Council is an advisory body available to the minister and the Authority. The Council may also exercise other functions delegated to it by law although there is no indication what those functions might be. The committee would welcome clarification of the types of functions that it is envisaged might be delegated to the Planning and Land Council.

4.31. The Council may exercise considerable influence. It may be appropriate for advice from within the public service to remain confidential but the Council is an independent advisory body and its advice should be open to scrutiny. The committee believes that its work should be transparent and therefore **recommends that advice it gives to the Authority or the minister should be made public when a decision or determination is made.**

4.32. **The committee also recommends that where the appropriate Assembly committee is examining a matter that has been the subject of advice from the Council that advice should be available to the committee.**

4.33. Witnesses to the committee expressed some concern with regard to the role of the Council. The Property Council believed that there was a need for greater clarity in the criteria which would apply to a ministerial or Authority decision to seek its advice. It also expressed concern about the council's processes. If the Council was examining a specific development application would the proponents have any right of access to the Council's deliberations?

4.34. The committee sought advice from PALM with regard to whether guidelines for the processes and operations of the Council (and the Authority and the Agency) had been prepared. It was advised that this process was underway but not yet complete.

4.35. The committee recommends that internal guidelines and procedural manuals developed by the Authority, the Council and the Land Agency be tabled in the Legislative Assembly and be freely available to the public.

4.36. The committee notes the submission of APESMA that engineering skills should be among the areas of expertise specifically identified for membership of the Planning and Land Council (and the board of the Land Agency – see clauses 27 and 58). The committee supports the intent of this proposal but is concerned that the inclusion of a specific professional qualification in a list of general expertise may be inappropriate.

4.37. The committee recommends that the category 'land development' be extended to include 'construction'.

The Land Development Agency

4.38. Organisations representing the construction and development sector were, generally, unenthusiastic about the role of the Land Development Agency, believing that its role was better left to the private sector.

4.39. There was some concern that the requirement to operate in accord with sound business practice and the pressure to meet the demands of developers would lead it to favour development imperatives over planning objectives. ***The committee supports the proposal of the Planning Institute and therefore recommends that it be made explicit in the legislation that the Land Development Agency is bound by the same general planning principles as the Authority.*** This would also address the concerns of the MBA that the Agency's decisions are consistent with overall government policy on planning and development.

4.40. The committee notes that the Agency is required to comply with the 'urban management objectives' set out in the Territory Plan. If that term is to be used it should be defined more clearly. At present it appears that the Agency, and others, will have to infer these objectives from the general terms of the plan.

4.41. To ensure accountability, the committee recommends that the Land Development Agency maintain separate accounts for its various activities. For example, the existing Kingston Foreshore Development Authority and the Gunghalin Development Authority's activities should be clearly identifiable.

4.42. The committee is generally supportive of the MBA's view that extremely detailed and comprehensive reporting by the Land Agency will be necessary to ensure accountability and to enable the public to monitor its performance. As far as is possible, the Agency should meet the reporting requirements of private sector corporations.⁴⁹

4.43. The Treasurer may direct the Agency to pay moneys to the Territory (s.47). Concern has been expressed that the pressure on the Agency to deliver revenue to the Territory could compromise its ability to operate on sound business principles. One protection against this is to ensure that the Agency's dealings with the Treasury are open to scrutiny.

4.44. The Bill as drafted does not require a direction by the Treasurer to be a notifiable instrument whereas ministerial directions are notifiable instruments (s.51). The committee recommends that directions by the Treasurer under section 47 of the Planning and Land (Consequential Amendments) Bill should be notifiable instruments.

4.45. The committee also seeks clarification from the minister as to the implications of this Agency for the ACT's obligations under the National Competition Policy (NCP). As the sole developer of land in the ACT the Land Development Agency will replace existing private developer. It will also be required to respond to ministerial directions with regard to issues such as affordable housing which may be considered anti-competitive. There are concerns that the operations of the Agency may expose the ACT to penalties under the NCP.

The Administrative Appeals Tribunal

4.46. The committee generally supports the extended jurisdiction of the AAT. It particularly welcomes the emphasis on mediation and the introduction of time limits on the decision making process. Similar changes in other jurisdictions have generally been beneficial to the process.

4.47. The ability to award costs has caused some debate. Costs are only to be awarded where a party fails to comply with a direction of the Tribunal, the power is discretionary and is limited to the costs of the case.

4.48. The Property Council proposed giving the Tribunal power to award costs where it determined an appeal was frivolous or vexatious. (see para 3.66) While the committee supports action to discourage abuse of appeals, or any other, processes, it is concerned that such a power could discourage legitimate community action.

4.49. The committee supports the President of the AAT's proposed amendment to s.279 (see para 3.62-3.63) of the Land Act to make the decision maker responsible for advising the development applicant of an appeal against the application.

⁴⁹ MBA, submission, p.4

Community Participation

4.50. A general comment from all sectors has been that the Planning and Land Council does not allow for community, environmental, welfare or industry representatives to be involved in the deliberations of the Council. While the role of the Council is to be an expert body, other organisations rightly point out that their delegates are experts in their respective fields and that these areas of expertise are of direct relevance to planning.

4.51. While there is some merit in having an organisation whose members are not encumbered by allegiances to outside groups, the fact remains that while the bill makes special effort to ensure that professional and independent advice is facilitated, no such regard is given to members of the community. It is easy to understand the view expressed by some members of the community that the bill only replaces one large bureaucracy with another.

4.52. The committee views planning as a process that not only needs to be academically and professionally informed it also needs widespread community respect and ownership. The bill sets out to deal with one side of the equation but does little to address the other. **The committee recommends that a review of the place of community participation in this proposed planning structure be undertaken.**

Conclusion

4.53. This report should not be considered an endorsement of this package of legislation. The committee has raised a number of issues that it believes require further debate and discussion before the legislation is finalised. The restrictions in the time available to the committee, which are described in chapter 1, have inhibited its ability to conduct a thorough analysis of the proposals.

4.54. The committee reaffirms its view that the long term outcome of the government's reform process will be improved if more time is allowed for consideration of this legislation. The committee reserves its right to comment further on any aspect of these bills.

Vicki Dunne MLA

Chair

13 November 2002

Appendix 1 – Conduct of the Committee’s Inquiry

Submissions

The committee wrote to a wide range of community, professional and industry groups inviting written submissions. Nine submissions and three supplementary submissions were received:

1. Housing Industry Association – ACT/Southern NSW
2. Assoc. of Professional Engineers, Scientists and Managers Australia (APESMA)
3. Planning the ACT Together (PACTT)
4. Property Council of Australia
5. National Capital Authority
6. Planning Institute Australia, ACT Division
7. The Law Society of the ACT
8. ACT Administrative Appeals Tribunal
9. Master Builders Association of the ACT

Supplementary submissions were received from the Property Council of Australia, the Law Society and PACTT.

Public Hearings

The committee held two public hearings. On 27 September 2002 the Minister for Planning, Simon Corbell MLA and Dorte Ekelund, David Snell and Vic Smorhun representing PALM gave evidence.

On 8 October the committee took evidence from:

John Futer and Alan Morschel, Housing Industry Association for the ACT and Southern New South Wales;

Don Hare, Association of Professional Engineers, Scientists and Managers of Australia;

Romilly Madew and Tony Adams, Property Council of Australia

Alphonso del Rio, Law Society of the ACT, Planning and Environmental Law Committee

Paul Cohen, Planning Institute of Australia, ACT Division

James Macgregor Dickins, Robin Brown, Gordon Soames, PACTT