ISCCC comments on the ACAT question.

The ISCCC questions whether only 15 merit track decisions have been made by ACAT since 2019 since online reports suggest it is a higher number.

The ACAT-Annual-Review-2021-22 indicates (p.29) that 28 applications for administrative review of Planning and Development decisions were made in 2018-19, 37 in 2019-20, 31 in 2020-21, and 34 in 2021-22. The Annual Review for 2022-23 does not appear to have been published as yet. Halving the 2018-19 to 14 total because have the year was in 2018 indicates that a total of 116 applications for review were lodged between 2019 and the end June 2022. While some of these matters may still have been undecided at the end of the period, it seems implausible that only 15 matters had been decided as this would leave some 101 still before the ACAT, although presumably heard in 2018-19 or 2019-20 etc, usually the year in which they were lodged. Perhaps the Committee has misinterpreted something?

EPSDD's 2022-23 Annual Report indicates on p.345 that in 2022-23 only 54% of matters taken to ACAT had the original DA upheld. This means that some 46% had the DA approval overturned. Assuming these figures were typical of ACAT Planning and Development reviews in previous years it seems likely that about 53 (16% of 116) of the 116 matters since 2019 had the DA overturned. Perhaps the Committee means that about 15 DA's a year are overturned?

Does ACTPLA count withdrawn or revised DAs? Instead of counting actual ACAT decisions on applications for review a more meaningful count is how many applications for review resulted in a new or revised DA. ACTPLA often requires withdrawal or revision of a DA before it gets to an ACAT decision. For example, the GNCA sought review by ACAT of 5 DAs on 5 blocks and achieved the outcome of dual occupancy instead of treble occupancy on the 5 blocks. It only has 1 actual ACAT decision but 4 DAs have been withdrawn and 3 have so far been replaced by new DAs.

The overturn rate on ACTPLA DA decisions in 2022-23 was 46% which is nearly half. If, as the question suggests, the number of decisions is low, then the number of overturns is low. However, the following should be noted:

It is usual in merits review tribunals for the overturn rate to be about 30% so 46% is high and suggests further examination is needed.
It is common for ACTPLA to shepherd a DA through to compliance, so it is unusual for a DA to be non-compliant by the time it reaches ACAT. For example, in a recent GNCA case ACTPLA had used its powers 8 times to go back to the developer to get them to improve the DA to achieve compliance

The GNCA frequently has new plans presented at the hearing to achieve compliance. If there were 4056 merit review track decisions by ACTPLA does ACTPLA have any analysis of those decisions? For example: number of times objections were lodged?; number of reviews by panels (these require 30 objections)?

Does ACTPLA or ACAT keep records of applications for merits review of ACTPLA decisions where the applicant withdraws? For example, at mediation the GNCA was discouraged from proceeding with its application when it was warned about the difficulties it would face.

Turning to the second leg of the question, "Is ACAT a barrier to the creation of medium density housing?". ACAT is not a barrier to anything. An ACAT administrative review merely determines if a public service administrator has made the correct decision according to law. If a DA is overturned it means that it was not compliant, and should not have been approved by ACTPLA. While politicians might at times find Administrative Review rights inconvenient, any attempt to remove these would probably be found to be unconstitutional. Perhaps the Committee should turn its consideration to ways to ensure that more DA's are compliant with planning law as it exists. Perhaps some surety fee to be lodged by developers to demonstrate their confidence that their DA application is fully compliant, which is surrendered to ACT Revenue if ACTPLA or ACAT find that the DA was not compliant. Or, to present the same idea in a different fashion, arrange things so that a proportion of the ACTPLA lodgement fee is reimbursed to a developer once their DA has successfully survived the approval process without challenge.

Before the introduction of the new Planning Act the Assembly had full power to amend the Planning and Development Act at any time if it were of the view that too many worthy DA applications were being unreasonably rejected by ACTPLA or by ACAT. Now however, with planning rules entirely in the hands of the Chief Planner, they have no such option, and will just have to endure the public abuse, without any way of remediating the situation.

Do the questions reflect the Property Council's submission that third party merits review rights should be removed? That position overlooks the longstanding and well-established value of merits review, particularly in improving primary decision making. This year the Robodebt Royal Commission Report showed how, if AAT decisions had been taken into account by the primary decision makers, the law would have been upheld and loss of life and distress avoided.