actlawsociety

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

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1. The Review

1. The ACT Law Society supports the decision to review the *Australian Capital Territory (Self-Government) Act 1988 (Commonwealth)* (the Self-Government Act).

2. Reviewing the history of the ACT, the progress and development of Self-Government in the ACT is to be praised. Initially designed as a political Territory, the ACT has now evolved into a thriving community. Due to the rate of growth of population and industry, a review of the Self-Government Act is necessary to ensure that it reflects the needs of its citizens.

3. The Society notes the recent reviews carried out by Dr Allan Hawke[1] and Professor John Halligan[2] and is generally supportive of their recommendations. The Society also supports the actions already taken by the Government to implement the recommendations arising out of these reports.

4. Considering the recent publication of these reports, the Society does not intend to comment on the structure or composition of the institutions created under the Self-Government Act. The Society does, however, consider that there are certain issues that should be taken into consideration as part of this review.

5. Initially, the Society would like to suggest that a recognition to the traditional owners of the land should be included in the preamble to the Self-Government Act.

2. The ACT Legislative Assembly – Part III & IV

Size of the Assembly

6. The Assembly is a unicameral parliament of 17 members[3] elected from three multi-member electorates: Brindabella, Ginninderra and Molonglo. Brindabella and Ginninderra return five members each, and Molonglo seven. Members are elected using the Hare-Clark system of proportional representation and serve a fixed four-year term.

7. The Society notes the *Hawke Report* recommended that the size of the Assembly be increased. The Society wishes to stress the significance both logistically and financially of increasing the size of the Assembly and recommends that full consideration is taken before a decision is made. The ACT is unique in its composition and geographical size in relation to the other States and Territories. These significant differences provide that the representation of ACT citizens in the Assembly will be different from that of other jurisdictions.

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[1] "Governing the City State, *One ACT Government – One ACT Public Service*", Dr. Allan Hawke, 2 February 2011.

[2] "An Assessment of the Performance of the Three Branches of Government in ACT Against Latimer House Principles", Professor John Halligan, 10 November 2011.

[3] As prescribed by section 8(2) of the Self-Government Act.

8. The determination of the size of the Assembly should take into consideration a number of factors including the composition of the ACT and the capacity of the representatives to carry out their statutory duties as prescribed under the Self-Government Act. There does not appear to be an overwhelming need to increase the size of the Assembly and the Society considers that resources could be better utilised elsewhere.

Updating of Sections

9. The Society suggests that consideration should also be given to remove section 16 of the Self-Government Act. This section effectively allows the Governor-General to dissolve the ACT Legislative Assembly. This section undermines the legitimacy of the Assembly. The Society suggests that this section be deleted.

10. The Society suggests that section 23 of the Self-Government Act should also be revisited as part of this review. Section 23 limits the competence of the Assembly to make laws in a number of areas. While the Society accepts that some of these restrictions remain relevant, consideration should be given to whether certain matters should still be excluded from the competence of the Assembly. The ACT Government has evolved since the introduction of the Self-Government Act and it would be appropriate to review this section at this time.

3. The Executive – Part V

Size of the Executive

11. The Society considers that the size of the Executive should be reviewed. The Executive currently operates with 5 members, the Chief Minister and 4 others.[4] The portfolios of the Executive are delegated to Ministers through section 43 of the Self-Government Act. Due to the small number of Ministers in the Executive, portfolios delegated are numerous. This has the potential to affect the quality of portfolios being managed.

12. With the development of the ACT Government, a greater number of Ministers would be beneficial to improve the quality and efficiency of portfolios being managed. This in turn would also improve the democratic process in Executive decisions. The Society considers that increasing the size of the Executive would improve the efficiency and quality of the ACT Government as a whole and would be a more appropriate first step than increasing the size of the Assembly.

Relationship Between Sections 37 and 43

13. The Society considers that the relationship between sections 37 and 43 of the Self-Government Act should be looked at as part of the review. These sections detail the powers of the Executive and Ministerial Portfolios respectively.

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[4] Section 41(2A) of the Self-Government Act.

14. The powers vested in the Executive through section 37 are statutory powers, however, it is unclear the extent to which powers conferred on a Minister by virtue of section 43 are statutory powers of the Executive or powers within a regulation. The Society suggests that as a matter completeness this issue should be considered as part of this review.

Updating the Schedules

15. The Society suggests that the Government take this opportunity to update the Schedules of the Self-Government Act. There are several pieces of legislation referred to in the Schedules that have either been amended or repealed. It may be determined that the *Acts Interpretation Act 1901(Cwth)* allows for the interpretation of any re-enactments. However, the Society suggests that it would be appropriate to update the Schedules at this time. The Society suggests that policy decisions may be required in respect of some pieces of legislation to determine whether they should still be included in the schedules at all.

Removal of a Judicial Officer

16. The process for the removal of a judicial officer is set out in Part VA. The power to actually remove a judicial officer is vested in the Executive.

17. When a complaint, or a notice from a member of the legislative assembly, has been made against a judicial officer effect is given to the *Judicial Commissions Act 1994 (ACT)* for determining the process to be followed. The Self-Government Act provides that once the ACT Attorney-General has received a complaint about a judicial officer that he or she determines should be investigated, the Executive is asked to form an *ad hoc* Judicial Commission to investigate the case. Following the investigation the report of the Judicial Commission is put before the Assembly which may require the Executive to remove a judicial officer from office. The Attorney-General also has the power to decline to investigate a complaint.[5]

18. However, if the Attorney-General receives a complaint that is valid but that does not warrant the establishment of a Judicial Commission there is no other option available. In other words, there is no middle ground available to the Attorney-General to deal with a complaint other than by its dismissal or the establishment of a Judicial Commission.

19. This situation is not desirable as there may be a complaint that warrants the intervention of the Attorney-General without an inquiry by the Judicial Commission. For example, if a judicial officer is continually arriving late to Court or taking an excessive time to deliver judgments, intervention may be required without the need for a Judicial Commission to be established. The Society suggests that the Executive be given the appropriate means and discretion to address complaints of varying degrees of severity.

[5] Section 17 of the Judicial Commissions Act 1994 (ACT).

4. Powers of the Judiciary – Part VA

20. Section 48A of the Self-Government Act sets out the jurisdiction and powers of the ACT Supreme Court. This section is mirrored in section 20 of the *ACT Supreme Court Act 1933 (ACT)*. This section is different from those of other jurisdictions in the manner in which it sets of the jurisdiction of the ACT Supreme Court.

21. When the Self-Government Act was introduced it was not immediately obvious how this section would be interpreted. In *Kelly v Apps*,[6] the jurisdiction of the ACT Supreme Court was challenged and the legitimacy of its jurisdiction was reviewed by the Federal Court. The Federal Court held that the jurisdiction of the Supreme Court was valid and the question was dismissed. This helped put to bed any concerns that existed in regards to the validity of the ACT Supreme Court.

22. The Society considers that the present situation is satisfactory and that Part VA of the Self-Government Act should not be tinkered with as the implications that could potentially arise as a result of reform could be vexatious. The Society considers that interpretation in this area should be left to the Courts and that reform is not required.

Funding of Courts and Caseload

23. Ensuring that the ACT Courts are adequately funded to deal with their increasing caseload is imperative to the effectiveness of the Judiciary. The Society is encouraged by initiatives such as the "ACT Supreme Court Blitz" put in place to address the backlog of cases in the Court. The Society does, however, consider that the Judiciary requires further support. The Society suggests that a separate review should be carried out into the funding of and resources ACT Courts. This review should be carried out by a retired eminent person or retired judge and should be tabled in the Assembly. Such a report need not be expensive as it is not envisaged that the reporter would have any special powers, although it would be advisable that he or she would be immune from any liability which might arise from his or her report.

5. Australian Capital Territory (Planning and Management) Act 1988 (Cwth)

24. In this context, the Society also wishes to make the following comments in respect of *the Australian Capital Territory (Planning and Management) Act 1988 (Cwth)* (PALM). The Society considers that comment here is appropriate as this Act was

[6] Kelly v Apps [2000] FCA 687; [2001] ACTSC 27.

one of the four pieces of key legislation passed by the Commonwealth Parliament which constrain the legislative competence of the ACT.[7]

Crown Leases

25. The ACT is different to other jurisdictions in Australia in that land is leasehold rather than freehold. The Society acknowledges that in practice within the ACT the differences in the land tenure systems are not significant. However, the Society does harbour concerns that potential investors can be put off by the different system and particular new investors to the ACT (especially those from overseas) can be discouraged because of the apparent differences compared to the States.

26. The Society recommends that consideration be given to lifting the term limit on Crown leases granted in the ACT. The granting of Crown leases is currently limited to a period of 99 years by virtue of section 29(3) of PALM. The period is relatively short in regards to land tenure and serves to create uncertainty in ownership and unnecessary administrative burden upon renewal.

27. For some purposes, the period of tenure granted has been extended to 999 years.[8] The Society recommends that consideration be given to extending the limit to 999 for all Crown leases. The increased security of tenure should increase the demand for Crown land and investment in the Territory. The ACT Government should then be able to decide on behalf of the ACT whether the granted term of crown leases should then be extended. At present, the process for crown lease renewal is an additional administrative exercise absorbing valuable government and private resources. If the ACT Government wishes to acquire a crown lease for proper public purposes, then there already exists a regime for fair compensation under the ACT's Lands Acquisition Act.

28. It should be noted that this reform would in no way effect the way a change of use or lease variation fee would be administered under the *Planning and Development Act 2007 (ACT)*. The extension would only serve to increase the security of tenure and reduce administrative costs for the ACT Government and ACT citizens alike.

PALM Act Section 29

29. Section 29 confers power to the Executive for the management of land on behalf of the Commonwealth. However, it is unclear how much of this power can be delegated by the Executive. It is likely that the Executive can delegate power in land management to another body, however, no statutory mechanism is provided for the

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[7] The aforementioned legislation being; Australian Capital Territory (Self-Government) Act 1988 (Cwlth); Australian Capital Territory (Electoral) Act 1988 (Cwlth); Australian Capital Territory (Planning and Land Management) Act 1988 (Cwlth); and the ACT Self-Government (Consequential Provisions) Act 1988 (Cwlth).

[8] Regulation 3 of the Australian Capital Territory (Planning and Land Management) Regulations has extended the granting of tenure to 999 years for tertiary education and church purposes.

Executive to do so. The Society suggests that the provision of a statutory mechanism for the Executive to delegate powers under this section be introduced.

National Capital Authority

30. The National Capital Authority (NCA) was established under the PALM Act to represent the Commonwealth Government's continuing interest in the strategic planning, promotion, development and enhancement of Canberra as the National Capital.

31. The NCA and the ACT Planning and Land Authority play an integral role in the protecting and fostering the interests of the ACT. The Society considers that enduring and productive solutions are to be found in clarifying the roles and reforming the corporate governance of these bodies.

32. It is clear that there are potentially competing national and local interests in the planning of the ACT. This is a natural side effect of bearing the honour of the Nation's Capital. In order to foster good relations the Society considers that the lines of communication between local and federal authorities need to be improved in order to facilitate effective cooperation.

33. The Society notes that an inquiry into the role of the NCA was carried out by the *Joint Standing Committee on the National Capital and External Territories* in 2008. The Society made submissions and appeared before the Committee at a public hearing. More recently, in response to the *Hawke Report* the Commonwealth embarked on yet a further inquiry by Dr. Allan Hawke into the National Capital Authority.[9] That report was released in October 2011 and is still awaiting a public response by the Commonwealth. The Society is most interested in ensuring there is a constructive outcome to these inquiries and reports. The Society considers that the NCA is pivotal to the effective planning and development of the ACT and a focal point for Australia as whole on its national capital. The Society urges the Government in a real and substantive way to acknowledge and support this role of the NCA.

[9] "Canberra a Capital Place: Report of the Independent Review of the National Capital Authority", Dr. Allan Hawke AC, July 2011.