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INQUIRY INTO THE PLANNING AND DEVELOPMENT
(PROJECT FACILITATION) AMENDMENT BILL 2014

STANDING COMMITTEE ON PLANNING, ENVIRONMENT AND TERRITORY
AND MUNICIPAL SERVICES

6 MAY 2014

REPORT NUMBER 5

Confidential Draft

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RESOLUTION OF APPOINTMENT

On 27 November 2012 the ACT Legislative Assembly (the Assembly) agreed by resolution to establish legislative and general purpose standing committees to inquire into and report on matters referred to them by the Assembly or matters that are considered by the committees to be of concern to the community, including:

- (e) a Standing Committee on Planning, Environment and Territory and Municipal Services to examine matters related to planning, public works, land management, municipal and transport services, heritage and sport and recreation and matters related to all aspects of climate change policy and programs, water and energy policy and programs, provision of water and energy services, conservation, environment and ecological sustainability.

The Assembly agreed that each committee shall have power to consider and make use of the evidence and records of the relevant standing committees appointed during the previous Assembly.¹

TERMS OF REFERENCE

On 8 April 2014, the Legislative Assembly referred the Planning and Development (Project Facilitation) Amendment Bill 2014 for inquiry and report by 6 May 2014.

¹ Legislative Assembly for the ACT, Minutes of Proceedings No. 2, 27 November 2012, pp. 24-27, accessible at <http://www.parliament.act.gov.au/downloads/minutes-of-proceedings/MoP%202.pdf>

ACRONYMS AND ABBREVIATIONS

ACTPLA	ACT Planning and Land Authority
BCC	Belconnen Community Council
DA	Development Application
DV	Draft Variation
EIS	Environmental Impact Statement
ESDD	Environment and Sustainable Development Directorate
GNCA	Griffith/Narrabundah Community Council
ISCCC	Inner South Canberra Community Council
SPV	Special Precinct Variation
WCCC	Western Creek City Council
WVCC	Woden Valley Community Council

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RECOMMENDATIONS

RECOMMENDATION 1

- 1.20 The Committee recommends that the Planning and Development (Project Facilitation) Amendment Bill 2014 proceed subject to the recommendations set out in this report.

RECOMMENDATION 2

- 2.18 The Committee recommends that the consideration period for special amendments is widely promoted to ensure that a variety of stakeholders are able to participate in the consultation process.

RECOMMENDATION 3

- 2.34 The Committee recommends that mechanisms to protect Aboriginal sites under the *Heritage Act 2004* continue to be provided for.

RECOMMENDATION 4

- 2.57 The Committee recommends that the ACT Government produce a guidelines document to provide clarity about the criteria for declaring a project of major significance and that this document be published on the ACT Planning and Land Authority website.

RECOMMENDATION 5

- 2.77 The Committee recommends that the ACT Government consider that the proposal to allow a development proponent to lodge a development application at the same time as a draft variation is considered be amended from being an optional provision to a mandatory requirement.

RECOMMENDATION 6

- 2.87 The Committee recommends that the ACT Government enable the concurrent lodgement of Environmental Impact Statements, Draft Variations and Development Applications for all public and private projects outside Special Precinct Areas.

RECOMMENDATION 7

- 3.28 The Committee recommends that the period for community consultation to consider draft Special Precinct Variations and draft Significant Project Declarations be extended to a minimum of 60 days.

RECOMMENDATION 8

- 3.29** The Committee recommends that the consultation period for inspection of consultation comments on draft Special Precinct Variations and draft Significant Project Declarations be extended to a minimum of 30 working days.

RECOMMENDATION 9

- 3.30** The Committee recommends that all documentation related to draft Special Precinct Variations and draft Significant Project Declarations be made available free of charge on the Environment and Sustainable Development website.

RECOMMENDATION 10

- 3.51** The Committee recommends that the Planning and Development (Project Facilitation) Amendment Bill 2014 be amended to include a sunset clause.

RECOMMENDATION 11

- 3.76** The Committee recommends that the ACT Government conduct a review of the application of the Planning and Development (Project Facilitation) Amendment Bill 2014 during its period of enactment.

1 INTRODUCTION

BACKGROUND TO THE INQUIRY

- 1.1 The Planning and Development (Project Facilitation) Amendment Bill 2014 was presented to the Legislative Assembly on Thursday 20 March 2014 by Mr Corbell MLA, Minister for the Environment and Sustainable Development.
- 1.2 On 8 April 2014, the Assembly referred the Planning and Development (Project Facilitation) Amendment Bill 2014 to the Standing Committee on Planning, Environment and Territory and Municipal Services for inquiry and report by 6 May 2014.

CONDUCT OF THE INQUIRY

- 1.3 The Committee invited submissions from a range of stakeholders. The inquiry was advertised on the Committee website.
- 1.4 The Committee received 25 submissions which are listed at Appendix A and published on the inquiry website at the following location: http://www.parliament.act.gov.au/in-committees/standing_committees/Planning,-Environment-and-Territory-and-Municipal-Services/planning-and-development-project-facilitation-amendment-bill-2014
- 1.5 The Committee held two public hearings to assist its inquiry. On 14 April 2014 the Committee heard evidence from Mr Simon Corbell MLA, Minister for the Environment and Sustainable Development and directorate officials. On 24 April 2014 the Committee heard evidence from individuals, community groups and other organisations. A list of witnesses is provided at Appendix B. Transcripts of proceedings are available on the inquiry website at the following location: http://www.parliament.act.gov.au/in-committees/standing_committees/Planning,-Environment-and-Territory-and-Municipal-Services/planning-and-development-project-facilitation-amendment-bill-2014

TIMING OF THE INQUIRY

- 1.6 The Committee received correspondence from individuals and organisations expressing their concern about the short timeframe for the Committee to conduct its inquiry and requesting that the Committee extend the period of the inquiry.
- 1.7 The Committee acknowledges that there was a very short timeframe available for interested stakeholders to prepare submissions, particularly as the submission period coincided with school holidays and the Easter holiday period.

- 1.8 In light of the short timeframe, the Committee sought to expedite the inquiry process by adopting processes used by Senate committees when conducting legislation inquiries in short timeframes.

ACKNOWLEDGEMENT

- 1.9 The Committee expresses its thanks for the contributions made by submissions and witnesses who participated in public hearings.
- 1.10 The Committee would also like to thank staff from the Legislative Assembly Library for their assistance with this inquiry.

NOTES ON REFERENCES

- 1.11 References and footnotes in this report to the Hansard transcripts for public hearings are to the Proof Hansard. Please note that page numbers may vary between the proof and the final transcripts.

STRUCTURE OF THE REPORT

- 1.12 The Committee regrets that due to the compressed timeframe, it has been unable to conduct a comprehensive analysis of all provisions in the Planning and Development (Project Facilitation) Amendment Bill 2014. To developing this Report, the Committee has focused on the major issues brought to their attention in submissions and during public hearings.
- 1.13 The Report is structured as follows:
- Chapter 1—Introduction—which provides background information about the establishment and conduct of the inquiry as well as an overview of the Bill and comments from the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role);
 - Chapter 2—Comments on the Bill—provides a summary of evidence received on the four major sections of the Bill;
 - Chapter 3—Other Issues—provides a summary of evidence received on the following matters:
 - community consultation;
 - call-in powers;
 - background and rationale for the Bill
 - politicisation of planning matters; and
 - appeal provisions.

CONSIDERATION BY STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY (LEGISLATIVE SCRUTINY ROLE)

- 1.14 In accordance with its resolution of appointment, the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) examined the Project Facilitation Bill and made comments in Scrutiny Report 16.
- 1.15 In its report, the Scrutiny Committee wished to draw a number of matters to the attention of the Assembly including:
- access to justice concerns in relation to unavailability of judicial review in respect of a special precinct variation, development approvals within a special precinct area, as well as a declaration of a project of major significance;
 - clause 54 of the Bill proposes to add three classes of administrative decisions that are to be excluded from review under the *Planning and Development Act 2007*;
 - restriction declarations in special precincts.
- 1.16 The Committee notes that the Government provided a response to the Scrutiny Committee which is included in Scrutiny Report 17.

OVERVIEW OF THE INQUIRY

- 1.17 The Committee heard evidence from stakeholders about a range of matters related to the Bill. The majority of the evidence directly related to provisions in the Project Facilitation Bill related to special precinct variations and projects of major significance although evidence was received on the proposed changes to the lodgement of development applications with draft Territory Plan variations and draft Environmental Impact Statements.
- 1.18 The Committee also heard evidence on other broader issues such as community consultation, call-in powers, background and rationale for the Bill, politicisation of planning matters, and appeal provisions.
- 1.19 The Committee acknowledges the evidence indicating concern with particular areas of the Bill and, in light of these concerns, has made a number of recommendations.

Recommendation 1

- 1.20 The Committee recommends that the Planning and Development (Project Facilitation) Amendment Bill 2014 proceed subject to the recommendations set out in this report.

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2 COMMENTS ON THE BILL

INTRODUCTION

2.1 As outlined in Chapter 1, the Project Facilitation Bill proposes changes to the *Planning and Development Act 2007* in the following broad areas:

- allow the Territory Executive to vary the Territory Plan through a special precinct area variation;
- allow the Territory Executive to declare certain development proposals to be projects of major significance to the Territory;
- allow a development proponent to lodge a development application that applies a draft Territory Plan variation; and
- the impact track, allow simultaneous development approval variation and public consultation on the attached Environmental Impact Statement (EIS).

2.2 Each of these matters is discussed in further detail in this section of the Report.

SPECIAL PRECINCT AREA VARIATIONS

2.3 The Bill proposes to insert a new Part 5.3A into the Act to prescribe requirements for the variation of the Territory Plan to identify a special precinct area. A special precinct variation identifies a designated area for priority development and changes the Territory Plan. Draft special precinct variations will be subject to community consultation for a minimum of 30 working days.

2.4 Following public consultation, and consideration and approval by the Executive, the Special Precinct Variation is tabled in the Legislative Assembly as a disallowable instrument. If the proposal is not disallowed during the stated six sitting days, the relevant Territory Plan Variations will take effect.

2.5 Further information about special precinct area variations was provided to the Committee by ESDD officials at a public hearing as follows:

If I could add just a footnote to the description of the special precinct area process in terms of the content of the special precinct area variation, the content will also include any territory plan variations that might be needed to give effect to the structure plan that will be part of the special precinct area variation. For example, there could be a variation to permit a different range of uses within the special precinct area, and those

variations will take effect the moment that the special precinct area variation takes effect.²

DEFINITION OF SPECIAL PRECINCT AREA

2.6 Section 85H of the Bill prescribes when the Executive may make a special precinct variation. In accordance with this section, the Executive must consider that the special precinct area would achieve:

- (i) a substantial public benefit; and
- (ii) 1 or more of the following objectives:
 - (A) implementation or progress towards implementation of the planning strategy or elements of the planning strategy;
 - (B) progress towards sustainable development of the Territory;
 - (C) economic, social, cultural or environmental progress for the Territory.³

2.7 When providing evidence to the Committee, the Minister provided the following information about special precinct variations:

As part of determining whether or not there should be a special precinct variation to the territory plan, the executive must consider whether or not the variation will provide, firstly, for a substantial public benefit, whether it will achieve significant implementation of either the ACT planning strategy, the sustainable development of the territory or significant economic, social, cultural or environmental objectives for our community. The declaration of a special precinct variation will permit the territory plan to meet the statutory objects of the plan, and the structure plan that is developed as part of that process must be consistent with the statement of strategic directions outlined in the ACT planning strategy.

2.8 Several witnesses noted that the definition of a special precinct area is vague and ill defined.⁴

2.9 The National Trust of Australia (ACT) submitted that 'there is no clear understanding on how far reaching a special precinct can be defined and the Bill provides no limits and no methodology'. The National Trust also observed that 'there is also no clear understanding to what extent these boundaries can be adjusted by technical amendment or special amendment but there appears to be no limits'.⁵

² Mr Don Dunstan, *Transcript of Evidence*, 14 April 2014, p. 12.

³ Planning and Development (Project Facilitation) Amendment Bill 2014, p. 12.

⁴ See for example, Ms Margaret Fanning, Submission No. 21, p. 4, Belconnen Community Council, *Transcript of Evidence*, 24 April 2014, p. 57,

⁵ National Trust of Australia (ACT), Submission No. 9, p. 2.

- 2.10 Mrs Robyn Coghlan submitted that the criteria to define special precinct areas and projects of major significant (s85H and s137I respectively) 'are as typically obscure as the current criteria in the Territory Plan...There can be no transparency in decision-making based on such imprecise statement and there can be no surety to the community'.⁶
- 2.11 GNCA suggested that the a special precinct area should only be declared it if would achieve a substantial public benefit as well as meeting the three objectives in section 85H d(ii). Representatives from the GNCAA also indicated that the criteria to declare a special precinct area 'should not really be very different, or different at all, from 137I, criteria for declaration of a project of major significance'.⁷

COMMITTEE COMMENTS

- 2.12 The Committee notes the concerns raised about the criteria to be used to define a special precinct area.

SPECIAL AMENDMENTS

- 2.13 The Bill creates a new category of 'special amendments' to vary the Territory Plan. If a variation is categorised as a special amendment it will be subject to a limited consultation period of at least 20 working days. This is similar to the consideration of a number of categories of 'technical amendments' in the current *Planning and Development Act 2007*.
- 2.14 The Committee heard additional evidence from ESDD officials about special amendments as they apply to a declaration of a special precinct area:

But I think it is also perhaps important to keep in mind that the declaration of the special precinct area will, in itself, create an ability to do what are called special amendments to the territory plan for the future within that special precinct area. That process will allow future variation to the territory plan as it applies to the special precinct area through a 20-day consultation process, similar to the technical amendment process that we already have in the act. So it allows for variations to happen at the time of the special precinct area variation but it also allows, should the need arise or future issues arise within the special precinct area, for future territory plan variations to be made through that process.⁸

- 2.15 In a submission to the Committee, Mrs Robyn Coghlan expressed concern that 'once a declaration of a special precinct area has been made, a variation to change the boundary of a

⁶ Mrs Robyn Coghlan, Submission No. 13, p. 2.

⁷ Griffith/Narrabundah Community Association, *Transcript of Evidence*, 24 April 2014, p. 45.

⁸ Mr Don Dunstan, *Transcript of Evidence*, 14 April 2014, p. 12.

zone will be a technical amendment rather than a draft variation...or is it a special amendment?⁹

- 2.16 Ms Le Couteur also expressed concern that variations to a special precinct area will be regarded as special amendments and subject to limited consultation in the same way that technical amendments are currently considered 'with limited publicity and consultation'...[which] gives the potential for a significant reduction in public involvement'.¹⁰
- 2.17 Mr Leon Arundell submitted a similar concerned view that special amendments would be subject to a limited consultation period.

Recommendation 2

- 2.18 The Committee recommends that the consideration period for special amendments is widely promoted to ensure that a variety of stakeholders are able to participate in the consultation process.

RESTRICTION DECLARATIONS

- 2.19 The Bill provides that a restriction may be made for special precinct variations. The ES explains that:

A restriction declaration means that the *Heritage Act 2004* and the *Tree Protection Act 2005* (apart from declared sites and registered trees) do not apply to development approvals for these matters. A restriction declaration also means that the Heritage Council and Conservator of Flora and Fauna do not provide advice on development applications.¹¹

- 2.20 The Committee heard additional evidence about restriction declarations from the Minister as follows:

In relation to heritage restrictions, these restrictions are optional and are declared by the executive if they are believed to be warranted. And they are of course subject to disallowance in the Legislative Assembly. They relate to areas that are nominated but not yet determined by the ACT Heritage Council. In relation to sites that are nominated but not yet determined by the Heritage Council, the council is invited to provide comments to the executive in relation to those matters. Those comments would have

⁹ Mrs Robyn Coghlan, Submission No. 13, p. 2.

¹⁰ Ms Le Couteur, Submission No. 1, p. 1.

¹¹ Explanatory Statement, p. 11.

to be provided to the Legislative Assembly in the instance that the declaration made by the executive chose not to include nominated sites as part of the declaration.

The Heritage Act would not then apply to DA decisions, and the Heritage Council would not be able to process applications. It does not affect those sites which are already declared heritage sites and which are listed on the ACT heritage register. Those protections remain in effect.

A similar approach is adopted in relation to tree protection and the operation of the tree protection legislation. Again, it is discretionary on the part of the executive as to whether or not the tree protection provisions should apply for...regulated trees.¹²

CONCERNS ABOUT THE IMPACT OF RESTRICTION DECLARATIONS

- 2.21 Several witnesses expressed their concern about the potential negative impact of Restriction Declarations—with a particular focus on heritage.
- 2.22 Ms Margaret Fanning expressed concern that a restriction may be made for special precinct variations 'especially given that special precinct variations are likely to focus primarily on older areas in Inner Canberra where heritage values and tree values are of particular significance'.¹³
- 2.23 The Walter Burley Griffin Society identified 'the removal of application of the *Heritage Act* and the *Tree Protection Act* in the granting of development approvals in Special Precincts' as a negative aspect of the Bill.¹⁴
- 2.24 The National Trust of Australia (ACT) questioned whether the protections stated in the ES in relation to heritage declared sites are sufficient:

The explanatory memo seems to say that they are a declared site and they are protected. But if the Heritage Council does not have the right to give any advice—if a restriction declaration is made and the Heritage Council then has no right to give any further advice when we get to the DA stage—I am not sure what the assurance of protection for an existing declared site might mean, because the Heritage Council will never get to know what happens.¹⁵

- 2.25 In addition, the National Trust expressed concern with respect to greenfield sites:

¹² Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 2.

¹³ Ms Margaret Fanning, Submission No. 21, p. 3.

¹⁴ Walter Burley Griffin Society, Submission No. 18, p. 2.

¹⁵ National Trust of Australia (ACT), *Transcript of Evidence*, 24 April 2014, p. 75.

But in the greenfield sites, which this bill extends to, Indigenous artefacts that could well be not identified yet could exist in some of these sites and could be adversely affected as a result of the potential of this act.¹⁶

2.26 The ACT Heritage Council identified similar concerns to the National Trust in their submission where it was noted that there may be a number of possible unintended consequences as a result of some provision in the Project Facilitation Bill. In particular, the concern that Aboriginal heritage places (both registered and those subject to the blanket protective provisions of the Heritage Act) could be ignored in developments subject to project facilitation.¹⁷

2.27 When responding to a question from the Committee about the possible impact of the Bill, Mr Marshall responded:

We think that one of the possible consequences of this legislation may be that when an area is declared subject to this piece of legislation, there is no active effort to fully understand the range of values which may exist in that location that have not yet been formally identified through the ACT heritage register. They may be places, as I say, on our existing register or they may be places which are out there in the community but which have not yet come to the attention of someone to nominate those places or to the attention of the council itself.¹⁸

2.28 In order to overcome potential unintended consequences, the Heritage Council suggested the following amendments:

- capacity for Council to advise on a range of matters consistent with the general objectives of the Bill such as protection of known heritage places, investigation of potential heritage places, exploration with the developer of feasible and prudent alternatives for the conservation of heritage places, and the provision of independent expert heritage advice in the review of development proposals or EIS reports;
- the continued application of the protective mechanisms for Aboriginal sites provided under the Heritage Act; and
- that existing provisional registrations be allowed to proceed to consideration by Council for final registration, and registered if their heritage values are confirmed, or alternatively that an amendment be made to the Heritage Act such that any existing provisional registration timeframes are extended by the period of the project facilitation.¹⁹

¹⁶ National Trust of Australia (ACT), *Transcript of Evidence*, 24 April 2014, p. 75.

¹⁷ ACT Heritage Council, Submission No. 2, pp. 1-2.

¹⁸ ACT Heritage Council, *Transcript of Evidence*, 24 April 2014, p. 39.

¹⁹ ACT Heritage Council, Submission No. 2, p. 2.

2.29 The ACT Heritage Council indicated their support for 'fully informed decision-making that is essential to successful and effective planning outcomes. This includes knowledge of heritage values and expert, independent assessment of impacts of any proposed development'.²⁰

2.30 Mr Duncan Marshall, Chair of the ACT Heritage Council outlined the importance of the Heritage Council providing input and advice into proposed developments and projects:

That includes a good understanding of the heritage values of places and objects which might be impacted, that there is an expert independent assessment of the impacts of any such development and also a recognition that an important role that the Heritage Council plays in the current system is a negotiation process with proponents where we see proposals at hopefully an early stage. There is a negotiation from that point where perhaps a better heritage outcome can be achieved through that negotiation process.²¹

2.31 Furthermore, it was acknowledged that in order to minimise 'surprises' late in the process and to increase certainty for all affected parties, robust and comprehensive consultation and engagement processes should be utilised early.

COMMITTEE COMMENTS

2.32 The Committee notes the concerns raised about the restrictions on the consideration of heritage and tree protection issues when declaring special precinct areas and projects of major significance.

2.33 The Committee also notes that there is uncertainty for heritage sites that have been provisionally registered, in addition to heritage applications that are still under consideration by the ACT Heritage Council.

Recommendation 3

2.34 The Committee recommends that mechanisms to protect Aboriginal sites under the *Heritage Act 2004* continue to be provided for.

SYMONSTON MENTAL HEALTH FACILITY

2.35 The Bill includes provision that 'a special precinct variation in relation to a mental health facility at the Symonston site is a notifiable instrument and commences on the day stated in the variation'.²²

²⁰ ACT Heritage Council, Submission No. 2, p. 1.

²¹ ACT Heritage Council, *Transcript of Evidence*, 24 April 2014, p. 38.

²² Planning and Development (Project Facilitation) Amendment Bill 2014, p. 13.

- 2.36 When presenting the Bill in the Assembly on 20 March 2014, Minister Corbell noted that 'the proposed mental health facility in Symonston is an example of the type of project for which this bill is designed'. In accordance with this Bill:

A special precinct area and related declarations around the mental health facility are to be progressed through the proposed public consultation process to the territory executive. I flag at this point, however, that in light of the fact that the Assembly has already made its will known on this matter, the bill includes a special provision to permit a special precinct and related proposals to take effect immediately on notification.

In other words, the special precinct area proposals and the mental health facility are to proceed as a notifiable, not a disallowable, instrument. Members will of course have access to the draft proposal when it is released for public comment and I undertake to report to the Assembly on the results of the consultation.²³

- 2.37 The Committee also heard evidence about the proposed mental health facility from other witnesses.

- 2.38 Ms Caroline Le Couteur submitted:

The example included in the bill does not make the case of needing the special precinct area in my opinion. The plans for the secure mental health facility have been around for I think about 5 years. There would have been ample time for the government to put forward a territory plan variation, if it had wanted to.²⁴

- 2.39 Weston Creek Community Council submitted that the proposed Symonston Mental Health Facility and the Planning and Development (Project Facilitation) Amendment bill 2014 should be 'de-coupled' to allow for consideration of the mental health facility to be dealt with in isolation which would allow the remainder of the Bill to be reconsidered and subjected to greater public scrutiny.²⁵

- 2.40 On another matter relating to the Symonston Mental Health Facility, the Inner South Canberra Community Council noted their concern that the Bill includes provisions to fast-track the facility, with particular reference to their concern that the 'original consultation with local residents in relation to this project was seriously deficient'. Further to this, the ISCCC submitted that 'this project is in fact is [sic] a clear demonstration of the dangers of a system of planning approvals based on Assembly endorsement in individual cases'.²⁶

²³ Mr Simon Corbell MLA, *Debates*, 20 March 2014, p. 618.

²⁴ Ms Caroline Le Couteur, Submission No. 1, p. 1.

²⁵ Weston Creek Community Council, Submission No. 15, p. 4.

²⁶ Griffith/Narrabundah Community Association, Submission No. 16, p. 4.

COMMITTEE COMMENTS

- 2.41 The Committee notes the evidence provided to the inquiry suggesting that the Symonston Mental Health Facility project could be progressed through the development of individual, project specific legislation.
- 2.42 However, the Committee acknowledges that there is a need to expedite consideration for the development of the mental health facility.
- 2.43 The Committee notes that on 7 August 2013 the Legislative Assembly passed a motion affirming their support for the construction of a secure mental health facility in Symonston.²⁷

PROJECTS OF MAJOR SIGNIFICANCE

- 2.44 The Bill introduces a new process for the Executive to declare certain development proposals to be projects of major significance to the Territory. The ES describes the process in more detail:

The draft significant project declaration must state the development proposal that is the subject of the declaration, the proponent for the development proposal, the period the declaration is in force, how the project meets the criteria in s137I...and the likely assessment track and timeframes for assessment.²⁸

- 2.45 The consultation period and approvals processes for projects of major significance mirror the processes provided for the consideration of special precinct areas.

CRITERIA FOR DECLARATION OF PROJECT OF MAJOR SIGNIFICANCE

- 2.46 The Bill proposes that the Executive may only declare a development proposal a project of major significance if the development proposal:
- (a) would achieve a substantial public benefit; and
 - (b) is of major economic, social, cultural or environmental significance to the Territory.²⁹
- 2.47 When discussing details relating to the criteria for defining a major project, the Minister told the Committee:

²⁷ Legislative Assembly for the ACT, *Minutes of Proceedings*, 7 August 2013, available at: http://www.parliament.act.gov.au/data/assets/pdf_file/0011/479873/MoP027F.pdf

²⁸ Explanatory Statement, p. 17.

²⁹ Planning and Development (Project Facilitation) Amendment Bill 2014, p. 32.

The purpose is to provide for priority for projects that meet that threshold of the criteria set out for declaration by the executive, and that threshold is deliberately set at a very high level. It talks about substantial public benefit. It talks about projects that will provide that substantial public benefit and will progress the ACT planning strategy, the sustainable development of the territory or meet other territory economic, social, cultural or environmental objectives. So it is deliberately set at quite a high threshold. These assessments are always subjective. Nevertheless, it will not be solely within the hands of the executive to determine whether or not such a declaration will stand. It will also sit with all the elected members of this place.³⁰

- 2.48 On this issue, the Committee heard evidence from submitters that the criteria were too broad and general which could potentially allow for a high number of projects to fulfil the requirements to be declared a project of major significance.³¹
- 2.49 Friends of Hawker Village Inc. submitted that 'substantial public benefit is a vague term that means different things to different people' and suggested that there 'needs to be clearer definition of "substantial public benefit" to assist in the speedy assessment of "projects of significance"'.³²
- 2.50 Mr Leon Arundell also expressed concern at the criteria for declaring a project of major significance, noted that it could be possible to 'qualify a proposal to move all of the Territory's asbestos waste to the Heritage-listed Northbourne Oval as a project a major significance'.³³
- 2.51 Belconnen Community Council submitted that 'the language used in defining the basis of qualification for designation as special precinct area and project of major significance is value-laden and will require substantial value judgements on the part of the decision makers. Such decisions will not be transparent'.³⁴
- 2.52 GNCA suggested that section 137I (b) should be expanded to explicitly state that the project is of major economic, social, cultural or environmental significance and that it will be of benefit against those criteria.³⁵

CRITERIA USED IN OTHER JURISDICTIONS

- 2.53 The Minister advised the Committee that other jurisdictions have similar legislation to enable the declaration of projects of state significance.

³⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 13.

³¹ See for example, Submission No. 12, p. 2, Submission No. 15, p. 3, Submission 19, p. 1, Dr Max Kwiatowski, *Transcript of Evidence*, 24 April 2014, p. 18.

³² Submission No. 4, p. 1.

³³ Submission No. 8, p. 1.

³⁴ Submission No. 11, p. 1.

³⁵ Griffith/Narrabundah Community Association, *Transcript of Evidence*, 24 April 2014, p. 45.

- 2.54 The Committee notes that jurisdictions have enabled the approval of major or state significant projects in a variety of ways through different legislative frameworks and assessment and approval processes. The Committee has been unable to conduct a comprehensive analysis of practices in each jurisdiction however, a brief overview of these approaches is provided at Appendix D.
- 2.55 The Committee notes that there is a range of criteria used across jurisdictions to define a project of major significance and that additional information and guidance documents are published on some planning department websites.
- 2.56 Furthermore, the Committee is aware that some jurisdictions are currently considering further reforms to their planning systems and that consideration of these matters is an ongoing process.

Recommendation 4

- 2.57 The Committee recommends that the ACT Government produce a guidelines document to provide clarity about the criteria for declaring a project of major significance and that this document be published on the ACT Planning and Land Authority website.

CONSIDERATION OF PROPOSALS TO DECLARE A PROJECT OF MAJOR SIGNIFICANCE

- 2.58 Mr Thomas Keen submitted that proposals to declare a project of major significance should not bypass oversight by the Heritage Council of the Conservator of Flora and Fauna or 'avoid detailed examination by a bipartisan committee inquiry'. Due to the likely impact of a major project in the public and/or in the public space, the proposal 'should receive wide consideration, take place over a timeframe to allow this, and proceed on the basis of a balance of community views'.³⁶
- 2.59 Ms Martha Kinsman submitted her concerns with respect to section 137B of the Bill which excludes significant project declarations from requiring any public consultation if they fall within a draft special precinct variation. Ms Kinsman noted that 'this seems to mean that the *draft* [emphasis in submission] precinct variation will not need to include all possible special projects that it may encompass', which may result in the Executive adding special projects 'to any area that is part of a *draft* [emphasis in submission] special precinct variation'.³⁷

³⁶ Submission No. 10, p. 1.

³⁷ Submission No. 20, p. 1.

APPROVAL BY A VOTE OF A SPECIAL MAJORITY

2.60 The Committee inquired about whether the Minister had considered seeking approval from the Legislative Assembly on declarations of projects of major significance through a positive affirmation rather than a negative vote. In particular, the Minister was asked whether there would be merit in requiring a special majority, such as two thirds, for a declaration to be approved.

2.61 In response the Minister advised:

In relation to the disallowance process as opposed to a positive affirmation, as you describe it, the government has chosen to follow the precedent that already sits in the Planning and Development Act and has been in place for all territory plan variations since self-government, which is decisions on territory plan variations are the responsibility ultimately of the executive but they are subject to veto by the Legislative Assembly.

We think that mechanism has worked well in the past. It provides for a majority of members of the Assembly to reject a territory plan variation if they believe it is not warranted. That has occurred only on a very small number of occasions during the history of self-government, but it has occurred. And it also recognises the fact that the history of self-government is overwhelmingly one of minority government. There has only been one instance where there has been a majority government, where a single party has had a majority on the floor of the Assembly. So the disallowance mechanism has proven to be a very effective one in terms of cautioning the executive about how far it can go...³⁸

2.62 On the matter of requiring approval from a special majority, the Minister told the Committee:

In relation to special majority, no, the government has not given consideration to special majority. We do not believe special majority is warranted. Special majorities tend to be reserved for a very small number of matters. Indeed, the only special majority provisions relate exclusively to electoral matters such as the size of the Assembly and the operation of the electoral law.³⁹

2.63 The option of seeking approval via a special majority vote was also suggested by Dr Max Kwiatowski in evidence to the Committee. It was noted that this may provide an additional safeguard to ensure that the proposal is considered and approved by a larger number of representatives.⁴⁰

³⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 7.

³⁹ Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 7.

⁴⁰ Dr Max Kwiatowski, *Transcript of Evidence*, 24 April 2014, p. 19.

LODGEMENT OF DEVELOPMENT APPLICATION THAT APPLIES A DRAFT TERRITORY PLAN VARIATION

- 2.64 The Project Facilitation Bill proposes to allow a development proponent to lodge a development application on the basis that it complies with a draft Territory Plan variation that has been publicly notified.
- 2.65 The ES notes that the 'amendment allows the development application to progress at the same time the relevant Territory Plan variation is progressed...This process does not impact on the integrity of the development assessment and public notification process, as the development approval cannot be made unless and until the Territory Plan variation takes effect'.⁴¹
- 2.66 The Committee sought further information about how the two processes would be run concurrently, with particular reference to concerns that the simultaneous lodging of development applications and territory plan variations may result in a very complex process which is difficult to understand.
- 2.67 The Minister advised the Committee as follows:
- I argue, and I think the experience of the Planning and Land Authority backs this up, that it actually helps people to understand what a draft variation to the territory plan means in practice if they are able to see a DA. And a good example of this is the variation that the Assembly process has just completed in relation to the ABC flats site. There we have had a rezoning, but we have not had before us a DA that outlines at that very high level of detail what the built outcome is going to be on the ground as a consequence of the territory plan variation.⁴²
- 2.68 Further to this, the Minister observed that there are risks associated with lodging a development application at the same time as a draft variation to the territory plan because if the draft variation is not supported, then the development application will not be required.
- 2.69 The Minister went on to say that it is because of the risks associated with the concurrent lodgement that it is an optional process. Furthermore, the Minister noted that 'we know it is a process that is welcomed by the development sector because it allows them to streamline the preparation of their documentation and bring it forward concurrently'.⁴³

⁴¹ Explanatory Statement, p. 23.

⁴² *Transcript of Evidence*, 14 April 2014, p. 14.

⁴³ *Transcript of Evidence*, 14 April 2014, p. 14.

- 2.70 In response to questions about any potential issues that may arise if a draft variation is approved but the associated development application is not approved, the Committee was advised that this situation can arise under the existing system whereby a variation to the Territory Plan is approved to allow for a particular type of development and a development application subsequently lodged may not be approved.⁴⁴
- 2.71 The Minister confirmed that the only change that would result is in 'relation to this aspect of the bill is the period within which these matters can be deliberated upon and dealt with. Rather than going for six or 18 months in the territory plan variation and then another six to nine months beyond that in relation to a development application, you do them together. So it is a shorter period'.⁴⁵
- 2.72 The Committee heard positive and negative views on the merits of allowing for the lodgement of a DA that relates to a draft Territory Plan variation.
- 2.73 Friends of Hawker Village Inc. submitted that simultaneous lodgement of a DA, DV and an EIS will require that considerable resources are devoted to complete assessment of all documents in the required time which is 'likely to divert scarce resources from other development applications not in the fast track and to slow down their processing'.⁴⁶
- 2.74 Similarly, the Belconnen Community Council submitted that compressing the assessment DAs, DVs and EIS 'into one short time period will place extraordinary pressure on the planning staff with a likely decrease in quality of decision-making'. In addition, prioritising special projects will likely come at the expense of assessment delays for other projects.⁴⁷
- 2.75 The GNCA observed that enabling the community to consider a DA at the same time as a draft variation is positive as this would assist stakeholders to gain a more holistic perspective of what is intended for the site. Furthermore, it was suggested that it may be worth considering mandating that a DA must be submitted at the same time as a DV for some of the major projects.⁴⁸

COMMITTEE COMMENTS

- 2.76 The Committee notes that the evidence provided during the inquiry demonstrated different views about the concurrent consideration of Development Applications and Draft Variations to the Territory Plan.

⁴⁴ *Transcript of Evidence*, 14 April 2014, p. 15.

⁴⁵ *Transcript of Evidence*, 14 April 2014, p. 16.

⁴⁶ Submission No. 4, p. 2.

⁴⁷ Submission No. 11, p. 1.

⁴⁸ Griffith/Narrabundah Community Association, *Transcript of Evidence*, 24 April 2014, pp. 44-45, p. 47.

Recommendation 5

- 2.77 The Committee recommends that the ACT Government consider that the proposal to allow a development proponent to lodge a development application at the same time as a draft variation is considered be amended from being an optional provision to a mandatory requirement.

CONCURRENT LODGEMENT OF DEVELOPMENT APPLICATION AND ENVIRONMENTAL IMPACT STATEMENT

- 2.78 As noted in the Explanatory Statement, the Bill allows for the concurrent lodgement of a development application in the impact track with a draft Environmental Impact Statement (EIS). Currently, DAs would ordinarily require the preparation of an EIS before it could proceed. The Bill permits the proponent to complete the required EIS in tandem with the lodgement of the development application itself.⁴⁹
- 2.79 The Minister advised the Committee that this change is a time-saving measure:
- By allowing them to run concurrently, again both the Planning and Land Authority and the broader community can see how one takes account of the other, and vice versa, and also saves the proponent time in being able to submit both matters concurrently. The EIS must still be completed before a DA is granted, and the EIS must still address all of the issues that are currently required under territory law.⁵⁰
- 2.80 The ES notes that 'from the proponent's point of view this option comes with some risk. The proponent risks the entire exercise being rejected on the basis that the completed EIS is not satisfactory even if the development application was otherwise acceptable. For this reason, this process remains an option available rather than a mandatory process'.⁵¹
- 2.81 The Committee heard positive and negative views on the merits of the concurrent lodgement of a DA and a draft EIS.

⁴⁹ Explanatory Statement, p. 24.

⁵⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 4.

⁵¹ Explanatory Statement, p. 24.

2.82 The GNCA observed that there is some merit in the EIS being available 'up front' and at the same time as the DA.⁵²

2.83 Whilst acknowledging that this issue had not been directly considered by the Heritage Council, Mr Marshall noted that there is a risk associated with the EIS and DA being considered concurrently:

...in that if the EIS is found to be not adequate in some way, if it has not dealt effectively with heritage or environmental issues, the proposal falls over, in a sense, or is stalled while those issues are reviewed and revised and a better impact assessment is undertaken. That may delay a development project.⁵³

2.84 In this context, Mr Marshall explained that although the Heritage Council do not deal with EIS, the Council does consider heritage impact statements that focus solely on heritage values. Mr Marshall indicated that DAs and heritage impact statements have been lodged concurrently in the past:

...my recollection is that they have been successfully dealt with. The one qualification I would make is that usually that lodgement has occurred after significant prior consultations—pre-development application discussions—which have gone a long way to ironing out potential issues. So it is not as though the documentation arrives as a complete surprise at the Heritage Council and we have to deal with it as an entirely new issue. There has been what has been often a very useful preliminary discussion or series of discussions in order to both better understand impacts and also, as I suggested in my introduction, reshape the development in some ways to either avoid development impacts or minimise those impacts in some improved way.⁵⁴

2.85 As indicted above, the Belconnen Community Council anticipates difficulties with the concurrent consideration of EIS, DA and DV as this will place a significant pressure to consider a number of documents—particularly as much of this work is done by volunteers.⁵⁵

⁵² Griffith/Narrabundah Community Association, *Transcript of Evidence*, 24 April 2014, p. 49.

⁵³ ACT Heritage Council, *Transcript of Evidence*, 24 April 2014, p. 41.

⁵⁴ ACT Heritage Council, *Transcript of Evidence*, 24 April 2014, pp. 41-42.

⁵⁵ Belconnen Community Council, *of Evidence*, 24 April 2014, p. 55.

COMMITTEE COMMENTS

- 2.86 The Committee notes that there are differing views about the concurrent lodgement of Development Applications and Environmental Impact Statements.

Recommendation 6

- 2.87 The Committee recommends that the ACT Government enable the concurrent lodgement of Environmental Impact Statements, Draft Variations and Development Applications for all public and private projects outside Special Precinct Areas.

Confidential Draft

Confidential Draft

3 OTHER ISSUES

- 3.1 The Committee heard evidence on a number of other matters relating to the Bill including, community consultation, call-in powers, background and rationale for the Bill, the politicisation on planning decisions and appeal processes. Each of these issues is discussed in further detail in this section of the Report.

COMMUNITY CONSULTATION

- 3.2 The Committee heard evidence from a number of witnesses about matters relating to community consultation in two key areas:
- level of community consultation about the Planning and Development (Project Facilitation) Amendment Bill 2014; and
 - consultation provisions outlined in the Planning and Development (Project Facilitation) Amendment Bill 2014.

CONSULTATION ABOUT THE BILL

- 3.3 The Committee heard evidence that there has not been sufficient public consultation on this Bill.⁵⁶
- 3.4 The Belconnen Community Council submitted that the consultation period should be extended to 90 days, noting the short timeframe for committee consideration of the Bill.⁵⁷
- 3.5 The National Trust of Australia (ACT) submitted that 'the original timetable for this Bill did not sit well with any view that public consultation in planning matters was important...While there may be benefits to the proposals there are concerns that need to be clarified by a reasonable and sensible consultation process'.⁵⁸
- 3.6 In a submission to the inquiry, Dr Max Kwiatkowski observed that 'the Project Facilitation Bill...looks like a case study in how **not** to do public policy' [emphasis in submission] due to the rushed nature and the lack of community consultation of the legislation.⁵⁹ When responding to questions from the Committee, Dr Kwiatkowski explained that his experience working in a

⁵⁶ See for example, Submission No. 1, Submission No. 9, Submission No. 11, Submission No. 15, pp. 4-5, Submission No. 16, Submission No. 21, p. 1, Planning Institute of Australia (ACT Division) *Transcript of Evidence*, 24 April 2014, p. 9,

⁵⁷ Submission No. 11, p. 1.

⁵⁸ Submission No. 9, p. 3.

⁵⁹ Submission No. 12, p. 2.

federal government department indicated that draft legislation should be subjected to a for week consultation period. Following this consultation, the government would usually take four weeks to consider comments and then a redraft of the legislation would be released for further consideration.⁶⁰

- 3.7 The Weston Creek Community Council suggested that there should be at least 60 days public consultation on the Bill.⁶¹
- 3.8 Several witnesses advised the Committee that they were not aware that the Project Facilitation Bill was being considered and they only became aware of it when it was presented in the Legislative Assembly on 20 March 2014.
- 3.9 In response to a question taken on notice about when the WCCC was first advised by the ACT Government about the Bill, Mr Anderson advised that the Council has record of receiving four emails: two emails from Mr Rattenbury (dated 20 March 2014 and 8 April 2014), one email from Mr Rattenbury's office (dated 7 April 2014) and one email from the Secretariat to the ACTPLA Planning and Development Forum relating to an agenda item relating to the Bill scheduled for discussion at the meeting the following day (dated 8 April 2014).

REFERRAL OF THE BILL TO THE STANDING COMMITTEE ON PLANNING, ENVIRONMENT AND TERRITORY AND MUNICIPAL SERVICES

- 3.10 A number of submissions noted that it was positive that the Bill had been referred to the Committee but expressed concern about the reporting date agreed to by the Legislative Assembly.⁶²
- 3.11 The Inner South Canberra Community Council and the Griffith/Narrabundah Community Association recommended that the time allowed to the Committee for reporting be extended to 7 July 2014 which would allow 90 days for consultation and consideration.⁶³
- 3.12 The North Canberra Community Council also submitted 'that the period for public consultation on this Bill be extended by ninety days to allow for full and informed public consideration and comment to be available for the Committee's deliberations'.⁶⁴

⁶⁰ Dr Max Kwiatowski, *Transcript of Evidence*, 24 April 2014, p. XX.

⁶¹ Weston Creek Community Council, *Transcript of Evidence*, 24 April 2014, p. 32.

⁶² See for example, Yarralumla Residents Association Inc, Submission No. 19, p. 1.

⁶³ Inner South Canberra Community Council, Submission No. 16, p. X, Griffith/Narrabundah Community Association, Submission No. 17, p. 4.

⁶⁴ North Canberra Community Council, Submission No. 22, p. 1.

CONSULTATION PROVISIONS IN THE BILL

- 3.13 The Committee heard evidence that the consultation requirements in the Bill do not allow sufficient time for the community to consider proposals.
- 3.14 Woden Valley Community Council submitted that the requirements in the Bill for 30 working days for public consultation on fast-track proposal is 'clearly inadequate for public comments on projects which will have far-reaching significance for the future of Canberra'.⁶⁵
- 3.15 The ISCCC identified deficiencies in the consultative arrangements in the Bill including:
- 30 working days is insufficient for analysis and comment on complex special precinct areas and significant project declarations;
 - unavailability of relevant documents on-line and for free; and
 - absence of a requirement to publish information on the ACTPLA website.⁶⁶
- 3.16 Further to this, the ISCCC submitted that 'enhanced opportunities for community consultation will actually improve the quality of developments and projects to be advanced under the new scheme'.⁶⁷
- 3.17 Woden Valley Community Council submitted that the requirements in the Bill for 30 working days for public consultation on fast-track proposal is 'clearly inadequate for public comments on projects which will have far-reaching significance for the future of Canberra'.⁶⁸

SUGGESTED TIMEFRAME FOR COMMUNITY CONSULTATION

- 3.18 The Committee heard evidence about alternate timeframes for community consultation.
- 3.19 The GNCA submitted that the proposed periods for public consultation in relation to draft special precinct variations and draft significant project declarations be amended from 30 to 60 working days and the consultation period for inspection of consultation comments be extended from 15 to 30 working days.⁶⁹
- 3.20 Similarly, the Yarralumla Residents Association Inc. submitted that the period of consultation for proposed special precinct areas and significant projects be extended to at least 60 working days and information material should be available online and free of charge.⁷⁰

⁶⁵ Woden Valley Community Council Inc, Submission No. 3, p. 2.

⁶⁶ Inner South Canberra Community Council, Submission No. 16, p. 2.

⁶⁷ Inner South Canberra Community Council, Submission No. 16, p. 2.

⁶⁸ Woden Valley Community Council Inc, Submission No. 3, p. 2.

⁶⁹ Griffith/Narrabundah Community Association, Submission No. 17, p. 8.

⁷⁰ Yarralumla Residents Association Inc, Submission No. 19, p. 1.

- 3.21 When responding to questions from the Committee, the WVCC and the ISCCC suggested that there should be at least 60 days for consultation.⁷¹
- 3.22 Similarly, the Walter Burley Griffin Society noted that 60 days is a reasonable timeframe for the community to consider proposals.⁷²

COMMITTEE COMMENTS

- 3.23 The Committee notes the large number of comments received expressing concern at the limited consultation about the Project Facilitation Bill and the consultation provisions contained in the Bill.
- 3.24 The Committee acknowledges that under section 63 of the current *Planning and Development Act 2007*, the public consultation period for 'standard' draft plan variations is 'not less than 30 working days' and that copies of written comments about the draft plan variation are 'made available (unless exempted) for public inspection for a period of at least 15 working days starting 10 working days after the day the consultation period ends, at stated places.'⁷³
- 3.25 In addition, there is provisions for further review and consideration of the draft plan variations by Legislative Assembly committees—either once referred by the relevant Minister or the Committee can also considering the draft plan variation documents even if the draft plan variation is not otherwise referred to the committee.⁷⁴
- 3.26 Notwithstanding the existing consultation periods for draft plan variations, the Committee accepts that, due to the expected complex nature of proposals to declare special areas precincts and projects of major significance and the range of documentation involved, additional time should be provided for consultation. Allowing additional time for consultation at the beginning of the process may reduce the risk of issues arising later in the development process.
- 3.27 In light of this, the Committee suggests that further consideration be given to extending the nominated consultation periods in the Project Facilitation Bill.

⁷¹ Woden Valley Community Council, *Transcript of Evidence*, 24 April 2014, p. 37, Inner South Canberra Community Council, *Transcript of Evidence*, 24 April 2014, p. 52.

⁷² Walter Burley Griffin Association, *Transcript of Evidence*, 24 April 2014, p. 14.

⁷³ *Planning and Development Act 2007*, p. 46.

⁷⁴ *Planning and Development Act 2007*, p. 54.

Recommendation 7

- 3.28 The Committee recommends that the period for community consultation to consider draft Special Precinct Variations and draft Significant Project Declarations be extended to a minimum of 60 days.

Recommendation 8

- 3.29 The Committee recommends that the consultation period for inspection of consultation comments on draft Special Precinct Variations and draft Significant Project Declarations be extended to a minimum of 30 working days.

Recommendation 9

- 3.30 The Committee recommends that all documentation related to draft Special Precinct Variations and draft Significant Project Declarations be made available free of charge on the Environment and Sustainable Development website.

CALL-IN POWERS

- 3.31 When discussing provisions in the Bill, a number of witnesses also raised concerns about the existing call-in powers available to the Minister in the *Planning and Development Act 2007*. In particular, it was suggested that because the Government has indicated that the new provisions are less controversial than call-in powers, this may mean that the new powers are used more frequently than call-in powers have been used to date.⁷⁵
- 3.32 The ISCCC submitted that maintaining the Minister's capacity to exercise call-in powers under the *Planning and Development Act 2007* 'casts significant doubt on one of the key justifications of the Bill' because even if the Legislative Assembly was to disallow a special precinct variation or project of major significance, the project may still proceed if the Minister chose to use call-in powers.⁷⁶
- 3.33 Some witnesses acknowledged that the community consultation provisions and consideration by the Legislative Assembly about special precinct variations and projects of major significance included in the Bill may be an improvement on existing call-in powers.⁷⁷

⁷⁵ Dr Max Kwiatowski, Submission No. 12, p. 1, Submission No. 15, p. 3,

⁷⁶ Submission No. 16, p. 2.

⁷⁷ Mr Patrick Stein, Submission No. 7, p. 1, Submission No. 18, p. 1,

- 3.34 However, it should be acknowledged that there was some conflicting evidence provided to the Committee, whereby some witnesses had made the assumption that call-in powers under the *Planning and Development Act 2007* would no longer be available under the new Bill.⁷⁸
- 3.35 The National Trust of Australia (ACT) recommended that the existing call-in powers in the *Planning and Development Act 2007* should be reviewed when this Bill and the Heritage Act amendments are being settled.⁷⁹
- 3.36 When discussing call-in powers, the GNCA suggested that guidelines should be developed to inform the application of call-in powers. Similarly, Woden Valley Community Council observed that more information needs to be made available to explain to the community the case that has been made to inform the use of the call-in power.
- 3.37 In response to questions from the Committee, the Minister advised that the government is not proposing any repeal of existing call-in provisions. The Minister went on to explain:

The effect, though, of this legislation will be to significantly reduce, in my view, the number of instances where a minister would be asked to exercise a call-in power. The criteria for the use of the call-in power are also set out in the legislation. They are different from the criteria used to determine whether or not a declaration of a special precinct should occur. And there will be some instances where a call-in may be warranted because they do not meet the criteria for a special precinct but they nevertheless meet the lower thresholds that exist for call-ins. So they are designed to deal with different circumstances, and one complements the other'.⁸⁰

COMMITTEE COMMENTS

- 3.38 The Committee notes that there was not universal understanding of call-in powers as they relate to the Project Facilitation Bill.

BACKGROUND AND RATIONALE FOR THE BILL

- 3.39 When presenting the Project Facilitation Bill to the Legislative Assembly on 20 March 2014, the Minister noted that 'the bill cuts building industry red tape and fast tracks priority developments in the Territory. This bill is a vital part of the Government's stimulus package, and will help our building industry through tough economic times'.⁸¹

⁷⁸ Walter Burley Griffin Society, *Transcript of Evidence*, 24 April 2014, p. 26.

⁷⁹ National Trust of Australia, Submission No. 9, p. 2.

⁸⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 10.

⁸¹ Mr Simon Corbell MLA, *Debates*, 20 March 2014, p. 618.

- 3.40 When providing evidence to the Committee at a public hearing, the Minister provided the following information to explain the outcomes that would be achieved from this Bill:

It is worth highlighting that this bill was announced as part of a package of measures introduced by the Chief Minister last month to provide stimulus for the Canberra building and construction industry and was composed of a number of other elements as well as this bill...⁸²

- 3.41 The Committee heard evidence from several witnesses that a strong case to justify the need for the Bill had not been presented.⁸³
- 3.42 Ms Margaret Fanning submitted that the Bill proposes fundamental changes to the ACT planning system 'yet there is little acknowledgement in the Minister's Explanatory Statement of the radical nature of these changes...There has been no attempt to identify flaws in the existing planning processes which the legislation is intended to resolve but simply an assertion that the changes are necessary to deal with claimed "rigidities: in the planning system'.'⁸⁴
- 3.43 The GNCA observed that the benefits and disadvantages of 'a model where the legislature passes a once off omnibus bill to deal with all conceivable contingencies' as compared to dealing with major projects through project specific legislation 'have yet to be canvassed by the Government'.⁸⁵
- 3.44 The Walter Burley Griffin Society offered the following view on the Bill:
- In the society's view, the major problem of the draft Planning and Development (Project Facilitation) Amendment Bill 2014 is the specious claims about transparency and accountability, when in reality they threaten a marked decline in democratic processes with inevitable consequential poor outcomes in terms of environmental heritage, design and social outcomes.⁸⁶

SCOPE OF THE BILL

- 3.45 On a related issue, the Planning Institute of Australia (ACT Division) indicated their support for the 'standard objectives for faster decision-making and greater certainty for critical projects but the improvements should be made in such a way that they are available to all citizens, not just the government'. The Planning Institute went on to note that the 'project facilitation mass

⁸² Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 1.

⁸³ See for example, Submission No. 12, p. 1, Submission No. 13, p. 2, Submission No. 10, p. 3, Walter Burley Griffin Association, *Transcript of Evidence*, 24 April 2014, p. 16, Griffith/Narrabundah Community Association, *Transcript of Evidence*, 24 April 2014, p. 42.

⁸⁴ Ms Margaret Fanning, Submission No. 21, p. 2

⁸⁵ Submission No. 17, pp. 1-2

⁸⁶ Walter Burley Griffin Society, *Transcript of Evidence*, 24 April 2014, p. 25.

rezoning objectives can be met...through existing legislation in regard to variations, precinct codes and overlays'. Major projects have been delivered successful under the existing Act.⁸⁷

- 3.46 The Planning Institute also submitted that it is important that governments should follow standard planning development processes in the same way that other developers would be required to do.

REVIEW OF THE BILL

- 3.47 In light of the Minister's comments that the Bill is part of a stimulus package, the Committee asked the Minister when the legislation would be repealed. The Minister responded:

It is not proposed to be repealed. It is proposed to be ongoing legislation. But it is part of a suite of measures to provide greater confidence to the building industry. Some of those measures are short term and some of those measures are ongoing.⁸⁸

- 3.48 On a related issued, Mr John Ley recommended that a sunset clause be inserted into the Bill:

At this time, before the legislation has been passed, it is difficult to foresee all the possible outcomes of its implementation. However, in several years time we will have had a good deal of experience with the application of the legislation. Given that it represents a very substantial change in the ACT's established planning legislation, I believe there is a very good case for inserting a sunset clause, to expire in four or five years time, so that the next Assembly will automatically review the operation of the Act, in light of the experience of its strengths and weaknesses over that period.⁸⁹

- 3.49 Similarly, Ms Le Couteur suggested that a maximum period for a declaration of a special precinct area or major project be inserted—'Possibly a maximum of 4 years would be appropriate as it would give time for much work to be approved while ensuring that every legislative assembly reviews all declarations'.⁹⁰

COMMITTEE COMMENTS

- 3.50 The Committees notes the evidence provided to suggest that ongoing discussion should be undertaken about the effectiveness and ongoing requirement for the provisions contained in the Bill. In light of this, the Committee is of the view that a sunset clause should be included in the Bill so that the legislation shall cease to have effect after a defined period. This will

⁸⁷ Planning Institute of Australia (ACT Division), *Transcript of Evidence*, 24 April 2014, p. 19.

⁸⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 10.

⁸⁹ Mr John Ley, Submission No. 24, p. 2.

⁹⁰ Ms Le Couteur, Submission No. 1. P.2.

facilitate discussion about whether the provisions to declare special precinct areas and projects of major significance should continue.

Recommendation 10

- 3.51 The Committee recommends that the Planning and Development (Project Facilitation) Amendment Bill 2014 be amended to include a sunset clause.**

POLITICISATION OF PLANNING DECISIONS

- 3.52 The Committee heard evidence relating to concerns that provisions in the Bill would lead to politicisation of planning decisions.
- 3.53 The GNCA observed that a consequence of the changes introduced by this Bill is that the Minister will be the decision maker at the expense of ACTPLA, which will result in planning in the ACT becoming much more politicised.⁹¹
- 3.54 With particular reference to the 2008 project to provide for a data centre and power station in Block 1671 Tuggeranong, Mr Peter Vincent notes his concerns as follows:

I am very concerned that political will may override affected residents' concerns and normal rights. There needs to be an independent process in assessing the potential impacts and benefits of the project. Otherwise the community and specifically affected residents are powerless.⁹²

- 3.55 Mr Patrick Stein submitted:

The ACT has had one of the best planning systems in Australia with least corruption—compared to local councils in other states—because approvals are removed from the assembly/council and assessed by historically relatively well resourced and professional planners and designers against standard and transparent rules.⁹³

- 3.56 Similarly, WCCC submitted that:

The ideal situation in any community should be the separation of planning and politics. The Project Facilitation Bill heads in the opposite direction and concentrates power in the Legislative Assembly. There is no doubt that voting on projects will be on party

⁹¹ Griffith/Narrabundah Community Association, Submission No. 17, p. 3.

⁹² Mr Peter Vincent, Submission No. 6, p. 1.

⁹³ Mr Patrick Stein, Submission No. 7, p. 1.

lines – any party with majority support will always carry the day and get its favoured project through, no matter how controversial or inappropriate it may be.⁹⁴

3.57 The Committee also heard evidence from the WVCC on this issue:

The second point is that the bill gives the executive—not the parliament; the executive, that is, the planning minister and the cabinet—excessive and unaccountable powers over development associated with projects of significance or special precincts. Even the role of the Assembly is watered down because all the Assembly can do is vote to disallow the instruments that give effect to the proposed fast-track legislation. I guess that they are two key points about how the institutions of planning are unbalanced as a result of this bill.⁹⁵

3.58 Other witnesses also expressed concern that a disallowable instrument is not the appropriate mechanism for declarations to be finalised.

3.59 A different view was offered by the Belconnen Community Council who indicated supported for the disallowable instrument provision as it ‘allows the Assembly to reject the declaration of the special precinct or the special project in the first place’.⁹⁶

APPEALS PROCESSES

3.60 The ES acknowledges that the restriction of third party appeals to the ACAT and review by the Supreme Court arguably engages sections 17 (Taking part in public life) and section 21 (Fair trial) of the Human Rights Act 2004. The ES also provides the following additional detail:

However, case law indicates that human rights legislation does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial...In addition, the right to take part in public life is comprehensively addressed by the extensive opportunities for public comment on the draft declaration, publicly notified development applications and technical amendments to the Territory Plan. The declaration will also be subject to scrutiny and debate by the Canberra community’s democratically elected representatives in the Legislative Assembly.⁹⁷

⁹⁴ Weston Creek Community Council, Submission No. 15, p. 2.

⁹⁵ Woden Valley Community Council, *Transcript of Evidence*, 24 April 2014, p. 49.

⁹⁶ Belconnen Community Association, *Transcript of Evidence*, 24 April 2014, p. 71.

⁹⁷ Explanatory Statement, p. 15, p. 21.

- 3.61 Several submissions noted their concern that the Bill proposes to remove the right to appeal under ACAT merit review and Supreme Court review under the *Administrative Decisions (Judicial Review) Act 1989*.⁹⁸
- 3.62 Woden Valley Community Council noted that because appeals must be lodged within 60 days of the fast-track decision being made, this will further 'reduce any effective government accountability in relation to special projects. On many occasions, appeals have uncovered flaws in ACTPLA decision making. It is important that adequate appeal rights be maintained'.⁹⁹
- 3.63 Mr Patrick Stein suggested that one way to address perceived unreasonable delays due to reviews and appeals is to define a reasonable maximum time to resolve appeals and complete reviews—for example, six months.¹⁰⁰
- 3.64 Weston Creek Community Council submitted that the safeguards identified in the ES are insufficient and suggested that 'further work on the legislation should be undertaken, including legal opinion by independent lawyers and, if relevant, a statement or submission from the Human Rights Commissioner to satisfy the community that Human Rights are not infringed'.¹⁰¹
- 3.65 In their submission to the inquiry, the ISCCC suggested that the Bill be amended to retain judicial review of all decisions made in the Bill. The submission also noted that there should be a much more level playing field in relation to the conduct of appeals because developers are at an advantage compared to community members and their representative groups.¹⁰²
- 3.66 An alternative view was proposed by the Planning Institute of Australia (ACT Division) who expressed their support for 'limited third-party appeals at the end of the process rather than the open slather third-party merits appeals within the existing system'.¹⁰³
- 3.67 When responding to questions on this matter at a public hearing, Mr Viv Straw, President explained further:

I think where people come unstuck is that there are a number of government departments that have three or four bites at the cherry—heritage, environment, and a number of other groups have an input into the strategic frame and then they get more information and they have a refined input later on. In the meantime they do some

⁹⁸ See for example, Submission No. 9, p. 2, Submission No. 11, p. 1, Submission No. 12, p. 1, Submission No. 14, p. 2, Submission 17, p. 6, Submission 18, p. 2, Submission No. 21, p. 4,

⁹⁹ Submission 3, p. 2

¹⁰⁰ Submission 7, p. 1.

¹⁰¹ Submission No. 15, p. 4.

¹⁰² Inner South Canberra Community Council, Submission No. 16, p. 3.

¹⁰³ Planning Institute of Australia (ACT Division), Submission No. 25, p. 2.

background work and discover that an item should be listed as heritage or whatever and it was not done up-front.¹⁰⁴

3.68 In order to remedy this, the Planning Institute reiterated the importance of 'clarifying all those issues up-front, getting them out of the way and having good discussions in a single room really cleaned things up'.¹⁰⁵

3.69 The Committee discussed appeals with the Minister who stated:

The rationale for that [no ACAT merit review] is that, if the executive and consequently the Assembly consider that a declaration of a project of major significance is warranted and it is not disallowed on the floor of the Assembly, then that is giving an indication as to the priority and the significance of the project and that issues around merit review should not come into play.

Similarly in relation to the Administrative Decision (Judicial Review) Act, at the moment in relation to the operation of the call-in powers, as a comparison, decisions made by the minister using call-in powers are subject to AD(JR), and there is an example of that currently occurring in relation to the litigation that surrounds my decision to call in and approve the redevelopment of the Giralang shops. Whilst that is clearly not a project of the territorial significance type, it nevertheless highlights how AD(JR) currently operates in relation to call-in powers. The government believes that the use of AD(JR) can be exploited by those who are opposed to particular projects, often on commercial grounds—and we certainly see that in relation to the Giralang litigation—and therefore we propose not to provide for the operation of AD(JR).

We do, however, accept that the Supreme Court of course has an inherent jurisdiction under common law to consider appeals on decisions, and we propose that in relation to those other legal proceedings there should be a set period within which those actions should be brought, and the bill proposes that such actions should be brought within 60 days.¹⁰⁶

3.70 The Committee inquired about the human rights implications in declaring special precinct areas and how that might affect the right of appeal in civil matters. The Minister advised:

There is a limitation in relation to the right to seek review of a decision through the courts. That is a limitation on people's rights, and the government believes, though, that that limitation is proportionate to the extent necessary to provide certainty for decision-making on major projects.

¹⁰⁴ Planning Institute of Australia (ACT Division), *Transcript of Evidence*, 24 April 2014, p. 21.

¹⁰⁵ Planning Institute of Australia (ACT Division), *Transcript of Evidence*, 24 April 2014, p. 22.

¹⁰⁶ Mr Simon Corbell MLA, *Transcript of Evidence*, 14 April 2014, p. 3.

It is worth highlighting that the purpose, of course, underlying this legislation is to give clear certainty and clear time frames around decision-making on whether or not certain projects are able to proceed.

- 3.71 The National Trust of Australia (ACT Division) advised the Committee that they 'have some considerable concerns about the truncating and elimination of appeals rights'. The Committee was further advised that the number of appeals that go to ACAT from development applications:

...is miniscule as a fraction of the total number of development applications. In turn, the number of matters that go from the ACAT or anywhere to the Supreme Court is even less than miniscule. It is a fraction of the first group.¹⁰⁷

COMMITTEE COMMENTS

- 3.72 The Committee notes that several witnesses expressed concern that the Bill abolishes appeal provisions to both the ACAT and the Supreme Court under ADJR. The Committee further notes that the issue of removing appeal provision was raised as an issue by the Scrutiny Committee.
- 3.73 The Committee acknowledges that the Planning Institute of Australia (ACT Division) indicated their support for the relaxation of some appeal rights, suggesting that the focus needs to be on quality and comprehensive consultation and consideration when proposals are first developed, to reduce the risk that appeals will be required.

¹⁰⁷ National Trust of Australia (ACT), *Transcript of Evidence*, 24 April 2014, pp. 59-60.

CONCLUDING COMMENTS

- 3.74 The Committee notes that the Bill seeks to improve process efficiencies in the development assessment and Territory Plan variation process and facilitate the delivery of key Government projects. To achieve this, the Bill includes provisions which make fundamental changes to the planning system in the ACT.
- 3.75 In light of this, the Committee is of the view that the application of the Bill should be reviewed during its period of enactment.

Recommendation 11

- 3.76 The Committee recommends that the ACT Government conduct a review of the application of the Planning and Development (Project Facilitation) Amendment Bill 2014 during its period of enactment.

[Signature]

Chair

[Date report adopted by Committee]

Appendix A

List of Submissions

The following submissions were received by the Committee:

1. Ms Caroline Le Couteur
2. ACT Heritage Council
3. Woden Valley Community Council
4. Friends of Hawker Village Inc.
5. Ms Helen Ollerenshaw
6. Mr Peter Vincent
7. Mr Patrick Stein
8. Mr Leon Arundell
9. National Trust of Australia (ACT)
10. Mr Thomas Keen
11. Belconnen Community Council
12. Dr Max Kwiatkowski
13. Mrs Robyn Coghlan
14. Tuggeranong Community Council
15. Weston Creek Community Council
16. Inner South Canberra Community Council
17. Griffith/Narrabundah Community Association
18. Walter Burley Griffin Society
19. Yarralumla Residents Association
20. Ms Martha Kinsman
21. Ms Margaret Fanning
22. North Canberra Community Council
23. Australian Institute of Architects (ACT)
24. Mr John Ley
25. Planning Institute of Australia (ACT Division)

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Appendix B Witnesses

Monday 14 April 2014

ENVIRONMENT AND SUSTAINABLE DEVELOPMENT DIRECTORATE

- Mr Simon Corbell MLA, Minister for the Environment and Sustainable Development
- Mr Ben Ponton, Deputy Director-General, Planning
- Mr Jim Corrigan, Executive Director, Planning Delivery
- Mr David Dunstan, Senior Legal Policy Officer, Legislation

Thursday 24 April 2014

PLANNING INSTITUTE OF AUSTRALIA (ACT DIVISION)

- Mr Viv Straw, President, ACT Division of the Planning Institute of Australia
- Mr Hamish Sinclair, Divisional Director, ACT Division of the Planning Institute of Australia

WALTER BURLEY GRIFFIN SOCIETY INC

- Mr Brett Odgers, Committee Member, Walter Burley Griffin Society Inc

DR MAX KWIATOWSKI

ACT HERITAGE COUNCIL

- Mr Duncan Marshall, Chair, ACT Heritage Council
- Ms Anna Gurnhill, A/g Manager, Heritage, Environment and Sustainable Development Directorate

WESTON CREEK COMMUNITY COUNCIL

- Mr Tom Anderson, Chair

WODEN VALLEY COMMUNITY COUNCIL

- Dr Jenny Stewart, Chair

GRIFFITH/NARRABUNDAH COMMUNITY ASSOCIATION

- Mr John Edquist, President
- Dr David Denham, Secretary

INNER SOUTH COMMUNITY COUNCIL

- Ms Anne Forrest, Vice-Chair
- Ms Deborah Price, Secretary

BELCONNEN COMMUNITY COUNCIL

- Mrs Robyn Coghlan, Chairperson

NATIONAL TRUST OF AUSTRALIA (ACT)

- Mr Eric Martin, Council Member, Member of Heritage Committee
- Mr Brendan Preiss, Member of Heritage Committee

Appendix C Planning and Development (Project Facilitation)
Amendment Bill 2014

Bill to be inserted

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Appendix D – Overview of other jurisdictions

Jurisdiction	Legislation	Definition of major or significant project
New South Wales	Environmental Planning and Assessment Act 1979	Under this legislation, projects can be declared as a State Significant Developments (SSD) or State Significant Infrastructure (SSI) and assessed against separate frameworks. Projects that fall within these categories will be assessed by the Department of Planning and Infrastructure (the Department) and determined by the Minister, the Planning Assessment Commission (PAC) or senior departmental staff. This is an interim assessment system which will be reviewed as part of the ongoing review of the NSW planning system. The SSD assessment system has been established to guide planning decisions on large-scale industrial, resource and other proposals in 24 different development classes or development in precincts identified as important to the State by the NSW Government. The SSI assessment system has been established to allow planning decisions on major infrastructure proposals, in particular linear infrastructure (such as roads, railway lines or pipes which often cross a number of council boundaries) or development which does not require consent but which could have a significant environmental impact (such as a port facility).
Northern Territory	Planning Act	A significant development proposal is one that may significantly impact on the strategic planning of the Territory, its natural environment, or the existing amenity of the land or adjoining land as defined under section 50A of the Act. The Minister has the power under the Act to refer significant development proposals to the Planning Commission for assessment. When assessing a significant development proposal, the Commission must consider the objects of the Act, and the significant development report must identify and give advice about the possible impacts of the proposal on future land use and development in the Territory. (Planning Commission Annual Report 2012-13—p. 22).
Queensland	Economic Development Bill	Under the Act, the Minister may declare a prescribed project in a number of categories. When declaring the project, the Minister may have regard to: the public interest or the general welfare of persons in the region in which the project is to be undertaken, whether a voluntary environmental agreement is likely to be entered into in relation to the undertaking of the project and other matters the Minister considers relevant. In addition, if the Minister considers the undertaking of the project is critical or essential for the State for economic, environmental or social reasons, the Minister may, in the gazette notice, declare the project to be a critical infrastructure project.
South Australia	Development Act	In accordance with section 46 of the Act, the Minister may declare a major development or project. A development or project may be

Jurisdiction	Legislation	Definition of major or significant project
	1993	considered to be of major environmental, social or economic importance due to the fact that the cumulative effect of the development or project, when considered in conjunction with any other development, project or activity already being undertaken or carried on, or proposed to be undertaken or carried on, at or within the vicinity of the relevant site, gives rise to issues of major environmental, social or economic importance.
Tasmania	State Policies and Projects Act	The Premier can declare a project to be a Project of State Significance, provided the development possesses at least one of the 7 attributes outlined in s 16 of the SPPA e.g. significant capital investment and significant impact on the environment. The order to do this must be made by the Governor at the recommendation of the Minister and approved by both Houses of Parliament. The assessment process is conducted by the Tasmanian Planning Commission and the final decision is made by the Government, instead of the planning authority. These projects are subject to integrated assessments and the public are given an opportunity to make submissions and appear at public hearings in relation to the proposed development.
Victoria	Planning and Environment Act 1987	Under Part 9A—Projects of State or Regional Significance can be declared by the Minister.
	Major Transport Projects Facilitation Act 2009	Under the Act, projects are declared as Major Transport Projects. Before a project is 'declared', the Premier assesses the economic, social and environmental significance of the project to the State or a region within it. The assessment is made having regard to the project declaration guidelines. The Premier can declare a transport project to be a 'declared project' to which the whole or part of the MTPF Act would apply. Following declaration, a Project Minister and a project proponent is appointed for the project.
Western Australia		Since the establishment of the Lead Agency Framework in October 2009, a single agency (known as the lead agency) is responsible for coordinating interaction between major project proponents and Government departments. Through the framework, major projects in WA are assigned to a Lead Agency that works with project proponents to manage all Government interactions and statutory approvals; helping to improve efficiency and reduce the time taken to deliver projects, while fully considering the public interest. There is a suite of reforms proposed in the Planning Reform Phase Two Discussion Paper (Sep 2013, consultation closed Dec 2013) will further streamline approval processes to improve housing affordability, ensure continuity of land supply and co-ordinate essential services.