

## The dual planning framework

### Introduction

- 10.1 The *Australian Capital Territory (Planning and Land Management) Act 1988* (the PALM Act) seeks to ensure that Canberra and the Territory are planned and developed in accordance with their national significance. This land consists of the *Designated Areas* referred to in the PALM Act and the National Capital Plan (NCP). The Designated Areas are almost identical to the 1964 Areas of Special National Concern. At that time, however, there was one planning body for the Australian Capital Territory (ACT) -the National Capital Development Commission (NCDC).
- 10.2 The PALM Act provided for two plans and two planning bodies. Since that time there has been increasing confusion about how the planning framework operates.
- 10.3 These arrangements have given rise to anomalies and inconsistencies in planning and development within the ACT. The dual planning framework inevitably leads to conflict and some overlap between the ACT and National Capital Authority (NCA). The complexity and ambiguity continues to be a source of confusion and frustration for planners, developers and residents.
- 10.4 This chapter elaborates on these concerns and sets out a pathway for reducing perceived duplication is the objective to align land administration with planning jurisdiction, where possible.

## Background and origins of the dual planning framework

- 10.5 Australia's national capital experienced a significant change in 1989 when self-government was introduced in the ACT. The Federal Government established the NCA to manage the Commonwealth's continuing interest in Canberra as Australia's national capital.<sup>1</sup> The NCA was later given responsibility for managing National Land and associated assets required for the special purposes of the capital.
- 10.6 The ACT Government's statutory agency responsible for planning is presently the ACT Planning and Land Authority (ACTPLA). ACTPLA's functions are to administer the Territory Plan; to grant, administer, vary, and end leases on behalf of the Executive, to review and approve decisions for development applications and to regulate the building industry. ACTPLA operates under the *Planning and Development Act 2007 (ACT)*, and, in addition, cannot be inconsistent with the provisions in the NCP.
- 10.7 Despite the introduction of self-government some 19 years ago, there appears to remain a large degree of uncertainty, at least among ordinary citizens, about the areas for which the NCA has statutory planning responsibilities. The ambiguity arising from the dual-planning regime continues to create confusion and frustration for planners, developers and residents.
- 10.8 The likelihood of confusion and conflict resulting from the dual planning arrangement was foreseen shortly after the advent of self-government, when Senator Margaret Reid stated:

...the ACT Government and the people of Canberra have concerns arising out of the dual planning system...the concerns are two-fold really – the additional costs that the National Capital Plan may impose upon the Territory, particularly the way in which it restricts land use, and the confusion which seems to be in existence created by a dual planning system.

ACT business has to contend with the concepts of the National Land and the Territory Land, land in Designated Areas and land subject to special requirements. Maybe it is because it is so new that it is still causing this confusion and it will all become clear, but I believe there are some grey areas and there are some areas which the Commonwealth has attempted to retain which I believe is not justified.

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<sup>1</sup> The National Capital Authority was previously known as the National Capital Planning Authority, see *Table 1.1*.

Contending with planning authorities, I am sure all would realise, can be complicated in the best of circumstances, but where there are two bodies answerable to two different governments in a city the size of Canberra, I think it is confusing.<sup>2</sup>

10.9 The inevitability of conflict arising from the new planning arrangements was also recognised by Mr John Langmore MP, during debate on the *Australian Capital Territory (Planning and Land Management) Amendment Bill 1990*. Mr Langmore stated:

The matter will not always be free of conflict. Inevitably there will be conflict over issues. There was conflict over the division of land between National Land and local land. Inevitably there is conflict over the use of powers, the powers of designation, and over the use of special conditions which the National Capital Planning Authority can impose on the Territory.<sup>3</sup>

10.10 The confusion and frustration emerging from the current planning environment has led to calls for reform to the planning framework. The present arrangement whereby the ACT Government is required to seek works approval from the NCA where works occur on Territory Land in Designated Areas remains a contentious issue. During 2004 the tension between the two was intensified by the conflict concerning the Gungahlin Drive Extension (GDE) which led ACT political parties to call for a reduced role for the Federal Government in ACT planning matters.

10.11 In drawing attention to the complexity of the planning framework, the ACT Government noted that there were five combinations of planning and land management which currently occur in the ACT:

- designated land that is also National Land (eg the Parliamentary Zone);
- designated land that is Territory Land (eg the ACT Legislative Assembly);
- National Land where Special Requirements apply (eg Benjamin Offices);
- Areas of Special Requirements that are Territory Land (eg Canberra Avenue); and
- Territory Land, administered by the Territory (Note: land use must still be consistent with the General Policy Plan in the NCP).<sup>4</sup>

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2 Australia, Senate 1990, *Debates*, 6 December, p. 5123.

3 Australia, House of Representatives 1990, *Debates*, 15 November, p. 4256.

4 ACT Government, *Submission 69*, p. 9.

## Designated Areas

10.12 Section 10 of the PALM Act states that the NCP may specify areas of land that have the special characteristics of the national capital to be Designated Areas; and:

...set out the detailed conditions of planning, design and development in Designated Areas and the priorities in carrying out such planning design and development.<sup>5</sup>

10.13 The NCP identifies three primary factors for determining those areas of land which have the 'special characteristics of the national capital' and the extent to which they are Designated Areas:

- Canberra hosts a wide range of national capital functions – activities which occur in Canberra because it is the national capital and which give Canberra a unique function within Australia.
- Griffin's strong symbolic design for Canberra Central has given the national capital a unique and memorable character.
- Canberra's landscape setting and layout within the Territory have given the Capital a garden city image of national and international significance.<sup>6</sup>

10.14 'National capital functions' include parliamentary buildings, Commonwealth agencies, official residences of the Prime Minister and Governor General, embassies, national institutions and major national associations.<sup>7</sup>

10.15 As outlined in the plan, the Designated Areas comprise:

- Lake Burley Griffin and its Foreshores
- the Parliamentary Zone
- the balance of a Central National Area adjoining the lake and the Zone, and extending from the foot of Black Mountain to the airport
- the Inner Hills which form the setting of the Central National Area
- the Main Avenues and Approach Routes between the ACT border and the Central National Area.<sup>8</sup>

10.16 The NCA explained that:

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5 Section 10, *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).

6 National Capital Authority, 2008, *Consolidated National Capital Plan*, NCA, Canberra, p. 14.

7 National Capital Authority, 2008, *Consolidated National Capital Plan*, NCA, Canberra, p. 15.

8 National Capital Authority, 2008, *Consolidated National Capital Plan*, NCA, Canberra, pp. 15-161.

In addition to establishing that broad strategic framework for Canberra, the National Capital Plan also identifies those places that are thought to have the special characteristics of the capital and which warrant more detailed planning and design attention because of their use, location or topography and because they play a much more significant part in establishing the layout and the character of the capital than other places do. These places are currently called the 'designated areas' and they have been recognised by the Commonwealth since 1964, when they were called 'areas of special national concern'.<sup>9</sup>

- 10.17 The fact that Designated Areas include both Territory Land and National Land continues to be the source of much confusion among both planners and the wider ACT community.
- 10.18 Various complexities emerge where Territory Land is also designated land under the NCP. Although leasing matters are the responsibility of the Territory, specific works approval for developments must be obtained from the NCA. The NCA stated:
- Within the designated areas, the authority currently has responsibility for development approval. However, because the designated areas cover territory land as well as national land, there is a perception of planning duplication and some public confusion in relation to territory land.<sup>10</sup>
- 10.19 The NCA is responsible for approving the construction, alteration, extension or demolition of building or structures, landscaping, tree felling or excavations in Designated Areas. This excludes alterations within buildings or structures. Changes proposed in Designated Areas must meet any detailed conditions of planning, design and development set out in the National Capital Plan.<sup>11</sup>
- 10.20 One way this layering of planning responsibility and the resulting involvement of two authorities in the approval process can be streamlined is to remove one layer. When the layer created by the NCP is removed, this has been described as 'uplifting Designated Areas'.

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9 National Capital Authority, Ms Annabelle Pegrum, *Transcript*, T1, p. 30.

10 National Capital Authority, Ms Annabelle Pegrum, *Transcript*, T1, p. 30.

11 Section 4, *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).

## Special Requirements

- 10.21 The NCP includes ‘Special Requirements’ for some areas of Territory Land and National Land, outside Designated Areas, where that is considered to be desirable in the interest of the National Capital.
- 10.22 Areas that are subject to Special Requirements include the land fronting the main avenues and approach routes because they enhance the role and experience of Canberra as the National Capital, and the river corridors and open space system because they are part of the character and setting for the Capital and are environmentally sensitive.<sup>12</sup>
- 10.23 A Development Control Plan (DCP) must be approved by the NCA for land, which may be either Territory Land or National Land, which is subject to Special Requirements. In addition, development on Territory Land subject to a DCP also requires development approval by the Territory Government. The NCA noted that ‘this is a statutory duplication of administration and creates considerable confusion for the developer and community.’<sup>13</sup> The NCA further stated:
- Development on National Land subject to a DCP requires consideration by the Authority for consistency (with the DCP) but not development approval. This too can result in confusion and administrative red tape.<sup>14</sup>
- 10.24 The NCA was particularly pointed in its criticism of Special Requirements commenting that as a planning tool they ‘are clumsy and create unwarranted red tape.’<sup>15</sup> The NCA proposed that Special Requirements be removed from the NCP. The NCA commented that this ‘would eliminate the need for a DCP and enable the ACT Government to administer Territory Land without any references to the Authority.’<sup>16</sup>
- 10.25 In addition, the removal of Special Requirements would ‘exempt Commonwealth Government agencies (such as Defence and Finance) from preparing a DCP and referral to the Authority.’<sup>17</sup> The NCA noted that both the Commonwealth and ACT Government would continue to be bound by the general provisions of the NCP. The NCA advised that ‘if the Commonwealth retains broad strategic control then the general land use is

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12 National Capital Authority, *Submission 55*, p. 33.

13 National Capital Authority, *Submission 55*, p. 33.

14 National Capital Authority, *Submission 55*, p. 33.

15 National Capital Authority, *Submission 55*, p. 34.

16 National Capital Authority, *Submission 55*, p. 34.

17 National Capital Authority, *Submission 55*, p. 34.

protected and there is little risk in removing additional planning processes and giving control to the ACT government.<sup>18</sup>

- 10.26 The committee notes that there was some concern about removing Special Requirements from National Land. Mr David Wright stated:

So when the NCA say, 'We'll relinquish or set aside the use of special requirements,' I would caution very seriously against doing that. And I think that problem will be exacerbated if the designated areas are rolled back to reveal more national land sites, because those national land sites, if they are not in designated areas and there are no special requirements as currently provided for in the National Capital Plan, are literally holes in this one plan, and the Commonwealth basically has a free hand. It can spout all it likes about good neighbour relations with the planning authorities, but in fact it has all the power and all the money and it will make its decisions. So I would caution very seriously about withdrawing special requirements.<sup>19</sup>

- 10.27 The committee also heard evidence of a more fundamental issue in that, with the benefit of hindsight, it may be the case that the original declaration of National Land did not extend to certain areas where the Commonwealth has a legitimate planning interest. These areas may include the Australian Institute of Sport, the Australian National University, the Tidbinbilla Deep Space Tracking Station and roads within the Diplomatic Estates, all of which are Territory Land which is either currently designated or subject to special requirements.<sup>20</sup> The committee notes the NCA's proposal for 'uplift' included some areas of existing Territory Land being gazetted as National Land.<sup>21</sup> The committee believes that one of the issues to be addressed in the future should be to determine exactly which areas of Territory Land should be gazetted as National Land.

## Possible options for reform

- 10.28 The NCA's proposal for uplift of Designated Areas, as shown in *Figure iii*, is extensive. In particular, the NCA has proposed that the inner hills and those areas comprising the National Capital Open Space System and main avenues and approach routes be uplifted.

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18 National Capital Authority, Ms Annabelle Pegrum, *Transcript*, T1, p. 30.

19 Mr David Wright, *Transcript T4*, p. 24.

20 Mr David Wright, Submission 68, p. 16.

21 See National Capital Authority, Ms Annabelle Pegrum, *Transcript T1*, p. 37.

- 10.29 This aspect of the NCA's proposal caused concern as the evidence suggests that one area that warrants particular protection under the NCP is the inner hill, ridges and buffers, which is the aspect of the NCP that prevents development in these areas, a central feature of the original design of Canberra as a city in the landscape.
- 10.30 The NCA proposed that other areas, primarily in the Central National Area, and described as areas of national significance 'should continue to be identified in the NCP that are vital to the functioning and quality of the built environment and landscape setting and to the protection of the character of the National Capital.'<sup>22</sup>
- 10.31 The NCA acknowledged that the name Designated Areas 'does nothing to help understand the national significance of these sites' and 'the fact that this title relates to both National Land and Territory Land creates a perception of duplication of planning processes.'<sup>23</sup> In view of this confusion, the NCA proposed that Designated Areas in the NCP should be reviewed in scope and renamed as *Areas of Special National Importance*. The NCA stated:
- The proposed Areas of Special National Importance should continue to cover those places at the heart of the Capital that accommodate national capital functions, symbolic and cultural places, national public places, the geometry and layout of the city and the diplomatic precincts.<sup>24</sup>
- 10.32 The NCA noted that 'ideally, all of the land within the proposed Areas of Special National Importance should be National Land declared as required for the special purposes of Canberra as the National Capital.' The NCA further proposed that 'the places within the proposed Areas of Special National Importance that are currently on Territory Land should be gazetted as National Land to ensure the alignment of planning and land status.'<sup>25</sup>
- 10.33 The proposed Areas of Special National Importance would continue to be under the planning responsibility of the NCA. The NCA commented that 'this is the proper way to ensure that planning, design and urban outcomes are of a standard of excellence commensurate with the value of these areas.'<sup>26</sup>

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22 National Capital Authority, *Submission 55*, p. 31.

23 National Capital Authority, *Submission 55*, p. 31.

24 National Capital Authority, *Submission 55*, p. 31.

25 National Capital Authority, *Submission 55*, p. 31.

26 National Capital Authority, *Submission 55*, p. 31.



10.34 In relation to those areas that would have their status uplifted and planning approval transferred to the Territory, the NCA noted the need for ongoing consistency with the NCP. The NCA stated:

Many places that are within the current Designated Areas and on Territory Land (such as City Hill, the Albert Hall precinct, West Basin, Barton, and the inner hills, ridges and buffers) would not be within the new Areas of Special National Importance. Because the development of these places over time will affect the quality and character of the heart of the Capital, their general land use must continue to be defined in the National Capital Plan.<sup>27</sup>

10.35 The results of these changes would ensure that 'planning administration arrangements would be aligned with land status such that the ACT Government is solely responsible for development approval on Territory Land.'<sup>28</sup> With these changes, the NCA suggested that the 'perceived duplication of national planning and local planning and confusion over land administration will be eliminated.'<sup>29</sup>

10.36 The NCA was confident that there would be sufficient oversight to achieve the highest standard in design because:

- the quality of detailed planning and design outcomes is protected in Areas of Special National Importance; and
- the general land use and character of Canberra and the Territory is protected through the NCP.<sup>30</sup>

10.37 The NCA advised the committee that its proposal would not lead to a diminution in the quality of planning or compromise those areas of national significance provided the NCP retained its essential principles. The NCA stated:

I think it would be fair to say that our strongest recommendation to this committee is that the strategic vision for the whole of the territory – that metropolitan plan – needs to be retained by the parliament through the National Capital Plan, because what it does is say what is urban and what is not urban. It does not say that in the urban areas you can have townhouses or hotels or whatever. It just says urban and non-urban. It establishes the framework for growth. It says where the major roads should be – not their exact alignment, not what they look like, but simply

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27 National Capital Authority, *Submission 55*, p. 31.

28 National Capital Authority, *Submission 55*, p. 31.

29 National Capital Authority, *Submission 55*, p. 32.

30 National Capital Authority, *Submission 55*, p. 32.

where they should be – and, importantly, it protects that setting and character of the National Capital Open Space System. If the National Capital Plan continues to do that, if the parliament continues to have that control, then our view is that it is safe for the detailed planning to be reduced to those areas that are more important. To use an example, if the Commonwealth relinquished that strategic control and the area of detailed control were reduced to that shown on the map on your right, there would be nothing to stop an ACT government deciding that the land on the inner hills looks awfully good for residential development.<sup>31</sup>

10.38 The NCA's proposal for uplift of Designated Areas was met with a variety of responses and not all were favourable. The extent of the areas to be uplifted is significant in scope and there was limited time for people and organisations to interpret the scale and planning implications.

10.39 The ACT Government supported the proposal. The ACT Government stated its commitment to the adherence to the principles embedded in the NCP:

To the extent that we are looking at removing the duplication, and if we can get to the point of a combined planning approach, the planning outcome sought by the National Capital Plan, if you like, would be embedded in that with the lifting of those designations et cetera. If we go back to the principle that the planning jurisdiction would reside with whoever administers the land, the capacity for effectively a veto power by the NCA would be removed accordingly but the planning controls that would be in place for the administration, whoever administers the land, would be consistent with the National Capital Plan.<sup>32</sup>

10.40 Other than the ACT Government, most groups responded to the proposed reform with varying levels of opposition. The Property Council of Australia's ACT Division did not 'wish the National Capital Authority and the Commonwealth Government to withdraw from any of the areas.'<sup>33</sup> The Property Council stated that 'one of the primary reasons for that is that we believe the ACT government do not have the capacity to undertake additional planning responsibility.'<sup>34</sup>

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31 National Capital Authority, Ms Annabelle Pegrum, *Transcript*, T1, pp. 36-37.

32 ACT Government, Mr Andrew Cappie-Wood, *Transcript* T2, p. 7.

33 Property Council of Australia (ACT Division), Ms Catherine Carter, *Transcript*, T2, p. 55.

34 Property Council of Australia (ACT Division), Ms Catherine Carter, *Transcript*, T2, p. 55.

- 10.41 Similarly, the Royal Australian Institute of Architects stated that it ‘does not support the reduction of the NCA role in both planning and development management in Designated Areas, as currently defined.’<sup>35</sup>
- 10.42 The Canberra Business Council (CBC) disagreed with the NCA proposal in relation to some of the central areas that are proposed to be uplifted from the NCP.<sup>36</sup> The CBC stated that in addition to the proposed Areas of Special National Importance, ‘there are other elements – hills, ridges, the lake foreshores, the entire central area and some of the access routes into Canberra – that need to be protected as well.’<sup>37</sup>
- 10.43 Professor Ken Taylor suggested that the area around Lake Burley Griffin should continue to be subject to planning approval by the NCA. Professor Taylor commented that ‘most planners – international ones – who know anything about Canberra, would find it difficult to disagree that the area around the lake – the lake itself and the area around it – is of critical national importance to the standing of this city – its tangible and intangible meanings.’<sup>38</sup> In relation to the National Capital Open Space System, Professor Taylor stated:
- ...if the NCA relinquishes planning control on the designated land, which is substantially inner parts of the National Capital Open Space System, a robust form of Commonwealth that has national oversight of planning of this integral aspect of the open space system is vital. It cannot be left to a local planning authority, whether it is in Canberra or anywhere else.<sup>39</sup>
- 10.44 The National Capital Open Space System is made up of 4 key elements comprising:
- Lake Burley Griffin and foreshores;
  - the inner hills;
  - the river corridors; and
  - Namadgi National Park.
- 10.45 During the hearings some groups commented on the possibility of enshrining the National Capital Open Space System in legislation. Mr David Wright who was opposed to this proposal stated:

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35 Royal Australian Institute of Architects, Mr Alec Tzannes, *Transcript*, T1, p. 70.

36 Canberra Business Council, Ms Christine Fualks, *Transcript*, T2, p. 31.

37 Canberra Business Council, Ms Christine Faulks, *Transcript*, T2, p. 32.

38 Professor Ken Taylor, *Transcript*, T3, pp. 66-67.

39 Professor Ken Taylor, *Transcript* T3, p. 62.

It needs to be recognised that NCOSS covers more than 80% of the total land (and water) area of the ACT. Each of the four elements is vastly different but contributes to an integrated whole. Each of the four elements needs specific policies but such detail is inappropriate in legislation. It should properly reside in the National Capital Plan and the Territory Plan as appropriate.<sup>40</sup>

- 10.46 Mr Wright, in contrast to the NCA, believed that Lake Burley Griffin Foreshores and the Inner Hills should remain Designated Areas. He noted that ‘where elements of the system are not in a designated area then the detailed policies and standards for such areas should remain in the Territory Plan.’<sup>41</sup>
- 10.47 Mr Wright, in arguing against the need for legislation protecting the National Capital Open Space System, noted that the NCP ‘has the force of law and provides the same level of protection as legislation would but in a much less cumbersome way.’<sup>42</sup> Mr Wright concluded that ‘any change to the policies governing the National Capital Open Space System would require the NCA to propose a draft amendment to the NCP and that cannot be given effect without the consent (through disallowance) of the Australian Parliament.’<sup>43</sup>
- 10.48 Dr John Gray also advised that the lake foreshore should remain under the control of the NCA ‘because it is an integral part of the Griffin Plan.’<sup>44</sup> Dr Gray stated that ‘it is essential that it remain under the same level of protection that is afforded the Parliamentary Triangle and Anzac Parade.’<sup>45</sup>
- 10.49 Mr Wright commented that the reduction in Designated Areas proposed by the NCA was not in the interests of the national capital. In particular, Mr Wright warned that the removal of designation would reduce controls on telecommunications carriers. Mr Wright stated:

What removing designation does – perhaps unintentionally – is actually removes all control, other than under the Telecommunications Act, over the activities of the telecommunication carriers to build towers where they like. If you drive down the Hume Highway to Sydney, you see some awful sights that are blots on the landscape. We could be faced with the

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40 Mr David Wright, *Submission 68.2*, p. 2.

41 Mr David Wright, *Submission 68.2*, p. 2.

42 Mr David Wright, *Submission 68.2*, p. 2.

43 Mr David Wright, *Submission 68.2*, p. 2.

44 Dr John Gray, *Transcript T5*, p. 70.

45 Dr John Gray, *Transcript T5*, p. 70.

situation where any telecommunication carrier operating under that act could erect a tower on, for example, Red Hill or Mount Ainslie without any reference to ACTPLA or the National Capital Authority.<sup>46</sup>

### Administration of the proposed reforms

10.50 The administrative arrangements and implementation of planning powers if the proposed uplift of Designated Areas occurred could be challenging for both the ACTPLA and the NCA. The committee found however that neither agency had a reasonable understanding of their respective roles after uplift. Indeed scrutiny by the committee through the testing of certain scenarios revealed significant differences in opinion between the planning agencies as to how the new system would operate.

10.51 The committee explored a hypothetical situation where in an area of land where designation has been uplifted, and is no longer under the control of the NCA, the Territory proposes something that appears to be inconsistent with the NCP. The NCA confirmed that it would no longer have planning control.<sup>47</sup> The NCA was clear that as is the case now, 'the territory's decisions are the territory's and the authority's decisions are the authority's.'<sup>48</sup>

10.52 In response to this scenario, the ACT Government stated:

If ACTPLA wished to, or by agreement with the National Capital Authority they were still matters of national significance, the National Capital Authority could act as a referral entity. Our legislation has provisions for that. The submission details the technicality in relation to Commonwealth legislation that would need to be covered off. The National Capital Authority would then have a right of comment on a development application and the ACT Planning and Land Authority would be required to take those comments into account, unless for any reason they considered them to be irrelevant.<sup>49</sup>

10.53 The NCA quickly responded that this would be unworkable, and that the NCA would not be second guessing ACTPLA on its decisions. The NCA stated:

We have not seen that before. We would find that extremely difficult to manage. The delegate is the delegate. There is debate,

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46 Mr David Wright, *Transcript T4*, p. 22.

47 National Capital Authority, Ms Annabelle Pegrum, *Transcript T5*, p. 45.

48 National Capital Authority, Ms Annabelle Pegrum, *Transcript T5*, p. 46.

49 ACT Government, Ms Jacqui Lavis, *Transcript T5*, p. 46.

discussion, controversy and determination around amendments or variations to plans. That is the DAF model. But, when it comes to a development application and the open consultation on that, then the delegate makes a decision. If the territory kept referring for advice to the authority, then you would get duplication again. We do not believe that that would be workable.<sup>50</sup>

- 10.54 This divergence of views between the ACT Government and the NCA was illustrative and indicated that the work ahead relating to uplift would require much cooperation and consultation between these two planning bodies. Both agencies confirmed that, notwithstanding these initial differences, uplift of Designated Areas was fully supported and could be achieved.<sup>51</sup>
- 10.55 Uplift of Designated Areas has funding implications. If uplift occurs then the ACT Government will have additional planning responsibility. The ACT Government consulted with the NCA about funding issues. The ACT Government confirmed that the NCA had between three and four full-time staff responsible for planning which if shifted to the Territory would translate to a recurrent budget of around \$300 000 or \$350 000. An additional \$100 000 would be required for analysis currently undertaken by the NCA into urban design work for major developments.<sup>52</sup>
- 10.56 The Property Council of Australia (ACT) was critical of ACTPLA's performance and suggested that more than just additional funding would be necessary. The Council stated:
- It needs to be understood, and it needs to be understood very clearly, that it is not simply a matter of money. Three or four positions, if they were transferred from the Commonwealth, and \$300,000 to \$400,000 will not solve the problems that are inherent in the ACT planning system.<sup>53</sup>
- 10.57 The Property Council of Australia (ACT) was particularly concerned about ACTPLA's performance and time taken for planning approval. The Council stated:
- There is a major crisis in ACTPLA. It is taking an inordinate amount of time to get material through and approved. Given a choice between dealing with the National Capital Authority and dealing with ACTPLA, every person involved in the property

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50 National Capital Authority, Ms Annabelle Pegrum, *Transcript T5*, p. 47.

51 ACT Government, Mr Andrew Cappie-Wood, *Transcript T5*, p. 38; National Capital Authority, Ms Annabelle Pegrum, *Transcript T5*, p. 38.

52 ACT Government, Mr Neil Savery, *Transcript T2*, p. 10.

53 Property Council of Australia (ACT Division), Ms Catherine Carter, *Transcript T2*, p. 56.

industry in Canberra would prefer to deal with the National Capital Authority. That is the stark reality of the current situation. A transference of responsibility – for example, in that area of Barton I think you mentioned before when the Canberra Business Council was here – would lead to a significant delay, it would lead to a significant decline in quality and it would not be supported by the Property Council.<sup>54</sup>

- 10.58 The Australian Institute of Landscape Architects commented that ‘ACTPLA faces some far more immediate demands on their time and sometimes do not meet absolute perfect performance because of the sheer volume of the work that they have to deal with and the sheer volume of the level of service that they are providing, from such a small-scale through to quite major national areas with the NCA.’<sup>55</sup>
- 10.59 A further issue arose relating to the potential for ACTPLA to reconsider and even revoke decisions of the NCA after dedesignation. For example, once ACTPLA assumes planning control of Designated Areas currently under the planning jurisdiction of the NCA it could review past decisions of the NCA and make changes provided that there was no inconsistency with the NCP. Mr Graham Anderson raised concerns about this possibility.<sup>56</sup>
- 10.60 Similar concerns were raised by the Canberra Property Council, and the Royal Australian Institute of Architects who support the continuing role of the NCA in managing Commonwealth land.<sup>57</sup>
- 10.61 Mr Anderson advised that the NCA has approved a development application for dual occupancy development on his property. Mr Anderson commented that if the planning function was to be transferred to the ACT ‘we would like to be satisfied that the dual occupancy approval we now have would still apply and would not be subject to removal or review.’<sup>58</sup>

## ACTPLA’s compliance with NCP principles

- 10.62 As part of the debate about implications of uplifting designated status, some groups raised concerns about the adequacy of ACTPLA to apply the principles in the NCP. Under the proposal for uplift, discussed in the

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54 Property Council of Australia (ACT Division), Mr Anthony Hedley, *Transcript T2*, p. 56.

55 Australian Institute of Landscape Architects, Mr Neil Hobbs, *Transcript T2*, p. 73.

56 Mr Graham Anderson, *Submission 15*, p. 1.

57 Canberra Property Council, Ms Catherine Carter, *Transcript T2*, pp. 53-55; The Australian Institute of Architects, *Transcript T1*, pp. 69-70.

58 Mr Graham Anderson, *Submission 15*, p. 1.

previous sections, ACTPLA would have planning jurisdiction over land that was once designated. ACTPLA in performing this function would need to comply with the principles in the NCP just as the NCA does now.

- 10.63 There was concern that if ACTPLA made a decision that appeared to be inconsistent with the principles, would it be appropriate for the NCA to have some form of veto power. In response to this hypothetical situation, the Attorney-General's Department stated:

We are still thinking about the details of this. It is very much a case of, say, if the ACT were to do something that transgressed the principles enshrined in the legislation – for example, if it decides to build on the top of Red Hill or something like that. It would need to be a meaningful trigger rather than potentially being an incentive for the NCA to act prematurely or be encouraged to act prematurely. It would also need to be a very real trigger so that the NCA was able to take whatever action it wanted to – presumably, seeking an injunction or something like that – before too much had actually occurred. We are still working through the details of how that might operate.<sup>59</sup>

- 10.64 The committee looks forward to being advised of the Department's views on this matter.
- 10.65 The CBC commented that if the ACT Government made decisions that were in conflict with the NCP 'then there should be a procedure or a mechanism for the Australian government to step in and override that on behalf of the citizens of Australia.'<sup>60</sup> Similarly, the Property Council of Australia (ACT) stated that 'so, as to the question of whether the NCA ought to be able to overturn decisions of the territory, the answer to that, given the NCP has precedence, has to be yes.'<sup>61</sup>
- 10.66 The Australian Institute of Landscape Architects also agreed that if different land boundaries were adopted then 'for those key parts of the NCP, some statutory authority would have that oversight or review process.'<sup>62</sup>
- 10.67 In contrast to these views, some groups advised that if a decision is made to transfer planning jurisdiction to the ACT then, for planning certainty, those arrangements must be accepted. The Planning Institute of Australia stated:

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59 Attorney-General's Department, Mr Iain Anderson, *Transcript T1*, p. 66.

60 Canberra Business Council, Ms Christine Faulks, *Transcript T2*, p. 33.

61 Property Council of Australia (ACT Division), Ms Catherine Carter, *Transcript T2*, p. 55.

62 Australian Institute of Landscape Architects, Mr Neil Hobbs, *Transcript T2*, p. 72.



Once you agree that those lands are to be administered by the ACT government they should be administered by the ACT government. My personal view is that it all hangs on getting that agreement about the vision and strategic direction for the future of Canberra. I do not believe that the ACT government will approve things that are completely inconsistent with that if they have been part of setting that direction.<sup>63</sup>

10.68 The ACT Government was not supportive of a veto power and argued that such a situation would undermine planning certainty and destroy confidence in the planning system.

10.69 There is also evidence that this ambiguity is being broadly interpreted as time goes on. As an example of what could happen, the ACT Government drew attention to planning dispute over EpiCentre at Fyshwick:

I will give you the example: EpiCentre at Fyshwick, which we are all familiar with. It is very contentious. Is that the situation we want arising every time? If that is the outcome of even strengthening the capacity to intervene in our decisions, having uplifted designation and saying, 'We think you've got a greater capacity and ability to undertake this role,' the cost to the whole community of going through those exercises every time someone wants to play a game of cat and mouse between what the National Capital Plan says and what the territory plan says and who is making the right interpretation, I think that is where we have a planning system that is almost dysfunctional.<sup>64</sup>

10.70 The heart of this problem according to both planning authorities, lies in the ambiguity of the definitions contained in the NCP relation to what constitutes 'national significance'. The committee notes that both the NCA and ACTPLA have strongly endorsed the need to remove this ambiguity. The NCA stated:

Where we have complete agreement, I suspect, with the territory is a very clear definition of national significance and a very clear – and as unambiguous as is possible in planning – line from the top in the statements of significance through to the detail planning that the territory ultimately would be doing outside of the areas of special importance.<sup>65</sup>

10.71 The ACT Government similarly stated:

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63 Planning Institute of Australia, Ms Sue Holliday, *Transcript T3*, p. 18.

64 ACT Government, Mr Neil Savery, *Transcript T2*, p. 9.

65 National Capital Authority, Ms Annabelle Pegrum, *Transcript T5*, p. 43.

Twenty years on, the ACT Government believes the time is right to overcome these limitations through the creation of a genuine dual planning system – a planning regime in which the NCA has administrative and development control over areas of clear national significance, while the ACT Government, operating as necessary within broad planning principles identified to protect Canberra’s national and planning heritage, has the surety of planning control over all other areas within the ACT. The ACT Government believes that such a system will help *both* the NCA and the ACT Government to perform their respective roles more openly and effectively.<sup>66</sup>

- 10.72 The committee believes aligning the definitions in both the NCP and the Territory Plan is a worthy and important initiative. The committee believes it would form an essential part of major planning reforms which are discussed in Chapter 11.

## **Solving the immediate problem**

- 10.73 The committee notes that the NCA proposal to uplift Designated Area status still puts the NCA in the box seat in defining national capital principles thereby impacting on planning decisions by the ACT Government or ACTPLA despite handing over development approval to the ACT. This does not resolve a key complaint about the dual planning system, which is the uncertainty of the prospect of the NCA disagreeing with the ACT Government’s interpretation of the NCP, and overriding that decision, in other words, acting to veto that decision. Hence the committee’s objective of planning jurisdiction aligned with land administration would not appear to be achieved with the NCA’s proposal for uplift.
- 10.74 The committee also notes the NCA proposal for uplift included additional areas of Territory Land being gazetted as National Land. The logic of the proposal for uplift relied heavily on these land transfers occurring.
- 10.75 In addition, there is no formal agreement on the geographic boundary of where uplift would apply. All that is on the record is the NCA’s proposal. The committee heard different views on where the boundaries should be and why.
- 10.76 In particular, the Canberra Business Council’s concerns about the boundaries are discussed in paragraph 10.43 and include elements such as
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66 ACT Government, *Submission 69*, p. 4.

hills, ridges and the lake foreshores. Professor Ken Taylor focuses on the lake foreshores (paragraph 10.44).

- 10.77 Despite the genuine concern by many witnesses that the NCA's proposed uplift of Designated Areas would result in a loss of key principles of the NCP, in particular protection from development of the inner hills, ridges and buffers and the National Capital Open Space System, the committee notes that most of the protections would be retained because the principles and policies of the NCP would still apply.
- 10.78 Nonetheless it should be noted that the committee did not hear any convincing evidence that there was a threat from the ACT Government or developers to these critical features of the NCP. Importantly, the ACT Government reiterated their commitment to these principles which give Canberra its character as a city within the landscape, such as no development on the hills and the open space system.
- 10.79 In the absence of major reforms that protect the principles and policies, as discussed in Chapter 11, the committee believes there is an opportunity for an interim measure that resolves the overlap in land administration and planning jurisdiction on Territory Land in Designated Areas.
- 10.80 This opportunity could be in the form of the NCA formally delegating the planning jurisdiction to ACTPLA for Territory Land in Designated Areas, once they were assured that the relevant national capital principles and policies would be protected through a Memorandum of Understanding. The NCP would still function as is, resulting in no risk to national significance.
- 10.81 This would provide for an interim measure to remove duality, provide the necessary protections for national capital principles and ensure the arrangement was based on agreement between the two authorities.
- 10.82 The committee notes this idea has not been tested with either authority and it would obviously be subject to negotiation and agreement to be useful and successful.

## Conclusions

- 10.83 The *Australian Capital Territory (Planning and Land Management) Act 1988* states that the National Capital Plan (NCP) may specify areas of land that have the special characteristics of the national capital to be Designated Areas. Designated Areas may include land administered by the Commonwealth or the Territory Government. The Commonwealth has sole planning control over these areas.

- 10.84 Currently, the ACT Government administers Territory land within Designated Areas and the NCA has planning jurisdiction. This aspect of the planning arrangements has created confusion and led to calls for the reform of the planning framework.
- 10.85 The theory behind uplifting Designated Area status from certain areas would be to align land administration and planning jurisdiction. The NCA's proposal for uplifting designated status is shown in *Figure iii*.
- 10.86 However, the committee notes that the proposal to uplift was itself ambiguous and despite evidence that consultation with the ACT Government had occurred, there was a difference of opinion about the implications and effects of such an uplift.
- 10.87 The proposal is extensive and there was a particular concern about the NCA removing itself from planning over areas of land that exhibit the special characteristics of the national capital.
- 10.88 The committee believes that the process for pushing ahead with the uplift of designated status requires consideration of a range of complex issues.
- 10.89 As such, the committee believes that uplift ought to be considered in the context of major planning reforms, including a consultative approach to establishing clear and formal geographic areas of planning jurisdiction, as discussed in the final chapter (Chapter 11) of this report.
- 10.90 The committee notes however, that there is a pressing need for interim action to remove duplication and increase clarity for Territory Land with designated and special requirements status. The committee feels compelled to offer a short term option until uplift of Designated Areas can be examined through comprehensive considerations of planning reforms including a draft amendment to the NCP.
- 10.91 The PALM Act is quite clear in its directive that the Territory Plan cannot be inconsistent with the NCP. Therefore, there is an opportunity for development applications and works approval on Territory Land which is within Designated Areas, to be formally 'delegated' by the Commonwealth (via the NCA) to the ACT. This will require an amendment to the PALM Act.
- 10.92 The committee believes this approach will enable the NCA to focus its efforts on maintaining and enhancing those areas which are undoubtedly significant to the national capital.
- 10.93 There were significant criticisms made about the ability of ACTPLA to perform its present planning functions effectively due to workload. While this is an issue for the ACT Government, the committee suggests that the ACT Government will need to address these criticisms and reassure the

community that it can perform these additional planning functions if they are delegated. In saying this, the committee acknowledges recent changes to the Territory Plan and that ACTPLA is still bedding down these changes.

- 10.94 **Accordingly, the committee suggests that any delegation must be accompanied by assurances that adequate resources will be available within ACTPLA to guarantee timely approvals including factors relating to national capital considerations.**
- 10.95 While the NCP will continue to provide planning protection for Designated Areas, some groups were particularly concerned about the future protection of the National Capital Open Space System. The National Capital Open Space System is an enduring feature of Canberra's design and development and will be protected regardless of which planning authority is administering it. The committee, in the final chapter (Chapter 11) of this report proposes that these areas not just be protected through the NCP but, in addition, through an amendment to the PALM Act so that the National Capital Open Space System is protected in perpetuity.
- 10.96 During the inquiry it was brought to the attention of the committee that the removal of designation will remove all controls over the activities of telecommunications carriers to build towers where they like without reference to ACTPLA or the NCP. This is not acceptable. **The committee proposes that any delegation of the planning jurisdiction of Designated Areas must ensure that this 'unintended consequence' does not prevail and the same limits that apply to telecommunications carriers now will exist.**
- 10.97 During hearings ACTPLA repeatedly argued the need for planning certainty. This same need also applies to individuals and organisations who have had development applications already approved by the NCA. A concern has been raised that upon possible dedesignation, or as recommended by the committee, formal delegation, ACTPLA could review development applications previously approved by the NCA and even retrospectively revoke those decisions. This would provide no planning certainty. **Therefore, if delegation occurs, ACTPLA should not be able to retrospectively revoke decisions of the NCA without the approval of the NCA.**
- 10.98 A further issue raised during the inquiry was the possible need for the NCA to have veto power over ACTPLA in the event that ACTPLA makes decisions inconsistent with the NCP. While there were some persuasive arguments supporting this position, there were also very strong arguments opposed to this proposal. The committee does not support a

- veto power as it would create too much planning uncertainty. As discussed above, ACTPLA will still need to comply with the NCP and the PALM Act which provides that the Territory Plan cannot be inconsistent with the NCP. The committee has also outlined further reforms in Chapter 11 that address removing the veto power by having both planning authorities working to a legislated set of principles and policies.
- 10.99 In concluding this section, the proposal to uplift Designated Area status is seen by the committee as most appropriately part of a much larger, second major stage of reform. The committee supports the approach that ultimately, the planning jurisdiction should reside with the body that administers the land and that this is the first key element of reform to Canberra's future planning.
- 10.100 Until the major reforms are undertaken, the committee recommends an interim measure which reduces red tape and duplication: that the NCA and ACTPLA negotiate an MOU to delegate the planning jurisdiction of Territory Land with designated status from the NCA to ACTPLA.
- 10.101 Such an MOU may contain conditions as to the circumstances in which the delegation is exercised and the geographic areas covered by the delegation.
- 10.102 The committee also recommends that such a transfer would need to include a transfer of resources from the Commonwealth to ACTPLA necessary to support these functions.
- 10.103 With possible further reform pending, as recommended in Chapter 11, this process of delegation would remove in the short term the duplication of the two planning authorities in relation to Territory Land which is within a Designated Area, a term in the inquiry reference.
- 10.104 The committee notes that areas subject to Special Requirements under the NCP do create confusion and additional red tape. The NCA proposed that Special Requirements be removed from the NCP. The committee supports the need to reduce red tape but believes that safeguards should still apply to sensitive areas. The committee therefore recommends that Special Requirements be removed from the NCP and that all areas of National Land subject to Special Requirements be converted to Designated Areas.
- 10.105 Further, the committee is concerned that removing 'Special Requirements' would remove any Commonwealth role in development approval, through the creation of a development control plan, for areas of Territory Land where the Commonwealth may still have a legitimate ongoing planning interest. This could include, for example, areas such as the Australian Institute of Sport, which is a Commonwealth asset on Territory Land.

- 10.106 The committee therefore recommends that areas of Territory Land where the Commonwealth has a significant and enduring planning interest be converted to Designated Areas until the broader review outlined in Chapter 11 which seeks to align land administration with planning jurisdiction. One of the aims of this broader review should be to determine which existing areas of Territory Land have ‘national significance’ and should therefore be considered for future gazettal as National Land.
- 10.107 Until such a review, the committee notes that removing Special Requirements from the NCP would establish three types of land:
- National Land which is Designated;
  - Territory Land which is Designated (pending the broader review to consider possible gazettal as National Land); and
  - Territory Land where the ACT Government has sole responsibility for development approval.

#### **Recommendation 14**

- 10.108 **That, as a possible interim measure to resolve duplication, the Commonwealth consider amendments to the *Australian Capital Territory (Planning and Land Management) Act 1988* to permit the National Capital Authority and ACT Planning and Land Authority to negotiate a memorandum of understanding to delegate the planning jurisdiction for Territory Land which has designated status under the National Capital Plan from the NCA to ACTPLA.**

**Such a delegation would need to be accompanied by the necessary resources to fulfil these functions.**

#### **Recommendation 15**

- 10.109 **That, in the interests of removing unnecessary complexity and red tape:**
- **‘Special Requirements’ be removed from the National Capital Plan;**
  - **All areas of National Land previously subject to Special Requirements be converted to Designated Areas; and**
  - **Any areas of Territory Land previously subject to ‘Special Requirements’ where the Commonwealth has a significant and**

**enduring planning interest be converted to Designated Areas until a broader review of the National Capital Plan and Territory Plan is undertaken to assess whether such areas should be considered for future gazettal as National Land.**