Submission 68.2

JOINT STANDING COMMITTEE ON THE NATIONAL CAPITAL AND EXTERNAL TERRITORIES

INQUIRY INTO THE ROLE OF THE NATIONAL CAPITAL AUTHORITY

SECOND SUPPLEMENTARY SUBMISSION by

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2 June 2008

Foreword

At the invitation of the Committee Chair, Senator Kate Lundy, I attended the joint presentation of evidence given by the National Capital Authority and the ACT Government. On Friday 2 May 2008. I forwarded my observations to Senator Lundy by email on Monday 5 May 2008 without having the benefit of the *Hansard* record.

In Part 1 I set out my main observations as presented to Senator Lundy.

In Part 2 of this supplementary submission – *Future Choices* - I present some comments regarding the process of the Committee, how it can arrive at a set of recommendations that present a coherent alternative if substantial changes are proposed to either the current *Australian Capital Territory (Planning and Land Management) Act 1988* or the key features of the National Capital Plan.

In Part 3 I provide comments on the findings of the Australian National Audit Office report - *The National Capital Authority's Management of National Assets – Performance Audit Report No. 33 2007-8.* I believe this to be relevant to the current inquiry, given the negative public comments that have been made by the Chair of the Committee, the Minister and the fact that the Minister has referred the report to the Committee. I confine my remarks to the report's treatment of the Authority's management of diplomatic leases, a responsibility I carried for almost a decade from 1993.

Responses to a number of Questions on Notice arising from my submission and evidence presented to the Committee on Thursday 1 May 2008 will be provided under separate cover.

David Wright

2 June 2008

Part 1 - Advice to Senator Lundy dated 5 May 2008

I attended the Committee hearing on Friday morning as you suggested and I am very pleased that I did. It served to confirm at first hand my worst fears. It was worthy of note that it was the ACT Chief Minister's Department and not ACTPLA that presented before the Committee. (Indeed the ACT Chief Planning Executive was not present at the hearing). This only underscores my concern that the administration of planning by the ACT Government is a movable feast. I point to the frequent reviews of both the ACT planning legislation and the administrative arrangements that have occurred with even greater frequency since the introduction of the initial Territory planning legislation in 1991. Transport planning, environmental planning and responsibility for heritage have been in and out of the ACT planning authority like the proverbial fiddler's elbow. In contrast, the legislative and administrative arrangements governing the National Capital Plan have remained stable since the introduction of self-government. The danger of the Chief Minister or the Chief Minister's Department 'hijacking' the ACT's planning agenda is all too real. It has happened before with strategic planning and I have no doubt it will happen again. Friday's hearing revealed to me just how real and close to the surface these dangers are.

The ACT Liberal Party's announced this week that, if elected, they would appoint a new Infrastructure Commissioner. How this position (and another bureaucracy) would fit with the current arrangements is anyone's guess. Experience elsewhere suggests that such a position, if only by virtue of the relative size of the budget it would be dealing with, would be more powerful and could over-ride the role of the ACT planning authority and the ACT Chief Planning Executive.

The lesson here, I believe, is simple. Beware of transferring planning responsibilities for areas which for more than 40 years have formally been recognised by the Australian Parliament as Areas of Special National Concern. Not only can we not guarantee that successive ACT governments will act as responsible custodians of those national (capital) values, one can be reasonably certain that their standing will, initially, decline to become but another item in a long list of municipal priorities and not long after that their importance, and even their origins, will be forgotten.

Once that process is initiated it will be inexorable and irretrievable. Mr. Cappie-Wood made it quite clear that once Designation is removed, any land affected should become Territory Land and that all planning and leasing matters, including any residual concerns about national significance, would be decided by the Territory. Ms. Lavis had to intervene to say that planning matters on such sites would be referred to the Authority for comment. Even this concession relegates the Commonwealth to just another player with the same status as Queanbeyan City Council, Capital Airport Group or 'Mr and Mrs Joe Bloggs from Rivett or Flynn'. Equally significant, particularly in the context of the Inquiry's Terms of Reference is that having both authorities each deciding on matters of national significance would increase red tape and would certainly add to confusion in the public mind.

What became abundantly clear on Friday is that the ACT Government does not understand or simply refuses to acknowledge the fundamental basis on which self-government was granted to the ACT and that is that it was to administer, in this case administer land, ***on behalf of the Commonwealth.*** *It was clear from Mr. Cappie-Wood's statements that he was of the view that Territory land is the ACT's land and that it's use, both now and in the future, should be the subject of ACT planning*

control. This is not only presumptuous, it is logically flawed. The land administration arrangements, if they are required to align with planning responsibilities, should follow a resolution of the Plan, not be the basis of the Plan, especially where one is dealing with matters of national significance. Similarly, given that that was not a criteria of allocating land administration responsibilities in the first place, new definitions of National and Territory Land need to be established and the whole of the original division of land administration needs to be re-examined.

The proper procedure should be to establish the planning principles and policies, allocate planning responsibilities (Designated Areas controlled by the Commonwealth and non- designated areas controlled by the ACT planning authority). Only then is it sensible to consider aligning land administration with planning responsibilities. This final step is not essential and, as such, it should certainly not be the major consideration in the future planning and development of the National Capital. ***Administrative nicety should not take precedence over a determination of national significance.***

Further evidence of the potential dangers of handing over additional responsibility to the ACT Government appeared as front-page headline news in The Canberra Times on Wednesday 30 April. The announcement of 15000 new home sites included land in Molonglo and Symonston. Molonglo is the subject of a Draft Amendment to the National Capital Plan and has yet to pass through the Parliament. ***Symonston, as far as I am aware is simply contrary to the National Capital Plan****. I wonder what consultation was undertaken with the NCA by the Chief Minister's Department or ACTPLA before maki9ng the announcement.*

Only when the ACT Government accepts its proper role and operates within its actual powers will we have an environment where joint planning arrangements and the notion of One Plan have any hope of success. I fear that day is a long way off. Even if it were achieved at some future point in time, its sustainability in the light of ACT government elections every 3 years, can hardly be guaranteed.

Part 2 – Future Choices

It appears almost certain that the Committee will recommend changes to the current planning arrangements in the ACT particularly in terms of the role to be played by the Commonwealth in the future.

I have previously urged the Committee to proceed with the utmost caution. I do not propose to repeat the arguments I have put to the Committee. However, I am anxious that before any major changes are made to the legislative arrangements and before any changes are introduced to the National Capital Plan, I believe it is important that the changes the Committee proposes to recommend to Parliament gat a proper public airing for two important reasons:

1 To ensure that the changes proposed are coherent and hang together i.e. that they represent a comprehensive and workable alternative, and
2 To ensure that people, particularly those who made submissions to the Inquiry, have an opportunity to present their views of the alternative system being proposed for the ACT.

To date the Inquiry has focussed on the alleged inadequacies of the present planning arrangements in the ACT as provided for by the *Australian Capital Territory (Planning and Land Management) Act 1988*, *the National Capital Plan* and *the Territory Plan.* Before abandoning or making substantial alterations to the current arrangements, it is only proper that an opportunity be afforded to those who have put forward their views on what alternative is proposed. Once the proposed alternative or alternatives are known, people may have a different view to that given in their original evidence to the Committee.

I offer a simple personal example: When asked in evidence, I did not support the idea that the Commonwealth , through the NCA or its equivalent, should have the power of veto over a planning decision of the ACT Government or the Territory planning authority. That view was expressed on the basis that under the present arrangements, I did not believe it was necessary and, indeed, it was entirely inappropriate if one was trying to establish an enduring co-operative arrangement between the Commonwealth and the Territory and the NCA and ACTPLA. However, if the Commonwealth proposes to substantially reduce its current planning control over substantial areas that are currently within the Designated Areas and, furthermore, abandon the use of Special Requirements, then my view would be quite contrary to that given to the Committee in evidence.

Another example involves the planning regime governing the use of National Land outside Designated Areas. At present, the interests of the Territory are secured by the use of Special Requirements which require the preparation of a Development Control Plan, albeit approved by the NCA, but on condition that *it reflects the relevant provision of the Territory Plan*. If Special Requirements are to be abandoned as proposed by the NCA, another mechanism needs to be found to secure the Territory's interest. Under the present system, Designation is the only remedy, but that would necessitate a change in the definition of National Land in the *Australian Capital Territory (Planning and Land Management) Act 1988.* The development at the Canberra International Airport since the removal of designation provides ample illustration of the unintended consequences in a

change to the established planning arrangements – consequences that have served neither the Territory interests nor those of Canberra as the National Capital.

If such problems are to be overcome, it is important that the alternative arrangements proposed by the Committee should be subject to professional critiques and the alternative models be presented as real choices for the public to comment upon. At the very least, those individuals and groups who have made the effort to put submissions to the Committee should be invited to comment on the potential outcomes of the Committee's inquiry. Having said that, I see no reason to restrict the invitation to comment on the Committee's 'alternative futures' for securing the future of the National Capital. Given such an opportunity - the consideration of a real choice between alternative futures -many more people and organizations may wish to contribute to the Committee's deliberations.

Part 3 – The Australian National Audit Office report: *The National Capital Authority's Management of National Assets – Performance Audit Report No. 33 2007-8.*

The timing of the release of this report was unfortunate to say the least. The public reporting of it poor and the comments made by both the Minister and the Chair of the Committee were premature, inappropriate and unwarranted.

I limit my comments here to the treatment in the report and the subsequent media coverage of the report to the question of the NCA's management of diplomatic leases and, in particular the view expressed in the report that had a different regime applied, the Commonwealth would have received an additional $385 million over the 99 year terms of all the diplomatic leases.

It is not clear how the figure of $385m was derived. Variables mentioned w ere:

1 Restricting lease offers to rental rather than premium (purchased leases)
2 Charging 8 or 10% of the unimproved capital value (UCV) as annual rent
3 Reviewing the rents every other year rather than every 20 years

Restricting lease offers to lease rentals flies in the face of current practices for all other leases in the ACT and is contrary to established practice, which has its origins in the first offer of a diplomatic lease to the USA in the 1940's.

Charging 8 or 10% rather than the current 5% would also fly in the face of current practice – established by the report's own admission in the late 1960's. It would also represent what the AVO consider a market value. However, as I point out below, this misses the point. Diplomatic leases are issued under the *Leases (Special Purposes) Ordinance 1925* and are intended to be **concessional leases.**

The Authority is not empowered under the *Leases (Special Purpose)s Ordinance 1925* to review the rent charged every other year. The *Leases (Special Purposes) Ordinance 1925* specifies that the rent is to be reviewed every 20 years.

The report does not elaborate on whether the $385m relates to the possible income from all Diplomatic Leases issued to date or only those issued since the Authority took over responsibility for diplomatic leases in 1993. In this context it is important to note that the report attributes the failure to collect this amount is sheeted home to the NCA as the responsible agency although, in a fine print footnote, it acknowledges that the NCA has only issued 21 of 71 leases over diplomatic sites. Furthermore, it makes no reference to the fact that the value of the sites issued by the Authority because of their location (primarily Deakin and O'Malley) are considerably less than those leased by its predecessors (primarily in Yarralumla). As such, the proportion of the 'lost' $385m for which the NCA might be deemed to be responsible would be very small indeed.

The report makes the point that only since 1991 have countries demonstrated a preference to take up a premium as opposed to rental lease. Given that the rental leases have been offered on a concessional rate and therefore returned less than market value, the sale of the sites at market

value provides an opportunity to invest that capital and receive a market return. In short sale of the land provides an opportunity to avoid the subsidy offered through concessional rental charges.

The report suggests that because these issues were raised in a draft internal report and not acted upon, the Authority was to blame for the failure to collect this additional $385m. That the report suggested that current practice breached Department of Finance Guidelines is not supported by the actions of the Department of Finance at the time. They considered the matter to be of such minor importance that they could not find the resources to nominate an officer to participate in an inter-departmental working group established to consider the draft report!

Similarly, the Department of Foreign Affairs was and is unlikely to show much interest, in that the income derived from Diplomatic Leases is not reflected in the Department's budget as it passes into consolidated revenue. Their interest is in securing the Commonwealth's interest in both diplomatic and property negotiations with foreign missions. The same could be said of the Authority as it stands to gain no benefit from any increase in revenue from diplomatic leases. If the Department of Finance could not summon any great interest in the matter, it was obvious that there was (and still is) no appreciable interest in changing the current practices which seek to balance financial returns with Australia's broader international interests.

I expressed my concern in the following Letter to the Editor of The Canberra Times which was published on Wednesday 21 May 2008 under the headline ***Poor reporting on NCA by Audit Office and Media:***

Sir,

The ANAO report on the NCA and the subsequent media coverage of the report cannot pass without some redress.

The ABC caption on Thursday night's news read: (The NCA…) Lost $385 million through poor rent collection from foreign embassies. Ross Solly took this misinformation further claiming that, according to the ANAO, (the NCA) had botched the management of diplomatic leases. Nothing could be further from the truth.

The ANAO report speculated that had all diplomatic leases been issued on a rental basis at 10% of the Unimproved Capital Value of the site, reviewed every 2 years, then the Commonwealth would, they claim, have received an extra $385 million in revenue over the 99 year terms of all the diplomatic leases in Canberra. Had the rental basis been 8% then the extra revenue would have amounted to $100m. It gave the impression that these losses were real and they were entirely attributable to the NCA. The ANAO's report, based as it was on an exploratory in-house report some 14 years ago, overlooks some fundamental considerations:

- *Diplomatic leases are issued under the Leases (Special Purposes) Ordinance 1925. Leases issued under this legislation are* ***concessional leases.***
- *Diplomatic leases are country specific and have a very limited lease purpose clause.*
- *Diplomatic leases cannot be bought or sold on the open market.*
- *The rate at which rent is paid, currently 5% of UCV, reflects the spirit of the legislation and is incorporated into each lease. Once the lease is executed that rate cannot be changed.*

- *The rent review period (every 20 years) is enshrined in the legislation.*
- *Some diplomatic leases are revenue neutral - they are the result of reciprocal agreements with other countries. These negotiations are handled by DFAT, not the NCA.*
- *Two thirds of all diplomatic leases were issued before the NCA assumed responsibility for administering diplomatic leases. Many of these had rent rates set at 2% or less. These could not be revisited.*
- *Even if the NCA had applied the standards suggested by the 1993 discussion paper, the difference between what has been collected by the NCA and what it might have received have been a small fraction of ANAO's mythical $385m.*

Perhaps ANAO could have behaved like a conventional auditor and reported on the actual rent that the NCA has failed to collect. Perhaps they could have reported that the function, initially staffed by three people, is now staffed by less than one person in the NCA.

ANAO's poor reporting of the management of diplomatic leasing raises considerable doubts about the value of the rest of its findings. Of one thing we can be certain - ANAO's report has been very damaging to the NCA and at the very time when many people are trying to deal seriously, through the JSC, with the future planning of the National Capital.

ANAO and the Canberra media stand condemned for their treatment of this vital issue.

David Wright

Recommendations

That the Committee:

- **Note the advice forwarded to the Chair of the Committee, Senator Lundy, as set out in Part 1 of this Submission.**
- **Subject its proposed alternative legislative and planning frameworks to professional scrutiny**
- **Subject those recommended alternatives together with the professional evaluation to further public consultation, and**
- **Invite public comment on the ANOA Report, given that that report has now been referred to the Committee by the Minister in the context of the current inquiry into the National Capital Authority.**