Mr Stephen Boyd
Secretary
Joint Standing Committee on the National
Capital and External Territories
Parliament House
CANBERRA ACT 2600

Dear Mr. Boyd

I am writing in response to the request from the committee for additional information following my evidence provided at the public hearing on 14 May.

I mentioned some other recent initiatives of the Commonwealth government that may provide useful points of comparison. This letter outlines more detail on these, and provides comments on the other areas you indicated were of interest to the committee.

Lessons from the Murray Darling Basin

The *Water Act 2007*, which came into effect on 3 March 2008, foreshadowed significant changes to the role of the present Murray-Darling Basin Commission.

The present Commission structure, like that of the National Capital Authority, is a legacy from past history, and is not considered a good model for governance. In particular, COAG and Ministers from the various Murray-Darling Basin jurisdictions have come to perceive the structure as cumbersome, slow and not adapted to meet the needs of contemporary government decision-making. In that context, there has been a conscious effort to move to a new structure and an intention on the part of the Commonwealth that – subject to negotiations with the Basin member jurisdictions – the Commission will be merged with a new body.

The *Water Act 2007* "establishes an independent Murray-Darling Basin Authority with the functions and powers, including enforcement powers, needed to ensure that Basin water resources are managed in an integrated and sustainable way...The Authority will report to the Commonwealth Minister for Climate Change and Water and will comprise a full-time Chair and four part-time members. The Authority members must have significant relevant expertise to be eligible for appointment, for example in fields such as water resource management, hydrology, freshwater ecology, resource economics, irrigated agriculture, public sector governance and financial management". (from the website of the Department of the Environment, Water Heritage and the Arts page on the *Water Act 2007*).

In summary, a much smaller body is proposed instead of the larger cross-jurisdictional, representative-based Commission. Nevertheless the Authority will still need to have reference to the various jurisdictions, and take account of their views – so there will be input from the different jurisdictions at government level. In addition, there are already strong community consultation forums that also provide advice to the present Commission, and there is no indication that the new arrangements are intended to do away with these advisory forums. Thus the new Authority will have input from different sources – above and below – to help guide its activities; but the Authority itself will be small and able to undertake governance effectively.

There are of course limits to the degree of parallels that can be drawn between differing functions, but hopefully this example provides an indication of how representation can be achieved without compromising good governance.

National Capital Planning Commission/ Ministerial Council/ accountability to two legislatures

You asked for my comments on this model. There are various other bodies that are accountable

to multiple jurisdictions; the Department of Finance *List of Australian Government Bodies and Governance Relationships as at 31 December 2004* (the most recently published list) shows 82 joint Commonwealth-State bodies (although a majority of these are Ministerial Councils, joint committees and the like). In addition there is joint ownership by the Commonwealth and States/Territories of companies such as Snowy Hydro Ltd.

In many cases, even where appointments to a body nominally rest with the Commonwealth, the views of other jurisdictions are taken into account before appointments are made (for example with bodies such as the Australian Competition and Consumer Commission or Food Standards Australian New Zealand).

As the previous paragraphs illustrated in relation to the Murray-Darling Basin, it is possible to put in place an arrangement where a body is accountable to Ministers and through those Ministers to legislatures from different jurisdictions: but the design of the accountability arrangements requires considerable thought.

For the purposes of administrative accountability - financial management, annual reporting, auditor-general's coverage, consideration of budgets and so on – my suggestion to the Committee would be that only one jurisdiction should be involved. Otherwise, there is a risk of duplication, conflicting messages and confusion. It would be undesirable, for example, for the organisation to be subject to two Auditor-General's audits, or two sets of appearances at estimates hearings, to enable it to be accountable to each jurisdiction. The simplest model would be for the Commonwealth to retain the body as a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act) and apply the accountability regime found under that legislation for administrative purposes.

It is quite possible though for a body to be subject to a Ministerial Council that provides the body with guidance, and holds it accountable for its performance against objectives set by the Ministers involved. This in turn provides for accountability to the relevant legislatures through those Ministers.

The term "Ministerial Council" may not be the best one to apply in this case, where presumably only the Commonwealth and ACT are likely to be involved; in the *Commonwealth-State Ministerial Councils Compendium* of 2007, "a Ministerial Council is defined as a formal meeting of Ministers of the Crown from more than four jurisdictions, usually including the Commonwealth, the States and Territories of the Australian Federation"; moreover, there is a presumption against creation of new Councils. An equivalent body, however, could be established by legislation to apply to the NCA.

Should such a Ministerial body be established, there would still be a need for a mechanism to break any deadlock resulting from a difference in views between the jurisdictions. This was canvassed in the public hearing of the Committee previously in relation to dealing with differences between the Minister and the NCA – the same considerations would apply in a case where the NCA faced conflicting demands from the Commonwealth and ACT Ministers. A possible mechanism might be a requirement for a dispute to be resolved by tabling of a formal direction from the Commonwealth Minister, as a disallowable instrument, together with a requirement that any such direction outline the reasons for the decision involved.

The committee would need to consider whether there was a need for both a Board for the NCA and a Ministerial body. If Ministers were to become more active in providing direction and guidance to the NCA, this raises the question of whether a Board is required at all.

What kind of Board?

The question of the role and composition of the Board is therefore worth exploring in more detail.

As noted in the Department of Finance and Deregulation's advice on governance arrangements for Australian Government Bodies, "applying a board structure where a board has a limited power to act, and fulfil a governing role, may obstruct good governance and a body's performance". The department recommends against a board as the governance structure for an FMA Act body. For such bodies an advisory board may be appropriate.

In the case of the NCA, however, neither sort of "board" model seems really applicable. The NCA is not in the situation of an independent authority with a structure akin to a corporation - the model that applies to *Commonwealth Authorities and Companies Act 1997* bodies. In these cases the governance arrangements include a board with powers defined either in enabling legislation or (in the case of a company structure) the corporate constitution. But neither is it a traditional government agency with a direct accountability link to a Minister – it is designed to be at arms length and exercise a high degree of independent judgement in relation to the planning responsibilities it has been given.

The governance arrangement that applies best to such bodies is the "commission" rather than board or authority model. There are numerous such commissions in the Commonwealth: they include the Australian Law Reform Commission, Crime Commission, Human Rights and Equal Opportunity Commission, National Water Commission, Australian Competition and Consumer Commission, Australian Securities and Investments Commission, Productivity Commission, and Commonwealth Grants Commission. The most frequently observed form of such bodies is a group of a few commissioners, often with a full time chair and part time commissioners, charged with the undertaking of defined statutory functions. The focus of the body termed the "commission" is the carrying out of the functions given to it by the government[1].

Commonwealth commissions frequently appoint a Chief Executive Officer or equivalent to be responsible for the day-to-day management of the organisation – including staffing, finances, property, contracts and other administrative matters. The position is variously described as CEO (eg Australian Securities and Investments Commission), Secretary (eg Commonwealth Grants Commission) or Head of Office (eg Productivity Commission). There are others (such as the National Water Commission) where the chair of the Commission is also the CEO – but these reflect particular circumstances and policy objectives.

There would be advantages in moving the governance of the NCA to the Commission model with either the Chair of the Commission appointed as CEO, or with a separate CEO/head of office role that was clearly designated as an administrative one rather than one of acting as the public face of the organisation.

There are strong arguments in terms of accountability, clarity and operational effectiveness in separation between Board and CEO. Separation between the chair of a Board and CEO is common practice in Australian corporate boards, and provides advantages in that the Chair can provide counsel and guidance to the CEO and an independent perspective on his or her performance. However, in the case of the NCA past governance arrangements have not been conducive to this role; although in my view it would be a desirable feature of a new commission, it is not an essential one on which model stands or falls.

Under a commission model, there would be no problem with there also being a Ministerial body to which the commission reported – this occurs with other commissions (for example the National Water Commission provides advice to both COAG and to the Minister for Climate Change and Water).

[1] There are (as with most classifications of Commonwealth bodies) some exceptions that arise for historical reasons: for example, while most commissions fall under the FMA Act not all do; and some that go by the name "commission" are in reality standard public service entities; these exceptions do not detract from the applicability of the more common model to the NCA.

In summary, the advantages of a Commission and Ministerial 'council' model are greater accountability, greater consistency with well established governance arrangements for comparable bodies, and a more clearly understood internal administrative structure.

At one level, accountability to two different jurisdictions is a disadvantage, in that it may lead to conflict and require a mechanism for resolving that conflict. Against this, it could be argued that there is already conflict – so establishing an institutional mechanism that allows any conflicts to be resolved in an orderly way could be seen as an advance on current arrangements.

Other legislative amendments

You sought my views, in the context of your description that "the NCA has enjoyed inordinate powers to avoid scrutiny with respect to the Public Works Act and the Environment Protection and Diversity Conservation Act", on whether there was a need for amendments to these Acts.

If other aspects of the current arrangements were to be retained, then there would be some value in consideration of amendment of either Act. In particular, while there are limits to the scope to Public Works Act (referring only to Commonwealth works) there are much broader powers conferred on the NCA to affect planning more broadly in the Australian Capital Territory. This has the potential to give rise to inconsistencies, anomalies or confusion.

However, if there were other reforms put in place that had the effect of:

- increasing the accountability of the NCA or replacement body to a committee of the Parliament; and
- instituting joint Commonwealth and ACT Ministerial responsibility for overseeing the performance and directions of the NCA

then there would be less of a need for amendment to other legislation. Ministers and the Parliament could be expected to take account of the need for consistency with other legislation.

Sustainability

Planning is a key contributor to the sustainability of the urban environment. Considerations of patterns of transport, land use, buildings, services and the integration of all these to meet the needs of the community they serve are vitally important. In recent years governments at all levels in Australia have recognised the need to pay more attention to sustainability. I am sure the committee is aware of the fine work being done by various organisations to promote, research and support urban sustainability.

In that context, it would be desirable for a re-modelled NCA to have a specific reference to sustainability among its objectives.

Commonwealth presence in Canberra

In answering your query on this I intend to leave aside the airport question – different considerations apply to airport land not only in Canberra but in other cities, as a result of the arrangements put in place for airport sales by the previous government, and amendments to the provisions of the Federal Airports Act 1996. These raise important issues in relation to planning and land use, but not ones that can be easily resolved through the present inquiry.

In respect of other issues you raise – management of land, location of offices and development proposals – there is a careful balance that needs to be struck between coordination and devolution. Either heavy-handed central control (and its associated bureaucracy and delays) on the one hand, or on the other hand devolution to the extent that the Commonwealth is embarrassed by lack of coordination between its agencies, are be undesirable.

Unfortunately the present NCA does not have a good reputation among Commonwealth agencies for its responsiveness to their needs, and providing it or its replacement body with a greater level of coercive powers would be likely to be resisted strongly.

In that context, I would be reluctant to see more powers given to a reconstituted National Capital authority to undertake a coordination role. The risk is that it would see its role as directive rather than consultative, simply adding another layer of approval mechanisms and regulation to the processes. A better alternative would be to reinforce current mechanisms for coordination, especially in relation to the Public Works Committee of the Parliament.

If there were to be a role for the new NCA or replacement body in provision of advice and coordination – for example, in organising a network or forum of Commonwealth agencies with property interests in Canberra, in establishing an indicative listing of projects in consideration, in advising agencies on suitable sites for new developments – then the risks would be lower. There are strong arguments in favour of better distribution of information between agencies in Canberra on these sorts of issues, and it would be an appropriate role for the NCA or equivalent.

I hope these comments are of assistance to the Committee in its inquiry. Please do not hesitate to contact me if you would further clarification of any of these points.

Yours Sincerely

Stephen Bartos

19 June 2008