



Australian Government
National Capital Authority

Senator Kate Lundy
Chair
Joint Standing Committee on the National Capital
and External Territories
Parliament House
CANBERRA ACT 2600

Dear Senator

I bring to the Committee's attention errors of fact regarding the *ACT (Planning and Land Management) Act 1988* (PALM Act) in the submission of the ACT Government regarding alleged provisions for the NCA to review. I refer to page 7 and quote from the submission:

In particular the Act should be amended to:

- *repeal provisions that give rise to the NCA having the power to review a decision of the Australian Capital Territory Planning and Land Authority (ACTPLA);*
- *repeal provisions that permit challenges to the validity of ACTPLA decisions on the basis of inconsistency with the NCP.*

There are no provisions in the PALM Act for either of these powers.

I attach the advice of the Australian Government Solicitor accordingly.

I am concerned that the Committee is asking question related to these matters in the absence of the facts.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Pegrum'.

Annabelle Pegrum AM
Chief Executive

22 April 2008

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22 April 2008

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Dear Ms Pegrum

Proposed Amendments to PALM Act

1. You seek our advice about some proposals for amendment to the *Australian Capital Territory (Planning and Land Management) Act 1988* (the PALM Act).
2. It is proposed that the PALM Act be amended to repeal provisions that give rise to the National Capital Authority (the NCA) having the power to review a decision of the Australian Capital Territory Planning and Land Authority (ACTPLA).
3. There is no provision in the PALM Act which gives the NCA any power to review a decision of ACTPLA. Accordingly, we do not see any basis for the proposed amendment.
4. It is proposed that the PALM Act be amended to repeal provisions that permit challenges to the validity of ACTPLA decisions on the basis of inconsistency with the National Capital Plan (the Plan).
5. There are no provisions of the PALM Act which specifically permit challenges by any person, including the NCA, to the validity of ACTPLA decisions on the basis of inconsistency with the Plan. There are no provisions in the PALM Act which give the NCA, or any other authority, any specific powers to force any person or body, including ACTPLA, to comply with any of their obligations under the PALM Act to act consistently with the Plan.
6. There is a requirement in s 11(2) of the PALM Act which has the effect of requiring that ACTPLA act consistently with the Plan. Section 11(2) provides as follows:

The Commonwealth, a Commonwealth authority, the Capital Territory or a Capital Territory authority shall not do any act that is inconsistent with the Plan.
7. There is potential for persons with legal standing to seek court orders to compel compliance with the obligations imposed by s 11(2) of the PALM Act. The Commonwealth Attorney-General would have standing to seek court orders to

compel the Territory or a Territory authority to comply with the obligations imposed by s 11(2) of the PALM Act. Other Commonwealth Ministers and other elements of the Commonwealth might also have standing.

8. In recent litigation in the ACT Supreme Court the applicant companies, which were associated with the Canberra Airport, sought orders to prevent a development at the Epicentre site at Fyshwick from proceeding on various grounds, including on the ground that the development approval granted by ACTPLA to Direct Factory Outlets Canberra Pty Limited was invalid because it was inconsistent with the National Capital Plan. The applicants relied on s 8 of the *Land (Planning and Environment) Act 1991* (ACT) (the Land Act), which prohibited ACTPLA from acting in a manner inconsistent with the Territory Plan, and on s 9.1(k) of Part A3 of the Territory Plan, which prohibited ACTPLA from approving a proposal which would be inconsistent with any relevant provision of the National Capital Plan. The applicants also relied on s 11(2) of the PALM Act.
9. In *Capital Property Projects (ACT) Pty Limited & Ors v Planning and Land Authority and Anor* [2007] ACTSC 95 (7 December 2007) the ACT Supreme Court held that in that case the Land Act gave ACTPLA the role of deciding whether a development was consistent with the National Capital Plan. The Court held that in exercising its judicial review function it was not the role of the Court to itself determine on the basis of fresh evidence to the Court whether a development was consistent with the Plan. It follows from this decision that the only question to be determined by the Court was whether ACTPLA made its approval decision in accordance with law, in particular in accordance with the requirements of administrative law.
10. The decision of the ACT Supreme Court would not preclude the Commonwealth in appropriate cases from taking court proceedings to enforce obligations under s 11(2) of the PALM Act. Such a case might arise where an act was clearly inconsistent with the Plan. Such proceedings would not be appropriate in cases where the Plan calls for the exercise of judgement and opinion, and a decision is within the range of judgement or opinion permitted by the Plan. It would not be sufficient that a different judgement or opinion might have been reached. There must be inconsistency with the Plan before any court orders could be sought to enforce s 11(2) of the PALM Act.

Yours sincerely



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