LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING AND URBAN RENEWAL
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Submission Cover Sheet

Engagement with Development Application Processes in the ACT

Submission Number: 058 - Environmental Defenders' Office (ACT)

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Environmental Defenders' Office
AUSTRALIAN CAPITAL TERRITORY

The Committee Secretary
Standing Committee on Planning and Urban Renewal
Legislative Assembly for the ACT
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Dear Standing Committee,

Inquiry into Engagement with Development Application Processes in the ACT: Environmental Defenders Office ACT Submission

The Environmental Defenders Office ACT provides advice and representation to individuals and community groups on planning and development where it impacts on the environment in the ACT and surrounding areas. Indeed, a large number of inquiries that the EDO ACT receives are about planning and development applications and their impacts on the ACT's unique biodiversity.

Given this, the EDO ACT welcomes the opportunity to comment on the *Inquiry into Engagement with Development Application Processes in the ACT.* At a time of large-scale development in the ACT, the community relies on the limited protections within the *Planning and Development Act* 2007 (ACT) (*PD Act)*, specifically the development application (DA) and EIS processes within it, to protect the natural and built environment, to provide the public the opportunity to engage in democratic processes, and to plan for the future.

In its current form, environmental protections within the DA process do not adequately protect the environment. The DA process must allow for greater and more robust protections of the environment, as per the objective set out in section 6(a) of the PD:

> *"to provide a planning and land system that contributes to the orderly and sustainable development of the ACT consistent with the social, environmental and economic aspirations of the people of the ACT".*

ToR 1. Community engagement and participation in the Development Application Process

The importance of community engagement and participation in the DA process cannot be understated. Community members and groups are often best placed to provide accurate information on impacts of proposed projects, including their impacts on biodiversity and heritage. Members of the community live with the impacts of development and must be able fully contribute to the decisions that affect them.

Community engagement and meaningful participation is a basic principle in international law. For example, Principle 10 of the Rio Declaration, sets out three fundamental rights:

- access to information;
- access to public participation; and
- access to justice.[1]

The Australian Panel of Experts on Environmental Law (APEEL), in their technical paper entitled "Foundations of Environmental Law. Goals, objects, principles and norms" discuss these 'three pillars', essential in achieving environmental democracy. APEEL states that "for each of these 'pillar' principles to have any direct legal force or effect, it is necessary for environmental legislation to establish specific procedural mechanisms to give effect to them. For example, with respect to access to justice, there must be legislative provision for open standing or the avoidance of costs awards in public interest cases. To these core environmental democracy principles could be added principles in support of transparency and accountability in the administration of environmental legislation".[2] Satisfaction of each of these pillars will help to achieve the PD Act's objective, noted above.

Despite the importance of community engagement and participation in the DA process, and this being a basic principle in international law, community engagement and participation in the DA process is stifled by a number of issues set out below.

(a) The accessibility and clarity of information on Development Applications and Development Application processes, including Development Application signage; the Development Application finder app; and online resources.

The EDO ACT often assists or takes inquiries from members of the public who would like to engage with a development application process, but find it difficult to navigate the ACT Government's Environment, Planning and Sustainable Development Directorate – Planning website (ACT Planning website), or access and understand information on DAs generally. Clients often find both the form and the substance of DAs difficult to understand. The PD Act is often described as a challenging piece of legislation that is difficult to grapple.

Better community engagement in planning and development matters is ensured when information for development and related applications is clear, accessible and transparent. The existing ACTG Planning website must be made more accessible to the general public to ensure better engagement. Some of the issues currently experienced with the website, thereby making public engagement with the DA process difficult, are discussed below.

(i) Lack of information for the public who wish to engage with a DA process

[1] *Report of the United Nations Conference on Environment and Development (Rio Declaration)* UN Doc A/CONF.151/26 (1992), Principle 10.
[2] The Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law. Goals, Objects, Principles and Norms. Technical Paper 1,* p. 36.

There is an abundance of information on DA processes on the ACTG Planning website for people planning to lodge development applications (applicants). However, there is very little information available for all users of the development process, including third parties who wish to engage in the DA process.

The ACTG planning website needs to ensure transparency in the processing of DAs in the ACT, by providing the public with clear opportunities to comment on projects that are likely to affect them. The website is primarily directed to applicants in the DA process, with very little information for all users of the DA process. Plain language information is required that sets out general information on the DA process and identification of opportunities to comment at each stage. For example, the Victorian Department of Environment, Land, Water and Planning website contains a Guide to Victoria's planning system (https://www.planning.vic.gov.au/guide-home/guide-to-victorias-planning-system) that sets out, in some detail, the planning scheme, amendments, planning permits, other procedures, reviews, acquisitions and compensation, enforcement, agreements and plain English (see https://www.planning.vic.gov.au/__data/assets/pdf_file/0017/__95012/Using-Victorias-Planning-System-2015.pdf). The guide is "*designed to help professional planners, local council and referral authority officers, councillors, students, people applying for a planning permit, and people who may be affected by a planning proposal*".[3] Other guidance material in the form of planning practice and advisory notes have also been developed to assist users of the planning system. The ACTG planning website would benefit from similar guides being developed in the ACT for members of the public.

In addition to the general information on the DA process described above, plain, easy to access information should be provided for each individual DA publicly notified. This information needs to include:

- The background of each project, as described by the Planning and Land Authority, rather than the applicant;
- The relevant stage of the DA process the project is at;
- Any relevant consultation, scoping and EIS requirements to be fulfilled;
- A map of the development area.

On the Victorian planning site (https://www.planning.vic.gov.au/have-your-say), key proposals are summarised in a short information factsheet containing important information. For example, see the Information Sheet for the Proposed planning scheme changes for 111 – 139 Queen Street and 433 Smith Street, Fitzroy North (Former Gasworks site). The information page contains:

- A short description of the site, including a map;
- Key dates clearly displayed in a table;
- An outline of the proposed changes; and
- Information about where the view the proposal and about the planning process (including that Government Land Standing Advisory Committee generally).

[3] "Using Victoria's Planning System" at https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system.

The website clearly articulates digestible introductory information for the public to consider, when preparing representations on DAs. It is important to ensure that members of the public have access to all information on DAs, but that the information provided is also clear and logical. This is discussed in greater detail in 1(a)(iv) below.

Recommendation 1(a)(i): The EDO ACT recommends the Directorate provide accessible, plain language information relating to both the development process in general, and specific major developments.

(ii) Content and design is not plain language or user friendly

The ACTG Planning website does not incorporate plain language design and content on its website, inhibiting the public's understanding and participation in the planning process. The language of the website is highly technical and, as stated above, there is little information to explain the DA process in plain language.

Plain language communication incorporates not only language, but structure and design of information. This includes using logical order, paragraphs, headings, subheadings and contents pages, the use of smart art, graphics, and other tools, techniques and clear pathways to ensure information is disseminated in a way that will ensure its accessibility. Definitions of complicated terms must be made easily accessible for all users (the current definitions page of the ACTG Planning Website is difficult to find, not in plain language, and not all key terms are defined).[4] The ACT Government "Your Say" website is an example of a visually clear website that uses plain language graphics and icons to disseminate information.

Governments around the world are adopting a plain language approach to information for the public. For example, the South Australian State Government are committed to disseminating plain language information to its constituents, such that they have developed a "Good Practice Guide to Plain English" (see https://publicsector.sa.gov.au/wp-content/uploads/20070101-Good-practice-guide-Plain-English.pdf). The South Australian government also have a website style guide that adopts some of these principles (see https://www.sa.gov.au/editors/website/style-guide).

Victoria's "Using Victoria's Planning System" noted above contains a specific chapter on plain language. Chapter 9 details the plain language principles it incorporates, in line with the Victorian Ministerial Direction on the Form and Content of Planning Schemes that directs statutory planners to communicate in plain English.

Websites such as Law Access NSW, and Everyday Law Victoria contain clear design, graphics and structure, to make the website as user-friendly as possible. EDO ACT encourages the redevelopment of the ACTG Planning website to incorporate plain language design and content onto its website.

[4] The following are other plain language resources that may be useful: *Law by Design* by Margaret Hagan; *Better information handbook* (VLF); *Plain language and good communication: How to make your writing work* (VLF); Simplification Centre technical papers cover a variety of topics; Legal design toolbox; Legal design lab.

Recommendation 1(a)(ii): The EDO ACT recommends that the ACT Planning website be redeveloped, incorporating best practice design and plain language techniques in its development so that all users, including the community, can more readily contribute to DA consultations.

(iii) Opportunities to comment on DA process are difficult to find

The DA process is multifaceted and opportunities to comment on DAs arise at multiple stages of the process. Opportunities to comment are not limited to the lodgement of the DA itself – these opportunities extend to pre-DA consultations; consultations during a draft Environmental Impact Statement (EIS); or when the Minister receives an application to exempt the applicant from the requirement to include an EIS in the development process. Members of the public have opportunity under the PD Act to comment on each of these stages, however it is difficult to actually locate these opportunities to comment on the ACTG Planning website.

Firstly, opportunities to comment on DA processes are located in separate sections of the ACTG Planning website. Opportunities include:

- Development Applications ("DAs open for public comment");
- Pre-DA consultations ("Current Pre-DA Consultations");
- Environmental Impact Statements (EIS); and
- Applications to exempt the requirement to provide an EIS in the development process (EIS exemptions).

These opportunities to comment cannot be accessed from the home page, nor can they be accessed directly from the "Quick Links" section of the website. Members of the public have to click into a number of pages before accessing each of these pages. Whilst the informal rule of information architecture is to limit the number of clicks to find a page to three (and the current website achieves this, though each different opportunity to comment such as a DA, EIS or EIS exemption application are on separate pages), the EDO ACT recommends one central link from the homepage for all opportunities to comment. In addition, opportunities to comment and consultations on strategic planning are on an entirely different website altogether (the "YourSay" website).

The current information infrastructure on the ACTG Planning website inhibits the ordinary user from finding the information that they need to exercise their rights. Unless you are a regular and an experienced user of the ACTG Planning website, it is difficult to find these opportunities to comment on the website. Further, unless you are looking out for a particular opportunity to comment, it is easy to miss out on an opportunity. Recently, a client was only recently made aware of an application for an EIS exemption for a large development when an article appeared in the Canberra Times that prompted further investigation.

Whilst the EIS exemption process is a part of the pre-DA process and members of the public are entitled to provide comments, this opportunity is not centrally located and users will only find these opportunities if they know and expect to look for them. Users will only find these particular

opportunities by drilling down into the EIS architecture. Once you arrive at the "Exemption from requiring an EIS page, the process is explained (through a handy flow chart), with opportunities to comment at the very bottom of the page, when you scroll down. This is simply not accessible for an ordinary member of the public.

The EDO ACT has spoken with members of the public who advised that they did not make representations to DA applications, EIS documents for comment or applications to waive the requirement to provide an EIS, because *they were not aware that these opportunities to comment were open.* All opportunities to comment need to be combined into a central page for all stages of the development application process. This will show the interconnectedness between all opportunities to comment and be easier for the user to navigate.

Recommendation 1(a)(iii): The EDO ACT recommends that all opportunities to comment during the DA process be set out on one page in a central location, linked on the homepage.

(iv) Supporting documents are difficult to follow

Once a DA is located on the ACTG Planning website, a vast array of documents, in no particular order, are attached in support of the DA (note this also applies to opportunities comment on EIS and EIS exemptions). The supporting documents are often not labelled in a logical manner, and there is often no obvious correlation between the document submitted and the criteria it seeks to address. For large applications involving multiple blocks for example, it can be unclear as to what development will occur on which block, which documents refer to what impacts on which areas etc. Information is simply unclear. Documents supporting a DA (or an EIS or application for an EIS exemption) need to follow set protocols including:

- Logical ordering of documents;
- Naming of documents following particular naming ordering convention; and
- Completion of a checklist or other such document that identifies the criteria that needs to be addressed, and the supporting documentation that relates.

This will not only assist members of the general public wishing to make representations, but the decision makers who also have to navigate these documents.

Recommendation 1(a)(iv): The EDO ACT recommends that all supporting documents to DA applications (and associated processes such as EIS and EIS exemption applications) follow logical ordering and naming protocols so that all users of the DA system are able to understand the purpose and content of supporting documentation. Supporting documentation needs to be cross-referenced with the requirement it seeks to address.

(v) Additional search functions including maps

Currently, DAs can be searched on the ACTG Planning website according to closing date, district or DA number. There are certainly advantages to listing all developments in the ACT on a centralised database and EDO ACT encourages this practice. However, EDO ACT proposes an additional search

option, so that DAs can be searched by the type and size of development. This will better enable members of the public to assess a development and decide whether, given its size and type, it is likely to impact on them.

In addition, providing details of a DA's type, size and location on a map will make it easier for the public to see the size and location of the development to scale. This will better enable the public to accurately decide whether a development is likely to impact them or not. This will also bring the website into line with the DA Finder app.

Presently, some of this information is available by searching the relevant block and section on the ACTmapi viewer (http://www.actmapi.act.gov.au/). However, this information needs to be readily available in the one place, attached to the relevant application, rather than requiring members of the public to search for this information themselves.

This feature is not uncommon in other jurisdictions. The Victorian Environment, Land, Water and Planning website, specifically it's "Have your say" section with respect to DAs (https://www.planning.vic.gov.au/have-your-say), sets out a summary of each proposal, a google map of the area to be developed, the comment period in relation to the timeline of the entire project, a document library and an opportunity to make submissions.

Recommendation 1(a)(v): The EDO ACT recommends the inclusion of additional search functions, including searching DAs by type and size and inclusion of maps on the website.

(vi) Advertise Opportunities to Comment more broadly

With notifications of development applications no longer advertised in the Canberra Times, opportunities to comment are limited to what can be found on the ACT Planning website. This limits exposure to opportunities for comment to those members of the public with access to the internet or a computer. Consideration needs to be given to providing exposure to opportunities to comment in different fora.

Members of the public now engage with information and opportunities to comment in different ways. Social media has gained popularity as a place to disseminate information. It is suggested that more dynamic methods be used by the Planning and Land Authority to disseminate notification of, particularly major, developments. This may include notifications on social media, but may also include in local public spaces (e.g. libraries) for those without internet access to be able to engage with these processes.

Recommendation 1(a)(iv): The EDO ACT recommends publicising opportunities to comment on DAs on multiple platforms including social media and in local public spaces.

(b) Pre- Development Application consultation and statutory notification processes

(i) Insufficient notification period for community consultation

The current minimum notification period for major developments is not long enough to allow for genuine, meaningful community consultation or engagement in the DA process.

Division 7.3.4 of the PD Act sets out different public notifications requirements, depending on the type and size of the application. The notification periods are prescribed by the *Planning and Development Regulation 2008* (section 157 PD Act). The minimum notification period for minor DAs is 10 working days unless it is a notification for an estate development (then it is 20 working days) (regulation 28(a)). For major DAs, the public notification is 15 working days, unless it is a notification for an estate development (then it is 20 working days) (regulation 28(b)). These notification periods are inadequate to provide members of the public with sufficient time to difficult to provide comments on sometimes complex development applications. By comparison, designated developments[5] in NSW require a minimum 30 day notice period.

The Planning and Land Authority has the discretion to extend a notification period (under section 156(3)). However, this is a discretion only, and there are no guarantees that any requests for extensions will be granted, nor that the public has time to make their representations. DAs are complex and preparing submissions is time consuming. The EDO ACT suggests that all notification periods be for 30 days, with an opportunity to extend beyond that 30 day period including but not limited to a notification period involving a major, complex development, or a development application lodged in the impact track.

In addition, in the ACT the consultation period includes the summer holiday period, when members of the public are generally on holiday and are unavailable to contribute to consultations. As is in case in NSW,[6] the summer holiday period (20 December to 10 January) should be excluded when calculating the minimum exhibition period.

Recommendation 1(b)(i): The EDO ACT recommends that the minimum consultation period for major developments should be extended from 15 to 30 days.

(ii) Community engagement where multiple DAs are required for large-scale projects

Large-scale projects are often completed in stages with DAs lodged periodically, forming part of the one, large project. In the EDO ACT's experience, some DAs lodged in a piecemeal way, without consideration of the larger development, has made it difficult for members of the public to articulate their concerns about a project in its entirety, because they are restricted to commenting on the smaller DA before them. A development is the sum of its parts and being unable to comment on the wider implications of a smaller DA takes away from community engagement and consultation. The

[5] Environmental Planning and Assessment Act 1979 (NSW), s. 79; Environmental Planning and Assessment Regulation 2000 (NSW) section 78.
[6] *Environmental Planning and Assessment Act 1979 (NSW)* Schedule 1 Div 3 Section 16.

fragmentation of the DA process with respect to large-scale projects often has environmental implications because multiple DAs often fail to address the cumulative impacts of the project (this is despite section 124A(1)(b) defining significant adverse environmental impact including the cumulative or incremental effect of a proposed development). On the flipside, the existence of a Strategic Assessment precludes the need for EISs at each stage of the large-scale development, usually resulting in the failure to monitor ongoing impacts of a development as a project develops.

Both a long-term, large-scale lens and short term, small scale evaluation is essential to the DA process in ensure that environmental considerations are balanced with economic and social objectives. Where smaller DAs are known to be part of a larger project, both the immediate DA and long term proposal must be submitted to the Planning and Land Authority as part of the DA process to provide context and information to the Authority and those members of the public wanting to make a representation.

Recommendation 1(b)(ii): The EDO ACT recommends that where smaller DAs are part of a larger project, both the immediate DA and long term proposal be submitted to the Planning and Land Authority as part of the DA process to provide context and information to the Authority and those members of the public wanting to make a representation. This information must be presented in an accessible manner so that the public can understand each DA and how it fits in to the larger development. Smaller DAs need to address considerations pertaining to the project in its entirety. This includes using plain English, an accessible website format, and creating factsheets to explain the DA.

(iii) Ensuring early and genuine community consultation

The ACTG introduced guidelines to encourage applicants to have meaningful engagement with the public prior to lodging a DA. The guidelines came into effect in November 2017, setting out minimum engagement requirements and apply to specific proposals, though developers are generally encouraged to consult with community.

The EDO ACT welcomes initiates encouraging early and meaningful consultations between development applicants and the general public. However, genuine, meaningful consultations with members of the public involve processes where plans are collaboratively developed and are more than a desire for members of the public to rubber stamp development plans without genuine consideration of alternative suggestions.

In addition to early consultations that occur between the applicant and community, pre-DA consultations and meetings take place between the Planning and Land Authority and development applicants. In our experience, the public have the perception that pre-DA consults between the Planning and Land Authority and the applicant impact on decisions prematurely, as though the decision has already been made. The opaqueness of pre-DA discussions can leave the public feeling as though any community consultation process is tokenistic and will not impact on the DA decision. Further measures of transparency are required to build the public's confidence and trust that the DA process is administered fairly and according to the law.

Recommendation 1b(iii): The EDO ACT recommends that pre-DA discussions between the Planning and Land Authority and the applicant are transparent. In addition, the EDO ACT recommends that any pre-DA consultations between the applicant and community are recorded, and that applicants present community concerns to the Planning and Land Authority, including how they propose to address those concerns.

ToR 2. The accessibility and effectiveness of Development Application processes, including:

(a) The information provided in relation to the requirements for Development Applications

There are currently three information packs on DAs centrally located on the ACTG Planning website,[7] and assorted other guides found deep within topic pages on the website (e.g. Proponent's Guide to EIS Exemptions).[8] This information is important, as it ensures that applicants are informed of the law and correct process. However, the guides are limited for the following reasons:

- Current information is not comprehensive and is fragmented in a number of different guides. Information on the DA process needs to be set out in one guide, so that all stakeholders in the development process understand the process holistically (see ToR 1(a) above);
- The guides do not reflect plain language design. Information needs to be repackaged following plain language principles so as to be accessible to all users of the DA system see ToR 1(a)(ii) above);
- The guides are currently limited in audience. They do not cater for all interested parties in the DA process. This limits the general public's ability to exercise their rights to engage in this process;
- Guides provide limited information on public consultation – for applicants, so that they understand how and when to engage, and for members of the public, so they too know how to engage.

Please refer to ToR 1(a) for relevant recommendations on improving the information provided in relation to the requirements for DAs.

Recommendation 2(a): The EDO ACT recommends that more detailed information guides are created for all users of the DA process, including information on public consultation and community engagement and that this resource is made available on the ACTG Planning website.

(b) The current development assessment track system;

The current DA application system works, in practice, as a self-assessment process, whereby applicants nominate which track their application falls within and the Planning and Land Authority then

[7] These are: "Building approval information pack, Development Application information pack and Owner-builder's licensing information pack", located at https://www.planning.act.gov.au/development_applications/info_packs.
[8] https://www.planning.act.gov.au/__data/assets/pdf_file/0008/1145357/EIS-Exemption-proponents-guide.pdf

makes an assessment of the application. The Planning and Land Authority relies on the applicant to know, understand and correctly apply the law, including which track the development should be lodged in. This is problematic. Such a process assumes the following:

- Applicants have a good understanding of each track and can thereby make an assessment as to which track applies in their case;
- Applicants that do not have an understanding of each track and are unsure as to which track to lodge their application in will contact the Planning and Land Authority for guidance;
- Applicants are aware of environmental values located on the land that they wish to develop. This is not necessarily the case;
- Applicants act in good faith in the protection of the environment, even to their own detriment.

Section 114 of the PD Act states that an application lodged in an incorrect track must be refused. Despite the lack of discretion in this section, EDO ACT has worked with a number of clients dealing with developments inappropriately lodged in the merit track, rather than the impact. In one instance, this matter has been raised with the Planning and Land Authority, and action has only recently been taken to refuse the application (though this process of refusal has taken many months).

The Planning and Land Authority need to be appropriately resourced both by way of staff and expertise, to make decisions as to the merits of each DA application, including the appropriateness of the track where each DA is lodged.

In addition, the Planning and Land Authority needs to take a precautionary approach in the assessment of development applications and possible harm to the environment, as per the principles enshrined in section 6 and section 9(1)(a) PD Act. The precautionary principle *"means that, if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation".* [9] A precautionary approach to DAs lodgement will mean, in practice, that where the impacts of a development are uncertain, a DA must be lodged in the impact track to ensure an independent EIS is undertaken to provide certainty on the impacts of a development.

Case study: Incorrect DA track lodgement and initial acceptance

The EDO ACT assisted a community group concerned about a Development Approval for a railway siding. The railway siding was proposed in land zoned ITZ2 (Industrial Mixed Use Zone). Under ITZ2, Railway use is a prohibited development.

The DA was lodged in the merit track in this case, and was approved, despite the fact that the application was clearly lodged in the wrong track. The community group raised this as an issue with the Planning and Land Authority in February 2018. They have now been notified of a change in the decision – however this only came about after members of the public raised the issue to the Planning and Land Authority. This could have been avoided if the DA's track was scrutinized at first instance.

[9] Section 9(2) of the PD Act.

Recommendation 2(b): The EDO ACT recommends that the Planning and Land Authority take a precautionary approach when lodging (and assessing) DAs in the appropriate track. Where it is likely that a development will meet considerations set out in Schedule 4, applications in the wrong track must be refused. An assessment of the correct track must form part of the initial assessment of every DA. The Planning and Land Authority and all other relevant "referring entities" need to be appropriately resourced to assess the risk of a development, and be trained to take into account all relevant considerations when deciding whether a DA has been lodged in the correct track.

(c) The Development Application e-lodgement and tracking system, e-Development

In our experience, DA forms are often not adequately completed by applicants. For example, a sample of DAs from the ACTG Planning website demonstrate inaccuracies are commonplace:

"Please provide a full description of your proposal (Note: This must accurately describe all aspects of your proposal and include any lease changes being applied for.)"

"Construction of 26 new townhouses with associated garages plus all associated site works"

"Proposed New Two-Storey Townhouse Development with mixed of covered and non-covered parking for 24 spaces (including 3 visitor parking spots). Increasing the number of dwelling from 5 to 12 dwellings". (Note that this description does not include the proposed lease variation).

"[The development] will be a 5 star hotel building containing a total of 233 hotel suites with a Wellness Centre (Gym/Pool), an Internal Courtyard, Bar & Bistro, Café, Hotel Buffet Restaurant, Signature Restaurant, Hotel Club Lounge and Hotel Outdoor Bar, Roof Terrace Pool. This hotel will be 16 storeys (including mezzanine) as well as 2 levels of basement including associated works. The current 2 storey building will be demolished". (Note that this description does not include the proposed lease variation).

Indeed, a cursory look at the DA form itself shows at least one mistake in the form itself. The DA form states *"if the Environment and Planning Directorate assesses an application made in the incorrect assessment track it must refuse the application (S. 114(3)).* The form refers to section 114(3) PD Act (which does not exist). The form should reference section 114(2)(b).

Recommendation 2(c): The EDO ACT recommends that the Planning and Development Act be amended to include, as a basic validity requirement, the completion of DA forms in sufficient detail. This will increase the likelihood that users of the DA process will better engage with the DA process.

(f) Reconsideration and appeal processes

The EDO ACT assists members of the public with reconsideration and appeals processes. There are a number of barriers to public participation in these processes, discussed below.

(i) Standing

Applicants for a development tend to challenge an "eligible entity's" standing at appeal to the (see, for instance, *North Canberra Community Council v ACT Planning and Land Authority & Canberra District Rugby League Football Club Ltd* [2014] ACAT 1; *Ginninderra Falls Association v ACT Planning and Land Authority & Anor* [2017] ACAT 108)).

In order to have standing for merits appeals to ACAT, a group or individual must be an 'eligible entity' under Schedule 1 of the PD Act. An eligible entity to appeal a decision to under section 162 to approve a DA in the merit track or in the impact track must have:

> *(a) made a representation under section 156 about the development proposal or had a reasonable excuse for not making a representation;* ***and***
>
> *(b) the approval of the development application may cause the entity to suffer material detriment.*

Material detriment is defined in section 419 PD Act. For an entity that has objects or purposes, the decision must relate to a matter included in the entity's objects or purposes to establish material detriment.

The requirement to make a representation at initial application stage presents an initial hurdle to standing. For the reasons set out above regarding the inaccessibility of the website (see ToR 1(a)), members of the public have limited scope to have a DA decision reviewed in ACAT if a prior representation was not made. EDO ACT have consulted with clients who have missed opportunities to have decisions reviewed because they were not alerted to the fact that an opportunity to make a representation had arisen. These clients are unlikely to have standing to challenge a decision, despite being highly concerned about the development.

In addition, the requirement to prove "material detriment" can be a barrier to engaging in appeals processes, especially for entities with objects and purposes. Even through ACAT has taken a broad approach when determining material detriment, giving a wide interpretation to 'objects and purposes,'[10] time and money spent arguing about procedural issues such as standing is better directed towards dealing with the planning decisions at hand.

Standing for merits review needs to be expanded so that any person or entity that has made a representation during the public comment phase of a decision-making process has the right to challenge those decisions. This was endorsed (in the EPBC equivalent of section 419 of the PD Act) in the *Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (the Hawke Review). The Hawke Review recommended removing the requirement to meet section 27 of

[10] See, for example, *North Canberra Community Council v ACT Planning and Land Authority & Canberra District Rugby League Football Club Ltd* [2014] ACAT 1, with Professor Peta Spender noting at [48] that 'The relevant case law demonstrates that the courts have interpreted [section 419(1)(b) of the Planning Act] as having a wide operation.'

the AAT Act, the equivalent of section 419 PD Act.[11] As such, the Hawke Review recommended that the EPBC Act be *"amended to prescribe an extended definition of legal standing for the purpose of merits review applications for decisions made under the Act to include those persons who made a formal public comment during the relevant decision-making process".*[12] This recommendation was not agreed to by the Commonwealth government, in part because *"only a small number of the processes for which merits review is available include a process for receiving public comments."*[13] This is not the case for the PD Act. As a progressive and innovative jurisdiction, the ACT Government should amend the PD Act to encompass the recommendation of the Hawke Review and remove the material detriment requirement.

Recommendation 2f(i): The EDO ACT recommends that the PD Act be amended to allow for standing for any person or entity that makes a representation during the public commenting period. Opportunities for comment should be made more accessible so that the public can easily establish standing by making a representation.

(ii) Limited number of reviewable decisions

The review of decisions based on merit is only available for reviewable decisions in Column 2, Schedule 1 of the PD Act. Of the 51 total reviewable decisions set out in the PD Act, only 3 decisions can be appealed by a community group or affected individual (that is, third party) as an "eligible entity":

- Item 4: decision under s 162 to approve a development application in the merit track;
- Item 6: decision under s 162 to approve a development application in the impact track;
- Item 12: decision under s 193 (1)(b)(i) on reconsideration, unless the development application to which the reconsideration relates is exempted by regulation.

There is a clear disparity between the rights of review open to applicants, approval-holders and lessees, and the rights of review open to third parties. Indeed, there are a number of very important planning and development decisions that significantly affect the public, or that are in the public interest to be open for comment, but are not open for merits review.

Recommendation 2f(ii): The EDO ACT recommends that the PD Act be amended to expand the list of decisions that third parties can have reviewed, including all important decisions under the *PD Act,* such as the decision to grant an EIS exemption.

[11] As noted in *North Canberra Community Council,* The only relevant difference between section 419(1)(b) of the Planning Act and section 27(2) of the AAT Act is the heading, "material detriment".
[12] *Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (the Hawke Review) (2009) Recommendation 50.
[13] *Australian Government response to the Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999* (2011) page 90.

(iii) Accessibility

The planning process is notoriously complicated, and despite this there is a lack of guidance available for third parties wishing to engage in DA processes. This disempowers the public and prevents them from exercising their rights (see ToR 1(a)). Where third parties do challenge environmental decisions, they oppose well-funded, sophisticated applicants. The financial risks and costs of challenging decisions or pursuing legal remedies act as a disincentive to public participation. The valuable perspectives of communities, citizens, and civil society are less likely to be engaged because of financial barriers. Legal costs, ACAT costs, and expert costs act as a deterrent. This is at the expense of democratic process and the protection of the environment.

The Australian Panel of Experts on Environmental Law (APEEL)[14] has recommended that this disparity be resolved through "a combination of measures, including the restoration of funding to community legal centres, establishment of a sustainable public interest defence fund... and adoption of legislative provisions for penalties or forfeitures arising from the prosecution of environmental harms to be distributed to the public interest defence fund." The establishment of a public interest environmental defence fund would act as a progressive solution to costs barriers.

The Environmental Defenders Office ACT is an essential service in that it provides accessible legal assistance for individuals and third parties involved or interested in public interest environmental law in the ACT and surrounds. We acknowledge the ACT Government for its continued support - a demonstration of an ongoing commitment to access to justice for environment matters.

Recommendation (f)(iii): The EDO ACT recommends an ongoing investment in tools for all users of the DA process to engage in the planning and development process.

(g) Heritage, Tree Protection and Environmental assessments

(i) Lack of independence in the environmental assessment process

The EDO ACT remains concerned with the independence of the planning and assessment process with respect to assessing environmental impacts of developments. Reports provided in support of DAs to assess the environmental impacts of a development are currently commissioned and overseen by proponents. In this case, it is naturally questionable whether EISs provided in support of a DA are sufficiently independent to give an unbiased opinion of the impacts of a development. The current system provides the opportunity for proponents to shape the content and scope of reports or to "expert shop" to obtain environmental assessments that support their development. In our experience, experts have been discredited (despite their vast experience) because their reports have not suited the particular development applications.

Environmental impact statements must be completed by independent accredited experts, engaged by the Planning and Land Authority, rather than proponents engaging in contractual relationships with

[14] Australian Panel of Experts on Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, 2017).

contractors to provide a service. Independent assessors should be obtained from a pool of independent experts in the ACT and surrounds. To increase transparency and remove any perceptions of bias, the experts should be assigned to a project by an independent body. Projects with the largest potential impacts should attract the greatest scrutiny.

Independent assessors and decision-makers must be provided with the best information available on the development in order to provide an accurate statement on environmental impacts. Best practice assessment must therefore by underpinned by comprehensive baseline data and current environmental accounts, with resource and time allowances to address data gaps.

Recommendation 2(g)(i): The EDO ACT recommends that independent experts be selected by an independent body to conduct environmental assessments on major projects. For transparency, these assessments need to be publically available and provided to government, whether or not they are favourable to the proponent.

(ii) Insufficient public consultation in the environmental impact statement (EIS) process

There is insufficient public consultation during the environmental impact statement (EIS) process. Public consultation during the environmental assessment stage is very important because the local community are often experts in the environmental values of the area. Citizen scientists also play an important role in monitoring and research. In particular, the PD Act should be amended to require consultation at each of the following stages:

1. Preparation of a scoping document. A scoping document is a written notice prepared by Planning and Land Authority that sets out the matters that must be addressed by the proponent in preparing the draft EIS (section 212). Identifying the likely environmental impacts of a development proposal is an important step in the EIS as it defines the scope. Public consultation is required at this pre-EIS stage, to provide inputs to the scope of the EIS.
2. Revised draft EIS. The PD Act offers no opportunity for further public consultation following consultation on a draft EIS. The public should be given the opportunity to re-consult if EIS' are revised.

Recommendation 2(g)(ii): The EDO ACT recommends that opportunities for comment in the EIS be expanded to include further consultations when EIS' have been revised.

(iii) Exemptions from environmental impact statements

EDO ACT has significant concerns about the current EIS exemption process under the PD Act. Under section 211H of the PD Act, the Minister can grant an exemption from the requirement to produce an EIS in a development application. While it is important that applicants do not duplicate the time, energy and resources needed to conduct an EIS, we are concerned that the EIS exemption process is currently used to avoid necessary environmental assessment, particularly with respect to threatened species and ecological communities in the ACT, listed under the Nature Conservation Act (refer to ToR 2(g)(iv) below).

There are several procedural issues with the EIS exemption process:

1. The standard period to lodge representations to an application for an EIS exemption is 15 days (section 211C(2)(a)(ii)). This period of time is far too short for any meaningful public consultation, particularly where third party representations are likely to include detailed information on the likely impacts of a proposal, not currently addressed in existing documents.
2. Much like the general DA process, applications (and supporting information) requesting an exemption of an EIS are similarly inadequately labelled and poorly organised, making it difficult for third parties to comment on materials provided. Much like the recommendation at ToR(a)(iv) above, all materials in support of any aspect of DA applications (including EIS or EIS exemptions) need to follow a protocol that will allow third parties to adequately assess materials provided. Currently, the volumes of poorly labelled documents make it difficult for even the most sophisticated community members to navigate.
3. The PD Act generally grants EIS exemptions for a maximum period of 5 years, or where there is an approval under the EPBC Act, for the length of time of that approval (section 211I PD Act). For example, the Ginninderry EIS exemption is being sought for the same period as the EPBC approval, that is, until 30 June 2067. Other EIS exemptions have been granted until 2041 (Molonglo Valley Stage 2 - Urban Development, Infrastructure and Link Bridge) and 2043 (Gungahlin Strategic Assessment Area). Natural systems constantly change and this dynamism will increase with climate change. It is highly unlikely that studies submitted for the purpose of an EIS exemption will still be relevant in 20 years' time. For example, whilst it is necessary to assess the cumulative impacts of a development through a strategic assessment, this does not provide proper basis upon which a long-term EIS exemption should be granted – this is simply not sound process, particularly with respect to dealing with the impacts of development on the environment. The PD Act needs to legislate for ongoing, independent monitoring and evaluation of developments, and adjustments of developments if environmental impacts arise that are not anticipated. If an EIS exemption is to be granted, it should be done so for a limited time so that it remains applicable.
4. The decision to grant an exemption from an EIS under section 211H can be appealed by the applicant for development approval (Item 15 of Schedule 1), but cannot be appealed by third parties. As discussed at ToR 2(f)(ii), this is a clear disparity between the rights of the public and the proponent. The right for third parties to appeal an EIS exemption decision needs to be included under Schedule 1 of the PD Act.

Recommendation 2(g) (iii): The EDO ACT recommends a precautionary approach be taken with respect to assessment of EIS exemption applications. We recommend that the PD Act be amended to include a requirement for ongoing monitoring and evaluation of environmental impacts of a development every 5 years, based on accurate and independent baseline studies, where an EIS exemption application has been approved.

(iv) NC listed species and ecological communities are overlooked in the current DA process

There is a gap between the level and quality of environmental assessment afforded to EPBC-listed species, and assessment of locally or regionally-listed species in the ACT.

Large housing developments most often require a strategic assessment under Part 10 of the EPBC Act. In general, under the Strategic Assessment Agreement, the EPBC Strategic Assessment Report is required to address listed threatened species and communities (under sections 18 and 18A EPBC Act) and listed migratory species (under sections 20 and 20A EPBC Act).

In our experience, the EPBC strategic assessment is being regarded by the ACT Government to be sufficient to assess all environmental impacts on species and ecological communities, regardless of their listing.

"Significant impacts" to regionally-listed species are a trigger to lodge a DA in the impact track, per Schedule 4.3 Item 1(e) of the PD Act. The same level of diligence in providing reports on impacts to ACT-listed species is required to those listed under the EPBC Act.

Whereas EPBC species are considered at the Commonwealth level, the ACT Government is responsible for protecting our ACT-listed species and ecological communities. The Planning and Development Authority has a responsibility to ensure that impacts on ACT-listed species and ecological communities are adequately assessed through the development application process.

Recommendation 2(g)(iv): The EDO ACT recommends that the Planning and Land Authority apply the law with respect to the protection of ACT-listed species. The Planning and Land Authority need to take extra care to ensure that there are sufficient reports to address potential impacts on these species, as set out in the PD Act and Regulations.

ToR 3. Development Application compliance assessment and enforcement measures.

(i) Barriers to enforcement of the PD Act

Lack of compliance and enforcement of DA legislation and regulations renders the law ineffective. The EDO ACT regularly assists clients who are concerned with breaches of the PD Act.

There are several mechanisms for compliance and enforcement in these situations. With respect to criminal enforcement in the PD Act for example, it is an offence to develop without approval (section 199 PD Act); to undertake prohibited development (section 200 PD Act); and to develop other than in accordance with conditions (section 202 PD Act). Applicants can be prosecuted or fined. The PD Act also includes enforcement mechanisms through controlled activities. Controlled activities (defined in Schedule 2 of the Planning Act or by regulation) include activities such as failure to implement an offset management plan; undertaking developments that do not meet approval requirements; developing without approval; unapproved structures and unauthorised use of unleased territory land. The Planning and Land Authority can issue a controlled activity order on its own initiative or as a result of a complaint (s 340). Contravening a controlled activity order is a criminal offence and can be prosecuted without having to prove a fault element, in other words, it is enough for the prosecution to prove the physical element of the offence only to secure a conviction (s 361). Review (both judicial and merits) are also important tools in ensuring compliance by decision-makers (see ToR 2(f)).

Whilst the PD Act contains provisions for enforcement and compliance, in reality, these are rarely used. Table 1 demonstrates that there are very few prosecutions for breaches of the PD Act and related environmental legislation. In the past four years, the Environment and Sustainability

Directorate gave no briefs of evidence to the Department of Prosecutions relating to regulatory prosecutions under the PD Act. It is highly unlikely that breaches *are not occurring* – it is more likely that breaches do occur, but are not prosecuted.

Table 1: Briefs of evidence and prosecutions under the PD Act (Data sourced from the Department of Prosecutions Annual Reports)

Year	Briefs of evidence received under the PD Act	Prosecutions under the PD Act
2016/17	0	0
2015/16	0	0
2014/15	0	0
2013/14	0	0

These figures indicate barriers to enforcement. These barriers can be improved by:

1. Streamlining the complaints system. The first hurdle to enforcement begins at the complaint level. Currently, complaints are made through Access Canberra. The Access Canberra website is difficult to navigate. Clients who telephone Access Canberra are made to wait on hold for long periods of time. It is not clear who is responsible for complaints, and our clients have been transferred between one delegate and another. Once a complaint is made, the process of dealing with the complaint is not transparent. It is not clear what steps are being taken to resolve the issue, or why complaints do not eventually result on a brief to the DPP and an eventual prosecution. Without a transparent and accessible complaints and prosecution mechanisms, proponents breach legislation and regulations with impunity.
2. Resourcing the Planning and Land Authority and other relevant directorates. The Planning and Land Authority appear to have little resources to enforce compliance with the PD Act.
3. Creating a mechanism for citizen enforcement of breaches. One solution is to allow specified private citizens or a class of citizens to institute prosecutions for offences against planning or environment legislation. In NSW, there have been long-standing rights for 'any person' to challenge government decisions made or to undertake enforcement proceedings under planning and environmental laws. For example under the Protection of the Environment Operations Act 1997 (NSW)[15] citizens may institute proceedings with leave of the Court. A recent study of environmental litigation in NSW has found that this provision does *not* have a floodgates effect.[16]

[15] Protection of the Environment Operations Act 1997 (NSW) ss 252–253
[16] Andrew Macintosh, Amy Constable, Isabella Comfort, Fathimath Habeeb, Mhairin Hilliker, Mandy Liang and Anna-Claudia Oliveros Reyes, Environmental Citizen Suits in the New South Wales Land and Environment Court: Working Paper (The Australia Institute, 2016)

Recommendation 3(i): The EDO ACT recommends the proper resourcing of the Planning and Land Authority, Access Canberra and other authorities, so that breaches of the PD Act are effectively prosecuted. Where this does not occur, standing for citizens to bring proceedings for breach of the PD Act should be introduced.

(ii) Compliance with notice periods

The EDO ACT has received complaints by third parties who had lodged a review of a decision in the ACAT, only to find out that the Planning and Land Authority approved the development they were appealing prior to the end of the statutory time limit for third parties to lodge an appeal in ACAT to review the matter.

In two instances, once the Planning and Land Authority advised the development applicant of the development approval (despite this being within the 20 day time period for which third parties could lodge their application, and in contravention of development approval periods in the PD Act) the applicants in both instances immediately sought to develop the land, cutting down regulated trees or threatened flora, rendering ACAT appeals redundant.

The fact that this has occurred on more than one occasion suggests a level of dysfunction in the basic, day to day functioning of the Planning and Land Authority, that is both unlawful (per Division 7.3.9 of the PD Act) and contravenes what little rights applicants have to appeal the matter.

Case study: Compliance with timeframes

The EDO ACT assisted a member of the public ('the client') who lodged an application in ACAT for review of a reconsideration decision to approve a DA.

Application for reconsideration was lodged on 13 February 2018. The decision to approve the reconsidered DA was made on 8 March 2018. The client lodged an appeal to ACAT on 5 April, which was the final day of the 28 day period (under ACAT Act section 10(2)).

Had the client not lodged an appeal in ACAT, the DA would have come into effect 20 working days after the final notice of the decision to approve the application was given (that is, 11 April). However, the Planning and Land Authority released stamped plans *before* the 20 working day period (on 9 April). The applicant then started developing their land, *prior* to the end of the 20 working day period the member of the public had to lodge their ACAT application.

On 10 April, ACAT sent out notice of the appeal to the Planning and Land Authority and the client. On 10 April the Planning and Land Authority notified the developer that an appeal had been lodged. They did not make clear to the developer, that the appeal in effect placed on hold the the 8 March decision.

On 11 April, the applicant cut down trees and commenced development. Under section 183 PD Act, the DA takes effect on the latest of either the day the ACAT decision takes effect under the ACAT Act or the day after the day the application for review is withdrawn (per section 183(2)(c)). In commencing development before the DA had come into effect, the applicant was in breach of the PD Act.

Development continued until 21 April despite numerous calls, emails and complaints from the client and their neighbours to the Planning and Land Authority, the Tree Conservator and Access Canberra. It is unclear how these complaints were handled (see ToR 3(i) above).

Despite the matter proceeding to ACAT, trees on the block had been irreparably damaged– a demonstration of the importance of compliance and enforcement in retaining environmental values. At the time of writing, the relevant ACAT decision has not been published.

Recommendation 3(ii): The EDO ACT recommends an investigation into the Planning and Land Authority with respect to DA approvals, especially where third parties have a right to appeal a matter to ACAT. Where development applicants breach the PD Act, they must be investigated and prosecuted (see ToR 3(i)).

ToR 4. Development Application practices and principles used in other Australian jurisdictions.

As a progressive jurisdiction, the ACT is in a position to embrace the most up-to-date principles and practice.

(i) Prioritising biodiversity within the ACT planning objects

The natural environment is not given priority within the planning system, despite the objects in section 6 of the PD Act described above.

Sustainable development, as defined in section 9 *PD Act,* includes important environmental principles: the precautionary principle; the inter-generational equity principle; conservation of biological diversity and ecological integrity; and appropriate valuation and pricing of environmental resources.

That environmental principles are one of a number of objects means that no priority or weight is given to the natural environment. This means that the weight to be assigned to these nature conservation and biodiversity principles is at the discretion of the decision-maker. Inevitably, the principles that conserve the environment give way to more immediately powerful economic and social considerations. The conservation of the natural environment should be given explicit priority in the PD Act, rather than being listed as one of many objects.[17] Decision-makers should also be required to exercise their functions in order to achieve these objects.

Conservation of nature has been given priority in other jurisdictions. For example, the *National Parks and Access to the Countryside Act 1949* (UK), in implementing the European Union Habitats Directive states in its objects clause that *if it appears that there is conflict between these purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural*

[17]http://www.lec.justice.nsw.gov.au/Documents/preston_%20adapting%20to%20climate%20change%20and%20law%2030april%202012.pdf

heritage of the area.[18] Prioritising the natural environment in planning decisions is essential to retain and better the nature in our city.

In addition, the objects must be framed in a way that the decision-maker must do more than merely consider them in their decision. The *PD Act* needs to be redrafted to require the decision-maker to exercise their decision-making power actually achieve environmental objectives. As an example, the EU Habitats Directive creates protected areas. Development will only occur in these areas if there are no alternative options and there is an *overriding public interest.* In this way, the decision-maker must exercise their power in a way which achieves conservation aims, rather than being a mere consideration.

Recommendation 4(i): Conservation of the natural environment be given explicit priority in the PD Act objects, as is the case in other jurisdictions.

(ii) Recommended environmental principles

The Australian Panel of Experts on Environmental Law (APEEL) are a panel of environmental law experts who have recently produced a Blueprint for the Next Generation of Australian Environmental Law (2017). These principles include:

- *Smart regulation principles*[19] such as the policy mix principle,[20] the parsimony principle[21] and the escalation principle.[22] For example, this includes using an escalating range of enforcement mechanisms. At the lower end of the scale, government might require business to disclose information about greenhouse gas emissions, whereas at the upper end, it may require licencing to enforce emission levels.
- *Principles that promote particular economic measures, for example, that polluters pay for their environmental impacts.* This includes having proponents pay for environmental impacts.
- *Principles that endorse particular tools or mechanisms for environmental management (for example, environmental impact assessment (EIA) - both project and strategic).* This includes reducing the use if EIS exemptions (above).

[18] Section 11A(2)
[19] See Neil Gunningham, Peter Grabosky & Darren Sinclair (1998) *Smart regulation: designing environmental policy*. Oxford University Press.
[20] The principle that a complementary range of instruments is desirable to address an issue. These should include regulatory tools, economic measures, information-based measures, self-regulatory alternatives (for low impact, low risk activities) and voluntary measures. See Australian Panel of Experts on Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, 2017).
[21] The principle that less interventionist instruments or approaches should be applied first to achieve desired environmental outcomes (for example, it would make little sense to deploy scarce enforcement resources on those who are willing to comply voluntarily under less interventionist approaches). See Australian Panel of Experts on Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, 2017).
[22] The principle that regulatory measures should ascend a dynamic instrument pyramid to the extent necessary to achieve policy goals. See Australian Panel of Experts on Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, 2017).

- *Principles related to environmental democracy such as access to environmental information, public participation and access to justice.* For example, with respect to access to justice, there must be legislative provision for open standing or the avoidance of costs awards in public interest cases.
- *A principle of responsive and flexible environmental governance.* Measurable triggers should be implemented, which, if exceeded will required more precautionary responses and increased protections for species at risk of exceeding these triggers.[23]
- *A principle of environmental restoration.* Although the reality of ongoing ecological change (which will intensify if climate change is not mitigated), means that the environment will not be restored to its original state, a principle of environmental restoration aims to improve the complexity, structure and resilience of ecosystems to enable them to adapt to a changing climate.
- *A principle of non-regression.* This involves the idea that there should be no retreat or backwards movement with respect to the level of protection afforded to the environment. This principle is especially relevant to development on greenfield land.
- *A precautionary principle and prevention of harm principle*. This involves taking precautionary measures if there is some risk to human health or the environment, even if some cause and effect relationships are not fully established scientifically. The prevention of harm principle involves the prevention of tangible harms to individuals and the environment and provide for appropriate recovery for those harms if they occur.

In addition, the following two new and relevant principles should be incorporated:

- *"a principle of achieving a high level of environment protection, which requires that decisions and actions aim for an optimal level of environmental protection and biodiversity;"*[24] and
- *"a principle of applying best available techniques by mandating up-to-date tools and methods suitable for protecting the environment and conserving biological diversity".*[25]

Recommendation 4(ii): The environmental principles outlined above be explicitly set out in the PD Act and legally enforceable mechanisms be introduced to implement them.

ToR 5. Any other relevant matter

(i) Integrating climate change into the development application process

The EDO ACT remains concerned that there is limited coordination between government directorates on environmental goals and policies, particularly with respect to climate change. We are currently

[23] See Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Nature Management (Technical Paper 3, 2017) Recommendation 4.2.4.
[24] For more information, see Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management (Technical Paper 3, 2017) p 45.
[25] Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management (Technical Paper 3, 2017).

researching steps that the ACT Government can take to better integrate its emission reduction targets into decision-making processes across directorates as part of the development process.

Recommendation 5(i) Climate change strategies should be integrated as a key aspect of ACT housing and planning policies, with the same aims of reducing the ACT's environmental impact and making more liveable cities. The EDO ACT looks forward to presenting a substantial law reform project on this issue.

If you have any questions or wish to clarify any of the above, please do not hesitate to contact the EDO ACT [redacted]

Yours faithfully,

[redacted]

Stephanie Booker
Principal Legal Officer