LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING AND ENVIRONMENT

(Reference: inquiry into exposure draft planning and development bill 2006)

Members:
MR M GENTLEMAN (The Chair)
MR Z SESELJA (The Deputy Chair)
MS M PORTER

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 5 SEPTEMBER 2006

Secretary to the committee:
Dr H Jaireth (Ph: 6205 0137)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents relevant to this inquiry that have been authorised for publication by the committee may be obtained from the committee office of the Legislative Assembly (Ph: 6205 0127).

WITNESSES

CARTER, Ms Catherine, Executive Director, Property Council of Australia, ACT Division **48**

DEL RIO, Mr Alfonso, Member, Property Law Committee, Law Society of the Australian Capital Territory **73**

DODSON, MS MELINDA, President (ACT Chapter), Royal Australian Institute of Architects **61**

LEMEZINA, Ms Caroline, Regional Executive Director, Housing Industry Association **41**

MacKENZIE, MR ANDREW, President, Australian Institute of Landscape Architects (ACT Chapter) **61**

METCALFE, Ms Joanne, Member, Property Council of Australia, ACT Division **48**

MORSCHEL, Mr Alan, Planning Adviser, Housing Industry Association **41**

WETTENHALL, PROF ROGER LLEWELLYN, Centre for Research in Public Sector Management, University of Canberra **58**

WHEELER, Mr Chris, Member, Property Council of Australia, ACT Division **48**

WILSON, MR ANDREW, Chair, Planning Committee, Royal Australian Institute of Architects **61**

The committee met at 1.59 pm.

LEMEZINA, Ms Caroline, Regional Executive Director, Housing Industry Association

MORSCHEL, Mr Alan, Planning Adviser, Housing Industry Association

THE CHAIR: Good afternoon. I will open these hearings into the draft planning system reform bill. I welcome Caroline Lemezina and Alan Morschel to the hearings this afternoon. I will read the statement card. The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the resolution agreed by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings.

Before the committee commences taking evidence, let me place on record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee in evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others, necessary to the discharge of functions of the Assembly without obstruction and without fear of prosecution.

While the committee prefers to hear all evidence in public, if the committee accedes to such a request, the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly.

I should add that any decision regarding publication of in camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing. Firstly, may I apologise for our committee associate Mary Porter. She is out of the country at the moment. Would you like to begin by making any opening comments?

Ms Lemezina: If I may, I will make some introductory comments based on the submission the HIA provided. As committee members would be aware, HIA has been concerned about the complicated and uncertain conditions of the ACT planning policies and controls for many years. It has certainly been a worsening situation, which HIA sees adding to the overall costs of home building and a threat to possible future investments in the ACT. Certainly, as an affordability issue, it is something we have been keenly aware of.

HIA therefore welcomed the planning system reform project which was initiated last year and is pleased with the progress of the consultation which has followed over the past 12 months. The recent case study workshop, which my colleague Alan Morschel attended, was a particularly notable part of the consultation process. That clarified many issues for HIA and its members and also allowed for free-flowing discussion and open feedback to the ACT Planning and Land Authority.

HIA has found ACTPLA's processes to be transparent throughout the consultation process, and the authority's staff were very receptive to frank discussion and suggestions. This produced the draft bill which offers a framework to re-establish the

ACT's reputation as a uniquely well planned city. Many of the suggestions HIA made at the beginning of the consultation process, which began last year, have been incorporated into the draft bill. Of particular importance to HIA members is the proposed reduction in the level of consultation and appeal rights. The ACT carries the reputation for having the most excessive level of planning approval controls in Australia and is regarded as the nimby capital of Australia.

Many residents have an extreme level of expectation to be involved in the happenings in their neighbour's backyard but fiercely object when the situation is reversed. Excessive consultation only leads to greater community conflict and frustration. Whilst there may be some initial community concern, HIA believes that the draft bill has established a reasonable balance on this matter. Neighbourhood comments will still be invited on impacting-type residential projects, while more expansive public consultation and appeal rights will be available on more sensitive projects.

The next stage of the planning reform project is to review and rewrite planning codes. This is the most critical part that we see of the project altogether. It is critical that these new codes are accepted and gain the confidence of property owners and their builders, their neighbours and the whole Canberra community.

HIA has reviewed the draft bill and finds it to be a much clearer document with its use of plainer language, clearer definitions and terminology which is more commonly used in the planning and development jurisdictions throughout Australia. HIA has provided detailed comments on chapters of the document as they affect our members. We are certainly happy to answer any questions in relation to these comments.

THE CHAIR: Thank you very much, Ms Lemezina. Mr Morschel, do you want to make any comments?

Mr Morschel: I fully support what Caroline has just said. I am happy to have a discussion or to take questions from you. I think it was a good summary in the regard that the process to date has been pretty open and frank. We have appreciated the way in which ACTPLA has tackled this difficult task, but we believe that the real work—the serious work—is ahead of us for the next six months or so when the draft codes start to come forward from ACTPLA. It is a cliche that the devil is in the detail as to just what interest can be provided for our members in designing and building houses in the future here in Canberra.

MR SESELJA: Thank you for coming in. The territory plan is going to be amended after the bill is enacted. We have had some comment with the last group of stakeholders we had in last week about the adequacy of that. Do you have comment about whether, in your opinion, that will work? Obviously how the territory plan is amended and simplified will be crucial to how the new planning system operates. Do you want to make comment on the lag in the time frame?

Mr Morschel: We were always aware that this was going to be the process of establishing the process bill, which is before us now as a draft, to set the framework for the way in which applications, leases, et cetera that are all contained in that bill were going to be handled. There have been some preliminary indications from ACTPLA as to the directions they will be taking the codes in.

I am not saying that if there had been a little bit more knowledge at this stage of the codes it could have been more helpful. I think we have accepted it on the basis of the amount of work we have seen that has gone in to get to this point. To have loaded it up with too much of the codes and the territory plan work, we might not be here today discussing what we are at least discussing now. We would be happy with ACTPLA's program to have this bill passed this year or very early next year to at least give us one important part of the planning process ticked off and in place.

MR SESELJA: You make comments about ACTPLA staff currently being risk averse, and you are hopeful that that will change as this new system is put in place. You particularly make mention of third party appeals—maybe changes there to free them up. Have you seen any evidence to date that there is cultural change within ACTPLA which will embrace these things? Do you have any comment about how you see that going, or are there areas of reform in addition to all the legislation we will be looking at that need to be taking place within ACTPLA to complement these changes?

Ms Lemezina: We have certainly identified the cultural issues in our submission. Some of the risk-averse positions in ACTPLA are of concern to HIA. But we are confident that the new streamlining of projects and the approval system, especially when we are looking at some of our greenfield developments, will free up some of those staff to tackle some of the more complicated planning approval decisions that need to be made.

Also, with the community consultation process being revised and having a lot of that information up front, there is going to be less community criticism of decisions made by ACTPLA staff. We believe that will result in them being a little bit more able to make those decisions without worrying about those community criticisms.

Mr Morschel: I think one of the important things that is still in place—and it is most probably not a thing that can be spelt out strongly in the bill—is the pre-application process. We cannot deny that when that was first introduced—and in some ways it was introduced with a bit of a heavy administrative approach from ACTPLA; my memory tells me that it even started before it became ACTPLA, when it was PALM—for a lot of our members in terms of the simple, straightforward projects that are now going to go into the exempt stream, it was an extreme process.

We anticipate that a large proportion of our members' work will move into the exempt areas for the single housing and the greenfields. We are hoping that ACTPLA's resourcing of the pre-application process—and, we would say, with encouragement from associations like us—will allow the builders and designers in Canberra to take advantage of that when they are considering a project that is obviously not going to be exempt.

I think that is an important area for ACTPLA to have well resourced and staffed, because it is in a very early stage of the process—the pre-application stage. You could attend ACTPLA with only sketch ideas or sketch plans in mind. ACTPLA is prepared to make site visits quite often to understand the complications and the issues associated with the site.

Sometimes with a simple neighbourhood doorknock a lot of the issues can be resolved at really limited cost to an applicant. We would like to encourage that to be done—more so

in the non-exempt project areas. So it is important for ACTPLA to maintain good resourcing to be able to meet promptly with people on that issue. They have given themselves time frames now when they get into the non-exempt areas. They have obviously got to stick to those in the legislation.

Some of the issues our members will face are associated with the agencies—driveway crossings, work on verges, waste management and disposal and all of that. It is also important that they can visit the agencies to get some information and discuss the peculiarities of that particular project. They know that they can then confidently complete the design and do the documentation and that it really is pretty assured of going through the system. I think that is the most important part to follow from now on.

THE CHAIR: You have made a comment in your submission that would indicate that you would be able to assist in ensuring procedures for the exempt track are developed according to best practice. Would you be able to clarify how you could contribute to that process?

Mr Morschel: To establish the codes that will support that, we are intending to have a selection of our members working with us and reporting back to ACTPLA. We are therefore hoping that our comments and advice, and discussions that we will have with ACTPLA, are useful, particularly if they can look at the workshop model that they have already used.

That would be the first point at which we would use a cross-section of our members to input it and have the confidence that that code is going to work for many of the projects. Once the code is replaced, we would be quite happy to work with ACTPLA in terms of training sessions, information sessions, et cetera. ACTPLA has already attended a few. We will possibly make them more formal, but hopefully the code will not be that complicated that we have to spend a lot of time on it. But it was, particularly leading up to it, a matter of getting the words clearly understood.

There will be another area in that particular code—the exempt code—where we will be looking to work with the private certifiers. As you understand, they now play a role in the planning approval process which they have never played before. We understand that they have a degree of hesitation but in principle are willing to do it. With the processes and the administration of them, we would like to think that one or two of our members, as private certifiers, and others that we know in town, would join in discussions with us. The worst thing would be for the certifiers to be very bureaucratic in their approach to receiving applications from our members.

THE CHAIR: That was my next question, actually. Do you see any downside to outsourcing to private certifiers?

Ms Lemezina: I guess the only downside is the number of private certifiers. We have certainly seen that, in a number of jurisdictions, we are finding it difficult to find certifiers out there. It is about having enough people to do the certification, and do it in a timely manner. Obviously we do not want to see the time for things to be approved extended. We want to see that reduced so we can improve on things like affordability. Our major concern would be the ability to locate enough private certifiers to handle the additional workload.

MR SESELJA: In your submission you have indicated that you have welcomed some of the changes to third party appeal or review. Other witnesses have indicated that they think that will be a negative for democracy because it takes away the ability of people to object to things. It gives them one less avenue, I suppose. One of the witnesses, I think from the Environmental Defender's Office, suggested that there was no evidence to show that, by allowing third party appeals, you significantly slowed developments. Do you have any comment in response to that? I have spoken to a lot of people in the industry who would argue otherwise. What does the HIA think about that?

Ms Lemezina: Our members—the builders, developers and contractors out there—are also members of the community, and we welcome community input in consultation on planning issues. But it needs to be done up front, and it needs to be clear so there is certainty for the industry to proceed with development. If we can get the community involved up front, then we know that as an industry we can proceed to provide the best possible outcomes. We certainly welcome community input, but we believe that there is a time and place for it. We believe that that should be early in the process, rather than when we are coming down to the final details of a particular development.

MR SESELJA: This could be quantitative or you can just give examples. Is it the HIA's view that the current regime of review has significant costs to developers and therefore to home buyers, or is it really not a big part of the process? Is it a significant thing? Will this change save money for developers and in building houses overall? Will that be, in your view, passed on?

Mr Morschel: To any builder, designer or developer time is money. There has been clearly a delay or a lengthy time to get through the third party process, when you look at the track and the dates. We do not have it here with us, but I am sure it is readily available from ACTPLA as you step through.

It also adds an uncertainty because you do not really know until the very end that you might be challenged by a third party and go to the AAT. That can come right towards the end. I give credit too for changes in the last couple of years that meant that an arbitration—"mediation" I think they term it—process has been introduced. We understand that that has removed a fair degree of uncertainty and has limited the legal costs. The other observation we have made is that most of the proceedings before the AAT have ended up with legal representation. You can imagine the costs associated with that, plus the time in waiting for both appearing and then for the decision to come out.

There is certainly an understanding amongst our colleagues. Some of the worst time delays have been six to 12 months. You know that all time delays cost in a project. Obviously market conditions are changing. I suspect that, with the rising values we have observed, there has most probably been the ability for some projects still to proceed.

We would say that, if Canberra had had a quieter market in the last few years, as it did in the past, appeal processes could have either stopped projects or seriously curtailed projects. When you have a fixed budget and you have paid out a lot of money to consultants, lawyers, et cetera to win that case before the AAT, that might mean that your whole quality of finishes on the project gets slashed to pay for that.

We think that, in a pendulum sense, the pendulum has gone too far in the consultation process. We believe this bill before us is a reasonable change and that the more complex and more sensitive projects then can have the third party. Plus there is the definition of who is affected.

You mentioned examples. There are areas of Canberra where, if you are aware of them, you know you are taking on a big risk to do work in those areas. Inner south Canberra is one prime example that comes to mind—working around Manuka, both commercially or in the residential areas of Forrest and Griffith. A lot of builders and developers know that that is a risky area to take on work in the ACT, just due to a group of residents.

There have been in the past north of us here, up Northbourne Avenue, notified or agreed redevelopment areas. There have been some excessive costs applied to projects there where residents have taken their legal capacity to an excessive limit, we would say.

THE CHAIR: My final question is with regard to the response to anticipated planning code reforms. You touched on code reforms earlier. You refer to a collection of disparate rules for the size of a house, how they restrict innovative design and the capacity to meet challenging market demands. You suggest that this collection be reduced. How do you envisage compliance with the intent of the code if a site coverage requirement is introduced?

Mr Morschel: With that statement we have put in there, we acknowledge that we may be a bit in advance of the process. That paragraph was to signal to ACTPLA where they could be expecting HIA to be coming from. We have listed there a number of components of the current codes that control the size, height, et cetera of a residence.

THE CHAIR: Car parking.

Mr Morschel: We would like to see that whole menu reviewed. I have to say that, as a preliminary discussion amongst a couple of our members, we said, "Let us raise that as a discussion point." Site coverage is a percentage of the footprint on the site versus the plot ratio. That is a percentage of all floor areas, whether they be something within the ground or up into the attics. The basement is not included.

We look at a different way of tackling it. It is our feeling that the codes have to address the alternatives of residential accommodation that we think Canberra needs to be able to offer to all of its citizens and its new citizens. They range from youthful generation-wise, maybe leaving home at some stage, to our large and increasing number of aged people and their locational needs and types of accommodation. There are also those people looking for a more traditional suburban approach. They have to be very diverse codes, or the capacity of the codes to address those diverse needs is very important for the future.

MR SESELJA: This is sort of a statement. I am reading through your comments, still on review of decisions. You are talking about the restrictions on collective third party applicants in the context of material detriment. We heard from the planning authority at the beginning of this process. There was some confusion about how that applies. I think there was confusion even with Neil Savery when we asked him.

One of his officials clarified that organisations that are set up, whether they be save our

suburbs, environmental groups or others, do not need to be materially affected. It simply needs to be related to their articles of association or the reason that they have set up. Is that your understanding from reading the legislation? Would that be news to you if that were the interpretation? As I said, there was some confusion even amongst the planning officials. If that is the correct interpretation, is that a concern to you, or do you not see it as an issue?

Mr Morschel: We understood from the presentations and our reading of it that certainly community councils would meet the definition that is in the bill. As for some of the names you have just mentioned, yes, it would be of concern if some of those were to be able to come forward and participate. I use the example again of the south Canberra situation. There is certainly known to be a dozen or so people there that appear regularly before the AAT. If they were merely to give themselves a title and write a set of objectives and get recognised as repeat appellants, we would have concern.

That is something that maybe we need to turn a bit more attention to, but at this stage we would accept it, as I said, on the basis of a community council. We have been supporters of the community councils replacing the role of those three small suburban groups. Yes, we were fully in support of LAPACs, but if de facto LAPACs were to be accepted under the legislation we would have concern.

THE CHAIR: Thank you very much for your presentation and submission. We will get you a copy of the transcript as soon as we can for any editorial changes.

CARTER, Ms Catherine, Executive Director, Property Council of Australia, ACT Division

METCALFE, Ms Joanne, Member, Property Council of Australia, ACT Division

WHEELER, Mr Chris, Member, Property Council of Australia, ACT Division

THE CHAIR: Good afternoon. I will just read out our privileges statement before we begin. The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the resolution agreed by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings.

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Thank you for coming in. Would you like to make some opening comments?

Ms Carter: I will, if I may, make some introductory remarks and then hand over to Chris and Jo to go through in detail and respond perhaps to some of the questions. At the ministerial launch of the proposed bill in July this year, the property council welcomed the release for public consultation of new draft legislation designed to deliver a simpler, faster and more effective planning system for Canberra. In our view, as the nation's capital and one of the world's pre-eminent planned cities, Canberra deserves a best practice planning system that encourages investment, growth and high quality and sustainable development. The property council regards the release of the proposed bill in principle as an important step towards achieving this goal.

We have some concerns, however, with the draft bill as it stands—that some vital issues of principle will be undermined by the proposed reform. I will hand over later to Chris and Jo to go through some of the detail of that, but perhaps our top issues include the essential enduring right to develop land in accordance with the uses outlined in a crown lease and the implementation of all development assessment forum recommendations.

For the benefit of the committee—and you are probably familiar with this already—the development assessment forum was created to identify leading edge approaches to development assessment in Australia. The DAF leading practice model for development

assessment provides a blueprint for jurisdictions for a simpler, more effective approach to development assessment. It achieves this by defining 10 leading practices that a development assessment system should exhibit and then by applying the 10 leading practices to six development assessment pathways or tracks.

The property council was closely involved in the development of the DAF model. That is one of the reasons that we are supportive of the implementation through the draft bill. On 4 August 2005, at a meeting with the ministerial council, local government ministers and planning ministers acknowledged the model as an important reference for individual jurisdictions in advancing reform of development assessment. Again, that is why we consider it to be a critical part of this new legislation.

The property council has indicated that we support the broad objectives of the draft bill. However, unless the critical aspects that I identified earlier are addressed, support by the property council for the draft legislation may be jeopardised. We are in fact concerned that some critical aspects of the proposed forums will, contrary to stated government objectives, create uncertainty, increase complexity, blow out response times and add significantly to government workload.

The issue in relation to crown leases is worth attention. There may be adverse consequences to the ACT revenue base, in our view, as the way crown leases are valued for rates purposes will change as a result of this legislation, if it is passed as is. In essence, as the bill is presently drafted, the fundamental nature of development and use controls in a crown lease could change in a way that will lead to lack of certainty and additional expense if a usage is proposed which, while it is in the crown lease, may not have been used previously.

It should also be noted that the property council, and indeed all stakeholders, have been asked to comment on the framework of a bill without having had the opportunity to consider the codes and regulations. This makes it a difficult task. We would like to see the entire suite of documents provided in order to make informed comment about the entirety of the proposed changes. That said, however, we will continue to work productively with the government and with the ACT Planning and Land Authority in particular to resolve what we consider to be the outstanding issues. I will now hand over to my colleagues to provide some further detail.

THE CHAIR: While you are handing over to Mr Wheeler, I should extend apologies from our committee colleague Ms Mary Porter, who is out of the country at the moment.

Mr Wheeler: My name is Chris Wheeler. I am treasurer and chair of the economic development committee of the property council. As Ms Carter indicated, the property council has broad support for many of the aspects that are in the draft bill. However, there are a couple of points that we actually have some deep concern over, and Ms Metcalfe and I will just emphasise those points.

I am not sure whether you are aware of it today or whether anyone has presented this issue to you, but one of the more significant aspects of the exposure draft is a new concept, that is, one that says that use itself is development, triggers a development, so that if you wish to change your use amongst a variety of uses in your crown lease or activate a use in your crown lease that you have not used before, then that is a trigger for

a development application. That is a quite foreign and unusual concept.

The concept that we all have today, those of us who own our own properties, is that our crown lease has a purpose clause in it. That purpose clause says what you may or may not use your crown lease for—residential in the suburbs or, not unusually in the city here, office, retail and maybe residential. Under the proposed concept in the bill, the first time you want to use any of those uses you must include those uses in your development application and seek approval. This is notwithstanding the fact that you have paid already for your lease, you have paid already for the rights in the lease. That concept as well is going to be challenged.

If we have a scenario where, for example, we have a crown lease that has three purposes, office, retail and residential, and we have activated only two of those uses, office and retail, and we want to add residential five years down the track, to do so we will need to apply to the authority for permission to activate that use. Again, that concept is itself unusual. There are some exemptions.

The way in which the exposure draft is presently drafted is such that, if you cease to be using an existing use that has been approved, then there is a fear that you will actually lose that right, unless you reapply later for an approval for it. So you have this concept of "Yes, it is approved; it ceases to be used; it is no longer approved; I want to use it again; I've got to get approval." The authority have indicated to us that that is not their intention, but that is not what the words say in the bill.

A fundamental underpinning our crown leasehold system is the uses you have paid for—emphasising "paid for"—already. You won't be able, as a matter of right, to use them. You must get further approval to do so. The issue that then comes up is whether a change of use charge is required to activate a use that you have already paid for. Again, it is not clear. The intention seems to be, however, that that is not the case. So we are certainly looking for assurances in the final bill that that would be made clear.

You have also the situation of what happens to all the leases that are out there now, the leases that people own. How does this new regime affect those? The act, in its transitional provisions towards the back, attempts to deal with this. The way it attempts to deal with it is to say that there is a presumption that for pre-act leases, if you like, those ones that exist today, there is a presumption that all those uses which the crown lease refers to are already approved, but that is expressed to be subject to any evidence to the contrary.

If a neighbour can establish that of, say, the five uses in a crown lease only two have been used and the other three have not, then the person who owns that crown lease may not have the right to use those other three uses, even though they were in an existing lease and paid for, emphasising that they have already paid for this right. That appears to be an acquisition of pre-existing rights. Again, to be fair to the authority, they say that is not the intention, but that is not what the words say.

This is a revolutionary concept, something that we are fearful will undermine confidence in our market. We already have an unusual system compared to the rest of Australia, one based on crown leases. They are hard enough to understand as it is. We are adding another layer of complexity that just might, we feel, be another reason not to invest in the

ACT.

I turn to a couple of other issues that we are concerned about. There is a concept in the current land act, replicated in this exposure draft, that in situations where someone has purchased a crown lease but is yet to build on it, the owner of the crown lease cannot offer that crown lease as security for the full range of uses that everyone would ordinarily expect. As presently drafted, you need to obtain the authority's consent for that to occur.

We had thought that this was actually going to be addressed. This is a matter that we have been raising for some years now. This is an antiquated concept. If the reason for having that is that the authority is concerned to make sure that people don't land bank and actually build when they are required to, there are other ways of enforcing those obligations. There is a provision in all crown leases that actually obliges a crown lessee to build within a certain time. But the way this provision works is just unwieldy and actually discriminates, certainly for younger people who actually want to use their new lease as security for a variety of loans. Again, to be fair to the authority, they have indicated to us that it is possible that that provision will be removed but, as presently drafted, it is still there.

I wish to make a comment about third party appeals to the AAT and cost. Third party appeal rights have been modified, a stance on which the property council applauds the authority. Again, it is consistent with the DAF model. We are concerned, however, that there are still some residual aspects of third party review available for organisations which may not be affected whatsoever by a development.

The classic example that Assembly members are more than familiar with is the GDE. The GDE was a situation where we had a development application which was opposed by a special interest group and basically, simply because it was a special interest group, that gave it standing. Many of those members may not have been directly affected by the location of that road. Nonetheless, they were able to object and actually cause enormous delay to the government. The government eventually, as you know, legislated to approve that development. That is not a luxury that is available to mere mortals like the rest of us. The bill gives any entity that has as its object, effectively, to protest automatic standing to challenge a development application. Again, the property council does not believe that is consistent with the DAF model, nor an efficient outcome for planning purposes.

As far as cost is concerned, many of our members have endured a situation where they have had applications approved, third parties have appealed and they have had to go to the AAT. It is not unusual for situations like that to arise where the costs incurred in getting witnesses and paying lawyers amount to quite a bill. The AAT does not have the ability, we believe, to award costs against objectors who have actually no foundation to their claim.

It is one thing to say your piece, that's fine, but it is another thing to run a matter through to the AAT, delaying applications for at least six months and obliging the applicant to incur significant costs in so doing without themselves having to pay or contribute in any way towards those costs if they lose. We are particularly concerned that for matters where the objection is vexatious or without any significant merit the tribunal have the ability to award costs against that objector as a disincentive for someone just to spin the

system out. That incentive is not there. That is enough for me for the time being.

Ms Metcalfe: My name is Jo Metcalfe. I am on the division council and I also chair the planning committee for the property council. I just might make note that our submission to government is available on the property council's web site and we can also make it available to you by email if you need it.

One of the other things that we touched on in our proposal was that we would like to see a broadening of the agenda. We understand that the planning reform system project has a limited scope and, indeed, a limited time frame. What would be really good, as Mr Wheeler just alluded to, would be whether there is a possibility that down the track the Administrative Appeals Tribunal and the dovetailing of this planning system into that could also be reviewed. We think that would be enormously helpful to the streamlining and effectiveness of the system as a whole.

We also like the idea of a simple and single plan that incorporates both the territory plan and the national capital plan. We understand that there have been discussions, maybe of an informal nature, between both ACTPLA and the NCA in relation to that. So it is actually on the agenda in the background but it is something that we would like to see maybe brought forward to a more visible arena.

MR SESELJA: How would you see that working in terms of the breakdown of responsibilities between the territory government and the NCA? In terms of administration, if we had one plan, how would you determine who is going to have a say at any particular point in the process as to what developments should apply? Obviously, at the moment the national capital plan is slightly more overarching. How would you see that actually working in practice?

Ms Metcalfe: You currently have to look at two different web sites, two different documents. We are just looking at a streamlining and that might be the simplest way of doing it. You would still end up with two jurisdictions. However, you might just have a simplification of the actual documents that currently you have to wade through and cross-reference, et cetera.

THE CHAIR: Are you suggesting perhaps an overlay with referencing?

Ms Metcalfe: Yes. I am not exactly sure logistically how it might work, but just one single document of reference that can help us.

Mr Wheeler: We have given some thought to this. There are a couple of ways that this could be done. An analogous situation is under our environment legislation. The commonwealth, under the EPBC Act, has the ability to approve certain developments that trigger significant environmental impacts. The commonwealth environment department has actually delegated some of its functions to state and council agencies to make those assessments themselves; so, rather than having several doors to go through for an environmental approval, you only have one.

ACTPLA could well be the one referral body for, if you like, a dual controlled piece of land. The more preferable scenario, however, would be to have it clearer. It is stated property council policy that there should only be one planning authority for one site. So,

if it is designated land, it is the NCA, the NCA alone, and you don't need to worry about the planning authority. If it is non-designated land, it should just be the ACT planning authority and not the NCA; you shouldn't have to go through two. So a more clear demarcation of where the dividing lines are; it is really one or the other.

MR SESELJA: I'm sorry, I cut you off there.

Ms Metcalfe: No, that's fine. The other thing that we have mentioned in our submission is the implementation of this reform project. What the bill doesn't really contemplate in any detail is how the continuous improvement of the bill and the monitoring of it will be ongoing. One thing we also mentioned was ACTPLA's culture. In our original submission to the initial reform project we had grave concerns at that time that any reform project could be implemented with any great effectiveness by ACTPLA with their current culture in place.

What we have seen, and our members have been great in giving us some feedback on the positives, is that ACTPLA have had a major mindset change and they are very proactive and have internally evolved into a much more workable organisation that we think we can work much better with. So that is a great thing, but we would like to see maintenance of that changed management program.

Ms Carter outlined in her opening statement the development assessment forum model. What we would like to see is more rigorous testing of the bill in line with the principles outlined by the DAF. The DAF is a best practice model and, whilst it was put forward as a smorgasbord, if you like, of tools and elements that you can pick and choose from, we think that as a whole, if it can be implemented more holistically, then that would be a good thing.

I will just give you a couple of examples as to where we think the bill underperforms in relation to DAF. We think it is a great thing that the track assessment regime is being put in place, but one thing it does miss out on is one of the tracks that DAF considers; that is, the self-assessment track. One of the great things about track assessment is that, as it is currently proposed, it is going to free up a number of resources. In ACTPLA, if self-assessment came in, we think that it might even free up more resources for ACTPLA to be able to be focus on some of the more complex developments that our members will be putting forward for approval.

Leading practice No 3 from the DAF model calls for built-in improvement mechanisms. The more stuff that you put into the legislation, the bill itself, means, I think, the harder it will be for continuous improvement or the working document to evolve. If it goes more into the regulations and codes, it is probably a bit easier to update. So that is something that we would like them to look at. I think that summarises the major concerns we have. We have got quite a bit in our submission. If you would like to go into questions now, we would be happy to answer them.

Mr Wheeler: I might just emphasis that we have provided you with quite a few comments about our concerns. There are lots of good things about this exposure draft, so we are not being totally negative whatsoever. There are lots of good things about it. The territory plan system has been streamlined. We think that is a very good thing. It shouldn't take up to two years to vary the territory plan, and it won't under the proposal.

The discipline that is actually embedded in here in terms of having government agencies respond to development applications within 15 days is, we think, a very good policy and one that the authority should be applauded for. Also, the level of public consultation we can't complain about. It has been almost overextensive in some ways, but that is necessary, given the amount of material. So there have been lots of good points about this exercise.

MR SESELJA: Mr Wheeler, we don't have a lot of time but, just looking back to your discussion about leases and your concerns there, I want to get a handle on where you are concerned it might go in practice. On change of use, you said that ACTPLA has indicated that it was not the intention that you would have to pay change of use if you activated part of the lease that hadn't been previously used. Are you suggesting that you would need almost a lease variation on top of a development application if you wanted to build something that you hadn't previously been using on the lease, or is it lease activation? I am just trying to get my head around that.

Mr Wheeler: This is a perfect example of how the mindset is already accustomed to how we do things at the moment; that is, that if you want to add a use that is not in your current crown lease you make application to the planning authority to vary your crown lease and pay a change of use charge. That concept will still be there, but we are talking not about adding uses that don't already appear in your crown lease but actually seeking permission to use a use that is already in your permitted crown lease purpose clause. Again, the system doesn't naturally flow, and that is part of the problem.

If it is counterintuitive, too complex, normal punters are not going to be able to understand and it doesn't pass the KISS principle, the keep it simple principle. That is how, essentially, we all operate and confidence grows in that sort of general understanding. But if you seek to switch from one use to another in your crown lease and you haven't used one of those uses before, you've got to get approval if it activates a change to the form of your building. That is actually a summary of an understanding of many provisions. You don't come to that conclusion very simply.

THE CHAIR: If we have in place the track system without self-assessment that is currently in the bill, do you think that there will still be instances where there will be ambiguity over which track a development would fit into? Will this tie up the new process?

Ms Metcalfe: There is going to be, obviously, a learning curve at the beginning. It will also depend on the codes and, as we mentioned at the beginning, we haven't seen those yet, so it is difficult for us to comment on where things might fall through the cracks, what might get shunted into an inappropriate track. One of the points that we do make is that it is really important, particularly at the beginning of this implementation, to have the right of review. If your development gets put into a certain track and you believe that it should be in a different track, you should have the right to have that reviewed. Particularly at the beginning, when we are all learning about what this thing is going to be, it would be good to be able to review mistakes or misunderstandings that happen. It is difficult to comment in detail on whether we think things will knit or fall into the wrong types of tracks.

Mr Wheeler: That is a very good question, because a fear that we have is that the decision about which of the tracks you go through is a vitally important one, because it determines which whole process and which level of public engagement and what level of material you must provide, an EIS if it is impact, or not. Because of the way in which impact assessment is proposed to be assessed at the moment, by reference to these schedules and whether your proposal falls within them, the meanings in those schedules are very broad.

Again, the authority tells us that this is unintended, but one of those events that trigger an impact assessment is anything that has a significant greenhouse emission from it. If you think about that, most buildings will have an adverse greenhouse emission, by definition. Does that mean that every development therefore falls within impact assessment? Answer: that is not intended. So there are going to be these fine lines. If the authority comes to a conclusion that the development has to go through an impact assessment rather than a merit track assessment, then that decision itself should be able to be challenged.

Ms Carter: We would like to encourage the government and ACTPLA to take up all aspects of the DAF development assessment model. It was agreed universally by all the planning ministers to be a best practice model and best practice outcome. I think that one of the things the property council would like to see is the ACT genuinely achieving the status of being a best practice jurisdiction. So to leave off one of the tracks seems disappointing when we could follow this best practice model.

Ms Metcalfe: One of the things we would like to add is that we have indicated to ACTPLA that we would like to work closely in working up the codes and we are pretty confident that they will be taking us up on that opportunity.

MR SESELJA: Going back to third party review, a previous witness questioned the material that has been put out by ACTPLA and how it will actually operate. My understanding of what ACTPLA has said is that, depending on the track, you will have third party rights if there is material detriment or if you are an organisation and it falls within your articles of association or whatever. He suggested that it was worded in such a way that material detriment could mean that your enjoyment of land, which could be public land, was affected. He used the example of walking your dog down the street and there being a development near where you walk your dog and the material detriment is that your enjoyment of that land, not your land, is affected. Have you looked closely at that and would you share that assessment of the wording?

Mr Wheeler: I haven't thought about that, but, thinking about it now that you have raised it, our focus, of course, has been from the perspective of the land that our members tend to own, which tends not to be public land.

MR SESELJA: But it could adjoin public land.

Mr Wheeler: Yes, I agree. That is actually quite plausible.

MR SESELJA: I would say unintended, but a concern nonetheless.

Mr Wheeler: Yes. It would only be those sorts of developments that would be, I guess, a

conversion of public space, really, that would fall into, that that would be a trigger. You emphasised that all you need to do is to amend your articles of association or your constitution and away you go.

MR SESELJA: Or establish a new group.

Mr Wheeler: Yes, indeed. I can see in my mind's eye that there will be some lawyers that will have sitting on the shelf, ready to run, these dummy associations where you just fill in the blanks as to what is the issue for today, run it out and off you go. That sort of opportunity will exist.

Ms Metcalfe: I think we have said in our submission that we believe that the definition of material detriment is quite broad. What we actually said is that, in particular, a community organisation should not be able to appeal a decision merely because the decision relates to a matter included in the entity's objects or purposes—that is quite a broad thing— and that the property council does not oppose such an organisation making representation in respect of a development proposal, but strongly opposes any third party appeal rights unless the organisation can demonstrate that the decision has or is likely to have an adverse impact on the entity's use or enjoyment of its land.

MR SESELJA: That is an issue we discussed with ACTPLA and, as I was saying to a previous witness, there was confusion at the time amongst the ACTPLA officials, but the message we got back from them was that, if your articles of association said you were for better planning in Canberra or something and it was close enough, then there was a good prospect of AAT review.

Ms Carter: We had the same advice and it is our interpretation as well.

THE CHAIR: Do you think there would be more opportunity then for a vexatious intervention?

MR SESELJA: Or the same opportunity as currently.

Ms Carter: Yes, the same opportunities.

Mr Wheeler: And there are no better examples than the ones the government has been involved with itself.

THE CHAIR: The only other question I have is on the new public notification procedures. Do you think they are adequately transparent? Is there enough notification there?

Ms Metcalfe: The property council's policy on the public's involvement is that we welcome community involvement at the beginning of a policy definition process in particular; so, if they are involved in community master planning, neighbourhood planning and indeed in the bill and we get that right up front with that community involvement, then the policy is set, and if you then fall into a code track or into those tracks and you are doing the right thing by way of that policy, then you shouldn't be open, unless material detriment is shown, to that third party appeal.

Mr Wheeler: As a community, we have got used to doing things in a certain way, and Canberra is somewhat renowned for everyone having a go at any sort of development at any time, multiple times. As long as the principle behind that aspect of the code assessment track is one that, if you are honest up front, which is what the code assessment track is meant to be, in saying, "This is what can happen in and around your neighbourhood; are you happy with that?" and you get the response, "Yes, I am, that's the rule that applies to everybody," then you shouldn't have a second go when somebody the next day follows that brief procedure. If people have bought into the concept at the start, they shouldn't have another crack later, and the code track then is down the line, it has done what everyone said it would do and no one can complain.

Impact assessment is a little bit different. They are stretching the bounds a little bit more, maybe giving a better quality outcome. That is then more understandably to trigger a wider consultation. We think that that sort of principle is a fair one and also one that the community can probably understand, because it has got logic to it.

THE CHAIR: Thank you very much for your presentation this afternoon. We will get onto the net and a look at the submission. We will get a copy of the transcript to you as soon as we can for any editorial changes. Thank you once again.

Meeting adjourned from 3.04 to 3.17 pm.

WETTENHALL, PROF ROGER LLEWELLYN, Visiting Professor, Centre for Research in Public Sector Management, University of Canberra

THE CHAIR: Good afternoon, Professor Wettenhall, and thanks for coming along to our hearings this afternoon. I begin by reading out the privileges statement for you. The committee has authorised the recording, broadcasting and re-broadcasting of these proceedings in accordance with the rules contained in the resolution agreed to by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings. Before the committee commences taking evidence, let me place on the record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee in evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others, necessary to discharge the functions of the Assembly without obstruction and without fear of prosecution.

While the committee prefers to hear all evidence in public, if the committee accedes to such a request, the committee will take evidence in camera and record that evidence. Should the committee take the evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly. I add that any decision regarding publication of in-camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing.

Professor Wettenhall, once again, good afternoon. Would you like to make some comments to the committee? Before I let you go there, I apologise on behalf of our committee colleague Ms Mary Porter. She is out of the country at the moment.

Prof Wettenhall: Thank you. Could I say that when your secretary contacted me she mentioned that she had seen my comments on the Uhrig inquiry, which was a commonwealth government inquiry. That is what I have been researching mostly in the recent period. I see some similarities between what has happened in the commonwealth and what is happening in the ACT now. I have been critical of the Uhrig inquiry.

If I could very briefly mention the main lines of my criticism: one was that it was a closed inquiry, not a public inquiry, so that members of the public were not able to give evidence. It took its evidence from a very narrow range of people very closely associated with the commonwealth government. So it missed a lot of viewpoints that might have been useful to it.

The second criticism was that it virtually ignored the legislature's interests, although it was told to consider the relationship between statutory authorities and the legislature as well as the executive government. That was virtually ignored.

The third criticism was that it focused very much on trying to enhance and improve the role of ministers. It seemed to me to take very little cognisance of the fact that so many statutory bodies were created to give them a degree of autonomy or independence. Sometimes they needed protecting too—protecting against unfortunate, unwise, even occasionally corrupt ministerial actions—but the Uhrig inquiry was not interested in that at all; it was all about enhancing ministerial power.

One has to say that the effects have been considerable. You see a number of commonwealth authorities either going back into departments, being absorbed into the portfolio departments, or losing their boards. The boards gave the executives and staff of authorities another frame of reference, apart from the minister. If you knock the board out, they lose that second frame of reference.

I am now, in the work I am doing, developing the argument that some statutory bodies are desperately in need of that autonomy or independence. Think of audit offices and ombudsmen. But there are others like human rights commissioners and so on that need this. They desperately need protectors outside the executive government.

I have quite recently been at an international conference in Mexico looking at transparency issues. This was a very important issue at that conference. A Swiss bureaucrat said, "We need a fourth power above parliaments and executive governments." A South African public service commissioner was talking about a need for some power above the parliament, the reason being that parliaments were seen so often to be ineffective in countering adverse executive actions in relation to statutory bodies.

That is a very brief indication of my interest in Uhrig and how it relates to statutory bodies in general.

I looked at the ACT in 2002. A colleague of mine at the University of Canberra and I published an article trying to look at the experience of the statutory bodies in the ACT public sector. I have a copy of that, which I could leave with you, if it is of any interest. About the same time the ACT government web site was showing six departments. We are interested in the structure of the system of government. A second group shown in that website was a collection of courts, some statutory authorities and some programs assembled under one or other of the six departments.

In that 2002 listing, PALM, Planning and Land Management, was listed under "Urban Services". That 2002 listing showed the Legislative Assembly standing separately, as it should do—I am sure of that—and then there was another group of independent statutory authorities running to the territory-owned corporations. In that list, a puzzle for me was why some statutory bodies like the Public Trustee were listed back in the second group under departments and others were standing apart from departments. I do not have an explanation for that. There are several puzzles as far as I am concerned.

Perhaps I could finish this brief statement quickly. Hannah sent me a copy of the relevant pages of the 2005 Auditor-General's financial audits report. It has got quite a different list, a list not like either the one I was involved in compiling or that one in the ACT government web site. It had 20 items under the heading "Departments", which included the Planning and Land Authority and a few others that I regard as statutory authorities, but then a separate list of statutory authorities that included the Land Development Agency.

With that background, when the strategic and functional review was announced just before Christmas, we in the Centre for Research in Public Sector Management at the University of Canberra were interested in making a submission. There was an

advertisement inviting submissions. We saw a number of statements in government documents and in press reports referring to 10 government agencies. I had difficulty knowing which 10 were counted. I queried that with the strategic review's secretariat. The answer I got was: "Yes, there are 10 departments, or authorities classified as departments, however there are many other statutory authorities.

We in the Centre for Research in Public Sector Management made two submissions to that review. One of our recommendations was that all this needed sorting out, but we have not had access to the review. So we are not really clear what happened there.

I have been checking the Financial Management Act, parts VIII and IX dealing with territory authorities, as revised to early August 2006. I am assuming that includes some post-2006 budget amendments. There are two lists of territory authorities. One lists only those with boards; the other is a more extensive list. The Land Development Agency appears in both, the ACT Planning and Land Authority in neither.

Another little puzzle for me is why the University of Canberra is under the full list but not under the list of those with boards. It has a council. I do not know why that is not considered as a board.

I have found a 2003 declaration under the Financial Management Act that the Planning and Land Authority is not a territory authority for these purposes. There are declarations removing some others but I do not think they are very relevant to this inquiry. I do not know why ACTPLA was excluded. In its 2005 report it describes itself as being independent for some purposes. It talks about getting ministerial directions, the power of the minister to give directions, and it lists one it received. That is very much like a statutory authority. But it is not listed as a statutory authority.

I am quite confused about its status. I understand that you are now looking at legislation which might affect this. I would be very pleased to see some clarification. It does not seem to me to be very satisfactory to have a body which is an independent authority for some purposes but which is treated as a ministerial department for other purposes. The patterns of accountability are different. That ought to be clear in the legislation.

THE CHAIR: Thank you. I thank you for coming in and giving us that presentation. We will take your comments on board for the inquiry that we are doing. We will get a copy of the transcript out to you as soon as we can so that you might make any editorial changes to that. We will be in touch. Thank you once again.

Prof Wettenhall: Thank you very much. Can I say that I have copies of my comments on Uhrig and that article we produced on the ACT statutory bodies. Would it be useful if I left this?

THE CHAIR: Yes, it would.

Meeting adjourned from 3.30 to 3.58 pm.

DODSON, MS MELINDA, President (ACT Chapter), Royal Australian Institute of Architects

WILSON, MR ANDREW, Chair, Planning Committee, Royal Australian Institute of Architects

MacKENZIE, MR ANDREW, President, Australian Institute of Landscape Architects (ACT Chapter)

THE CHAIR: We recommence the hearings into the draft planning system reform bill. I welcome members from the institutes of architects and landscape architects. I will read out to you our privileges statement before we begin. The committee has authorised the recording, broadcasting and re-broadcasting of these proceedings in accordance with the rules contained in the resolution agreed to by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings. Before the committee commences taking evidence, let me place on the record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee in evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others, necessary to discharge the functions of the Assembly without obstruction and without fear of prosecution.

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Welcome. I apologise for our committee colleague Ms Mary Porter, who is out of the country at the moment. We will make sure she gets all of the information that you have provided for us. Would you like to make some opening comments?

Ms Dodson: Thank you for having us here today. I am the President of the Royal Australian Institute of Architects here in the ACT, and Andrew Wilson is the Chair of the Planning Committee. A short bit of background for you on the institute of architects: we are the peak professional body representing architects here in Australia. We have 6,000 architects who are also members—registered architects. We have nearly 9,000 members all up. That comprises architects and graduates who are in the process of becoming architects.

We have, for our members, a professional code of conduct which speaks to such things as design excellence and a concern about the built environment and a concern about environmental design in general. Our terms of reference are to promote responsible environmental design. Today we are here in that capacity. The planning committee in particular, under Andrew's chairmanship, has done a detailed review of all the material that you have supplied.

Firstly, we commend the ACT government on a planning reform objective that aligns with the development assessment framework model to which the institute of architects was a co-signatory some time back. We can see key principles within that DAF model that have been articulated through the draft planning reform.

We want to discuss with you today and highlight some of our concerns. I will touch on that very briefly and then hand to Andrew to discuss it in more detail with you. Firstly, a key issue is that we have an issue with the timing. The timing issue relates to the release of the draft planning reform bill and the fact that that is only supported by, at this stage, one sample zone policy. Our concern relates to the ability to test the reform bill through case studies and through an analysis of the code and merit track documentation that will obviously be rolled out, but rolled out subsequent to this reform bill going through. We will talk a little bit more about some examples of case studies that are drawing our attention to potential complexities in the system.

The second point we make is related to the merit track system, as it compares with the code track system, the length of time associated with merit track assessment, the additional fees associated with that and, in particular, the merit track system and its automatic trigger to go to public consultation and the associated additional time involved in that. That is something we would like to discuss with you more today as well. Our nervousness there relates to certain instances of certain applications unwittingly being pushed into the merit track assessment process for relatively simple things, which then leads to a more lengthy and complex approval process.

We also touch on having appropriately qualified staff to support both the merit and code track systems. Obviously, the resource shrinkage that we have seen in ACTPLA recently is of concern to us.

I will hand over to Andrew. Perhaps Andrew can highlight in more detail some of these issues.

Mr Wilson: Thank you, Melinda. Thank you for this opportunity to present to the committee. As Melinda has communicated, the institute of architects supports the thrust of a simpler, faster, clearer planning system. In our detailed paper, we have presented our points under four subheadings, the first one addressing the planning authority's organisational structure and certification process. I refer to submission page No 6.

Broadly, the institute of architects seeks that ACTPLA staff assessing development applications have the requisite professional qualifications in the area of matter that they are assessing. So the simple logic would be: if the design problem being assessed is one of an architectural nature, that person should have an architectural qualification. Conversely, with landscape, that person should have a landscape qualification.

Secondly, we say that we support ACTPLA, in writing the revisions to the territory plan, being able to supply the detailed codes and instruments to which this legislation will refer. We suggest later in the document that the professional organisations are willing to participate in the consultation process to assist in the drafting of those documents.

In writing those revisions, we understand the budgetary constraints on the government and the pressure on resources within ACTPLA. We also encourage the government to

provide the resources to ACTPLA so that the codes, which are the very important detailed instruments which we use day to day, are written very clearly, simply and thoroughly.

The next issue that we broadly address under ACTPLA resources is that we would like ACTPLA to have the authority to adjudicate on competing issues by other authorities to whom matters may have been referred. We have—and I stated this before a Legislative Assembly committee in July last year—the example of an ACT government school, which was Amaroo school, being delayed for some time because there could not be brokered an agreement between Environment ACT and our client, who was the ACT government department of education, on the removal of some significant trees and the requirement of a school building in place of those trees. Therefore we seek to avoid that time-delaying process by having the ability for ACTPLA to make a decision, albeit with consultation and always with the objective of bringing along the agreement of the referred authority.

With regard to addressing private entity certification of developments, we make the point that, again, we would like those persons who are registered certifiers to have the appropriate qualifications in the field. We observe that this legislation is silent on that matter.

Finally, addressing ACTPLA's organisational structure, we request that requests for additional information not cause undue delay to applications. In a number of points through our submission, we ask for a time frame of 10 days to be the period in which ACTPLA is required to request additional material from applicants.

The second broad area that we have addressed is design quality. I may stop at this point. I assume you have read the document.

THE CHAIR: Yes.

Mr Wilson: If I am going across it in too much detail, I would prefer to back off and give you more time to ask questions. Would you like me to continue addressing each of the sections in this level of detail or less?

THE CHAIR: The level of detail is fine with me.

MR SESELJA: Yes, it is fine with me.

THE CHAIR: Do you want to ask questions as we go along?

MR SESELJA: I am happy to. We have had a lot of submissions. Even though we are across them, it is hard to remember all the details. So it is helpful for me, certainly.

DR FOSKEY: I have not read them.

Mr Wilson: Then I will continue in the same manner.

THE CHAIR: Yes, continue with that. If we could, Mr Wilson, we will interrupt you for a question if that is fine.

Mr Wilson: The second broad area of concern is design quality. As architects, we quite frequently are concerned with design quality and quite often wish to challenge things that have not been, ask why not and try to promote alternative solutions that may not be prescribed by mechanistic or prescriptive dimensional controls. Therefore, we would emphasise that we request that performance-based assessment compliance should play a more important role in the assessment of applications.

If the performance of a design achieves a desirable outcome beyond that which would be described by simple dimensional constraints, then we see great merit in pursuing that application. We contend that the merit track assessment should not take any longer than a code track assessment unless public notification is required.

THE CHAIR: What would you consider that the criteria for public notification be?

Mr Wilson: "Public notification criteria" is well defined in the proposed legislation by reference to bodies who may be materially affected by the proposal. Therefore, public notification would be, of course, a requirement.

The example that I give at this point that we wish the legislation be redrafted to address is the simple case of a householder within an existing inner suburb, with a very developed street tree canopy, where the canopies are overlapping, seeking to make an application to move a driveway from one position to another. That would, under the legislation as drafted now, require public notification because the driveway is within the canopy effect of the tree. It may have an impact on the tree. Therefore, that application for the moving of the driveway would be subject to public notification, on our reading of the legislation.

We suggest, in that case, that the planning authority, by reference to Environment ACT with their expert assessment, could assess the impact of the driveway movement and make a judgment without going to public notification. I think the point is simply made.

The third point we make under design quality is that we are hesitant about the precinct development plans because consideration needs to be given to mechanisms that allow localised negotiation for innovative design solutions within a precinct. Under the legislation as it exists, there is a system of master plans that more particularly describe the form and type of development permissible in that area.

Under the precinct plans, we observed, from the sample code, that the sample code is not as descriptive. Therefore, we would like the legislation to allow for a merit-based consultation process in assessing applications against the precinct plans, as we see them drafted at the moment. But we would address this point further in consultation with the drafting of subsequent codes.

Our third broad area of concern was consultation. The RAIA supports strongly the new public consultation model that restricts vexatious claims; that is, we do not want to be seen to nor we do not want to restrict consultation. We want to have a mechanism by which a claim, which is not based on the test of the objector being materially affected but which is assessed as being vexatious, is excluded. We support the exclusion of a vexatious claim.

We contend that the merit requirement for mandatory consultation is inconsistent with the DAF model and note that a merit track may require third party consultation. We would be quite pleased to have that test "being materially affected" as the test for the need for third party consultation.

The final point under consultation is that, again, we would like to see ACTPLA given the authority to mediate conflicting submissions, as we have been making the point that we would like to see them mediate conflicting advice from other statutory authorities.

The fourth area of concern is to do with environmental impact. The RAIA supports the move to a one-step process for environmental impact. We support and applaud the effort of the government to retain its authority without adding undue delays to the assessment process. We would like further clarity over which developments trigger environmental impact statements and notification requirements of the scoping component of the EIS.

We make, in the following text, a series of statements which, in short, seek a mechanism by which unspecified delay can be managed during the public consultation or notification process. We state that the nominated 20-day public notification period contains no specified time line for the initial draft preparation or the final agreement on scope before and after public notification. We suggest that this should be replaced by a 10-day period for the authority to draft the scope of an EIS.

I have outlined the concerns of the institute of architects. Our objectives in outlining these concerns are threefold. In summary: to achieve a simpler, faster planning system with a faster time frame for approvals; secondly, to align time frames for code and merit assessment—and our reason for doing that is that we feel our membership may be more likely to be pursuing applications in the merit assessment field; yet we feel our clients may avoid exploring innovative solutions if there is a time delay on that application; and, thirdly, we encourage the precinct codes to be developed in a way that does allow for innovative design.

Finally, I say we have attempted to draft, for the assistance of the committee, amendments to particular sections of the legislation. I will leave that tabled and ask the committee members to refer to it. I hand over to Andrew MacKenzie, if that is appropriate.

THE CHAIR: Yes. I welcome Dr Foskey to the hearing as well.

Mr MacKenzie: My name is Andrew MacKenzie. I am the President of the Australian Institute of Landscape Architects (ACT Chapter). I am also a lecturer in landscape architecture at the University of Canberra and have postgraduate qualifications in public policy in relation to environmental law. So this naturally interests me significantly.

I have had the opportunity to work with the Royal Australian Institute of Architects to draft their bill and, in doing so, support the institute of architects' submission. I make additional reference to part V of the bill and to the objects of the bill as well. I also note that this is a verbal submission and we have not included an additional written submission in relation to this opportunity. First of all, AILA recognises that the opportunity for comment on development codes and tables will occur in the near future

but sees this as an important time to address the way in which landscape setting for future urban development is recognised by the current bill.

The first point I make is that the first object of the act lists that the development will meet the social, economic and environmental aspirations of the people of the ACT and suggests that in order to do that it is necessary that the planning instrument adopt a more specific approach to landscape planning as a result of the bill, as opposed to a one-size-fits-all approach which favours a development outcome which expedites planning and construction of housing.

The removal of development applications from construction of new houses in greenfield sites will have a major impact on the operation and development of housing for ACTPLA and the ACT. It will significantly reduce the administrative burden of ACTPLA in housing construction in many areas and will allow ACTPLA to focus efforts in areas that need attention. Many of these areas are set out in the RAIA submission.

To add to that, we also ask you to pay attention to part V.5 of the bill. In doing so, we ask you to consider how this part of the bill facilitates the design of new suburbs. Part V.5 details the hierarchy of plans that describe the form and structure of new urban areas. It states that these plans set out the principles and policies for future development.

AILA argues that a priority for the ACT government in the development of greenfield sites is that ACTPLA is appropriately resourced to design and implement structure plans and concept plans that recognise and integrate with finer-grained landform and biophysical factors of a site so that the landscape can best accommodate the built form. The objectives of these structure plans should also maximise the opportunity for the appropriation of open space, both private and public space, by the community in order to create social bonds and make good neighbourhoods.

This can be done by recognising the need for adequate open space that not only allows residents to physically use it for outdoor activity but also to create the landscape setting that Canberra is famous for. This is not merely a requirement for more private or public open space but a better relationship between house footprint and surrounding open space, regardless of house or block size. By looking at these particular plans, the hierarchy of these plans and the integration of the landscape setting terms into these plans, we believe it offers the opportunity to explore a wider range of solutions in the new suburbs—and in fact in all suburbs—that takes into consideration the specific characteristics of the landform in which the housing will occur.

This brings me to the second object of the bill, which is that housing will occur using sound environmental principles. By considering that housing should respond to the biophysical characteristics of the landform and, in doing so, produce a better design outcome for housing in that landform, you produce more efficient and more appropriate housing for the people living in those spaces, which could be seen as a sound principle of management of that landscape. Part of that talent, I suspect you could say, is that the resources that have been freed up from the administrative burden of ACTPLA could be focused on addressing that issue to make sure that the structure plans and the concept plans integrate this issue of landscape setting as part of the requirements of the bill.

That is all we would submit. I thank you for the opportunity to do so. You might like to

ask questions of us generally.

THE CHAIR: Thank you, Mr MacKenzie, and other witnesses.

MR SESELJA: I am interested in your submission about qualifications of ACTPLA staff. That is something that I have heard raised on a number of occasions. Are you confident that, with the skills shortage and with the relative pay scales of government versus private sector, ACTPLA will be able to attract sufficiently qualified staff to meet the criteria that you have set out in your submission? Or will it mean that the in-house training will become much more important rather than necessarily formal qualifications?

Mr Wilson: I think there is an overriding intention in the restructuring of the legislation to move certification of greenfield development to private certifiers or to have the resources to address greenfield developments addressed by private entities. If the consequence of that move is that the current staffing levels of ACTPLA are, therefore, more focused on a range of activities addressing more inner area development, commercial and inner residential development, then I feel much more confident that the design sensitivities which architects seek to have addressed will be addressed more thoroughly than they have been in the past.

I have heard reports in various forums leading up to the preparation of our submission—reports of planners, architects, other design professionals alike—that there is a noticeable improvement in the culture or the manner in which ACTPLA staff address proponents, applicants or other professionals. The way they address them now is much improved. I assume that that is because their workload is becoming more manageable.

It has still to be addressed—and I cannot address it—whether pay and conditions are a factor in professionals seeking to join ACTPLA or not. My view would be that that is probably a neutral issue. It is more important that we get a simpler, faster planning approvals system that results in less vehement conflict across the counter and therefore a more pleasant work environment for planning officers. I say that is a desirable outcome on both the proponent and the authority's side.

Mr MacKenzie: If I might add to that, to look at qualifications alone in terms of capacity to assess is not essentially the only thrust that is coming from the Australian Institute of Landscape Architects and the Royal Australian Institute of Architects. You should also consider the use of performance-based assessment criteria. In effect, the design of that criteria may or may not involve the industry. It predicts a level of self-regulation that they design their own assessment. The notion is that performance criteria give the opportunity for the assessors and the industry to work closer in terms of what they deem to be a common desirable outcome in areas that do not comply with the code-based assessment or the deemed to comply assessment model.

The issue at hand here is not just qualifications; it is the capacity as a result of a better design of codes and tables in relation to this particular opportunity. The door is left open a little bit here. We see that, in order for more active industry involvement to occur, it can occur with the appropriate level of qualification of staff but also in a more efficient manner, so to speak.

DR FOSKEY: You suggested that resources would be freed up by planning reform and

less focus, I assume, on development approvals. Is that where you see the resources being freed up?

Mr MacKenzie: In relation to greenfields assessment, yes, because of the exemption.

DR FOSKEY: That excess might release a capacity to ensure that buildings comply with the landscape setting. That is what I took you to mean.

Mr MacKenzie: Not so much that the buildings on individual blocks comply with landscape setting but that appropriate attention is given to the landscape setting for what we call the structured plans, the concept plans and the estate development plans. So we are looking at a landscape setting on a neighbourhood scale.

DR FOSKEY: Back at the beginning.

Mr MacKenzie: The original plans.

DR FOSKEY: Presumably what they have been doing now for the new suburbs.

Mr MacKenzie: In a sense, yes. I share the concern of the architects that the precinct codes, according to the legislation, talk about the policies that dictate how housing might occur. In fact, it says here that the structure plan sets out principles and policies for development of future urban areas. We are interested in this: at what point does the reference to specific landscape setting of new urban areas come into the actual wording in the act? It is not until you get to the estate development plan in section 86 that there is a reference to "block boundaries, zones, estate include the following: road layout, infrastructure, works and landscaping", which are very specific, technical requirements for the provision of services within that setting. But there is no reference to the setting itself.

Our concern—and to give you an example—is that in some ways you might have a compelling argument on a particular landform to have a larger or a lesser setback which provides the opportunity for a substantial street tree canopy because of the aspect of the ground or the slope of the ground, but that cannot possibly be recognised unless you recognise that setting in the first place. As an instrument to recognise the landscape, we ask that there is some reference to that analysis in the legislation here so that it precludes a requirement that occurs during that process.

DR FOSKEY: One of the things that were discerned through the estimates process of questions on notice was that ACTPLA currently does not have a great deal of expertise in the environmental assessment side of things—I believe that was the answer to one of our questions—not to mention the social planning side of things. I was wondering whether freeing up resources, through having fewer people involved in development approvals, does not necessarily mean that you have got the people who are qualified to do this—in fact, heaven forbid—in many cases.

How would you ensure that we had a streetscape, for instance, and town planning which took into account the landscape setting? I am assuming that, when you talk about that, you are also considering things like drought proofing and safe trees that do not have to be cut down when they reach 20 years. I was wondering whether you are also

considering things like alignment of streets so that houses can be developed to be solar passive and energy efficient, given that this is something that needs to be taken into account at that early stage and given that it is going to be terribly expensive to retrofit if we do not get it right.

Mr MacKenzie: You very generously made the point for me, in the sense that all of those things cannot occur without adequate information about the landscape setting in which a suburb is going to occur. One of the issues here is this idea of the primacy of the individual landscape setting. If you wanted to look at an example, you can have a very undulating part of a new greenfield site or you can have a very flat part of a greenfield site within the same suburb covered by the same precinct code, but they would require very different treatments, not just at the block level but at the neighbourhood level.

Imagine that a suburb is much like a system in the way that blocks, streets and neighbourhoods interact with each other physically. To most effectively use that space may require that the landscape setting is acknowledged at a very early stage, not just in the actual planning process, because that is done to a certain extent anyway, but in terms of the legislative requirements of the development so that that occurs.

The other thing that that gives the opportunity for in a degree of discussion within the development of codes is this: to what scale or what grain does that analysis occur? It is obviously inefficient and inconceivable that you would look at a block-by-block setting, but there is sufficient technology available to do contour mapping, vegetation mapping and quite sophisticated aerial analysis of sites that can emerge as part of the planning process that can only be required if there is some legislative requirement for that to be considered at an early stage.

DR FOSKEY: And you are saying that is not there as yet?

Mr MacKenzie: I do not believe so. Fundamentally, the issue here is that—and we, as a profession, promote design, and I suspect architects are the same—the implementation of design principles at a landscape scale and the planning of the landscape are two different things. In order for them to marry, so to speak, we are saying that there are design principles in relation to looking at an entire suburb that need to be considered at that particular stage.

We are not looking at a highly sophisticated block-by-block planning approach but at a neighbourhood scale. To give you just one example—and this inevitably applies to existing suburbs as the greenfields sites run out and the need to infill develop potentially occurs—I am currently undertaking a study with the CSIRO on the redevelopment of Duffy. It has radically changed through two events. One was the destruction caused by a fire. The second was the rebuilding through insurance capital coming into this place and other developments.

We are looking at the extent the landscape setting has been considered in the redevelopment of that particular suburb. At this stage, it is a case of "watch this space". We were proposing to submit a report to Environment ACT and the ACT planning authority this time next year, detailing that which predates this particular argument, that in both cases an understanding of the landscape setting needs to be considered.

DR FOSKEY: You were talking about consultation and the legislation's restriction of vexatious claims which I believe you defined—but you can tell me differently—as "anyone not materially affected". It seems to me that that makes a lot of sense when you are talking about the point of view of an architect who has a commission to put up a house and the residents association says, "No, this is against the look we want in our suburb."

What if you were, as an architect concerned about design and the other things that architects care about, very concerned about a development because you saw it as something that was obscene or horrible? Then you would be someone who had an interest—and I would say a valid interest, because of your expertise—but you would not be materially affected, would you?

Mr Wilson: That is a very good point.

DR FOSKEY: My concern about the legislation is that this is a very broad brush.

Mr Wilson: We have struggled in the short time frame to wrestle with an address in detail to this issue. How do we respond?

Ms Dodson: It would be appropriate for architects, particularly architects who choose to be members of the institute of architects as well, to use other mechanisms to make comment on a particular development. It might be through public comment in the media or through other mechanisms of lobbying, but I am not convinced that it would be fair for an architect to use the public consultation process to necessarily make comment on their personal preference or aesthetic preference when it comes to a particular development. Do you want to add to it?

Mr Wilson: I tried to set the brief for the legislators to draft the requirement for public consultation by describing our task as architects in this way: in one sense, we are very technical people but, in another, we are very artistic people. Our task is to put the technical and the artistic together, to produce an object that is useful and beautiful. In order to do that, there is a design process that goes on which is about research, information gathering and so on, to lead you to an understanding of your client and your community's design problem so well that you know it better than they do.

In consulting with the public we, in a community, get a wide-ranging spectrum of opinions, and each one is quite valid. Those opinions are very hard to deal with if they come into your design briefing process over a long period of time or without some boundary or containment. We focus on wanting to gather all relevant information to get to that point of understanding the design problem so well, within a defined period, probably—if I express it most crudely—because we cannot afford to talk about something forever. Rather than draft legislation which restricts public content or public consultation, we would like it contained in time so that our task is manageable.

DR FOSKEY: Yes, that seems reasonable. Another issue is that, if the code were adequately detailed or nuanced and covered most of the things that generally people complain about—there are probably some unreasonable complaints, but often they are about setback, overshadowing and things that are relatively reasonable—that would mean a fairly fine grain to the code, quite a bit of detail and quite a bit of prescription in

a sense.

We are yet to go to code, are we not? That is the next stage. We cannot really say whether that will cover it, but it would seem to me that we need to cut out that ability. We need to have that attention in the development of the code. Would you say so?

Mr Wilson: Yes. If I can describe it in my terms, there is an attempt to prescribe what might be so that the public might have a clearer picture of what is permissible in that area. That is quite an acceptable procedure to follow. The qualification that architects would like to put on it is, and I have referred to it in a number of times in the merit assessment stream, that we can often see a physical form that may be prevented from happening by a code dimensional constraint on us—setback on a site boundary or something—that would, in the end, deliver a much more delightful product and might be prevented if we were constrained to only design to a prescriptive performance code.

I can illustrate that with a picture. Imagine the fundamentals that the public would be concerned about: overshadowing, noise, overlooking—those three broad issues. If you had a wall on a boundary that, by the code, was required to be set back, say, nine meters so that there was some distance between a potential window in that wall and the adjoining block to prevent immediate overlooking, overshadowing and so on, and if an architect proposed a window that came obliquely out of that wall and only looked towards the street but was over the measurement boundary, that would, in a performance sense, meet all the requirements of a prescriptive code but would break the dimensional requirements.

DR FOSKEY: So it is really about how it is framed?

Mr Wilson: Yes.

Mr MacKenzie: I add that, again, in each of these cases—and it happens, certainly with landscape architecture as well—there seems to be a disjunct with the rigorous application of prescriptive codes that then require this delay which, in a sense, in development terms, equals risk. Therefore, to reduce risk you deem to comply. Hence you have the majority of housing being deemed to comply off the plan, off the page-type development. Some of the consequences of the prescriptive code, it appears, certainly in other jurisdictions, have been that people have sought to retrofit their houses using landscape treatments like hedges that have then resulted in some quite vigorous and heated debates about hedges which are not bound by those restrictions.

While the code seeks to protect, in a sense, the amenity of the area, in the absence of appropriate performance criteria as well, you are restricting the potentially creative responses. Then you get what we call retrofits. The retrofits, as you have already mentioned, are invariably expensive but can also be quite dangerous in the sense that you create this adversarial environment where people seek to, say, put up a hedge to create privacy or, in many cases, to create a sound barrier, although that is not effective. That is not governed by legislation.

There is this disjunct which appears to be a product not of a lack of input from the industry into the development design of this performance-based criteria. There is a great opportunity for better outcomes in both greenfields and existing suburbs, through that

potential, essentially, partnership environment—dare I say—or even self-regulation.

DR FOSKEY: You do not feel as though you are going to be consulted to death when we come to a code and merit as a separate process? Do you feel that this process—so far and as it looks it will be in the future—is adequate for getting the right result and is not too demanding for stakeholders?

Ms Dodson: It is fair to say that we are happy to be consulted. We have appreciated the opportunities to contribute both last year and again this year. We want to continue to be a party to the development.

DR FOSKEY: And next year too.

Ms Dodson: Yes.

DR FOSKEY: You think that, at the end of it, we will have something that you will be able to work with?

Ms Dodson: We still have a degree of nervousness. The nervousness relates to the code unwittingly pushing a lot of developments into a merit-based assessment and then us, in turn, seeing automatic triggers of public consultation and, therefore, a multilayered process. It is a concern. Having dealt with other building codes and government briefs, we have the desire to be prescriptive. We try to deal with every instance that leads to a document that is difficult to apply to all of the circumstances that you see coming through in applications. A view that we share, certainly within the institute, is that there is a real danger that the merit track assessment may be more heavily utilised than is currently anticipated by the draft reform legislation.

DR FOSKEY: Thank you. You have made that clear anyway.

THE CHAIR: Thank you very much for your presentation and your submission. We will get a copy of the transcript of today out to you as soon as we can for any editorial changes.

Meeting adjourned from 4.53 to 5.00 pm.

DEL RIO, Mr Alfonso, Member, Property Law Committee, Law Society of the Australian Capital Territory.

THE CHAIR: Good afternoon, Mr del Rio. Welcome to the planning and environment committee's inquiry into the draft planning system reform bill. Before we start, I will give our apologies for Ms Mary Porter, another of our committee members who is overseas at the moment. We will make sure we get all the information to her that you provide. I will read our privileges statement to you.

The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the resolution agreed by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings.

Before the committee commences taking evidence, let me place on record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee in evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others, necessary to the discharge of functions of the Assembly without obstruction and without fear of prosecution.

While the committee prefers to hear all evidence in public, if the committee accedes to such a request, the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and all those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly. I should add that any decision regarding publication of in camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing. Would you like to make some comments?

Mr del Rio: Yes. Firstly, I would like to thank the committee for their time in making the opportunity available for the Law Society of the ACT to make submissions in respect of this very important piece of legislation. The ACT law society's submission is not available at this time. I apologise for that. There is a process the law society needs to follow for that to go through its committee and be endorsed. The committee is aware of that. I take the opportunity to thank the committee for the opportunity to submit the submission later on. It is due on 12 September, or something like that. It will be in within the next week or so.

There are only five main comments that I really want to make. The first one is a matter of principle. The society believes that the track system is a very good system. It is generally consistent with the development assessment forum model, which is the national model of best practice for development assessment systems.

The law society believes that the hierarchy of codes is a good thing. That is enshrined in section 107 of the draft bill. The law society believes that the time frame for agencies to respond to various issues is also a good thing—that is proposed to be 15 working days—because at this point in time there is not a time frame by which referral agencies need to respond. Also, as a general principle, the concept of enshrining the preapplication meeting concept, which is found in section 127, is quite a good idea.

Just speaking generally, one of the fundamental problems we have had with planning law in the territory is that there have been a lot of administrative protocols that are not found in the legislation. Effectively, we have been regulated by guidelines. So the bill drawing all those processes together and having it in a legislative format is something the society has been advocating for some time. It is very pleased to see that. Those are the good things.

There are then three things that I would like to comment on. The firsts is the appeals provision. The society is concerned that there is a test which refers to material detriment. The wording of that is new, in that it is different from the existing provision, which talks about a material adverse effect. The society's comment there is: why is it necessary to change it? From a practical point of view, I do not believe there will any difference in how the test is applied by the AAT. Just as a matter of principle, fundamentally we have a test at the moment that is being considered by the AAT. It is well established and reasonably well understood. Changing it to a different set of words means that, for a period, there will be uncertainty. I do not believe anything will be achieved by that.

That having been said, the fact that the appeals mechanism and who can appeal is set out in schedule 1 is a fantastic thing. At this point in time they are in seven different schedules to the regulations covering 40-odd pages. To effectively have them in schedule 1 of the act—which means, of course, that it will require the approval of the Legislative Assembly to amend—is something the society is quite supportive of.

The society's position on things like third party appeals is that it is important that people who are adversely affected by a decision have the opportunity to comment on that decision. There should also be some sort of protection against what we refer to as the vexatious litigant—the people that are serial offenders that complain about everything. From that point of view, that is found in the current legislation.

I would also like to draw the committee's attention to what we think is a defect in the legislation and the test that is used. I am sorry to be painful about this stuff. Clause 374 (1) (a) of the bill says:

> the decision has, or is likely to have, an adverse impact on the entity's use or enjoyment of the land …

This is on page 286 of the draft bill. The reference to "the land" in that context is likely to be interpreted as a reference to the land which is the subject of the development application. Clearly, that does not make any sense at all. I think that provision is meant to be read as a reference to "their land", being the objector's land.

That is consistent with how the explanatory guide talks about what the test should be. The explanatory guide says, "Material detriment means the decision has, or is likely to have, an adverse impact on the person's use or enjoyment of their land." I think that is just a typo, but, importantly in the context of that particular provision, which is the standing test, it will make a huge difference. The society will point that out in their formal submission, but I think it is important to draw the committee's attention to that.

THE CHAIR: We have had it raised before.

Mr del Rio: That is fine. That is good. The other thing which undoubtedly you have had raised before as well is clause 259, which is about the mortgaging of land. I have been appearing before this committee since the land act came in in 1992, and it is something I have taken the opportunity to raise on every occasion. It would be remiss of me if I failed to do so again. I will try and explain the problem in a much more simplistic fashion, because I have obviously failed to explain how it worked before.

The effect of this provision is that it is illegal in the ACT for a couple who wish to buy a block of land and build a house on it to consolidate their credit card debt and their car debt, for example, into the loan. That is clearly a consistent practice. I would suggest to you that nearly every home owner in the ACT who has bought a block of land and built a house has breached this provision.

The provision is not discretionary. You will see that it says explicitly that it cannot be mortgaged unless a certificate of compliance is issued—obviously a certificate of compliance cannot issue until the home is complete—or, alternatively, one of those three things below are met. It is not for other purposes.

The problem with this provision, as the law society has explained before, is that it is one that is not enforced. It is impossible to check compliance against it, because you do not know what the money that is subject to a mortgage is actually going to be used for. From an administrative perspective, it is something that is not enforced. It is something that cannot be policed, but it represents a significant impediment to investment in territory major commercial transactions when people read provisions that say that the land cannot be mortgaged "unless".

I would like to repeat once more the society's request for the abolition and removal of that particular provision. I know that ACTPLA is aware of it. I spent over 1½ hours with its officers explaining and giving them a range of further examples on it. I know that is something ACTPLA is considering with a view to getting a government decision on it.

THE CHAIR: Just to clarify that, the society would like it completely removed, not modified.

Mr del Rio: Correct. The only way it can work in practice is to remove it altogether. You could go into a similar provision to what is now section 180, which is proposed to be section 260, which deals with transfer. There is a consent requirement where the territory can consent to a mortgage, and there is a consent process.

The fundamental difficulty is a compliance enforcement issue, in that the territory does not know the purpose for which the money will be used. Effectively, you can change it in order to overcome the issues I am addressing, but you are going to introduce a compliance mechanism and a regime which is just overwhelming. It is the society's view that this provision is continually breached every time somebody buys a block of land and wants to build a house on it.

The other thing I would like to raise briefly is the concessional lease issue. The society is very pleased to see that concessional issues are finally being addressed in some form. Obviously the bill picks up the recommendations that were made in the concessional

lease review that was undertaken about two or three years ago. In principle, we think it is a fantastic idea, but we have some comments to raise about some possible modifications to the reporting mechanism.

I would like to go back and explain something to do with conveyancing processes in the ACT. When you buy a property in the ACT at the moment, the standard conveyancing procedure is that you request what is known as a “lease conveyancing inquiry”. It is just a form that is filled in. There are a number of questions on the form including, for example: is the territory aware of any breach of the crown lease? Has a compliance certificate been issued? Are we aware of any contamination on the land? The society would like to see as an additional question—with a yes or no—on every property: is this lease a concessional lease?

The problem at the moment with the proposed regime in the bill is that it talks about the fact that, if the territory determines that it is a concessional lease, it will notify the titles office that it has made that determination. The problem is that you do not know whether or not that determination has been made. When you buy something, by looking at the title you know whether it has been determined, but you do not know whether it has not been. The recommendation the society is making is that, if that question is asked—and effectively that question will be asked every time now—on 99.999 per cent of properties in the ACT it is not going to be an issue because they are residential.

On the ones where it is a problem, effectively that will force a process to be commenced about whether or not it is concessional, and that will trigger the provisions in here. Unless you do that, we are going to have the problem in five, six, seven, eight, nine or 10 years time that we still do not know which leases are concessional and which are not. I appreciate that in order to go through that process, it is going to involve the commitment of some resources. But, fundamentally, unless we do that, we have not achieved anything because we have simply got a process in place to make that determination without knowing with any certainty whether a particular lease is concessional or not.

In addition to that, there is a concept in here which refers to granting the lease at “less than market value”. There is a whole string of leases that are potentially granted at less than market value which are not, in the ordinary sense, things that we would call concessional leases.

For example, say I have a ballot where I am selling land to first home buyers. The reason why we have ballots is in order to ensure that there are opportunities for first home buyers to buy that land at perhaps something less than market value. If it had been purchased by a builder, for example, he would have been willing to pay more money. We think there is some additional work that needs to be done on the carve-outs for what is and what is not a concessional lease. It is quite clear what that is intended to apply to.

Also, “less than market value” does not recognise things where leases have previously been granted. An actual example is: “I am granting you a crown lease to build a golf course.” The government at the time did not want to spend the money on the infrastructure to build the golf course. Does that mean that that lease, which was granted for zero cost, is a concessional lease? The answer is: at the time, no, because at the time it was decided that the benefit the community would receive by the facility being

constructed on the land was a good enough benefit from the territory's perspective.

If we look at it now with the benefit of hindsight, going back 35 years, you may be able to say, "No, that is not fair. You did not pay anything for the land; therefore, you got it at less than market value." We do not believe that the concept that "less than market value" and "market value" means the full market value that you would have in X and Y, which is the normal valuation methodology, will work.

We think some further refinement is going to be required in that concept of full market value. Once again, that is something that will take some time to resolve. I think it is something that needs to be resolved by further dialogue. There are many examples I can give that I have been involved with over the years where those tests would treat the lease as being concessional when the clear understanding of everyone at that point in time was that the lease was not concessional.

Other examples include where I am required to do off-site works, where I have to spend money. For example, the Canberra Southern Cross Club was given the piece of land that Sky Plaza now rests on in consideration for building the Athllon Drive duplication. You look at the face of the lease and ask how much money was paid for the lease. Zero. Was that less than market value? Theoretically, yes. So there are issues that need to be determined, and a fair bit more time put around how that is going to work in practice.

I come to the last issue which, from the law society's point of view, is probably the most important issue. The law society is faced with a very unusual position. This relates to the issue of "use" as development. I am sure you have heard ad nauseam about the concept. The society's position is that it is unable to support the bill if the concept of "use" as development remains. As I have mentioned before, I have been appearing before this committee for many years. This is the first time that statement has ever been made. It is not made without due consideration and regard.

The fundamental problem the law society has with the concept of "use" as development is that it does not understand it, and it does not understand why it is being required. Ultimately, that is a silly reason to give. I would like to point out that this whole issue of leasehold administration is probably something that has been advocated and debated over many years, and everyone has a position they want to put.

The law society does not represent developers. I need to make this clear. As a result of the fact that I am here appearing before the Legislative Assembly committee, as my general practice involves developers, we also represent community councils. We also represent objectors. We represent the wide gamut of people that are involved in planning.

We do not fundamentally care about the policy decisions or objectives of government. That is not what the law society is about. Our sole responsibility is to do with protecting rights and ensuring that people that have rights do not have those rights taken away from them. It is a very central, core issue. That is why the society found itself in a very difficult position with regard to this.

I would like to refer the committee to an inquiry that was held in respect of administration of the ACT leasehold system. This goes back some time. You may take the view that it is much too old. The report was handed down on 15 November 1995. It

was known as the Stein inquiry. It was convened by Justice Paul Stein. He was a judge of the Land and Environment Court in New South Wales. The terms of reference for that report included "the extent to which the original purpose of the leasehold system is relevant and other relevant factors concerning administration of ACT leasehold".

One of the things was referred to at paragraph 13.28 of his report. I would just like to read this because I think it is key and central to this whole "use as development" concept. This was a report about whether or not we should do away with leasehold. There was a lot of public controversy at the time about it. Is leasehold relevant? It is outdated. We should move to perpetual leasehold. We should move to freehold. What are all the parameters surrounding it?

In his report Justice Stein identified four key reasons. These were the reasons why leasehold was introduced in the territory—and these are historical things. The first one was avoiding land speculation. It is in that context that section 180, which is now section 260, is relevant. That is why it is there—allowing unearned increments to be retained by the people to frame the cost of establishing the national capital. Lastly, and importantly from this point of view, is ensuring orderly planning by lease purpose clauses. The paragraph reads: "In our opinion this reason"—being the orderly planning by lease purpose clauses—"also remains relevant. However, for the leasehold system to deliver orderly planning in the ACT, lease purpose clauses need to be clear and unambiguous, rigorously enforced, reviewed and amended when appropriate to encourage desired redevelopment, and not overridden by a statutory zoning plan."

It was clear. It could not be more express. This was a report that was done after extensive public consultation. What we then had is in the guide, which is where we are today. It says, "The main change is to expand the definition of development to include commencement of use." It goes on to say, "Uses listed on a lease will be available for commencement subject to the assessment track system and the territory plan."

Fundamentally, we have a report—sure, it was written nearly 11 years ago—which, after extensive debate, says that one of the central elements of leasehold is the fact that it cannot be subjected to a statutory zoning plan. Now we have an immediate swap and we are saying no. Leases are now going to be subject to zoning. That is a fundamental policy shift. If that is a policy shift that the government wishes to do, that is fine, we accept that position, but we do not believe that that has been adequately articulated, nor is it understood by vast numbers of the community.

From a practical point of view, for 99.999 per cent of leases it does not matter because the lease is for residential purposes. The concept is always understood: if I have a lease for residential purposes, it does not mean I can build whatever size house I want. People understand that it is subject to planning principles.

We have always had this rather difficult interrelationship between the crown lease on the one hand and planning principles on the other. For most development that happens in the territory, it is really a non-issue. The concept of saying that the lease is subject to the territory plan is not a problem, because that is the way the people understand it—that is, I cannot do whatever I want on my land I need to comply with the relevant planning principles.

The problem we have is the crown leases which have a different purpose clause. That is your commercial/industrial. They have a list of allowed uses. What happens with that list of uses is that somebody goes along and the territory says generally, “This is a crown lease which I am prepared to offer you which allows you to do these things.” You look at that and say, “On that basis, I am prepared to pay you money.”

The system now proposed is: “Yes, you can give me money, but that does not mean you can actually use it for these purposes.” And, more importantly, “If you have actually given me money for those purposes but you have not used it for those purposes, then we might not allow you to use it for those purposes.”

The lease is fundamentally a contract between the lessee and the territory. I have paid money to purchase the rights that attach to that. I do not have a freehold system. I cannot do whatever I like. If I were in New South Wales and I bought a block of land, I would know that that is subject to the planning laws that exist from time to time. That is the whole basis for buying a block in New South Wales. I can do whatever I want with it, subject to the rules. In the ACT I buy the bundle of rights that are attached to the crown lease. Sure, I have to comply with setbacks and a whole set of other requirements, but use as a concept has never been something I needed to comply with.

Analogies have been drawn. I am sure that ACTPLA, when it makes its submission, if it has not done so already, will say, “Do not worry about the concept of use. It is not unique. The concept of use exists in New South Wales.” The answer to that is that it is absolutely true, but the context is very different.

In New South Wales if I have used the land for a bakery for a period of time and the territory plan prohibits use as a bakery, as in the relevant zoning instrument—I am using the territory plan as an analogy—then I can still continue to use it for that purpose. In New South Wales planning lawyers go back to statutory records that are kept to determine what the use was of a particular block of land 100 or more years ago.

ACTPLA is putting to the society in the discussions it has that this is a simpler system. We just do not accept that, because the whole concept of use requires a lot more investigation. It requires knowledge of what something was used for in 1940. Do we have those records? No. Do we have a system which allows us to track those records? No. The concept of use we are talking about is the use we are putting the land to today. What happens if I use it for something different? Why do I need to seek permission to be able to use it?

ACTPLA’s response to that is: “You do at the moment.” That is true. If I want to change a bathroom, change the external part of the building or put in offices, for example, there is a process that ACTPLA goes by to check what I am seeking to do from a building approval perspective. It is called a “compliance check”. They check to make sure the crown lease permits that. That is fine. If I am doing some work to move from one use to another, that means I may need to go through a whole set of building rules that I need to comply with. For example, if I want a restaurant and I do not have a toilet, it does not mean I can have a restaurant. I will not get a licence that allows me to use it. ACTPLA is trying to effectively use the development assessment process to achieve this objective. That, in our view, is fundamentally wrong and it just bespeaks an ignorance of how the system was originally designed to work.

If we want to throw leasehold out the window, fundamentally the law society would not care. But if the policy intent of government is to retain the leasehold system, then the concept of use flies in the face of that. I will give you another example. I have a crown lease which permits five different uses. I want to add an extra use to that. The process at the moment is that I apply to vary my lease. I get an assessment and I pay a "change of use" charge. I pay for that right.

This is saying, "Just because you have paid money for that right does not mean you can actually use it for that." So what am I paying money for? The defence to that comes, "Well, this whole change of use thing is really quite a dumb idea anyway. We are looking at changing the whole change of use charge system and going to an infrastructure charge." My response is: "Fine, but if you are going to do that, do not introduce use as a development until we have changed the change of use charge system. I have paid money for my rights to use my crown lease, and you are now taking it away."

There are references in the transitional provisions which say, "No, that is not quite right. If you have a crown lease at the moment, then you are allowed to keep using it for that purpose." The transitional provisions do not say that. ACTPLA, in response to what they have said to the law society, have said, "No. We are happy to make it perfectly clear that you can continue to have any existing use that you have at the moment."

Then I say, "Why are we changing the system again? If we are not changing it at all and it is going to continue to all be the same, what is the purpose of introducing this additional overlay?" I have asked that question on a number of occasions. I have yet to be given an answer other than: "It is going to make things easier." I just do not understand, and cannot understand, how it will make things easier when I am introducing an additional test into the definition of development.

Is it going to mean that I do not have to vary my lease from now on? No. It just means that, in order for me to use the lease for the purpose for which I bought it and for the purpose for which I am allowed to use it under the crown lease, I still need to go through a development assessment process. I just do not understand that. I am conscious of time. I think I have finished within my requisite half hour.

THE CHAIR: You have indeed. Thank you very much.

MR SESELJA: Thank you for that. It was quite detailed. We heard similar concerns expressed by Chris Wheeler from the property council earlier. I think you articulated it quite well, but is the change of use charge the most significant problem with this change?

You pointed out that you now need to go through a development assessment process anyway if you want to do something different. Obviously that is looking at it from a somewhat different perspective. If change of use were taken out of the equation along with this change, would there be as much of a concern, or would there just be a little bit of a concern? Is this the main thing, or are all those other things just as significant or very significant?

Mr del Rio: Do you mean if the charge were taken out?

MR SESELJA: If change of use were not an issue when you were looking to activate some of these uses.

Mr del Rio: I think part of the problem we have is the terminology. The current talk is about "change of use"charge. The automatic assumption that is drawn from that is: "You need to pay money to change the use—to move from one use to another." That is not true. The change of use charge, funnily enough, was introduced by the Stein inquiry. It used to be called a betterment tax.

The change of use charge was introduced if you wanted to add additional uses to those allowed under your crown lease. The whole concept of use as development has nothing to do with the change of use charge, because effectively it means that you may have a crown lease which says that you can do these things on it, but actually you cannot. "What can I do with that crown lease, then?" "You need to go back to the territory plan. You need to get an approval process."

In respect of new developments, that is not a big issue. I have an existing building in Fyshwick, for example, that has had a bundle of uses. At one stage it was a hairdressers. It then became a travel agency. It then became something else. It has moved around and had a different set of uses. What is the point in going through an approval process? We are actually adding a new development approval process. What is the benefit in doing that? What mischief are we trying to address?

Government went through an exercise some time ago of trying to remove red tape. This is an additional approval process. I have a tenant. I own the building. I have an existing restaurant and I want to change that to, for example, a TAB office. Assuming both purposes are permitted by my crown lease, there is an additional process where I need to go through and check whether or not that particular shift of use is something ACTPLA is going to be concerned about. It is just an additional process. What benefit is there in doing it? That is the whole point. We are introducing an additional requirement where there is no benefit at all. It just does not achieve anything. I do not know if I have answered your question, Mr Seselja.

MR SESELJA: I think you have. I can see that it is going to be a significant issue. Chair, are we getting ACTPLA back at all as part of this process?

THE CHAIR: I was going to talk to you about that.

MR SESELJA: We may well get ACTPLA back. We will ask them some questions about this as well.

Mr del Rio: In fairness to ACTPLA, the society said, "Look, we need to open up a dialogue." The society has articulated its concerns. Jacqui Lavis has been quite open. She put to me, "The only reason why the law society wants it is because you can manipulate the process." She suggested that there are people such as myself who get paid money in order to get an outcome. I said, "Well, Jacqui, if that is the point, you are giving me a system that is going to be even more fun to manipulate, because there are going to be additional layers to it."

I think there is just a lack of understanding of the respective positions. I think a lot of that

comes from the fact that the history of leasehold is being lost. The corporate memory of ACTPLA is now quite short. I am not sure that they understand what Justice Stein said in his report. As I said, the society does not mind if we are going to move away leasehold. But the effect of this decision is to really erode leasehold. What is the point of having a crown lease? Why am I doing it? If I have to comply with the territory plan fine. Let us just get rid of leases.

I am not talking about abolishing leases altogether. We can simply change it to the purpose clause. We can introduce an amendment to the legislation overnight which says that we are going to amend every crown lease in the territory so every crown lease says "any use permitted by the territory plan" full stop. But the reason why the territory would not want to do that is that it is going to erode the change of use charge. That is why the two are connected. That is where I think we need to be clear about the objective we are trying to achieve. Until that has really been thought through, in our view, use as development should not exist as a development activity.

THE CHAIR: Thank you very much for your detailed presentation. We look forward to the submission. We will get you a copy of the transcript from today as soon as we can, to allow you to make any editorial changes.

The committee adjourned at 5.31 pm.