

**2023**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CLAY AMENDMENTS TO *THE PLANNING BILL 2022***

**EXPLANATORY STATEMENT**

**Presented by  
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## **Clay Amendments to the *Planning Bill 2022***

This explanatory statement relates to the Clay amendments to the *Planning Bill 2022* (the *Bill*) as presented to the ACT Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate. It does not form part of the Clay amendments and has not been endorsed by the Assembly.

The statement must be read in conjunction with the Clay amendments. It is not, and is not meant to be, a comprehensive description of the Clay amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

### **Overview of the Clay Amendments**

Land is one of the ACT's primary resources, and we are an established jurisdiction with no 'easy' land left to develop. Like most cities worldwide, the ACT is faced with increasingly difficult choices about where we should house our growing population and how we can do this affordably. We also need to cut climate emissions while maintaining the quality of life and adapting to the climate change already locked in. We must also protect our remaining habitat and environment in the context of the Australian extinction crisis where roughly half of our forests and woodlands have been destroyed since colonisation and put 2,000 animals, plants and ecological communities on the threatened species list.

These issues come into play in every planning and development decision made in the ACT. Good consultation with the community and stakeholders helps inform decision-makers on these complex matters and ensures everyone has a say in the outcome. Our planning and development system must be consultative, robust and transparent, and contain strong measures for environmental protection, climate action and housing affordability.

Several of these amendments introduce measures to better protect the environment and to ensure that decisions are made with full knowledge of their environmental impact. These strengthen ecological protection and conservation, give teeth to Federal and local environmental laws and policies and ensure that greenfield development has appropriate oversight and appeal rights. Five amendments cover community consultation and transparency of decision-making and ensure that people are consulted and have enough time to consider a matter and submit early enough to have a genuine impact on the project. Two amendments deal with political accountability and ensure the Legislative Assembly has oversight and can check significant decisions, being the declaration of a territory priority project and changes to circumstances requiring an Environmental Impact Statement. One amendment ensures that climate change measures do not only aim for 'net zero' through offsets but represent genuine choices that reduce emissions. One ensures that housing affordability is core in the new system and that this concept is broad enough to incorporate transport costs and access to services in addition to the cost of housing.

These amendments are informed by consultation with community members and stakeholders, submissions made to the ACT Government in its consultation on the

*Bill*, and the recommendations made by the Planning, Transport and City Services Committee Inquiry into the Planning Bill 2022.

### **Consistency with Human Rights**

During the development of the Clay Amendments, due regard was given to its interaction with human rights as set out in the *Human Rights Act 2004* (the HRA). The Clay Amendments engage various human rights.

#### ***Right to Life***

The Clay Amendments support the right to life. In particular, climate and environmental protection amendments will help maintain the ACT as a safe and healthy environment that reduces climate emissions, protects biodiversity and habitat, maintains ecosystems and protects valuable land to help ensure future food and water security. These measures will help look after future generations and ensure their environment is as safe, healthy and biodiverse as ours.

#### ***Taking Part in Public Life***

The Clay Amendments support the right to take part in public life. In particular, amendments support this right where they strengthen the principles of good consultation, extend the public notification period for Environmental Impact Statements, ensure consultation occurs before the approval of significant developments and prior to the declaration of a territory priority project, and reinstate third party merits appeal rights in the ACT Civil and Administrative Tribunal for development on greenfield land (greenfield land being undeveloped land with very few structures on it).

#### ***Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities***

The Clay Amendments support the cultural and other rights of Aboriginal and Torres Strait Islander peoples. Reinstating third party merits appeal rights for development on greenfield land will ensure there is an opportunity to scrutinise development that may impact First Nations heritage.

#### ***Right to education and the right to work***

The Clay Amendments support the right to access education and work by ensuring that the concept of housing affordability includes access to affordable transport to enable the public to travel to places of employment and services such as schools.

### ***Right to a fair trial – merits review***

The Clay Amendment that reinstates the right to third party merits appeals in the ACT Civil and Administrative Appeals Tribunal on greenfields land supports the right to a fair trial. It protects the ability of third parties to seek a review of such decisions to ensure that they are determined by a competent, independent and impartial tribunal after a fair and public hearing.

By reinstating appeal rights for territory priority projects; the Clay Amendments introduce additional protections to better support human rights when these declarations are made and ensure that all four substantive public interest criteria are met in order for the Chief Minister and a Minister to declare a territory priority project. In addition, in order to increase transparency, the Clay amendments include that a declaration may only be made after the Chief Minister and Minister are satisfied that there has been sufficient consultation about the proposal and that a declaration made is transparent and can be disallowed by the members of the Legislative Assembly.

## **CLAUSE NOTES**

### **Clause 7 Planning Bill**

The object of the *Bill* is to “support and enhance the Territory’s liveability and prosperity, and promote the well-being of residents.” Amendment number 1 inserts an additional introductory phrase of “protect its natural environment” in order to balance the economic and social with environmental protection.

An amendment (number 2) is made to the introduction of clause 7(3) to omit the words “must be considered’ and substitutes the words “are integral to”. This is to elevate consideration of items in clause (3) beyond mere consideration.

Clause 7(3)(a) requires “biodiversity and landscape setting” to be considered in achieving the objects of the Bill. Amendment number 3 rephrases this to provide that “the *protection and conservation* of biodiversity, habitat, ecological processes and natural systems” must be considered. It is essential to consider their *protection and conservation*, not merely consider that they exist.

Clause 7(3)(e) (amendment number 4) requires consideration of a “a sustainable and resilient environment that is planned, designed and developed for a net-zero greenhouse gas future using integrated mitigation and adaptation...”

This has been rephrased to require consideration of “a sustainable and climate-resilient environment that is planned, designed and developed to adapt to climate change, reduce greenhouse gas emissions and achieve a net-zero greenhouse gas future using integrated mitigation and adaptation...” The revised definition supports *emissions reduction*, not merely net zero emissions given that net zero can be achieved with offsets rather than actual reductions. A positive duty to reduce emissions will lead to many different planning choices than would otherwise be made, such as building reuse rather than demolition, using low-carbon or negative

carbon building materials or ensuring public and active transport are accessible and available for the new development.

### **Clause 10**

The *Bill* sets out the principles of good planning that decision makers must consider when developing planning strategies, plans and policies, when making decisions on development applications, territory plan variations etc. An additional principle, the 'housing affordability principle', has been added as new subclause (ca) to clause 10(1) (amendment 5).

Clause 10(2) has been amended accordingly to provide a new definition of 'housing affordability principles'. This new definition in amendment number 6 includes supporting the delivery of reforms that improve housing access, affordability and choice and housing options for people who have a low income, and that such affordable housing is "close to essential services, amenities and affordable transport options, including public and active transport." The 2023 "Cost of Living Pressures in the ACT" inquiry found that transport costs are adding to the cost of living burden, especially for vulnerable and low-income people, and that people on low incomes are more likely to live farther from services and public transport routes and rely on private transport. Fuel costs are rising and are likely to continue to do so over the long term. Housing will not be affordable if it requires residents to pay an increasingly high proportion of their living expenses on high fuel costs for private transport due to a lack of accessible services and active and public transport options. Community need ready access to schools, shops, community spaces and green spaces as well as public and active transport.

In addition, amendment number 7 includes a new subclause (aa) in the definition of 'natural environment conservation principles'. New subclause (aa) is proposed to clarify that natural environment conservation principles should support the operation of environmental laws applying in the ACT. This will help ensure that other ACT laws such as the *Nature Conservation Act 2014* are considered when planning decisions are made.

### **Clause 11**

Clause 11 of the *Bill* sets out the principles of good consultation, which includes a definition of "inclusive" consultation as consultation that engages all affected stakeholders. In amendment number 8, Clause 11(2)(c) has been substituted to add a requirement that the consultation must engage stakeholders *directly affected* in addition to *other stakeholders*. This distinction is designed to ensure that those most directly affected by a planning decision, such as nearby residents, will be directly engaged such as through letterboxing and adequate on-site signage. Other stakeholders may be engaged through more general means.

Amendment number 9 to Clause 11(2)(d)(i) includes a definition of 'meaningful' consultation. This provides that information provided as part of the consultation must be not only "adequate" but also "well-informed".

The amendment to Clause 11(2)(g)(i) includes a definition of 'timely' consultation. Clause 11(2)(g)(i) adds a requirement that consultation must be "early" as well as at an appropriate time (through amendment number 10). An additional clause

11(2)(g)(iv) specifies that for significant development (defined in the *Bill*), consultation must be “undertaken as early as possible” (in amendment number 11).

These amendments are as a result of feedback received during both the ACT Government consultation and consultation during the inquiry into the *Bill 2022* initiated by the Planning, Transport and City Services Committee. Significant feedback from the community and developers during the inquiry indicated that the earlier feedback is received, the more likely it is to substantially affect a proposal or decision. Later feedback that comes after significant design work has occurred may not be incorporated regardless of content due to the sunk cost in the early designs and developer reluctance to experience delays.

### **Clause 47**

In clause 47 of the *Bill 2022*, the Territory Plan “may give effect to relevant outcomes related to planning contained in other government strategies and policies.”

Amendment number 12 proposes an amendment to Clause 47(c) and inserts “must take into account and” before “may give effect to relevant outcomes related to planning contained in other government strategies and policies.” The ACT has a suite of policies that affects planning, development and the environment, such as the ACT Climate Change Strategy, the Living Infrastructure Plan and the Active Travel Policy. If a planning decision contradicts these policies, it must be done intentionally and for good reason, and not because there was no requirement to consider those other policies and so they were disregarded.

### **Clauses 112**

The *Bill* sets out a public notification period for consultation on an Environmental Impact Statement of at least 20 working days. Environmental Impact Statements are only used for significant developments, that is, matters triggered by regulation. This can include a proposal that is likely to have a significant adverse environmental impact on critically endangered species. Environmental Impact Statements are usually highly complex and difficult for members of the public to digest. Genuine and thoughtful consultation is required in order to ensure that environmental protection is properly considered. Stakeholders who might wish to comment include traditional custodians, environmental organisations and those with environmental connections to the land. It is difficult for people in this situation to respond quickly and thoughtfully to government timelines but it is extremely important to provide time for proper feedback. Amendment number 13 increases the timeframe to notify an environmental impact state from a minimum of 20 working days to 30 working days to ensure that key stakeholders and members of the community have adequate time to consider and respond on such a significant environmental protection measure.

### **Clause 117**

The note to Clause 117(2) provides that the normal public consultation period of a draft EIS cannot be less than 20 working days, but this does not apply to a revised EIS. Amendment number 14 is consequential to the amendment to Clause 112 above.

### **Clause 187**

Clause 187 of the *Bill* allows a decision-maker (in clause 187(1)) or the chief planner or the Minister (in clause 187(2)) to approve an application that is inconsistent with

the advice of the conservator of flora and fauna if the decision-maker or the chief planner or Minister (in clause 187(1) or clause 187(2) respectively) has considered or is satisfied of a number of considerations. The new clause 187(2B) in amendment number 15 requires the decision maker to state in their decision why they were satisfied of the matters they had to consider in each of clauses 187(1)(d) or 2(c). This increases transparency in decision-making.

### **Clause 215**

The *Bill* allows the Chief Minister and Minister to jointly declare a development proposal to be a “territory priority project.” Once declared, a territory priority project is exempted from a third party appeal in the ACT Civil and Administrative Tribunal. This is a significant limitation of rights and it must be done in a careful and measured way. It is expected that territory priority projects will be declared rarely and for major projects of significant interest to the ACT where rapid progress of the project is essential and cannot be achieved through good project management. Territory priority projects are not intended to be used to bypass the checks and balances contained in the ordinary Development Application process.

The *Bill* provides that a territory priority project must not meet all of the four public benefit tests. This amendment requires a territory priority project to meet all four public benefit tests, that is Clause 215(1) (a) to (d) in amendment number 16.

The *Bill* makes a declaration of a territory priority project a notifiable instrument. New clause 215(2) in amendment number 17 instead makes the declaration a disallowable instrument, which means a majority of the Legislative Assembly could vote to disallow it. This level of political accountability is suitable for a power that removes third party appeal rights in the ACT Civil and Administrative Tribunal. It is also appropriate given that the power will be used rarely and for major projects that have substantial impact on the people of Canberra and our environment.

### **Clause 217**

The *Bill* sets out protected matters as matters defined under Commonwealth legislation. The new definition of *protected matter* in clause 217(1) (amendment number 18) adds species or ecological communities protected under the *Nature Conservation Act 2014* as a ‘protected matter’. Commonwealth and ACT lists differ and it is prudent to consider both.

### **Schedule 7, part 7.2, item 8**

Schedule 7 of the *Bill* sets out the matters that are exempt from third party review in the ACT Civil and Administrative Tribunal. Item 8 includes ‘a subdivision design application in a future urban area’ as being exempt from merits review. This means that any Development Application in a greenfields area is not subject to merits review in the ACT Civil and Administrative Tribunal. It is only subject to judicial review in the ACT Supreme Court to determine if the decision maker complied with the correct process. Few appellants have the resources to mount a Supreme Court challenge and, in most cases, what is needed is merits review, not judicial review.

This is a serious limitation of third party appeal rights and no justification has been given for the removal of these rights, despite the potential environmental implications.

Greenfields development often raises matters of cultural rights, as these areas often contain tangible or intangible First Nations cultural heritage. Many of these areas contain significant environmental values including threatened species and ecological communities, key threatening processes such as loss of mature native trees and lack of recruitment) and residual habitat because they are largely undeveloped. Removing third party appeal rights for greenfield development risks the ACT losing further precious cultural and environmental areas with limited oversight and no opportunity to have the decision review. Amendment number 19 removes item 8 and re-establishes appeal rights for greenfields development areas.