

2025

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

**Planning (Ainslie Volcanics) Amendment Bill 2025
REVISED EXPLANATORY STATEMENT**

Presented by
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Planning (Ainslie Volcanics) Amendment Bill 2025

Introduction

This explanatory statement relates to the Planning (Ainslie Volcanics) Amendment Bill 2025 (the Bill) as presented to the ACT Legislative Assembly by Shane Rattenbury MLA. It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. 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 Bill

The Planning (Ainslie Volcanics) Amendment Bill 2025 aims to safeguard environmentally and ecologically significant land located at the corner of Quick Street and Limestone Avenue in Ainslie. This Bill revokes an already approved development application for the site and to prohibit any future development, thereby preserving its environmental values.

Background

Ainslie Volcanics, located at the base of Mount Ainslie in Canberra's suburb of Ainslie, is a region of significant ecological importance. Spanning from the corner of Quick Street and Limestone Avenue towards Ainslie Village, this area encompasses a mix of grassland and woodland habitats. It is home to critically endangered ecological communities, including natural temperate grasslands and box gum woodlands, which are protected under both ACT and Commonwealth legislation.

The site also supports threatened native species such as the Canberra Spider Orchid and the Golden Sun Moth. These species' presence highlights the area's rich biodiversity and the necessity for its conservation.

Community groups, notably the Ainslie Volcanics Weeders, have been actively involved in rehabilitating the area by removing invasive weed species like St John's Wort. Their efforts aim to restore the native grasslands and enhance the site's ecological health.

In May 2023, a petition was initiated to incorporate the Ainslie Volcanics site into the Canberra Nature Park. This initiative seeks to provide formal protection and ensure the long-term preservation of the site's unique natural values.

In response to the petition, the government acknowledged the site has important ecological and cultural values that require ongoing protection.¹ They acknowledged that adding the area into the protected areas of Canberra Nature Park could assist to secure ecological improvements.

However, the government stopped short of committing to protecting the block, arguing it would require significant additional resourcing.

Despite its recognised significance, the site has faced development pressures. In late 2024, the ACT Government approved the construction of a mobile telecommunications tower at the corner of Quick Street and Limestone Avenue. This decision was met with criticism from conservationists, who expressed concerns over potential impacts on the site's ecological integrity.

There is a significant divide between the concerns of the community and those of the government. The government has been focused solely on the contemporaneous values of the Ainslie Volcanics site, failing to recognize its potential future ecological value.

Environmentalists and concerned local citizens initially restored degraded land, which is now recognized as ecologically significant, adjacent to the proposed development. Residents have now begun efforts to restore the site where the tower is proposed, drawing on their previous experience to demonstrate that this land can be restored to an ecologically significant state. This difference in perspective underpins the divide between the community and the government on this issue.

Efforts to protect and enhance the Ainslie Volcanics site continue, with ongoing community involvement and advocacy aimed at preserving its rich natural heritage for future generations.

Clause Notes

CLAUSE 1: Name of Act

The Act is the *Planning (Ainslie Volcanics) Amendment Act 2025*.

CLAUSE 2 Commencement

This Act commences on the day after its notification day.

CLAUSE 3: Legislation amended

This Act amends the *Planning Act 2023*.

¹ <https://epetitions.parliament.act.gov.au/details/e-pet-012-23/attachment/government-response-e-pet-012-23-incorporating-the-ainslie-volcanics-site-into-the-mt-ainslie-nature-reserve.pdf>

CLAUSE 4: New division 7.3.1

This clause inserts a new division which will prevent current and future development from occurring at the Ainslie Volcanics site.

Section 159A of this division will revoke development application 202342438 from being approved at the site of block 3, section 60, division of Ainslie.

Section 159B of the division will prevent any future development from occurring at the site by enforcing that any development applications for the site be refused.

Finally, section 159C guarantees that any revocation of an approved development application is accompanied by fair and just compensation to the original applicant. This is achieved by requiring the territory to engage directly with the applicants to negotiate appropriate compensation. If these negotiations fail to reach an agreement, the applicant is entitled to take the matter to court to seek adequate compensation.

Environmental & ecological importance

The area under consideration holds significant ecological values, particularly due to its inclusion of threatened ecological communities and native species. These values are recognized under the Nature Conservation Act 2014, including:

- Threatened Ecological Communities:
 - Natural Temperate Grassland
 - Yellow Box–Blakely’s Redgum Grassy Woodland
- Threatened Native Species:
 - Canberra Spider Orchid (*Arachnorchis actensis*)
 - Golden Sun Moth (*Synemon plana*)
 - Hoary Sunray (*Leucochrysum albicans*) (Special Protection Status)

However, while these ecological values indicate the area’s environmental importance, the Conservator of Flora and Fauna has approved development on this site under the grounds that the area has experienced some degree of environmental degradation. As a result, the proposed development has been allowed, not reflecting the fact that the site, though impacted, retains potential for ecological recovery. Active restoration efforts, such as those by the Molonglo Conservation Group and the ACT Parks and Conservation Service, are underway, underscoring the site's ecological significance and its potential to recover and contribute to broader conservation efforts.

Human Rights Considerations

During the development of the Bill, due regard was given to its interaction with human rights as set out in the Human Rights Act 2004 (the HRA). Engagement was made with the Human Rights Commission (the HRC) which informs the Human Rights Considerations

section of this Explanatory Statement. The advice provided by the HRC is available at the ACT Human Rights Commission website.² The Bill engages and supports the right to a healthy environment and engages and potentially limits rights the right to fair hearing.

The proposed Private Members Bill would amend the Planning Act 2023 to:

- Revoke any development approval given in relation to Block 3 of Section 60 in the Division of Ainslie (henceforth ‘the site’) under the Planning and Development Act 2007 (repealed) from commencement
- Require that any development application made in relation to the site must be refused; and
- Provide a pathway for a person to obtain reasonable compensation from the Territory for any acquisition of property other than on just terms that occurs as a result of the proposed reform.

The Bill echoes the structure of Division 7.3.2 of the Planning Act 2023. Those provisions in turn reflect previous amendments to the now-repealed Planning and Development Act 2007 made by the Planning and Development Amendment Act 2021 in February 2021.³ The Statement of Compatibility accompanying those reforms did not identify any human rights as being engaged.⁴

Supporting the right to a healthy environment

The right to a healthy environment has recently taken effect on 17 March 2025. Accordingly, there is not yet local jurisprudence directly addressing the nature, scope, and content of the right as recognised in the ACT and, as an emerging right in international human rights law, there is also limited, albeit growing, international or foreign case law governing its application.

Section 31 of the HR Act, however, clarifies that ‘international law’ relevant to a human right may be considered in its interpretation and captures in that definition, for the purposes of the HR Act, declarations and standards adopted by the United Nations General Assembly (UNGA) that are relevant to human rights. This includes the UNGA resolution that first recognised the right to a healthy environment in July 2022, and the related work of the Special Rapporteur on Human Rights and the Environment that underpinned its recognition.

The thematic reports of successive Special Rapporteurs therefore provide important extrinsic context when interpreting the intended scope and content of the right to a healthy environment. In particular, a report by former Special Rapporteur, John H Knox,

² https://www.hrc.act.gov.au/_data/assets/pdf_file/0007/2834701/ACT-HRC-Submission-Right-to-Housing-March-2025.pdf

³ Planning and Development Amendment Act 2021, available at: <https://www.legislation.act.gov.au/a/2021-2/>

⁴ https://www.legislation.act.gov.au/View/es/db_63810/20210210-75860/html/db_63810.html

published in January 2017, outlines governments' human rights obligations relating to the conservation and sustainable use of biological diversity.

The new right recognises the Government has obligations to protect against environmental harm that interferes with the enjoyment of human rights, including adverse impacts on ecosystems and biodiversity. The specific contours of these duties will often vary by situation and with regard to components of biodiversity that are especially necessary for the enjoyment of other human rights, like life, cultural rights, and privacy.

In essence, Governments are obliged to take effective steps to ensure the conservation and sustainable use of the ecosystems and biological diversity on which the full enjoyment of human rights depends. To this end, the Special Rapporteur recommends the social and environmental impacts of all proposed projects that may affect biodiversity are assessed, and that Governments establish, maintain, and uphold legal and institutional frameworks that protect biodiversity, especially for those who are most affected by degradation or loss of biodiversity (e.g. indigenous and transitional communities).⁵

With regard to the proposed Bill, the Special Rapporteur has recently emphasised that the right to a healthy environment's interpretation and application should always be guided by a series of principles sourced in international environmental law. These relevantly include:

- Prevention – Governments should ensure a robust regulatory framework with a view to proactively prevent environmental harms that threaten human rights.
- Precaution – Where there are threats of serious and irreversible harm to the environment, lack of full scientific certainty must not be used as a reason for postponing preventive action.

Having regard to these principles, we present the Bill as a precautionary and preventive approach to conservation of native temperate grasslands on the site and, by doing so, assert that it supports the right to a clean, healthy, and sustainable environment. This accords with recognition in local case law that each human right in the HR Act is to be construed in 'the broadest possible way'.⁶

The right to a healthy environment also recognises the close relationship between Aboriginal and Torres Strait Islander peoples and biodiversity and ecosystems. We understand there are differing views within the Aboriginal community about whether the broader site has cultural heritage value, with the ACT Heritage Council having decided not

⁵ Special Rapporteur on Human Rights and the Environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment - Biodiversity, UN Doc. A/HRC/34/49 (19 January 2017), available at: <https://docs.un.org/en/A/HRC/34/49>

⁶ Islam v Director-General, Justice and Community Safety Directorate [2021] ACTSC 33, [79].

to provisionally register the site.⁷ There is worth to considering consultation with key representative groups to determine whether the Bill should also be construed as supporting the cultural rights of Aboriginal and Torres Strait (HR Act, s 27(2)).

Engaging the right to fair hearing

There was consideration as to whether the statutory revocation of an approved development application would engage and limit the human right to fair trial pursuant to s21 of the HR Act. The HRC identified that there are other common law and statutory protections providing for fair hearing rights that may also be engaged by this Bill. However, the HRC did not specify any further as to what these protections may be. The proponent of this Bill suggests that it may encompass, but is not limited to, federal statutory provisions that safeguard the right to a fair trial, as well as common law principles related to procedural fairness. Due to the broad scope of common law in potentially influencing this right, it will likely require a specific case presented before the courts to determine which common law statutes may be relevant to the application of this Bill. The Commission limits their comments to the human right as protected by the HR Act.

The right to fair trial in the HR Act relevantly provides that ‘everyone has the right to have [...] rights and obligations recognised by law, decided by a competent, independent, and impartial court or tribunal after a fair and public hearing.’

The right to a fair trial is an absolute right insofar as irremediable procedural defects that render a proceeding manifestly arbitrary or a denial of justice must not ever be tolerated. The right to a fair trial is therefore concerned with the procedural fairness of a decision; it is guaranteed with respect to criminal charges and, relevantly, the determination of rights and obligations in a ‘suit at law’. Whether something qualifies as a ‘suit at law’ so as to enliven the right to a fair trial is informed by the nature of the right in question; it can encompass judicial procedures aimed at determining rights and obligations in a private sphere (e.g. in contract, property and tort) as well as equivalent notions in administrative law, including ‘procedures regarding the use of public land or the taking of private property.’⁸

However, the human right to a fair trial is not directly engaged in the context of the present Bill. Human rights, by their very nature, belong to individuals; meaning natural persons (HR Act, s 6, Legislation Act 2001, dictionary).

As the approved development application has been secured by a corporation, Indara Infrastructure Pty Ltd, its revocation by the proposed Bill would not directly engage (or

⁷ 1 Heritage (Decision about Provisional Registration of Ainslie Volcanics) Notice 2024, available at: <https://www.legislation.act.gov.au/View/ni/2024-668/current/html/2024-668.html>

⁸ United Nations (UN) Human Rights Committee (HRC), General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 90th sess, UN Doc. CCPR/C/GC/ 32 (23 August 2007), [16].

limit) the human rights of a natural person, including to fair trial. The same reasoning was relied on to advance that the Planning and Development Amendment Bill 2021 did not engage human rights, which was accepted by the Legislative Scrutiny Committee who made no comment on the Bill.⁹

Requiring refusal of future development applications

There was also consideration as to whether mandating that any development applications in relation to the site must be refused would engage and limit the right to fair trial (HR Act, s 21) were an individual to ever lodge a development application with respect to the site in future. The HRC appreciated that this situation is highly unlikely given it would also involve the ACT Government granting some form of lease or a public unleased land permit over the site in favour of an individual, however have considered it for completeness.

In its current form, proposed s 162B requires that any development application made in relation to the site must be refused. The proposed approach in the Bill is therefore different to s 161(1) of the Planning Act 2023 regarding waste facility development applications, which requires that the territory planning authority must not accept a prohibited waste facility development application. The Bill appears to still contemplate the receipt of development applications and decisions being made (albeit as directed by the legislation).

This approach appears to contemplate development applications in relation to the site still being received and needing to still be decided and refused by virtue of s 162B. This proposed approach could be understood as dictating the outcome of a decision-making process in a way that prevents effective access to a court or tribunal in the determination of rights and obligations. As such, it may be seen as engaging the right to a fair trial (HR Act, s 21).

Authoritative commentary of the United Nations Human Rights Committee affirms that the right to a fair trial – which guarantees procedural fairness in the determination of rights and obligations in a suit at law – does not operate where there is no underlying legal entitlement (such as in cases concerning promotions or appointments).¹⁰ Removing ability for the planning and land authority to receive a development application with respect to the relevant site, as is the case for waste facilities, may be preferred to the extent it would remove any underlying legal entitlement on which a denial of the right to fair trial might be argued. However, a decision was made against this approach out of

⁹ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), Scrutiny Report 2 of 2021, 24 March 2021, 4, available at:

https://www.parliament.act.gov.au/_data/assets/pdf_file/0003/1730613/Report_02_.pdf

¹⁰ Above 12, [17].

caution for any development applications that may be lodged in-between the proposal of this bill and it's potential passage.

Reasonableness and proportionality

In regard to the principle of proportionality, the enactment of this Bill is necessary to prevent irreversible damage to ecologically significant land and land with potential for significant ecological restoration. Without this Bill, such land could be irreparably harmed, which would effectively undermine the right to a healthy environment. In this context, the measures set forth in the Bill are proportionate to the issue at hand. Specifically, the revocation of the development application would serve to protect the site known as Ainslie Volcanics and directly further the right to a healthy environment.

It is important to note that the Bill does not prevent the proponent of the development application from pursuing the construction of a similar project at an alternative location within the same vicinity. Therefore, the Bill does not impose an undue burden on the corporation's ability to conduct its operations.

Additionally, the Bill provides for just compensation to the corporation for any investments made in the site, thereby addressing any concerns regarding the deprivation of property. This ensures that the corporation will not be unfairly deprived of its property or investments if the land is repurposed. By incorporating a compensation mechanism, the Bill ensures that the corporation's financial interests are respected and protected. Notably, since the land in question is public land leased for the construction of the tower, the corporation does not lose ownership of the land but rather the right to use it for a specific purpose. Given this, the compensation provisions in this Bill are proportionate to the impact on the corporation's property rights, guaranteeing fair reimbursement for any investments in the land.