Regulatory Impact Statement

Planning and Development Amendment Regulation 2012 (No. 2)

Subordinate Law 2012-19

Prepared in accordance with the *Legislation Act 2001*, section 34

Circulated by authority of

Simon Corbell MLA

Minister for the Environment and Sustainable Development

This Regulatory Impact Statement relates to substantive elements of the *Planning and Development Amendment Regulation 2012 (No. 2)* (the proposed law). The proposed law amends the *Planning and Development Regulation 2008* (the regulation).

Executive Summary

The proposed law seeks to ensure that development proposals for electricity generating stations with a certain capacity are assessed in the merit track (while higher capacity electricity generating proposals are assessed in the impact track) and that the planning system promotes the policy outcomes of the *ACT Sustainable Energy Policy: Energy for a sustainable city 2011-2020*, the *Canberra Plan* and *Weathering the Change: draft action plan 2*.

At the core of the proposed law is the objective of encouraging renewable energy sources in the production of electricity and to a lesser extent the use of gas (or a combination of gas and another energy source (other than brown coal)).

The proposed law supports the Government's first actions to the objectives of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* through the Solar Auction process.

The proposed law achieves the main outcome by using the existing framework in the Planning and Development Act, schedule 4, part 4.2. item 2 to prescribe amounts (or thresholds for the capacity of energy generation stations) by regulation.

Item 2 of Part 4.2 of Schedule 4 relates to electricity generation and transmission lines. The item includes renewable energy generation, and provides that if no supply capability is prescribed by regulation, an electricity generating station capable of supplying 4 megawatts or more of electrical power requires an EIS. There is currently no regulation prescribing an amount. The proposed law prescribes an amount by regulation.

This is the first time that this regulation making power is being used (since the power was inserted by the *Planning and Development (Environmental Impact Statements) Amendment Act 2011* (the EIS Act), effective 1 February 2011). The EIS Act also inserted a second regulation making power to prescribe particular locations, or particular kinds or a particular nature of electricity generating stations. In this way a future regulation (if it was determined that one was appropriate) could prescribe that certain types of electricity generating stations can be located in a particular area.

Defining the issue

The following discussion identifies broadly the issue and then provides broader discussion on each aspect of the issue: from a planning perspective and then from the perspective of the Government's *Sustainable Energy Policy*.

The broad issue

The ACT Government has a commitment to promote sustainable energy use and generation as a well as a clear commitment to protect the environment through the assessment of the impact on the environment of certain development proposals. These two objectives need to work in harmony for the citizens of the ACT to fully benefit from an effective planning system and the use of technology and renewable energy generation sources for the promotion of a sustainable city.

The issue that this regulatory impact statement addresses is two-fold:

- How to use the planning system to promote a sustainable city; and
  - the main object of the Planning and Development Act is "...to provide a planning and land system that contributes to the orderly and sustainable development of the ACT..."
- How to promote a sustainable city, through the use of renewable energy sources.
  - the first object of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* is "...to promote the establishment of large-scale facilities for the generation of electricity from a range of renewable energy sources in the Australian capital region."

The *ACT Sustainable Energy Policy* establishes the key objective of achieving a more sustainable energy supply as the Territory moves to carbon neutrality by 2060. Together, the objects of the *Planning and Development Act 2007*, the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act and the ACT Sustainable Energy Policy* provide the framework for a sustainable ACT.

The planning system

The P&D Act identifies the type of proposals requiring an EIS, with these proposals assessed in the impact track. Before being able to lodge a development application the proponent must complete the EIS process. This process can be intensive, in both time and money, and is summarised at *attachment A*.

The Act, Schedule 4, *Part 4.2 Development proposals requiring EIS – activities* provides that a development proposal that involves an electricity generating station (other than a coal electricity generating station) and that is capable of supplying 4 megawatt (MW) (the default threshold) or more of electrical energy is a development that requires an environmental impact assessment (EIS). However the P&D Act provides that a regulation can prescribe an alternative amount of supply.

This means that development proposals for large-scale electricity generating stations, capable of supplying more than 4MW of electricity, must complete an environmental impact assessment (EIS) unless the proposal is a type prescribed by regulation.

In itself an electricity generating station capable of supplying 4WM of electricity does not necessarily automatically mean there will be a significant adverse environmental impact (the test for requiring an EIS). For instance, the proposal may be on land e.g. rural or broad-acre where no other potential environmental triggers exist. If this is the case then it is inappropriate to require the proponent to complete a costly and time intensive process for no appreciable benefit.

It would be appropriate to assess this type of proposal in the merit track where, as part of the normal assessment process, the proposal is assessed against the Non-Urban Zones Development Code (of the Territory Plan). The Code requires an assessment of the environmental effects (opposed to *significant adverse environmental impact* – defined at s124A of the P&D Act) of the development proposal.

This means that the default 4MW threshold triggers the need for an EIS in all cases even when no other EIS trigger is met. This situation was anticipated in the *Planning and Development (Environmental Impact Statements) Amendment Act 2011* which established a framework whereby a regulation could prescribe an alternative threshold.

However, if the proposal was not in a broad-acre area but instead proposed to be established in an area known as a habitat for a species with a special protection status e.g. schedule 4, Part 4.3. item (1) (d) and also had the capacity to generate more than 4MW of electricity, then it is appropriate for the development proposal to undergo the full environmental assessment process.

This means that without prescribing an alternative threshold the default threshold (4MW) has the capacity to negatively influence the market's response to the Government's call for proposals from the energy sector to establish a large-scale solar generation capacity in the ACT region.

Sustainable energy policy

The *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* (the Electricity Feed-in Act) establishes a *scheme* to support the development of up to 210MW of large-scale renewable energy generation capacity for the Australian Capital Territory. The Electricity Feed-in Act first objective is to promote the establishment of large-scale facilities for the generation of electricity from a range of renewable energy sources in the Australian capital region.

The Large-scale Solar Auction established under the Electricity Feed-in Act, calls for proposals to establish large-scale renewable (solar) electricity generation in the Territory region. The present 4MW threshold has the potential to significantly distort the Solar Auction by encouraging proponents to make proposals just under the 4MW threshold so as not to trigger the requirement for a mandatory EIS. There are some indications that this may be occurring already.

Therefore, without intending to, the planning system may be creating distortions in the solar auction resulting in a sub-optimal configuration of proposal sizes and higher Feed-in

Tariff costs to the Territory. This cost is not expected to be accompanied by any corresponding environmental or planning benefit.

Summary of the issue

Therefore the problem is how to:

1. ensure that only development proposals, for electricity generating stations, that are likely to have a significant adverse environmental impact are in the impact track (and other proposals are in the merit track); and
2. remove the perceived barrier for proponents responding to the Government's commitment to support the establishment of large-scale renewable (solar) electricity generation facility without compromising the planning system.

This regulatory impact statement considers the objects of two pieces of law (the *Planning and Development Act 2007* and the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011),* although only the P&D Act is used to address the defined issues.

The following is information about the proposed law as required by section 35 of the Legislation Act 2001.

(a) The authorising law

The *Planning and Development Act 2007, s*ection 123(b) states that the impact assessment track applies to a development proposal if the proposal is of a kind mentioned in schedule 4. Schedule 4, Part 4.2, item 2 relates to electricity generation and transmission lines.

The proposed law uses this framework by prescribing two thresholds for electricity generation capacity before an EIS is required. It is important to note that item 2 of schedule 4, part 4.2 is the only item in the ten listed activities that has the capacity to prescribe two things by regulation. The first is the capacity to prescribe a threshold (as this proposed law does) the second to prescribe a particular location, a particular kind or a particular nature (for the electricity generating station).

Specifically item 2 provides that a regulation can prescribe the amount of electricity generating capacity. The proposed law does this by prescribing more than 10 MW and more than 20MW thresholds for different types of energy sources (used to generate the electricity).

(b) Policy objectives of the proposed law and the reasons for them

The policy objective is two-fold and related. Firstly, the proposed law is aimed at ensuring that only development proposals which are likely to have a significant adverse impact on the environment require an EIS (and are assessed in the impact track).

One of the key reforms behind the introduction of the *Planning and Development Act 2007* (P&D Act) was to ensure that the level and nature of assessment of development applications was appropriately tailored to the scale, complexity and likely impacts of the proposed development. For this reason, the P&D Act implemented a multi-tier assessment system including:

- merit track – for the assessment of more complex, significant matters (standard process)
- impact track – for the assessment of projects that by nature are likely to have a major environmental impact – this includes all development in schedule 4 to *the Act* (and development listed as impact track assessable in the development tables of the Territory Plan)

The *Planning and Development (Environmental Impact Statements) Amendment Act 2011* further supported the initial reforms by providing that a regulation could prescribe an alternative capacity for electricity generating stations that respond to Government policy.

The primary policy objective of the proposed law is to enable proposals which are unlikely to have a significant adverse environmental impact to be assessed in the merit track rather than the impact track. This will help reduce the cost of delivering in a timely manner important infrastructure to the ACT region.

The second (and related) policy objective is to facilitate the objectives of the *ACT Sustainable Energy Policy: Energy for a sustainable city 2011-2020*, through the establishment of large-scale solar energy electricity generation stations in the Australian capital region.

The *Sustainable Energy Policy* identifies 4 key outcomes:

- Outcome One: Reliable and Affordable Energy;
- Outcome Two: Smarter Use of Energy;
- Outcome Three: Cleaner Energy; and
- Outcome Four: Growth in the Clean Economy.

Outcomes one, three and four are most relative to the proposed law.

To support each of these outcomes 27 measures are proposed. Measures relative to the proposed law are:

- Measure 1 - the ACT will continue to actively promote the development of national energy policy and market frameworks that integrate social, economic and environmental policy objectives and represent the interests of the Territory;
- Measure 18 –the ACT will continue to actively promote the development of national energy policy and market frameworks that integrate social, economic and environmental policy objectives, including in support of renewable and low-carbon distributed energy technologies;
- Measure 23 - legislation in support of a large-scale Feed-in Tariff (FiT) will be introduced in 2011. A first tranche of up to 40MW will be made available through an auction process to ensure the lowest possible prices; and
- Measure 27 - the ACT Government will continue to support capability development in ACT companies that are developing clean technology products or services and creating sustainable businesses.

The ACT Sustainable Energy Policy supports the objectives of the *Canberra Plan: towards our second century* and the *Weathering the Change: draft action plan 2*. The Canberra Plan has

as priorities the aspiration to tackle and adapt to climate change and to explore the feasibility of a solar power station while the draft action plan 2 supports renewable energy generation (as one of the ways to respond to climate change).

The *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* first object is "...to promote the establishment of large-scale facilities for the generation of electricity from a range of renewable energy sources in the Australian capital region."

Therefore, the over-arching policy objective is to ensure the planning system does not impede the Government's commitment to renewable energy electricity generating stations (while maintaining the planning system's consideration of environmental issues). Achieving this policy objective will in itself deliver a second policy objective, that is it will provide a market environment that considers the best configuration and use of technology to establish a large-scale solar electricity generation station (without placing an artificial ceiling on the capacity of generators).

The proposed law seeks to utilise the planning system framework to promote and deliver on the objectives of the ACT Sustainable Energy Policy, The Canberra Plan and Weathering the Change: draft action plan 2.

(c) Achieving the policy objectives

Summary

The mechanism to achieve the policy objectives of the proposed law is the legislative framework already encompassed in the *Planning and Development Act 2007* (the P&D Act), schedule 4, part 4.2. item 2 which provides that a regulation can prescribe those development proposals that do not require an environmental impact assessment (EIS).

The proposed law removes the following types of development proposals from the impact track:

- an electricity generating station with a capacity of 10MW or less that generates electricity from gas or gas and another energy source, and
- an electricity generating station with a capacity of 20MW or less that generates electricity from a wind, solar, hydro, biomass or geothermal source.

This means that the development assessment process for these types of developments is moved from the impact track to the merit track. The key difference is that there is no need to complete an environmental impact statement before lodging a development application in the merit track.

The second policy objective is already delivered through the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* and no amendment is proposed (or required) by the proposed law. However, this regulatory impact statement will discuss how the primary policy objective supports the second policy objective.

Primary policy objective
The proposed law uses a framework that has been approved by the ACT Legislative Assembly to identify those types of electricity generation stations that do not require an environmental impact assessment.

The proposed law, by moving a development proposal from the impact track to the merit track, achieves the primary policy objective while maintaining the integrity of the planning system and supports the second policy objective. This is the case for the following reasons.

Development applications in the merit track must attach an assessment against the relevant rules and relevant criteria in the Territory Plan and other matters as required under s139 including, if required, a formal assessment of environmental effects. For example, this is required for merit assessments under the Non-Urban Zones Development Code in the Territory Plan, which applies to development in rural, broad-acre, river corridor, mountains, and bushland, hills, ridges and buffer zones.

A merit application must be publicly notified and is open to public comment. The application must also be assessed against the Territory Plan (e.g. code rules and merit criteria) and all of the applicable factors/criteria set out in ss119 and 120 of the Act. This includes assessment of the probable impact of the proposed development including the nature, extent and significance of probable environmental impacts.

A development application in the merit track will in some cases also require assessment of its potential environmental impacts under other legislation such as the Public Health Act 1997 or the Environment Protection Act 1997.

A proposal that by regulation is excluded from schedule 4, part 4.2 may still be assessable in the impact track for reasons unrelated to the prescribed threshold. For example, schedule 4 does not specifically include the construction of large sporting venues (but does include venues for motor racing). This is because such a project does not necessarily warrant the level of assessment involved in the impact track. However, the impact assessment track may still apply if the proposed sporting venue triggers another item in schedule 4. For example, it might be impact track assessable if it has significant adverse impacts on a place registered in the Heritage Act (item 6, Part 4.3 schedule 4).

Also importantly, the Act will continue to provide that a proposal outside the impact track may be shifted from the merit track to the impact track by the Planning Minister (s124) or the Health Minister (s125), if the Minister considers this is warranted in a particular case. For example, under s124 the Planning Minister may declare that the impact track applies to a development proposal if satisfied on reasonable grounds that there is a risk of significant adverse environmental impact from the proposal. That would then require an EIS to be prepared even though the proposed law seeks to exclude the development proposal from the need to complete an EIS.

While schedule 4 covers most environmentally significant developments likely to be proposed in the ACT, it is not practicable for the schedule to anticipate every possible

proposal. Exceptional projects not covered by the schedule can therefore trigger an EIS under ss124 or 125.

Relative to the second policy objective

Schedule 4 of the regulation already lists activities, areas and processes that require an EIS. In particular, schedule 4, part 4.2, item 2 (c) (i) (A) provides that a regulation can prescribe an amount of electrical power that may be generated before an EIS is required. If no amount is prescribed, 4MW is the default amount (item 2 (c) (i) (B)).

The proposed law proposes two amounts:

- more than 10MW if the source of energy to generate the electricity is gas or a combination of gas and another source.
- more than 20MW if the source of energy is renewable *i.e.* wind, solar, hydro, biomass or geothermal.

In this way the proposed law is responding to the Government's clear commitment to encourage the use of renewable and environmentally friendly resources for the generation of electricity and provides a second but lesser degree of support for the use of gas as an energy source over other non-renewable and less environmentally friendly energy sources such as brown coal.

The 10MW threshold for gas based electricity generators responds to the ACT Sustainable Energy Policy 2011-2020, which recognises that cogeneration and trigeneration technologies are an important potential contributor to the Territory's greenhouse gas reduction objectives and in reducing costs to energy users in the Territory.

A more than 10MW threshold has been set so as to not impose unreasonable costs on the developers of these technologies at the small-scale, while recognising that the community has an interest in ensuring that any medium to utility-scale deployment of gas generation technologies in the Territory are subject to a comprehensive assessment of their environmental impacts (including consultation with the community).

The 20MW threshold for renewable energy sources is consistent with the Government's clear commitment to the promotion of renewable energy sources. In particular the more than 20MW threshold will help to ensure that the objectives of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* (the Electricity Feed-in Act) are not impeded. These objectives are to:

(a) promote the establishment of large-scale facilities for the generation of electricity from a range of renewable energy sources in the Australian capital region;
(b) promote the development of the renewable energy generation industry in the ACT and Australia consistent with the development of a national electricity market;
(c) reduce the ACT's contribution to greenhouse gas emissions and help achieve targets to reduce the ACT's greenhouse gas emissions; and
(d) address the need for urgent action to be taken to reduce reliance on non-renewable energy sources while minimising the cost to electricity consumers.

Because the issue of whether or not a development proposal should be subject to an EIS is an important community and planning issue it is appropriate to explain the history of previous thresholds.

The *Planning and Development Act 2007* (the P&D Act) put in place a new framework for the consideration of environmental impacts of a development proposal and listed in schedule 4 those activities that required an EIS. The thresholds were overly complex and difficult to understand. In particular part 4.2, item 2 identified the activity of electricity generation as:

> "proposal for electricity generation works or distribution corridor, including a proposal including all or any of the following:
>
> (a) transmission line corridor construction, or realignment works, outside an existing corridor that are intended to carry transmission lines with a voltage of 132kV or more;
> (b) a hydroelectric facility that requires a new dam, weir or inter-valley transfer of water and that will generate 1 megawatt or more of electrical power;
> (c) a wind farm that will consist of 5 or more turbines or will generate 5 megawatts or more of electrical power;
> (d) an electricity generating station that will supply 30 megawatts or more of electrical power;
> (e) an electricity generating station if the temperature of water released from the station into a body of water (other than an artificial body of water) is likely to vary by more than 2°C from the ambient temperature of the receiving water

The *Planning and Development (Environmental Impact Statements) Amendment Act 2010* (the EIS Act) (effective 1 February 2011) put in place the current framework by amending the schedule. The framework reflects extensive consultations and negotiations between the ACT Greens MLAs and other ACT government directorates and drew on the expertise and operational experience of the Environmental and Sustainable Development Directorate (known formerly as ACT Planning and Land Authority) and reflects the latest environmental planning and assessment principles.

The amendments simplified the identification of the activity of *electricity generation* and provided the capacity to prescribe thresholds that could deliver policy outcomes such as electricity generation using renewable energy e.g. solar, as well as being able to prescribe the threshold for a proposal in a particular location or of a particular kind or of a particular nature. Where no threshold is prescribed the framework provides a default (4MW) threshold.

Second policy objective

The Electricity Feed-in Act provides for 210 megawatts of renewable energy generation capacity for the Australian capital region. The Solar Auction process is the first step in establishing this capacity and provides for 40 megawatts of solar energy generation to be located in the ACT.

Therefore the proposed new more than 20MW threshold will ensure that the market has reasonable opportunity to propose the most technological advanced solar renewable energy generators without the need of completing an EIS (while protecting environmental planning issues by requiring an EIS for proposals over 20MW).

In terms of the Solar Auction guidelines for the development of large-scale solar generation facilities in the ACT, bids of between 2 megawatts and 20 megawatts are allowed. The new more than 20MW threshold is aligned to the maximum 20MW capacity generator allowed for in the Solar Auction.

The Environment and Sustainable Development Directorate has identified that the 4MW threshold may create unnecessary costs for renewable energy proponents and distort the Auction process by encouraging smaller scale developments (less than 4MW). This may result in sub-optimal Auction outcomes for the ACT, including a higher Feed-in Tariff price impact on ACT electricity consumers.

The majority of Auction proposals are likely to be on rural and broad acre zoned land, which may have a range of other relevant EIS triggers, particularly in relation to endangered species and native vegetation. Importantly, prescribing an alternative threshold would not remove the requirement to undertake an EIS where other triggers exist.

However, if there were no other relevant EIS triggers, then proposals in non-urban zoned land would be merit track developments, and would be assessed against the Non-Urban Zones Development Code in the Territory Plan. That Code requires an *Assessment of Environmental Effects* to be undertaken for all merit track applications, where the environmental impact of the specific proposal can be considered as part of the assessment of the development application.

It is appropriate to use the regulation making power already provided within the P&D Act to minimize distortions in the Solar Auction process resulting from the present 4MW default threshold, and yet still maintain necessary environmental safeguards.

Consultation

Extensive consultations were held with the ACT Greens when drafting the amendments to the *Planning and Development Act 2007* in February 2011 and again in developing and finalising the EIS Act.

The Government, through the EIS Act, purposely made the amendment to permit the figure to be set by regulation with a view to, for example, supporting the key objectives of the ACT Sustainable Energy Policy 2011-2020 which encourages the use of renewable energy sources for the generation of electricity.

Solar Auction proponents have already voiced their concerns over this anomaly in the legislation and are very keen to have the matter resolved prior to the closing date for the lodgement of their final proposals.

(d) Consistency of the proposed law with the authorising law

The authorising law permits a regulation to prescribe (schedule 4 of P&D Act, authorised by section 123 (b)).

The proposed law uses the power of the authorising law to amend the regulation.

(e) The proposed law is not inconsistent with the policy objectives of another Territory law

The proposed law is not inconsistent with the policy objectives of another Territory law.

(f) Mutual recognition issues

There are no mutual recognition issues.

(g) Reasonable alternatives to the proposed law

There are no reasonable alternatives that will respond to each of the policy objectives identified. The following options were considered:

1. Maintain the status quo.

This means the efficacy of the Solar Auction process is compromised.

Proponents nominating generators with a capacity of less than 4 MW will gain an unfair advantage as the proposal will not include time and money costs associated with the EIS process. Further the proposal may not propose the best use technology in the context of environmental outcomes. This means that one of the main objectives of the ACT Sustainable Energy policy is not delivered.

Proponents proposing to use large-scale generators, because they are the latest and most environmentally friendly technology, will incur additional costs associated with the need to complete an EIS. If Government were to select such a proposal, because it achieves a key outcome of the ACT Sustainable Energy policy, the community may be required, through the feed-in tariff scheme, to pay a higher price for electricity.

2. Prescribe thresholds to respond to Government policy outcomes

Prescribing thresholds to respond to Government policy utilises the existing framework put in place by the EIS Act.

Prescribing different thresholds for different energy sources supports the Government's policy of encouraging the use of renewable energy sources and helps to achieve another Government policy position of reducing carbon emissions.

3. Amend schedule 4 to prescribe (in the Act) alternative thresholds

The structure of the Planning and Development Act provides that, where appropriate, a regulation can do certain things such as prescribing thresholds.

The capacity of the Act to provide this type of capacity has been agreed to by the ACT Legislative Assembly and scrutinised by the Standing Committee on Justice and Community Safety (performing the duties of a scrutiny of bills and subordinate legislation committee)

has considered the EIS Bill. The Committee did not identify any issues with the capacity for a regulation to prescribe things, for example thresholds.

Further, it is important to reiterate here the intensive consultations that happened on the EIS Act across government and including the ACT Greens MLAs.

(h) Brief assessment of benefits and costs of the proposed law

The proposed law removes unnecessary regulatory burden by excluding developments from third party ACAT merit review and from the need to do an EIS.

Sector	Costs	Benefits
Industry/business	Some industry providers which deal in electricity generating stations other than those covered by the proposed law may be negatively impacted. Without the proposed law electricity generating stations using renewable energy sources would incur additional costs (through the need to complete an EIS) with no appreciable benefits.	Industry providers that currently deal in electricity generating stations other than those covered by the proposed law may be encouraged to invest in research and development of alternative forms of electricity generation stations. The increased use of renewable energy source generating stations will further encourage those industry groups to invest in research and development of environmentally friendly technologies. The increased use of cogeneration and trigeneration electricity generating stations may encourage investment in research and development of environmentally friendly technologies.
Government	A proponent is required to pay certain fees as part of the EIS process. Moving the development proposal from the impact track to the merit track (and therefore not requiring an EIS) negates these fees.	Supports the ACT Sustainable Energy Policy: Energy for a sustainable city 2011-2020; Weathering the change: draft action plan 2 and The Canberra Plan. Utilises public sector resources effectively by placing an appropriate scale of assessment to the scope and scale of a development proposal.

		Efficient and timely provision of infrastructure for electricity generating stations that support the Government's sustainability policies.
Community	Without the proposed law there could be an increase in energy costs through the feed-in tariff process. Some loss of third party appeal rights and loss of ability to comment on draft EIS – these issues discussed below in paragraph (i)	Proposals for electricity, generated by renewable energy sources, would have lower costs (through the saving of not needing to do an EIS) and these lower costs would be reflected in the end-price to the consumer. Supports the aspirations of the community to respond to climate change.
Environment		Supports environmental principles. Helps to reduce carbon emissions. Reduces dependency of fossil fuels. Promotes the use of gas as an energy source over brown coal.

(i) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principle

The legislative reform introduced by the Planning and Development Act (the P&D Act) was comprehensive and the Act and regulations formed an integral part of a single package of planning reforms. The regulation, which is to be amended by the proposed law, was developed more or less concurrently with the P&D Act and gave effect to matters the Act allows to be prescribed by regulation.

The discussion below demonstrates that the proposed law is consistent with the Committee's principles.

Furthermore, general principles of the authorising law have been assessed by the Human Rights Commissioner and all issues responded to.

One effect of the proposed law is that some developments that would have previously been in the impact track will now be in the merit assessment track. This affects third party ACAT merit review rights as third party merit review rights are different in the merit track to the

impact track. A second effect of the proposed law is that taking a proposal out of the impact track means an EIS is not required and an EIS is a document that is publicly notified and anyone can make a representation about a draft EIS.

The Committee's terms of reference require it to consider whether (among other things) the proposed law unduly trespasses on rights previously established by law and makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

The proposed law raises potential issues with these terms of reference.

By removing an existing right of review and the opportunity to comment on a draft EIS, it can be considered to trespass on rights previously established by law. The issue is whether it does so unduly. In addition, by removing existing review rights, the proposed law makes certain rights, etc dependent on decisions that are (now) non-reviewable by ACAT. The issue is whether it does so unduly.

Appeals from decisions on development applications are dealt with in Chapter 13 (Review of decisions) of the P&D Act. Section 408 provides for an eligible entity for a reviewable decision to apply to the ACAT for review of the decision. Schedule 1 of the P&D Act sets out reviewable decisions, eligible entities and interested entities.

Impact track development proposals require public notification (section 130 of the P&D Act). Third party ACAT merit review is available in accordance with schedule 1 item 6 of the Act. Item 6 allows third party review from a decision to approve a development in the impact track whether subject to a condition or otherwise, unless the application is exempted by regulation. Section 351 of the regulation which refers to schedule 3 part 3.3 of the regulation exempts one matter (the building, alteration or demolition of public facilities on unleased land).

Third party ACAT merit review is also available in the merit track in accordance with schedule 1 item 4 of the P&D Act. There are, however, some limitations. Third party review is only allowed in the merit track if:

(1) the development application is notified under both s153 and s155 of the P&D Act. All merit track development proposals require public notification under section 153 and s155 except those prescribed by regulation (s152(1)(a) of the P&D Act and s27 of the regulation).
In summary, estate development plans require public notification only under section 155 and merit track developments listed in schedule 2 of the regulation require public notification only under section 152. This means that these merit track development proposals presently do not have third party appeal rights; and
(2) the development proposal is not exempt by regulation. Third party merit review in the merit track is exempted under section 350 of the Planning and Development Regulation which refers to the matters listed in schedule 3, part 3.2 of the regulation; and

(3) under section 121 of the P&D Act, a decision under s162 is only reviewable to the extent that the development proposal is subject to a rule and does not comply with the rule or is not subject to a rule.

It is to be noted that third party ACAT merit review in both the merit track and impact tracks are only available from approvals of applications and not refusals. There is also a requirement that to be eligible to appeal, the third party must have made a representation under s156 about the development or had a reasonable excuse for not making a representation and the approval of the development may cause the entity to suffer material detriment (schedule 1 of the P&D Act).

It is therefore apparent that the proposed law by taking some development proposals out of the impact track and putting them in the merit track results in a reduction, to some extent and in some cases only, in third party ACAT merit review rights.

Under the P&D Act, sections 217 and 219, a draft EIS has to be publicly notified and anyone can make a representation about a draft EIS. Taking a development proposal out of the impact track means this opportunity to comment is removed as there is no requirement for an EIS in the merit track.

The provisions of the P&D Act about third party appeals have been operating since the Act's inception in March 2008 and have been designed to deliver acceptable community outcomes. The proposed law seeks to maintain the core rules established during the Act's development. The P&D Act modified third party appeal rights, so that in general terms, only development applications having significant off site impacts, particularly in residential areas, would be open to third party appeals.

The *Human Rights Act 2004*, in sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by the proposed law. However, in relation to section 21, it would appear that case law (refer to Attachment B) indicates that human rights legislation does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial.

In two ACAT cases (*Thomson v ACT Planning and Land Authority* [2009] ACATp38 and *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46) it was agreed that some limitation on third party appeal rights is warranted when it delivers certainty and predictability for proponents.

Specifically the Commissioner (in Thomson) commented that "...providing certainty and predictability for applicants for development approval, and the need to ensure a timely approval process are sufficiently important objectives to justify some constraints on third party review rights.

In Tran, the Tribunal agreed with the approach in *Thomson*.

Case law (refer *Appendix C*) in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy.

To the extent that the proposed law limits any rights afforded by the *Human Rights Act 2004*, these limitations must meet the proportionality test of section 28 of that legislation.

Persons that may be affected by particular development applications continue to have the ability to make submissions on individual development applications as well as Territory Plan variations that establish the overall planning policy for these areas. Proposals in both the merit and impact tracks require public notification and the community is still able to comment on a development proposal in the merit track in a similar way to an impact track development proposal.

In relation to the issue about the lack of the ability to comment on the draft EIS, there remains the right to make representations about the development proposal to the planning and land authority and the authority must consider that representation (Section 120 (c) of the P&D Act) and the decision maker on a development application must also consider the probable impact of the proposed development including the nature, extent and significance of probable environmental impacts (section120(f) of the P&D Act).

The proposed law is therefore justified on the basis that it strikes a better balance between the competing factors – it ensures that only those power generating stations that are of a sufficient size to justify an EIS have to provide one and the smaller ones can be properly assessed under the merit track. The EIS process requires a considerable amount of time to be completed – scoping of the EIS (Section 212), drafting of the EIS (Section 216) public notification and consultation of the EIS (section 217 and 218), publication of representations (s220), consideration of the EIS and so on.

Therefore, setting proper limits for when an EIS is required is important to save the time and costs associated with preparing an EIS and it is considered that the limits of more than 10MW and more than 20MW set by the proposed law are more appropriate than the previous limit of 4MWs, particularly in light of the fact that environmental factors are still required to be considered in merit track applications.

In all these circumstances it is submitted that the proposed law does not unduly trespass on rights previously established by law and does not unduly make certain rights, etc dependent on decisions that are (now) non-reviewable by ACAT.

Conclusion

This regulatory impact statement complies with the requirements for a subordinate law as set out in Part 5.2 of the *Legislation Act 2001*. An Explanatory Statement for the proposed law has been prepared for tabling.

Attachment A

Summary of procedure for completion of an EIS

1. A development application assessable in the impact track must include a completed EIS (ss139 (2) (f), 210).
2. The procedure for the preparation, consultation and completion of an EIS is set out in Part 8.2 Environmental Impact Statements of the Planning and Development Act. In summary, these steps involve:
   - proponent applies to ACTPLA for a scoping document (s212)
   - ACTPLA prepares a scoping document setting out the matters that must be addressed in the EIS (s212). Section 212 (2A) makes the scoping document a notifiable instrument which expires in 18 months after the day it is notified (s215). The scoping document must include all matters required by regulation (s213 (1)). The scoping document must be prepared within 30 working days of application (s214).
   - proponent prepares a draft EIS and gives the draft to ACTPLA. The draft EIS must cover all matters raised in the scoping document.
   - ACTPLA publicly notifies the draft EIS (s217)
   - draft EIS is available for public comment for at least 20 working days (s218, 219)
   - after the public notification period ends, the proponent revises the draft EIS taking into account the public comments (s221)
   - proponent provides the revised draft EIS to ACTPLA (s222)
   - ACTPLA considers whether the revised draft adequately addresses all matters covered by the scoping document and raised in public comments
   - if ACTPLA is satisfied that the revised draft EIS is complete:
     i. it gives this and its assessment report to the Minister (ss222, 225). The assessment report is a notifiable instrument which expires 18 months after the day it is notified (s225A);
     ii. is not satisfied it must give the proponent no more than two opportunities to address the concerns. If after the second attempt ACTPLA remains unsatisfied it must reject the EIS (s224A). If the EIS is rejected a second time, the EIS does not go to the Minister and the EIS process is effectively terminated.
   - the Minister must consider the revised draft EIS and decide whether to:
     i. take no further action and inform ACTPLA of this (s226)
     ii. present the draft EIS to the Legislative Assembly (ss226, 227)
     iii. appoint an inquiry panel to consider and report on the draft EIS (ss226, 228)
   - the revised draft EIS becomes a "completed EIS" if:
     i. the Minister informs ACTPLA that no further action will be taken (ss209A(1), 226); or
     ii. 15 working days have passed from when the Minister received the revised draft EIS and the Minister has neither written to ACTPLA nor established an inquiry panel (ss209A(1)(b), 226, 228)
     iii. if the Minister has appointed an inquiry panel under s228 and the panel has made its report or the time for reporting has elapsed (ss209A(1)(d), 230)
   - the completed EIS must be attached to the application for development approval (s139 (2) (f)).

Attachment B

Case Law supporting the RIS

This attachment provides information on relevant case law from other jurisdictions as well as two cases heard by ACT Civil and Administrative Tribunal (ACAT) (*Thomson v ACT Planning and Land Authority* [2009] ACAT p38 and *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46). ACAT is the body that deals with third party appeals in the ACT.

***Extract - Thomson v ACT Planning and Land Authority* [2009] ACAT p38**

However, the House of Lords in *Runa Begum v Tower Hamlets LBC*[58] found that a limited right of review on questions of fact is sufficient. Lord Hoffman indicated that limitations 'on practical grounds' to the right to a review of findings of fact was not only clear from the case law of the Strasbourg Court[59] but also supported good administration.[60]

In *Bryan v the United Kingdom*[61] the European Court of Human Rights found that in assessing the sufficiency of the composite process it is necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.[62]

The Commissioner submitted that the availability of a partial merit review under s 121(2), relating primarily to issues of fact, and the assessment of specific criteria where rules have not been met, would be consistent with the right to a fair trial, when considered in the context of the whole planning approval process constituted by the Planning Act. This includes an administrative decision making process by ACTPLA, a statutory corporation independent from the Minister, and some procedural safeguards, such as the notification of affected parties and the opportunity for third parties to make representations regarding the development proposal. Importantly, the decisions of ACTPLA are also amenable to judicial review at common law and under the ADJR.

Counterbalanced with this are the limited rights of review under the ADJR, the disparity between the partial rights of review that ACAT can exercise under s 121(2) of the Planning Act and the respondent's obligations under s 120 of the Planning Act and the considerable cost associated with litigating issues in the Supreme Court.[63]

The Commissioner submitted that providing certainty and predictability for applicants for development approval, and the need to ensure a timely approval process are sufficiently important objectives to justify some constraints on third party review rights, while still preserving some aspects of merits review of important factual matters and the entitlement to judicial review. Therefore it was submitted that s 121(2) of the Planning Act might be a proportionate means to achieve that end.

Dealing with the factors set out in s 28(2) of the Human Rights Act, the Tribunal must firstly consider the nature of the right affected. As discussed above, the human right under consideration is the right to a fair hearing which is limited by the full or partial removal of merits review by the passage of the Planning Act. More broadly speaking, in the public debates which accompanied the passage of the Planning Act, the right was characterised as

a third party appeal right in planning issues. The purpose of the limitation was to create a national leading practice model for land development in the ACT.[65]

The limitation on third party appeal rights was a significant objective of the new regime which flowed from the model development assessment process proposed by the national Development Assessment Forum[66] and which reflected misgivings in the community that AAT appeals slowed down the process of approving legitimate development proposals. Although there was considerable debate as to whether the appeals were a major impediment to development in the ACT, the Minister advised the relevant Standing Committee that 'even a small number of appeals can be significant for developers and households given the costs, uncertainty, caution, hesitancy and loss of time caused by appeals'.[67] Therefore, applying s28(2)(b) and (d) of the Human Rights Act, the purpose of the limitation was important and was regarded as necessary to achieve significant policy goals.

The overarching consideration in s 28 of the Human Rights Act is that human rights may be subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. The views of many stakeholders were taken into account in the consultation process which preceded the passage of the Planning Act and the 2008 Territory Plan and many of the stakeholders expressed views about desirability or otherwise of removing third party appeal rights. The Planning Act was subject to scrutiny as to its compatibility with human rights[69] and the question regarding the composite administrative process which may be necessary for long term compliance with s21 of the Human Rights Act (as discussed above) was raised in Scrutiny Reports by the Standing Committee on Legal Affairs.[70]

In conclusion the Tribunal considers that the limit created by s 121(2) Planning Act to the right to a fair hearing in s 21 of the Human Rights Act is reasonable considering the broad objectives of the Planning Act, the public consultation that occurred prior to the passage of the Planning Act and the 2008 Territory Plan and ongoing opportunities for certain people to make representations about development proposals in combination with access to judicial review.

Extract - *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46
55. Pursuant to s28(2)(b) of the HRA, the purpose of the limitation in this case is the need for certainty and predictability for applicants for development approval and the need to ensure a timely approval process. The present Tribunal agrees with the approach in *Thomson* that these objectives are sufficiently important to justify some constraints on third party review rights. [52]

The present Tribunal agrees with the reasoning in *Thomson* regarding proportionality as it applies to the Planning Act and Planning Regulation. Certainly it is not unusual in Australian planning law for the rights of third party objectors to be limited or removed by legislation or other instruments. [53]

[53] See generally G McLeod (ed) *Planning Law in Australia* and for examples, note the restrictions in New South Wales at [1.180], Queensland at [1.2059] and Victoria at [2.740].

Smith v Hobsons Bay CC15 (includes Summary) (Red Dot) [2010] VCAT 668 (12 May 2010)

Last Updated: 16 June 2010

RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION
PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2562/2009 PERMIT APPLICATION NO. PA09118391

IN THE MATTER OF Rodger Smith (on behalf of Gary Stooke) v Hobsons Bay City Council
BEFORE Mark Dwyer, Deputy President
NATURE OF CASE Application of *Charter of Human Rights and Responsibilities Act 2006* in a planning context
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE LAW, PRACTICE OR PROCEDURE – issue of interpretation or application *Charter of Human Rights and Responsibilities Act 2006;* application of Charter; whether cl 54.04-6 of planning scheme dealing with overlooking compatible with **human right to privacy;** whether decision to delete a condition requiring a balcony screen would breach Charter; interpretation and application of ss 13 & 7(2) of Charter.

SUMMARY

15 Accessed at http://www.austlii.edu.au/cgibin/sinodisp/au/cases/vic/VCAT/2010/668.html?stem=0&synonyms=0&query=title(smith%20AND%20hobsons%20bay%20); 3 November 2011

This decision relates to the application of the *Charter of Human Rights and Responsibilities Act 2006* in a planning context, particularly the **human right to privacy** protected under s 13 of the Charter. An objector claims that a decision to delete a permit condition requiring a balcony screen would interfere with that right and be in breach of the Charter, and has raised this as a question of law requiring separate determination. The decision also considers, albeit more briefly, the potential impact on property rights protected under s 20 of the Charter.

The decision notes that:

* the right to privacy under s 13 is qualified. A person has the right not to have his or her privacy or home unlawfully of arbitrarily interfered with.
* s 7(2) of the Charter also recognises that reasonable limits may be placed on a protected right, having regard to relevant factors including the nature of the right and purpose and extent of the limitation.

In considering whether cl 54.04-6 of planning schemes, dealing with overlooking, is compatible with the **human right to privacy** protected under the Charter, the decision

applies the 3-step process recently endorsed by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50. Having regard to the structure of the planning regulatory framework in Victoria, the relevant clause is considered not to be either unlawful or arbitrary and, even it was, it imposes a reasonable, proportionate and justifiable limitation on the right to privacy. In considering whether a decision to delete or modify the condition requiring a balcony screen would breach the Charter, the decision adopts and applies a somewhat similar 3-step process.

*Step 1 is to consider if a human right protected under the Charter is engaged by the planning proposal for which a decision must be made. In considering this, the scope of that human right must be considered, including any specific qualifications or limitations on that right in the Charter.
* Step 2 is to consider whether any particular decision or outcome would be incompatible with that human right. If so,
* Step 3 is to apply s 7(2) of the Charter to determine whether any limitation or restriction on the right is justified as part of the decision. This may include a consideration of alternative decisions that have a lesser impact on the human right under consideration.

The overall objective of these steps is for the decision maker (i.e. the Tribunal in a review proceeding) to comply with s 38 of the Charter by giving proper consideration to any relevant human right as part of the decision making process.

Although the Charter right to privacy is potentially engaged in this case, any decision in relation to the condition that has proper regard to the planning regulatory framework would not be unlawful or arbitrary. Even if there was a potential interference with the right to privacy, the proper exercise of a planning discretion in accordance with that framework will likely reflect a reasonable, proportionate and justifiable limitation on the right to privacy.

The decision also makes some general observations on the application of the Charter in a planning context. The Charter does not manifestly change the role and responsibility of the Tribunal. Implicitly, the Tribunal already considers the reasonableness of potential infringements on a person's privacy and home in its day to-day decision making, in dealing with issues such as overlooking (as in this case), overshadowing, noise, environmental constraints and a variety of other issues and potential amenity impacts within the planning regulatory framework.

That framework recognises that reasonable restrictions may be placed on the use and development of land, and that there may on occasion be reasonable and acceptable off-site impacts on others. There is an emphasis on performance based policies, objectives and guidelines that deal with a range of potential amenity impacts on a person's privacy and home. Provided these issues are properly considered, it would be a rare and exceptional case where the exercise of a planning discretion in accordance with the regulatory framework is not Charter compatible. Each case however turns on its own facts and circumstances.

The planning regulatory framework seeks to balance public and private rights, and seeks to provide for the fair, orderly and sustainable development and use of land by imposing certain restrictions on the use and development of land that most would consider justified in a free and democratic society.

The Planning Act and the 2008 territory Plan both came into effect on 31 March 2008 and established a five track planning approval scheme with different considerations for approval and review rights for different tracks – s code, merit, impact prohibited and exempt.