

1996

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

ADMINISTRATIVE APPEALS TRIBUNAL (AMENDMENT) BILL 1996

AND

LAND (PLANNING AND ENVIRONMENT) (AMENDMENT) BILL (No 3) 1996

EXPLANATORY MEMORANDUM

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**GARY HUMPHRIES MLA
ATTORNEY-GENERAL**

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Background

The initiative to transfer the functions of the Land and Planning Appeals Board (the Board) to the Administrative Appeals Tribunal (the Tribunal) was announced last year. The Stein Report into the Administration of ACT Leasehold accepted that the transfer would occur.

The Administrative Appeals Tribunal (Amendment) Bill 1996 together with the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996 gives effect to the policy to transfer the functions of the Land and Planning Appeals Board (the Board) established by Part VIA of the *Land (Planning and Environment) Act 1991* (the Land Act) to the Administrative Appeals Tribunal (the Tribunal). This is achieved by the establishment of a separate Land and Planning Division within the Tribunal and the repeal of Part VIA of the Land Act. In short, all appeals against decisions under the Land Act will be heard in the Land and Planning Division of the Tribunal. All other proceedings would be heard in a General Division of the Tribunal.

The opportunity has been taken to effect some other amendments to both Acts to improve their effectiveness.

Financial Considerations

We expect the financial impact to be neutral this financial year. Savings may be made in subsequent years as the Tribunal's procedures, particularly its use of preliminary conferences, will produce real efficiencies over time.

Details of the Administrative Appeals Tribunal (Amendment) Bill 1996

Clause 1 (Short title) provides for the amending Act to be known as the Administrative Appeals Tribunal (Amendment) Act 1996.

Clause 2 (Commencement) provides for the commencement of the Bill.

Subclause 2(1) provides for the commencement of clauses 1 and 2 on gazettal.

Subclause 2(2) provides for the remaining provisions to commence on a day or on respective days fixed by notice in the *Gazette*. The provisions could commence together or on different days.

Subclause 2(3) provides for the automatic commencement of the remaining provisions at the end of a period of six months from the day when the amending Act is notified in the *Gazette*.

Clause 3 (Principal Act) provides that references in the Bill to the Principal Act mean the *Administrative Appeals Tribunal Act 1989*.

Clause 4 (Interpretation) provides that section 3 of the AAT Act is to be amended to include certain terms that would have a particular meaning for the purposes of the AAT Act as it is proposed to be amended. The principal inclusions are a definition of 'approved form' and 'proceeding'. The definition of 'proceeding' enables the deletion of subsection 3(6). The amendment effected by clause 4(a) gives Deputy Registrars all the powers of the Registrar and reflects the actual administration of various tribunals by the Magistrates Court which is where the AAT and other tribunals are located.

Clause 5 (Establishment of the Tribunal) changes the name of the Australian Capital Territory Administrative Appeals Tribunal to the Administrative Appeals Tribunal; it is not normal for Territory bodies to have the appellation Australian Capital Territory as part of their name. Clause 4(b) consequently amends the definition of "Tribunal" in the Act.

Clause 6 (Extension of term of office) adds new section 7A. It provides that the Executive may, by instrument, extend the term of office of a member before the expiry of his or her term. However, the new section will not authorise the Executive to extend or further extend the term of office of a member who could not be appointed for that term under the provisions of section 7 of the Act, eg, a person has attained 70 years of age.

Clause 7 (Oath or affirmation of office) re-numbers the schedule to the Act.

Clause 8 (Divisions) by amending section 17 will create a specific Land and Planning Division and a General Division in the AAT. Further Divisions may be created by regulations. Unless the AAT Act specifically provides otherwise, the provisions of the Act apply to each Division of the Tribunal.

Clause 9 will repeal section 19 and include new sections 19 and 19A. New section 19 will ensure that all proceedings under the Land Act are dealt with in the Land and

Planning Division of the Tribunal and other proceedings in the General Division of the Tribunal or such other Divisions as may be created.

New section 19A (Exercise of powers of Tribunal), in effect, will replace section 19 of the AAT Act. It provides that the powers of the Tribunal may be exercised -

- if no direction has been given by the President as to who constitutes the Tribunal for a particular proceeding - by the President or a member authorised by the President;
- if a direction has been given by the President as to who constitutes the Tribunal for a particular proceeding but the hearing has not commenced:
 - where the Tribunal is constituted by one member only, by the President or that member; or
 - in any other case, by the President or the presiding member;
- if the hearing by the Tribunal has commenced - by the Tribunal, except that in relation to certain specified proceedings, eg, a directions hearing, making a person a party to proceedings etc. - by the presiding member, the Tribunal or the President; or
- in any other case - by the member or members who constitute the Tribunal for the particular proceeding.

The repeal of the existing section 19 removes subsection 19(3) which enables the parties to, in effect, require proceedings to be dealt with by a presidential member. This is more appropriately a matter for the President of the Tribunal to determine.

Clause 10 (Reconstitution of Tribunal in certain cases) inserts new subsection 20(1A) and deletes the existing subsection 20(3) and replaces it with new subsection 20(3).

New subsection 20(1A) empowers the President of the Tribunal of his/her own motion or on an application by a party to proceedings to reconstitute the Tribunal having regard to the public importance of the matter or the factual or legal complexities of the issues involved.

New subsection 20(3) requires the President to consider any submissions made by the parties to a proceeding in relation to giving a direction under new subsection 20(1A).

Clause 11 (Questions of law) adds new section 20A which relates to how questions of law are to be decided.

New subsection 20A(1) will empower the Tribunal of its own volition or at the request of a party to request the President to constitute the Tribunal to give a ruling on a question of law.

New subsection 20A(2) provides that where a Tribunal is constituted to rule on a question of law, the Tribunal which requested the ruling is bound by the ruling.

New subsection 20A(3) provides that the question whether a particular question is one of law must be decided by the Tribunal constituted under subsection 20A(1) to rule on the question of law.

New subsection 20A(4) provides that the Tribunal to rule on a question of law must be constituted by at least the President, the Deputy President or a legally qualified senior member.

New subsection 20A(5) specifically provides that the power to reconstitute the Tribunal under new section 20A does not limit the power to reconstitute the Tribunal contained in section 20.

Clause 12 (Tribunal may review certain decisions) provides in new subsection 24(4A) that the Tribunal when reviewing a decision by the Minister or the Executive, as the case may be, under the Land Act may also review any decision of a concurring authority. This is a consequence of the removal from the Land Act of the separate right of review against a decision of a concurring authority.

This clause also inserts new section 19A in subsection 24(6) of the AAT Act. An enactment that provides for applications to be made to the Tribunal may also affect new section 19A in addition to the other provisions mentioned in subsection 24(6).

Clause 13 (Person affected by decision may obtain reasons for decision) includes a reference to an approved form that would be approved by the President under new section 62A in place of 'as prescribed' in subsections 26(4) and (12).

Clause 14 (Manner of applying for review) reflects regulation 4 of the AAT Regulations with some modifications. The references to 'as prescribed' in section 27 are to be replaced by references to an approved form.

Subsection 27(10) is amended to provide that the period of 14 days within which to give notice of opposition to an application to the Tribunal for review may be extended by the Tribunal.

Clause 15 (Parties to proceedings before Tribunal) inserts new subsection 28(2A) which, in effect, relocates section 280 of the Land Act as to the persons who may apply to become parties to proceedings. New subsection 28(2B) provides that a concurring authority would on application be made a party to proceedings in the Tribunal where the decision of the concurring authority is substantially at issue in the proceedings. This also is a consequence of the removal from the Land Act of the separate right of review against a decision of a concurring authority.

Clause 16 (Procedure of Tribunal) deletes subsection 32(2) which deals with the constitution of the Tribunal in certain circumstances because of changes to be effected by clause 9 (new section 19A). New section 19A will deal with the matters provided for by subsection 32(2).

Clause 17 (Certain documents and information not required to be disclosed and questions not required to be answered) inserts new subsection 35(2A) which specifically provides for a State or a Territory Attorney-General to certify that the disclosure of certain information would be contrary to the public interest.

Clause 18 (Public interest questions under section 35) will provide that questions as to whether disclosure of information by way of answers to questions would be contrary to the public interest (as provided for in section 35 of the AAT Act) can be decided not only by the Tribunal constituted by a presidential member but also by such other members of the Tribunal as directed by the President.

Clause 19 (Lodging material documents) will require lodgement of documents by decision makers within 14 days in matters under the Land Act and, in other cases, 28 days which is the position under the AAT Act. New subsection 37(2) provides that the time for lodgement and compliance with section 37 may be shortened by the Tribunal where, not to do so, would or could cause hardship or prejudice to a party or where to do so would be in the public interest. In effect, regulation 6 of the AAT Regulations with modification is contained in new subsection 37(2A).

Clause 20 (Powers of Tribunal) will amend section 40 to empower the Tribunal to give a party leave to inspect and make copies of a document or thing produced under a summons and the Tribunal may also impose conditions on leave to inspect and make copies.

The opportunity has also been taken to delete the reference to 'book' in subsection 40(2) of the AAT Act because the reference to 'document' is wide enough to include a book. Also, for compatibility with subsection 40(2), subsection 40(2B) will be amended to refer to 'document or thing' not just 'documents'.

Further, the form of summons in the Schedule to the AAT Regulations will be included in Schedule 2 of the amended Act and new subsection 40(2A) refers to this.

Clause 21 (Operation and implementation of a decision subject to review) incorporates the relocation of regulations 7, 8 and 9 of the AAT Regulations, with slight modification, as new subsections (3A), (3B) and (3C) in section 41 of the Act. Further, the reference to 'request' in subsection 41(1) and (2) is changed to 'application' to bring it within the definition of 'proceeding' in section 3 of the Act.

Clause 22 (Power to dismiss application or strike out party) amends section 43 to empower the Tribunal to direct that a person shall cease to be a party to a proceeding where that person fails to comply with a direction of the Tribunal within the time specified or otherwise within a reasonable time. Exceptions are made where the person concerned is the person who made the decision that is being reviewed or where the only other party to the proceeding is the person who made the decision.

Clause 23 (Review by Tribunal) provides that when a Land Act matter is heard by the Tribunal in the Land and Planning Division, it must endeavour to give its decision within 14 days after the hearing is completed.

No time to bring down a decision is specified in relation to the General Division.

Clauses 24 & 25 (Return of documents to provider and sending documents etc. to the Supreme Court) effect technical amendments to include references to 'document or thing' where appropriate in sections 45 and 49 of the Act so that there is consistency of terminology within the Act.

Clause 26 (Service of summons on witness) inserts new sections 51A and 51B in the Act to provide for the means of serving a summons issued under the Act. It is similar to section 62 of the *Magistrates Court Act 1930*. New section 51B will require a form for witnesses expenses to accompany any notice requiring a person to appear as a witness. (The service of summonses is at present provided for in regulation 13 of the AAT Regulations.)

Clause 27 (Failure to comply with summons) deletes the reference to 'book' in subsection 52(2) for the same reason as that which is set out in relation to clause 19.

Clause 27 (Refusal to be sworn or answer questions) merely includes in paragraph 53(c) of the AAT Act a reference to 'document or thing' rather than just a 'document'. This again is to ensure consistency of terminology within the Act.

Clause 29 (Seal of the Tribunal) provides for the seal of the Tribunal, its custody and use. New section 56A of the AAT Act is based on section 402 of the *Magistrates Court (Civil Jurisdiction) Act 1982*. The design, custody and use of the seal of the Tribunal is presently dealt with by regulation 3 of the AAT Regulations.

Clause 30 (Tribunal officers) amends section 57 of the AAT Act to remove references to Commonwealth public servants. The staff of the AAT were Commonwealth public servants. On 1 July 1996 the Tribunal was transferred to the Magistrates Court and the staff to the ACT Public Service. Accordingly, subsections 57(3), (4) and (5) will be omitted and new subsection 57(3) included.

Clause 31 (Witnesses fees and expenses) deletes sections 59 and inserts a provision that will apply the Supreme Court scale of witnesses fees and expenses to persons summonsed to attend to give evidence before the Tribunal. The effect of the determination made under subsection 59(1) of the Act will be retained.

Clause 32 (Fees and charges - determination) will omit from subsection 59A(1) of the AAT Act the words 'published in the *Gazette*'. The section will accord with subsection 6(2) of the *Subordinate Laws Act 1989* which provides that the publication in the *Gazette* of a notice of the making of a subordinate law is sufficient.

Clause 33 (Fees and charges - review of decisions) will amend subsection 59E(1) to provide in effect that only adverse decisions of the Registrar are reviewable.

Clause 34 (Lodging documents) amends section 61 which permits the electronic transfer of documents. However, the Magistrates Court (where the Tribunal is located) is not yet equipped for this to happen. The proposed amendments permit electronic lodgement from a date fixed by the President by notice published in the *Gazette*. Further, subregulation 10(2) of the AAT Regulations, which relates to the lodgement of certain documents, is relocated and will appear as new subsection 61(4).

Clause 35 (Retaining documents) will require that the Tribunal retain documents of a proceeding for at least seven years from the date of the signing of the last document in that proceeding. Further, the Tribunal must not dispose of an order, direction or decision of the Tribunal.

Clause 36 (Power of President to approve forms) will empower the President to approve forms for the purpose of the AAT Act.

Clause 37 (Schedule) inserts a new Schedule 1 in the Act because there will be more than one schedule in the amended AAT Act.

Clause 38 (Insertion) includes the form of summons as Schedule 2 to the Act.

Clause 39 (Repeal - Administrative Appeals Tribunal Regulations) repeals the AAT Regulations. The regulations as appropriate and modified where necessary will be included in the amended AAT Act.

Clause 40 (Consequential amendment - *Interpretation Act 1967*) effects a consequential amendment to section 14 of the *Interpretation Act 1967* to take account of the change of name of the Tribunal from the Australian Capital Territory Administrative Appeals Tribunal to Administrative Appeals Tribunal.

Details of the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996

Part I - Preliminary

Clause 1 (Short title) provides that the short title of the amending Act to be the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996.

Clause 2 (Commencement) provides for the commencement of the Bill.

Subclause 2(2) provides for the remaining provisions to commence on a day or on respective days fixed by notice in the *Gazette*. All the provisions could commence together or on different days.

Subclause 2(3) provides for automatic commencement of the remaining at the end of a period of six months from the day when the amending Act is notified in the *Gazette*.

Clause 3 (Principal Act) provides that references in the Bill to the Principal Act mean the Land (Planning and Environment) Act 1991.

Part II - Amendments of Principal Act

Clauses 4 and 7 (Interpretation) provide for a definition of 'Environment Minister' to be included in section 4 rather than in section 111 of the Land Act.

Clause 5 (Substitution) repeals section 80 of the Land Act and inserts new subsections 80(1) and (2).

New Subsection 80(1) provides that where the Minister decides to grant compensation to an applicant he must notify the applicant within 60 days after receiving the application.

New Subsection 80(2) omits the requirement that an adverse decision must be include a statement of reasons and provides that where the Minister refuses to grant compensation he or she must provide a notice in accordance with the Code of Practice in force under subsection 25B(1) of the *Administrative Appeals Tribunal Act 1989* (the AAT Act). The Code does not require a statement of reasons to be given at the outset but instead requires that a succinct explanation for the decision be given and the name and telephone number of a contact officer who can discuss the matter be provided. The Code also, in essence, provides that notice of the right to seek a statement of reasons must be given, certain details about the independent reviewing authority and the right of the person to use FOI legislation. Other requirements to include a statement of reasons when notifying adverse decisions are removed by subsequent clauses of the Bill.

Clause 6 (Access to restricted information) deletes subsection 85(3) of the Land Act and inserts new subsection 85(3).

New subsection 85(3) provides that where the Heritage Council publishes restricted information to a lessee or occupier of land or to a person considering purchasing an interest in land offered for sale it must give the person a statement explaining the effect under the Land Act of a declaration that information is restricted.

Clause 8 (Public inspection) provides that where the Environment Minister decides the maximum price that a person or authority designated as a proponent may charge for a copy of a preliminary assessment of the environmental impact of a proposal, the Minister must provide a notice in accordance with the Code of Practice in force under section 25B(1) of the AAT Act.

Clause 9 (Environmental impact statements - consultation and public inspection) provides that where the Environment Minister decides the maximum price that a proponent may charge for a copy of a draft environmental impact statement, the Minister must provide a notice in accordance with the Code of Practice in force under section 25B(1) of the AAT Act.

Clauses 10 and 16 (Notice of application) will relocate section 281 of the Land Act as new subsection 229(5A). It provides that the validity of an approval by the Minister to conduct a controlled activity is not affected by the failure by an applicant to erect a sign as required by subsection 229(5) of the Act.

Clause 11 (Substitution) repeals section 275 of the Land Act that dealt with review of decisions by applicants and in its place inserts a new section 275 which is similar in effect except that it refers to the Tribunal and the Code of Practice under the AAT Act.

New subsection 275(1) (Review of decisions) lists a number of ministerial decisions in relation to which the Minister must give a notice of the decision to a person that would be affected by the decision.

New subsection 275(2) provides that where the Executive decides to refuse approval to conduct a controlled activity mentioned in sections 240 or 241 of the Land Act or approves, subject to conditions, the Executive must give a notice of the decision to a person that would be affected by the decision.

New subsection 275(3) provides that where an approval is in force that a controlled activity be conducted subject to certain conditions to the satisfaction of the Minister or a specified person or body who decide that the controlled activity has not been conducted to their satisfaction, the Minister, person or body concerned must give a notice of the decision to the applicant for the controlled activity.

New subsection 275(4) provides that an application may be made to the Tribunal for a review of decision, referred to in new subsections 275(1), (2) and (3).

New subsection 275(5) requires that a notice under new subsections 275(1), (2) or (3) must be in accordance with the Code of Practice in force under subsection 25B(1) of the AAT Act.

Clause 12 (Review - objectors, third parties) amends section 276 of the Land Act to provide for review of decisions by the Tribunal. In the main, subsections 276(1), (2) and (3) of the Land Act are deleted and replaced by new subsections 276(1) and (2) that provide for application for review of decisions under sections 230, 245, 240 or 241 of the Land Act to be made to the Tribunal.

Further, new subsection 276(2) requires that a notice given under section 243 of the Land Act to a person who objected under section 237 of that Act must be in accordance with the Code of Practice in force under subsection 25B(1) of the AAT Act.

Clause 14 (Notification of objectors) Deletes subsection 278(1) of the Land Act and inserts new subsection 278(1) to the same effect of the previous subsection. The reason for the deletion is that paragraph 275(1)(b) of the Land Act (separate right of appeal against a concurring authority) has been omitted from new section 275. It also amends subsection 278(2) of the Land Act to delete the reference to Appeals Board and include the Tribunal.

Clause 15 (Notification of applicants) amends section 279 of the Land Act to delete the reference to Appeals Board and include the Tribunal and to make consequential amendment to subsection 279(3).

Clause 16 (Repeal) repeals sections 280 and 281 of the Land Act. The substance of section 280 has been included in new subsection 28(2A) of the AAT Act.

Clause 17 (Substitution) repeals Part VIA of the Land Act which established the Land and Planning Appeals Board and includes new 'Part VIA - Administrative Appeals' comprising new section 232A (Review of decisions).

New section 282A (Review of decisions) lists decisions that are subject to review by the Tribunal. Subsection 282A(1) lists decisions made by the Minister, subsection 282A(2) lists decisions by the Executive, subsection 282A(3) lists decisions by the Heritage Council, subsection 282A(4) lists decisions made by the Environment Minister and subsection 282A(5) provides that an application may be made to the Tribunal for review of the decisions listed in subsections 282A(1), (2), (3) or (4). It also enables appeal to the Tribunal for review of a decision not to register a place under paragraphs 69(1)(6) or 73(1)(6) of the Land Act in relation to Aboriginal heritage discoveries.

New review rights are provided for in respect of a decision of the Executive to consent to the surrender of a lease or to grant a person permission to extract minerals, (see new paragraphs 282A(2)(j) and (k)).

New subsection 282A(6) requires that a notice under subsections 282A(1), (2), (3), (4) and paragraphs 69(1)(6) or 73(1)(6) must be in accordance with the Code of Practice in force under subsection 25B(1) of the AAT Act.

Clause 18 (Substitution) repeals section 284 of the Land Act and includes new section 284 (Power of Administrative Appeals Tribunal and Supreme Court) which is similar in effect to repealed section 284 except that references to the Appeals Board are omitted. The section empowers the Tribunal or the Supreme Court to waive non-compliance with a requirement of the Land Act.

Clause 19 (Further amendments) effects further amendments to the Land Act that are listed in the Schedule which are of a consequential or technical nature to give effect to the policy to transfer the functions of the Appeals Board to the Tribunal.

Part III - Consequential amendments

Clause 20 (Land (Planning and Environment) Regulations) repeals regulation 23 of the Land (Planning and Environment) Regulations 1992 which refers to the remuneration of the members of the Appeals Board. Remuneration of Tribunal members will be dealt with by the Remuneration Tribunal.

Part IV - Transitional Provisions

Clause 21 (Interpretation) provides a definition provision for the 'Appeals Board' and the 'commencement date' ie, when new Part VIA of the Land Act comes into force.

Clause 22 (Certain decisions of Registrar) provides that when the Registrar of the Board has made or refused to make an order under section 256 of the Land Act in relation to controlled activities and the order is still in force or the time for review has not expired when the amending Act comes into force, the decision is deemed to have been made by the Minister.

Clause 23 (Applications) provides that any application made to the Appeals Board immediately before the amending Act comes into force shall be deemed to have been made to the Tribunal.

Clause 24 (Part-heard proceedings) provides for where the hearing of a proceeding had commenced but had not been completed by the Appeals Board at the date of transfer of matters under the Land Act to the Tribunal.

Subclause 24(1) provides that part-heard proceedings should continue to be heard in the Land and Planning Division of the Tribunal.

Subclause 24(2) provides that for the purpose of hearing a part-heard proceeding the Tribunal, subject to any direction as to procedure under section 32 of the *Administrative Appeals Tribunal Act 1989* (as amended), may have regard to any

record or evidence before the Appeals Board or any document lodged with the Appeals Board

Clause 25 (Conferences) provides that a conference held under section 282Y of the Land Act shall be taken to have been held under section 33 of the AAT Act. This is to protect what was said or done at the conference from being given in evidence at a subsequent hearing in the Tribunal, unless the parties otherwise agree.

Clause 26 (Actions of Appeals Board) provides that any order made, direction or ruling or extension of time given by the Board before new Part VIA of the Land Act comes into force, is deemed to have been made or given by the Tribunal.

Clause 27 (Production of Documents) provides that where documents are required to be provided to the Appeals Board in connection with a proceeding that has not been completed before the amending Act comes into force and the documents have not been provided to the Appeals Board, the Tribunal can take action as if it had required the documents.

Clause 28 (Completed hearing where decision not given) provides for where the Appeals Board has completed its hearing of a proceeding but has not handed down its decision at the time when this amending Bill comes into force.

Subclause 28(1) provides that in those circumstances the Land Act prior to amendment is deemed to continue to apply to the Appeals Board and to any such proceedings.

Subclause 28(2) provides that the AAT Act applies to a decision in those circumstances as if the decision were a decision of the Tribunal.

Clause 29 (Additional power of Supreme Court) provides that where the Supreme Court hears an appeal from the Appeals Board, the Court may order that the case be heard and decided again by the Tribunal. Where the Supreme Court remits the case to the Tribunal, it may have regard to any record of the case, including evidence given or submissions made or documents or things lodged, that was in the possession of the Appeals Board.