



Legislative Assembly for the ACT

STANDING COMMITTEE ON LEGAL AFFAIRS
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report

12 MARCH 2007

Report 39

TERMS OF REFERENCE

The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Zed Seselja, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

BILLS:

The Committee has examined the following Bills and offers no comments on them:

FINANCIAL MANAGEMENT AMENDMENT BILL 2007

This Bill would amend the *Financial Management Act 1996* to facilitate the efficient and effective cash management of departments by providing appropriation mechanisms to provide additional funding to agencies to pay unbudgeted abnormally high levels of employee entitlements; and for appropriations to be preserved from one financial year to the next based on an instrument signed by the Treasurer.

GOVERNMENT PROCUREMENT AMENDMENT BILL 2007

This Bill would amend the *Government Procurement Act 2001* to provide clearer and more effective arrangements for the operation of the Government Procurement Board and the procurement activities of Territory entities, including incorporating into the Act key elements from the Government Procurement (Principles) Guideline 2002.

SUBORDINATE LEGISLATIONDisallowable Instruments—No comment

The Committee has examined the following disallowable instruments and offers no comments on them:

Disallowable Instrument DI2007-42 being the **Board of Senior Secondary Studies Appointment 2007 (No. 1)** made under paragraph 8(1)(a) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as chair of the Board of Senior Secondary Studies.

Disallowable Instrument DI2007-43 being the **Board of Senior Secondary Studies Appointment 2007 (No. 2)** made under paragraph 8(1)(e) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person, after consultation with the University of Canberra, as a member of the Board of Senior Secondary Studies.

Disallowable Instrument DI2007-44 being the **Board of Senior Secondary Studies Appointment 2007 (No. 3)** made under paragraph 8(1)(d) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person, after consultation with the Australian National University, as a member of the Board of Senior Secondary Studies.

Disallowable Instrument DI2007-45 being the **Board of Senior Secondary Studies Appointment 2007 (No. 4)** made under paragraph 8(1)(f) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person, after consultation with the Association of Independent Schools, as a member of the Board of Senior Secondary Studies.

Disallowable Instrument DI2007-46 being the **Board of Senior Secondary Studies Appointment 2007 (No. 5)** made under paragraph 8(1)(j) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person, after consultation with the ACT Council of Parents and Citizens Associations Incorporated, as a member of the Board of Senior Secondary Studies.

Disallowable Instrument DI2007-47 being the **Board of Senior Secondary Studies Appointment 2007 (No. 6)** made under paragraph 8(1)(k) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person, after consultation with the Association of Parents and Friends of ACT Schools Incorporated, as a member of the Board of Senior Secondary Studies.

Disallowable Instrument DI2007-48 being the **Board of Senior Secondary Studies Appointment 2007 (No. 7)** made under paragraph 8(1)(l) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person, after consultation with the ACT and Region Chamber of Commerce and Industry, as a member of the Board of Senior Secondary Studies.

Disallowable Instrument DI2007-49 being the **Board of Senior Secondary Studies Appointment 2007 (No. 8)** made under paragraph 8(1)(m) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person, after consultation with the Trades and Labour Council of the ACT Incorporated, as a member of the Board of Senior Secondary Studies.

Disallowable Instrument DI2007-50 being the **Road Transport (General) (Vehicle Registration) Exemption 2007 (No. 1)** made under section 13 of the *Road Transport (General) Act 1999* determines that specified hybrid cars may be operated as hire cars.

Disallowable Instrument DI2007-51 being the **Attorney General (Fees) Amendment Determination 2007** made under section 13 of the *Court Procedures Act 2004* amends DI2006-141 and determines fees payable for the issue of a subpoena in a civil proceeding.

Disallowable Instruments—Comment

The Committee has examined the following disallowable instruments and offers these comments on them:

Is this instrument authorised by the legislation?

Disallowable Instrument DI2007-40 being the **Exhibition Park Corporation Board Appointment 2007 (No. 1)** made under section 9 of the *Exhibition Park Corporation Act 1976* appoints a specified person as a member of the Exhibition Park Corporation Board.

This instrument states that it is made under section 9 of the *Exhibition Park Corporation Act 1975*. That section provides:

9 Governing board members

The governing board has at least 7, but not more than 9, members.

Note 1 A chair and deputy chair of the governing board must be appointed under the *Financial Management Act 1996*, s 79.

Note 2 The chief executive officer of the corporation is a member of the governing board (see *Financial Management Act 1996*, s 80 (4)).

The Committee notes that there is no formal power in section 9 for the Minister to appoint members of the governing board. As a result, the Committee queries the formal basis of the appointment.

Minor drafting issue – Inadequate Explanatory Statement?

Disallowable Instrument DI2007-41 being the Health Professionals (Fees) Determination 2007 (No. 10) made under section 132 of the *Health Professionals Act 2004* determines fees payable for the purposes of the Act.

The Committee notes that this instrument is made (and signed) by the President of the ACT Nursing and Midwifery Board. That being so, the Committee queries why the Schedule to the instrument contains a space for the “Deputy President’s initials”.

The Explanatory Statement to this instrument gives no indication as to whether this instrument provides for new fees or increased fees, nor does it provide any justification for any new fees or any increase in fees. As the Committee has previously stated, the Committee considers that it is useful if Explanatory Statements in relation to fees determinations contain this information.

Subordinate Laws—No comment

The Committee has examined the following subordinate laws and offers no comment on them:

Subordinate Law SL2007-1 being the Health Professionals Amendment Regulation 2007 (No. 1) made under the *Health Professionals Act 2004* provides for the transfer of 9 regulated allied health professions to the Act.

Subordinate Law SL2007-2 being the Road Transport (Vehicle Registration) Amendment Regulation 2007 (No. 1) made under the *Road Transport (Vehicle Registration) Act 1999* amends the Road Transport (Vehicle Registration) Regulation 1999 and determines that it is an offence for a person to drive a registrable vehicle on a road or road-related area without a current registration label attached to the vehicle.

Subordinate Law SL2007-3 being the Agents Amendment Regulation 2007 (No. 1) made under the *Agents Act 2003* exempts a specified association, and its employees, from the requirement to have a real estate agent’s licence when providing tenancy management for low-income earners on behalf of ACT Housing.

REGULATORY IMPACT STATEMENT

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 5 March 2007, concerning comments made in Scrutiny Report 36 in relation to the Freedom of Information Amendment Bill 2006.
- The Minister for Industrial Relations, dated 8 March 2007, in relation to comments made in Scrutiny Report 38 concerning Disallowable Instrument DI2006-268, being the Long Service Leave (Building and Construction Industry) Board Appointment 2006.
- The Minister for Industrial Relations, dated 8 March 2007, in relation to comments made in Scrutiny Report 35 concerning Disallowable Instrument DI2006-229, being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2006 (No. 3), and the subsequent Government response, dated 6 February 2007.

The Committee wishes to thank the Attorney-General and the Minister for Industrial Relations for their helpful responses.

Karin MacDonald, MLA
Acting Chair

March 2007

**LEGAL AFFAIRS—STANDING COMMITTEE
(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION COMMITTEE)**

REPORTS—2004-2005-2006-2007

OUTSTANDING RESPONSES

Bills/Subordinate Legislation

Report 1, dated 9 December 2004

Disallowable Instrument DI2004-230 – Legislative Assembly (Members' Staff)
Members' Hiring Arrangements Approval 2004 (No 1)
Disallowable Instrument DI2004-231 – Legislative Assembly (Members' Staff) Office-
holders' Hiring Arrangements Approval 2004 (No 1)

Report 4, dated 7 March 2005

Disallowable Instrument DI2004-269 – Public Place Names (Gungahlin)
Determination 2004 (No 4)
Disallowable Instrument DI2004-270 – Utilities (Electricity Restriction Scheme)
Approval 2004 (No 1)
Disallowable Instrument DI2005-1 – Emergencies (Strategic Bushfire Management
Plan) 2005
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 (**PMB**)
Subordinate Law SL2004-61 – Utilities (Electricity Restrictions) Regulations 2004

Report 6, dated 4 April 2005

Disallowable Instrument DI2005-20 – Public Place Names (Dunlop) Determination
2005 (No 1)
Disallowable Instrument DI2005-22 – Public Place Names (Watson) Determination
2005 (No 1)
Disallowable Instrument DI2005-23 – Public Place Names (Bruce) Determination
2005 (No 1)
Long Service Leave Amendment Bill 2005 (**Passed 6.05.05**)

Report 10, dated 2 May 2005

Crimes Amendment Bill 2005 (**PMB**)

Report 12, dated 27 June 2005

Disallowable Instrument DI2005-73 – Utilities (Gas Restriction Scheme) Approval
2005 (No 1)

Report 14, dated 15 August 2005

Sentencing and Corrections Reform Amendment Bill 2005 (**PMB**)

Bills/Subordinate Legislation

Report 15, dated 22 August 2005

Disallowable Instrument DI2005-124 – Public Place Names (Belconnen) Determination 2005 (No 2)
 Disallowable Instrument DI2005-127 – Emergencies (Fees and Charges 2005/2006) Determination 2005 (No 1)
 Disallowable Instrument DI2005-133 – Emergencies (Bushfire Council Members) Appointment 2005 (No 2)
 Disallowable Instrument DI2005-138 – Planning and Land Council Appointment 2005 (No 1)
 Disallowable Instrument DI2005-139 – Planning and Land Council Appointments 2005 (No 2)
 Disallowable Instrument DI2005-140 – Planning and Land Council Appointments 2005 (No 3)
 Disallowable Instrument DI2005-170 – Public Places Names (Watson) Determination 2005 (No 2)
 Disallowable Instrument DI2005-171 – Public Places Names (Mitchell) Determination 2005 (No 1)
 Hotel School (Repeal) Bill 2005
 Subordinate Law SL2005-15 – Periodic Detention Amendment Regulation 2005 (No 1)

Report 16, dated 19 September

Civil Law (Wrongs) Amendment Bill 2005 (PMB)

Report 18, dated 14 November 2005

Guardianship and Management of Property Amendment Bill 2005 (PMB)

Report 19, dated 21 November 2005

Disallowable Instrument DI2005-239 - Utilities (Water Restrictions Scheme) Approval 2005 (No 1)

Report 25, dated 8 May 2006

Registration of Relationships Bill 2006 (PMB)
 Terrorism (Preventative Detention) Bill 2006 (PMB)

Report 28, dated 7 August 2006

Public Interest Disclosure Bill 2006

Report 30, dated 21 August 2006

Disallowable Instrument DI2006-154 - Architects (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-156 - Community Title (Fees) Determination 2006 (No. 1)
 Disallowable Instrument DI2006-157 - Construction Occupations Licensing (Fees) Determination 2006 (No. 1)

Bills/Subordinate Legislation

Disallowable Instrument DI2006-158 - Electricity Safety (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-159 - Land (Planning and Environment) (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-160 - Surveyors (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-161 - Unit Titles (Fees) Determination 2006 (No. 1)

Disallowable Instrument DI2006-162 - Water and Sewerage (Fees) Determination 2006 (No. 1)

Education (School Closures Moratorium) Amendment Bill 2006 (**PMB**)

Education Amendment Bill 2006 (No. 3)

Report 34, dated 13 November 2006

Disallowable Instrument DI2006-212 - Utilities (Water Restriction Scheme) Approval 2006 (No. 1)

Report 36, dated 11 December 2006

Crimes Amendment Bill 2006 (PMB)

Road Transport (Safety and Traffic Management) Amendment Bill 2006 (No. 2)

Report 37, dated 12 February 2007

Animal Welfare Legislation Amendment Bill 2006

Civil Partnerships Bill 2006

Corrections Management Bill 2006

Housing Assistance Bill 2006

Planning and Development Bill 2006

Report 38, dated 26 February 2007

Disallowable Instrument DI2006-269 - Road Transport (Driver Licensing) Driving Instruction Code of Practice 2006 (No. 1)

Disallowable Instrument DI2007-12 - Health Professionals (Fees) Determination 2007 (No. 1)

Disallowable Instrument DI2007-13 - Health Professionals (Fees) Determination 2007 (No. 2)

Disallowable Instrument DI2007-14 - Health Professionals (Fees) Determination 2007 (No. 3)

Disallowable Instrument DI2007-15 - Health Professionals (Fees) Determination 2007 (No. 4)

Disallowable Instrument DI2007-16 - Health Professionals (Fees) Determination 2007 (No. 5)

Disallowable Instrument DI2007-17 - Health Professionals (Fees) Determination 2007 (No. 6)

Disallowable Instrument DI2007-18 - Health Professionals (Fees) Determination 2007 (No. 7)

Bills/Subordinate Legislation

- Disallowable Instrument DI2007-19 - Health Professionals (Fees) Determination 2007 (No. 8)
- Disallowable Instrument DI2007-20 - Health Professionals (Fees) Determination 2007 (No. 9)
- Disallowable Instrument DI2007-21 - Mental Health (Treatment and Care) (Official Visitors) Appointment 2007 (No. 1)
- Disallowable Instrument DI2007-22 - Mental Health (Treatment and Care) (Official Visitors) Appointment 2007 (No. 2)
- Disallowable Instrument DI2007-23 - Health Professionals (Chiropractors and Osteopaths Board) Appointment 2007 (No. 1)
- Disallowable Instrument DI2007-27 - Land (Planning and Environment) Criteria for the Direct Grant of a Crown Lease for the National Zoo and Aquarium Determination 2007
- Disallowable Instrument DI2007-28 - Public Place Names (Belconnen) Determination 2007 (No. 1)
- Disallowable Instrument DI2007-30 - Nature Conservation (Flora and Fauna Committee) Appointment 2007 (No. 1)
- Disallowable Instrument DI2007-37 - Civil Law (Wrongs) Professional Standards Council Appointment 2007 (No. 1)
- Subordinate Law SL2006-53 - Gas Safety Amendment Regulation 2006 (No. 1)
- Subordinate Law SL2006-54 - Gungahlin Drive Extension Authorisation Amendment Regulation 2006 (No. 1)
- Subordinate Law SL2006-56 - Freedom of Information Amendment Regulation 2006 (No. 1)



Simon Corbell MLA

ATTORNEY GENERAL
MINISTER FOR PLANNING
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Mr Zed Seselja MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr ^{Zed}Seselja

Thank you for your Committee's Scrutiny of Bills Report No. 36 of 11 December 2006. I am writing in response to issues raised by the Committee in relation to the Freedom of Information Amendment Bill 2006. I think the Committee's extensive comments will greatly assist the Assembly's consideration of the Bill. I offer the following specific responses in relation to particular matters.

The report is correct in concluding that the government's intention is to permit the AAT to determine questions in relation to a conclusive certificate, consistent with similar provisions in the Commonwealth Act. Government amendments to the Bill are being prepared to ensure that this is given effect, and will include amendments not only to section 62, as noted in the Committee's report, but also to a number of other relevant provisions.

I acknowledge the Committee's discussion on the relationship between the *Human Rights Act 2004* (HRA) and freedom of information legislation, but note that there is some uncertainty in international human rights law as to whether a positive right to access to government-held information can be said to derive from the right to freedom of expression (Article 19, ICCPR). To the extent that such a right can be implied, the right to freedom of expression is not absolute, and it is accepted that the right may legitimately be subject to reasonable restrictions. Article 19 specifies the legitimate aims that any legal restriction on the exercise of this right must pursue. These are the rights and reputation of others, national security, public order, public health and public morals.

In relation to new section 37A and the rights issues raised in the Committee's report, the government considers that the amendments, as proposed to be amended by the government, meet internationally accepted minimum standards. That is, that access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest, and where persons who are refused access have a means of challenging the refusal before an independent body.

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I also note the Committee's concerns regarding the absence of a public interest override. That is, if the AAT determines that there are not reasonable grounds for a certificate, the Minister retains the power to maintain or revoke it. I note that limitations on section 16 of the HRA are permissible if they are demonstrably justified in proportionality terms.

I consider the limitations on the right to freedom of expression in relation to information seeking in this context are justified, because the aims of the provision are necessary to ensure the security of ACT citizens and others. The provision is the least restrictive mechanism available and, with proposed government amendments, contains an oversight mechanism. That is, the AAT will have supervisory jurisdiction over the reasonableness of a certificate issued under the proposed section 37A.

This is an appropriate threshold for oversight, and reflects the analysis of the High Court in *McKinnon*. In certain situations (such as the protection of national security), it is not appropriate for the AAT to perform a 'balancing exercise' between the various interests in information. When reviewing the issue of a certificate, the AAT would consider the public interest, but may not make a determination on it. In addition, the Minister must table the notice in the Assembly to maintain the certificate, if the AAT finding is adverse and the Minister chooses not to revoke the certificate.

Amendment to FOI Act section 41

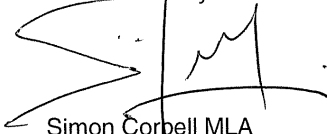
Limitations of section 16(2) of the HRA are justifiable under section 28 of the HRA. The right to freedom of expression may be limited to the protection of the privacy of others. Courts have recognised that these limits provide for an appropriate balancing of the right to respect for family life and privacy against the right to freedom of expression.¹ Protecting third parties whose privacy may be jeopardised is consistent with the HRA. Consulting with people before determining whether information should be exempt from release, on the ground that it is personal information, is proportionate and the least restrictive mechanism.

Replacement of section 23(1)

The rights of applicants under the *Freedom of Information Act 1989* (the FOI Act), to have access to documents, must be balanced with the need to ensure that the resources of government agencies are not unreasonably diverted to non-personal applications. FOI legislation has always provided a mechanism for refusal or for charging for a request when there is an unreasonable resource burden. The additional amendments will provide an incentive for organisations to be more focused in their applications. The amendments do not remove the right of people to apply for documents under the legislation.

I thank the Committee for its thorough and detailed report.

Yours sincerely



Simon Corbell MLA
Attorney General
5.3.07

¹ (*John Fairfax Publications v District Court of New South Wales* [2004] NSWCA 324; *B v United Kingdom*; *P v United Kingdom* [2001] 2 FLR 261; *Sutter v Switzerland* [1984] ECHR 2)



Andrew Barr MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR TOURISM, SPORT AND RECREATION
MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Zed Seselja
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr ~~Seselja~~ ^{Zed}

The Standing Committee on Legal Affairs in Scrutiny Report 38 of 26 February 2007 (the Report) commented on the appointment of the Chair of the Building and Construction Industry Long Service Leave Board (DI 2006-268).

The Report correctly identifies technical errors in that instrument and also notes that no explanatory statement was provided with the instrument. The Report also notes that the errors in the instrument are remedied by a new instrument (DI 2007-26).

I will endeavour to ensure these issues do not arise with future appointment instruments.

Yours sincerely

Andrew Barr MLA
Minister for Industrial Relations

- 8 MAR 2007

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Mr Zed Seselja
Chair
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Dear Mr ~~Seselja~~ ^{Zed}

I refer to my letter of 6 February 2007 regarding the Standing Committee on Legal Affairs in Scrutiny Report 35 of 20 November 2006 which commented on the appointment of members of the Default Insurance Fund Committee under Schedule 3 of the *Workers Compensation Act 1951*.

Subsequent to my letter, the Parliamentary Counsel's Office suggested that the Instrument of Appointment should explicitly state that the appointment is a standing acting appointment as provided for under section 209 of the *Legislation Act 2001*.

In line with the Parliamentary Counsel's suggestion, a revised Disallowable Instrument has been prepared

Thank you for drawing this matter to my attention.

Yours sincerely

Andrew Barr MLA
Minister for Industrial Relations

8 MAR 2007

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**Workers Compensation
Default Insurance Fund Advisory Committee - Appointment
2007**

Disallowable instrument 2007 -
made under the

Workers Compensation Act 1951, s 166 (Establishment of DI Fund)

1. Revocation of previous appointment

I revoke disallowable instrument DI2006-229, Default Insurance Fund Advisory Committee Appointment 2006.

2. Appointment

I appoint Mark Holman to act in the position of member of the Default Insurance Fund Advisory Committee during any period, or all periods, when the following appointees cannot for any reason exercise the functions of the position: Susie Walford and Peter Bradley.

3. Term of appointment

The appointment expires on 23 October 2009.



Andrew Barr

Minister for Industrial Relations

Dated **28** February 2007.