



Legislative Assembly for the ACT

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

Scrutiny Report

4 APRIL 2005

Report 6

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 Bill Stefaniak, 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:**Bills—No Comment**

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

Cemeteries and Crematoria Amendment Bill 2005
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This is a Bill to amend the *Cemeteries and Crematoria Act 2003* to make new provision for the investment of moneys in a perpetual care trust.

Gaming Machine Amendment Bill 2005

This is a Bill to amend the *Gaming Machine Act 2004* in ways that amount to technical and minor amendments, designed to ensure the proper operation of the Act and the Commission's regulation of gaming machine activity.

Insurance Authority Bill 2005

This is a Bill for an Act to repeal the *Insurance Authority Act 2000*, and to make new provision for an ACT Insurance Authority. This body would be more aligned within Treasury, similar to the Central Financing Unit and the Superannuation Unit.

Public Sector Management Amendment Bill 2005

This is a Bill to amend the *Public Sector Management Act 1994* to improve the way in which the Commissioner for Public Administration may conduct reviews of government agencies.

Statute Law Amendment Bill 2005
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This is a Bill to amend various Acts and regulations for statute law revision purposes only.

Unit Titles Amendment Bill 2005
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This is a Bill to amend the *Unit Titles Act 2001* to confer on the supreme Court power to make orders on applications for the cancellation of unit plan, taking into account the rights and interests of the unit owners.

Bills—Comment**Preliminary comment: Scrutiny of schemes of administrative regulation**

It is quite commonly the object of a Bill to create a scheme for the regulation of some activity—such as a field of commerce, or of agriculture and land use, or simply of some social activity. The means of regulation are various—such as by licensing some otherwise prohibited

activity, or of attaching penalties to the activity unless it is conducted in a particular way. The Bill will often provide for the enforcement of the scheme, sometimes by authorised officers in whom are vested powers of inspection, search, and seizure of things. There is often provision for administrative review of the relevant administrative powers.

Several of the Bills the subject of this Report are of this kind, and it is useful to state, without attempting to be exhaustive, the kinds of questions the Committee asks when examining such Bills.

The terms in which power is conferred

A Committee will review the terms in which administrative power is conferred in discharge of its function to ascertain whether “rights, liberties and/or obligations” have been made “unduly dependent upon insufficiently defined administrative powers”. In particular, the Committee is concerned with the following matters.

A power expressed in very wide terms—such as that the decision-maker simply “may” do something—does, on its face, appear to be “insufficiently defined”. A court would no doubt read down such a power so that its lawful exercise would require that the decision-maker have regard only to those matters the court, by reference to its view of the object of the Act, thinks were intended by the Act to be relevant to the exercise of the power. Nevertheless, the Committee’s term of reference indicates that the law should provide a sufficient definition of relevant (and/or irrelevant) matters.

The Committee may comment on a Bill from the perspective that where an administrative discretion is conferred, then

- as far as practicable having regard to the nature of the power, the decision-maker be required to address specific matters;
- if a generally worded residual discretion to act is desirable, that completely subjective language be avoided (and instead, for example, a power to act on “reasonable grounds” be conferred); and
- that some person or body, (preferably including the decision-maker, but perhaps some other superior authority too), be empowered to issue guidelines which state how in general the administrative discretion should be exercised. Guidelines might be prescriptive as to the range of matters the decision-maker may consider, or, in some circumstances, might leave a residual discretion to the decision-maker.

Review of an exercise of administrative power

The Committee is also required to ascertain whether “rights, liberties and/or obligations” have been made “unduly dependent upon non-reviewable decisions”.

This invites an examination of the Bill to determine just what provision is made for review. It is now very commonly the case that the exercise of any power of significance—in the sense that its exercise could affect adversely a person—is subject to review by the Administrative Appeals Tribunal, or by some other similar body. The Committee might identify the absence of provision for AAT review. On the other hand, the nature of the administrative power might be such that Ombudsman review of a particular power may satisfy the policy stated in the term of reference set out above. In some cases, judicial review might be sufficient.

The exclusion of judicial review

A privative clause seeks to restrict the ordinary jurisdiction of a court to review the legality of an exercise of administrative power (including of a power to make subordinate law). The Committee has a particular concern with such provisions, and would draw attention to them.

Judges commonly speak of statutory provisions that restrict or remove the ability of a citizen to have access to the courts to challenge the acts of a state official as involving a derogation from "the ordinary rights of individuals": *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 417 per Kirby J. This is reinforced by subsection 21(1) of the *Human Rights Act 2004*:

21 Fair trial

- (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The words "rights and obligations recognised by law" give this provision an extensive application.

Displacement of the *Administrative Decisions (Judicial Review) Act 1998* could not affect the jurisdiction of the Supreme Court to issue other forms of relief, whether by way of the prerogative orders, or the equitable remedies of injunction and declaration. The main issue with displacement of the *ADJR* may lie in the abrogation of the obligation on the decision-maker to give reasons for the relevant decision.

Apart from provisions which bear directly on the scope for judicial review, the Committee is concerned with clauses which might indirectly have the same effect, such as where the Bill provides that the validity of some administrative action is not affected by reason of non-compliance with some provision of the authorising law.

The appointment of authorised officers

Where a Bill provides for appointment of authorised officers, the Committee is concerned to see that there is some stipulation of who might be appointed. The common form of provision that the person be a public servant generally raises no concern. A power to appoint "any person" would be drawn to the attention of the Assembly.

The common form to which reference has just been made may be found in the Animal Diseases Bill 2005; see subclause 64(1).

Identity cards

A Bill will commonly provide for authorised officers who may exercise some coercive power to carry and produce identity cards. Bills deal with this matter in a common way, and the Committee has not had occasion to make any comment.

The common form to which reference has just been made may be found in the Animal Diseases Bill 2005; see clause 65 (the requirement that the authorised person be given an identity card), and see clauses 67 (remaining on premises), and 70(4) (requiring name and address), for circumstances in which the card must be produced.

Powers of entry and search of premises

The conferral of such powers on authorised officers invites consideration of whether the powers amount to an “undue trespass” on personal rights and liberties. In addition, such powers impinge upon some of the rights stated in the *Human Rights Act 2004*.

The Committee has noted that powers of entry and search of premises found in bills follow a common form, and it has taken the view that this form strikes an appropriate balance between, on the one hand, the interests of the public in the enforcement of the particular administrative scheme, and, on the other, the privacy (*HRA* section 12) and property rights of the person affected.

The common form to which reference has just been made may be found in the Animal Diseases Bill 2005; see clauses 66 to 69 (powers of entry onto premises), clause 71 (power to seize things), and clauses 74 to 78 (search warrants).

The Committee does, however, examine the detail of every such scheme, and will draw attention to any power that appears to be more extensive than the common form. In terms of a general framework for valuation of search and entry powers, which will be found stated in this Report in relation to Subordinate Law SL2005-4, the Committee reviews matters such as (and without being exhaustive):

- the times at which entry to premises may be made;
- the circumstances in which consent of the owner or occupier is required;
- the powers that may be exercised by the person making the search;
- when force may be used; and
- the custody and return of things seized during a search, and access to those things by a person.

The Committee is aware that by sections 170 and 171 of the *Legislation Act 2001*, the privileges against self-incrimination and of legal professional privilege are to be taken to operate unless specifically displaced by the particular bill. The Committee may suggest a cross-reference to these provisions if that is not in the bill. Displacement or modification of these privileges would be the subject of comment.

Powers to require a person to state their name and address

Such powers impinge on the privacy rights of the person affected: *HRA* section 12. They are commonly found in regulatory laws, and often take the form found in clause 70 of the *Animal Diseases Bill 2005*:

70 Power to require name and address

- (1) An authorised person may require a person to state the person's name and home address if the authorised person believes, on reasonable grounds, that the person is committing or has just committed an offence against this Act.
 - (2) The authorised person must tell the person the reason for the requirement and, as soon as practicable, record the reason.
 - (3) The person may ask the authorised person to produce his or her identity card for inspection by the person.
 - (4) A person must comply with a requirement made of the person under subsection (1) if the authorised person—
 - (a) tells the person the reason for the requirement; and
 - (b) complies with any request made by the person under subsection (3).
- Maximum penalty: 10 penalty units.

- (5) An offence against this section is a strict liability offence.

The Committee has not identified any general concern of substance with provisions in this form. While there is an impingement on privacy, the limited nature of the power will be, in most cases, justifiable under *HRA* s 28.

Custody and return of seized things

Again, such powers found in Bills follow a common form, and the Committee has taken the view that this form strikes an appropriate balance between, on the one hand, the interests of the public in the enforcement of the particular administrative scheme, and, on the other, the privacy (*HRA* section 12) and property rights of the person affected.

The common form to which reference has just been made may be found in the *Animal Diseases Bill 2005*; see clauses 79 to 82 (return and forfeiture of things seized).

Minimisation of damage and provision for compensation

The exercise of enforcement powers may lead to damage to property, and this being so, it is desirable that there be provision requiring the relevant authority to minimise damage, and, where damage occurs, that the person affected obtain compensation. Such provisions often take the form found in clauses 83 and 84 of the Animal Diseases Bill 2005:

83 Damage etc to be minimised

- (1) In the exercise, or purported exercise, of a function under this part, an authorised person must take all reasonable steps to ensure that the authorised person, and a person assisting, causes as little inconvenience, detriment and damage as practicable.
- (2) If an authorised person, or a person assisting, damages anything in the exercise or purported exercise of a function under this part, the authorised person must give written notice of the particulars of the damage to the person the authorised person believes, on reasonable grounds, is the owner of the thing.
- (3) If the damage happens at premises entered under this part in the absence of the occupier, the notice may be given by leaving it, secured conspicuously, at the premises.

84 Compensation for exercise of enforcement powers

- (1) A person may claim compensation from the Territory if the person suffers loss or expense because of the exercise, or purported exercise, of a function under this part by an authorised person or a person assisting an authorised person.
- (2) Compensation may be claimed and ordered in a proceeding for—
 - (a) compensation brought in a court of competent jurisdiction; or
 - (b) an offence against this Act brought against the person making the claim for compensation.
- (3) A court may order the payment of reasonable compensation for the loss or expense only if it is satisfied it is just to make the order in the circumstances of the particular case.
- (4) A regulation may prescribe matters that may, must or must not be taken into account by the court in considering whether it is just to make the order.

The Report will now turn to the Bills calling for comment.

The Committee has examined the following Bills and offers these comments on them.

Animal Diseases Bill 2005

This is a Bill to repeal the *Animal Diseases Act 1993* to take account of developments in animal health issues such as the National Livestock Identification System (NLIS), and to ban the feeding of swill to livestock.

Report under section 38 of the Human Rights Act 2004

Strict liability offences

Summation

The provision for strict liability offences raises issues canvassed in *Report No 2 of the 6th Assembly*. In essence, the issue is whether the derogation from the presumption of innocence (*HRA* s 22(1)) is justified by reason of the nature of the activity the subject of the offence (*HRA* s 28(1)).

Provision for strict liability offences are to be found in subclauses 23(3), 34(2), 46(2), 47(3), 49(2), 51(2), 70(5), 71(6), and 72(4).

In no case does the maximum punishment exceed 50 penalty points. (The Committee is of the view that 50 penalty points should be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Report No 2 of the 6th Assembly*.)

The Committee also notes the justification stated in the Explanatory Statement:

Offences incorporating strict liability elements are carefully considered when developing legislation and generally arise in a regulatory context where for reasons such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that people engaged in the conduct of for example selling animals, can be expected to be aware of their duties and obligations.

Aspects of the regulatory scheme

Summation

- Nearly all significant powers are subject to review by the AAT. The one omission concerns the giving of a direction under clause 14 to control the spread of exotic diseases.
- An issue arises out of clause 26, a widely drawn privative clause. The issue is whether this is in breach of *HRA* subsection 21(1), the right to have rights and obligations recognised by law decided by a competent, independent and impartial court or tribunal. If conflict arises, the issue is then whether this is justifiable under *HRA* section 28.
- An issue arises out of paragraph 66(1)(e), which would permit an authorized officer, without a warrant, to enter residential premises without the consent of the owner, if necessary with the use of force as permitted in subclause 66(7). The issue is whether this degree of conflict with rights of privacy and property is warranted under *HRA* section 28 by the nature of the power and the circumstances in which it may be used.

In the light of the preliminary comment above, the Committee notes the following:

Review of administrative powers under the Bill. Nearly all significant powers are subject to review by the AAT. The one omission concerns the giving of a direction under clause 14 to control the spread of exotic diseases. A very similar power under clause 18 in relation to the control of endemic disease is subject to AAT review. It is not apparent why the two powers are treated differently.

Clause 26 is a widely drawn privative clause, aimed at excluding judicial review of an exercise of power by the Minister under clause 19 to declare an area to be an exotic disease quarantine area. On its face, clause 26 is in conflict with *HRA*sub section 21(1), which states the right to have rights and obligations recognised by law decided by a competent, independent and impartial court or tribunal.

If conflict arises, the issue is then whether this is justifiable under *HRA* section 28, which permits rights to be subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

The Committee notes that the Explanatory Statement does not address this issue.

Enforcement powers. Generally, the powers of entry and search follow the common pattern, and the Committee sees no general rights objection. It draws attention, however, to one aspect of the power to enter premises; (this power impinges on several rights in the *HRA* (in particular, to privacy (s 12), or on other rights, such as to property). Generally, this clause is in the commonly used form, but paragraph 66(1)(e), when seen with subclause 66(7), contains an uncommon power.

66 Power to enter premises

(1) For this Act, an authorised person may—

- (a) at any reasonable time, enter premises if the authorised person suspects, on reasonable grounds—
 - (i) that an animal, animal product or thing at the premises is, or the premises are, infected with a disease; or
 - (ii) that entry to the premises is necessary to prevent or control the spread of disease; or
- (b) at any reasonable time, enter premises that the public is entitled to use or that are open to the public (whether or not on payment of money); or
- (c) at any time, enter premises with the occupier's consent; or
- (d) enter premises in accordance with a search warrant; or
- (e) at any time, enter premises if the authorised person believes, on reasonable grounds, that the circumstances are so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary.

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- (2) However, subsection (1) (a) or (b) does not authorise entry into a part of premises that is being used only for residential purposes.
 - (3) An authorised person may, without the consent of the occupier of premises, enter land around the premises to ask for consent to enter the premises.
 - ...
 - (7) For subsection (1) (e), the authorised person may enter the premises with any necessary and reasonable assistance and force.

Under paragraph 66(1)(e), and with the use of force as permitted in subclause 66(7), the authorised officer may without a warrant enter residential premises without the consent of the owner.

The issue is whether this degree of conflict with rights of privacy and property is warranted by the nature of the power and the circumstances in which it may be used. The Explanatory Statement does not deal with this issue.

Operation of a statutory instrument before its notification.

Generally, a registrable instrument will commence on the day after its notification on the Legislation Register (*Legislation Act 2001*, paragraph 73(2)(a)), but an Act may provide for its commencement at an earlier date or time (*Legislation Act 2001*, paragraph 73(2)(d)). Given that the general rule recognizes the policy that the citizen should be able to ascertain the law, a use of the power in *Legislation Act 2001*, paragraph 73(2)(d) calls for comment.

By clause 10 of the Bill, declarations under Part 3, in relation to controlling the spread of exotic and endemic diseases, may operate before its notification on the Legislation Register. This may occur, however, only in closely circumscribed conditions and in conjunction with an obligation on the Minister to make the fact of the declaration having been made known to the media.

In these circumstances, the Committee does not see an issue of concern, but draws the matter to the attention of the Assembly.

Is there an inappropriate delegation of legislative power?—Para 2(c)(iv)

The Committee notes that under subclause 90(3), a regulation made under the Act may “create offences and fix maximum penalties of not more than 10 penalty units for the offences”

Given the significance of the power to create an offence, the Committee draws to the attention of the Assembly the question whether it is appropriate for a law of this kind to be made by regulation.

Long Service Leave Amendment Bill 2005

This is a Bill to amend the *Long Service Leave Act 1976* to enable private sector workers in the ACT to have improved access to long service leave entitlements. In particular, the Bill would

ensure that temporary breaks in employment through the seasonal nature of the work are not regarded as affecting the employee's continuity of service with an employer; allow employees to access their long service leave entitlements after 7 years of continuous service; and amend the offence and related provisions as part of the Criminal Code harmonisation project.

Report under section 38 of the Human Rights Act 2004

Summation

The provision for strict liability offences raises issues canvassed in *Report No 2 of the 6th Assembly*. In essence, the issue is whether the derogation from the presumption of innocence (*HRA* s 22(1)) is justified by reason of the nature of the activity the subject of the offence (*HRA* s 28(1)).

In no case does the maximum punishment exceed 50 penalty points. (The Committee is of the view that 50 penalty points should be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Report No 2 of the 6th Assembly*.)

Some provisions of the Bill creating offences of strict liability are designed to harmonise the existing offence provisions of the Act with the *Criminal Code 2002*.

The Committee has examined the amendments and notes that the proposed amendments of sections 6, 8 and 12 of the Act would convert the relevant offences to ones of strict liability. In relation to section 13E, it is not clear whether it contains an offence provision, but, in any event, failure to comply with a notice to an employer to comply is now an offence of strict liability.

The Explanatory Statement provides a justification for the imposition of strict liability in relation to all these provisions. For example, in relation to the amendment to section 6 (see Schedule 1.2 of the Bill), the Explanatory Statement states:

The application of strict liability reflects the policy that employers should not be able to evade their responsibilities under the Act by claiming that they were unaware that their employees had become eligible to take long service leave.

In relation to the amendment to section 12 (see Schedule 1.5 of the Bill), the Explanatory Statement states:

All the offences in section 12 are strict liability offences, to reflect the public interest in ensuring that employers meet their obligations under the principal Act. Defences such as neglect, oversight or lack of intention will not be a sufficient excuse for an employer who fails to maintain proper employee records that are essential for determining employee entitlements to long service leave.

The Committee also notes in relation to subsection 13B(3), that a "reasonable excuse" defence is removed. No justification is offered, but the Committee notes that imposition of strict liability for this kind of offence is now standard, and the penalty is 1 penalty point.

Pest Plants and Animals Bill 2005

This is a Bill for an Act to control and regulate pest plants and animals. In the main, it would establish a system for declarations of pest plants and pest animals; provide for the development of management plans for declared pest plants and pest animals; and prohibit the supply of certain pest plants or pest animals, or material contaminated with certain declared pest plants or pest animals. The Act would repeal and replace Part 6, Division 3 of the *Land (Planning and Environment) Act 1991*.

Report under section 38 of the Human Rights Act 2004

Strict liability offences

Summation

The provision for strict liability offences raises issues canvassed in *Report No 2 of the 6th Assembly*. In essence, the issue is whether the derogation from the presumption of innocence (*HRA* s 22(1)) is justified by reason of the nature of the activity the subject of the offence (*HRA* s 28(1)).

Provision for strict liability offences are to be found in subclauses 10(2), 35(5), and 36(5).

In no case does the maximum punishment exceed 50 penalty points. (The Committee is of the view that 50 penalty points should be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Report No 2 of the 6th Assembly*.)

The Committee also notes the justification stated in the Explanatory Statement:

... where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that people engaged in the conduct of for example a business of supplying plants, as opposed to members of the general public who purchase plants from a commercial supplier, can be expected to be aware of their duties and obligations.

Stock Bill 2005

This is a Bill for an Act to regulate the keeping and movement of animals in stocks. Two significant aspects of the scheme are the impounding provisions, and the permit system for travelling stock. The Bill would repeal the *Stock Act 1991*.

Report under section 38 of the Human Rights Act 2004

Strict liability offences

Summation

The provision for strict liability offences raises issues canvassed in *Report No 2 of the 6th Assembly*. In essence, the issue is whether the derogation from the presumption of innocence (*HRA* s 22(1)) is justified by reason of the nature of the activity the subject of the offence (*HRA* s 28(1)).

Provision for strict liability offences are to be found in subclauses 9(2), 10(2), 21(3), 22(2), 23(4), 25(2), 26(2), 28(2), 29(3), 30(2), 43(3), 47(4), and 53(5).

In no case does the maximum punishment exceed 50 penalty points. (The Committee is of the view that 50 penalty points should be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Report No 2 of the 6th Assembly*.)

The Committee also notes the justification stated in the Explanatory Statement:

... where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that people engaged in the conduct of for example marking stock, can be expected to be aware of their duties and obligations.

Aspects of the regulatory scheme

Summation

Nearly all significant powers are subject to review by the AAT. No review is provided in relation to a travelling stock permit under part 4. While perhaps the nature of the activity for which the permit is sought renders any tribunal review not practicable, provision for a form of internal review would seem feasible, and would enhance the object of *HRA* subsection 21(1).

Part 4 of the Bill provides for a person to apply to the chief executive for a permit to travel stock. There is no provision in the Bill for review by the AAT of a decision of the chief executive. Given the nature of the activity of travelling stock, which it might be thought could not be delayed too long, it may not be feasible to provide for review by the AAT. On the other hand, some form of internal review would be inexpensive and quick and would provide an appropriate level of review of decision-making in relation to travelling stock. The Committee notes that the Tree Protection Bill 2005 provides for reconsideration of some decisions within the agency that made the decisions, and it suggests that a similar scheme might be adopted in relation to travelling stock permits.

Is there an inappropriate delegation of legislative power?—Para 2(c)(iv)

The Committee notes that under subclause 70(3), a regulation made under the Act may “create offences and fix maximum penalties of not more than 10 penalty units for the offences”

Given the significance of the power to create an offence, the Committee draws to the attention of the Assembly the question whether it is appropriate for a law of this kind to be made by regulation.

Tree Protection Bill 2005

This is a Bill to create a scheme for the control and regulation of tree damaging activities. It contains provisions for the establishment of a register of trees of high importance with appropriate levels of protection, and of comprehensive tree protection measures to be applied in areas where urban forest values are at risk of degradation; for approval of tree damaging activities, of groundwork activities within the tree protection zone of a protected tree, and of tree management plans; for offence and enforcement provisions; for the Conservator of Flora and Fauna (the Conservator) to make directions with regard to tree protection matters; and to establish a Tree Advisory Panel. The Bill would repeal the *Tree Protection (Interim Scheme) Act 2001*.

Report under section 38 of the Human Rights Act 2004

Protection of property interests balanced against community interest in the preservation of trees

Summation

In a general sense, the rights issue arising from this Bill is whether such diminution or interference with a person’s right to use their property as might occur in the exercise of powers conferred by the Bill are such as to be “demonstrably justified in a free and democratic society”. In this latter respect, regard might be had to the objects of the *Environment Protection Act 1997* and of the *Heritage Act 2004*.

The exercise of powers conferred by the Bill might be seen to restrict a person’s right to use and enjoy their property as they might desire. A right to property is recognised in Article 17 of the *Universal Declaration of Human Rights* (the foundational document of the international human rights framework):

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

In terms of Article 17, consideration of a countervailing public interest is probably justified by reason of the word “arbitrarily” in Article 17(2).

In the Territory, there is an additional dimension. Under paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* "the Assembly has no power to make laws with respect to: (a) the acquisition of property otherwise than on just terms; ...". This right is, however, narrower than the broader right to property stated in Article 17 of the *Universal Declaration*. Whether it would apply to the restrictions placed by the Bill on dealing with trees is debatable. In relation to section 23, there is no balancing of a countervailing public interest.

If the restrictions placed by the Bill on dealing with trees are viewed as a deprivation of property, or of some allied interest warranting protection, the question would then be whether this was justified by some countervailing public interest. The way in which this question has been addressed by the European Court of Human Rights may be seen from this comment in N Jayawickrama, *The Judicial Application of Human Rights Laws* (2002) at 914:

The concept of 'deprivation' covers not only formal expropriation, but also de facto expropriation, i.e. a measure which can be assimilated to a deprivation of property. The withdrawal of a permit to exploit a gravel pit on one's land may constitute a deprivation of property since it would seriously affect its value, but where the aim of revocation is the preservation of nature in the general interest, the measure will be considered as a control of the use of property [*Fredin v Sweden* (1991) 13 EHHR 784].

In terms of the countervailing public interest, regard might be had to the objects of the *Environment Protection Act 1997*. Some relevant parts of this statement follow:

3 Objects

(1) The particular objects of this Act are—

- (a) to protect and enhance the quality of the environment; and
- (b) to prevent environmental degradation and adverse risks to human health and the health of ecosystems by promoting pollution prevention, and
- ...
- (g) to promote the principles of ecologically sustainable development; and
- (h) to regulate, reduce or eliminate the discharge of pollutants and hazardous substances into the air, land or water consistent with maintaining environmental quality; and
- ...
- (m) to adopt a precautionary approach when assessing environmental risk to ensure that all aspects of environmental quality, including ecosystem sustainability and integrity and beneficial use of the environment, are considered in assessing, and making decisions in relation to, the environment;
- ...

and this Act must be construed and administered accordingly.

- #### (2) For subsection (1) (g), ecologically sustainable development is to be taken to require the effective integration of economic and environmental considerations in decision-making processes and to be achievable through implementation of the following principles:

- (a) the precautionary principle, namely, that if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (b) the inter-generational principle, namely, that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (c) conservation of biological diversity and ecological integrity;
- (d) improved valuation and pricing of environmental resources.

Conservation of trees has a role to play in diluting the effects of pollution. There is also a dimension of heritage protection. In this regard, note should be taken of paragraph 3(1)(a) of the *Heritage Act 2004*:

(1) The main objects of this Act are as follows:

- (a) to establish a system for the recognition, registration and conservation of natural and cultural heritage places and objects, including Aboriginal places and objects;
- ...

Strict liability offences

Summation

The provision for strict liability offences raises issues canvassed in *Report No 2 of the 6th Assembly*. In essence, the issue is whether the derogation from the presumption of innocence (*HRA* s 22(1)) is justified by reason of the nature of the activity the subject of the offence (*HRA* s 28(1)).

Provision for strict liability offences are to be found in subclauses 15(5), 16(5), 18(3), 28(3), 84(4), 89(5), and 90(5).

Except in relation to clause 15, in no case does the maximum punishment exceed 50 penalty points.

The Committee also notes that is only in relation to clause 15 that a justification stated in the Explanatory Statement:

Clause 15 establishes the offence of damaging protected trees. The question of whether a tree is a protected tree is a matter of strict liability. This is to reflect the policy that people should take care to ensure that trees they are working on are not protected, or that they have the relevant approvals to do the work. The maximum penalty for the offence depends on the level of the mental element the person had in relation to causing the damage. Intentional damage carries the most serious penalty, while the strict liability offence carries the lowest.

This justification applies to most of the other offences.

The Committee draws attention in particular to the penalties which may apply in relation to the strict liability offences under subclauses 15(1) (400 penalty points), 15(2) (200 penalty points), and 15(3) (100 penalty points). The strict liability element of these offences is the issue of whether the relevant tree is a protected tree. The Committee is of the view that 50 penalty points should be taken as a guide to the appropriate maximum level of punishment for strict liability: see *Report No 2 of the 6th Assembly*.

If the level of penalty was seen to be excessive, then this might be seen as a breach of *HRA* section 10. The Committee has noted that “[i]n various jurisdictions around the world it is a constitutional principle that no person should be subjected to a grossly disproportionate sentence”: D van Zyl Smit and A Ashworth, “Disproportionate Sentences as Human Rights Violations” (2004) 67 *Modern Law Review* 541 at 541.

The Committee draws these matters to the attention of the Assembly.

Aspects of the regulatory scheme

Summation

The Committee commends the provision made for the statement of guidelines and criteria to structure and confine the exercise of significant powers.

The significant administrative powers are subject to review by the AAT. The Assembly may wish to consider whether adequate provision is made for members of the public to participate in the decision-making processes surrounding administrative decisions made under the scheme.

The scope of administrative discretion. The Committee commends the provision made for the statement of guidelines and criteria to structure and confine the exercise of significant powers; see clauses 19, 29, 36, 43 and 73.

Review of administrative powers under the Bill. The significant administrative powers are subject to review by the AAT; see Part 13. Many of these powers are in the first place subject to formal reconsideration involving an initial ‘in-house’ process involving the Tree Advisory Panel and the Conservator.

The Assembly may wish to consider whether adequate provision is made for members of the public to participate in the decision-making processes surrounding administrative decisions made under the scheme.

Incorporation by reference

Summation

The effect of clauses 110 to 112 is to displace, in limited circumstances, the operation of section 46 of the *Legislation Act 2001*. To this extent, the right of a person to ascertain and gain access to the text of a law is qualified. The issue is whether this is justifiable in the circumstances.

Basic to the protection and enforcement of rights of any kind is the ability of a person to ascertain the law. A problem arises when a law would itself incorporate into its terms the text of some other document, or would permit the maker of a statutory instrument to incorporate into its terms the text of some other document.

This problem has been addressed in section 46 of the *Legislation Act 2001*, which operates where a law incorporates into its text the text of some document as it exists from time to time. The effect of subsection 47(6) is that the text of the incorporated document, as it is from time to time, must be published in the legislation register. The policy objective here is that the public may thus ascertain just what the law of the Territory is as it stands at a particular time. A member of the public need only consult the legislation register. This is an important safeguard of the basic right of a person to ascertain the law. Displacement of subsection 47(6) thus raises a rights issue, and where it is proposed by a Bill, the Committee looks for a justification in the Explanatory Statement.

Clauses 110 to 112 of the Bill provide in effect for an alternative scheme. Its major elements are described very briefly in the Explanatory Statement:

Clause 110 enables statutory instruments under this Act to refer to instruments that are in force from time to time. An Australian Standard is an example of such a document.

Clause 111 requires the Chief Executive to make any incorporated documents publicly available.

Clause 112 requires the Chief Executive to notify any amendment or replacement to an incorporated document. An incorporated document is a notifiable instrument.

(This explanation of clause 122 seems to contain an error. It is an incorporated document notice which is a notifiable instrument.)

In brief, the alternative to compliance with section 46 of the *Legislation Act 2001* is the notification (on the Legislation Register) of an incorporated document notice, which notice would inform the public how to gain access to the incorporated document.

The Explanatory Statement does not explain why this alternative is thought desirable.

The Committee draws this matter to the attention of the Assembly.

Equality before the law

Summation

Comparison of clauses 61 and 62 reveals an apparent breach of *HRA* section 8 (right to equal treatment under the law). This may be justifiable under *HRA* section 28.

Part 6 of the Bill provides for the creation of a tree register, and by clause 41 a person may, without charge, inspect and make a copy of all or part of the tree register. But by clause 42, the conservator may, under clause 61 or clause 62, restrict the publication of certain information. Clause 61 applies to all trees other than “an Aboriginal heritage tree” as that is defined in

subclause 62(4). There is some difference in substance in the way clauses 61 and 62 operate. The definition of “Aboriginal heritage tree” operates by reference to the significance of the tree as that is perceived by Aboriginal people, either generally or by of the area where the tree is located.

Section 8 of the *Human Rights Act 2004* provides:

8 Recognition and equality before the law

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The Committee appreciates that difference in treatment of persons on the basis of their race may well be justified under *HRA* section 28. It is aware that the law of the Territory does treat Aboriginal heritage matters differently to similar non-Aboriginal heritage matters, and that a body of reports and commentary offers justification for so doing.

Nevertheless, the strength of the statement of the right to equal treatment in *HRA* section 8 is such that in any case where there is, on the face of the Bill, an apparent breach of section 8, the Committee considers that the issue should be addressed in the Explanatory Statement. This is not the case in relation to clauses 61 and 62.

Is there an inappropriate delegation of legislative power?—Para 2(c)(iv)

The Committee notes that under subclause 113(2), a regulation made under the Act may “create offences and fix maximum penalties of not more than 10 penalty units for the offences”

Given the significance of the power to create an offence, the Committee draws to the attention of the Assembly the question whether it is appropriate for a law of this kind to be made by regulation.

SUBORDINATE LEGISLATION:

Disallowable Instruments—No Comment

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

Disallowable Instrument DI2005-14 being the Health Professions Boards (Procedures) Psychologists Board Appointment 2005 (No. 1) made under section 5 of the *Health Professions Boards (Procedures) Act 1981* appoints members to the Psychologists Board of the ACT.

Disallowable Instrument DI2005-16 being the Small Business Commissioner Appointment 2005 (No. 1) made under section 7 of the *Small Business Commissioner Act 2004* appoints a specified person as the Small Business Commissioner.

Disallowable Instrument DI2005-24 being the Emergencies (Bushfire Council Members) Appointment 2005 made under section 129 of the *Emergencies Act 2004* appoints specified persons as members of the Bushfire Council.

Disallowable Instrument DI2005-25 being the Road Transport (General) (Refund and Dishonoured Cheque Fees) Determination 2005 made under section 96 of the *Road Transport (General) Act 1999* revokes Disallowable Instrument DI2004-130 and determines fees payable for transactions relating to refunds and the handling of dishonoured cheque payments.

Disallowable Instrument DI2005-27 being the Road Transport (General) (Public Passenger Services Licence and Accreditation Fees) Determination 2005 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* revokes Disallowable Instruments DI2001-327 and DI2002-19 and consolidates existing fee determinations for buses, taxis, restricted taxis, private hire cars and restricted hire vehicles.

Disallowable Instrument DI2005-29 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 4) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to the ACT roads and road related areas used for the Team Mitsubishi Ralliart testing session.

Disallowable Instrument DI2005-30 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2005 (No. 3) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to the ACT roads and road related areas used when vehicles are competing in the ACT timed special (competitive) stages of the Brindabella Motor Sport Club Friday Night Special 1—Pleasuremax .

Disallowable Instruments—Comment

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

Minor drafting issue

Disallowable Instrument DI2005-20 being the Public Place Names (Dunlop) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of two geographic features in the Division of Dunlop.

The Explanatory Statement for this instrument refers to "Part 254A of the *Legislation Act 2001*" as the source of the power to delegate the power under the *Public Place Names Act 1989* that is exercised under the instrument. The Committee notes that the reference should be to *section* 254A of that Act. This error is repeated in the Explanatory Statements for DI2005-22 and DI2005-23.

Minor drafting issue

Disallowable Instrument DI2005-22 being the Public Place Names (Watson) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a new street in the Division of Watson.

See comment above.

Minor drafting issue

Disallowable Instrument DI2005-23 being the Public Place Names (Bruce) Determination 2005 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of new streets in the Division of Bruce.

See comment above.

Minor drafting issue

Disallowable Instrument DI2005-28 being the Road Transport (Public Passenger Services) Exemption 2005 (No. 1) made under subsection 64(1) of the *Road Transport (Public Passenger Services) Act 2001* exempts a specified vehicle from the definition of a hire car that prevents a bus from being a hire car and a specified person from the requirement of being accredited to operate a tour and charter service.

This instrument states that it is made under subsection 64(1) of the *Road Transport (Public Passenger Services) Act 2001*. The Committee notes that, in fact, the relevant power of exemption is contained in subsection 84(1) of that Act. The Committee also notes that, as a matter of law, a mistake made by a person exercising a power as to its source does not affect the validity of the decision if the person was otherwise authorised to make it: *Brown v West* (1990) 169 CLR 195, 203.

Subordinate Laws—No Comment

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

Subordinate Law SL2005-2 being the Criminal Code Regulation 2005 made under the *Criminal Code 2002* specifies the substances and plants that are "controlled drugs", "controlled plants" and "controlled precursors" and the quantities that apply.

Subordinate Law SL2005-3 being the Drugs of Dependence Regulation 2005 made under the *Drugs of Dependence Act 1989* replaces the Drugs of Dependence Regulation 1993 and gives legal effect to the application of schedule 1 of the Criminal Code Regulation to the Drugs of Dependence Act.

Subordinate Law SL2005-5 being the Heritage Regulation 2005 made under the *Heritage Act 2004* includes the interim heritage register entry for Aboriginal Places in the Districts of Belconnen and Majura in the heritage register.

Subordinate Law—Comment

The Committee has examined the following subordinate law and offers these comments on it:

Strict liability offences and powers to enter and inspect

Subordinate Law SL2005-4 being the Road Transport Legislation (Hire Cars) Amendment Regulation 2005 (No. 1) made under the Road Transport (Driver Licensing) Act 1999, Road Transport (General) Act 1999, Road Transport (Public Passenger Services) Act 2001, Road Transport (Safety and Traffic Management) Act 1999 and Road Transport (Vehicle Registration) Act 1999 provides for the introduction of accreditation for hire car operators, leased hire car licences and authorised vehicles for special events.

Strict liability offences

The Committee notes that the following subsections of this subordinate law expressly create strict liability offences: New subsections 18A, 21(3), 34(5), 45(5), 112(5), 126(5), 173(3), 174(2), 176(3), 179(4), 180(2), 181(2), 182(2), 183(5), 184(2), 185(2), 186(4), 188(3), 189(2), 190(3), 191(2), 192(4), 193(2), 194(6), 195(3), 196(5), 197(2), 198(3), 199(3), 200(2), 201(3), 202(2), 203(3), 204(2), 205(5), 206(2), 207(3), 208(2), 209(5), 210(2), 211(2), 212(2), 213(3), 214(3), 215(3), 217(2), 219(6), 220(3), 228(2), 230(6), 231(6), 232(5), 233(4), 234(5) and 235(5).

The Explanatory Statement to the subordinate law states:

A number of offences have been identified as strict liability offences. They include offences associated with new hire car provisions and existing offences in the *Road Transport (Public Passenger Services) Regulation 2002*. The identification of these offences as strict liability offences is consistent with other offences in the Road Transport legislation.

Strict liability offences under section 23 of the *Criminal Code 2002* means that there are no fault elements for any of the physical elements of the offence. That means that conduct alone is sufficient to make the defendant culpable.

However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Clause 23(3) of the Criminal Code provides that other defences may still be available for use in strict liability offences. Strict liability offences do not have a mental element. However, the physical actions do have a mental element of their own, for example, voluntariness. For that reason, the general common law defences of insanity and automatism still apply as they go towards whether a person has done something voluntarily, as well as whether they intended to do the act.

As noted in *Report No 2 of the Sixth Assembly*, the use of strict liability offences is a recurring issue for the Committee. In *Report No 2 of the Sixth Assembly* (at pp 5-8), the Committee set out a general statement of its concerns, as it had to the Fifth Assembly. The Committee also referred to the principles endorsed by the Senate Standing Committee for the Scrutiny of Bills in relation to strict liability offences (at p 9).

In particular, the Committee noted that, in its *Report No 38 of the Fifth Assembly*, it had proposed that where a provision of a Bill (or of a subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why a fault element (or guilty mind) is not required, and, if it be the case, explanation of why absolute rather than strict liability is stipulated;
- whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the *Criminal Code 2002*.

In *Report No 38 of the Fifth Assembly*, the Committee went on to say:

The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged. There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.

The Committee notes that, in this instance, the Explanatory Statement meets the second – but not the first – of the principles expressed by the Committee in its *report No 38 of the Fifth Assembly*. That is, it does not indicate why a fault element (or guilty mind) is not required in the case of the particular offences that are designated as strict liability offences. In this regard, the Committee notes that, in its *Report No 2 of the Sixth Assembly*, it quoted the statement of general approach contained in the Explanatory Statement to the *Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004* as an example of the kind of explanation that the Committee would prefer to see.

The Committee also notes, however, that the Explanatory Statement provides a good explanation in relation to the Committee's second principle (ie in that it provides a thorough explanation of the defences that are, nevertheless, available). The Committee also notes that none of the offence provisions in question provide for a term of imprisonment as the penalty but that 20 penalty units is the maximum penalty provided.

The Committee draws the provisions to the attention of the Assembly, as they may be considered to trespass on rights previously established by law, contrary to paragraph (a)(ii) of the Committee's terms of reference.

Powers of inspection and search

The Committee notes that new sections 229 to 235 (inserted by section 12 of this subordinate law) provide "the road transport authority, a police officer or an authorised officer" with powers of inspection, for the purposes of determining compliance with or contravention of the relevant legislation. These powers include the power to require the production of records or information (new section 230), the power to inspect maintenance facilities (new section 231) and the power to inspect and test vehicles (new section 232).

The Committee has previously referred to the principles expressed by the Senate Standing Committee for the Scrutiny of Bills in its *Fourth Report of 2000 – Entry and search provisions in Commonwealth legislation* (6 April 2000), noting (in particular) that, as a matter of common law, every unauthorized entry onto private property is a trespass. The Scrutiny of Bills Committee has pointed out that the modern authority to enter and search premises is essentially a creation of statute and, as such, it should always be regarded as an exceptional power, not a power granted as a matter of course. Further, the Scrutiny of Bills Committee has stated that any statutory provisions that authorize search and entry should conform with certain principles. These include that:

- the intrusion involved in a power of entry and search is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;
- the power to enter and search are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention;
- when granting powers to enter and search, Parliament should do so expressly, and **through primary, not subordinate, legislation**;
- a power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required;
- in considering whether to grant a power to enter and search, Parliament should take into account the object to be achieved, the degree of intrusion involved, and the proportion between the two—in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases;

The Explanatory Statement to this subordinate law does not address these criteria. Indeed, the Explanatory Statement suggests that the subordinate law amends the existing provisions in a way that widens the existing powers (see discussion of section 229, on page 9). In addition, strict liability offences are created in relation to non-compliance with the various search and inspection powers.

The Committee draws the provisions to the attention of the Assembly, as they may be considered to trespass on rights previously established by law, contrary to paragraph (a)(ii) of the Committee's terms of reference.

INTERSTATE AGREEMENTS

The Committee has not been advised of any negotiations in respect of an Interstate Agreement.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Industrial Relations, dated 11 March 2005, in relation to comments made in Scrutiny Report 1 regarding:
 - Disallowable Instrument DI2004-213 being the Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No 1); and
 - Disallowable Instrument DI2004-214 being the Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No 2).
- The Attorney-General, dated 16 March 2005, in relation to comments made in Scrutiny Report 4 regarding the Domestic Violence and Protection Orders Amendment Bill 2004.
- The Minister for Industrial Relations, dated 16 March 2005, in relation to comments made in Scrutiny Report 3 regarding the Dangerous Substances (Asbestos) Amendment Bill 2005.
- The Attorney-General, dated 16 March 2005, in relation to comments made in Scrutiny Report 4 regarding the Residential Tenancies Amendment Bill 2005.
- The Minister for Urban Services, dated 17 March 2005, in relation to comments made in Scrutiny Report 4 regarding:
 - Disallowable Instrument DI2004-266 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No 15);
 - Utilities Amendment Bill 2005; and
 - Disallowable Instrument DI2005-3 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No 1).
- The Minister for Industrial Relations, dated 21 March 2005, in relation to comments made in Scrutiny Report 2 regarding the Fair Work Contracts Bill 2004.
- The Chief Minister, dated 22 March 2005, in relation to comments made in Scrutiny Report 4 regarding Disallowable Instrument DI2004-267 being the Public Sector Management Amendment Standard 2004 (No 8).
- The Minister for Industrial Relations, dated 29 March 2005, in relation to comments made in Scrutiny Report 4, regarding Subordinate Law SL2004-56 being the Dangerous Substances (General) Regulation 2004.
- The Treasurer, dated 30 March 2005, in relation to comments made in Scrutiny Report 4, regarding Disallowable Instrument DI2004-262 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2004 (No. 5).

The Committee thanks the Chief Minister, the Attorney-General, the Treasurer, the Minister for Industrial Relations and the Minister for Urban Services for their helpful responses.

Bill Stefaniak, MLA

Chair

April 2005

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

REPORTS—2004-2005

RESPONSES

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
<u>Report 1, dated 9 December 2004</u>	
Disallowable Instrument DI2004-180 - Health Professions Boards (Procedures) Podiatrists Board Appointment 2004 (No. 1)	No. 2
Disallowable Instrument DI2004-194 - Construction Occupations Licensing (Fees) Determination 2004	No. 2
Disallowable Instrument DI2004-213 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 1)	No. 6
Disallowable Instrument DI2004-214 - Long Service Leave (Building and Construction Industry) Board Appointment 2004 (No. 2)	No. 6
Disallowable Instrument DI2004-220 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 1)	No. 4
Disallowable Instrument DI2004-221 - Nature Conservation (Flora and Fauna Committee) Appointment 2004 (No. 2)	No. 4
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)	
Disallowable Instrument DI2004-232 - University of Canberra (Courses and Awards) Amendment Statute 2004 (No. 2)	
Disallowable Instrument DI2004-246 - Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2004 (No. 1)	
Disallowable Instrument DI2004-258 - Road Transport (Offences) (Declaration of Holiday Period) Determination 2004 (No. 1)	No. 3
Subordinate Law SL2004-41 - Health Professionals Regulations 2004	No. 2
Subordinate Law SL2004-48 - Civil Law (Sale of Residential Property) Amendment Regulations 2004 (No. 1)	No. 2

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
<p><u>Report 2, dated 14 February 2005</u></p> <p>Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004 <i>Act citation: Classification (Publications, Films and Computer Games) (Enforcement) Amendment Act 2005 (Passed 8.03.05)</i></p> <p>Fair Work Contracts Bill 2004</p> <p>Government Procurement Amendment Bill 2004 <i>Act citation: Government Procurement Amendment Act 2005 (Passed 15.02.05)</i></p> <p>Justice and Community Safety Legislation Amendment Bill 2004 (No. 2) <i>Act citation: Justice and Community Safety Legislation Amendment Act 2005 (Passed 17.02.05)</i></p> <p>Water Efficiency Labelling and Standards Bill 2004 <i>Act citation: Water Efficiency Labelling and Standards Act 2005 (Passed 10.03.05)</i></p> <p><u>Report 3, dated 17 February 2005</u></p> <p>Dangerous Substances (Asbestos) Amendment Bill 2005 (Passed 17.02.05)</p> <p>Health Records (Privacy and Access) Amendment Bill 2005 (Passed 17.02.05).....</p> <p><u>Report 4, dated 7 March 2005</u></p> <p>Disallowable Instrument DI2004-260 - Health (Interest Charge) Determination 2004 (No. 1)</p> <p>Disallowable Instrument DI2004-261 - Liquor Licensing Standards Manual Amendment 2004 (No. 1).....</p> <p>Disallowable Instrument DI2004-262 - Taxation Administration (Amounts payable-Home Buyer Concession Scheme) Determination 2004 (No. 5)</p> <p>Disallowable Instrument DI2004-266 - Road Transport (General) (Application of Road Transport Legislation) Declaration 2004 (No. 15)</p> <p>Disallowable Instrument DI2004-267 - Public Sector Management Amendment Standard 2004 (No. 8)</p> <p>Disallowable Instrument DI2004-269 - Public Place Names (Gungahlin) Determination 2004 (No. 4).....</p> <p>Disallowable Instrument DI2004-270 - Utilities (Electricity Restriction Scheme) Approval 2004 (No. 1).....</p> <p>Disallowable Instrument DI2005-1 - Emergencies (Strategic Bushfire Management Plan) 2005</p> <p>Disallowable Instrument DI2005-2 - Public Sector Management Amendment Standard 2005 (No. 1)</p>	<p>No. 5</p> <p>No. 6</p> <p>No. 3</p> <p>No. 5</p> <p>No. 6</p> <p>No. 6</p> <p>No. 6</p> <p>No. 6</p> <p>No. 6</p>

Bills/Subordinate Legislation	Responses received— Scrutiny Report No.
Disallowable Instrument DI2005-3 - Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No. 1)	No. 6
Domestic Violence and Protection Orders Amendment Bill 2005 (Passed 17.03.05).....	No. 6
Land (Planning and Environment) (Unit Developments) Amendment Bill 2005 (PMB)	
Residential Tenancies Amendment Bill 2005.....	No. 6
Subordinate Law SL2004-52 - Health Professionals Amendment Regulation 2004 (No. 1).....	
Subordinate Law SL2004-53 - Supreme Court Amendment Rules 2004 (No. 4)	
Subordinate Law SL2004-56 - Dangerous Substances (General) Regulation 2004	No. 6
Subordinate Law SL2004-61 - Utilities (Electricity Restrictions) Regulations 2004.....	
Subordinate Law SL2004-64 - Civil Law (Sale of Residential Property) Amendment Regulation 2004 (No. 2).....	
Utilities Amendment Bill 2005 (Passed 17.03.05).....	No. 6
<u>Report 5, dated 14 March 2005</u>	
Disallowable Instrument DI2005-11 - Race and Sports Bookmaking (Operation of Sports Bookmaking Venues) Direction 2005 (No. 1)	
Disallowable Instrument DI2005-12 - Health Professions Boards (Procedures) Pharmacy Board Appointment 2005 (No. 1).....	
Disallowable Instrument DI2005-18 - Emergencies (Fees) Determination 2005.....	
Disallowable Instrument DI2005-8 - Community and Health Services Complaints Appointment 2005 (No. 1)	



KATY GALLAGHER MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS
MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Scrutiny of Bills and Subordinate
Legislation Committee
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr ^{Bill}~~Stefaniak~~

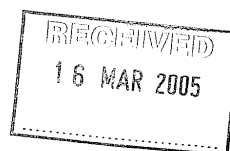
I am writing in response to an error in an explanatory statement noted by the Committee in the Scrutiny of Bills and Subordinate Legislation Committee Report No 1 of 2004 that was tabled in the Legislative Assembly on 9 December 2004.

The Committee noted that the explanatory statements to Disallowable Instruments DI2004-213 and DI2004-214 stated that the appointments made in both of these instruments to the Long Service Leave (Building and Construction Industry) Board are representing employee organisations. The Committee correctly wondered whether one of these appointments was a member representing employer organisations.

A typographical error in the explanatory statement to DI2004-213 made it appear that the instrument was appointing Mr John Haskins, a long standing representative of employer organisations on the Board, as a representative of employee associations. This explanatory statement has been replaced on the legislation register by an explanatory statement that identifies the appointment as being a representative of employer organisations.

Thank you for bringing this matter to my attention.

Yours sincerely



Katy Gallagher
Katy Gallagher MLA
Minister for Industrial Relations
11/3/05

ACT LEGISLATIVE ASSEMBLY

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Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

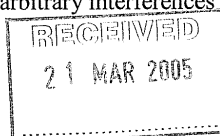
Thank you for your Scrutiny of Bills Report No. 4 of 7 March 2005. I offer the following comments in relation to the matters raised by your Committee on the Domestic Violence and Protection Orders Amendment Bill 2004.

Trespass on rights and liberties

The Committee has questioned whether this Bill unduly trespasses on rights and liberties and makes reference to a number of fundamental human rights engaged by the legislation.

It is the responsibility of the Territory to provide, as far as is practicable, effective protection from violence to ensure the right to security of the person is respected in the ACT. In doing so the government has taken into account the need to balance the rights and interests of both parties. The *Protection Orders Act 2001* is designed to ensure the safety and protection of people from violence, harassment and intimidation. In my view, the limitation on the rights of the alleged perpetrator to liberty and freedom of movement are both necessary and proportionate to achieve the aims of the legislation. Consequently, there is no incompatibility with the *Human Rights Act 2004* (HRA) on the face of the legislation or the Bill.

The Committee will also recall that it is a statutory duty of the police and the court to interpret and give effect to the *Protection Orders Act 2001* in a manner that is consistent with the HRA so far as it is possible to do so (s.30). Section 30 requires that administrative and judicial bodies must exercise their discretion consistently with human rights unless expressly authorised to act inconsistently with those rights. In addition, the *Protection Orders Act 2001* also requires the Magistrates Court, the registrar or another judicial officer to take into account any hardship that may be caused to the respondent by the making of a domestic or personal protection order. Together these safeguards provide legislative protection against arbitrary interferences with the right to liberty, privacy, and family life.



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The concept of personal injury

The Committee has raised a concern as to whether the concept of ‘personal injury’ in the Bill is appropriately defined. The Committee has also raised concerns over the expansion of the definition of domestic violence to include personal injury, and not just physical injury to someone and through the inclusion (according to the Committee) of ‘nervous shock’ as ‘personal injury’. In addressing its concern, the Committee asks the question of how a court could determine whether the aggrieved person had suffered nervous shock.

In my view, the concept of ‘personal injury’ as defined in the Bill is appropriately defined. The expansion of the definition of domestic violence to include personal injury is long overdue. The inclusion of ‘personal injury’ is compatible with current ACT legislation including the definition of ‘injury’ in the *Victims of Crime (Financial Assistance) Act 1983*. This Act defines ‘injury’ as physical or mental injury and includes mental shock or nervous shock. It would be inconsistent to recognise mental injury as one of the potential outcomes of crime, but not recognise it as a sufficient basis for a domestic violence order, which is an order intended to prevent the commission of a crime. In determining whether an aggrieved person had suffered nervous shock the court would have regard to the plethora of case law dealing with the legal concept of nervous shock, such as that espoused by Justice Windeyer in the High Court Case of *Mount Isa Mines v Pusey*. In his judgement Justice Windeyer described nervous shock as a lasting disorder of the mind or body, or some form of psycho-neurosis or psychosomatic illness, the starting point of which is usually emotional distress.

The concept of ‘nervous shock’ is not a new legal concept. The same sort of process will apply in the determination of personal injury as currently applies in the determination of physical injury where an aggrieved person seeks a personal protection or domestic violence order.

The concept of ‘relative’

The Committee has raised a concern as to whether the concept of ‘relative’ in the Bill is appropriately defined. The Committee is concerned over the proposed amendment that the definition of relative include anyone “who could reasonably be considered to be a relative of the original person” (proposed section 10A(c)(ii)), in particular, determination of a person as a ‘relative’ as explained in the example in the Bill appended to section 10A.

In my view, the concept of ‘relative’ as defined in the Bill is appropriately defined and the examples appended to section 10A are helpful in establishing who is a ‘relative’. The expansion of the definition of ‘relative’ to include anyone “who could reasonably be considered to be a relative of the original person” is an important amendment that recognises that for Aboriginal and Torres Strait Islanders, members of communities with non-English speaking backgrounds, and people with particular religious beliefs, the concept of ‘relative’ is wider than is ordinarily understood.

Restriction on publication of reports about proceedings

The Committee has raised an issue over whether proposed section 100(1) of the Act (amended by clause 33 of the Bill) is compatible with section 21 of the *Human Rights Act 2004* (HRA).

Section 100 prohibits the publication of information about the parties to a protection order hearing. Proposed section 100(1) rewords section 100 without altering its operation or effect.

Section 100 engages the rights to a fair and public trial (section 21) and freedom of expression (section 16(2)). However, where a provision interferes with a particular right or freedom, it may nevertheless be consistent with the HRA if it can be considered a reasonable limit that is justifiable in terms of section 28 of the HRA. Section 28 provides any law that interferes with a right must be reasonable and demonstrably justifiable in a free and democratic society. It must fulfil a pressing social need, pursue a legitimate aim and be proportionate to the aims being pursued.

Freedom of expression and the right to a public hearing are not absolute. The right to a public hearing, may be reasonably limited in circumstances where a public hearing would prejudice the interests of justice or trespass on the private lives of the parties (section 21(2)). The right to have judgments made public may be limited where children are involved (section 21(3)). Similarly, the right to freedom of expression may be limited to protect the rights or reputations of others.

While section 100 restricts the publication of judgments, it is not a blanket ban. It is subject to certain limits in section 101. Those limits ensure that information is available to interested parties, professionals and other courts. Courts have a discretion to circulate information to protect the public interest, promote compliance or to assist the proper functioning of the legislation (section 101(3)).

The courts have recognised that these limits provide for an appropriate balancing between the right to respect for family life and privacy and the right to a public hearing and to freedom of expression (*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).

In my view, the proposed amendment, when viewed in context, is clearly compatible with the HRA.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jon Stanhope'.

Jon Stanhope MLA
Attorney General

16 MAR 2005



KATY GALLAGHER MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
C/- Scrutiny Committee Secretary
Chamber Support Office
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Dear Mr ^{Bill} Stefaniak

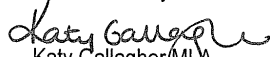
I refer to the Standing Committee on Legal Affairs Scrutiny Report No. 3 of 17 February 2005 (the Report) and the comments in the Report concerning the Dangerous Substances (Asbestos) Amendment Bill 2005 (the Bill).

The Report was prepared to inform debate on the Bill. The debate took place on 17 February 2005. The Report drew attention to the proposed amendment of section 47J (Liability of owners and occupiers to inform) in relation to section 38 of the *Human Rights Act 2004*. The purpose of the amendment was to ensure that section 47J was not interpreted as creating an obligation to actively discover the presence, location and condition of asbestos in properties (e.g. through obtaining a survey report) in order discharge the duty to inform others. Such active discovery was not the intention of section 47J when the provision was drafted in August 2004. (In contrast, see sections 47K and 47L which do require obtaining this information in specified circumstances.)

The Report noted that the removal of the words "ought reasonably to know" from section 47J arguably diminishes the legal protection of relevant persons in relation to asbestos. The Report noted, however, that without amending section 47J, owners and occupiers could potentially bear significant costs. The Report also noted that relevant persons may make their own inquiries in relation to the risks of asbestos. Further, the Report drew attention to protections afforded by sections 47K and 47L. These considerations were before Members at the commencement of the debate. The Legislative Assembly unanimously supported and passed the Bill, and the subsequent Act has now been notified and commenced.

On its introduction, the Bill was accompanied by a compatibility statement prepared by the Department of Justice and Community Safety under the provisions of the *Human Rights Act 2004* and signed by the Attorney General.

Yours sincerely


Katy Gallagher MLA
Minister for Industrial Relations
16/3/05

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Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chairperson
Standing Committee on Legal Affairs
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Stefaniak

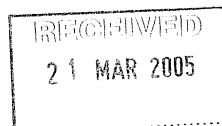
Thank you for your Scrutiny of Bills Report No.4 of 7 March 2005. I offer the following responses in relation to the matters raised by your Committee on the Residential Tenancies Amendment Bill 2005.

The Committee's concern over part 6A of the Bill dealing with tenancy databases is noted. Tenancy databases collect information on tenants. This information varies from names and addresses of tenants to information that would affect people's ability to get housing, such as whether a tenant has previously damaged property.

The Bill mitigates the privacy issues in the current operation of tenancy databases by providing a procedure to be followed before information can be put on a public tenancy database. In addition, the Bill allows an individual to apply to the Residential Tenancies Tribunal to have their personal information on a database omitted or corrected. The provisions ensure that the right to privacy is not interfered with unlawfully or arbitrarily.

The Bill does not cover internal databases as this would cover databases that would not affect people's ability to get housing. Extending the provisions to cover internal databases would cover internal databases which simply list the names of previous and current tenants and databases held by Housing ACT.

The Committee's concerns over whether proposed section 40(3) is an inappropriate delegation of legislative power are noted. Section 40(3) provides that the regulations may provide what is appropriate action to be taken under an eviction warrant. The regulations are included in the Bill for members. The regulations provide that it is appropriate action to evict a tenant between the hours of 8:00am and 6:00pm Monday to Thursday (except for Public Holidays), unless there are exceptional circumstances. This will ensure that tenants are able to access emergency accommodation.



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I trust this information addresses the Committee's concerns about the Residential Tenancies Amendment Bill 2005.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jon Stanhope', written over a horizontal line.

Jon Stanhope MLA
Attorney General

16 MAR 2005



JOHN HARGREAVES MLA

MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES
MINISTER FOR URBAN SERVICES
MINISTER FOR POLICE AND EMERGENCY SERVICES



MEMBER FOR BRINDABELLA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Bill
Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No. 4 of 7 March 2005. I offer the following response in relation to the matters raised by your Committee.

**1. Disallowable Instrument DI 2004-266 – Road Transport (General)
(Application of Road Transport Legislation) Declaration 2004 (No. 15)**

The Committee noted that the instrument incorrectly states that it is made under Section 12 of the *Road Transport (General) Act 1999* (the Act). The signed instrument correctly states that it is made under section 13 of the Act.

The incorrect reference is due to an administrative error, however the Committee's comment is noted.

2. Utilities Amendment Bill 2005

The Committee's comment in relation to the Utilities Amendment Bill 2005 have been noted.

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3. Disallowable Instrument DI2005-3 – Road Transport (Safety and Traffic Management) Parking Authority Declaration 2005 (No.1)

The Committee noted that it is not necessary to include (no.) when referring to 'section no 75A (2)' as the empowering provision. I thank you for your comments, which have been noted.

Yours sincerely



John Hargreaves
Minister for Urban Services

17 March 2005

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KATY GALLAGHER MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR CHILDREN, YOUTH AND FAMILY SUPPORT
MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Bill Stefaniak, MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr  Stefaniak

Thank you for your Scrutiny of Bills Report No. 2 of 14 February 2005. I offer the following comments in response to the matters raised in the report with respect to the Fair Work Contracts Bill 2004 (the Bill).

The report queried whether the Bill interferes with property rights. It is possible that the Committee may have overstated the effect of the Bill and its interaction with the *Human Rights Act 2004*. As the Committee noted the *Human Rights Act 2004* does not protect the right to own property. Where international instruments protect such a right, the protection is subject to the right of Nation States to restrict property use in the public interest. While the High Court has taken the position that some contractual rights are quasi-proprietary it has also emphasised that this characterisation affords those rights only some of the protections accorded to other property rights (see *Zhu v Treasurer of New South Wales* [2004] HCA 56 at paragraphs 124-126, 134-136). Even if contractual rights are protected by property rights, the Bill only affects the contractual rights of parties to the extent that those rights are unfair. This level of interference is consistent with basic principles of equity, and is proportionate to the public policy objectives of the Bill.

The report also questioned whether the restrictions placed on access to professional legal services, in clause 1.7 to Schedule 1, could infringe on the right to a fair hearing as protected by section 21 of the *Human Rights Act 2004*. In ensuring that a person receives a fair hearing it may be necessary to allow him or her access to legal representation, however this does not mean that a right to a fair hearing equates with a right to representation. In his commentary on the right to a fair trial, Peter Bailey suggests that in the case of civil proceedings the 'matter of importance is to ensure equal access by all to the courts, and a fair and enforceable determination.' (see P. Bailey *Human Rights: Australia in an International Context* (1990) at 300-301.)

The purpose behind the Bill is to provide an accessible mechanism for challenging unfair work contracts. The current costs and delays associated with Federal Court Proceedings may discourage contractors from utilising the mechanisms in *Workplace Relations Act 1996* (Cth), particularly where they are operating under contracts which provide for remuneration below award rates. The Bill reduces those barriers by using the Tribunal to focus on the factual circumstances surrounding the contract rather than legal arguments.

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By allowing parties to be represented by non-lawyers the Bill prevents disadvantage to a party who would otherwise have difficulty in presenting their own case. The tribunal can also grant leave for legal representation where that is necessary in order for the hearing to be fair. This provides the appropriate balance between ensuring parties are given the opportunity to present their case properly and keeping the proceedings in the Tribunal accessible and affordable.


The report also expressed concern that section 8 of the Bill defined work contracts too broadly, so that the Bill might apply to contracts between consumers and independent contractors. While the Bill has the potential to apply to a range of contracts it is unlikely that a dissatisfied consumer would challenge a contract through mechanisms of the Bill, rather than through the better suited mechanisms provided by the *Trade Practices Act 1974 (Cth)* or the *Fair Trading Act 1992 (ACT)*.

Section 16 of the Bill provides a range of matters which the court must consider in deciding whether a contract is unfair. These focus on the relative power of the parties to the contract, and the rate of pay under the contract. Section 18 provides some examples in which the tribunal may find that a contract is unfair. These relate to comparisons between the terms of the contract and the terms of employment contracts for similar work, monies paid by the contractor, and the public interest. These factors are not readily relevant or applicable to consumer contracts.

It is important to separate issues relating to whether the contract is unfair, from deciding whether the obligations of the contract have been fulfilled. For example; in a contract for plumbing work, the terms of the contract could be perfectly fair, even where the plumbing work itself is faulty. The Bill is concerned only with the terms of the contract for work, not the quality of the work itself, or whether the parties have met their obligations under the contract. It is this focus which limits the application of the bill.

I hope this information addresses the Committee's concerns about the Bill.

Yours sincerely


Katy Gallagher MLA
Minister for Industrial Relations
21/3/05

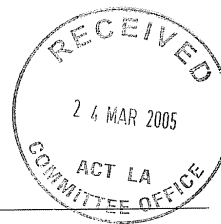


Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS

MEMBER FOR GINNINDERRA



Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
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Dear Mr Stefaniak

Thank you for providing me with Report No 4 of the Scrutiny of Bills and Subordinate Legislation Committee of 7 March 2005. I refer to comments on page 18 of that Report relating to Disallowable Instrument DI2004-267 Public Sector Management Amendment Standard 2004 (No 8).

The Committee has questioned the accessibility of previous versions of the Management Standards. As Scrutiny Report No. 4 notes, the current version of the Standards is accessible at www.psm.act.gov.au under 'legislation and standards'. Neither this website nor the ACT Legislation Register contain electronic historical consolidations of the Public Sector Management Standards, as to do would require greater resources than is currently possible to provide. The Management Standards are not kept on the ACT Legislation Registrar as they are maintained in a format that is currently incompatible with the format of other documents stored on the Register. Discussions are underway with the Office of Parliamentary Counsel to determine how best to resolve this issue within existing resource constraints.

I will be in a position to provide further advice once the discussions with the Office of Parliamentary Counsel are complete.

Yours sincerely

Jon Stanhope MLA
Chief Minister

22 MAR 2005

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KATY GALLAGHER MLA

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MINISTER FOR WOMEN MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

Mr Bill Stefaniak
Chair
Standing Committee on Legal Affairs
C/- Scrutiny Committee Secretary
Chamber Support Office
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak 

I refer to the Standing Committee on Legal Affairs Scrutiny of Bills and Subordinate Legislation Report No. 4 of 7 March 2005 (the Report) and the comments in the Report concerning the Dangerous Substances (General) Regulation 2005 ("the Regulation").

Strict liability offences

The Committee has noted that the Regulation contains a number of strict liability offences. The justification for the inclusion of strict liability offences in the Regulation is, in essence, the need to ensure that persons dealing with dangerous substances at all times act appropriately to minimise as far as possible the risk of harm to people, property and the environment from the hazards associated with dangerous substances.

The Government considers that the public interest is best served by establishing a regulatory regime that encourages people dealing with dangerous substances to develop a "safety culture" or run the risk of being found in breach of the legislation. The fostering of this safety culture would be more difficult to accomplish without the use of strict liability offences. This is consistent with the principles endorsed by the Commonwealth Scrutiny of Bills Committee of the Senate in its Sixth Report 2002, in particular, that "strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation ...". I acknowledge that a statement to this effect would have been useful to include in the explanatory statement to the Regulation.

Absolute liability offences

The Committee is incorrect in its assertion that section 447(1)(f) creates an absolute liability offence. Subsection (2) of the provision provides that absolute liability applies to only one of the elements in the offence, the element contained in paragraph (f) of section 447(1). As it does not apply to the offence as a whole, it is erroneous to categorise the offence as an "absolute liability offence". In fact, the offence in section 447(1) is a fault element offence that includes an absolute liability element. I note that the Committee commonly refers to such offences as absolute liability offences. This characterisation could give the wrong impression. It would be preferable, in my view, if the Committee did not continue to describe such offences in this way.

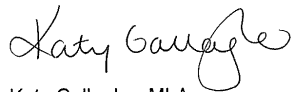
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A similar approach to drafting was taken in clause 311 of the Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Bill 2003. Page 24 of the Explanatory Statement for that Bill contains a useful explanation of the effect of providing that absolute liability applied to one element of an offence, usually the existence of a fact or circumstance, where the accused's state of mind about that fact or circumstance has no logical bearing on his or her culpability for that offence. This approach is consistent with the comments by the Committee in its Scrutiny Report No 38 of 2003, which recognises at page 14 that "absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant". Such is the case with section 447(1) of the Dangerous Substances (General) Regulation 2004.

Yours sincerely



Katy Gallagher MLA
Minister for Industrial Relations

29/3/05



Ted Quinlan MLA

DEPUTY CHIEF MINISTER

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT AND BUSINESS, MINISTER FOR TOURISM

MINISTER FOR SPORT AND RECREATION, MINISTER FOR RACING AND GAMING

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA

Chair

Scrutiny of Bills and Subordinate Legislation Committee

GPO Box 1020

CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your comments in the Standing Committee on Legal Affairs' Scrutiny of Bills and Subordinate Legislation Committee Scrutiny Report No 4 of 7 March 2005 relating to Disallowable Instrument DI2004-262 (Home Buyer Concession Scheme).

The Committee is concerned that the instrument may offend paragraph (iii) of its terms of reference, "by making rights, liberties and/or obligations unduly dependent upon non-reviewable decisions" and, for this reason, has drawn the instrument to the attention of the Assembly.

The Committee's concerns relate to the Eligible Home Buyer part of the instrument where the Commissioner may exercise a discretion to:

- extend the time for an applicant to comply with the residency requirements (paragraph (b)); and
- exempt an applicant from the requirement to be 18 years of age on the relevant date (paragraph (f) which is incorrectly referred to as paragraph (b) in the Report).

I acknowledge that paragraph numbering would assist citation of the provisions and future instruments and explanatory statements will have numbered paragraphs.

I am pleased to advise that assessments for all ACT rates and taxes are issued under the *Taxation Administration Act 1999* and the right to seek a review of an assessment or a specific decision is available in section 100 of this Act. It is not necessary for the instrument to contain this information, but it could be incorporated into future explanatory statements.

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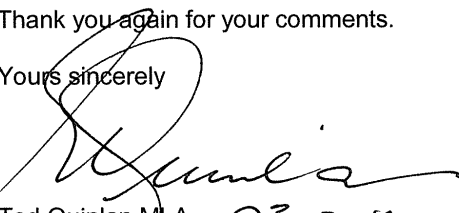
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In the case of the Home Buyer Concession Scheme, it should be noted that if the Commissioner refuses to exercise a discretion, the applicant is then not an Eligible Home Buyer and an assessment for full duty on the transaction is issued. In this case, and where an application for the Home Buyer Concession Scheme is unsuccessful for any other reason, an assessment is issued, the taxpayer is advised in writing that their application has been refused and that they have the right to object to the assessment. The grounds for objection can be that the Commissioner refused to exercise a discretion.

Thank you again for your comments.

Yours sincerely



Ted Quinlan MLA
Treasurer

13.3.05