



Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
(performing the duties of a Scrutiny of Bills and  
Subordinate Legislation Committee)

## Scrutiny Report

24 August 2009

**Report 11**

## **TERMS OF REFERENCE**

The Standing Committee on Justice and Community Safety (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 Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
- (e) 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.

## **MEMBERS OF THE COMMITTEE**

**Mrs Vicki Dunne , MLA (Chair)**  
**Ms Mary Porter AM, MLA (Deputy Chair)**  
**Ms Meredith Hunter, MLA**

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**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:

<b>COURTS AND TRIBUNAL (APPOINTMENTS) AMENDMENT BILL 2009</b>
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This is a Bill for an Act to amend the *ACT Civil and Administrative Tribunal Act 2008*, the *Magistrates Court Act 1930*, and the *Supreme Court Act 1933*, require the Executive to consult with the appropriate Legislative Assembly committee, before appointing, respectively, a presidential member of the ACT Civil and Administrative Tribunal, a magistrate or special magistrate in the Magistrates Court, or a resident judge or the master in the Supreme Court.

<b>FINANCIAL MANAGEMENT (BOARD COMPOSITION) AMENDMENT BILL 2009</b>
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This is a Bill for an Act to amend the *Financial Management Act 1996* to regulate aspects of the appointment of public servants to the boards of Territory statutory authorities, and, in particular to revoke Notifiable Instrument NI2009-310, promulgated by the Minister for Tourism, Sport and Recreation on 29 June 2009.

## GOVERNMENT AMENDMENTS

The Committee has examined the following proposed amendments to a Bill before the Assembly and has no comments to make in relation to them:

<b>LONG SERVICE LEAVE (PORTABLE SCHEMES) BILL 2009</b>
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The Minister for Industrial Relations proposes to amend the Bill by omitting subclauses 21(1) and (2) and inserting in their stead new subclauses 21(1), (2) and (2A). These provisions regulate the composition of the board of the proposed Long Service Leave Authority.

## SUBORDINATE LEGISLATION

### Disallowable Instruments—No comment

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

**Disallowable Instrument DI2009-92 being the Building (Master Builders Fidelity Fund Assets) Determination 2009 made under Schedule, clause 34(d) of the *Building (Prudential Standards) Determination 2005* allows the trustees of the Master Builders Fidelity Fund to apply funds for such other purpose as determined by the Minister, in writing.**

**Disallowable Instrument DI2009-94 being the Casino Control (Fees) Determination 2009 (No. 1) made under section 143 of the *Casino Control Act 2006* revokes DI2008-125 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-95 being the Gaming Machine (Fees) Determination 2009 (No. 1) made under section 177 of the *Gaming Machine Act 2004* revokes DI2008-126 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-96 being the Race and Sports Bookmaking (Fees) Determination 2009 (No. 1) made under section 97 of the *Race and Sports Bookmaking Act 2001* revokes DI2008-87 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-97 being the Road Transport (General) (Application of Road Transport Legislation) Declaration 2009 (No. 3) made under section 12 of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to a road or road related area that is a special stage of the 2009 Converga Safari Rally.**

**Disallowable Instrument DI2009-98 being the Lotteries (Fees) Determination 2009 (No. 1) made under section 18A of the *Lotteries Act 1964* revokes DI2008-117 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-99 being the Attorney General (Fees) Amendment Determination 2009 (No. 2) made under section 176 of the *Agents Act 2003* and section 13 of the *Court Procedures Act 2004* amends DI2008-145 as a consequence of the establishment of the ACT Civil and Administrative Tribunal.**

**Disallowable Instrument DI2009-102 being the Taxation Administration (Rates—Rebate Cap) Determination 2009 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2008-132 and determines a new rebate cap under the *Rates Act 2004*.**

**Disallowable Instrument DI2009-103 being the Taxation Administration (Rates—Fire and Emergency Services Levy) Determination 2009 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2008-134 and determines new amounts for the calculation of the fire and emergency service levy under the *Rates Act 2004*.**

**Disallowable Instrument DI2009-105 being the Electoral (Fees) Determination 2009 made under section 8 of the *Electoral Act 1992* revokes DI2008-154 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-106 being the Legal Aid (Commissioner—Law Society Nominee) Appointment 2009 made under subsection 7(3) of the *Legal Aid Act 1977* appoints a specified person, a nominee of the Law Society of the ACT, as a part-time Commissioner of the Legal Aid Commission.**

**Disallowable Instrument DI2009-108 being the Nature Conservation (Fees) Determination 2009 (No. 1) made under section 139 of the *Nature Conservation Act 1980* revokes DI2008-151 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-109 being the Water Resources (Fees) Determination 2009 (No. 1) made under section 107 of the *Water Resources Act 2007* revokes DI2008-153 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-110 being the Environment Protection (Fees) Determination 2009 (No. 1) made under section 165 of the *Environment Protection Act 1997* revokes DI2008-230 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-111 being the Taxation Administration (Amounts Payable—Eligibility—Pensioner Duty Concession Scheme) Determination 2009 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2008-288 and determines, for the purposes of the scheme, the eligibility criteria, the conditions, the method of calculation of duty payable and the time limit for applications.**

**Disallowable Instrument DI2009-112 being the Taxation Administration (Amounts Payable—Thresholds—Home Buyer Concession Scheme) Determination 2009 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2008-285 and determines the property value threshold amounts applicable to the calculation of concessional duty.**

**Disallowable Instrument DI2009-113 being the Taxation Administration (Amounts Payable—Eligibility—Home Buyer Concession Scheme) Determination 2009 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2008-286 and determines, for the purposes of the scheme, the income test and thresholds, the eligibility criteria, the conditions, the method of calculation of duty payable and the time limit for applications.**

**Disallowable Instrument DI2009-114 being the Taxation Administration (Amounts Payable—Thresholds—Pensioner Duty Concession Scheme) Determination 2009 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2008-287 and determines the property value threshold amounts for the calculation of concessional duty.**

**Disallowable Instrument DI2009-115 being the Health Professionals (Fees) Determination 2009 (No. 3) made under section 132 of the *Health Professionals Act 2004* revokes DI2009-130 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-117 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2009 made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2008-300 and determines the conditions under which Members may employ staff and engage consultants or contractors.**

**Disallowable Instrument DI2009-118 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2009 made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2008-301 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors.**

**Disallowable Instrument DI2009-119 being the Occupational Health and Safety Council (Acting Employee Representative) Appointment 2009 (No. 1) made under paragraph 14(a) of the *Occupational Health and Safety Act 1989* revokes DI2007-277 and appoints a specified person as an acting member of the Occupational Health and Safety Council, representing employees.**

**Disallowable Instrument DI2009-120 being the Occupational Health and Safety Council (Member) Appointment 2009 (No. 2) made under subsection 14(c) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member of the Occupational Health and Safety Council.**

**Disallowable Instrument DI2009-121** being the Occupational Health and Safety Council (Member) Appointment 2009 (No. 1) made under paragraph 14(c) of the *Occupational Health and Safety Act 1989* appoints a specified person as a member of the Occupational Health and Safety Council.

**Disallowable Instrument DI2009-122** being the Road Transport (General) (Vehicle Registration) Exemption 2009 (No. 2) made under section 13 of the *Road Transport (General) Act 1999* exempts a specified vehicle from the provisions of subsection 32B(2) of the *Road Transport (Vehicle Registration) Regulation 2000*, to allow the vehicle to be registered for the first time as a 4 year old vehicle.

**Disallowable Instrument DI2009-123** being the Road Transport (Safety and Traffic Management)) Parking Authority Declaration 2009 (No. 2) made under subsection 75A(2) of the *Road Transport (Safety and Traffic Management) Regulation 2000* repeals DI2008-190 and declares a specified organisation to be a parking authority for the area of blocks 19 and 20, section 63, City.

**Disallowable Instrument DI2009-124** being the Civil Law (Sale of Residential Property) Energy Efficiency Rating Guidelines Determination 2009 (No. 2) made under section 20A of the *Civil Law (Sales of Residential Property) Act 2003* revokes all previous guidelines for preparing an energy efficiency rating statement and makes the ACT House Energy Rating Scheme—Interim Guidelines for Preparing Energy Efficiency Rating Statements.

**Disallowable Instrument DI2009-125** being the Water and Sewerage (Fees) Determination 2009 (No. 1) made under section 45 of the *Water and Sewerage Act 2000* revokes DI2008-168 and determines fees payable for the purposes of the Act.

**Disallowable Instrument DI2009-129** being the Construction Occupations Licensing (Fees) Determination 2009 (No. 1) made under section 127 of the *Construction Occupations (Licensing) Act 2004* revokes DI2008-162 and determines fees payable for the purposes of the Act.

**Disallowable Instrument DI2009-134** being the Public Sector Management Amendment Standards 2009 (No. 6) made under section 251 of the *Public Sector Management Act 1994* amends the Standards.

**Disallowable Instrument DI2009-135** being the Planning and Development (Land Development Agency Board) Appointment 2009 made under section 42 of the *Planning and Development Act 2007* appoints specified persons as members of the Land Development Agency Board.

**Disallowable Instrument DI2009-136** being the Architects (Fees) Determination 2009 (No. 1) made under section 91 of the *Architects Act 2004* revokes DI2008-159 and determines fees payable for the purposes of the Act.

**Disallowable Instrument DI2009-138** being the Building (Fees) Determination 2009 (No. 1) made under section 150 of the *Building Act 2004* revokes DI2008-160 and determines fees payable for the purposes of the Act.

**Disallowable Instrument DI2009-139** being the Community Title (Fees) Determination 2009 (No. 1) made under section 96 of the *Community Title Act 2001* revokes DI2008-161 and determines fees payable for the purposes of the Act.

**Disallowable Instrument DI2009-141 being the Planning and Development (Fees) Determination 2009 (No. 2) made under section 424 of the *Planning and Development Act 2007* revokes DI2008-201 and DI2009-19 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-142 being the Surveyors (Fees) Determination 2009 (No. 1) made under section 80 of the *Surveyors Act 2007* revokes DI2007-152 and DI2008-166 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-143 being the Unit Titles (Fees) Determination 2009 (No. 1) made under section 179 of the *Unit Titles Act 2001* revokes DI2007-167 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-144 being the Utilities Exemption 2009 (No. 3) made under section 22 of the *Utilities Act 2000* revokes DI2006-47 and extends the time for the provision of a separate connection point to a specified provider.**

**Disallowable Instrument DI2009-145 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2009 (No. 1) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2008-233 and determines the maximum fares relating to the hiring and use of a taxi.**

**Disallowable Instrument DI2009-146 being the Roads and Public Places (Fees) Determination 2009 (No. 1) made under section 9A of the *Roads and Public Places Act 1937* revokes DI2008-158 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-148 being the Legislative Assembly (Members' Staff) Variable Terms of Employment of Office-holders' Staff 2009 (No. 1) made under subsection 6(2) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2008-122 and amends the rate of pay and superannuation contribution of the Executive Chief of Staff and aligns the value of the vehicle and parking space entitlements with that currently applying to executive in the ACTPS.**

**Disallowable Instrument DI2009-149 being the Gas Safety (Fees) Determination 2009 (No. 1) made under section 67 of the *Gas Safety Act 2000* revokes DI2008-164 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-150 being the Road Transport (General) (Pay Parking Area Fees) Determination 2009 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2008-302 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-151 being the Public Baths and Public Bathing (Active Leisure Centre Fees) Determination 2009 (No. 1) made under section 37 of the *Public Baths and Public Bathing Act 1956* revokes DI2008-169 and determines fees payable on pool admission, swim school and classes provided by the Active Leisure Centre.**

**Disallowable Instrument DI2009-152 being the Training and Tertiary Education (Fees) Determination 2009 made under section 111 of the *Training and Tertiary Education Act 2003* revokes DI2008-183 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2009-155 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 1) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 79 of the *Financial Management Act 1996* appoints a specified person as chair of the ACT Building and Construction Industry Training Fund Board.**



**Disallowable Instrument DI2009-156 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 2) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Building and Construction Industry Training Fund Board, representing the interests of employers in the building and construction industry.**

**Disallowable Instrument DI2009-157 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 3) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Building and Construction Industry Training Fund Board, representing the interests of employers in the building and construction industry.**

**Disallowable Instrument DI2009-158 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 4) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Building and Construction Industry Training Fund Board, representing the interests of employees in the building and construction industry.**

**Disallowable Instrument DI2009-159 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2009 (No. 5) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the ACT Building and Construction Industry Training Fund Board, representing the interests of employees in the building and construction industry.**

**Disallowable Instrument DI2009-160 being the Public Place Names (Gungahlin) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* amends DI1997-234 by amending the extent of Gribble Street and determines the names of new roads in the Division of Gungahlin.**

**Disallowable Instrument DI2009-161 being the Road Transport (General) (Vehicle Registration) Exemption 2009 (No. 3) made under section 13 of the *Road Transport (General) Act 1999* exempts a specified wheelchair-accessible taxi from the provisions of section 32B(2) of the *Road Transport (Vehicle Registration) Regulation 2000*.**

**Disallowable Instrument DI2009-162 being the Planning and Development (Land Rent Payout) Policy Direction 2009 (No. 1) made under subsection 272C(1) of the *Planning and Development Act 2007* repeals DI2008-203 and sets out the policy direction for determining the amount a lessee must pay when applying to the Planning and Land Authority to pay out the land rent payable under a lease.**

**Disallowable Instrument DI2009-163 being the Public Place Names (Crace) Determination 2009 (No. 2) made under section 3 of the *Public Place Names Act 1989* determines the names of new roads in the Division of Crace.**

**Disallowable Instrument DI2009-164 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2009 (No. 3) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2009-31 and provides approval for a new ACTTAB Limited sub-agency at the Canberra Deakin Football Club.**

**Disallowable Instrument DI2009-165 being the Public Place Names (Bonython) Determination 2009 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a new park in the Division of Bonython.**

**Disallowable Instrument DI2009-166 being the Children and Young People (Work Experience) Standards 2009 (No. 1) made under section 887 of the *Children and Young People Act 2008* provide the framework for work experience programs being conducted by schools.**

**Disallowable Instrument DI2009-168 being the Drugs of Dependence (Cannabis Handling, Destruction and Preservation Protocol) Determination 2009 (No. 1) made under subsection 193B(1) of the *Drugs of Dependence Act 1989* determines that the *Cannabis Handling, Destruction and Preservation Protocol* is a protocol for the purposes of the Act.**

#### Disallowable Instruments—Comment

The Committee has examined the following item of subordinate legislation and offers the following comments on it:

##### *Drafting error*

**Disallowable Instrument DI2009-100 being the Betting (ACTTAB Limited) Rules of Betting Determination 2009 (No. 1) made under subsection 55(1) of the *Betting (ACTTAB Limited) Act 1964* revokes DI2008-52 and determines the Rules of Betting.**

This instrument contains numerous references to “Rule 0”. There is no “Rule 0” in the instrument. It appears that “0” or “Rule 0” has been used as some sort of drafting device (pending the finalisation of the numbering of the instrument) and that the relevant references have not been inserted once the numbering of the instrument was finalised. This is apparent from the following extract from the instrument:

- 4.21 In making payments under Rules 0, 0 and 0 the Betting Operator shall not be obliged or concerned to inquire as to the legal rights of the bearer of the Account Card or Card as the case may be or to the ownership or possession of the Account Card or Card as the case may be.

The Committee draws the attention of the Legislative Assembly to this instrument, on the basis that it appears to offend against principle (a)(i) of the Committee’s terms of reference, as it does not appear to be in accord with the general objects of the Act under which it is made.

##### *Minor drafting issue*

**Disallowable Instrument DI2009-101 being the Taxation Administration (Rates) Determination 2009 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2008-136 and determines variable rating factors for the purposes of the calculation of rates payable under the *Rates Act 2004*.**

The Committee notes that the Explanatory Statement for this instrument contains the following paragraph:

9. Section 34 of the Rates Act was amended by the *Revenue Legislation Amendment Bill 2007* to correct an error contained in the formula contained in section 34(3). Previously, the formula provided for a single fixed charge (FC), which was administratively treated by apportioning the residential and commercial fixed charges across the parcel of land. The formula now confirms the administrative practice by reflecting the different fixed charges for commercial (FCC) and residential (FCR) parcels of land.

In the first sentence above, the reference should (of course) be to the “*Revenue Legislation Amendment Act 2007*”.

*Is this appointment valid?*

**Disallowable Instrument DI2009-104 being the Government Procurement Appointment 2009 (No. 1) made under sections 12 and 13 of the *Government Procurement Act 2001* appoints a specified person as a non-public employee member of the Government Procurement Board.**

This instrument appoints a specified person as a non-public employee member of the Government Procurement Board. As the Explanatory Statement for the instrument recites, subsection 12(3) of the *Government Procurement Act 2001* provides that a person appointed as a non-public employee member must not be a public employee. Despite making this statement, the Explanatory Statement does not indicate that *the person specified* is not a public employee. While it might be thought that the Committee (and the Legislative Assembly) should simply assume that this is the case, the Committee has consistently stated that it believes that instruments of appointment should explicitly address any formal pre-requisites for an appointment. The Committee has also pointed out that this could hardly be regarded as an onerous requirement.

*Minor issue re Explanatory Statement*

**Disallowable Instrument DI2009-107 being the Health (Fees) Determination 2009 (No. 2) made under section 192 of the *Health Act 1993* revokes DI2009-56 and determines fees payable for the purposes of the Act.**

The Committee notes that the Explanatory Statement for this instrument contains the following statement:

The Determination comes into effect on 1 July 2009 and reproduces Determination DI2009-56 except for:

- Items on Attachment A, which have increased by the Wage Price Index of 3.5% (subject to rounding);
- Items on Attachment B, which have increased by the National Consumer Price Index of 2.5% (subject to rounding);

.....

The Committee would appreciate the Minister’s advice as to why the fees for the items listed in Attachment B are increased by the National Consumer Price Index (ie 2.5%), while the fees for the items listed in Attachment A are increased by the Wage Price Index (ie 3.5%). In making this comment, the Committee notes that the vast majority of fees determinations that the Committee has considered in this report are increased on the basis of the increase in the Wage Price Index. The Committee is curious as to why a different approach has been taken in relation to the items listed in Attachment B.

*Is this instrument valid?*

**Disallowable Instrument DI2009-116 being the Attorney General (Fees) Determination 2009 made under the Agents Act 2003; Associations Incorporation Act 1991; Births, Deaths and Marriages Registration Act 1997; Business Names Act 1963; Civil Law (Wrongs) Act 2002; Civil Partnerships Act 2008; Classification (Publications, Films and Computer Games) (Enforcement) Act 1995; Consumer Credit (Administration) Act 1996; Cooperatives Act 2002; Court Procedures Act 2004; Dangerous Substances Act 2004; Emergencies Act 2001; Guardianship and Management of Property Act 1991; Instruments Act 1933; Land Titles Act 1925; Liquor Act 1975; Machinery Act 1949; Occupational Health and Safety Act 1989; Partnership Act 1963; Pawnbrokers Act 1902; Prostitution Act 1992; Public Trustee Act 1985; Registration of Deeds Act 1957; Sale of Motor Vehicles Act 1977; Scaffolding and Lifts Act 1912; Second-hand Dealers Act 1906; Security Industry Act 2003; Trade Measurement (Administration) Act 1991; Workers Compensation Act 1951 revokes DI2008-145 and determines fees payable for the purposes of the Acts.**

This instrument determines fees under 29 Acts. Among other things, it revokes DI2008-145, which the Committee commented on in *Scrutiny Report No 58* of the *Seventh Assembly*.

As the Committee noted in its comments in relation to DI2008-145, the determination of fees is provided for by section 56 of the *Legislation Act 2001*. Subsection 56(5) provides that a fees determination:

- (a) must provide by whom the fee is payable; and
- (b) must provide to whom the fee is to be paid; and
- (c) may make provision about the circumstances in which the fee is payable; and
- (d) may make provision about exempting a person from payment of the fee; and
- (e) may make provision about when the fee is payable and how it is to be paid (for example, as a lump sum or by instalments); and
- (f) may mention the service for which the fee is payable; and
- (g) may make provision about waiving, postponing or refunding the fee (completely or partly); and
- (h) may make provision about anything else relating to the fee.

The Committee notes that, like DI2008-145 (and as the Committee observed in relation to DI2008-145), this instrument does not indicate by whom the relevant fees are payable, as required by paragraph 56(5)(a) of the *Legislation Act*. In that regard, the Committee notes (as it noted in relation to DI2008-145) that this instrument contains no equivalent of subsections 4(1) and 5(1) of DI2007-131, the instrument which DI2008-145 replaced. Sections 4 and 5 of DI2007-131 provided:

- 4. (1) I **DETERMINE** the fees payable by a person for a service identified in Schedule 2 items 6 to 63, 91 to 253 and 255 to 350.
- (2) The fee is payable to the Territory.
- 5. (1) I **DETERMINE** the fees payable by a person for a service identified in Schedule 2 items 64 to 90.
- (2) The fee is payable to the Public Trustee.

In the Committee's observation, the vast majority (if not all) of the *other* fees determinations that the Committee has considered in this report contain a similar formulation.

Clause 5 of this instrument provides (in part):

**5 Determination of fees**

- (1) The fee payable for a matter stated in an item in schedule 2, column 2 is the fee stated in the schedule, column 3 for that matter.
- (2) The fee payable for a matter stated in an item in schedule 1, column 2 is payable to the Territory.
- (3) However—
  - (a) the fee payable under the *Public Trustee Act 1985* for a matter stated in schedule 2, column 2 (items 64 to 90) is payable to the Public Trustee; and
  - (b) the fee payable under the Guardianship and Management of Property Act 1991 for the matter stated in schedule 2, column 2 (item 254) is payable to the Public Trustee for the Territory.

.....

In *Scrutiny Report No 58* of the *Seventh Assembly*, the Committee stated (in relation to DI2008-145):

Quite apart from the fact that it is mandatory that an instrument determining fees provide for the persons by whom a fee is payable, the Committee notes that persons relying on the instrument must make assumptions as to the person who is to pay relevant fees. While this may be obvious in some cases, by reference to the narrative in Schedule 2 of the instrument, it is clearly less-than-helpful for users of the instrument (and arguably unlawful) that this instrument does not address the paragraph 56(5)(a) criterion.

Clearly, this comment applies equally to the current instrument.

The Committee is perplexed that its earlier comment has not been addressed and, indeed, that this instrument has been made in the same form as the previous instrument, *despite* the Committee's comments on the earlier instrument (and despite the fact that the formulation adopted in section 5 of this instrument seems to be unique among fees determinations). In the absence of any explanation as to why the previous approach has been continued (in spite of the Committee's earlier comments), this is disappointing. In the absence of an explanation as to why the earlier approach has been retained, the Committee recommends that this instrument be re-made, to ensure that there are no issues as to the instrument's validity.

The Committee draws the attention of the Legislative Assembly to this instrument, on the basis that it appears to offend against principle (a)(i) of the Committee's terms of reference, as it does not appear to be in accord with the general objects of the Act under which it is made.

*Are these appointments valid?*

**Disallowable Instrument DI2009-126 being the Education (Government Schools Education Council) Appointment 2009 (No. 5) made under section 57 of the *Education Act 2004* appoints a specified person as an education member of the Government Schools Education Council, representing students.**

**Disallowable Instrument DI2009-127 being the Education (Government Schools Education Council) Appointment 2009 (No. 6) made under section 57 of the *Education Act 2004* appoints a specified person as an education member of the Government Schools Education Council, representing students.**

**Disallowable Instrument DI2009-128 being the Education (Non-government Schools Education Council) Appointment 2009 (No. 3) made under section 109 of the *Education Act 2004* appoints a specified person as an education member of the Non-government Schools Education Council, representing the non-government school union.**

These instruments appoint 2 specified persons to the Government Schools Education Council and 1 specified person to the Non-government Schools Education Council. The first 2 instruments are made under section 57 of the *Education Act 2004*, which provides:

**57 Appointed members of council (government)**

(1) The Minister must appoint the following members of the council:

- (a) a chairperson;
- (b) 6 people who, in the Minister's opinion, have experience in 1 or more of the areas of business and commerce, public policy, early childhood care, education, the special needs of young people and teacher education (the *community members*);
- (c) 10 people who, in the Minister's opinion, represent the views of government school education (the *education members*).

*Note 1* For the making of appointments (including acting appointments), see Legislation Act, pt 19.3.

*Note 2* In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

*Note 3* Certain Ministerial appointments require consultation with a Legislative Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(2) For subsection (1) (c), the Minister must appoint—

- (a) 2 education members chosen from nominations of the peak organisation representing principals; and
- (b) 2 education members chosen from nominations of the government teacher union; and
- (c) 2 education members chosen from nominations of the peak organisation representing parent associations of government schools; and
- (d) 2 education members chosen from nominations of the peak organisation representing students; and
- (e) 1 education member chosen from nominations of the peak organisation representing school boards; and
- (f) 1 education member chosen from nominations of the peak organisation representing preschool parents.

The persons specified in the first 2 instruments are appointed “to the position of education member representing students”. This being the case, the Committee notes that paragraph (2)(e) above requires that such persons be “chosen from nominations of the peak organisation representing students”. The Committee also notes that there is nothing in either the instrument or in the Explanatory Statement for the instrument that indicates that the specified persons were chosen from nominations of the peak organisation representing students. Further, there is no indication of which peak organisation(s) nominated the persons concerned. While it might be thought that the Committee (and the Legislative Assembly) can assume that this is the case, especially given that (in each case) the Explanatory Statement states that the Legislative Assembly Standing Committee on Education, Training and Youth Affairs was consulted in relation to the appointments, the Committee would prefer that the pre-requisites for appointment were explicitly addressed, either in the instrument itself or in the Explanatory Statement for the instrument. As the Committee has previously noted, this can hardly be regarded as an onerous requirement.

A similar issue arises in relation to the third instrument. Section 109 of the Education Act provides for appointments to the Non-government Schools Education Council. According to the Explanatory Statement, the person appointed by the instrument is appointed “to the position of education member to represent the non-government school union”. Paragraph 109(2)(c) provides that such persons must be “chosen from nominations of the non-government school union. Again, there is no indication, either in the instrument or in the Explanatory Statement for the instrument, that the person appointed was chosen in this way. Again, there is no indication of which peak organisation nominated the person concerned. The same comments made above in relation to the first 2 instruments apply here.

*Are these appointments valid?*

**Disallowable Instrument DI2009-130 being the Board of Senior Secondary Studies Appointment 2009 (No. 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies, representing the Association of Parents and Friends of the ACT Schools Inc.**

**Disallowable Instrument DI2009-131 being the Board of Senior Secondary Studies Appointment 2009 (No. 2) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies, representing the Association of Independent Schools Inc.**

These 2 appoint 2 specified persons to the Board of Senior Secondary Studies. The instruments are made under section 8 of the *Board of Secondary Studies Act 1997*, which provides:

## **8 Membership of board**

- (1) The board must consist of the following members:
  - (a) a chair;
  - (b) 1 person appointed after consultation with the Canberra Institute of Technology;
  - (c) 1 person appointed after consultation with vocational education and training organisations;
  - (d) 1 person appointed after consultation with the Australian National University;
  - (e) 1 person appointed after consultation with the University of Canberra;

- (f) 1 person appointed after consultation with the body known as the Association of Independent Schools;
  - (g) 1 person appointed after consultation with the ACT branch of the Australian Education Union;
  - (h) 1 person appointed after consultation with the body known as the Catholic Education Commission;
  - (i) 1 person appointed after consultation with the body known as the Secondary College Principals' Association;
  - (j) 1 person appointed after consultation with the body known as the ACT Council of Parents and Citizens Associations;
  - (k) 1 person appointed after consultation with the Association of Parents and Friends of the ACT Schools Inc.;
  - (l) 1 person appointed after consultation with the ACT and Region Chamber of Commerce and Industry;
  - (m) 1 person appointed after consultation with the ACT Trades and Labour Council;
  - (n) the chief executive.
- (2) The Minister must appoint the board members (other than the chief executive).
- Note 1* For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.
- Note 2* In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).
- Note 3* Certain Ministerial appointments require consultation with a Legislative Assembly committee and are disallowable (see Legislation Act, div 19.3.3).
- (3) The Minister may appoint a person to be a board member only if satisfied that the person has qualifications and expertise relevant to the functions of the board.

The Explanatory Statement for the first instrument states that the person is appointed “to represent the Association of Parents and Friends of the ACT Schools Inc.”. This appointment presumably relates to the requirement in paragraph (1)(k) that the persons appointed to the Board include “1 person appointed after consultation with the Association of Parents and Friends of the ACT Schools Inc.”. The Committee notes, however, that the requirement is that the person be appointed after consultation with the relevant Association, not that they be appointed *to represent* the Association.

A similar issue arises in relation to the second instrument. The Explanatory Statement for the instrument states that the person is appointed “to represent the Association of Independent Schools Inc.”. This appointment presumably relates to the requirement in paragraph (1)(f) that the persons appointed to the Board include “1 person appointed after consultation with the body known as the Association of Independent Schools”. Again, the statutory requirement is to appoint a person after consultation with the relevant Association, not *to represent* that Association.



The Committee (and the Legislative Assembly) may be entitled to assume that a person appointed “to represent” a body was appointed after consulting the relevant body. It is clearly preferable, however, that either the instrument of appointment or the Explanatory Statement for the instrument explicitly address any pre-requisites for appointment. It is also preferable that the basis of an appointment be expressed in the same terms as the criteria for appointment.

*Accessibility of legislation / Minor typographical error*

**Disallowable Instrument DI2009-132 being the Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (No. 2) made under subsection 31A(1) of the Road Transport (Dimensions and Mass) Act 1990 revokes DI2009-27 and exempts compliant vehicles from the mass requirements of the Act in respect of the steer axle mass of the vehicle.**

**Disallowable Instrument DI2009-133 being the Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 2) made under section 31A of the Road Transport (Dimensions and Mass) Act 1990 revokes DI2009-28 and exempts specified compliant vehicles from the requirements of sections 9 and 24 of the Act and compliant drivers from paragraph 37(2) of the Act.**

These instruments both exempt certain specified types of vehicles from certain legislative requirements, if they comply instead with certain other requirements referred to in the instruments. The instruments revoke and re-make DI2009-27 and DI2009-28, respectively, which the Committee commented on in its *Scrutiny Report No 6 of the Seventh Assembly*.

Though it is not stated in either instrument (or Explanatory Statement), it appears that the instruments have been re-made in the light of the Committee’s comments in *Scrutiny Report No 6* about incorporation of material by reference and about the accessibility of material incorporated by reference (especially when various subsections of section 47 of the *Legislation Act 2001* are disappplied). The Committee notes with approval that both re-made instruments contain very helpful references as to where material incorporated by reference can be located (ie on the internet).

In this context, however, the Committee notes that there is a minor typographical error in one of the references. In Part 2 of the Schedule to DI2009-132, Note 2 (under paragraph v) refers to [www.conlaw.gov.au](http://www.conlaw.gov.au). The reference should (presumably) be to [www.comlaw.gov.au](http://www.comlaw.gov.au).

*Retrospectivity – Positive comment*

**Disallowable Instrument DI2009-137 being the Planning and Development (Reduction of Change of Use Charge) Policy Direction 2009 (No. 1) made under section 177 of the Planning and Development Regulation 2008 sets out a policy direction for determining the when the Planning and Land Authority must apply the change of use charge at rate of 50% for a lease variation.**

**Disallowable Instrument DI2009-140 being the Planning and Development (Change of Use Charge on Disused Service Station Sites) Policy Direction 2009 (No. 1) made under section 177 of the Planning and Development Regulation 2008 sets out a policy direction for determining when the Planning and Land Authority must remit 100% of the change of use charge paid for a lease variation in relation to the redevelopment of disused service station sites.**

The Committee notes that section 2 of each of the above instruments states that the instrument “is taken to have commenced on 1 July 2009”. The Committee also notes that, in each case, while the instrument is dated “30 June 2009”, the instrument was notified on 9 July 2009. This means that the instruments have a retrospective operation. The Committee notes, however, that the Explanatory Statement for the first instrument states:

The proposed law does not adversely affect any rights and do not impose liabilities, but rather operates to temporarily reduce in part an existing liability by reducing the rate at which the change of use charge is levied, from 75% to 50% in specified circumstances.

A similar statement is included in the Explanatory Statement for the second instrument. These statements allow the Committee (and the Legislative Assembly) to be satisfied that there is no issue with section 76 of the *Legislation Act 2001*, which provides that only “non-prejudicial” provisions can commence retrospectively. In light of this explanation, the Committee makes no further comment on these instruments.

#### *Determination of fees*

**Disallowable Instrument DI2009-147 being the Legal Profession (Barristers and Solicitors Practising Fees) Determination 2009 made under section 84 of the *Legal Profession Act 2006* revokes DI2008-104 and determines fees payable for the purposes of the Act.**

This instrument determines fees in relation to applications by barristers and solicitors for granting or renewal of practicing certificates. It revokes DI2008-104, which determined fees for the previous financial year. The Committee commented on DI2008-104 in its *Scrutiny Report No 56* of the *Sixth Assembly*, where the Committee stated:

This instrument determines fees in relation to applications by barristers and solicitors for granting or renewal of practicing certificates. There is no indication in either the instrument or the Explanatory Statement to the instrument as to how the fees imposed by the instrument compare to the existing fees. Nor is there any explanation for any increases in fees. The Committee notes that it has previously pointed out that it is important that the Legislative Assembly, which has a supervisory role in relation to the setting of fees, be advised of the magnitude of fees increases and also the justification for increasing fees. In this context, the Committee commends to the Law Society Council the approach adopted (for example) in Disallowable Instrument DI2008-105.

The Committee notes that, despite the comment in *Scrutiny Report No 56*, there is no indication in this instrument, or in its Explanatory Statement, as to how the new fees compare to the previous fees, nor is there any explanation for any increase in fees. Given the Committee’s comment in relation to the previous instrument (and in the absence of any explanation), this is disappointing.

The Committee draws the Legislative Assembly’s attention to this instrument, under principle (b) of the Committee’s terms of reference, on the basis that the Explanatory Statement for this instrument does not meet the technical or stylistic standards expected by the Committee.

#### *Explanatory Statement – Positive comment*

**Disallowable Instrument DI2009-153 being the Nature Conservation (Fees) Determination 2009 (No. 2) made under section 139 of the *Nature Conservation Act 1980* revokes DI2009-108 and determines fees payable for the purposes of the Act.**

The Committee notes that this instrument, which is dated 6 July 2009, revokes DI2009-108, which is dated 22 June 2009. It also re-determines the fees that were determined in DI2009-108.

The Explanatory Statement for the instrument states:

[The] purpose of this instrument is to correct the commencement date in DI 2009-108, also known as the Nature Conservation (Fees) Determination 2009 (No 1) (the former fee determination), which commenced on 1 July 2009.

The former fee determination inadvertently commenced entry fees for the Tidbinbilla Nature Reserve (TNR) from 1 July 2009. The commencement date for these fees should have been 1 August 2009. This instrument corrects that error, by clarifying that part 3 of the schedule, which sets out the TNR entry fees, commences on 1 August 2009. In the interim, no entry fees have been collected at TNR.

The opportunity has also been taken to correct references to the schedule to the instrument that appeared in sections 4 and 5 of the former fee determination. The remainder of the instrument does not differ from the former fee determination. There are no changes to the amounts of the fees set by the former fee determination.

This instrument commences upon notification, at which time the former fee determination is revoked.

The Committee notes that the explanation set out above both provides the Committee (and the Legislative Assembly) an explanation as to why this instrument is being re-made so soon after being made and allows the Committee (and the Assembly) to be satisfied that the instrument does not have any retrospective operation.

#### *General comment – Fees determinations*

In previous years, the Committee has observed a wide variation in the explanations given, in Explanatory Statements accompanying fees determinations, for the increasing of the various fees dealt with in the scores of fees determinations that the Committee examines each year. In recent years, the Committee has been pleased to observe both a greater willingness of agencies to indicate the magnitude of any fees increases and to explain the basis of those fees increases. The Committee has also been pleased to observe a much greater consistency in the explanations given for increasing fees.

The Committee notes that, for the fees determinations considered in this report, the majority of the Explanatory Statements for those fees determinations contained a statement along the following lines:

This instrument increases fees in accordance with the Wage Price Index estimates for 2009-10 of 3.5%. Rounding to the nearest dollar has occurred in relation to the increases. [from DI2009-94]

The Committee also notes, however, that the Explanatory Statements for a significant number of fees determinations (see, for example, DI2009-125, DI2009-129, DI2009-136, DI2009-138, DI2009-139, DI2009-141 DI2009-142, DI2009-143, DI2009-146 and DI2009-149) contained a different statement, along the following lines:

The fees determined for the 2009-10 financial year represent the 2008-09 financial year fees increased in accordance with Treasury's inflation factor of 3.5%. Rounding to the dollar has occurred in relation to the increases. [from DI2009-149]

Despite these inconsistencies, however, the Committee is pleased that the way that agencies address this issue (and, in particular, the Committee's comments on the issue) continues to improve.

#### Subordinate Laws—No comment

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

**Subordinate Law SL2009-30 being the Trade Measurement (Prepacked Articles) Amendment Regulation 2009 (No. 1) made under the *Trade Measurement Act 1991* amends the *Trade Measurement (Prepacked Articles) Regulation 1991* and determines new requirements for the position of measurement markings on standard wine packages.**

**Subordinate Law SL2009-32 being the Court Procedures Amendment Rules 2009 (No. 2) made under section 7 of the *Court Procedures Act 2004* introduces new rules to provide for procedures for bringing appeals from an order of the ACT Civil and Administrative Tribunal, and for service of documents in civil proceedings under the Hague Convention.**

**Subordinate Law SL2009-33 being the First Home Owner Grant Amendment Regulation 2009 (No. 2) made under the *First Home Owner Grant Act 2000* introduces a regulation that will allow a First Home Owner Grant applicant access to the First Home Owner Boost.**

#### Subordinate Laws—Comment

The Committee has examined the following subordinate laws and offers these comments on them:

##### *Accessibility of legislation*

**Subordinate Law SL2009-29 being the Environment Protection Amendment Regulation 2009 (No. 1) made under the *Environment Protection Act 1997* empowers the Minister to approve a noise measurement manual for the purposes of the Act.**

This subordinate law amends the *Environment Protection Regulation 2005* (**EP Regulation**), to provide (among other things) the Minister with a power to approve a “noise measurement manual”, for the measurement of noise, under the *Environment Protection Act 1997* (**EP Act**) and under the EP Regulation.

Section 8 of the subordinate law inserts a new Part 12 into the EP Regulation. The new Part 12 provides for the *Environmental Noise Control Manual* (1994), published by the NSW Environment Protection Authority, made under the *Protection of the Environment Administration Act 1991* (NSW), as in force at a stated time, to operate as the “noise measurement manual” until such time as the Minister approves a “noise measurement manual”. The NSW document is defined as the “noise control manual”.

New subsection 100(2) of the EP Regulation provides:

- (2) The Legislation Act, section 47(5) does not apply to the noise control manual so far as it is applied under this section.

*Note 1* The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47(5) or (6) is not disapplied (see s 47(7)).

*Note 2* A notifiable instrument must be notified under the Legislation Act.

*Note 3* The noise control manual may be inspected by a person at any reasonable time (see s 101).

As indicated in Note 1 above, new subsection 100(2) disapplies section 47(5) of the *Legislation Act 2001* in relation to the “noise control manual”. Subsection 47(5) provides:

- (5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

The effect of subsection 47(5) of the Legislation Act is that, where material external to an instrument is “incorporated by reference”, there is an obligation to publish that external material on the ACT Legislation Register (ie as a result of the external material being a “notifiable instrument”). New subsection 100(2) of the EP Regulation removes the requirement to publish the external material on the ACT Legislation Register, thereby limiting the opportunity of the general public to examine the material that is incorporated by reference.

The Committee notes, however, that new section 101 of the EP Regulation prescribes the “noise control manual”, for paragraph 19(1)(r) of the EP Act. Section 19 of the EP Act provides (in part):

## **19 Inspection of documents**

- (1) Subject to section 21, a person may inspect at any reasonable time any of the following documents kept by or on behalf of the authority:

.....

(r) any document prescribed by regulation.

- (2) If a person wishes to inspect a document specified in subsection (1) that is not in the authority’s possession, the authority must make arrangements for the person to inspect the document.

Subsection 20(1) further provides that the authority must provide, on request, copies of a document mentioned in subsection 19(1), on payment of “the reasonable copying costs”.

In the light of the above, the Committee notes that the subordinate law provides a reasonable opportunity for those who wish to examine the “noise control manual” to inspect and, if necessary, copy the manual. That being so, the Committee makes no further comment on this subordinate law.

*Limitation of third party appeal rights, etc*

**Subordinate Law SL2009-31 being the Planning and Development Amendment Regulation 2009 (No. 7), including a regulatory impact statement, made under the Planning and Development Act 2007 amends the Planning and Development Regulation 2008 to limit the potential for individual projects to stall as a result of delays in the development assessment or appeals process in relation to the Commonwealth Nation Building and Jobs Plan.**

The *Planning and Development Act 2007 (DP Act)* and the *Planning and Development Regulation 2008 (DP Regulation)* set out a regime that (among other things) governs the approval of development applications in the ACT. Part of that regime is that proposed development applications are notified to the public, to allow affected persons to make comment on them before they are approved (or not). Another part of the regime is that third parties have an opportunity to object to proposed developments. This subordinate law limits both the notification requirements that will apply in relation to certain development applications and the rights of third parties to object.

Section 4 of this subordinate law inserts a new subsection 27(4) into the DP Regulation. Section 27 requires that there be “public notification” of “merit track development applications”. New subsection 27(4) provides:

- (4) However, an application for a development proposal in the merit track in the following items in schedule 2 is not prescribed for the Act, section 152(1)(a):
  - (a) item 9;
  - (b) item 10;
  - (c) item 11.

*Note* The planning and land authority must publicly notify a development application for a proposal mentioned in s (4) in accordance with the Act, s 152 (1) (b).

Items 9, 10 and 11 (which are inserted into Schedule 2 of the DP Regulation by section 8 of this subordinate law) deal with:

- the building of single or multi-unit dwellings (and associated activities) by or for the Territory, where:
  - the development is funded under a declared funding program;
  - the dwelling is built on land leased by the Territory, a territory authority, or under an agreement to transfer the land back to the Territory once the dwelling is built;
  - the dwelling will be provided by the Territory under an approved social housing program or transferred to a community housing provider (item 9);
- the building of single or multi-unit dwellings (and associated activities) by or for a community housing provider, where:
  - the development is funded under a declared funding program;
  - the dwelling is built on land leased by a community housing provider, or under an agreement to transfer it to a community housing provider once the dwelling is built;
  - the dwelling will provide community housing (item 10); and
- the building of single or multi-unit dwellings (and associated activities) for defence housing, where:

- the development is funded under a declared funding program;
- the dwelling is built on land leased by Defence Housing Australia;
- the dwelling will provide defence housing homes across Australia (item 11).

The “declared funding program” in relation to which the amendments are premised is the Commonwealth Government’s *Nation Building and Jobs Plan*.

Section 152 of the *Planning and Development Act 2007* provides:

**152 What is *publicly notifies* for ch 7?**

- (1) For this chapter, the planning and land authority *publicly notifies* a development application if—
    - (a) for an application for a development proposal in the merit track that is prescribed by regulation—the authority notifies the application in the manner prescribed under subsection (2); or
    - (b) for any other application for a development proposal—the authority notifies the application under—
      - (i) section 153 and section 155; and
      - (ii) if the development proposal is, or includes, a lease variation—section 154 (if applicable).
- Note 1* Only developments to which the merit track and impact track applies are required to be publicly notified (see s 121 and s 130). Also, the planning and land authority must re-notify some amended development applications (see s 146).
- Note 2* An entity other than an applicant may apply for review of a decision to approve a development application in the merit track only if the application is required to be notified under section 153 and section 155 (see sch 1, item 4).
- (2) For an application prescribed under subsection (1)(a), the planning and land authority may, by regulation, prescribe either of the following ways of notifying the application:
    - (a) under section 155 (Major public notification) and, if applicable, section 154 (Public notice to registered interest holders);
    - (b) under section 153 (Public notice to adjoining premises) and, if the development proposal is, or includes, a lease variation—section 154 (if applicable).

The Explanatory Statement for the subordinate law states that the new subsection 27(4)

... has the effect of requiring the planning and land authority to notify [the development proposals dealt with by this subordinate law] in accordance with section 152(1)(b), which means that a social housing application must be publicly [notified] under both section 155 (Major public notification) and section 153 (Public notice to adjoining premises).

“Major public notification” involves displaying a sign on the place to which the application relates that states the development proposed to be undertaken and publishing notice of the making of the application in a daily newspaper. “Public notice to adjoining premises” requires (as the term suggests) that the registered proprietors of the premises adjoining to the premises to which the application relates. This is a more limited notification process than would otherwise apply to the applications in question.

Section 5 of this subordinate law amends section 28 of the DP Regulation, to include a new subsection 28(2), that provides that the period of public notification for a development for a development mentioned in subsection 27(4) is 10 working days after the application is notified. This is less than the 15 working day period that would otherwise apply.

The effect of the provisions discussed above is, therefore, to limit the extent to which the relevant development applications must be publicly notified and to limit the time available to comment on the proposed developments. On its face, this would appear to limit the rights of people affected by such a development application.

The Explanatory Statement to this subordinate law states:

Due to the time limits on the funding by the Commonwealth and the need for both the Commonwealth and Territory funding to achieve their objective of stimulating the economy, the government chose the option of expediting development applications for social housing projects which are not exempt development and therefore, require development approval, by limiting the public notification such applications to the minimum period of 10 days working days.

The Explanatory Statement also states that the amendments

Mean that government and community housing providers will be best placed to effectively use stimulus package funding in the shortest possible time frame. This ensures that the benefits in terms of provision of increased social housing and the resultant economic stimulus to the economy can be realised sooner, and the risk of losing funding due to delays in the development application process will be minimised.

Another element of the amendments contained in this subordinate law is the limitation of third party appeals in relation to the developments mentioned in items 9, 10 and 11 (discussed above). Again, on its face, this limits the rights of people affected by such a development application.

On this issue, the Explanatory Statement states:

The effect of bringing social housing development applications into schedule 2 of the regulation (i.e. proposals specified in Clause 8 of the proposed regulation) is that there can be no third party appeals for these projects.

The exclusion of third party appeals for the projects covered by the proposed regulation is not the first such exclusion under the Act. The Act specifically provides, through schedules 2 and 3, for a range of matters to be exempt from third party appeals.

It should be noted that the removal of third party appeals is for a limited period only (until 30 June 2012), and this exemption only applies to projects funded by a 'declared funding program', i.e. the Commonwealth or Territory economic stimulus programs.

At pages 4 to 5, the Explanatory Statement goes on to address the limitations imposed by the amendments as a human rights issue, by reference to the *Human Rights Act 2004* (HRA). Key elements of that discussion are:

- that section 21 of the HRA does not guarantee a right of appeal in civil matters;
- that, in planning matters, 'human rights law has not identified a third party right of appeal as a requirement, except in relation to a particularly badly affected 'victim' of a planning decision";



- that, in the absence of a human rights law “right”, a combination of the opportunity for input and the availability of judicial review had been found to be sufficient to satisfy the requirement of the existence of a right to fair trial; and
- that judicial review, under the *Administrative Decisions (Judicial Review) Act 1989*, was nevertheless available.

The discussion concludes with the following statements:

On balance, the social and economic benefits that will flow to the ACT community from securing the substantial funding available under the Commonwealth Plan for social housing projects outweigh the limited foregoing of third party appeal rights on development assessment decisions. This is especially the case given that the exemption is time limited to 30 June 2012; only applies to projects that funded under declared funding programs (i.e. Commonwealth or Territory economic stimulus programs); and there will be major public notification of all proposals and there will still be the opportunity to make representations to the planning and land authority.

The proposed amendments achieve an appropriate balance between the general benefit to the ACT community of facilitating development and the protection of the interests of residents and others likely to be affected by such development. In all these circumstances, the proportionality test of section 28 is met.

As indicated above, on their face, several of the amendments made by this subordinate law offend against principle (a)(ii) of the Committee’s terms of reference, in that they trespass on rights previously established by law. The question for the Legislative Assembly is whether, bearing in mind the matters set out in the Explanatory Statement, the amendments “unduly” trespass on existing rights. Similarly, on their face, several of the amendments made by this subordinate law offend against principle (a)(iii) of the Committee’s terms of reference, in that they make rights, liberties and/or obligations dependent upon non-reviewable decisions. The question for the Legislative Assembly is whether, bearing in mind the matters set out in the Explanatory Statement, the amendments “unduly” limit review rights.

*Explanatory Statement – Minor typographical error*

**Subordinate Law SL2009-34 being the Agents Amendment Regulation 2009 (No. 1) made under the *Agents Act 2003* determines the requirements for obtaining a real estate agents licence to only act as an owners corporation manager (conditional licence).**

The Committee notes that there is a minor typographical error in the Explanatory Statement, under the heading “Details of regulations”, in the paragraph dealing with regulation 3 (ie “amend” instead of “amends”).

*Retrospectivity – Positive comment*

**Subordinate Law SL2009-35 being the Planning and Development Amendment Regulation 2009 (No. 8) made under the *Planning and Development Act 2007* amends the *Planning and Development Regulation 2008* to facilitate implementation of Budget initiatives.**

The Committee notes that elements of this subordinate law have a retrospective effect. Section 8 of the subordinate law inserts into the *Planning and Development Regulation 2008* a new subsection 175(6), which applies the amendments made by this subordinate law to:

a change of use charge for a variation of a lease in a development application—

- (a) that is lodged with the planning and land authority on or after the day this subsection commences; or
- (b) that was lodged with the planning and land authority on or after 1 June 2009 and before the day this subsection commences.

As this subordinate law was not notified until 30 June 2009, this means that it has a retrospective effect. The Committee notes, however, that the Explanatory Statement to this subordinate law states:

Section 175(6) of the proposed law has the effect of allowing a reduction in the change of use charge, announced in the Territory Budget for 2009-2010 (Budget speech - Budget Paper 1, 5 May 2009) and subsequently by Ministerial media statement (Treasurer, 8 June 2009), to operate retrospectively from 1 June 2009. The policy directions made in conjunction with the proposed law reduce the change of use charges in relation to lease variations applied for from 1 June 2009, in specified circumstances.

The *Legislation Act 2001* section 76 allows for retrospective commencement of a provision if it is a ***non prejudicial provision*** within the meaning of section 76(4).

After setting out section 76 of the Legislation Act, the Explanatory Statement goes on to state:

Under section 76(1) of the *Legislation Act*, section 175(6) of the proposed law is not prejudicial as it reduces fees and does not operate to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) and therefore the provision may commence retrospectively.

As a result of the above statement, the Committee (and the Legislative Assembly) can be satisfied that there is no issue with section 76 of the *Legislation Act 2001*, which provides that only “non-prejudicial” provisions can commence retrospectively. In light of this explanation, the Committee makes no further comment on this subordinate law.

## REGULATORY IMPACT STATEMENTS

The Committee has examined a regulatory impact statement in relation to the following subordinate law and offers no comments on it:

**Subordinate Law SL2009-31 being the Planning and Development Amendment Regulation 2009 (No. 7), including a regulatory impact statement, made under the Planning and Development Act 2007 amends the Planning and Development Regulation 2008 to limit the potential for individual projects to stall as a result of delays in the development assessment or appeals process in relation to the Commonwealth Nation Building and Jobs Plan.**

## GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Territory and Municipal Services and Minister for Transport, dated 12 August 2009, in relation to comments made in Scrutiny Report 8 concerning Disallowable Instruments:

- DI2009-67, being the Pest Plants and Animals (Pest Plants) Declaration 2009 (No. 1);
  - DI2009-72, being the Road Transport (General) (Numberplate Fees) Determination 2009 (No. 1);
  - DI2009-73, being the Road Transport (General) (Vehicle Registration and Related Fees) Determination 2009 (No. 1);
  - DI2009-84, being the Stock (Fees) Determination 2009 (No. 1); and
  - DI2009-85, being the Waste Minimisation (Landfill Fees) Determination 2009 (No. 1).
- The Minister for Territory and Municipal Services and Minister for Transport, dated 13 August 2009, in relation to comments made in—  
Scrutiny Report 7 concerning Disallowable Instruments:
    - DI2009-35, being the Territory Records (Advisory Council) Appointment 2009 (No. 1);
    - DI2009-49, being the Road Transport (Public Passenger Services) (Authorised Fixed Fare Hiring) Approval 2009 (No. 1); and
 Further comment on Disallowable Instruments:
    - DI2009-27, being the Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009; and
    - DI2009-28, being the Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 1).
  - The Attorney-General, dated 17 August 2009, in relation to comments made in Scrutiny Report 10 concerning the Justice and Community Safety Legislation Amendment Bill 2009 (No. 2).
  - The Attorney-General, dated 20 August 2009, in relation to comments made in Scrutiny Report 10 concerning the Crimes Legislation Amendment Bill 2009.
  - The Minister for Industrial Relations, dated 20 August 2009, in relation to comments made in Scrutiny Report 10 concerning the Long Service Leave (Portable Schemes) Bill 2009.
  - The Minister for Industrial Relations, dated 20 August 2009, in relation to comments made in Scrutiny Report 10 concerning the Work Safety Legislation Amendment Bill 2009.

The Committee wishes to thank the Minister for Territory and Municipal Services, the Minister for Transport, the Attorney-General and the Minister for Industrial Relations for their helpful responses.

Vicki Dunne, MLA  
Chair

August 2009

**JUSTICE AND COMMUNITY SAFETY—STANDING COMMITTEE  
(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND  
SUBORDINATE LEGISLATION COMMITTEE)**

**REPORTS—2008-2009**

**OUTSTANDING RESPONSES**

**Bills/Subordinate Legislation**

**Report 1, dated 10 December 2008**

Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008

**Report 2, dated 4 February 2009**

Disallowable Instrument DI2008-221 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 2)

Disallowable Instrument DI2008-222 - Emergencies (Bushfire Council Members) Appointment 2008 (No. 3)

Education Amendment Bill 2008 (PMB)

Freedom of Information Amendment Bill 2008 (No. 2)

**Report 3, dated 23 February 2009**

Subordinate Law SL2008-55 - Firearms Regulation 2008

**Report 4, dated 23 March 2009**

Disallowable Instrument DI2009-15 - Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2009 (No. 1)

**Report 8, dated 22 June 2009**

Disallowable Instrument DI2009-65 - Fair Trading (Fitness Industry) Code of Practice 2009

Disallowable Instrument DI2009-75 - Utilities (Consumer Protection Code) Determination 2009

Disallowable Instrument DI2009-86 - Legal Aid (Commissioner—Bar Association Nominee) Appointment 2009

Subordinate Law SL2009-19 - Fair Trading (Consumer Product Standards) Regulation 2009

**Report 10, dated 10 August 2009**

Disallowable Instrument DI2009-93 - Utilities (Grant of Licence Application Fee) Determination 2009 (No. 2)

Subordinate Law SL2009-22 - Gungahlin Drive Extension Authorisation Amendment Regulation 2009 (No. 1)

Subordinate Law SL2009-25 - Criminal Code Amendment Regulation 2009 (No. 1)

**Bills/Subordinate Legislation**

Subordinate Law SL2009-26 - Dangerous Substances (Explosives) Amendment  
Regulation 2009 (No. 1)

Subordinate Law SL2009-27 - Medicines, Poisons and Therapeutic Goods Amendment  
Regulation 2009 (No. 1)



## Jon Stanhope MLA

### CHIEF MINISTER

MINISTER FOR TRANSPORT   MINISTER FOR TERRITORY AND MUNICIPAL SERVICES  
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT  
MINISTER FOR INDIGENOUS AFFAIRS   MINISTER FOR THE ARTS AND HERITAGE

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MEMBER FOR GINNINDERRA

Mrs Vicki Dunne MLA  
Chair  
Standing Committee on Justice and Community Safety  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mrs Dunne

I refer to the Scrutiny of Bills Report No 8 dated 2 June 2009 regarding *Disallowable Instrument DI2009-67, Disallowable Instrument DI2009-72, Disallowable Instrument DI2009-73, Disallowable Instrument DI2009-84 and Disallowable Instrument DI2009-85.*

**Pest Plants and Animals (Pest Plants) Declaration 2009 (No 1) (DI2009-67)**

The Committee notes that there is an inconsistent use of “schedule **one**” and “schedule 1” in this instrument. Care will be taken to ensure that future instruments are more consistent.

The Committee also notes that the Explanatory Statement for the instrument makes note that “**The Department** proposes to revoke the Disallowable Instrument DI2008-44....”

The Committee notes that the relevant power (ie in section 7 of the *Pest Plants and Animals Act 2005*) is invested in **the Minister**. This reference will be corrected when preparing future declarations.

**Road Transport (General) (Numberplate Fees) Determination 2009 (No 1) (DI2009-72)**

The Committee notes that there is an inconsistent use of “numberplate” and “number plate” within this Determination. Care will be taken to ensure that future instruments are more consistent.

**Road Transport (General) (Vehicle Registration and Related Fees) Determination 2009 (No 1) (DI2009-73)**

The Committee notes that there appears to be a missing comma in subsection 4 (6) of this

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instrument (ie after “indivisible load”). This will be noted when preparing future instruments.

**Stock (Fees) Determination 2009 (No 1) (DI2009-84)**

The Committee notes that there is an inconsistent use of the term “stock mark” in the schedule to this instrument, in the sense that, in some instances, the term “stockmark” is used. The Committee notes that “stock mark” is the term used in the *Stock Act 2005*. This will be noted when preparing future instruments.

**Waste Minimisation (Landfill Fees) Determination 2009 (No 1) (DI2009-85)**

The Committee has concerns in relation to this instrument as Section 6 provides that 'The Minister may waive a fee listed in Part 2 of the Schedule if it is in the public interest to do so.' The Committee is concerned that the power to waive fees “if it is in the public interest to do so” is imprecise and has sought the Minister’s guidance as to the circumstances in which it is contemplated that the public interest will warrant the waiver of a fee.

It is expected that this power will be used for situations where it would not be in the public interest to charge landfill fees.

One hypothetical example might be waste generated from a natural disaster, such as a bushfire. The Minister may find that it would be in the public interest to waive landfill fees for individuals or organisations involved in the clean-up, given that they did not generate the material and could not reasonably prevent its generation.

One real example in which the fee waiver discretion was exercised was for the waste in the Bruce illegal dump in 2008. The people and organisations dumping material could not be identified, so there was no way to pass landfill fees on to those responsible. In November 2008, the Minister waived the landfill fees in order to facilitate the clean-up of the illegal dump.

These examples should not be taken as an absolute limitation on the discretion. A 'public interest' test is designed to be broad enough to accommodate a variety of situations. The discretion will be controlled because it is a Ministerial discretion.

I thank the committee for their comments.

Yours sincerely



Jon Stanhope MLA  
Minister for Territory and Municipal Services  
Minister for Transport

**12 AUG 2009**

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## Jon Stanhope MLA

### CHIEF MINISTER

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MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT  
MINISTER FOR INDIGENOUS AFFAIRS   MINISTER FOR THE ARTS AND HERITAGE

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MEMBER FOR GINNINDERRA

Mrs Vicki Dunne MLA  
Chair  
Standing Committee on Justice and Community Safety  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mrs Dunne *Vicki*

I refer to the Scrutiny of Bills Report No 7 dated 9 June 2009 regarding *Disallowable Instrument DI2009-35, Disallowable Instrument DI2009-49, Disallowable Instrument DI2009-27 and Disallowable Instrument DI2009-28.*

#### **Territory Records (Advisory Council) Appointment 2009 (No 1) (DI2009-35)**

The Committee questioned the validity of this appointment as the Explanatory Statement for the instrument includes the following statement:

"Mr Andrew Kefford has been nominated to represent Territory agencies. Mr Kefford is a public servant and appointed in accordance with Section 227 2(a) of the *Legislation Act 1991*. Mr Kefford is appointed for a three year term. Although it is not a legislative requirement to appoint Mr Kefford by disallowable instrument, this has been done to provide a complete list of Council members on the ACT Legislation Register.

The Committee feels that including a public servant appointment on this instrument is confusing in the sense that it complicates the situation faced by the Legislative Assembly should there be any possibility of the Assembly seeking to disallow the instrument of appointment.

The Committee also noted their interest in the Minister's views on the practical issues arising from including a non-disallowable appointment in an instrument of appointment. As stated in

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the Instrument's Explanatory Statement this was done to provide a complete list of Council members on the ACT Legislation Register.<sup>19</sup>

It is intended that future public servant appointments will be notified on the ACT Legislation Register as a Notifiable Instrument. This ensures that a complete list of members is still included on the ACT Legislation Register but are listed separately to those appointments that are disallowable. This will avoid future confusion.

**Road Transport (Public Passenger Services) (Authorised Fixed Fare Hiring) Approval 2009 (No 1) (DI2009-49)**

The Committee raised several matters arising from a note in the Explanatory Statement which approves certain hiring for the Nightlink taxi service. The Committee is correct in its assumption about where the quotation mark should have closed in the citation of the heading to section 142A of the *Road Transport (Public Passenger Services) Regulation 2002*. The Committee is also correct in its other assumption that the purpose of the note is to indicate that the heading to section 142A incorrectly refers to section 85 (1), rather than section 128 (1), of the *Road Transport (Public Passenger Services) Act 2001*.

The Committee refers to the part of the disallowable instrument in which section 142A of the regulation is cited with the incorrect section reference as being the 'formal part' of the instrument and queries why the error could not have been corrected in the instrument. The part of the instrument in which the incorrect section reference appears is the empowering provision for the instrument and, as such, is a substantive part of the instrument.

Therefore, I cannot agree that the citation of section 142A's heading could have been corrected administratively in the disallowable instrument. This is because it would not be an accurate statement of the section's heading at the time the instrument was made. I believe that the note in the explanatory statement was the appropriate way of dealing with the matter. I am pleased to advise that amendments of the regulation are being drafted which will include a correction of the error in section 142A's heading and that, once the amendment has been made, this issue will not arise in relation to future instruments made under the section.

**Road Transport (Dimensions and Mass) 6.5 Tonnes Single Steer Axle Exemption Notice 2009 (DI2009-27); and Road Transport (Dimensions and Mass) B-Double, 4.6 Metre High Vehicle and 14.5 Metre Long Bus Exemption Notice 2009 (No. 1) (DI2009-28)**

The Committee noted that in a letter dated 29 May 2009, I responded to comments made by the Committee in its *Scrutiny Report No 6* of 2009, in relation to these instruments, seeking confirmation that they had in fact been re-made and asked why they had not yet been placed on the ACT Legislation Register. I can confirm that these instruments have both been remade and are now currently on the ACT Legislation Register (DI2009-132 and DI2009-133).

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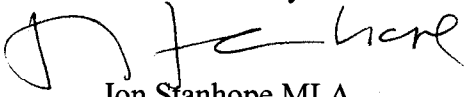
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I thank the committee for their comments.

Yours sincerely

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

Jon Stanhope MLA  
Minister for Territory and Municipal Services  
Minister for Transport

**13 AUG 2009**

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## Simon Corbell MLA

ATTORNEY GENERAL

MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER

MINISTER FOR ENERGY

MINISTER FOR POLICE AND EMERGENCY SERVICES

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA

Chair

Standing Committee on Justice and Community Safety

ACT Legislative Assembly

London Circuit

CANBERRA ACT 2601

Dear Mrs Dunne *Vicki*

Thank you for your Scrutiny of Bills Report No. 10 of 10 August 2009. I offer the following response in relation to the Standing Committee on Justice and Community Safety's comments on the Justice and Community Safety Legislation Amendment Bill 2009 (No 2).

### *Door-to-Door Trading Act 1991*

The Committee raised concern over the scope of the regulation making power. These changes maintain the original spirit of the Act, which provided for regulations to exempt certain contracts from its provisions. Marketing practices change over time, and for some new practices, certain provisions of the Act may be unreasonable or impossible to apply. The regulation making power makes it possible to maintain the original intent and relevance of the Door-to-Door Trading Act without constant legislative amendment.

### *Legal Aid Act 1977*

#### Proposed subsection 31E(5)

The Committee expressed concerns over the broad scope of the Legal Aid Commission's power to set criteria for appointing private legal practitioners. The Committee suggested including criteria in the legislation, or making a determination about appointment a disallowable instrument.

The Legal Aid Commission is primarily responsible for delivering legal aid services in the Territory. The Commission possesses the necessary expertise and information to determine the criteria for engaging private legal practitioners, and it remains accountable to the Government under its statutory obligations to provide legal aid to the public. The provisions regarding private legal practitioners give the Commission the flexibility to create arrangements on such terms and conditions as are necessary to address the changing needs of the community.

As the Committee notes in its report, proposed section 32 acknowledges the right of private legal practitioners to notice and a hearing in relation to decisions about their participation in the legal aid system. The Committee commended this provision, and it should be noted that proposed section 32

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affords protection to private legal practitioners against unfair exclusion from participating in the legal aid scheme.

Secrecy provisions in 35D and 35E

The Committee's comment on proposed section 35D(e) criticises the rule on disclosure as required by a Commonwealth or Territory law as not providing enough assurance to the involved parties. The confidentiality clauses in this amendment are consistent with existing Territory laws governing alternative dispute resolution, for example, the *Mediation Act 1997*. I would like to note that these confidentiality rules would operate in conjunction with new section 35E, which encourages open and honest negotiations by making statements during a negotiation inadmissible in a later proceeding.

The Committee's comments on section 35E would suggest significantly reducing the scope of the confidentiality that applies to these negotiations. As the Committee noted in its comment on proposed section 35D(e), it is important to have assurances of confidentiality to facilitate these negotiations. If the parties are concerned, for example, that discussing disputes collateral to the subject of the negotiation could become evidence in an unrelated proceeding, factors that might be central to a negotiated resolution will be left undiscussed by the parties. The purpose of confidentiality in this context is to promote an honest and open effort at settling disputes. This will not occur unless the parties are able to freely discuss every position, interest, and need that might contribute to settling the dispute.

*Machinery Act 1949*

The purpose of the amendment is to make expertise outside the public service available to assist in inspections under the Act. The Chief Executive will still make employment decisions in accordance with the needs of each particular situation under the Act. Adding conditions or specifications is unnecessary for this reason.

I trust that the above response answers the Committee's concerns and I thank the Committee for its observations and commendations.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Simon Corbell', written over a horizontal line.

Simon Corbell MLA  
Attorney General

17 AUG 2009



## Simon Corbell MLA

ATTORNEY GENERAL  
MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER  
MINISTER FOR ENERGY  
MINISTER FOR POLICE AND EMERGENCY SERVICES

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MEMBER FOR MOLONGLO

Mrs Vicki Dunne MLA  
Chair  
Standing Committee on Justice and Community Safety  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mrs Dunne

Thank you for your Scrutiny of Bills Report No. 10 of 10 August 2009. I offer the following response in relation to the Committee's comments on the *Crimes Legislation Amendment Bill 2009* (the Bill).

**Amendment to the *Evidence (Miscellaneous Provisions) Act 1991*: prohibition on cross-examination in person by self-represented accused**

I note the Committee's concern that the explanatory statement to the Bill did not include discussion of the human rights issues which are raised by section 38D of the *Evidence (Miscellaneous Provisions) Act 1991*. As acknowledged in the Committee's report, the human rights issues were extensively considered in the explanatory statement to the *Sexual and Violent Offences Legislation Amendment Act 2008* which inserted section 38D into the *Evidence (Miscellaneous Provisions) Act 1991*. Given the nature of the amendments to section 38D in the Bill, which do not change the policy behind the prohibition, but rather provide an additional option to facilitate an accused person's ability to cross-examine a witness, it was not considered necessary to repeat the discussion on human rights. However, I agree with the Committee's recommendation and accordingly I will table a revised explanatory statement which will include a reference to the human rights discussion in the explanatory statement to the *Sexual and Violent Offences Legislation Amendment Bill 2008* (the SARP Legislation).


In its Report, the Committee noted that the explanatory statement to SARP Legislation did not cite any cases decided by the European Court of Human Rights (ECHR) that considered the right of an accused to defend themselves personally, or through legal assistance chosen by them; and the right to examine prosecution witnesses (section 22 (2) (d) and (g) of the *Human Rights Act 2004*). I would like to take the opportunity to highlight that in considering whether the SARP Legislation would impact upon these rights, the explanatory statement cites Canadian case law. However, for future reference, please find the following citation for a case decided by the ECHR that considers these rights – *S.N. v. Sweden*, 2 July 2002, 39 EHRR 13.

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I trust that the above response answers the Committee's enquiry and I thank the Committee for its observations.

Yours sincerely



Simon Corbell MLA  
Attorney General

20 AUG 2009



## John Hargreaves MLA

MINISTER FOR DISABILITY AND HOUSING

MINISTER FOR AGEING

MINISTER FOR MULTICULTURAL AFFAIRS

MINISTER FOR INDUSTRIAL RELATIONS

MINISTER FOR CORRECTIONS

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Member for Brindabella

Mrs Vicki Dunne MLA

Chair

Standing Committee on Justice and Community Safety

C/- Scrutiny of Bills and Subordinate Legislation Committee Secretary

Chamber Support Office

Legislative Assembly Building

CANBERRA ACT 2601

Dear Mrs <sup>Vicki</sup>~~Dunne~~


I refer to Report No. 10 of the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) and particularly to comments on the Long Service Leave (Portable Schemes) Bill 2009 (the Bill).

I would like to thank the Committee for its comments contained in the Report, particularly in regard to clause 2 of the Bill. The Bill was drafted in this manner as a contingency to cover any possible delays in the Long Service Leave Authority's readiness to commence, particularly in relation to its new computer system. As the Chief Executive of the Authority has guaranteed that all systems will be ready for 1 January 2010 I have therefore instructed the Parliamentary Counsel's Office (PCO) to provide an amendment to the Bill in line with that date.

The Committee also had two drafting queries. The PCO have acknowledged these recommendations and has agreed that both would be progressed through a Government Assembly Amendment.

Thank you again for your comments.

Yours sincerely

  
John Hargreaves MLA  
Minister for Industrial Relations

20 August 2009

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## John Hargreaves MLA

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Member for Brindabella

Mrs Vicki Dunne MLA  
Chair  
Standing Committee on Justice and Community Safety  
ACT Legislative Assembly Committee Office  
GPO Box 1020  
Canberra ACT 2601

Dear Mrs ~~Dunne~~ *Vicki*

Thank you for the Scrutiny of Bills Report No. 10 of 10 August 2009. I offer the following response in relation to the Committee's comments on the Work Safety Legislation Amendment Bill 2009 (the Bill).

### **Maximum Penalty for strict liability offences**

The *Work Safety Act 2008* (the Act) provides employers and workers with flexible consultation methods and does not mandate the use of work safety committees. However, there is a considerable amount of evidence to support the use of work safety committees to improve safety outcomes, particularly in large enterprises. Section 55A provides an exception to the flexible methods of consultation and allows the relevant chief executive to give a direction that work safety committees will be mandatory in a specific hazardous industry. Breach of the direction is a strict liability offence with a maximum penalty of 100 penalty units. The maximum penalty for a strict liability offence is usually limited to 50 penalty units.

The Committee has asked for the maximum penalty of 100 penalty points for breach of the strict liability offence proposed in section 55A of the Bill to be justified. Section 55A in the Act is similar to existing section 55 of the Act where a direction may be issued to a single employer to establish a work safety committee where the work done by that employer's workers is hazardous and the establishment of such a committee will improve work safety.

In general the requirement to establish a work safety committee will be applied to large companies in hazardous industries such as commercial construction where there is a high incident and/or high severity rate of work safety accidents. In this environment a maximum of 50 penalty units is not an adequate deterrent. To achieve compliance, a maximum of 100 penalty units for failing to comply is appropriate and is consistent with the penalty under the existing section.

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## Use of Protected Information

The Committee has provided extensive comments in relation to section 211 of the Bill which provides for the use of protected information based on the Australian Law Reform Commission's (ALRC) recent discussion paper on the *Review of Secrecy Laws*. While the Committee has not adopted the ALRC Report, information has been provided as a way of engaging the Executive in a dialogue on the operation of 'use of protected information' clauses from a human rights perspective. Section 211 has also been assessed in light of the ALRC Report.

Section 211 of the Bill as presented to the Legislative Assembly clarifies and strengthens the existing Section 211 of the Work Safety Act 2008, which was passed by the Legislative Assembly only last year. These sections are modelled on similar recent statutory provisions, including the *Medicines, Poisons and Therapeutic Goods Act 2008* (ACT), and build on the existing section 207 of the *Occupational Health and Safety Act 1989*. As you would be aware, the ACT Human Rights Office has also examined this particular provision in detail and has issued a compatibility statement prior to the tabling of the Bill.

The Committee raises specific questions about the exceptions provided for the use of protected information. These issues are discussed below.

### Section 211 (3)(a) – Providing information under another Territory law

In its discussion of section 211 (3)(a) the Committee asks whether the extension of the provision to include 'under another territory law' goes too far. This provision is intended to make it clear that a person who records or divulges this information under the provisions of another territory law (such as a law that can compel the production of information) will not, if complying with that law, be committing the offence. It is entirely appropriate that inspectors who have collected protected information in the course of inspections and investigations under this Act be protected from prosecution if required to provide it. The following two scenarios illustrate situations where this provision is necessary in the public interest.

1. A worker is electrocuted on a building site and a work safety inspector investigates. ACTPLA also become aware of the incident and consider whether it should take action regarding the builder's licence and electrician's licence of the responsible builder and an electrician. It serves a statutory demand under section 31 of the *Electricity Safety Act 1971* on the inspector to produce a report into the incident. The inspector must comply or face possible prosecution under the Electricity Safety Act.
2. There is a fire at a Canberra bar and staff and patrons are injured trying to get out. A work safety inspector investigates and finds that a fire escape was blocked. The Commissioner for Fair Trading, who licences liquor licensees, becomes aware of the event and wants to investigate whether action should be taken in respect of the licence for having unsafe premises and failing to keep exits clear. Using the powers in section 13 of the *Fair Trading (Consumer Affairs) Act 1973*, an investigator issues a notice requiring the work safety inspector to produce his report. Again, the inspector would face a possible fine and/or a gaol term if the inspector did not comply with the demand.

In scenario one, a work safety inspector releases the documents under the Electricity Safety Act. In scenario two the documents are released under the Fair Trading (Consumer Affairs)

legislation. Section 211 of the Bill makes it clear that the inspector must comply, and, can do so without committing an offence.

The Committee also comments that the provision allowing inspectors to comply with other laws will have an effect on the willingness of people to cooperate in inspections and investigations carried out under the Act. A similar provision presently exists in section 207 of the *Occupational Health and Safety Act 1989*. In addition, as noted above, the tabled amendment merely clarifies and strengthens the existing section 211 of the *Work Safety Act 2008*, which was passed by the Legislative Assembly last year without comment. No such issues have been raised with me. Disclosure in this case is the same circumstance of that of a private citizen required to provide information if compelled to do so under another Territory law. The possible deterrence anticipated by the Committee may equally be said to affect all dealings a person might have in relation to their information.

In any event, an inspector's power to collect information is not completely dependent on cooperation of those he deals with. More commonly, information is obtained through inspection, search warrant or by a requirement to answer questions or produce documents.

### **Section 211 (3)(d) and 211 (5) – Definition of corresponding law**

The committee recommends that the words 'whether or not the law corresponds, or substantially corresponds, to this Act' be removed. The Committee's concern is that the definition as a whole may permit data-matching by some other government agency. According to the Federal Privacy Commissioner data matching *"is the large scale comparison of records or files...collected or held for different purposes, with a view to identifying matters of interest."* Section 211 is designed to handle specific pieces of protected information to be divulged under this or another law, in the exercise of a function under a Territory law, in the interests of work safety, to an interstate WorkCover, to the police or to a court. It is not considered that the definition of corresponding law in section 211 authorises large scale data-matching. Rather, it provides a mechanism to share specific information with interstate counterparts.

This being the case it is not considered necessary to change the way the Executive exercises its regulation making power in relation to this provision. However, to reassure the Committee that this provision is not intended for data-matching, a Government amendment will be moved to remove the words as recommended.

### **Opportunity to Object**

The Committee raises the question of whether a person whose personal information is to be divulged should be given an opportunity to comment. It is submitted that this would not be appropriate and may defeat the purpose of the provision. The information is being provided under this or another law, in the exercise of a function under a Territory law, in the interests of work safety, to an interstate WorkCover, to the police or to a court. In each of these cases, the person concerned might well object, because they do not want to be investigated for breaches of other laws.

This is not a case of a government agency making use of information for a purpose other than the purpose for which it was collected. The information is being passed on either because it is required, or to ensure that the circumstances found by an inspector are assessed by those with appropriate expertise and authority to follow up on possible breaches of the law. In addition, as you would be aware, timely sharing of information between agencies is often critical to preventing further risks to public safety.

### **Section 211 (3)(f) – Disclosure of information to a court**

Section 211 (3)(f) of the Bill provides for the disclosure of information ‘to a court, under a summons or subpoena.’ The Committee suggests that this is too narrowly expressed and should simply provide for an exception to govern the divulging of protected information ‘to a court’. The Committee’s recommendation is accepted and a Government amendment will be progressed.

I trust the above comments address the Committee’s concerns and I thank the Committee for the above comments.

Yours sincerely



John Hargreaves MLA  
Minister for Industrial Relations

20/6/09