

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(LEGISLATIVE SCRUTINY ROLE)

SCRUTINY REPORT 8

8 AUGUST 2017

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ROLE OF 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.

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

- (1) 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):
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (2) 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;
- (3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (a) unduly trespass on personal rights and liberties;
 - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) 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*; and
- (5) 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.

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BILLS

BILL—NO COMMENT

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

GAMING MACHINE AMENDMENT BILL 2017

This Bill amends the *Gaming Machine Act 2004* to introduce a gaming machine tax rebate for small and medium clubs (which are defined as clubs with the relevant gaming licences with a gross gaming machine revenue of less than \$4 million), allow those small and medium clubs to lodge gaming machine tax and payments to the Problem Gambling Assistance Fund quarterly instead of monthly, and set up a review of the gaming machine tax rebate after two years. The Bill will also require social impact assessments, which are prepared as part of the process of applying for various authorisation certificates relating to licensing of gaming machines, to be made available at a named place in the ACT and on the ACT Gambling and Racing Commission's website instead of the current requirement to make them available at the Commission's office.

BILLS—COMMENT

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

CRIMES (INVASION OF PRIVACY) AMENDMENT BILL 2017
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This Bill amends the *Crimes Act 1900* by replacing and adding offences relating to observing, distributing, and threatening to observe or distribute intimate images.

Currently it is an offence under s 61B of the Crimes Act to observe with the aid of a device or capture visual data which a reasonable person would consider to be an invasion of privacy, and is indecent or is of specified areas of a person's body. The Bill will replace this offence with a new offence (in s 72C) that applies to the observation with the aid of a device or capture of what are termed "intimate" images. The Bill will also similarly make it an offence to distribute intimate images where a reasonable person would, in all the circumstances, consider the distribution of the intimate image to be an invasion of privacy.

An intimate image is defined to extend beyond images that are currently covered by s 61B to include being engaged in a private act, which in turn is defined to include being in a state of undress, using a toilet, shower or bath, engaged in a sexual act or in a position of a sexual nature or context that a reasonable person would not expect to be made public. Under proposed s 72A(3), whether a person is engaged in a private act will depend on the individual's circumstances.

The current defences or exceptions available under s 61B will apply to the new offences, including where the defendant believed the affected person consented or did not know and could not reasonably be expected to have known that the affected person did not consent. The definition of consent, for both the new offences and for various existing sexual offence provisions, is amended. Consent will be negated by a mistaken belief as to the nature of the act being otherwise consented to. Consent by a child is made possible provided there is not more than two years' difference in age between them.

The new offences will also not apply where a reasonable person would consider the observation or capture to be acceptable having regard to what was observed or captured, the circumstances in which this occurred, the circumstances of the affected person, and extent of the invasion of privacy. It will not be an offence to distribute intimate images in the public interest.

The Bill also adds an offence of threatening to capture or distribute intimate images, where a reasonable person would consider the capture or distribution as threatened to be an invasion of privacy, and the person knew, or was reckless as to whether, the person would fear the threat.

Any prosecution of a person under 18 for the proposed offences will require the approval of the Director of Public Prosecutions. The Bill also provides for the court to order a person found guilty of the offences relating to observation or distribution of intimate images to “take reasonable action to remove, retract, recover, delete or destroy an intimate image ... within a stated period.”.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—
Committee terms of reference paragraph (3)(a)***

Report under section 38 of the *Human Rights Act 2004* (HRA)

FREEDOM OF EXPRESSION (s 16 HRA)

The explanatory statement accompanying the Bill describes the process of consultation that contributed to development of the Bill’s present form. The various submissions received in that consultation process and the impact on the development of the Bill are set out at some length. The explanatory statement refers to submissions by the Human Rights Commission on human rights concerns raised by a draft version of the Bill, including a concern that the breadth of the previous definition of “intimate document” was an unjustifiable limitation on the right to freedom of expression. The explanatory statement suggests that the clause in issue was removed, and exceptions were built into the Bill to extend the right to freedom of expression, including a new “public interest” exception (presumably this refers to the exception to the offence of distribution of intimate images where the distribution would be in the public interest. It is noted that this exception does not apply to the observation or capturing of intimate images or threatening to capture or distribute).

However, as has been commented previously by the Committee in response to the reference to submissions on draft Bills,¹ the explanatory statement must still provide an adequate analysis of the human rights issues that arise from the Bill as presented to the Assembly. It is not sufficient to merely refer to submissions provided on previous drafts, even where those submissions are directly related to human rights concerns.

The Committee notes that there are elements of the Bill as presented to the Assembly that may be seen to constitute reasonable limits on freedom of expression as protected by s 16 of the HRA. These include the defences and exceptions relating to consent, distribution in the public interest, and where a reasonable person would regard the conduct as acceptable in the circumstances. These and other elements of the Bill should be set out in the explanatory statement using the framework set out in s 28 of the HRA in demonstrating that they act as reasonable limits on freedom of expression; that is that they are aimed at a legitimate objective and are rationally and proportionately connected to that objective.

¹ See *Scrutiny Report 7, 2017* at p.2

The Committee draws this matter to the attention of the Assembly, and asks the Member to respond.

RIGHT TO PROTECTION OF THE FAMILY AND CHILDREN (S 11 HRA)

The Bill restricts the circumstances in which a child can observe, capture and distribute intimate images, engaging the right to the protection of children needed because of being a child provided by s 11 of the HRA. The explanatory statement should include reference to this right and justify the restriction using the framework provided in s 28 of the HRA. The Committee notes that the Bill provides for children to consent, and therefore limits the operation of the new offences, as well as a number of existing sexual offences, where there is less than two years' difference in the ages of the children involved. There is also a need for the Director of Public Prosecutions to approve any prosecution.

The Committee draws this matter to the attention of the Assembly, and asks the Member to respond.

RIGHT TO PROTECTION OF CHILDREN IN THE CRIMINAL PROCESS (S 20 HRA)

Section 20 of the HRA provides for protection of children in the criminal process, including the way children accused of an offence are dealt with as part of the process of establishing criminal guilt and the consequences of conviction. As the explanatory statement sets out, the Bill seeks to provide additional protection for children by requiring the Director of Public Prosecutions to approve any prosecution of a person under 18 years of age and the Committee draws this to the attention of the Assembly.

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (S 22 HRA)

The offences relating to observation or distribution of an intimate image include a strict liability element. Both apply strict liability to the element of the offence requiring that a reasonable person would, in all the circumstances, consider the observation, capture or distribution of the intimate image to be an invasion of the affected person's privacy.² By applying strict liability to this element, the Bill makes it clear that the prosecution does not have to establish that the defendant believed that their actions would be reasonably considered an invasion of privacy, or that the defendant was aware of the substantial risk of such a finding, and that risk was not justified in the circumstances.³

To the extent therefore that strict liability, even when applying to only part of the elements of the offence, places the evidential burden on the defendant to establish a defence then this limits the presumption of innocence protected by s 22 of the HRA. The use of strict liability should therefore be acknowledged in the explanatory statement and a justification provided using the framework set out in s 28 of the Human Rights Act.

The Committee notes that s 61B of the Crimes Act currently applies strict liability to the invasion of privacy element of the offence. The Bill introducing that offence was accompanied by an explanatory statement setting out in detail the justification for the strict liability aspect of the offence.⁴ That Bill and explanation was in turn the subject of comment by this Committee.⁵ However, the significant

² Paragraphs 72(1)(b) (see s 72C(2)) and 72D(1)(b) (See s 72D(2)).

³ See ss 18, 20 and 22 of the *Criminal Code 2002*

⁴ *Crimes Legislation Amendment Bill 2014*

⁵ *Scrutiny Report No 27, 2015* at pp 1-6.

differences in the offences introduced in this Bill means that discussion is of limited application. Justification of the role of strict liability in these new offences needs to be provided to enable consideration by the Assembly.

The Committee draws this matter to the attention of the Assembly, and asks the Member to respond.

PROTECTION OF PROPERTY AND POWER TO ORDER RECTIFICATION

As discussed above, the Bill also provides for the court to order rectification where a person is found guilty of an offence of capturing or distributing intimate images. The power to compel removal, retraction, recovering, deletion or destruction of an image interferes with the property rights of the defendant. As the Committee has noted previously in relation to similar powers of rectification,⁶ while property rights are not in themselves directly protected through the HRA, any interference with property rights can potentially amount to an undue interference with personal rights and liberties. The Committee notes, however, that powers akin to rectification may be available in analogous contexts, such as where a breach of confidentiality is established. The explanatory statement should therefore include consideration of the extent the court's power of rectification conferred by the Bill goes beyond the remedies otherwise available and can reasonably be justified.

The Committee draws this matter to the attention of the Assembly, and asks the Member to respond.

GAMING MACHINE (CASH FACILITIES) AMENDMENT BILL 2017
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This Bill amends the *Gaming Machine Act 2004* and the *Gaming Machine Regulation 2004* to limit EFTPOS withdrawals in gaming machine premises. Premises authorised to have more than 20 gaming machines are limited to one EFTPOS facility. The facility must be operated by a person trained in responsible provision of gambling services who confirms the amount of cash to be withdrawn and hands the cash directly to the person making the withdrawal. The amount of cash that can be withdrawn is limited to \$200. The Bill also makes some minor changes to existing provisions relating to ATM withdrawals.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—
Committee terms of reference paragraph (3)(a)***

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO THE PRESUMPTION OF INNOCENCE (S 22 HRA)

The limitation on providing EFTPOS facilities introduced by the Bill is implemented through introduction of a strict liability offence in a new Part 8A of the Gaming Machine Regulation. Strict liability offences engage the right to the presumption of innocence provided for in s 22 of the HRA. The explanatory statement accompanying the Bill sets out a justification for the adoption of a strict liability offence using the framework set out in s 28 of the HRA and the Committee draws this analysis to the attention of the Assembly.

⁶ See *Scrutiny Report No 7, 2017* at p 2 when commenting on the Crimes (Intimate Image Abuse) Amendment Bill 2017.

In particular, the Committee notes that the strict liability offence is applied to licencees operating within a regulated industry, generally only applies to corporations operating large gaming facilities given the nature of the licencing regime, gives rise to a maximum penalty of 10 penalty units which is within the range previously recognised by the Committee as reasonable for offences within subordinate legislation, and it is noted that defences under the Criminal Code are available, including mistake of fact and an intervening conduct or event.

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

Do any provisions of the Bill inappropriately delegate legislative powers?—Committee terms of reference paragraph 3(d)

CREATION OF OFFENCES BY REGULATION

The Bill amends the regulation making power in s 178 of the Gaming Machine Act by inserting a new s 178(2)(c):

(c) the operation (including the restriction of the operation) of a cash facility at authorised premises.

A “cash facility” is relevantly defined as

- (i) an automatic teller machine; or*
- (ii) an EFTPOS facility; or*
- (iii) any other facility for gaining access to cash or credit*

Existing s 178(3) provides for regulations to create offences with a maximum penalty of not more than 10 penalty units.

The intention of this amendment is to authorise the amendments to the regulations which implement the substantive effect of the Bill, namely to impose limitations on withdrawals through EFTPOS facilities. However, the regulation making power is sufficiently broad to enable future amendments to the regulations beyond those currently being considered, including restrictions on the use of ATM machines which go beyond those currently contained within the Gaming Machine Act. While the Committee recognises that any such offences cannot be inconsistent with the current offences within the Gaming Machine Act which place limits on cash facilities, and that any offence set out in regulations is limited to only 10 penalty units, the Committee remains concerned over the shift to imposing future limitations through regulations.

The Committee recognises that there may be reasons why the offences to be introduced through this Bill are appropriately done so through regulations. However, there is no justification provided in the explanatory statement. In the absence of any such explanation, and given the potential breadth of the amended regulation making power to introduce criminal offences, the committee considers that the Bill inappropriately delegates legislative power.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2017-46 being the Cemeteries and Crematoria (Public Cemetery Fees) Determination 2017 (No 1) made under section 49 of the *Cemeteries and Crematoria Act 2003* revokes DI2016-108 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-47 being the Cemeteries and Crematoria (Perpetual Care Trust Percentage and Perpetual Care Trust Reserve Percentage) Determination 2017 (No 1) made under section 11 of the *Cemeteries and Crematoria Act 2003* revokes DI2015-298 and determines the perpetual care trust reserve percentages payable to the Public Trustee and Guardian by the operator of a specified cemetery or crematorium.

Disallowable Instrument DI2017-48 being the Heritage (Council Member) Appointment 2017 (No 1) made under section 17 of the *Heritage Act 2004* appoints a specified person, an expert in the discipline of history, as a member of the ACT Heritage Council.

Disallowable Instrument DI2017-49 being the Heritage (Council Member) Appointment 2017 (No 2) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council, representing the property ownership, management and development sector.

Disallowable Instrument DI2017-50 being the Heritage (Council Member) Appointment 2017 (No 3) made under section 17 of the *Heritage Act 2004* appoints a specified person, an expert in the discipline of archaeology, as a member of the ACT Heritage Council.

Disallowable Instrument DI2017-51 being the Heritage (Council Member) Appointment 2017 (No 4) made under section 17 of the *Heritage Act 2004* appoints a specified person, an expert in the discipline of architecture, as a member of the ACT Heritage Council.

Disallowable Instrument DI2017-52 being the Heritage (Council Member) Appointment 2017 (No 5) made under section 17 of the *Heritage Act 2004* appoints a specified person, an expert in the discipline of archaeology, as a member of the ACT Heritage Council.

Disallowable Instrument DI2017-53 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2017 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2016-42 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-54 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 4) made under section 13 of the *Road Transport (General) Act 1999* declares that specified provisions of the road transport legislation do not apply to a vehicle participating in a special stage of the National Capital Rally.

Disallowable Instrument DI2017-55 being the Civil Law (Wrongs) Law Society of South Australia Professional Standards Scheme 2017 made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of South Australia's approval of The Law Society of South Australia Professional Standards Scheme.

Disallowable Instrument DI2017-56 being the Civil Law (Wrongs) South Australian Bar Association Inc Professional Standards Scheme 2017 made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of South Australia's approval of The South Australian Bar Association Inc Professional Standards Scheme.

Disallowable Instrument DI2017-58 being the Work Health and Safety (Work Safety Council Acting Employer Representative) Appointment 2017 (No 1) made under Schedule 2, section 2.3 and section 209 of the *Work Health and Safety Act 2011* and *Legislation Act 2001* appoints a specified person as an acting member of the Work Safety Council, representing the interests of employers.

Disallowable Instrument DI2017-59 being the Work Health and Safety (Work Safety Council Acting Employer Representative) Appointment 2017 (No 2) made under Schedule 2, section 2.3 and section 209 of the *Work Health and Safety Act 2011* and *Legislation Act 2001* appoints a specified person as an acting member of the Work Safety Council, representing the interests of employers.

Disallowable Instrument DI2017-60 being the Work Health and Safety (Work Safety Council Acting Employee Representative) Appointment 2017 (No 1) made under Schedule 2, section 2.3 and section 209 of the *Work Health and Safety Act 2011* and *Legislation Act 2001* appoints a specified person as an acting member of the Work Safety Council, representing the interests of employees.

Disallowable Instrument DI2017-61 being the Firearms (Use of Noise Suppression Devices) Declaration 2017 (No 2) made under section 31 of the *Firearms Act 1996* revokes DI2017-18 and declares that a firearm fitted with a noise suppression device is not a prohibited firearm when being used by an authorised person for a prescribed purpose.

Disallowable Instrument DI2017-62 being the Prohibited Weapons (Noise Suppression Devices) Declaration 2017 (No 2) made under section 4L of the *Prohibited Weapons Act 1996* revokes DI2017-19 and determines that a noise suppression device being used by an authorised person for a prescribed purpose is not a prohibited article.

Disallowable Instrument DI2017-63 being the Financial Management (Territory Authorities) Guidelines 2017 made under section 133 of the *Financial Management Act 1996* revokes DI2016-72 and prescribes the entities that are territory authorities for the purposes of the Act.

Disallowable Instrument DI2017-64 being the Veterinary Surgeons (Fees) Determination 2017 (No 1) made under section 136 of the *Veterinary Surgeons Act 2015* revokes DI2016-39 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-65 being the Financial Management (Territory Authorities prescribed for Outputs) Guidelines 2017 made under section 133 of the *Financial Management Act 1996* revokes DI2016-70 and prescribes certain Territory authorities for output reporting for the purposes of the Act.

Disallowable Instrument DI2017-66 being the Financial Management (Statement of Performance Scrutiny) Guidelines 2017 made under section 133 of the *Financial Management Act 1996* revokes DI2016-122 and prescribes the information to be included in statements of performance of directorates and Territory authorities and annual scrutiny by the Auditor-General.

Disallowable Instrument DI2017-68 being the Agents (Fees) Determination 2017 made under section 176 of the *Agents Act 2003* revokes DI2016-81 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-69 being the Births, Deaths and Marriages Registration (Fees) Determination 2017 made under section 67 of the *Births, Deaths and Marriages Registration Act 1997* revokes DI2016-247 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-70 being the Civil Unions (Fees) Determination 2017 made under section 28 of the *Civil Unions Act 2012* revokes DI2016-95 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-71 being the Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2017 made under section 67 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* revokes DI2016-85 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-72 being the Fair Trading (Motor Vehicle Repair Industry) (Fees) Determination 2017 made under section 55 of the *Fair Trading (Motor Vehicle Repair Industry) Act 2010* revokes DI2016-87 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-73 being the Pawnbrokers (Fees) Determination 2017 made under section 27 of the *Pawnbrokers Act 1902* revokes DI2016-88 and determines the fee payable for a licence.

Disallowable Instrument DI2017-74 being the Prostitution (Fees) Determination 2017 made under section 29 of the *Prostitution Act 1992* revokes DI2016-99 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-75 being the Registration of Deeds (Fees) Determination 2017 made under section 8 of the *Registration of Deeds Act 1957* revokes DI2016-89 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-76 being the Retirement Villages (Fees) Determination 2017 made under section 262 of the *Retirement Villages Act 2012* revokes DI2016-90 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-77 being the Sale of Motor Vehicles (Fees) Determination 2017 made under section 91 of the *Sale of Motor Vehicles Act 1977* revokes DI2016-91 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-78 being the Second-hand Dealers (Fees) Determination 2017 made under section 17 of the *Second-hand Dealers Act 1906* revokes DI2016-92 and determines the fee payable for a licence.

Disallowable Instrument DI2017-79 being the Taxation Administration (Amounts Payable—Duty) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-139 and determines differential rates of duty, or the method by which an amount of duty is payable under the Duties Act 1999.

Disallowable Instrument DI2017-80 being the Gambling and Racing Control (Governing Board) Appointment 2017 (No 1) made under sections 11 and 12 of the *Gambling and Racing Control Act 1999* and section 78 of the *Financial Management Act 1996* revokes DI2014-296 and appoints a specified person, with knowledge, experience or qualifications related to providing counselling services to problem gamblers, as a member of the ACT Gambling and Racing Commission Governing Board.

Disallowable Instrument DI2017-81 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-305 and determines, for the purposes of the Scheme, the time limit for applications, eligibility criteria, determination of amounts, method of calculation of duty payable and eligibility requirements.

Disallowable Instrument DI2017-82 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-304 and determines, for the purposes of the Scheme, the time limit for applications, determination of amounts, method of calculation of duty payable, and eligibility requirements.

Disallowable Instrument DI2017-83 being the ACT Teacher Quality Institute (Certification Renewal Fee) Determination 2017 (No 1) made under section 95 of the *ACT Teacher Quality Institute Act 2010* determines the fee payable in respect of an application for renewal of certification under the Australian Professional Standards for Teachers.

Disallowable Instrument DI2017-84 being the Associations Incorporation (Fees) Determination 2017 made under section 125 of the *Associations Incorporation Act 1991* revokes DI2016-94 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-85 being the Land Titles (Fees) Determination 2017 made under section 139 of the *Land Titles Act 1925* revokes DI2016-96 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-86 being the Partnership (Fees) Determination 2017 made under section 99 of the *Partnership Act 1963* revokes DI2016-98 and determines the fee payable for an application for registration as an incorporated limited partnership.

Disallowable Instrument DI2017-87 being the Security Industry (Fees) Determination 2017 made under section 50 of the *Security Industry Act 2003* revokes DI2016-100 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-88 being the Casino Control (Fees) Determination 2017 made under section 143 of the *Casino Control Act 2006* revokes DI2016-154 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-89 being the Gaming Machine (Fees) Determination 2017 made under section 177 of the *Gaming Machine Act 2004* revokes DI2016-152 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-90 being the Race and Sports Bookmaking (Fees) Determination 2017 made under section 97 of the *Race and Sports Bookmaking Act 2001* revokes DI2016-156 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-91 being the Unlawful Gambling (Charitable Gaming Application Fees) Determination 2017 made under section 48 of the *Unlawful Gambling Act 2009* revokes DI2016-155 and determines the fee payable for a charitable organisation to apply to the ACT Gambling and Racing Commission for approval to conduct charitable gaming.

Disallowable Instrument DI2017-92 being the Liquor (Fees) Determination 2017 made under section 227 of the *Liquor Act 2010* revokes DI2016-97 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-94 being the Freedom of Information (Fees) Determination 2017 made under section 80 of the *Freedom of Information Act 1989* revokes DI2016-104 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-97 being the Unit Titles (Management) (Fees) Determination 2017 made under section 119 of the *Unit Titles (Management) Act 2011* revokes DI2016-107 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-98 being the Emergencies (Fees) Determination 2017 made under section 201 of the *Emergencies Act 2004* revokes DI2016-102 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-100 being the Electoral (Electoral Commission Member) Appointment 2017 (No 1) made under section 12 of the *Electoral Act 1992* appoints a specified person as a member of the ACT Electoral Commission.

Disallowable Instrument DI2017-101 being the Plant Diseases (Importation Restriction Area) Declaration 2017, including a regulatory impact statement, made under section 12 of the *Plant Diseases Act 2002* declares specified parts of Western Australia subject to an importation restriction.

Disallowable Instrument DI2017-102 being the Dangerous Substances (Fees) Determination 2017 made under section 221 of the *Dangerous Substances Act 2004* revokes DI2016-65 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-103 being the Machinery (Fees) Determination 2017 made under section 5 of the *Machinery Act 1949* revokes DI2016-67 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-104 being the Workers Compensation (Fees) Determination 2017 made under section 221 of the *Workers Compensation Act 1951* revokes DI2016-64 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-105 being the Work Health and Safety (Fees) Determination 2017 made under section 278 of the *Work Health and Safety Act 2011* revokes DI2016-68 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-106 being the Lotteries (Fees) Determination 2017 (No 1) made under section 18A of the *Lotteries Act 1964* revokes DI2016-79 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-107 being the Scaffolding and Lifts (Fees) Determination 2017 made under section 21 of the *Scaffolding and Lifts Act 1912* revokes DI2016-66 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-108 being the Children and Young People (Family Group Conference) Standards 2017 (No 1) made under section 887 of the *Children and Young People Act 2008* determines the Standards for Family Group Conferencing in the ACT.

Disallowable Instrument DI2017-109 being the Clinical Waste (Fees) Determination 2017 made under section 40 of the *Clinical Waste Act 1990* revokes DI2016-176 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-113 being the Tobacco and Other Smoking Products (Fees) Determination 2017 (No 1) made under section 70 of the *Tobacco and Other Smoking Products Act 1927* revokes DI2016-170 and fees payable for the purposes of the Act.

Disallowable Instrument DI2017-114 being the Electoral (Fees) Determination 2017 made under section 340B of the *Electoral Act 1992* revokes DI2016-93 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-115 being the Juries (Payment) Determination 2017 made under section 51 of the *Juries Act 1967* revokes DI2016-181 and determines payments made to jurors for the purposes of the Act.

Disallowable Instrument DI2017-116 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2017 (No 1) made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* revokes DI2016-248 and provides that a pharmacist or intern pharmacist may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards as set out in Schedule 1.

Disallowable Instrument DI2017-117 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2017 (No 1) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2016-298 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors.

Disallowable Instrument DI2017-119 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2017 (No 1) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2016-280 and determines the conditions under which Members may employ staff and engage consultants or contractors.

Disallowable Instrument DI2017-120 being the City Renewal Authority and Suburban Land Agency (Suburban Land Agency Chair) Appointment 2017 made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as chair of the Suburban Land Agency Board.

Disallowable Instrument DI2017-121 being the City Renewal Authority and Suburban Land Agency (Suburban Land Agency Deputy Chair) Appointment 2017 made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as deputy chair of the Suburban Land Agency Board.

Disallowable Instrument DI2017-122 being the City Renewal Authority and Suburban Land Agency (Suburban Land Agency Member) Appointment 2017 (No 1) made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Suburban Land Agency Board.

Disallowable Instrument DI2017-123 being the City Renewal Authority and Suburban Land Agency (Suburban Land Agency Member) Appointment 2017 (No 2) made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Suburban Land Agency Board.

Disallowable Instrument DI2017-124 being the City Renewal Authority and Suburban Land Agency (Suburban Land Agency Member) Appointment 2017 (No 3) made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Suburban Land Agency Board.

Disallowable Instrument DI2017-125 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Chair) Appointment 2017 made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as chair of the City Renewal Authority Board.

Disallowable Instrument DI2017-126 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Deputy Chair) Appointment 2017 made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as deputy chair of the City Renewal Authority Board.

Disallowable Instrument DI2017-127 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Member) Appointment 2017 (No 1) made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the City Renewal Authority Board.

Disallowable Instrument DI2017-128 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Member) Appointment 2017 (No 2) made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the City Renewal Authority Board.

Disallowable Instrument DI2017-129 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Member) Appointment 2017 (No 3) made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the City Renewal Authority Board.

Disallowable Instrument DI2017-130 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Member) Appointment 2017 (No 4) made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the City Renewal Authority Board.

Disallowable Instrument DI2017-131 being the Public Place Names (Pialligo) Determination 2017 made under section 3 of the *Public Place Names Act 1989* determines the name of a road in the Division of Pialligo.

Disallowable Instrument DI2017-132 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2017 (No 2) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2017-53 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-133 being the Road Transport (General) Driver Licence and Related Fees Determination 2017 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2016-43 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-134 being the Road Transport (General) Numberplate Fees Determination 2017 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2016-44 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-135 being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2017 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2016-45 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-136 being the Road Transport (General) Fees for Publications Determination 2017 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2016-46 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-137 being the Agents (Qualifications for Auditors) Determination 2017 made under section 114 of the *Agents Act 2003* revokes DI2004-202 and prescribes the qualifications for auditors undertaking audits of real estate, stock and station, and business agents' trust accounts.

Disallowable Instrument DI2017-138 being the Taxation Administration (Special Arrangements—Lodging of Returns) Revocation 2017 (No 1) made under section 42 of the *Taxation Administration Act 1999* revokes DI2016-157.

Disallowable Instrument DI2017-139 being the Taxation Administration (Amounts Payable—Fire and Emergency Services Levy) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-109 and determines new amounts for the calculation of the fire and emergency services levy for the purposes of the *Rates Act 2004*.

Disallowable Instrument DI2017-140 being the Taxation Administration (Amounts Payable—Land Rent) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-140 and determines the percentages and income threshold amounts for the purposes of the *Land Rent Act 2008*.

Disallowable Instrument DI2017-141 being the Taxation Administration (Amounts Payable—Land Tax) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-143 and determines the fixed charge and percentage rates for the calculation of land tax for residential land for the purposes of the *Land Tax Act 2004*.

Disallowable Instrument DI2017-142 being the Taxation Administration (Amounts Payable—Rates) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-110 and determines amounts for fixed charge and percentage rates for the purposes of the *Rates Act 2004*.

Disallowable Instrument DI2017-143 being the Rates (Deferral) Determination 2017 (No 1) made under section 46 of the *Rates Act 2004* revokes DI2016-148 and determines the income, asset and equity requirements that form the eligibility criteria for the rates deferral scheme.

Disallowable Instrument DI2017-144 being the Taxation Administration (Amounts Payable—Rates Discount Rate) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-146 and determines the discount rate for the purposes of the *Rates Act 2004*.

Disallowable Instrument DI2017-145 being the Rates, Land Tax and Land Rent (Certificate and Statement Fees) Determination 2017 (No 1) made under section 78 of the *Rates Act 2004*, section 43 of the *Land Tax Act 2004* and section 32 of the *Land Rent Act 2008* revokes DI2016-141 and determines the fee for the provision of a certificate of rates, land tax and other charges, and a statement of amounts payable and payments made.

Disallowable Instrument DI2017-146 being the Taxation Administration (Amounts Payable—Interest Rates) Determination 2017 (No. 1) made under section 139 of the *Taxation Administration Act 1999* and paragraph 75AD(2)(a) of the *Duties Act 1999* revokes DI2012-176, DI2015-3 and DI2016-147 and determines interest rates for unpaid rates, land tax and land rent, and for duty payable under a deferred duty arrangement for the purposes of the *Land Tax Act 2004*.

Disallowable Instrument DI2017-147 being the Architects (Fees) Determination 2017 made under section 91 of the *Architects Act 2004* revokes DI2016-123 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-148 being the Building (Fees) Determination 2017 made under section 150 of the *Building Act 2004* revokes DI2016-124 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-149 being the Community Title (Fees) Determination 2017 made under section 96 of the *Community Title Act 2001* revokes DI2016-125 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-150 being the Construction Occupations (Licensing) (Fees) Determination 2017 made under section 127 of the *Construction Occupations (Licensing) Act 2004* revokes DI2016-126 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-151 being the Electricity Safety (Fees) Determination 2017 made under section 64 of the *Electricity Safety Act 1971* revokes DI2016-127 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-152 being the Environment Protection (Fees) Determination 2017 made under section 165 of the *Environment Protection Act 1997* revokes DI2016-177 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-153 being the Fisheries (Fees) Determination 2017 made under section 114 of the *Fisheries Act 2000* revokes DI2016-178 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-154 being the Gas Safety (Fees) Determination 2017 made under section 67 of the *Gas Safety Act 2000* revokes DI2016-128 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-155 being the Heritage (Fees) Determination 2017 made under section 120 of the *Heritage Act 2004* revokes DI2016-129 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-156 being the Nature Conservation (Fees) Determination 2017 made under section 368 of the *Nature Conservation Act 2014* revokes DI2016-179 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-157 being the Planning and Development (Fees) Determination 2017 made under section 424 of the *Planning and Development Act 2007* revokes DI2016-130 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-158 being the Surveyors (Fees) Determination 2017 made under section 80 of the *Surveyors Act 2007* revokes DI2016-131 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-159 being the Unit Titles (Fees) Determination 2017 made under section 179 of the *Unit Titles Act 2001* revokes DI2016-132 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-160 being the Stock (Fees) Determination 2017 made under section 68 of the *Stock Act 2005* revokes DI2016-137 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-161 being the Stock (Minimum Stock Levy) Determination 2017 made under section 7A of the *Stock Act 2005* revokes DI2016-135 and determines the minimum stock levy for landholdings.

Disallowable Instrument DI2017-162 being the Stock (Levy) Determination 2017 made under section 6 of the *Stock Act 2005* revokes DI2016-134 and determines the number of animals making up a stock unit and the levy amount per stock unit.

Disallowable Instrument DI2017-163 being the Water and Sewerage (Fees) Determination 2016 (No 1) made under section 45 of the *Water and Sewerage Act 2000* revokes DI2016-133 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-164 being the Water Resources (Fees) Determination 2017 made under section 107 of the *Water Resources Act 2007* revokes DI2016-283 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-166 being the Road Transport (General) (Pay Parking Area Fees) Determination 2017 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2016-165 and determines relevant parking fees for Territory-operated pay parking areas.

Disallowable Instrument DI2017-171 being the University of Canberra Council Appointment 2017 (No 1) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2017-172 being the University of Canberra Council Appointment 2017 (No 2) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2017-173 being the University of Canberra Council Appointment 2017 (No 3) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2017-174 being the Working with Vulnerable People Background Checking (Fees) Determination 2017 (No 1) made under section 68 of the *Working with Vulnerable People (Background Checking) Act 2011* repeals DI2016-171 and determines the fees for services provided by the Working With Vulnerable People Screening Unit.

Disallowable Instrument DI2017-175 being the Public Pools (Active Leisure Centre Fees) Determination 2017 (No 1) made under section 54 of the *Public Pools Act 2015* revokes DI2016-183 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-176 being the Planning and Development (Lease Variation Charges) Determination 2017 (No 1) made under paragraph 276C(2)(a) and subsection 276E(1) of the *Planning and Development Act 2007* revokes DI2011-198 and DI2015-205 and determines lease variation charges.

Disallowable Instrument DI2017-177 being the Domestic Animals (Fees) Determination 2017 (No 1) made under section 144 of the *Domestic Animals Act 2000* revokes DI2016-159 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-178 being the Waste Management and Resource Recovery (Fees) Determination 2017 (No 1) made under section 126 of the *Waste Management and Resource Recovery Act 2016* determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-179 being the Tree Protection (Fees) Determination 2017 (No 1) made under section 109 of the *Tree Protection Act 2005* revokes DI2016-160 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-181 being the Animal Welfare (Fees) Determination 2017 (No 1) made under section 110 of the *Animal Welfare Act 1992* revokes DI2016-158 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-182 being the Long Service Leave (Portable Schemes) Community Sector Levy Determination 2017 made under subsection 56(1) of the *Long Service Leave (Portable Schemes) Act 2009* determines the levy payable by contractors in the community sector for each quarter.

Disallowable Instrument DI2017-183 being the Long Service Leave (Portable Schemes) Contract Cleaning Industry Levy Determination 2017 made under subsection 56(1) of the *Long Service Leave (Portable Schemes) Act 2009* determines the levy payable by contractors in the contract cleaning industry for each quarter.

Disallowable Instrument DI2017-184 being the Long Service Leave (Portable Schemes) Security Industry Levy Determination 2017 made under subsection 56(1) of the *Long Service Leave (Portable Schemes) Act 2009* determines the levy payable by contractors in the security industry for each quarter.

Disallowable Instrument DI2017-185 being the Adoption (Fees) Determination 2017 (No 1) made under section 118 of the *Adoption Act 1993* repeals DI2015-182 and determines the maximum fees payable for services provided by the Child and Youth Protection Services.

Disallowable Instrument DI2017-187 being the Waste Management and Resource Recovery (Fees) Determination 2017 (No 2) made under section 126 of the *Waste Management and Resource Recovery Act 2016* supplements DI2017-178 and determines fees payable for the purposes of the Act.

DISALLOWABLE INSTRUMENTS—COMMENT

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

DRAFTING ISSUE

Disallowable Instrument DI2017-57 being the Electoral Commission (Chairperson) Appointment 2017 (No 2) made under section 12 of the *Electoral Act 1992* appoints a specified person as chairperson of the Electoral Commission.

This instrument appoints a specified person as chairperson of the ACT Electoral Commission. The instrument states that it is made under section 12 of the *Electoral Act 1992*.

The Committee notes that section 12 of the Electoral Act provides for the appointment of members of the Electoral Commission (though the Committee notes that paragraph 12(3)(a) refers to the appointment of “the commissioner”). Appointment of the chairperson is mentioned in section 12C of the Electoral Act, which deals with *eligibility* for appointment as chairperson:

12C Eligibility for appointment as chairperson

- (1) The Speaker may appoint a person as the chairperson of the electoral commission only if the person—
 - (a) is or has been a judge; or
 - (b) has been a justice of the High Court; or
 - (c) has been the head of service; or
 - (d) has been a director-general of an administrative unit; or
 - (e) has been a chief executive officer (however described) of a territory instrumentality; or
 - (f) has been a statutory office-holder; or
 - (g) has been a Commonwealth agency head; or
 - (h) has been a member of—
 - (i) the electoral commission; or
 - (ii) an authority of the Commonwealth, a State or another Territory that the Speaker is satisfied corresponds to the electoral commission; or
 - (i) is a person who—
 - (i) is a lawyer; and

- (ii) has been a lawyer for at least 5 years; and
- (iii) the Speaker is satisfied has held a senior position in the legal profession; or
- (j) is a person who the Speaker is satisfied—
 - (i) has held, for at least 5 years, a senior position—
 - (A) as an academic; or
 - (B) in business; or
 - (C) in a profession; and
 - (ii) has the knowledge and experience to exercise the functions of chairperson.

(2) In this section:

Commonwealth agency head means an agency head under the Public Service Act 1999 (Cwlth), section 7 (Interpretation).

Note The *Public Service Act 1999* (Cwlth), s 7, defines **agency head** as—

- (a) the secretary of a department; or
- (b) the head of an executive agency; or
- (c) the head of a statutory agency.

judge means—

- (a) a judge of the Supreme Court; or
- (b) a judge of the Supreme Court of a State or another Territory; or
- (c) a judge of the Federal Court or Family Court.

(3) In this section, a reference to a person who was a **director-general** of an administrative unit includes a reference to someone who was a chief executive of an administrative unit.

The Committee notes that, while it addresses eligibility-for-appointment issues set out in section 12, the explanatory statement for the instrument does not address the eligibility-for-appointment requirements of section 12C

The Committee notes that there may also be an argument that (given the absence of a formal provision stating that “the Speaker must appoint the chairperson of the Electoral Commission”) the explanatory statement for the instrument (and the formal part of the instrument itself) might also have referred to section 79 of the *Financial Management Act 1996*, which allows the “responsible minister” for a “territory authority” to appoint a chairperson and a deputy chairperson of a “governing board”, in the absence of an express power to do so in the relevant Act. However, the operation of that argument is clearly limited by the fact that the Speaker would not seem to come within the definition of “responsible minister”.

The Committee seeks the Speaker’s advice as to whether the specified person who is appointed by this instrument meets the eligibility requirements of section 12C of the *Electoral Act 1992*.

This comment requires a response from the Speaker.

DRAFTING ISSUE

Disallowable Instrument DI2017-93 being the Court Procedures (Fees) Determination 2017 (No 2) made under section 13 of the *Court Procedures Act 2004* revokes DI2017-20 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-110 being the Court Procedures (Fees) Determination 2017 (No 3) made under section 13 of the *Court Procedures Act 2004* revokes DI2017-93 and DI2017-20 and determines fees payable for the purposes of the Act.

The Committee notes that the first instrument mentioned above, which determines fees for the *Court Procedures Act 2004*, was made on 6 June 2017. The second instrument mentioned above was made on 13 June 2017. It revokes and replaces the first instrument, with effect from 1 July 2017 (other than the provision that revokes the second instrument, which is taken to have commenced on the date that the first instrument was notified, ie 7 June 2017). The Committee notes that the explanatory statement for the second instrument states:

The Determination corrects a technical error at Item 1205, removing an incorrect reference to the Master. Item 1206 determines the amount payable on lodging for filing a document to commence an appeal from the Registrar in a proceeding other than an interlocutory proceeding. Item 1205 determines the amount payable on lodging for filing a document to commence an appeal from the Registrar in a proceeding in an interlocutory proceeding.

Section 7 repeals the Court Procedures (Fees) Determination 2017 (No 2) DI2017-93 retrospectively to correct an administrative error in relation to the commencement as the fees should have commenced on 1 July 2017. This repeal means that DI2017-93 was never effective. This is a non-prejudicial provision as the fees under DI2017-20 are less than the fees that would have applied under DI2017-93.

Section 8 repeals the Court Procedures (Fees) Determination 2017 (No 1) DI2017-20 on 1 July 2017.

The Committee draws this explanation to the attention of the Legislative Assembly.

This comment does not require a response from the Minister.

DRAFTING ISSUE

Disallowable Instrument DI2017-95 being the Guardianship and Management of Property (Fees) Determination 2017 made under section 75 of the *Guardianship and Management of Property Act 1991* revokes DI2016-253 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-96 being the Public Trustee and Guardian (Fees) Determination 2017 made under section 75 of the *Public Trustee and Guardian Act 1985* revokes DI2016-252 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-111 being the Guardianship and Management of Property (Fees) Determination 2017 (No 2) made under section 75 of the *Guardianship and Management of Property Act 1991* revokes DI2017-95 and DI2016-253 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-112 being the Public Trustee and Guardian (Fees) Determination 2017 (No 2) made under section 75 of the *Public Trustee and Guardian Act 1985* revokes DI2017-96 and DI2016-252 and determines fees payable for the purposes of the Act.

The first instrument mentioned above, made on 6 June 2017, determines fees for the *Guardianship and Management of Property Act 1991*. The third instrument mentioned above was made on 13 June 2017. It revokes and replaces the first instrument, with effect from 1 July 2017 (other than the provision that revokes the second instrument, which is taken to have commenced on the date that the first instrument was notified, ie 7 June 2017). The Committee notes that the explanatory statement for the third instrument states:

Section 5 repeals the Guardianship and Management of Property (Fees) Determination 2017 DI2017-95 retrospectively to correct an administrative error in relation to the commencement as the fees should have commenced on 1 July 2017. This repeal means that DI2017-95 was never effective. This is a non-prejudicial provision as the fees under DI2016-253 are less than the fees that would have applied under DI2017-95.

Section 6 repeals the Guardianship and Management of Property (Fees) Determination 2016 (No 2) DI2016-253 on 1 July 2017.

The fourth instrument mentioned above deals, similarly, with the second instrument mentioned above. A similar explanation to that set out above is set out in the explanatory statement for the fourth instrument.

The Committee draws these explanations to the attention of the Legislative Assembly.

This comment does not require a response from the Minister.

ISSUES WITH FEES INSTRUMENTS

Disallowable Instrument DI2017-99 being the Firearms (Fees) Determination 2017 made under section 270 of the *Firearms Act 1996* revokes DI2016-103 and determines fees payable for the purposes of the Act.

For this Scrutiny Report, the Committee has examined over 60 instruments that determine fees, for various Acts. The instrument mentioned above determines fees for the *Firearms Act 1996*. It revokes and replaces the previous fees determination, for that Act. It sets out new fees.

The explanatory statement for the instrument states:

Firearms fees in the 2017-18 Financial Year will increase from fees in the previous Financial Year by an indexation of 4% and rounded to an appropriate value. This increase is the same increase for all regulatory fees.

Item numbers are included in the schedule, column 2, to enable the comparison of past fees set under the Act with those set by this instrument.

The Committee notes the proposition that “[t]his is the same increase for all regulatory fees.” The consistency of explanations provided for fees increases is discussed further below.

As the Committee has consistently noted, it takes a particular interest in relation to fees determinations. In the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

In addition, at times of the year when there are great numbers of fees determinations, the Committee has taken an interest in monitoring the consistency of the explanations for fees increases.⁷ In that context, the Committee notes the following examples of explanations given for fees increases provided for in explanatory statements for instruments considered for this Scrutiny Report:

The Associations Incorporation (Fees) Determination 2017 (DI2017-84) determines fees for the *Associations Incorporation Act 1991*. The explanatory statement for the instrument states:

Fees under the Act have been increased from 1 July 2017 by indexation of 4% rounded down to the nearest dollar.

The Agents (Fees) Determination 2017 (DI2017-68) determines fees for the *Agents Act 2003*. The explanatory statement for the instrument states:

Fees in the 2017-18 Financial Year have been generally increased from fees in the previous Financial Year by an indexation of 4% and rounded to an appropriate value.

The Court Procedures (Fees) Determination 2017 (No 2) (DI2017-93) determines fees for the *Court Procedures Act 2014*. The explanatory statement for the instrument states:

This instrument increases fees for matters in respect of which fees or charges are payable under the Act. Fees in the 2017–18 financial year have been generally increased from fees in the previous financial year by indexation of 4% and rounded to an appropriate value. Explanatory notes in the Determination list the fees previously determined to enable comparison.

The Rates, Land Tax and Land Rent (Certificate and Statement Fees) Determination 2017 (No 1) (DI2017-145) determines fees for the *Rates Act 2004*, the *Land Tax Act 2004* and the *Land Rent Act 2008*. The explanatory statement for the instrument states:

As part of the 2014-15 Budget, a 4 per cent indexation was introduced for regulatory service fees. This indexation was fixed for 4 years and due to expire on 30 June 2018. Accordingly, for 2017-18 the fee has been increased from \$107 to \$112 (rounded up to the nearest dollar).

The Road Transport (General) Refund and Dishonoured Payments Fees Determination 2017 (No 1) (DI2017-135) determines fees for the *Road Transport (General) Act 1999*. The explanatory statement for the instrument states:

⁷ See, eg, *Scrutiny Report 35* of the 8th Assembly (21 September 2015), at page 11 and *Scrutiny Report 47* of the 8th Assembly (8 August 2016), at page 13.

The fees in the determination have been increased by the Wages Price Index (WPI) of 2%, rounded down to the nearest ten cents.

The Casino Control (Fees) Determination 2017 (DI2017-88) determines fees for the *Casino Control Act 2006*. The explanatory statement for the instrument states:

This instrument increases the fee by indexation of 2%, rounded down to the nearest dollar. A comparative table indicating the previous and revised fee is included as an attachment to this Explanatory Statement.

The Electoral (Fees) Determination (DI2017-114) determines fees for the *Electoral Act 1992*. The explanatory statement for the instrument states:

The fees for 2017/2018 are determined by increasing the 2016/2017 fees, determined by DI2016-93, by the Wage Price Index (WPI) of 2%, rounded down to the nearest \$0.05.

The Veterinary Surgeons (Fees) Determination 2017 (No 1) (DI2017-64) determines fees for the *Veterinary Surgeons Act 2015*. The explanatory statement for the instrument states:

This instrument sets out the fees payable to the board by applicants for registration as a veterinary surgeon in the Territory. The determination increases the fees since the previous determination by 2% rounded for cash handling and other purposes. The increase is in reference to the Wage Price Index.

The Building (Fees) Determination 2017 (DI2017-148) determines fees for the *Building Act 2004*. The explanatory statement for the instrument states:

The fees in the determination have been increased by 2% for the 2017-18 financial year, based on the wage price index as per government's advice. Administration fees relating to refunds are increased by 2% (the Wage Price Index), as per the government's Fees and Charges Policy and Guidelines. Appropriate rounding has been made in relation to increases.

The Architects (Fees) Determination 2017 (DI2017-147) determines fees for the *Architects Act 2004*. The explanatory statement for the instrument states:

The regulatory fees in the determination have been increased by 2% for the 2017-18 financial year, based on the wage price index as per government's advice, Administration fees relating to refunds are increased by 2% (the Wage Price Index), as per the government's Fees and Charges Policy and Guidelines. Appropriate rounding has been made in relation to increases.

The Road Transport (General) Driver Licence and Related Fees Determination 2017 (No 1) (DI2017 133) determines fees for the *Road Transport (General) Act 1999*. The explanatory statement for the instrument states:

All driver licence fees and other driver licence related fees (other than the search of records fee) have increased by the Wages Price Index (WPI) of 2%, rounded down to the nearest ten cents. The search of records fee is increased at 2.5% (above WPI) to \$24.70 to align with the fee for a registration search of records. The search of records fee for driver licences was previously 20 cents less than for a registration search of records even though the cost to deliver the service is the same. This impacted on customer service and created confusion for people who require both services.

The Road Transport (General) Vehicle Registration and Related Fees Determination 2017 (No 2) (DI2017-132) also determines fees for the *Road Transport (General) Act 1999*. The explanatory statement for the instrument states:

Vehicle registration fees have been increased by 5%, rounded down to the nearest ten cents. Other fees and charges have been increased by the Wages Price Index (WPI) of 2%. The short term registration surcharge (payable for registration periods of less than 12 months) has not been changed. Heavy vehicle fees in this determination were adjusted on 1 July 2017 and are not further amended by this determination.

The Water Resources (Fees) Determination 2017 (DI2017-164) determines fees for the *Water Resources Act 2017*. The explanatory statement for the instrument states:

The regulatory fees (excluding water abstraction charge) in the determination have been increased by 2% for the 2017-18 financial year based on the wage price index as per government's advice, appropriate rounding has been made in relation to increases. The government will index the Water Abstraction Charge (WAC) by 3% as per the government's decision in the 2017-18 Budget.

The Road Transport (General) (Pay Parking Area Fees) Determination 2017 (No 1) (DI2017-166) determines fees for the *Road Transport (General) Act 1999*. The explanatory statement for the instrument states:

The updated disallowable instrument includes a 6% increase to listed pay parking fees, including pre-paid all-day parking tickets and CIT pre-paid tickets, rounded to the nearest ten cents. An annual 6% increase in pay parking fees was announced in the 2014-15 ACT Government budget, and was previously applied from 1 July 2015 in a previous fee determination, Road Transport (General) (Pay Parking Area Fees) Determination 2015 (No 1) (DI2015-203) and 1 July 2016 in Road Transport (General) (Pay Parking Area Fees) Determination 2016 (No 2). Discounts apply to fees for multi-stay parking tickets. Discounts have been applied in previous fee determinations.

The Cemeteries and Crematoria (Public Cemetery Fees) Determination 2017 (No 1) (DI2017-46) determines fees for the *Cemeteries and Crematoria Act 2003*. The explanatory statement for the instrument states:

The determination increases fees by approximately 8% for the majority of services provided, this is to phase fee increases which were recommended in a report commissioned by the Regulator of the Act to ensure there is adequate funding in the Perpetual Care Trust Reserve to meet the requirements of the Act. Fees for ancillary services and products including the Christ the Redeemer Mausoleum fees are increased by the 2 percent Wage Price Index. The increased fees are rounded for cash handling purposes. The fee for removing a ledger has increased by 15.3% to reflect an increased cost by the contractors performing this function.

A number of new fees have been introduced in relation to new services provided for the interment of ashes in the Children's Garden and for the provision of bricks for Islamic Children's grave.

As the Committee noted in *Scrutiny Report 37* of the *8th Assembly* (21 September 2015), in relation to a similar batch of fees instruments, the point of setting out the above is to demonstrate the variety of reasons provided for fees increases, etc contained in instruments considered by the Committee for this Scrutiny Report. The examples provided are not intended to be exhaustive but merely indicative. The Committee notes with approval that, in every case, an explanation is provided for the relevant fees increases. Setting out the examples is merely intended to demonstrate to the Legislative Assembly the variety in the reasons and explanations provided.

That said, the Committee also notes that the proposition in the explanatory statement for the Firearms (Fees) Determination 2017 that the increase provided for in the instrument "is the same increase for all regulatory fees" is, in the light of the examples set out above, a little perplexing. As the Committee noted in *Scrutiny Report 47* of the *8th Assembly* (8 August 2016), in relation to the

previous batch of fees instruments, it is the Committee’s view that the overall standard of explanations provided for fees increases is much-improved, compared to previous years. However, it would be preferable if Ministers and agencies could consider the issue of consistency of explanation (and of the approach to issues such as rounding) when preparing future fees instruments.

These comments do not require a response from the Minister.

MINOR DRAFTING ISSUE

Disallowable Instrument DI2017-118 being the Civil Law (Wrongs) Professional Standards Council Appointment 2017 (No 1) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* reappoints a specified person to be a member of the Professional Standards Council.

This instrument appoints a specified person to the ACT Professional Standards Council. It is made under section 4.38 of Schedule 4 to the *Civil Law (Wrongs) Act 2002*, which provides:

Division 4.6.2 Membership of council

4.38 Membership of council

The council is to consist of 11 people appointed by the Minister who have the experience, skills and qualifications the Minister considers appropriate to enable them to make a contribution to the work of the council.

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

Note 2 In particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and 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 an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

As the explanatory statement for the instrument notes:

... The ACT Council consists of eleven people appointed by the Minister who have the experience, skills and qualifications the Minister considers appropriate to enable them to make a contribution to the work of the ACT Council.

All states and territories have agreed to appoint the same eleven members to their Professional Standards Councils. The Councils will comprise one member nominated by each of the states and territories and the Commonwealth, with the exception of NSW and Victoria, which nominate two.

The Committee notes that, unlike some previous instrument made under the relevant provision (eg Civil Law (Wrongs) Professional Standards Council Appointment 2015 (No 5), DI2015–317), the explanatory statement for this instrument does not identify the jurisdiction that nominated the specified person. While the Committee acknowledges that this is not a formal requirement, the Committee considers that it is preferable that the nominating jurisdiction be identified, in each case.

This comment does not require a response from the Minister.

DRAFTING ISSUE

Disallowable Instrument DI2017-167 being the Canberra Institute of Technology (Institute Board Member) Appointment 2017 (No 1) made under section 8 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Canberra Institute of Technology Institute Board.

Disallowable Instrument DI2017-168 being the Canberra Institute of Technology (Institute Board Member) Appointment 2017 (No 2) made under section 8 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Canberra Institute of Technology Institute Board.

Disallowable Instrument DI2017-169 being the Canberra Institute of Technology (Institute Board Member) Appointment 2017 (No 3) made under section 8 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* appoints a specified person, nominated by the staff of the Institute, as a member of the Canberra Institute of Technology Institute Board.

Disallowable Instrument DI2017-170 being the Canberra Institute of Technology (Institute Board Member) Appointment 2017 (No 4) made under section 8 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* appoints a specified person, nominated by students of the Institute, as a member of the Canberra Institute of Technology Institute Board.

Each of these instruments appoints a specified person as a member of the board of the Canberra Institute of Technology. All of the instruments identify section 8 of the *Canberra Institute of Technology Act 1987* (which the formal parts of the instrument suggest relates to “Establishment of Institute board”) and also section 78 of the *Financial Management Act 1996* as the source of the power to make the appointments. The latter provision is relevant because it authorises the Minister responsible for a “territory authority” to appoint members of the governing board of such an authority. However, the reference to section 8 of the *Canberra Institute of Technology Act* is incorrect. The correct reference should be to section 9 of that Act, which provides for the establishment of the relevant board.

Similarly, the Committee notes that the explanatory statements for the third and fourth instruments mentioned above also incorrectly refer to section 10 of the *Canberra Institute of Technology Act*. The correct reference should be to section 11 of the Act, which provides for staff members and student members of the board.

The Committee notes that it made a similar comment in *Scrutiny Report 35* of the Eighth Assembly (10 August 2015) (at page 16), in relation to DI2015-149, DI2015-150, DI2015-151, DI2015-152 and DI2015-153, which also appointed specified persons as members of the relevant board. As the Committee indicated in that *Scrutiny Report*, the reference to the incorrect sections reflects a failure to take into account the re-numbering that occurred as a result of section 34 of the *Canberra Institute of Technology Amendment Act 2014*. As the Committee noted in the earlier *Scrutiny Report*, the re-numbering is consistent with sections 114, 116 and 118 of the *Legislation Act 2001* (which deal with editorial changes to legislation).

In making this comment, the Committee notes (as it did in *Scrutiny Report 35*) that the common law recognises that an incorrect reference to an empowering provision does not operate to invalidate the making of delegated legislation and that as long as there is an empowering provision, the authority to make the delegated legislation will not be in doubt (see Pearce, DC and Argument, S, *Delegated Legislation in Australia* (5th edition), paragraphs 13.20 to 13.24).

This proposition is recognised in the following passage in the Committee’s document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at https://www.parliament.act.gov.au/data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf):

EMPOWERING PROVISIONS

The Committee prefers that subordinate legislation correctly identify the provision (eg of an Act) under which it is made. While the Committee accepts that there are legislative mechanisms and case-law principles that can operate to ‘save’ instruments that incorrectly identify the empowering provision, it is obviously preferable that the correct provision be identified. Apart from anything else, having the correct provision identified allows the Committee (and the Legislative Assembly) to be more confident about the content of the instrument.

The Committee notes that the relevant page on the ACT Legislation Register correctly identifies section 9 of the Canberra Institute of Technology Act as the empowering provision for these instruments.

Two obvious points should be made. First, the Committee notes that these instruments demonstrate another point made in the Committee’s “Tips/Traps” document, regarding the potential pitfalls of using previous documents as precedents, without checking that the empowering provisions are still the same. The “Tips/Traps” document states:

ISSUES ARISING FROM THE USE OF TEMPLATES AND PRECEDENTS

The Committee often identifies issues that appear to arise from the use of previous instruments as templates or precedents for new instruments. The kinds of issues that arise are references to the plural in instruments that appoint only 1 person (and vice versa) and references to, say, provisions relating to the appointment of chairs and deputy chairs to governing boards when the particular instrument appoints a person only as a member. This suggests to the Committee that a previous instrument (or the Explanatory Statement for a previous instrument) has been used as a template or a precedent, without sufficient care being taken to ensure that the previous instrument or Explanatory Statement is adapted to fit the new situation. The Committee accepts that instruments and Explanatory Statements will be used as templates and precedents but cautions instrument makers that caution must be taken to ensure that the earlier document is adapted to fit the new situation.

The second point is that the relevant agency clearly did not take note of the comments made by the Committee in *Scrutiny Report 35* of the 8th Assembly. This is disappointing.

This comment does not require a response from the Minister.

WHY WAS THIS INSTRUMENT RE-MADE, SO SOON AFTER BEING MADE?

Disallowable Instrument DI2017-180 being the Public Unleased Land (Fees) Determination 2017 (No 1) made under section 130 of the *Public Unleased Land Act 2013* revokes DI2016-162 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-186 being the Public Unleased Land (Fees) Determination 2017 (No 2) made under section 130 of the *Public Unleased Land Act 2013* revokes DI2017-180 and determines fees payable for the purposes of the Act.

The Committee notes that the first instrument mentioned above, which was made on 23 June 2017 (and notified on the ACT Legislation Register on 29 June 2017), determines fees for the *Public Unleased Land Act 2013*. The second instrument mentioned above, which was made on 30 June 2017 (and notified on the ACT Legislation Register on 30 June 2017), revokes the first instrument and also determines fees for the relevant Act. The explanatory statement for the second instrument provides no explanation as to why it was necessary to revoke and re-make the first instrument, so soon after it was made.

It appears that the changes made by the second instrument, compared to the first instrument, are:

- the first instrument increased the fee determined by item 1.2 of Schedule 1 to the instrument, from \$117.00 to \$119.00 – the second instrument reduced the fee, back to \$117.00; and
- the second instrument adds four new items to Schedule 1 – new items 4.1, 4.2, 4.3 and 4.4.

No explanation is provided as to the reasons for these changes to the first instrument.

The Committee seeks the Minister's advice as to the reasons for the changes made to the first instrument by the second instrument.

This comment requires a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2017-12 being the Road Transport (Vehicle Registration) Amendment Regulation 2017 (No 1) made under the *Road Transport (Vehicle Registration) Act 1999* amends the definition of "tow truck" to clarify that vehicles with significant flat areas are goods vehicles rather than tow trucks.

Subordinate Law SL2017-13 being the Road Transport (Third-Party Insurance) Amendment Regulation 2017 (No 1) made under the *Road Transport (Third-Party Insurance) Act 2008* aligns the definition of a breakdown vehicle with the definition of a tow truck in the Road Transport (Vehicle Registration) Regulation 2000.

Subordinate Law SL2017-14 being the Road Transport Legislation Amendment Regulation 2017 (No 1) made under the *Road Transport (General) Act 1999*, *Road Transport (Safety and Traffic Management) Act 1999* and *Road Transport (Vehicle Registration) Act 1999* amends specified legislation to allow for the use of segways on public land.

Subordinate Law SL2017-16 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2017 (No 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* amends the *Road Transport (Safety and Traffic Management) Regulation 2000* to amend the definition of *fixed camera detection device* and *radar speed measuring device*.

Subordinate Law SL2017-17 being the Court Procedures Amendment Rules 2017 (No 3) made under section 7 of the *Court Procedures Act 2004* amends the *Court Procedures Rules 2006*.

SUBORDINATE LAWS—COMMENT

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

UNUSUAL PROCEDURE FOR MAKING A SUBORDINATE LAW

Subordinate Law SL2017-15 being the Electricity Feed-in (Large-scale Renewable Energy Generation) Regulation 2017 enacted by the *Planning, Building and Environment Legislation Amendment Act 2017 (No 2)*.

The Committee notes that this subordinate law was “made” by the *Planning, Building and Environment Legislation Amendment Act 2017 (No 2)*. Section 7 of that Act inserts into the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* a new section 7, that provides:

26 Electricity Feed-in (Large-scale Renewable Energy Generation) Regulation 2017—sch 1

- (1) The provisions set out in schedule 1 are taken, on the commencement of this section, to be a regulation made under section 25.
- (2) To remove any doubt and without limiting subsection (1), the regulation may be amended or repealed as if it had been made by the Executive under section 25.
- (3) Also to remove any doubt, the regulation is taken—
 - (a) to have been notified under the Legislation Act on the day the *Planning, Building and Environment Legislation Amendment Act 2017 (No 2)* is notified; and
 - (b) to have commenced on the commencement of the *Planning, Building and Environment Legislation Amendment Act 2017 (No 2)*; and
 - (c) not to be required to be presented to the Legislative Assembly under the Legislation Act, section 64 (1).
- (4) Subsections (1) to (3) are laws to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.
- (5) This section and schedule 1 expire on the day they commence.

A (new) Electricity Feed-in (Large-scale Renewable Energy Generation) Regulation 2017 is then “made” by section 8 of the *Planning, Building and Environment Legislation Amendment Act 2017 (No 2)*, which inserts a new Schedule 1 into the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act* that, in turn, sets out the new regulation.

While (as a result of this unusual making procedure) the Committee, technically, has no scrutiny jurisdiction in relation to the Electricity Feed-in (Large-scale Renewable Energy Generation) Regulation 2017, the Committee has, nevertheless, considered the content of that subordinate law, against the principles set out in the Committee's terms of reference, and has no comments to make on the subordinate law.

The Committee notes with approval that, despite the removal of the Legislative Assembly's capacity to disallow the subordinate law, the new subsection 26(2) of the Electricity Feed-in (Large-scale Renewable Energy Generation) Act nevertheless expressly preserves the power of the Legislative Assembly to amend or repeal the subordinate law.

This comment does not require a comment from the Minister.

RELIANCE ON "HENRY VIII" CLAUSE

Subordinate Law SL2017-18 being the City Renewal Authority and Suburban Land Agency (Transitional Provisions) Regulation 2017 made under the *City Renewal Authority and Suburban Land Agency Act 2017* modifies the *Planning and Development Act 2007* to enable the office of the deputy chair of the Land Development Agency Board to exist until the legislative requirement to prepare a report or financial statement for the 2016-2017 financial year is met.

The Committee notes that this subordinate law is made under subsection 200(2) of the *City Renewal Authority and Suburban Land Agency Act 2017*. Section 200 of that Act provides:

200 Transitional regulation

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this part (including in relation to another territory law) to make a provision in relation to anything that, in the Executive's opinion, is not, or is not adequately dealt with in this part.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

As the Committee noted in its *Scrutiny Report 5* of the Ninth Assembly (at page 3), subsection 200(2) is a "Henry VIII" clause, in that it allows primary legislation to be amended by delegated (or subordinate) legislation. Further information on "Henry VIII" clauses can be found in the Committee's publication titled *Henry VIII clauses—Fact sheet* (available at https://www.parliament.act.gov.au/data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf).

As the Committee also noted in *Scrutiny Report 5*, the explanatory statement for the Bill that was enacted suggests that subclause 200(3) (as it was before it was enacted) is not intended to authorise the making of a regulation limiting future enactments of the Legislative Assembly. This generally accords with the Committee's view about the possible effect of a provision such as subsection 200(3).

The effect of this subordinate law is to insert into the City Renewal Authority and Suburban Land Agency Act a new section 200A that, in turn, provides for a new paragraph 494(2)(c) to be inserted into the *Planning and Development Act 2007*. The explanatory statement for this subordinate law states:

The *City Renewal Authority and Suburban Land Agency Act 2017* (the Act) establishes the City Renewal Authority and the Suburban Land Agency and includes consequential amendments to the *Planning and Development Act 2007* (P&D Act). The Act includes transitional provisions such as those designed to allow the land development agency (LDA) to prepare a report or financial statement for the 2016-2017 financial year.

Item 1.10 of schedule 1 of the Act enables this by inserting section 494 into the P&D Act. Section 494 provides that the offices of the chief executive officer of the LDA and the chair of the LDA Board continue to exist until the requirement to prepare a report or financial statement for the 2016-2017 financial year is met.

It would also be beneficial for the office of the deputy chair of the LDA Board to continue to exist for this purpose. The deputy chair of the LDA Board is also the chair of the Board's Audit and Risk Committee, which plays an important role in the preparation of the financial statements and reports. It is therefore necessary to amend section 494 of the Planning and Development Act to also include the office of the deputy chair of the LDA Board.

Section 200 of the Act allows transitional provisions to be amended by regulation if a matter is not adequately dealt with by the existing transitional provisions.

The explanatory statement goes on to state:

The effect of this regulation is to enable the office of the deputy chair of the LDA to continue to exist until the legislative requirement to prepare a report or financial statement for the 2016-2017 financial year is met.

Part 10 of the Act contains transitional provisions. Section 200(1) allows a regulation to prescribe matters necessary or convenient to be prescribed because of the enactment of the Act. Section 200(2) allows a regulation to modify part 10 in relation to anything that is not adequately dealt with.

This regulation, in clause 3, uses this power to amend part 10 by inserting a new section 200A. New section 200A of the Act provides that the P&D Act is modified as set out in schedule 1 of the regulation. Schedule 1 of the regulation modifies section 494 of the P&D Act by inserting a new subsection (2)(c) which adds the deputy chair of the LDA Board to the list of offices that continues in existence for the purpose of preparing the report or financial statement for the 2016-2017 financial year.

The result of this regulation is that the deputy chair of the LDA Board is added to the offices of the chief executive officer of the LDA and the chair of the LDA Board as offices that continue in existence. These positions continue in existence for the purpose of ensuring that the legislative requirement to prepare a report or financial statement for the 2016-2017 financial year is met.

The Committee draws this explanation to the attention of the Legislative Assembly.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSE

The Committee has received a response from:

- The Minister for Aboriginal and Torres Strait Islander Affairs, dated 4 May 2017, concerning the Aboriginal and Torres Strait Islander Elected Body Amendment Bill 2017.

A copy of this response can be viewed online at <http://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.

The Committee would like to thank the Minister for Aboriginal and Torres Strait Islander Affairs for her response.

Giulia Jones MLA
Chair

8 August 2017

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 6, dated 30 May 2017

Education and Care Services National Law Amendment Act 2017 (Victoria)

Report 7, dated 18 July 2017

Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB)

Lands Acquisition Amendment Bill 2017