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Our ref: MINS2024/00491

Mr Peter Cain MLA

Chair

Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

scrutiny@parliament.act.gov.au

3 April 2024

Dear Mr Cain 

Thank you for the comments made by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) in its Scrutiny Report 39 on the Magistrates Court (Public Unleased Land Infringement Notices) Amendment Regulation 2023 (No 1) (the Amendment Regulation).

The Amendment Regulation introduces an infringement notice penalty of \$440 following the introduction of a new offence under the *Public Unleased Land Act 2013* for new movable electoral sign restrictions. These restrictions set a maximum limit of 250 signs on public unleased land per prospective candidate or entity and prevent their placement from roads with a standard speed limit at or above 90km/hr.

As noted by the Committee, this penalty may limit the right to freedom of expression under section 16 and the right to presumption of innocence under section 22 of the *Human Rights Act 2004*. The Committee noted the explanatory statement provides direct justification for limiting the right to presumption of innocence and sought confirmation that the limitation on the right to freedom of expression is also directly addressed.

The explanatory statement sets out that the primary purpose of the Amendment Regulation is to reduce excessive waste production, environmental pollution, and road safety risks posed by the influx of corflute signs during electoral campaigns. The restriction to the number of signs achieves the environmental objectives by reducing the overall quantity of signs produced, placing higher value on remaining signs to ensure they are managed responsibly. The location restriction achieves road

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safety objectives by preventing drivers from stopping and merging in higher speed zones and removing the risks of dislodged signs obstructing higher speed traffic.

The purpose and justification of the amendment's impact on human rights overlaps significantly for both the right to freedom of expression and the right to presumption of innocence. Detailed discussion within the explanatory statement reflects this overlap by combining the human rights analysis to directly address each right affected under the same subheadings. While the majority of the discussion addresses both rights affected simultaneously, the proportionality section of the explanatory statement provides more detail against each affected right separately. For the right to freedom of expression, the proportionality section sets out that any limitation on the right to freedom of expression is considered proportional to the purpose given the penalty does not ban the use of corflute signs for electoral campaigning and all other forms of political expression continue to be available in addition to the use of corflute signs.

Thank you for raising this matter. I trust this information is of assistance.

Sincerely

A handwritten signature in blue ink, appearing to read 'Tara Cheyne', with a stylized flourish extending to the right.

Tara Cheyne MLA
Minister for City Services

Australian Capital Territory

Public Unleased Land (Movable Signs) Code of Practice 2023 (No 1)

Disallowable Instrument DI2023—244

made under the

Public Unleased Land Act 2013, section 27 (Movable signs code of practice)

EXPLANATORY STATEMENT

Overview of amendments

The amendments made to the Public Unleased Land (Movable Signs) Code of Practice (the Code) reflect the new offence introduced to section 28(2) of the *Public Unleased Land Act 2013* via the *Electoral and Road Safety Legislation Amendment Act 2023*.

The offence introduces a strict liability penalty of 20 penalty units for breaching the maximum number of electoral advertising signs and for placing electoral advertising signs on Designated Public Roads, which are detailed at clauses 6(4)(a), 7(1)(a)(ii) and 9 of the Code. At the time of this Code amendment, this incurs an infringement penalty amount of \$440.

This means requirements set out in the Code under the new offence at section 28(2) are covered by a larger infringement notice amount than all other requirements in the Code except relating to insurance. All other requirements in the Code not relating to insurance or the maximum number of electoral signs or Designated Public Roads are covered by the existing strict liability offence of 10 penalty units at section 28(1) of the Public Unleased Land Act. At the time of this Code amendment, this incurs an infringement penalty amount of \$220.

The Code sets out the detail for the new offence at section 28(2) of the Public Unleased Land Act as follows:

Maximum number of electoral signs

- a. A maximum 250 electoral signs on public unleased land per candidate and entity (including party and policy/issue-based signs). E.g., a political party with five candidates in five electorates must not exceed 6,500 signs (250 for each of the individual candidates and 250 for the entity).
- b. The maximum number of electoral signs applies only to elections, not referendums.

- c. For the purposes of the Code, candidates and entities include prospective candidates, Members of the Legislative Assembly (MLAs), parties, businesses, lobby groups, and other campaigners that may authorise electoral communications.
- d. The allocation is determined by authorisation, not content. For example, an individual MLA who is also a member of a political party may place 250 electoral signs on public unleased land, regardless of whether the content of the sign promotes the individual, party or a policy issue, while the MLA's party may also have a maximum 250 signs authorised by the party as an entity.

Designated Public Roads

- a. Roads with a usual speed limit of 90km/h or more are Designated Public Roads under the Code, meaning electoral signs must not be placed on or adjacent to these roads.
- b. For the purposes of the Code, this applies even where a temporary speed limit is applied to the road, such as for road works for events, but does not apply to roads within Designated Areas under Clause 8 of the Code, as electoral signs are already prohibited from being placed in Designated Areas.
- c. This amendment is in addition to existing requirements in the Code around where movable signs may or may not be placed. These include certain spacing and distance requirements for road related areas set out in Clause 7 of the Code and Designated Areas, which are areas with special characteristics of the National Capital, set out at Clause 8 of the Code. These existing requirements remain covered by the existing offence at section 28(1) of the Act, set at 10 penalty units.
- d. This amendment applies to both elections and referendums, along with all existing requirements for electoral advertising signs in the Code.
- e. Public unleased land is defined in the Act as unleased territory land which the public is entitled to use or is otherwise open to be used by the public. Public roads are defined in the Act as including the street, road, lane, thoroughfare, footpath, or place that is public unleased land. The amendments to the Code around electoral signs being prohibited at Designated Public Roads includes all public unleased land alongside or adjacent to the road.

For the purposes of the Code, 'electoral advertising signs' means movable signs containing any printed electoral matter to which electoral advertising authorisation requirements apply under existing Commonwealth and Territory legislation. Specifically, section 292 of the *Electoral Act 1992*, section 292 of the *Electoral Act 1992* as applied by section 17 of the *Referendum (Machinery Provisions) Act 1994*, section 321D of the *Commonwealth Electoral Act 1918* (Cwlth), and section 110C of the *Referendum (Machinery Provisions) Act 1984* (Cwlth). This definition remains unchanged in the Code, with the exception of updating references to specific sections in other pieces of legislation that have moved.

The purpose of limiting the number of movable electoral signs per candidate during election campaigns is to reduce excessive waste production, environmental pollution and road safety risks posed by the influx of corflute signs during campaign periods. While reducing the

overall number of corflutes from reaching landfills and from becoming litter is the primary environmental objective, reuse and recycling of corflutes will also continue to be encouraged.

The purpose of restricting movable electoral signs from Designated Public Roads at or exceeding 90km/h speed limits is to address safety risks associated with vehicles stopping to install/remove signs, signs blowing into the path of moving traffic, and driver distraction due to a sudden influx of electoral corflutes during election and referendum campaigns. While some existing restrictions in the Code already address road and pedestrian safety more generally, such as spacing limits from verges, this new restriction directly targets the issue of high-speed road safety. The reason why public roads with a usual speed limit of 90km/h are still considered Designated Public Roads when temporary speed limits are applied is to reflect that these roads are still subject to high traffic flow. Temporary speed limits may also be lifted during the campaign period, meaning those responsible for the signs would be required to revisit the road to remove the signs following the usual speed limit being reinstated, presenting a safety risk.

Human rights analysis

The following analysis assesses the amendments to the Code against criteria set out under section 28 of the *Human Rights Act 2004* to demonstrate that any limitations on human rights are reasonable and justified.

The amendments to the Code limit the right to freedom of expression under section 16 of the Human Rights Act and engage the implied Australian Constitutional right to freedom of political communication. The strict liability offences at new sections 28(2) of the Act engage rights in criminal proceedings, specifically the right to be presumed innocent until proven guilty under section 22 of the Human Rights Act.

The new offence at section 28(2) is set at 20 penalty units and is strict liability, with infringement notices of \$440 at the time of establishment in 2023. This is double the existing offence for breaching other non-insurance related provisions in the Code under section 28(1). This higher penalty may only apply to the maximum number of electoral advertising signs and the prohibiting of electoral advertising signs at Designated Public Roads.

The existing offence at section 28(1) relates to all other provisions in the Code. This existing offence for the remaining provisions in the Code does not apply to the new offences at section 28(2) and their corresponding provisions at clauses 6(4)(a), 7(1)(a)(ii) and 9 of the Code.

The purpose of making the new offence strict liability is to provide an effective deterrent. Where candidates or an entity are clearly or repeatedly breaching the maximum number of signs and/or the location restriction on Designated Public Roads, the strict liability offence ensures responsive enforcement during campaign periods where candidates or entities may

have otherwise considered breaching the Code to be worth the advantage over competitors. As the new offence is strict liability, the defence of reasonable mistake of fact is available. The purpose of a higher penalty amount compared to all other non-insurance related restrictions in the Code is to reflect the greater safety risks in high-speed roads and the increased environmental concerns associated with pollution and unnecessary waste production.

It is also intended for the maximum number of signs and the new location restriction at Designated Public Roads to complement each other during election campaign periods. Higher-speed traffic areas have proven popular for large quantities of corflutes in previous elections. Applying the maximum number of 250 signs without restricting their placement along higher-speed roads could result in candidates further concentrating their limited signs in these high-visibility areas, increasing the associated road safety risks. Restricting signs from Designated Public Roads without a maximum number of signs could result in higher concentrations of signs on all remaining permitted roads, which leads to more litter and doesn't address growing concerns around waste reduction. While recycling technology does exist for corflute signs, avoidance is always best.

The Code defines 'electoral advertising signs' as movable signs containing printed electoral matter to which authorisation requirements under existing ACT and Commonwealth legislation apply. This means that the broader definition of 'electoral matter' set out in other legislation is not used in full; only signs covered by the existing authorisation requirements under section 292 of the *Electoral Act 1992*, section 292 of the *Electoral Act 1992* as applied by section 17 of the *Referendum (Machinery Provisions) Act 1994*, section 321D of the *Commonwealth Electoral Act 1918* (Cwlth) or section 110C of the *Referendum (Machinery Provisions) Act 1984* (Cwlth) are considered to be electoral advertising signs.

This has been demonstrated through existing enforcement practice for the Code in past elections, where only signs which self-identify as electoral matter are considered to be electoral advertising signs. Similarly, the authorisation information is most commonly used to determine the responsible person or party for a sign in breach of the Code. Warnings and an educative approach are the preferred method of enforcement for the Code during campaign periods. Given the amendments to the Code for the maximum number of signs and Designated Public Roads are new, this will continue to be the approach of authorised persons in administering the Code.

The responsible area for administering the Code is Transport Canberra and City Services (TCCS). TCCS will work with the ACT Electoral Commission at implementation and future elections and referendums to ensure the new restrictions are understood by prospective candidates, parties, and other entities, including that a higher penalty applies to the new restrictions. Candidate briefings and information packs (e.g. the ACT Candidate Handbook) will also make this clear. TCCS also promotes the Code and provides a copy to relevant prospective candidates and parties at the commencement of an election period.