LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Public Accounts Committee

Report of Ministerial Correspondence on Subordinate Legislation

July 2018 - May 2019

May 2019

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<tr><td colspan="3">On 1 February 2019, Member for Port Darwin, the Hon Paul Kirby MLA was discharged from the Committee and replaced by Member for Katherine, Ms Sandra Nelson MLA. On 12 February 2019, Member for Sanderson, Mrs Kate Worden MLA stood down as Chair of the Committee. The Member for Katherine, Ms Sandra Nelson MLA was elected Chair of the Committee. On 22 March 2019, Member for Spillett, Mrs Lia Finocchiaro MLA was discharged from the Committee and replaced by Member for Daly, Mr Gary Higgins MLA.</td></tr>
</table>

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Terms of Reference

Sessional Order 13

Public Accounts Committee

(1) Standing Order 177 is suspended and the Public Accounts Committee appointed under that Standing Order shall continue with following terms of reference.

(2) The Public Accounts Committee has the following duties:

(a) to examine the accounts of the receipts and expenditure of the Northern Territory and each statement and report tabled in the Legislative Assembly, pursuant to the *Financial Management Act* and the *Audit Act*

(b) to report to the Legislative Assembly with such comments as it thinks fit, any items or matters in or arising in connection with those accounts, statements or reports, or in connection with the receipt or disbursement of the moneys to which they relate, to which the committee is of the opinion that the attention of Parliament should be drawn

(c) to report to the Legislative Assembly any alteration which the committee thinks desirable in the form of the public accounts or in the method of keeping them or in the method of receipt, control, issue or payment of public moneys

(d) to inquire into and report to the Legislative Assembly on any question in connection with the public accounts of the Northern territory

(i) which is referred to it by a resolution of the Assembly or

(ii) which is referred to it by the Administrator or a Minister

(e) to inquire into and report to the Legislative Assembly on any matters within the executive authority of Ministers of the Territory to which the committee is of the opinion that the attention of the Assembly should be drawn

(f) the reports by statutory bodies tabled in the Assembly, including the recommendations of the Electoral Commissioner tabled under section 313 of the *Electoral Act*

(g) in relation to any instruments of a legislative or administrative character which the Assembly may disallow or disapprove:

(i) whether that instrument has sufficient regard to the rights and liberties of individuals, including whether the instrument:

(A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(B) is consistent with principles of natural justice; and

(C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(F) provides appropriate protection against self-incrimination; and

(G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(ii) whether that instrument has sufficient regard to the institution of Parliament, including whether an instrument:

(A) is within the authorising law which allows the instrument to be made: and

(B) is consistent with the policy objectives of the authorising law; and

(C) contains only matter appropriate to subordinate legislation; and

(D) amends statutory instruments only; and

(E) allows the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons and if authorised by an Act.

(3) The Committee will consist of six Members.

(4) The Committee will elect a Government Member as Chair.

(5) The Committee will provide an annual report of its activities to the Assembly.

(6) This resolution does not change the Chair, membership or existing inquiries of the Committee.

(7) Standing Order 176 is suspended and the Subordinate Legislation and Publications Committee is dissolved.

(8) The Public Accounts Committee will have access to the records of the former Subordinate Legislation and Publications Committee and may continue the consideration of any matter commenced by that Committee.

Adopted 24 August 2017

1 Introduction

Committee's Duties Regarding Subordinate Legislation

1.1 Under Sessional Order 14, the Public Accounts Committee has taken on the duties of the former Subordinate Legislation and Publications Committee to examine and report on all instruments of a legislative or administrative character that the Assembly may disallow or disapprove to advise the Assembly whether the instrument has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

1.2 Committees to examine subordinate legislation against such terms is common in Westminster style Parliaments. This scrutiny is to assist the Parliament ensure other bodies use its delegated power to make laws according to certain principles. Those principles are detailed in Sessional Order 14(2)(g).

1.3 Under section 63 of the *Interpretation Act 1978*, the Assembly may disallow subordinate legislation by motion, notice of which must be given within 12 sitting days of the tabling of the subordinate legislation. The Committee's role is to bring to the Assembly's attention any issues arising under Sessional Order 14(2)(g) to inform it on whether the power to disallow should be exercised.

1.4 The Committee obtains independent legal advice on whether an instrument raises any issues. It will then refer issues raised to the Minister for response. If issues arise warranting the Assembly's immediate attention, the Committee reports that subordinate legislation to the Assembly. It also provides periodic reports such as this to the Assembly of its correspondence with Ministers to account to the Assembly for the work it has done and place on the public record the issues noted and the explanations given.

Significant issues arising with regulations

1.5 In most instances the Committee was satisfied with the explanations Ministers gave and any related undertakings given. There were, however, two instances which raised concerns for the Committee, although the Committee did not consider that they warranted a separate report.

Pastoral Land Amendment Regulations

1.6 As set out in the letters in Chapter 2, Regulation 32 of the Pastoral Land Regulations was in response to the Assembly enacting section 68(5)(c) of the *Pastoral Land Act 1992* subsequent to what the Minister described as an administrative error. This was after significant amendments were made to the Pastoral Land Legislation Amendment Bill 2017 due to a decision to defer some of the proposals made in the original Bill. The Minister explained that the purpose of Regulation 32 was "to suspend the application of Section 68(5)(c) of the Act until appropriate sub leasing provisions are made".

1.7 The purpose of the regulation-making power is to give effect to an Act, not to suspend a provision of an Act when it is inconsistent with Government policy. To do this is prima facie not to have due regard to the institution of Parliament as the supreme law-making body. Further, the Committee's independent legal advice took the view that such a regulation was beyond the regulation-making power under the Act.

1.8 The Minister also advised that the regulation would soon be replaced with the planned legislative amendments.

1.9 Given these circumstances, where the Regulations appeared convenient for the administration of pastoral lands, did not appear to adversely affect any person, and were to be replaced in the coming months, the Committee did not consider a standalone report to the Assembly was required.

Petroleum (Environment) Amendment Regulations No 27 of 2018 & Petroleum (Environment) Further Amendment Regulations 28 of 2018

1.10 As detailed in the letters below, questions were raised regarding whether regulations relating to hydraulic fracturing in the Petroleum (Environment) Regulations were outside the regulation-making power under the *Petroleum Act 1984*.

1.11 The definition of 'petroleum' under the Act states that it "does not include a substance which, in its naturally occurring state, is not recoverable from a well by conventional means". On its face, this appeared to exclude hydraulic fracturing from the ambit of the Act.

1.12 Although this definition is to be amended on the commencement of the *Petroleum Legislation Amendment Act 2019*, it was the definition at the time the regulations were made.

1.13 The Minister provided his firm advice "that Petroleum obtained by hydraulic fracturing has always been within the ambit of the definition", although he did not provide the reasoning behind that advice, or what then was the meaning of the exclusion within the definition.

1.14 The Committee accepted the Minister's advice, although it notes that it is better able to discharge its duties if Ministers provide the reasons for their views, and that in some circumstances it may decide that a notice of motion to disallow a regulation is required to extend the period for disallowance if adequate reasoning is not provided in a timely manner.

2 Ministerial Correspondence on Subordinate Legislation

Termination of Pregnancy Law Reform Regulations No. 20 of 2017

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.139

Hon Natasha Fyles MLA
Minister for Health
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Termination of Pregnancy Law Reform Regulations 2017 [No 20 of 2017]

Thank you for your letter of 6 November 2017 responding to the questions raised about the Termination of Pregnancy Law Reform Regulations.

The Committee is satisfied with the Department's responses in relation to Regulations 3 and 12 and the action being taken to address the issues with Regulation 4.

The Committee is concerned that the Department's response to Regulation 8 did not address the issue raised by Professor Aughterson. Professor Aughterson noted that for terminations performed at not more than 14 weeks there was only prescribed information for reports to the CHO for terminations using a drug or by surgical procedure. No information is prescribed by the Regulation for terminations by other means, despite subregulation (2) referring to terminations by means other than drugs or surgery.

The response from the Department indicates that it is intended that the Regulation cover new technology or methodology. The Department may therefore wish to consider whether there should be prescribed information if methods other than using drugs or surgical procedures are used for terminations at not more than 14 weeks.

Yours sincerely

Mrs Kate Worden MLA
Chair

November 2017

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Public and Environmental Health Amendment Regulations No. 12 of 2018

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.211

Hon Natasha Fyles MLA
Minister for Health
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Public and Environmental Health Amendment Regulations (No 12 of 2018)

The Public Accounts Committee considered the Public and Environmental Health Amendment Regulations (No 12 of 2018) on 14 August 2018 and resolved to refer the comments received from its legal advisor to you for your consideration.

I would therefore be grateful if you could provide the Committee with your response to the attached comments.

I note that as the Committee is to consider the Regulations within the 12 sitting days that they are subject to disallowance, your prompt response would be of assistance.

Yours sincerely

Mrs Kate Worden MLA
Chair

14 August 2018

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COPY

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Mrs Kate Worden MLA
Chair Public Accounts Committee
GPO Box 3721
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Dear Mrs Worden

Re: Public and Environmental Health Amendment Regulations (No 12 of 2018)

Thank you for your letter dated 14 August 2018, relating to your review of the Public and Environmental Health Amendment Regulations (Regulations). I note your legal advisor has highlighted the lack of a reasonable excuse defence for regulation 41A (2) of the Regulations.

The Office of the Parliamentary Counsel has advised that as a general rule drafters try not to provide for a reasonable excuse defence as it is too open-ended and unclear as to the criteria needed to be established for this defence.

However, given that a reasonable excuse defence has been included for regulations 42 and 43 (on the advice of the Subordinate Legislation and Publications Committee), to ensure consistency, a reasonable excuse defence will be included for regulation 41A (2). This will be included as part of the second stage of amendments to the Public and Environmental Health Regulations, which are currently being drafted by the Office of the Parliamentary Counsel. These amendments are more complex and require industry consultation, therefore it is anticipated that these amendments will be finalised by mid-2019 at the latest.

In anticipation of the regulatory amendment next year, departmental officers will in the interim use the public health notice provisions under Section 29 of the *Public and Environmental Health Act* and where a reasonable excuse defence is provided at Section 30 (2).

Thank you for bringing this matter to my attention.

Yours sincerely

Natasha

NATASHA FYLES

28 AUG 2018

NORTHERN TERRITORY GOVERNMENT

Termination of Pregnancy Law Reform Amendment Regulations No. 17 of 2018

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY
13th Assembly

Public Accounts Committee

REF: COMM2016/00010.233

Hon Natasha Fyles MLA
Minister for Health
GPO Box 3146
Darwin, NT 0801

Dear Minister

The Public Accounts Committee is considering the Termination of Pregnancy Law Reform Amendment Regulations 2018 (No 17 of 2018) in accordance with Sessional Order 14(2)(g).

The Committee is pleased that Regulations 17 of 2018 have addressed the drafting error in regulation 4(5) of the Termination of Pregnancy Law Reform Regulations raised in the Committee's letter of 11 October 2017.

However, the Committee was concerned regarding the tabling note for Regulations No 17 of 2018, which stated that the Committee's concerns with regulation 8 had been resolved by a comprehensive written response.

On 16 November 2017, the Committee wrote to advise you of its view that the written response did not address the issues raised in relation to regulation 8 of the Termination of Pregnancy Law Reform Regulations. The Committee seeks your advice as to what consideration your Department has given to the issues outlined in that letter.

Thank you for your assistance

Yours sincerely

Kate Worden MLA
Chair

31 October 2018

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Ms Kate Worden MLA
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Dear Ms Worden

Thank you for your letter of 31 October 2018, in your capacity as Chair of the Public Accounts Committee (the Committee).

Your letter raised concerns by the Committee regarding a tabling note for the Termination of Pregnancy Law Reform Regulations (the Regulations) No 17 of 2018, in particular comments in the tabling note relating to Regulation 8. Of specific concern was a statement in the tabling note that the Committee's concerns with Regulation 8 had been resolved by a comprehensive written response. Your note sought advice as to what consideration the Department of Health has given to this issue.

In my original response to the Public Accounts Committee on 6 November 2017, I advised it was considered appropriate to allow for developments in medical technology similar to what has occurred with the development of termination drugs. It is possible new technology, methodology or pharmacology will be developed and, under the regulatory framework for health services there is potential for such new services to be delivered in the Northern Territory where the *Termination of Pregnancy law Reform Act* (the Act) and the Regulations permit.

I also advised the Regulations empower the Chief Health Officer in relation to the provision of prescribed information by suitably qualified medical practitioners. As such, the Chief Health Officer will review and consider any regulatory and legislative changes required should the aforementioned advances in technology, methodology or pharmacology occur.

Regulation 8 in its current form provides sufficient safe guards for the termination of pregnancies in the Northern Territory. The Department of Health is soon to commence a legislative review of the Act, this will include scrutiny of the existing Regulations and appropriate recommendations for amendment. The review will also consider, where the Act and Regulations permit, such advances in new technology, methodology or pharmacology under the regulatory framework for health services already existing in Australia.

Thank you for taking the time to write to me, I hope this information clarifies the situation for you.

Yours sincerely

Natasha

NATASHA FYLES

29 NOV 2018

NORTHERN TERRITORY GOVERNMENT

Education and Care Services National Amendment Regulations No. 246 of 2018

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.234

Hon Selena Uibo MLA
Minister for Education
GPO Box 3721
Darwin NT 0801

Dear Minister

The Public Accounts Committee is considering the Education and Care Services National Amendment Regulations 2018 in accordance with Sessional Order 14(2)(g).

The Committee notes that the regulations extend the exemption from the National Quality Framework for 34 former Budget Based Funded early childhood and school age education and care services in the Northern Territory.

The Committee seeks your advice as to the reasons for extending this exemption and whether it affects the users of those services' right to an appropriate standard of care and education.

To enable the Committee to complete its consideration of the regulations before the end of their disallowance period, the Committee requests this advice by 16 November 2018.

Thank you for your assistance.

Yours sincerely

Kate Worden MLA
Chair

31 October 2018

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Ms Kate Worden MLA
Chair
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Dear Ms Kate Worden

Thank you for your letter dated 31 October 2018 enquiring into the exception of the former Budget Based Funded (BBF) services in the Northern Territory (NT) for the National Quality Framework (NQF).

The NQF is a unified national regulatory system that commenced in 2012. Victoria is the host jurisdiction for the *Education and Care Services National Law* (National Law) which was enacted in the NT through the *Education and Care Services (National Uniform Legislation) Act*. Under the National Law, the Education and Care Services National Regulations (National Regulations) are made by Education Council.

At the commencement of the National Law and National Regulations, BBF services, which were wholly funded by the Commonwealth Government to provide non-mainstream child care, were expressly excluded from the NQF.

On 31 January 2017, Education Council agreed to the recommendations from the 2014 Review of the National Quality Agenda, which included no change to the scope of services regulated under the NQF.

The BBF program ceased on 30 June 2018 with the introduction of the Commonwealth Government's new child care package, Jobs for Families. The 2018 amendment to the National Regulations is necessary to ensure that the former BBF services continue to be defined and recognised as out-of-scope services of the NQF following the changes to the funding arrangements.

Some former BBF services with viable business models have, or are, transitioning over to a regulated service model. Services transitioning to the new Commonwealth Government funding arrangements are being supported by the Commonwealth Government Department of Education to develop a service model that best suits community needs.

To ensure these out-of-scope services provide quality early childhood education and care, Minister's Rules introduced under the Commonwealth Government's Family Assistance Law

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require these services to meet standards that mirror some NQF requirements, including high quality care, serious incidents, work health and safety, insurance and a quality improvement plan.

The NT Department of Education works closely with the Commonwealth Government (locally and nationally) and service providers to support communities and ensure that quality early childhood education and care services are available to all children and families in the Territory.

I trust that this information assists the Committee to complete its consideration of the National Regulations.

Yours sincerely

Selena Uibo

SELENA UIBO

12 NOV 2018

Fisheries Amendment (Priority Species and Swim Bladder) Regulations No. 18 of 2018

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY
13th Assembly

Public Accounts Committee

REF: COMM2016/00010.235

Hon Ken Vowles MLA
Minister for Primary Industry and Resources
GPO Box 3146
Darwin NT 0801

Dear Minister

The Public Accounts Committee is considering the Fisheries Amendment (Priority Species and Swim Bladder) Regulations 2018 (No 18 of 2018) in accordance with Sessional Order 14(2)(g).

The Committee notes that regulation 46D makes possession of a swim bladder per se a strict liability regulatory offence.

The Committee seeks your advice as to the justification for this imposition of strict liability, and whether the Regulation has sufficient regard to Aboriginal tradition.

To enable the Committee to complete its consideration of the regulations before the end of their disallowance period, the Committee requests this advice by 16 November 2018.

Thank you for your assistance.

Yours sincerely

Kate Worden MLA
Chair

31 October 2018

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Ms Kate Worden MLA
Chair
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Dear Ms Worden

Thank you for your letter of 31 October 2018, in relation to the Public Accounts Committee's consideration of Fisheries Amendment (Priority Species and Swim Bladder) Regulations 2018 (the Regulations). I am pleased to provide the below advice that justifies the introduction of a strict liability offence for Regulation 46D and its regard to Aboriginal tradition.

As you may be aware, Black Jewfish and other popular reef fish species are vulnerable to overfishing and already classified as overfished around the greater Darwin district. The biology of these species and the continual improvement of fishing technology means that reef fish are easy to target and susceptible to high levels of stock depletion.

The rise of an illegal trade for fish swim bladders (especially from Black Jewfish) in the Northern Territory poses a significant threat to resource sustainability. The trade is driven by the high market value of swim bladders. Prices for swim bladders from Black Jewfish have steadily increased over the past year and are now estimated to range between $550 and $850 per kilogram (wet weight). Swim bladders from other species, such as Barramundi and King Threadfin, are also increasing in market value.

While commercial operators can legally sell the swim bladders, the high market values continues to encourage the development of a black market for swim bladders from recreationally caught fish. This is applying increased pressure to overfished Black Jewfish stocks around Darwin.

Amateur fishing regulations prohibit the sale or barter of fish and fish products under the *Fisheries Act*, however, strong anecdotal evidence suggests that non-licenced fishers are retaining swim bladders for these purposes. The risk of amateur fishers conducting illegal trade was heightened by the home exemption defence in the Fisheries Regulations that

previously allowed individuals to stockpile recreationally caught fish (and their swim bladders) at home.

The development of the Regulations was regarded as a critical priority by my Recreational Fishing Advisory Committee (RFAC) as well as the Coastal Line Fishery Management Advisory Committee (CLFMAC) given the ability for illegal trade of swim bladders to undermine the current management in place to recover overfished resources around Darwin. The objectives of the Government's action to address this issue were to:

1. Restrict the opportunity to partake in illegal trade of swim bladders;
2. Increase awareness of the issue and improve stewardship of resources; and
3. Ensure the enforcement risks and associated penalties were sufficient to act as a disincentive to target vulnerable species for profit.

A balanced assessment of the various options to address the illegal trade of swim bladders was considered by RFAC and CLFMAC when developing the regulations. These included options of maintaining the status quo as well as entirely prohibiting the possession of all fish swim bladders. An impact analysis of the options found the regulations provided a clear net benefit to the public that ensures stock sustainability, maintains fishing activity, provides minimal interruption to existing fishing practices and facilitates effective compliance and enforcement for this issue.

Please note the implementation of the regulations does not have any imposition on the Aboriginal traditional use (customary harvest) of swim bladders. In accordance with Section 53 of the *Fisheries Act* no provision, instrument or administrative character shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner.

I trust the above information will assist the Public Accounts Committee's consideration of these important regulations. However, if the Committee requires further information to assist in its deliberations, then I am more than happy to arrange for officers from my Department to be made available to provide a verbal briefing.

Yours sincerely

KEN VOWLES 20/11/18

Gaming Machine Amendment Regulations No. 15 of 2018

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY
13th Assembly

Public Accounts Committee

REF: COMM2016/00010.236

Hon Natasha Fyles MLA
Attorney-General
GPO Box 3146
Darwin NT 0801

Dear Attorney-General

The Public Accounts Committee is considering the Gaming Machine Regulations (No 15 of 2018) in accordance with Sessional Order 14(2)(g).

The Committee notes that the regulations reduce the number of gaming machines authorised for use from 1,852 to 1,734.

The Committee seeks your advice as to how the reduction in gaming machines is effected, in particular:

- Do the regulations result in a reduction in the number of gaming machines that have been authorised?
- What procedure is there for determining which gaming machines will no longer be authorised?
- What rights of appeal or consultation does a person have if their gaming machines lose authorisation?
- Is there any compensation due or payable if a person loses authorisation of a gaming machine?

To enable the Committee to complete its consideration of the regulations before the end of their disallowance period, the Committee requests this advice by 16 November 2018.

Thank you for your assistance.

Yours sincerely

Kate

Kate Worden MLA
Chair

31 October 2018

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Mrs Kate Worden MLA
Chair
Public Accounts Committee
Legislative Assembly of the Northern Territory
GPO Box 3721
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Via email: pac@nt.gov.au

Dear Chair

Thank you for your letter of 31 October 2018, with regards to the reduction in gaming machines authorised for use in hotels and clubs in the Northern Territory.

As part of the package of measures implemented to ensure Territorians who are experiencing difficulty with their gambling behaviours can be assisted, the aggregate number of gaming machines which may be authorised for use in the Territory was reduced from 1852 to 1734, effective 1 July 2018.

I note the questions posed by the Committee in relation to the reduction in numbers and am able to advise the following:

- The reduced aggregate number was determined in consultation with Licensing NT, and took into consideration the aggregate number of gaming machines authorised for use under a licence issued under the *Gaming Machine Act* (the Act) at the time, which was and remains, below 1734. No licensee has had their approved numbers reduced.

- As the current aggregate is under the cap, and with reference to section 22C of the Act which requires the Director-General to summarily reject an application for a gaming machine licence, or an increase in the number of gaming machines authorised for use under a gaming machine licence, if the grant of the application would breach the restrictions placed on the number of gaming machines, the determining of which gaming machines will no longer be authorised is not a live consideration.

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- All decisions under the Act to grant or revoke a licence or authorised gaming machine, save for the provisions of section 22C, are reviewable decisions. The Act provides mechanisms for affected persons to seek a review of a delegate's decision or one made by the Director-General.

- There is no provision in the Act or the *Gaming Machine Regulations* for the payment of compensation to a licensee.

If you require any further information in relation to the number of gaming machines authorised for use in the Northern Territory please contact my office.

Yours sincerely

NATASHA FYLES

15 NOV 2018

Pastoral Land Amendment Regulations No. 24 of 2018

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.282

Hon Eva Lawler MLA
Minister for Environment and Natural Resources
GPO Box 3146
Darwin NT 0801

Dear Minister

Re: Pastoral Land Amendment Regulations No 24 of 2018

The Public Accounts Committee is considering the Pastoral Land Amendment Regulations no 24 of 2018 in accordance with Sessional Order 14(2)(g).

The Committee's legal advisor is of the view that Regulation 32, by seeking to require the Minister to comply with a process developed by the Minister in consultation with stakeholders who will be affected by the decision, is not sufficiently clear and unambiguous as required by Session Order 14(2)(g)(i)(K).

Further, the regulation, by purporting to limit the Minister's power given under the Act by adding another requirement to those in section 68(5)(c), goes beyond the regulation making power under the Act.

I note that the former Subordinate Legislation and Publications Committee took the view that regulations purporting to impose laws that are beyond power should be disallowed (*Report on the Ports Management Regulations*, February 2016; *Report on the Motor Accidents (Compensation) Amendment Regulations 2014*, November 2014) and the Public Accounts Committee shares that view. The Committee therefore seeks your comments on these issues by 15 April 2019 so it can consider and if necessary report on these issues before the expiry of the disallowance period for the regulation.

Yours sincerely

Sandra Nelson MLA
Chair

19 March 2019

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MINISTER FOR ENVIRONMENT AND NATURAL RESOURCES

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Sandra Nelson MLA
Chair
Public Accounts Committee
GPO Box 3721
DARWIN NT 0801

Dear Chair Sandra

Thank you for your letter of 19 March 2019, regarding the Pastoral Land Amendment Regulations No.24 of 2018, specifically Regulation 32 of the *Pastoral Land Regulations 1992* (the Regulations).

I intend to reintroduce registrable subleases for primary production purposes under the *Pastoral Land Regulations 1992* in August of this year. At this time regulation 32 will be removed.

Should you require further information or clarification please contact Geraldine Lee, Director Pastoral Lease Administration and Board on 8999 4474 or geraldine.lee@nt.gov.au.

Thank you again for your advice.

Yours sincerely

EVA LAWLER
16 APR 2019

NORTHERN TERRITORY GOVERNMENT

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2019/00002.13

Hon Eva Lawler MLA
Minister for Environment and Natural Resources
GPO Box 3146
Darwin NT 0801

Dear Minister

Re: Pastoral Land Amendment Regulations No 24 of 2018

Thank you for your correspondence dated 16 April 2019 where you advised of your intention to reintroduce registrable subleases for primary production purposes under the Pastoral Land Regulations 1992 in August of this year and at that time remove regulation 32.

Your response does not directly address the issues raised by the Committee, in particular whether adding requirements to those in section 68(5)(c) goes beyond the regulation making power under the Act.

The purported making of a regulation that goes beyond the power granted by an Act is a serious matter that should be brought to the attention of the Assembly.

I note that the former Subordinate Legislation and Publications Committee took the view that regulations purporting to impose laws that are beyond power should be disallowed (*Report on the Ports Management Regulations*, February 2016; *Report on the Motor Accidents (Compensation) Amendment Regulations 2014*, November 2014) and the Public Accounts Committee shares that view.

The Committee therefore seeks your comments on the issues raised in its previous letter by 7 May 2019 so it can consider and if necessary report on them before the expiry of the disallowance period for the regulation.

Yours sincerely

Sandra Nelson MLA
Chair

2 May 2019

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Sandra Nelson MLA
Chair
Public Accounts Committee
GPO Box 3721
DARWIN NT 0801

Dear Sandra Chair

Thank you for your letter of 2 May 2019, requesting further information regarding the Pastoral Land Amendment Regulations No. 24 of 2018, specifically Regulation 32 of the Pastoral Land Regulations 19992 (the Regulations).

In late 2018, amendments to the Pastoral Land Regulations 1992 were urgently devised to correct an administrative oversight that resulted in the unintended introduction of a new provision to the *Pastoral Land Act 1992* (the Act) established in September 2018.

Section 68(5)(c) of the Act provides me with new capacity to consent to a sublease for a non-pastoral purpose. While the Government is committed to providing this type of leasing arrangement in the longer term, the inclusion of this provision is currently considered premature.

The retention of paragraph (c) was unintentional as it is contrary to the Governments' publicly stated provision. The decision was made to defer consideration of such provisions until further consultation with key stakeholders was undertaken in relation to enhanced procedural rights for native title holders with respect to the assessment of non-pastoral uses under the Act.

In my view, a lack of immediate action to address the administrative error could have severely degraded the considerable consultation that had been undertaken with Land Councils to develop a mutually acceptable negotiation process to inform the assessment and issue of non-pastoral use permits. Regulation 32 is a provision that is convenient for the purposes of section 68(5)(c) of the Act and therefore arguably comes under the regulation making power in section 128(b) of the Act.

In recognition of the administrative error, on the 26 November 2018 I approved the Executive Council Submission recommending that the Administrator make a regulation to suspend the application of Section 68(5)(c) of the Act until appropriate sub leasing provisions are made. This was signed by the Administrator in December 2018 and required that any decision made under section 68(5)(c) must be made in accordance with processes developed in consultation

NORTHERN TERRITORY GOVERNMENT

with stakeholders affected by the decision. These Regulations were notified in Special Gazette No. S103 on 12 December 2018.

My Department is currently working with the Office of Parliamentary Counsel to draft instructions that will enable subleasing provisions for non-pastoral purposes and in doing so, Regulation 32 will be removed. It is anticipated this regulatory amendment will take effect from August 2019.

I trust this is sufficient advice to address concerns raised by the Public Accounts Committee and the actions being undertaken to rectify issues.

Should you require further information or clarification please contact Geraldine Lee, Director Pastoral Lease Administration and Board on 8999 4474 or Geraldine.lee@nt.gov.au.

Yours sincerely

EVA LAWLER

07 MAY 2019

Petroleum (Environment) Amendment Regulations No. 27 of 2018

Petroleum (Environment) Further Amendment Regulations No. 28 of 2018

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY
13th Assembly

Public Accounts Committee

REF: COMM2016/00010.283

Hon Paul Kirby MLA
Minister for Primary Industry and Resources
GPO Box 3146
Darwin NT 0801

Dear Minister

Re: Petroleum (Environment) Amendment Regulations No 27 of 2018 & Petroleum (Environment) Further Amendment Regulations No 28 of 2018

The Public Accounts Committee is considering the Petroleum (Environment) Amendment Regulations No 27 of 2018 and the Petroleum (Environment) Further Amendment Regulations No 28 of 2018 in accordance with Sessional Order 14(2)(g).

The Committee's legal advisor is of the view that there is no legislative authority in the *Petroleum Act 1984* to authorize or regulate hydraulic fracking by regulation.

The Committee notes that the definition of 'petroleum' in section 5 of the Act states that it "does not include a substance which, in its naturally occurring state, is not recoverable from a well by conventional means". Given that the Act effectively excludes non-conventionally recovered petroleum from its ambit, it is not apparent how it can provide a power to regulate in regard to hydraulic fracturing.

This raises questions regarding the validity of all the regulations regarding hydraulic fracturing purported to be made under the Act, including the definition in Regulation 3, and Regulations 5(2)(g), 8(4)(ba), 8A(b), 37A and 37B.

In regard to the Petroleum (Environment) Amendment Regulations No 27 of 2018, the Committee's legal advisor also stated:

> 10.4 Regulation 8A (2) seeks to authorize the Minister to publish the plan "*in any manner the Minister considers appropriate*". This lack of clear information regarding publication of plans for *drilling of wells* and *hydraulic fracturing* is of concern. If the plan is to be published, and that is the intention, then the right of the public to know what plan is proposed should require publication in a way that the public and/or interested parties can know about it and respond accordingly.
>
> 10.5 In my opinion Regulation 8A (2) offends Sessional Order 14 (2) (g) (i) (A) and (ii) (B).
>
> 10.6 The matters referred to in paragraph 10.4 above apply equally to Regulation 35A (2).

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10.7 Regulation 8A (5) (b) seeks to allow the Minister to withhold information without any guidelines for doing so other than what an individual Minister might consider "*reasonable*". This gives the Minister such unrestricted and broad power that it may include the power to withhold information that may be politically damaging or likely to cause an outrage in the community. It has the capacity to subvert the very purpose of the publication, which is to inform the public.

10.8 Regulation 35A (3) (b) suffers from the same issues as Regulation 8A (5) (b) above. They both purport to require publication but permit selective publication on unidentified and potentially spurious grounds. If information is to be withheld, it should be for a properly identified reason set out in the Regulation.

10.9 In my opinion the matters referred to in paragraphs 10.7 and 10.8 above offend Sessional Order 14 (2) (g) (i) (A) and (C).

In regard to the Petroleum (Environment) Further Amendment Regulations No 28 of 2018, Regulations 37A and 37B require provision of a report on flowback fluid and produced water to the Minister within 6 months of occurrence or extraction. The Committee notes that recommendation 7.10 of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory stated that information about flowback fluid and produced water must be reported and publicly disclosed online as soon as it becomes available. How is the six month timeframe in keeping with the Inquiry's recommendation?

Regulations 37A and 37B also create strict liability offences for failing to provide such reports with a penalty of 200 penalty units. Can you please outline the justification for imposing strict liability in these circumstances?

I note that the former Subordinate Legislation and Publications Committee took the view that regulations purporting to impose laws that are beyond power should be disallowed (*Report on the Ports Management Regulations*, February 2016; *Report on the Motor Accidents (Compensation) Amendment Regulations 2014*, November 2014) and the Public Accounts Committee shares that view. The Committee therefore seeks your comments on these issues by 15 April 2019 so it can consider and if necessary report on these issues before the expiry of the disallowance period for the regulation.

Yours sincerely

Sandra Nelson MLA
Chair

19 March 2019

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Ms Sandra Nelson MLA
Chair
Public Accounts Committee
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DARWIN NT 0801

Dear Ms Nelson

Re: Petroleum (Environment) Amendment Regulations No 27 of 2018 and Petroleum (Environment) Further Amendment Regulations No 28 of 2018

Thank you for your letter dated 19 March 2019 regarding the consideration for recent changes to the *Petroleum (Environment) Regulations* in accordance with Sessional Order 14(2)(g). I have provided a responses to your concerns as outlined below.

Definition of Petroleum – "conventional means"
You queried the authority for the *Petroleum Act 1984* to authorise or regulate hydraulic fracturing, citing that the definition for petroleum "does not include a substance which, in its naturally occurring state, is not recoverable from a well by conventional means".

The Petroleum Legislation Amendment Bill 2018 was passed by the Northern Territory Legislative Assembly on 19 March 2019. The definition for petroleum was amended through this Bill to remove reference to "conventional means". The amendment of this definition confirms that hydraulic fracturing is an activity regulated under the *Petroleum Act*.

Regulation 8A(2) and Regulation 35A(2)
You raised concerns regarding Regulation 8A(2) and Regulation 35A(2) which authorises the Minister to publish the plan "in any manner the Minister considers appropriate". These Regulations provide for the legal requirement for the Minister to publish an environment management plan that pertains to the drilling of petroleum wells and hydraulic fracturing activity.

Prescribing the exact medium of how this publication was to occur in the Regulation was avoided to allow for the advancement of technology, websites, outages, Departmental name changes etc. To prescribe a location of where an environment management plan will be published in the Regulation would require a change to the Regulations each time there was a change to these technologies. Regulation 26 (Method of publication and confidentiality) of the *Petroleum (Environment) Regulations* already makes the same provisions for all other documents published under these Regulations.

NORTHERN TERRITORY GOVERNMENT

Regulation 8A(5)(b) and 35A(3)(b)

You raised concerns regarding Regulation 8A(5)(b) and 35A(3)(b) which allows the Minister to "withhold other information from the public if satisfied there are reasonable grounds for doing so". Regulation 26 (Method of publication and confidentiality) of the *Petroleum (Environment) Regulations 2016* already had this discretionary test for all other documents published under these Regulations.

The inclusion of Regulations 8A(5)(b) and 35A(3)(b) provide for the Minister to withhold information that may be sensitive however falls outside of the requirements of 8A(5)(a) and 35A(3)(a) such as the location of sacred sites or other culturally significant areas, or any other information a third party may not wish to be disclosed. This Regulation requires the consideration of "reasonable grounds for doing so". This does not prevent an information request being made under the *Information Act 2002* to acquire the information not initially published.

Regulation 37A and 37B

You raised concerns regarding the time frame stipulated in Regulations 37A and 37B which require reports pertaining to the composition of flowback fluid and produced water to be provided to the Minister within six months of the flowback occurring or extraction of produced water, for publication.

The Scientific Inquiry into Hydraulic Fracturing in the Northern Territory recommended that "…information about flow back and produced water must be reported and publicly disclosed online as soon as it becomes available…" This means the results of testing are to be disclosed online as soon as they are available however, prior to the enactment of this Regulation, there has been no requirement for a petroleum company to test flowback or produced water to determine its composition.

Standard industry practice is to collect and store flowback or produced water. It should be noted that a flowback period can occur for an extended period of time. For example, the flowback from the operations at Origin's Amungee Well ran for more than 80 days. The timeframe appointed to this Regulations ensured that flowback and produced water are able to be collected and then undergo testing within a manageable timeframe. It should also be noted that the testing of flowback and produced water occurs in accredited laboratories which conduct independent testing. These laboratories are not in remote locations such as the Beetaloo Sub-basin and time is required for these water samples to taken, transported to accredited laboratories, tested and reported to the regulator.

Strict liability offences have been provided to these regulations for the failure to provide a report to the Minister. This means no other elements of fault need to be proven in order to penalise a breach of these regulations.

I trust you find these explanations sufficiently address your concerns regarding the Petroleum (Environment) Amendment Regulations No 27 of 2018 and Petroleum (Environment) Further Amendment Regulations No 28 of 2018.

Yours sincerely

PAUL KIRBY

18/4 /2019

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2019/00002.15

Hon Paul Kirby MLA
Minister for Primary Industry and Resources
GPO Box 3146
Darwin NT 0801

Dear Minister

Re: Petroleum (Environment) Amendment Regulations No 27 of 2018 and Petroleum (Environment) Further Amendment Regulations No 28 of 2018

Thank you for your letter dated 18 April 2019 responding to the Public Accounts Committee's questions on the above regulations.

The Committee refers to your advice that the passing of the Petroleum Legislation Amendment Bill 2018 on 19 March 2019 amends the definition of petroleum to remove reference to conventional means, and thereby confirms that hydraulic fracturing is an activity regulated under the *Petroleum Act 1984*.

The Committee notes that your advice does not address the questions of whether the regulations were made in accordance with the regulation making power available at the time, or whether there is any capacity for regulations purportedly made beyond power to be retrospectively validated by the subsequent amendments to the Act.

The Committee asks that you provide it with any advice assuring of the validity of the regulations notwithstanding the issues raised, or of what action is proposed to ensure the validity of the regulations if such validity is not beyond doubt.

The Committee seeks your response by Tuesday, 7 May 2019 to allow the Committee time to consider the response prior to the end of the disallowance period for the regulations.

Thank you for your attention to this important matter.

Yours sincerely

Sandra Nelson MLA
Chair

2 May 2019

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Ms Sandra Nelson
Chair
Parliamentary Accounts Committee
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DARWIN NT 0800

cc: pac@nt.gov.au

Dear Ms Nelson

Re: Petroleum (Environment) Amendment Regulations No 27 of 2018 & Petroleum (Environment) Further Amendment Regulations No 28 of 2018

Thank you for your letter of 2 May 2019 regarding the above matter.

Noting your further questions in your letter of 2 May 2019, let me be clear – the Government rejects the argument that the regulations have been made beyond power.

Our firm advice is that Petroleum obtained by hydraulic fracturing has always been within the ambit of the definition. There has never been an exclusion of petroleum obtained by hydraulic fracturing which would affect the validity of the Regulations as they relate to hydraulic fracturing.

I note also that the former CLP Government enacted Petroleum (Environment) Regulations in July 2016 which specifically included "hydraulic fracturing" as a regulated activity. Shortly thereafter, the Amungee NW1H horizontal well was hydraulically fractured and production tested.

If the Committee's view is, to quote your earlier letter dated 19 March, that "that there is no legislative authority in the *Petroleum Act 1984* to authorize or regulate hydraulic fracking by regulation", that would suggest that the former Government's regulations would also have been beyond power.

I note that such an argument has not been made to me about the former Government's regulations or about hydraulic fracturing activities authorised pursuant to those regulations in 2016.

NORTHERN TERRITORY GOVERNMENT

I would also suggest that the Committee reconsider its view on these matters in light of the exhaustive work of the Independent Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs in the Northern Territory (Inquiry).

The Inquiry produced an extraordinarily detailed Final Report on hydraulic fracturing and unconventional reservoirs. The Inquiry – led by the now Justice of the NSW Land and Environment Court – made 135 detailed recommendations, including numerous recommendations relating to the legislative changes required in the *Petroleum Act* and other legislation and regulations.

A central purpose of the Inquiry was to examine regulatory requirements for hydraulic fracturing of unconventional reservoirs, and nowhere in their work did the Inquiry identify, to quote your earlier letter of 19 March, that "the Act effectively excludes non-conventionally recovered petroleum from its ambit".

Instead, the Inquiry's Final Report clearly and specifically noted that the former Government's Petroleum (Environment) Regulations applied to hydraulic fracturing. To quote the Final Report, it says:

> "The Petroleum Environment Regulations apply to any petroleum activity that has an environmental impact. This includes hydraulic fracturing because "hydraulic fracturing" is listed as a "regulated activity." It is an offence to conduct hydraulic fracturing without an approved EMP."[1]

I suggest that in light of the Inquiry's work and their Final Report, and the fact that Inquiry specifically stated that hydraulic fracturing was a regulated activity under the Petroleum (Environment) Regulations, that the Committee should be satisfied with these regulations.

To reiterate, it is the view of the Government that the regulations were made in accordance with the regulation making power available at the time. In my response on 18 April 2019, I emphasised that the aim of the amendment to the definition of petroleum was to avoid public confusion – particularly given the damaging effects public misunderstanding could have in the context of onshore gas developments and hydraulic fracturing.

I trust that this correspondence addresses the Committee's concerns.

Yours sincerely

PAUL KIRBY
10/5/2019

[1] Final Report, page 374. Final Report footnotes omitted. Available to view: https://frackinginquiry.nt.gov.au/inquiry-reports?a=494286

Plant Health (Fees) Amendment Regulations No. 29 of 2018

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.284

Hon Paul Kirby MLA
Minister for Primary Industry and Resources
GPO Box 3146
Darwin NT 0801

Dear Minister

Re: Plant Health (Fees) Amendment Regulations No 29 of 2018

The Public Accounts Committee is considering the Plant Health (Fees) Amendment Regulations No 29 of 2018 in accordance with Sessional Order 14(2)(g).

Notwithstanding sections 65 and 65C of the *Interpretation Act*, the Committee's legal advisor is of the view that Regulation 3 by purporting to give the Chief Inspector the power to waive fees, exempt payments and refund fees already paid goes beyond the regulation making power under the Act. The Chief Inspector's powers are specifically set out in the Act. They do not include the power to prescribe fees payable under the Act.

The Committee also notes that regulation 3 does not provide any guidance or criteria for the exercise of the power purported granted to waive fees, exempt payments and refund fees. The Committee considers that such a power should not subject to appropriate criteria, such as the reasons outlined in the Tabling Note for the Regulations.

I note that the former Subordinate Legislation and Publications Committee took the view that regulations purporting to impose laws that are beyond power should be disallowed (*Report on the Ports Management Regulations*, February 2016; *Report on the Motor Accidents (Compensation) Amendment Regulations 2014*, November 2014) and the Public Accounts Committee shares that view. The Committee therefore seeks your comments on these issues by 15 April 2019 so it can consider and if necessary report on these issues before the expiry of the disallowance period for the regulation.

Yours sincerely

Sandra Nelson MLA
Chair

20 March 2019

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Ms Sandra Nelson MLA
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Public Accounts Committee
GPO Box 3721
DARWIN NT 0801

Dear Ms Nelson

Re: Plant Health (Fees) Amendment Regulations No 29 of 2018

Thank you for your correspondence of 19 March 2019, in which you raised concerns about the enactment of Regulation 3 of the *Plant Health Regulations 2012*, which provides the Chief Inspector with the power to waive fees, exempt payments, and refund fees already paid.

In your correspondence, you articulated concerns that this provision goes beyond the regulation making power under the *Plant Health Act 2008* ('the Act'), since the Chief Inspector's powers under this Act do not include the power to prescribe fees payable under the Act.

Section 73(2)(b) of the Act provides that the Administrator may "prescribe fees payable under this Act". Section 2 of the *Plant Health (Fees) Regulations 2012* prescribes the fees payable under the Act. These fees are listed at Schedule 1 (Attachment A). Under Section 2, fees are only prescribed for sections 16, 36, 41 and 42 of the Act. Section 65C of the *Interpretation Act 1978* provides that the power to prescribe fees and also includes the power to provide for an exemption, waiver or refund of the fee.

As you state, the Act does not provide the Chief Inspector with the power to prescribe fees payable under the Act. However, the recent amendment allows the Chief Inspector to provide exemption, waiver or refund only those fees that have been prescribed under Section 2 of the *Plant Health (Fees) Regulations 2012*. The new regulation therefore allows for the exemption, waiver or refund of fees *only* in relation to those fees that have been made by the Administrator under the *Plant Health (Fees) Regulations 2012*. This amendment is consistent with section 65C of the *Interpretation Act 1978* in that if a power is conferred under an Act for subordinate legislation to prescribe a fee, the power includes power to provide for the exemption from payment of the fee; the waiver (wholly or partly) of the fee; and the refund (wholly or partly) of the fee.

NORTHERN TERRITORY GOVERNMENT

Under the Act, the Chief Inspector may impose requirements on persons that will result in provision of additional fees under Section 2 of the *Plant Health (Fees) Regulations 2012* (e.g. refer to sections 16, 36, 42, and 45 of the Act). Under s 71 of the Act, the Chief Inspector also has the power to reimburse an owner of a place or thing for any damage caused by, or costs incurred because of, an inspector exercising a power or performing a function under the Act. Therefore, the Act does provide the Chief Inspector with limited powers to impose new costs on a person or to reimburse a person for activities under the Act. The power conferred to the Chief Inspector as a result of Regulation 3 is similarly limited to exempt, waive or refund fees for activities that have already been prescribed by the Administrator under the *Plant Health (Fees) Regulations 2012*.

The intent of the regulatory change is to encourage growers to adopt, and comply with, conditions or requirements to provide assurance that specific requirements associated with the production of plants or products have been met to protect the Northern Territory (NT) from damaging plant pests and diseases. In the event of a disease outbreak, new conditions or requirements are likely to be imposed on growers at short notice. These conditions or requirements often impose additional costs on growers, in addition to the requirement to purchase a permit for each consignment of plants or plant materials that are moved. To address this, the intent of Regulation 3 is to provide some scope for the Chief Inspector to exempt, waive or refund fees under very limited situations.

These updates ensure the Territory continues to promote and facilitate growth, investment and sustainability of primary industries and resources and offers a strategic, contemporary and nationally integrated biosecurity system, which is an economic imperative to safeguard the NT's valuable primary industries, assets and environment.

Yours sincerely

PAUL KIRBY

15 / 4 /2019

Education (Infringement Notice) Regulations No. 2 of 2019

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY
13th Assembly

Public Accounts Committee

REF: COMM2016/00010.299

The Hon Selena Uibo MLA
Minister for Education
GPO Box 3146
Darwin NT 0801

Dear Minister

Re: Education (Infringement Notice) Regulations No 2 of 2019

The Public Accounts Committee is considering the Education (Infringement Notice) Regulations No 2 of 2019 in accordance with Sessional Order 14(2)(g).

The Committee's legal adviser has raised concerns with regulations 5(2)(c), stating that "To the extent that Regulation 5(2)(c) sets out any penalty or threat of penalty, that seeks to go beyond the monetary penalty for non-payment of the infringement notice, it is beyond power. The penalties, or threatened penalties that are not limited to payment of a specified amount pursuant to s291(2) are beyond power."

The Committee notes that while enforcement action of the type referred to in the regulation is available to enforce a fine imposed by a court under Part 5, Division 4 of the *Fines and Penalties (Recovery) Act 2001*, they are not included in Part 5, Division 2 which relates to penalty enforcement orders.

The Committee therefore seeks your response to the advice that regulation 5(2)(c) is beyond power.

As currently advised, it appears to the Committee that the regulation conflates enforcement action that may be taken to enforce a fine imposed by a court after a finding of guilt with that which may be taken in response to an order from the Fines Recovery Unit in relation to an outstanding penalty under an infringement notice. If this is the case, the Committee seeks your advice as to how a regulation could be made in such terms.

The Committee's legal advisor also says that "Regulation 7 seeks to empower the Chief Executive Officer to withdraw an Infringement Notice at will. Section 283 specifies that the only people who can bring proceedings for an offence under the Law are; The Regulatory Authority, a person authorized by the Regulatory Authority, or a Police officer. Consequently, that Regulation is also beyond power, unless of course, the Chief Executive Officer satisfies that criteria."

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The Committee also seeks your response to this advice.

I note that the former Subordinate Legislation and Publications Committee took the view that regulations purporting to impose laws that are beyond power should be disallowed (*Report on the Ports Management Regulations*, February 2016; *Report on the Motor Accidents (Compensation) Amendment Regulations 2014*, November 2014). The Public Accounts Committee shares that view.

The Committee seeks your comments on these issues by 3 May 2019 so it can consider, and if necessary report on, these issues before the expiry of the disallowance period for the regulation.

Yours sincerely

Sandra Nelson MLA
Chair

9 April 2019

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Ms Sandra Nelson MLA
Chair
Public Accounts Committee
Legislative Assembly of the Northern Territory
GPO Box 3721
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Dear Ms Nelson

I wish to thank the Public Accounts Committee (the Committee) for its consideration of the Education (Infringement Notice) Regulations No 2 of 2019 (the Education (Infringement Notice) Regulations).

By way of background, the *Education and Care Services (National Uniform Legislation) Act 2011* (the NUL Act) commenced in the Northern Territory (NT) in January 2012. The NUL Act consists of two parts:

- the administrative provisions at the commencement of the NUL Act that provide for the adoption of the *Education and Care Services National Law (NT)* (the National Law)
- the National Law, which is set out as an Appendix to the NUL Act.

The NUL Act also gives effect to the Education and Care Services National Regulations 2011 (NSW) (the National Regulations).

This suite of legislation forms the legal platform for the National Quality Framework (NQF) designed to drive continuous improvement of quality in education and care services across Australia. This includes providing a national approach to regulating and assessing the quality of early childhood education and care services. In the NT, Quality Education and Care Northern Territory (QECNT), within the Department of Education, is the regulatory authority responsible for administering the NQF. The National Law and the National Regulations establish a number of approaches and tools to address issues of non-compliance by approved services or providers. The Education (Infringement Notice) Regulations ensure regulatory practice in the NT is consistent with the National Law by enabling the issuing of infringement notices.

NORTHERN TERRITORY GOVERNMENT

The department, along with the Department of the Attorney-General and Justice and the Office of Parliamentary Counsel, were engaged in responding to the concerns raised by the Committee's legal advisor in relation to the Education (Infringement Notice) Regulations.

Regulation 5(2)(c)

Regulation 5 provides for the matters that must be specified in an infringement notice.

The Committee's legal advisor raised concern that regulation 5(2)(c) is beyond power to the extent that it sets out "any penalty or threat of penalty that seeks to go beyond the monetary penalty for non-payment of the infringement notice."

Regulation 5(2)(c) does not set out any additional penalties; rather it requires that the infringement notice specify some of the enforcement actions available under Part 5 of the *Fines and Penalties (Recovery) Act 2001* (the Act). Enforcement action may be taken by the Fines Recovery Unit against a fine defaulter who fails to pay a fine or an infringement notice. These enforcement actions are not penalties, and it remains that action may only be taken in accordance with Part 5 of the Act.

The Committee's legal advisor also stated that the types of enforcement actions listed in regulation 5(2)(c) can only be taken to enforce fines imposed by a court under Part 5, Division 4 of the Act. However, this understanding is incorrect.

Part 5, Division 4 of the Act deals specifically with fine enforcement orders for enforcing the payment of fines imposed by a court. Consequently, this does not apply to the enforcement of an infringement notice. Orders to enforce the payment of outstanding penalties under an infringement notice are dealt with under Part 5, Division 2 of the Act.

Of relevance, section 35 of the Act gives the Fines Recovery Unit power to take action under Part 5 to enforce an outstanding fine imposed by a court, as well as an outstanding penalty under an infringement notice. In all relevant respects, Part 5, divisions 5 to 11 deal with fine enforcement orders and penalty enforcement orders in the same way – in that, they are both within the definition of 'enforcement order' for the purposes of section 5 of the Act.

Regulation 5(2)(c) does not extend the monetary infringement penalty for an offence under section 291(2) of the National Law; it only refers to the possible enforcement actions that the Fines Recovery Unit can take for the non-payment of the infringement notice. For this reason, it is submitted that regulation 5(2)(c) is not beyond power.

Regulation 7

Regulation 7 provides that the Chief Executive Officer may withdraw an infringement notice by the giving of notice.

The Committee's legal advisor raised concern that regulation 7 is beyond power as the Chief Executive Officer is not included as a person authorised to bring proceedings under section 283 of the National Law. Section 283 provides that proceedings for an offence under the National Law may be brought by a regulatory authority, a person authorised by the regulatory authority or a police officer.

Importantly, section 291(1) of the National Law provides that an authorised officer or other person authorised by the regulatory authority may issue an infringement notice. Infringement notice offences and penalty amounts are prescribed in the National Law and National Regulations. For the purposes of the National Law, infringement laws are enacted and applied relative to each jurisdiction. The Education (Infringement Notice) Regulations are an infringement law in the NT pursuant to section 9(3) of the NUL Act.

The power to commence proceedings is distinct from the issuing and withdrawal of an infringement notice. An authorised officer may issue an infringement notice under section 291(1) of the National Law, with the Chief Executive Officer able to withdraw the notice pursuant to regulation 7 of the Education (Infringement Notice) Regulations. For this reason, it is submitted that regulation 7 is not beyond power.

However, to ensure greater consistency with the National Law, an amendment is proposed to substitute reference in regulation 7(1) to the Chief Executive Officer with the Regulatory Authority. This amendment is anticipated to be made in a Bill to be introduced in the May 2019 sittings of the Legislative Assembly.

Thank you again for the opportunity to comment on the concerns raised by the Committee.

Yours sincerely

Selena Uibo

SELENA UIBO

03 MAY 2019

Appendix A: List of Ministerial Correspondence on Subordinate Legislation

No.	Title of Regulation/By-law	Minister	Letter to Minister	Minister's Response
20 of 2017	Termination of Pregnancy Law Reform Regulations	Hon. Natasha Fyles	01/11/17	N/A
12 of 2018	Public and Environmental Health Amendment Regulations 2018	Hon. Natasha Fyles	14/08/18	28/08/18
17 of 2018	Termination of Pregnancy Law Reform Amendment Regulations 2018	Hon. Natasha Fyles	31/10/18	29/11/18
246 of 2018	Education and Care Services National Amendment Regulations 2018	Hon. Selena Uibo	31/10/18	12/11/18
18 of 2018	Fisheries Amendment (Priority Species and Swim Bladder) Regulations 2018	Hon. Ken Vowles	31/10/18	20/11/18
15 of 2018	Gaming Machine Amendment Regulations 2018	Hon. Natasha Fyles	31/10/18	15/11/18
24 of 2018	Pastoral Land Amendment Regulations 2018	Hon. Eva Lawler	19/03/19	16/04/19
24 of 2018	Pastoral Land Amendment Regulations 2018	Hon. Eva Lawler	02/05/19	07/05/19
27 of 2018	Petroleum (Environment) Amendment Regulations 2018	Hon. Paul Kirby	19/03/19	18/04/19
27 of 2018	Petroleum (Environment) Amendment Regulations 2018	Hon. Paul Kirby	02/05/19	10/5/2019
28 of 2018	Petroleum (Environment) Further Amendment Regulations 2018	Hon. Paul Kirby	19/03/19	18/04/19
28 of 2018	Petroleum (Environment) Further Amendment Regulations 2018	Hon. Paul Kirby	02/05/19	10/5/2019
29 of 2018	Plant Health (Fees) Amendment Regulations 2018	Hon. Paul Kirby	20/03/19	15/04/19
2 of 2019	Education (Infringement Notice) Regulations 2018	Hon. Selena Uibo	09/04/19	03/05/19

Appendix B: Subordinate Legislation commented on in 13th Assembly

Report	No.	Title of Regulation/By-Law	Minister	Date
July 2018 – May 2019	2 of 2019	Education (Infringement Notice) Regulations 2019	Hon. Selena Uibo	09/04/19
	29 of 2018	Plant Health (Fees) Amendment Regulations 2018	Hon. Paul Kirby	20/03/19
	28 of 2018	Petroleum (Environment) Further Amendment Regulations 2018	Hon. Paul Kirby	19/03/19
	27 of 2018	Petroleum (Environment) Amendment Regulations 2018	Hon. Paul Kirby	19/03/19
	24 of 2018	Pastoral Land Amendment Regulations 2018	Hon. Eva Lawler	19/03/19
	15 of 2018	Gaming Machine Amendment Regulations 2018	Hon. Natasha Fyles	31/10/18
	18 of 2018	Fisheries Amendment (Priority Species and Swim Bladder) Regulations 2018	Hon. Ken Vowles	31/10/18
	246 of 2018	Education and Care Services National Amendment Regulations 2018	Hon. Selena Uibo	31/10/18
	17 of 2018	Termination of Pregnancy Law Reform Amendment Regulations 2018	Hon. Natasha Fyles	31/10/18
	12 of 2018	Public and Environmental Health Amendment Regulations 2018	Hon. Natasha Fyles	14/08/18
	20 of 2017	Termination of Pregnancy Law Reform Regulations	Hon. Natasha Fyles	01/11/17
June 2017 – July 2018	36 of 2017	Racing and Betting Amendment Regulations 2017	Hon. Natasha Fyles	13/03/18
	20 of 2017	Termination of Pregnancy Law Reform Regulations	Hon. Natasha Fyles	11/10/17
	12 of 2017	Litchfield Council (Dog Management) By-Laws	Hon. Gerry McCarthy	11/10/17
	11 of 2017	Bushfires Management (General) Regulations	Hon. Lauren Moss	17/08/17
	3 of 2017	Barramundi Fishery Management Plan Amendment 2017	Hon. Ken Vowles	17/08/17

October 2016 – May 2017	36 of 2016	Guardianship of Adults Regulations	Hon. Natasha Fyles	23/11/16
	32 of 2016	Petroleum (Environment) Regulations	Hon. Ken Vowles	23/11/16
	21 of 2016	Local Court (General) Rules	Hon. Natasha Fyles	27/10/16
	12 of 2016	Medical Services (Royal Darwin Hospital Parking) Regulations	Hon. Natasha Fyles	27/10/16
	11 of 2016	NT Civil and Administrative Tribunal Rules	Hon. Natasha Fyles	27/10/16
	N/A	NT Public Sector Employment and Management By-Laws 2016	Hon. Gerry McCarthy	27/10/16