

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

11th Assembly

Subordinate Legislation & Publications Committee

**Report of
Ministerial Correspondence on
Subordinate Legislation**

August 2011 – April 2012

COMMITTEE REPORT

May 2012

Report deemed as
a Tabled Paper in
the Legislative
Assembly of the
Northern Territory
May 2012

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Chair's Preface

Rules, regulations and by-laws affect people in their day to day lives and it is important that the Assembly maintains a sufficient level of public scrutiny to ensure that they keep within the purpose and intention of the laws under which they are made and do not unduly affect people's rights. The publication of the Committee's correspondence with Ministers lets the public see the issues the Committee has raised and the responses and clarifications from Ministers.

The Committee acknowledges the responsiveness of Ministers and officers to the Committee's queries and is grateful for their work in responding to the Committee. The Committee also acknowledges the significant contribution made by its legal counsel, Professor Ned Aughterson, and thanks him for his diligent work in advising the Committee.

I also thank the members of the Committee for their efforts and collegiate approach in seeking to ensure a high standard of rules and regulations in the Northern Territory. I thank the secretariat staff for their support. On behalf of the Committee, I commend this report to the House.

Michael Gunner MLA
Chair

Committee Members



Mr. Michael GUNNER, MLA

Member for Fannie Bay

Party: Australian Labor Party
Parliamentary Position: Government Whip; Deputy Chairman of Committees; Parliamentary Secretary for Business and Employment

Committee Membership:
 Standing: Public Accounts; Estimates; Subordinate Legislation and Publications; Legal and Constitutional Affairs; Standing Orders; Members' Interests

Sessional & Select: Environment and Sustainable Development; Youth Suicides

Chair: Public Accounts; Estimates; Subordinate Legislation and Publications



Mr Ross BOHLIN, MLA

Member for Drysdale

Party: Country Liberal Party
Parliamentary Position: Deputy Chairman of Committees; Shadow Minister for Defence Support; Arts and Museums; Information, Communications and Technology Policy; Sport and Recreation

Committee Membership:
 Standing: House; Subordinate Legislation and Publications



Mr Adam GILES, MLA

Member for Braitling

Party: Country Liberal Party
Parliamentary Position: Shadow Minister for Indigenous Policy; Transport and Construction; Regional Development

Committee Membership:
 Standing: Subordinate Legislation and Publications
 Sessional: Council of Territory Cooperation Innovation, Development and Trade Sub-committee



Ms. Marion SCRYMGOUR, MLA

Member for Arafura

Party: Australian Labor Party
Parliamentary Position: Deputy Chairman of Committees; Parliamentary Secretary for Territory 2030

Committee Membership:
 Standing: House; Public Accounts; Estimates; Subordinate Legislation and Publications; Legal and Constitutional Affairs;

Sessional & Select: Environment and Sustainable Development; Council of Territory Co-operation (CTC); CTC Innovation, Development and Trade Sub-committee; CTC Animal Welfare Governance Sub-committee; Youth Suicides;

Chair: Environment and Sustainable Development; Youth Suicides; Legal and Constitutional Affairs



Ms. Lynne WALKER, MLA

Member for Nhulunbuy

Party: Australian Labor Party
Parliamentary Position: Deputy Speaker; Chairman of Committees; Parliamentary Secretary for Education

Committee Membership:
 Standing: House; Public Accounts; Estimates Subordinate Legislation and Publications

Sessional & Select: Environment and Sustainable Development; Council of Territory Co-operation (CTC); CTC Animal Welfare Governance Sub-committee; CTC Innovation, Development and Trade Sub-committee; Youth Suicides

Chair: CTC Animal Welfare Governance Sub-committee

Committee Secretariat

Clerk Assistant Committees: Mr Russell Keith

Committee Secretary: Ms Julia Knight

Administrative/Research Assistant: Ms Lauren Copley

Committee Administration Assistant: Ms Kim Cowcher

Contact Details: GPO Box 3721 DARWIN NT 0801
Tel: +61 8 8946 1429
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Terms of Reference

Standing Order 20

1. A Standing Committee on Subordinate Legislation and Publications to consist of five Members shall be appointed at the commencement of each Assembly. The Committee shall examine and report upon all instruments of a legislative or administrative character and other papers which are required by statute to be laid upon the Table.
2. The Committee shall, with respect to any instrument of a legislative or administrative character which the Legislative Assembly may disallow or disapprove, consider -
 - (a) whether the instrument is in accordance with the general objects of the law pursuant to which it is made;
 - (b) whether the instrument trespasses unduly on personal rights or liberties;
 - (c) whether the instrument unduly makes rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
 - (d) whether the instrument contains matter which in the opinion of the committee should properly be dealt with in an Act;
 - (e) whether the instrument appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
 - (f) whether there appears to have been unjustifiable delay in the publication or laying of the instrument before the Assembly; and
 - (g) whether for any special reason the form or purport of the instrument calls for elucidation.
3. The Committee, if it is of the opinion that an instrument ought to be disallowed or disapproved -
 - (a) shall report that opinion and the grounds thereof to the Assembly before the end of the period during which any notice of the motion for disallowance of that instrument may be given to the Assembly; and
 - (b) if the Assembly is not sitting, may refer its opinion and the grounds thereof to the authority by which the instrument was made.

For the purposes of these Standing Orders, "instrument of a legislative or administrative character" has the same meaning as that defined in the Interpretation Act .

4. The Committee, if it is of the opinion that any matter relating to any paper which is laid upon the Table of the Assembly should be brought to the notice of the Assembly, may report that opinion and matter to the Assembly.
5. All petitions and papers presented to the Assembly which have not been ordered to be printed shall stand referred to the Committee, which shall report from time to time as to what petitions and papers ought to be printed and whether wholly or in part.
6. The Committee shall inquire into and report, from time to time, on the printing, publication and distribution of publications or such other matters as are referred to it by the Speaker or the Assembly.

7. The Committee shall have power to send for persons, papers and records, to sit in public or private session notwithstanding any adjournment of the Assembly and to adjourn from place to place.

8. The Committee have the power to consider, disclose and publish the Minutes of Proceedings, evidence taken and records of the Subordinate Legislation, Tabled Papers Committees and Publications Committees established in this Assembly and all previous Assemblies.

1 MINISTERIAL CORRESPONDENCE ON SUBORDINATE LEGISLATION

After examining subordinate legislation tabled and receiving advice from its legal counsel, the Committee may raise any questions or issues of concern with the responsible Minister. These letters, and the Ministers' replies, are set out below.

**26 of 2010 Construction Contracts (Security of Payments)
Amendment Regulations**



DOCUMENT 68
PAGE 1 OF 2

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Subordinate Legislation and Publications Committee

Hon. Delia Lawrie, MLA
Minister for Justice and Attorney General
GPO Box 3146
DARWIN NT 0801

February 2011

Dear Attorney

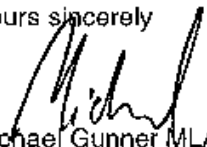
Delia

**Re: Construction Contracts (Security of Payments) Amendment Regulations
[No. 26 of 2010]**

The Subordinate Legislation Committee met on 22 February 2011 and considered the above by-law.

The Committee seeks your clarification of the matters raised in the attached enclosure.

Yours sincerely


Michael Gunner MLA
CHAIR

24/2



DOCUMENT 608
PAGE 2 of 2

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Subordinate Legislation and Publications Committee

Construction Contracts (Security of Payments) Amendment Regulations [No 26 of 2010]

There seems to be an inconsistency between the Explanatory Memorandum and Regulation 5(d). The Explanatory Memorandum states that the Regulations are amended by, among other things, omitting RICS Dispute Resolution Services as a "prescribed appointor" whereas reg 5(d) inserts RICS as a prescribed appointor.



MINISTER FOR JUSTICE & ATTORNEY-GENERAL

Parliament House
State Square
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Darwin NT 0801
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Mr Michael Gunner MLA
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Dear Mr *Michael* Gunner

Thank you for your letter dated 24 February 2011 regarding the Construction Contracts (Security of Payments) Amendment Regulations 2010 (the Regulations). This letter was received in my office on 11 August 2011.

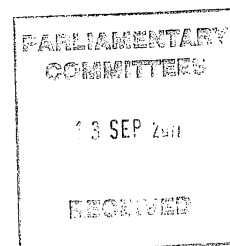
You seek clarification about an apparent inconsistency between the explanatory memorandum and Regulation 5(d) of the Regulations, namely that the explanatory memorandum states that the Regulations omit RICS Dispute Resolution Services as a 'prescribed appointer' whereas in fact the Regulations insert RICS Dispute Resolution Services.

I am advised that Cabinet office prepared the explanatory memorandum and that the inconsistency has been brought to its attention. I understand that a corrected version has been prepared and that Cabinet office will request the Tabling Office to provide it to the Subordinate Legislation and Publications Committee, with an apology for the error.

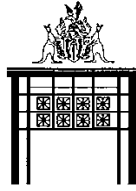
Yours sincerely

DELIA LAWRIE

30.8.11



13 of 2011 Legal Practitioners Disciplinary Tribunal Rules



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY
11th Assembly

Subordinate Legislation and Publications Committee

Hon. Delia Lawrie MLA
Minister for Justice and Attorney-General
GPO Box 3146
DARWIN NT 0801

Dear Minister,

Re: Legal Practitioners Disciplinary Tribunal Rules [No 13 of 2011]

The Subordinate Legislation Committee met on 16 August 2011 and considered the above Rules.

The Legal Advisor to the Committee raised the attached issues regarding the drafting of the Rules. The Committee has resolved to refer this advice to you for your consideration and comment.

I would be grateful if you could advise the Committee of your response to the issues raised.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Gunner'.

Michael Gunner MLA
CHAIR

16 August 2011

GPO Box 3721, DARWIN NT 0801
Telephone: 08 8946 Facsimile: 08 89 e-mail:



MINISTER FOR JUSTICE & ATTORNEY-GENERAL

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Mr Michael Gunner MLA
Chair
Subordinate Legislation and Publications Committee
Legislative Assembly of the Northern Territory
GPO Box 3721
DARWIN NT 0801

Dear *Michael* Mr Gunner

Thank you for your letter of 16 August 2011 that raises concerns with rule 17 of the Legal Practitioners Disciplinary Tribunal Rules.

The Office of Parliamentary Counsel has confirmed that the issue with rule 17 is the result of a drafting error and has made suggested amendments to rule 17 (refer Attachment A). The Chairperson of the Legal Practitioners Disciplinary Tribunal has agreed to amending rule 17 as suggested by Parliamentary Counsel. Accordingly, an amendment to rule 17 will be made in due course.

I trust that the forgoing addresses the issue that the Subordinate Legislation and Publications Committee has with rule 17.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Delia Lawrie'.

DELIA LAWRIE

22.9.11

ATTACHMENT A

**LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL RULES
POSSIBLE AMENDMENTS OF RULE 17**

The suggested amendments are marked in the following copy of rule 17.

17 Affidavits

- ~~(1) This rule applies only if a party to the proceedings intends to rely on affidavits at the hearing.~~
- (2) ~~As soon as practicable (but no later than 5 days) before the hearing day, the party must~~ A party who intends to rely on affidavits at a hearing must, as soon as practicable (but no later than 5 days) before the hearing day:
 - (a) file the affidavits the party intends to rely on; and
 - (b) serve copies of the affidavits on each other party.
- (3) ~~If the~~ If a party requires a person who has sworn an affidavit for another party to attend the hearing to give evidence or for cross-examination, the party must, at least 3 days before the hearing day:
 - (a) file a notice that the person is required to attend for that purpose; and
 - (b) serve a copy of the notice on each other party.
- (4) A copy or notice served under subrule (2) or (3) must be served personally on a party other than the Law Society.
- (5) Subrule (3) does not affect any power, practice or procedure under these Rules in relation to subpoenas.

The amendments would be achieved by making amendment Rules containing the following provision:

Rule 17 amended

- (1) Rule 17(1)

omit

- (2) Rule 17(2)

omit

As soon as practicable (but no later than 5 days) before the hearing day, the party must:

insert

A party who intends to rely on affidavits at a hearing must, as soon as practicable (but no later than 5 days) before the hearing day:

- (3) Rule 17(3)

omit

If the

insert

If a

5 of 2011 Katherine Town Council Amendment By-Laws



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY
11th Assembly

Subordinate Legislation and Publications Committee

Hon. Malarndirri McCarthy MLA
Minister for Local Government
GPO Box 3146
DARWIN NT 0801

Dear Minister,

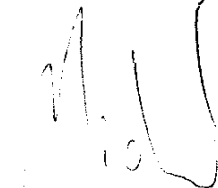
Re: Katherine Town Council Amendment By-Laws (No.5 of 2011)

The Subordinate Legislation Committee met on 16 August 2011 and considered the above By-Laws.

The Legal Advisor to the Committee raised the attached issues regarding the drafting of the By-Laws. The Committee has resolved to refer this advice to you for your consideration and comment.

I would be grateful if you could advise the Committee of your response to the issues raised.

Yours sincerely



Michael Gunner MLA
CHAIR

16 August 2011

Katherine Town Council Amendment By-Laws (No.5 of 2011)

By-Law 115(1) and (2): Query the use of the word 'to' after 'presentation' in both parts – begs the question of to whom, but in any event seems superfluous. Compare by-law 116(3) – card presented 'to an officer'.

115 Effect Of Registration

- (1) Subject to these By-Laws, a resident borrower is entitled to borrow, free of charge, for use away from the library any library item which is designated by the librarian as a library item available for lending, on presentation to of his or her borrower's card.
- (2) Subject to these By-Laws, a non resident borrower is entitled to borrow for use away from the library any library item, which is designated by the Librarian as a library item available for lending, on presentation to of his or her borrower's card and subject to payment of a refundable deposit, as prescribed by Council from time to time.

By-Law 118(2): the by-law provides – 'The Council may prescribe a fee for overdue items may be levied as determined by the Council'. The wording is awkward. Does it mean any more than 'The Council may prescribe a fee for overdue items'?

118 Retention of library items beyond period of loan

- (2) The Council may prescribe a fee for overdue items may be levied as determined by the Council.

By-Law 120(4): the word 'of' in the first line should be replaced with 'or', so that it reads 'A person who contravenes or fails to comply with this Part or with a direction of a librarian...'

120 Powers of librarians

- (4) A person who contravenes or fails to comply with this Part of with a direction of a librarian under Subclause (1) and (2) may be removed or excluded from the library by the librarian, an authorised person, an officer or an employee of the Council.

By-Law 121(1)(i): the use of the word 'with' is potentially confusing [given the introductory words of 121(1): 'A person shall not'] – suggest either delete 'with' or substitute 'without'.

121 Conduct of persons in library

- (1) A person shall not:
 - (i) take a tracing from a library item without the correct equipment and with the permission of the librarian;

By-Law 121(1)(o): provides that a person shall not 'sleep, lie on a chair or table or on the floor' of a library. While it is noted that an identical provision exists under the Darwin City Council by-laws [146(1)(h)(iv)], it leaves exposed to penalty anyone who 'nods off' at a desk in the library. It is imagined that the object is to prevent people camping in the library and if that is so alternative wording might be adopted.

121 Conduct of persons in library

- (1) A person shall not:
 - (o) sleep, lie on a chair or table or on the floor;



MINISTER FOR LOCAL GOVERNMENT

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Mr Michael Gunner MLA
Chairman
Subordinate Legislation and Publications Committee
Legislative Assembly of the Northern Territory
GPO Box 3721
DARWIN NT 0801

Dear Mr Gunner

Thank you for your letter dated 16 August 2011, providing advice from the Subordinate Legislation and Publications Committee on the recently introduced Katherine Town Council By-laws.

The above By-laws were made under the *Local Government Act* by special resolution of the Katherine Town Council on 25 January 2011. In accordance with section 190(1)(c) of the *Local Government Act*, the council provided a certificate from a legal practitioner certifying that the By-laws were made consistently with the principles prescribed in the Act.

A copy of your letter was sent to the Katherine Town Council for their consideration and response. The Council has responded to the matters raised, in the attached letter.

Yours sincerely

A handwritten signature in blue ink that reads "Malandarri McCarthy".

MALARNDIRRI McCARTHY

23 SEP 2011



KATHERINE TOWN COUNCIL

PO Box 1071 KATHERINE NT 0851
Civic Centre, Stuart Highway KATHERINE

Folder: Legal Documents/ Administration/By-Laws

30 August 2011

Ms Trish Angus
Executive Director
Department of Local Government
GPO Box 4621
DARWIN NT 0801

Dear Ms Angus,

KATHERINE TOWN COUNCIL BY-LAWS

I refer to your letter of 25 August 2011 and the comments from Mr Michael Gunner MLA on recent amendments to the Katherine Town Council By-laws.

Mr Gunner's comments have been referred to Council legal advisor Cridlandsmb Lawyers. Cridlandsmb drafted the Amendment By-laws.

Cridlandsmb advise that they agree that the first four points (grammatical and typographical matters) should be corrected and suggest that this could occur when next the Katherine Town Council By-laws are amended.

With respect to the final matter Cridlandsmb advise that they do not believe a change to this By-law 121(1)(o) is required. Their view is "a person who accidentally nods off or falls asleep at a library desk would not be prosecuted and would be unlikely to be convicted if charged. The Latin maxim "de minimis non curat lex" (the law does not concern itself with trifles) would likely apply to any such action".

For further enquiries please contact Council's CEO Geoff Brooks.

Yours sincerely

Anne Shepherd
MAYOR OF KATHERINE

Phone (08) 8972 5500 Fax: (08) 8971 0305 E-mail records@kic.nt.gov.au
www.kic.nt.gov.au

39 of 2011 Mineral Titles Regulations



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY
11th Assembly

Subordinate Legislation and Publications Committee

7 December 2011

Hon. Kon Vatskalis MLA
Minister for Primary Industries, Fisheries and Resources
PO Box 3146
Darwin NT 0801

Dear Minister,

Re: Mineral Titles Regulations (No 39 of 2011)

The Subordinate Legislation and Publications Committee met on 30 November 2011 and considered the above regulations.

The Legal Advisor to the Committee raised the attached issues regarding the regulations. The Committee has resolved to refer this advice to you for your consideration and comment.

I would be grateful if you could advise the Committee of your response to the issues raised.

Please contact me or Russell Keith, Clerk Assistant-Committees on 8946 1429 if you need further clarification on this matter.

Yours sincerely,

Michael Gunner, MLA
CHAIR

Enc.



THE HON KON VATSKALIS MLA
MINISTER FOR PRIMARY INDUSTRY, FISHERIES
AND RESOURCES

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Hon. Michael Gunner MLA, Chair
Subordinate Legislation and Publications Committee
Legislative Assembly of the Northern Territory
GPO Box 3721
DARWIN NT 0801

Dear Minister

Thank you for your letter of 07 December 2011, in your capacity as chair of the Subordinate Legislation and Publications Committee, regarding issues raised by the Legal Advisor to the committee in respect of the *Mineral Titles Regulations*.

Given the specific nature of your query, the matter was referred to Parliamentary Counsel and its response to the issues raised is given below.

Regs 28 and 113

These offences do not include a provision allowing for a reasonable excuse because they are not strict liability offences. An offence against reg.8(1) can be distinguished from these offences because it is a strict liability offence. That means no fault element (or mental state) has to be proved in relation to the alleged offender. Just the fact that the person failed to comply with the notice of approval for the survey is sufficient to find the person guilty of the offence. In such offences, it is usual to allow for a reasonable excuse defence to cover possible contingencies that may have resulted in the person being unable to comply with the relevant obligation.

However, to prove an owner of land has committed an offence against s.28 or 113, the prosecution will have to establish the existence of the relevant fault elements (or the state of mind of the owner) applicable to the offence. The *Mineral Title Regs* generally do not specify the fault elements for an offence which means the 'default' fault elements apply under s.43AM of the Criminal Code. That reads as follows:

2 FEB 2012

43AM Offences that do not provide fault elements

(1) If a law that creates an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.

(2) If a law that creates an offence does not provide a fault element for a physical element that consists of a result or circumstance, recklessness is the fault element for the physical element.

To apply s.43AM of the Code to regs 28 and 113, the following will apply:

(1) Paragraph (a) mentions a physical element consisting of a *circumstance* and therefore the prosecution will have to prove that the owner was *reckless* about the person being authorised. Recklessness is proved in this case by applying the following (from s.43AK of the Code):

43AK Recklessness

(1)

(2) A person is reckless in relation to a circumstance if:

(a) the person is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.

Note that under s.43AK(4), if the prosecution can show that the owner *knew* the person was authorised, the fault element for the circumstance will be proved. For example, if the owner had given consent to the entry, that will be sufficient.

(2) Paragraph (b) mentions the physical element consisting of the *conduct* of the owner. The prosecution will have to show that the owner *intended* to prevent the person from entering the land or conducting PE (or fossicking) on the land. If the prevention was merely because a gate was inadvertently locked, then the intention would not be proved.

An owner of land charged with this offence in the circumstances mentioned in the document from the Subordinate Legislation and Publications Committee has the defence of lawful authority under s.43BE of the Criminal Code. For instance, if regulation

3

23(1)(b)(ii) applied to the person entering the land and the person failed to comply with that provision, then the owner would be justified in refusing entry because there would be no evidence of the person being authorised to enter the land. Accordingly it is difficult to imagine the owner being charged with this offence in such a circumstance.

Regs 104 and 105

The Lands, Planning and Mining Tribunal is given particular powers under s.161 of the *Mineral Titles Act*. Under s.162 of the Act, the regs may provide for other matters and procedures relating to applications to the Tribunal. Reg.123(1) enables a person to apply to the Tribunal for a decision about a dispute relating to the matters mentioned in it, including fossicking. The provision is very broad, and although reg.123(2) does not limit the general provision it gives some guidance about the matters a dispute might relate to. As mentioned in the document, this provision clearly enables an application to be made to the Tribunal if a person disputes the withdrawal of consent to fossicking under reg.105.

Reg. 105 does not limit the operation of reg.123 in any way. Therefore, if the Minister consents to a person fossicking on reserved land and then withdraws consent under reg.105, there is nothing to prevent the person from disputing the withdrawal and applying to the Tribunal for a decision. This applies even though reg.104(4) does not permit a person to apply to the Tribunal if the Minister refuses to consent to a request to fossick on reserved land. There is nothing contradictory in this. The Minister is responsible for the protection of reserved land and therefore, under reg.104, may refuse to consent to fossicking on the land if the refusal is reasonable. If the Minister's withdrawal of consent is reasonably based on the matters mentioned in reg.105(1)(a) or (b), there should be no dispute. However, there is no basis for the Regulations to deny the fossicker the right to apply to the Tribunal for a decision if:

- o the fossicker disputes the withdrawal; and
- o has grounds to argue that the Minister's belief was not reasonable because the circumstances mentioned in those provisions did not apply and there was no evidence to support the withdrawal of consent.

trust this addresses the issues raised by your Legal Advisor.

Yours sincerely

CON VATSKALIS

31 JAN 2012

 Northern Territory
Government

2 FEB 2012

Appendix A: List of Ministerial Correspondence on Subordinate Legislation

No.	Title of Regulation/Bylaw	Minister	Letter to Minister	Minister's Response
26 of 2010	Construction Contracts (Security Payments) Amendment Regulations	Hon Delia Lawrie	24/2/2011	30/8/2011
13 of 2011	Legal Practitioners Disciplinary Tribunal Rules	Hon Delia Lawrie	16/8/2011	22/9/2011
5 of 2011	Katherine Town Council Amendment By-Laws	Hon Malandirri McCarthy	16/8/2011	23/9/2011
39 of 2011	Mineral Title Regulations	Hon Kon Vatskalis	7/12/2011	2/2/2012