

**Economic Development Directorate  
CLEARANCE AND ASSESSMENT**

**GRC 2011/18**

<b>Subject: Letter to Mr Max Mercer President of ClubsACT requesting that the ClubsACT Code of Governance be Reviewed</b>	
Minister for Economic Development	Date:
Director-General, Economic Development Director:	Date: 11/7/11
Chief Executive:	Date: 12/7/2011
Director / Manager:	Date:
Contact Officer: Greg Jones	Ext: 70360




**SUBJECT: Letter to Mr Max Mercer President of ClubsACT  
 Requesting that the ClubsACT Code of Governance be  
 Reviewed**

To: Minister for Economic Development

- Director-General, Economic Development Directorate *D 17/11/11*

From: Chief Executive Officer, Gambling and Racing Commission

Date: 12 July 2011

**Critical date and reason**

20 July 2011 to provide a timely request to ClubsACT.

**Purpose**

1. To recommend that you sign a letter to Mr Max Mercer, President of ClubsACT, requesting that the existing ClubsACT Code of Governance be reviewed by industry.

**Background**

2. The ACT Gambling and Racing Commission's review of the governance provisions of the *Gaming Machine Act 2004* recommended that:

"...the Minister write to ClubsACT requesting that the ClubsACT Code of Governance be reviewed and updated to include 'best practice' provisions to improve club accountability and transparency to their members. The Minister could require the Commission to monitor the outcomes of the review including the application of the results across the industry and provide advice back to the Minister in due course whether legislative reform is required in this area."

ClubsACT expressed in principle support for this recommendation in its second stage consultation submission.

3. The Government has accepted all the recommendations of the report. The *Gaming Machine (Club Governance) Amendment Act 2011* (the Act) put the recommendations requiring legislative change into effect.
4. During the debate stage speech you indicated that you would request that ClubsACT review its current Code of Governance.

**Issues**

5. The proposed letter from you to ClubsACT states that you have accepted the recommendations made in the Commission's report, including the recommendation relating to the review and enhancement of the existing ClubsACT Code of Governance.
6. The letter requests that ClubsACT review its Code of Governance to improve the accountability and transparency of club management. The stated expectation is for ClubsACT to have substantially completed their review by the end of 2011 with the implementation of the revised Code of Governance by 1 April 2012.
7. The letter also informs ClubsACT of your request that the Commission monitor the progress and outcomes of ClubsACT's review of its Code of Governance as well as the application of its results across the industry.

**Consultation**

8. Consultation was conducted with external stakeholders, including ClubsACT, as well as other Government agencies as part of the review process.

**Financial**

9. The Commission will absorb the minor cost of monitoring the progress of ClubsACT's review. The cost to industry of developing the code will be minor. The cost of implementation depends on the nature of the code adopted, but is also likely to be minor.

**Media**

10. Media interest in your request is unlikely.

**Recommendation**

That you:

- sign the letter at Attachment A and;

*AGREED*/NOT AGREED/PLEASE DISCUSS

- note that the Commission will report to you on the progress of the ClubsACT review.

*NOTED*/PLEASE DISCUSS

Greg Jones  
Chief Executive Officer  
Gambling and Racing Commission

Andrew Barr MLA *Andrew Barr* ..... 19/7/11

Action Officer: Greg Jones  
Branch: Gaming and Racing Commission  
Extension: 70360



**Andrew Barr MLA****DEPUTY CHIEF MINISTER**

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT

MINISTER FOR EDUCATION AND TRAINING

MINISTER FOR TOURISM, SPORT AND RECREATION

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**MEMBER FOR MOLONGLO**

Dear

I refer to the Gambling and Racing Commission's report of its investigation into the governance provisions of the *Gaming Machine Act 2004* (the Act) and the recent amendments to the Act based on this review.

As stated during debate of the legislative amendments, I have accepted all of the Commission's recommendations in its report. A copy of the report is available on the Commission's website.

One of the Commission's recommendations relate to the review and enhancement of the existing ClubsACT Code of Governance with the suggestion that it includes 'best practice' provisions. I fully support this suggestion on the basis that it provides the industry with the opportunity to improve its current overall governance arrangements without the need for regulation. I understand that in ClubsACT's second stage consultation submission as part of the review process that support in principle was provided for this recommendation.

I therefore request that ClubsACT conduct a review of their Code of Governance to generally improve accountability and transparency of club management processes and to include amongst other things 'best practice' provisions. It is important that the revised Code of Governance is consistent with ACT gaming laws and is a stand-alone document tailored to ACT circumstances.

I would expect that this review should be substantially completed by ClubsACT by the end of 2011 and be implemented by licensees by 1 April 2012.

Further, I have requested that the Commission monitor the progress of this important work and report back to me at suitable times regarding the content and implementation by individual licensees of any enhanced Code.


It may be helpful for you to liaise with the Commission from time to time as you conduct your review and develop your enhanced Code of Governance so that the Commission can monitor progress and provide any assistance.

**ACT LEGISLATIVE ASSEMBLY**

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I look forward to receiving in due course your revised Code of Governance along with advice on the implementation and on-going monitoring of the application of the Code by the industry.

Yours sincerely

  
Andrew Barr MLA  
Minister for Economic Development

21 JUL 2011



**Economic Development Directorate  
CLEARANCE AND ASSESSMENT**

**EDD  
GRC 2011/12**

<b>Subject: Letter of Concern from Clubs ACT Re: Gaming Machine (Club Governance) Amendment Bill 2011</b>	
Minister for Economic Development	Date:
Director-General, Econor	Date: 6/7/11
Chief Executive:	Date: 4/7/2011
Director / Manager:	Date:
Contact Officer: Greg Jones	Ext: 70360


**Andrew Barr MLA**

DEPUTY CHIEF MINISTER

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT

MINISTER FOR EDUCATION AND TRAINING

MINISTER FOR TOURISM, SPORT AND RECREATION

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MEMBER FOR MOLONGLO

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Dear

I refer to your letter of 21 June 2011 concerning the *Gaming Machine (Club Governance) Amendment Bill 2011*.

You raised a number of concerns with the Bill which were addressed by the Legislative Assembly during the debate of the Bill on 28 June 2011. As you are aware, the Bill was passed by the Assembly with minor technical amendments and commenced on 1 July 2011.

While I noted the matters you raised in relation to the Bill, I could not agree with the arguments presented. However, to ensure that there are no adverse consequences of any of the governance amendments I have agreed to a review of these provisions after two years of operation.

As clubs are not for profit organisations operated for the benefit of their members and the community, they have a responsibility to conduct their activities in a transparent and accountable manner. The amendments to the *Gaming Machine Act 2004* will enhance the governance arrangements and the regulatory framework that clubs operate under. This is important for the continued success of the community gaming model.

I will write to you separately concerning a review of the industry's Code of Governance with the aim of ensuring that the industry operates with a best practice approach to their governance arrangements.

Yours sincerely

Andrew Barr MLA  
Minister for Economic Development

12 JUL 2011

ACT LEGISLATIVE ASSEMBLY



Mr Andrew Barr MLA  
Minister for Gaming and Racing  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

*Gaming Machine (Club Governance) Amendment Bill 2011*

Dear Minister,

On behalf of the members of ClubsACT, I write to express our significant concern regarding the above Bill.

As you would know I have been discussing this matter at length with your office and have now been advised that it is likely that the Government will push ahead with the bill without any amendments.

**Section 148A – Club Directors Acting in Good Faith**

The proposed legislation contains the following provision:

New Section 148A

“Club directors – acting in good faith

A director of a club must exercise the director’s powers and discharge the director’s duties-

- (a) In good faith in the best interests of the club; and
- (b) for a proper purpose”.

This provision mirrors Section 181 of the Federal *Corporations Act 2001* which states:

“181 Good faith—directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose”.

This would mean, for example, that the Labor Club would be bound to provide funds to only the Labor Party to the exclusion of all else.

While this example may seem trivial, the point is that no work has been done by the Government, so far as ClubsACT is aware, that would allow us to have some certainty over what actions would represent a potential breach of this law.

This is a significant concern given the very broad nature of the law. Unless there is clarity over what would be regarded as a breach of this new law, it should not pass the Legislative Assembly.

#### In What Circumstance Could the Commission Launch an Investigation

No information has been provided which details the circumstances under which the Gambling and Racing Commission would be able to launch an investigation.

Given the extremely broad scope of the provision and the significance a breach of this provision would represent, ClubsACT believes the circumstances that would warrant the Commission launching an investigation should be codified.

This would not only protect against frivolous investigations but also ensure there is clarity and certainty for licensees who will be subject to this law should it pass.

There are no provisions in this Bill which places any obligations on the Commission to meet specified criteria when deciding to launch any investigation and we believe the Commission should have standards laid out before they are able to launch investigations.

#### No Independent Third-Party Review Prior to Decision

One of the most concerning aspects of this provision is that it empowers the Commission to not only investigate such breaches but also determine guilt and apply penalties before any independent, third-party can become involved.

While this is not entirely unprecedented for regulators, given a breach of Section 148A would represent a very serious matter both for the club and its directors, higher standards and more stringent processes should apply.

If a breach of this same provision contained Federal Corporations Law is believed to have occurred, then the relevant body being the Australian Securities and Investment Commission (ASIC), must prove their case in a court of law. This is appropriate given the nature of the offence and the same standard should be applied in the ACT.

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### Relationship with Federal Corporations Law and ASIC

If this law is passed, then the ACT and Australian Governments will both have jurisdiction for the same offence. While I do not believe there is any justification for the ACT to pass this law, at the very least a number of important questions need to be answered prior to the Bill being passed.

One important question is what is the policy the ACT Government will adopt with respect to the potential for parallel investigations? Clearly the prospect of both the ACT Gambling and Racing Commission and ASIC launching investigations needs to be considered as at least possible.

It needs to be stated whether the Commission would continue an investigation in the context of ASIC investigating. Further, if ASIC conducts an investigation and finds against an ACT club, would the Commission launch its own investigation and apply penalties additional to those applied by a Federal Court. Or would the Commission simply apply penalties taking the outcome of the federal court action as sufficient basis for action?

If the Commission finds against a licensee for the actions of its directors and applies penalties up to and including the loss of its license, will the Commission refer those decisions to ASIC?

If after the Commission has found against a licensee and applied penalties and ASIC decides to launch a court action against that same licensee and the court ultimately finds in favour of the licensee, will the Commission be obliged to review its finding? Would a licensee be able to seek compensation from the ACT Government for a finding which a Federal Court disagrees with?

These are important, legitimate questions and while there may be good answers to these questions, the point is they have not been provided.

### Why Are Only Clubs Subject to This Law

It has not been explained to me why only licensed clubs are subject to this law.

If the determining factor is that fact that our venues provide gambling services, then I would ask why other gambling providers are not subject to this law?

If the determining factor is that we have access to poker machines, then I would ask why this law does not apply to the small number of pubs and taverns that have poker machines?

If the determining factor is that we have exclusive access to a particular type of poker machines, then I ask why this law applies to all clubs whether or not they have poker machines?

If the determining factor is that we are clubs, then I would respectfully ask what is the justification for this law to be introduced at all?

**Section 53B – Commission’s Power to Amend Constitutions Without a Vote of Members**

This is the other provision that significantly concerns ClubsACT.

While we agree that club constitutions should in no way be inconsistent with the *Gaming Machine Act 2004*, we strongly oppose the right of the Commission to bypass the members of clubs to enact changes to that constitution.

It has not been demonstrated why the Commission should have the power to require such changes without a vote by the members of the club.

Surely a more appropriate course of action would be for the Commission to write to the club and require them to put a constitutional amendment to a vote of members. This would of course be only a formality as such amendments would be passed by the members and the Commission would have to option to apply penalties and seek remedial action should the amendment fail to pass such amendments.

But allowing the members to exercise their right to vote to change something as important as their constitution, as opposed to the Commission simply requiring it to be done and bypassing the members will create a negative atmosphere in a sector already concerned about the actions of government.

Clearly the outcome of the Commission requiring a club to amend its constitution via a vote would be the same as requiring it to be done without a vote so I would very strongly encourage you to not bypass the members of clubs by allowing the Commission to completely disregard their role by forcing constitutional amendments without the involvement of members.

The ACT has the most highly regulated club sector in the nation. The level of intervention that certain provisions in this Bill represent is unjustified and unworkable.

I would be grateful if you could release any legal advice that was provided to you relating to this Bill and could you also indicate whether or not this legislation was subject to a Regulatory Impact Statement?

Kind regards

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Chief Executive  
21 June 2011.

# URGENT

000181



**Economic Development Directorate  
CLEARANCE AND ASSESSMENT**

GRC 2011/14

C1729/11

<b>Subject: Debate Folder <i>Gaming Machine (Club Governance) Amendment Bill 2011</i></b>	
Minister for Economic Development	Date:
Director-General, Economic Devel	Date: 16/6/11
Chief Executive:	Date: 16/6/2011
Director / Manager	Date: 16/6/11
Contact Officer: GREG JONES	Ext: 70360


M. Barr



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# Daily Program

This program of proposed business is issued for the general guidance of Members. It is not a formal document and business listed is subject to change.

Tuesday, 28 June 2011  
10 am

## Prayer or Reflection

## COMMITTEE REPORT

### Standing Committee on Justice and Community Safety - Scrutiny Report 38

Mrs Dunne (Chair) to present Scrutiny Report 38 and, by leave, make a statement.

## Presentation of paper

Ms Gallagher (Treasurer) to present the Government response to the report of the Select Committee on Estimates 2011-2012 and move – That the Assembly take note of the paper.

## Statements, by leave

Mr Corbell (Minister for the Environment and Sustainable Development) to seek leave to make a statement, pursuant to the resolution of the Assembly of 9 March 2011 regarding community gardens.

Mr Corbell (Minister for the Environment and Sustainable Development) to seek leave to make a statement, pursuant to the resolutions of the Assembly of 9 December 2009 and 25 August 2010 regarding Kambah masterplan and Erindale masterplan.

## EXECUTIVE BUSINESS

### Orders of the day

- No. 1 Planning and Building Legislation Amendment Bill 2011 — Detail Stage – Clause 1 – Resumption of debate (Mr Barr); agreement to Bill.
- No. 2 Gaming Machine (Club Governance) Amendment Bill 2011 — Resumption of debate (Mr Smyth) on agreement in principle; detail stage; agreement to Bill.

### At 2 pm

### Questions without notice

- Presentation of papers – Speaker
- Ms Gallagher (Minister for Health)

**Debate Speech One**  
**(Minister for Economic Development)**  
**Gaming Machine (Club Governance) Amendment Bill 2011**

Mr Speaker,

The club industry in the ACT makes a significant contribution to the community by providing funds and facilities to local sporting and not-for-profit organisations.

Clubs are themselves not operated for profit, but for their members and the community.

This confers upon clubs a responsibility to conduct their activities in a transparent and accountable manner, in line with accepted standards.

In order to ensure clubs were operating within a suitable governance regulatory framework, the Gambling and Racing Commission was tasked with reviewing the governance arrangements applying to clubs.

Two periods of industry and community consultation occurred, totalling ten weeks.

The Commission first produced an Issues Paper, released in May 2010, to commence the initial stage of public consultation.

The Paper was forwarded directly to stakeholders, advertised in *The Canberra Times* and made available on the Commission's website.

The Commission also participated in an industry seminar which was facilitated by ClubsACT.

Mr Speaker,

This Bill has been developed in consultation with the industry, in an open and transparent process.

The Commission's report and recommendations - which I made available to the Assembly on 5 May this year - have been accepted by the Government.

The *Gaming Machine (Club Governance) Amendment Bill* is designed to improve the transparency and accountability of clubs.

It is also designed to strengthen the powers of the Gambling and Racing Commission as the local regulator.

Mr Speaker,

The key to good governance in an organisation lies with the Directors.

Put simply - this Bill requires that directors act in the best interests of their club.

While this provision echoes existing Commonwealth Corporations Law requirements it importantly places the monitoring of this provision with the local regulator.

It should be noted that this provision does not impose any additional requirements on directors beyond those that already exist in Corporations Law.

These provisions are aimed at ensuring major decisions - such as significant expenditure or other commitments - are taken consistent with a club's constitution and in the best interests of members.

The significance of placing the monitoring duties in the hands of the Gambling and Racing Commission was outlined in its review of the governance provisions in the Gaming Machine Act.

The review noted that the Australian Securities and Investments Commission – or ASIC - has significant national responsibilities and a very large number of organisations to monitor.

The report recognised that as a result ASIC is not always able to give local corporate issues the attention they may require.

However, these issues are important to the proper conduct of the club industry and they should be addressed and rectified.

Mr Speaker,

Unlike Corporations Law, the requirement contained in this Bill does not have any civil penalties.

Instead, where a director is found to have acted contrary to the club's best interests - the Gaming Machine Act would provide the Gambling and Racing Commission with the power to seek to have the matter addressed with the licensee.

This could include disciplinary action against the licensee.

This mechanism ensures that the licensee addresses the issues and takes responsibility to ensure that their directors are compliant with their legal obligations.

As with all disciplinary matters, the Commission would consider the circumstances of any breach - including providing the licensee with an opportunity to comment and rectify - before taking action.

If action is taken by the Commission the licensee has the opportunity to seek a review of the decision with the ACT Civil and Administrative Tribunal.

In relation to the potential for two regulators pursuing a licensee for the same issue, ASIC's focus is on the individual director while this Bill encourages a licensee to resolve the matter at board level.

In any case, I have no doubt the two regulators would communicate with each other in such circumstances - to ensure that any action taken was co-ordinated.

Mr Speaker,

An important point of the governance arrangements of many clubs is the use of an associated organisation to maintain consistent objects and therefore stability in its goals.

This Bill recognises this fact but proposes some important requirements on the operation of associated organisations.

While associated organisations will retain the ability to appoint directors - under this Bill they will no longer be able to remove directors from club boards.

This is to ensure a director appointed by an associated organisation does not experience pressure - real or perceived - to act in the interests of the associated organisation rather than the club.

As I have emphasised, a director's first responsibility must be to the members and the club.

This Bill helps to ensure the interests of the members and the club remain foremost in the minds of directors.

Mr Speaker,

This Bill recognises that organisations can change over time.

This Bill requires that associated organisations continually meet the requirements of their initial declaration and therefore continue to be a benefit to the club.

The Bill also requires an associated organisation not to do anything that would - if the Commission were considering whether to declare the entity as an associated organisation for a club - cause the Commission to refuse to make the declaration.

For example, if the entity had a history of regulatory non-compliance, then not only would this be an issue on application - it would also be relevant if it occurred after an initial approval was granted.

The Bill provides the Commission with the power to suspend or repeal a declaration of an associated organisation.

This will protect clubs and their assets from associated organisations having a significant influence when they are no longer a benefit to the club.

Mr Speaker,

This Bill has been carefully developed following a comprehensive review and extensive consultation process with the ACT Clubs industry.

The implementation of this Bill will set the ACT club industry on a better course of governance.

It will ensure better outcomes for members and the community.

To build on this approach to governance, I will soon request ClubsACT to review their existing voluntary Code of Governance.

This is to ensure it includes best practice guidelines along with a system to monitor licensee performance in achieving those outcomes.

Mr Speaker, we will monitor the impact of these changes over time, and will review the operation of the changes made by the Bill in two years.

Mr Speaker,

I would also like to foreshadow that the Government will be moving three minor amendments to the Bill.

**CLAUSE 18 – 2 Amendments****Amendment 1 (Text)**

Clause 18  
 Proposed new section 147B (1)  
 Page 9, line 2—

*after*  
 satisfied

*insert*  
 on reasonable grounds

**SPEAKING NOTES FOR AMENDMENT 1 (to Clause 18)**

This amendment addresses the comment by the Scrutiny of Bills Committee. In its report on the Bill, the Committee sought clarification as to why the powers conferred on the ACT Gambling and Racing Commission under section 147C of the Act (clause 18 of the Bill) did not have the same qualifying condition relating to “reasonable grounds” as was conferred under section 148B of the Act (clause 21 of the Bill).

While I am advised that there are sufficient requirements in place to ensure that the Commission makes “reasonable” administrative decisions, this amendment and the one that follows makes this requirement explicit and puts the matter beyond doubt.

Although the Scrutiny of Bills Committee only raised the matter in relation to proposed new section 147C, the Government considered that if section 147C were to be amended then for consistency 147B should also be amended.

**Amendment 2 (Text)**

Clause 18  
 Proposed new section 147C (1) (b)  
 Page 9, line 20—

*after*  
 satisfied

*insert*  
 on reasonable grounds

**SPEAKING NOTES FOR AMENDMENT 2 (to Clause 18)**

This amendment addresses the comment by the Scrutiny of Bills Committee. In its report on the Bill, the Committee sought clarification as to why the powers conferred on the ACT Gambling and Racing Commission under section 147C of the Act (clause 18 of the Bill) did not have the same qualifying condition relating to “reasonable grounds” as was conferred under section 148B of the Act (clause 21 of the Bill).

This amendment makes this requirement explicit consistent with the amendment to proposed new section 147B (1).

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**SPEAKING NOTES FOR GOVERNMENT AMENDMENTS TO  
GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011**

**CLAUSE 2 (1)**

**Amendment (Text)**

Clause 2 (1)  
Page 2, line 6—

*after*  
commences

*insert*  
, or is taken to have commenced

**SPEAKING NOTES FOR AMENDMENT**

In the event of not being able to enact the Bill by 1 July 2011, this amendment to Clause 2 (1) of the Bill will enable enactment after that day with the Bill still taken to have commenced on 1 July 2011. This amendment avoids financial implications for the club industry that may arise if the Bill is not taken to have commenced on 1 July 2011.

**SPEAKING NOTES FOR GOVERNMENT AMENDMENTS TO  
GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011**

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Clause 2 (1)  
Page 2, line 6—

*after*  
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*insert*  
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Australian Capital Territory  
Legislative Assembly

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**Gaming Machine (Club Governance)  
Amendment Bill 2011**

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Amendments to be moved by the Minister for Economic Development

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**1**  
**Clause 2 (1)**  
**Page 2, line 6—**

*after*  
commences  
*insert*  
, or is taken to have commenced,

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**2**  
**Clause 18**  
**Proposed new section 147B (1)**  
**Page 9, line 2—**

*after*  
satisfied  
*insert*  
on reasonable grounds

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3

**Clause 18**

**Proposed new section 147C (1) (b)**

**Page 9, line 20—**

*after*

satisfied

*insert*

on reasonable grounds

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000-07

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3

**Clause 22**

**Section 164 (3), definition of *contribution*, proposed new paragraph (b) (xvi)**

**Page 11, line 20—**

*omit*

, other than a payment required under section 163A (1)  
(Required payment to problem gambling assistance fund)

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4

**Clause 23**

**Page 12, line 1—**

*[oppose the clause]*

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These are in response to comments from the Scrutiny of Bills Committee and are intended to ensure that the Bill is taken to have commenced on 1 July 2011.

I commend the Bill and the Government's forthcoming amendments to the Assembly.

Ends

000165

**Australian Capital Territory  
Legislative Assembly**

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**Gaming Machine (Club Governance)  
Amendment Bill 2011**

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Amendments to be moved by Mr Brendan Smyth

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**1**  
**Clause 9**  
**Proposed new section 53B**  
**Page 5, line 7—**

*omit*

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**2**  
**Clause 20**  
**Page 10, line 17—**

*[oppose the clause]*

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Australian Capital Territory  
Legislative Assembly

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**Gaming Machine (Club Governance)  
Amendment Bill 2011**

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Amendments to be moved by the Minister for Economic Development

---

**1**  
**Clause 2 (1)**  
**Page 2, line 6—**

*after*

commences

*insert*

, or is taken to have commenced,

---

**2**  
**Clause 18**  
**Proposed new section 147B (1)**  
**Page 9, line 2—**

*after*

satisfied

*insert*

on reasonable grounds

---

3

Clause 18

Proposed new section 147C (1) (b)

Page 9, line 20—

*after*

satisfied

*insert*

on reasonable grounds

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2011

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011**

**GOVERNMENT AMENDMENTS**

**SUPPLEMENTARY EXPLANATORY STATEMENT**

**Presented by  
Andrew Barr MLA  
Minister for Economic Development**

**EXPLANATORY STATEMENT FOR GOVERNMENT AMENDMENTS**

These government amendments are minor or in response to Scrutiny of Bills Committee comments.

**AMENDMENT 1****Amendment to Clause 2(1)****Page 2, line 6**

In the event of not being able to enact the Bill by 1 July 2011, this amendment to Clause 2 (1) of the Bill will enable enactment after that day with the Bill still taken to have commenced on 1 July 2011. This amendment avoids financial implications for the club industry that may arise if the Bill is not taken to have commenced on 1 July 2011.

**AMENDMENT 2****Amendment to Clause 18, proposed new section 147B (1)****Page 9, line 2**

This amendment to Clause 18, proposed new section 147B (1) inserts the qualifying condition 'on reasonable grounds'. This amendment will require the Commission to be satisfied, on reasonable grounds, that an associated organisation has stopped meeting a requirement for its declaration before giving a warning notice.

**AMENDMENT 3****Amendment to Clause 18, proposed new section 147C (1) (b)****Page 9, line 20**

Consistent with amendment 2, this amendment inserts the qualifying condition 'on reasonable grounds' into Clause 18, proposed new section 147C (1) (b). This amendment will require the Commission to be satisfied, on reasonable grounds, that an associated organisation has stopped meeting a requirement for the associated organisation declaration before either suspending or repealing the declaration.

**EXECUTIVE BUSINESS – ORDER OF THE DAY NO. 2****GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011****RESUMPTION OF DEBATE, DETAIL STAGE**

**CLERK:** Executive Business – Order of the day No. 2 – Gaming Machine (Club Governance) Amendment Bill 2011 – Resumption of debate on the question – That this Bill be agreed to in principle.

**SPEAKER:** To call Mr Smyth who will resume debate.

*Debate may ensue*

***Time limits –***

*Next opposition Member speaking 20 minutes*

*Next crossbench Member speaking 20 minutes*

*Any other Member 15 minutes*

**Debate concludes when Mr Barr (Minister for Economic Development) responds.**

**SPEAKER:** The question is – That this bill be agreed to in principle. Those of that opinion say “AYE”; of the contrary “NO”.

**DECLARE RESULT**

**DETAIL STAGE**

**SPEAKER:** Is it the wish of the Assembly to dispense with the detail stage? **NO**

**Clause 1**

**SPEAKER:** The question is – That Clause 1 be agreed to.

Clause 2

**SPEAKER:** The question is – That Clause 2 be agreed to – **Mr Barr**.

**MR BARR:** Pursuant to standing order 182A (b) , I seek leave to move 3 amendments that are minor and technical in nature.

**SPEAKER:** Is leave granted?

**MR BARR:** I move amendment No. 1 circulated in my name and table a supplementary explanatory statement to the government amendments.

**SPEAKER:** The question is – That **Mr Barr**'s amendment No 1 be agreed to.

**SPEAKER:** The question now is – That Clause 2 (as amended) be agreed to.

Clauses 3 to 8

**SPEAKER:** Is it the wish of the Assembly to take Clauses 3 to 8 together?  
The question is – That Clauses 3 to 8 be agreed to.

Clause 9

**SPEAKER:** The question is – That Clause 9 be agreed to – **Mr Smyth**.

**MR SMYTH:** I move amendment No. 1 circulated in my name.

**SPEAKER:** The question is – That **Mr Smyth**'s amendment No 1 be agreed to.

**SPEAKER:** The question now is – That Clause 9 (as amended) be agreed to.

**Clauses 10 to 17**

**SPEAKER:** Is it the wish of the Assembly to take Clauses 10 to 17 together?  
The question is – That Clauses 10 to 17 be agreed to.

**Clause 18**

**SPEAKER:** The question is – That Clause 18 be agreed to – **Mr Barr**.

**MR BARR:** I seek leave to move amendments Nos. 2 and 3 circulated in my name together?

**SPEAKER:** Is leave granted?

**MR BARR:** I move amendments Nos. 2 and 3 circulated in my name together.

**SPEAKER:** The question is – That **Mr Barr's** amendments Nos. 2 and 3 be agreed to.

**SPEAKER:** The question now is – That clause 18 (as amended) be agreed to.

**Clause 19**

**SPEAKER:** The question is – That Clause 19 be agreed to.

**Clause 20**

**SPEAKER:** The question is – That Clause 20 be agreed to – **Mr Smyth**.

**MR SMYTH:** I will be opposing this clause.

**SPEAKER:** The question is – That Clause 20 be agreed to.

**Clause 21**

**SPEAKER:** The question is – That Clause 21 be agreed to.

**Clause 22**

**SPEAKER:** The question is – That Clause 22 be agreed to – **Ms Hunter**.

**MS HUNTER:** I move amendment No. 3 circulated in my name.

**SPEAKER:** The question is – That **Ms Hunter**'s amendment No 3 be agreed to.

**SPEAKER:** The question now is – That Clause 22 (as amended) be agreed to.

**Clause 23**

**SPEAKER:** The question is – That Clause 23 be agreed to – **Ms Hunter**.

**MS HUNTER:** I move amendment No. 4 circulated in my name.

**SPEAKER:** The question is – That **Ms Hunter**'s amendment No 4 be agreed to.

**SPEAKER:** The question now is – That Clause 23 (as amended) be agreed to.

**Remainder of bill**

**SPEAKER:** Is it the wish of the Assembly to take the remainder of the bill as a whole?  
The question is that the remainder of the bill as a whole be agreed to.

**SPEAKER:**

The question now is – That this bill (as amended) be agreed to.  
*(This question must be put forthwith and determined without amendment or debate. See standing order 189.)*

Those of that opinion say “AYE”;  
of the contrary “NO”.

**DECLARE RESULT**

1 Bill

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2 Explanatory Statement

---

3 Presentation Speech

---

4 Scrutiny Comment and Reply

---

5 Closing/Debate Speeches

---

6 Government and/or Opposition & Cross  
Bench Amendments and Speaking Notes

---

7 Minister Barr Media Release

---

8 Q & A Sheet

---

9 Summary of Amendments

---

10 Commission's Final Report

2011

THE LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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(As presented)

(Minister for Gaming and Racing)

## Gaming Machine (Club Governance) Amendment Bill 2011

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5	Eligibility of clubs and other corporations New section 21 (1) (f) and (g) 3

2011

THE LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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(As presented)

(Minister for Gaming and Racing)

## **Gaming Machine (Club Governance) Amendment Bill 2011**

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### **A Bill for**

An Act to amend the *Gaming Machine Act 2004* and the *Gaming Machine Regulation 2004* in relation to the governance of clubs in the ACT

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The Legislative Assembly for the Australian Capital Territory enacts as follows:

1, **Part 2** **Gaming Machine Act 2004**

2 **4** **Grounds for refusing initial licence application by club**  
3 **Section 14 (1) (a)**

4 *substitute*

- 5 (a) payments for goods and services supplied to a club, including  
6 the rental or lease payments for the club's premises, are related  
7 to the level of gaming machine performance; or

8 **Examples—goods and services**

- 9 • food and beverages  
10 • cleaning services  
11 • gaming machines

12 *Note* An example is part of the Act, is not exhaustive and may extend,  
13 but does not limit, the meaning of the provision in which it  
14 appears (see Legislation Act, s 126 and s 132).

15 **5** **Eligibility of clubs and other corporations**  
16 **New section 21 (1) (f) and (g)**

17 *insert*

- 18 (f) the corporation is not the subject of an auditor's opinion that it  
19 is not able to pay all of its debts as and when they become due  
20 and payable; and  
21 (g) the corporation is not the subject of an auditor's adverse  
22 opinion or disclaimer of opinion, within the meaning of  
23 Auditing Standard ASA 705.

**9 New sections 53A and 53B***insert***53A Condition about club's constitution—consistency with gaming laws**

It is a condition of a licence for a club that the club's constitution is consistent with the gaming laws.

**53B Condition about club's constitution—amendment if inconsistent with gaming laws**

- (1) It is a condition of a licence for a club that the club's constitution provides for the constitution to be amended in accordance with a direction by the commission under section 148B (Club constitution—consistency with gaming laws) without an election of the voting members of the club.
- (2) This section is declared to be a corporations legislation displacement provision for the Corporations Act, section 5G (Avoiding direct inconsistency arising between the Corporations legislation and State and Territory laws).

*Note* Subsection (2) ensures that any provision of the Corporations Act or the *Australian Securities and Investment Commission Act 2001* (Cwlth) with which this section would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

**10 Annual report of clubs  
Section 54 (a)***substitute*

- (a) any contractual arrangement or consultancy entered into with an influential person during the year, including—
  - (i) the position the influential person occupies in the club;  
and

1 **13** **New section 144A**

2 *in part 9, insert*

3 **144A** **Definitions—pt 9**

4 In this part:

5 *associated organisation declaration* means a declaration under  
6 section 147 (Associated organisations—declaration) that an entity is  
7 an associated organisation for a club.

8 *warning notice*, for an associated organisation—see  
9 section 147B (1).

10 **14** **Section 147 heading**

11 *substitute*

12 **147** **Associated organisations—declaration**

13 **15** **Section 147 (2)**

14 *after*

15 declaration

16 *insert*

17 *(an associated organisation declaration)*

18 **16** **New section 147 (2) (ba)**

19 *insert*

20 (ba) it does not have the power to remove a director from the club's  
21 board; and

1 **147B Associated organisation—warning notice**

- 2 (1) If the commission is satisfied that an entity declared to be an  
3 associated organisation for a club has stopped meeting a  
4 requirement for the associated organisation declaration, the  
5 commission may give the entity a notice (a *warning notice*).
- 6 (2) A warning notice given to the entity must—
- 7 (a) state that the commission is not satisfied that the entity is  
8 meeting a requirement for the associated organisation  
9 declaration; and
- 10 (b) tell the entity that the entity may, within 3 weeks after the day  
11 the entity is given the notice (or a longer period stated in the  
12 notice), give a written response to the commission about the  
13 notice.

14 **147C Associated organisation declaration—suspension or**  
15 **repeal**

- 16 (1) This section applies if—
- 17 (a) an associated organisation has been given a warning notice;  
18 and
- 19 (b) after considering any responses given within the period stated  
20 in the warning notice, the commission is satisfied that the  
21 associated organisation has stopped meeting a requirement for  
22 the associated organisation declaration applying to the  
23 organisation.
- 24 (2) The commission may—
- 25 (a) suspend the declaration; or  
26 (b) repeal the declaration.

1 **21 New section 148B**

2 *insert*

3 **148B Club constitution—consistency with gaming laws**

4 (1) This section applies if the commission believes on reasonable  
5 grounds that—

6 (a) a provision of a club’s constitution is inconsistent with a  
7 gaming law; or

8 (b) a function under a provision of a club’s constitution would, if  
9 exercised, be inconsistent with a provision of a gaming law.

10 (2) The commission must, in writing, direct the club to amend the  
11 constitution to remove the inconsistency.

12 (3) A club must comply with a direction under subsection (2) within the  
13 reasonable time stated in the direction.

14 (4) In this section:

15 *club* means a club in relation to whose premises a licence is in force.

16 **22 Approval of community contributions**  
17 **Section 164 (3), definition of *contribution*,**  
18 **new paragraph (b) (xvi)**

19 *insert*

20 (xvi) the payment of a tax, fee or levy, other than a payment  
21 required under section 163A (1) (Required payment to  
22 problem gambling assistance fund).

- 1 **27** **Dictionary, new definitions**
- 2 *insert*
- 3 *associated organisation declaration*, for part 9 (Club  
4 administration)—see section 144A.
- 5 *gaming law*—see the Control Act, dictionary.
- 6 *warning notice*, for an associated organisation, for part 9 (Club  
7 administration)—see section 144A.

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2011

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011**

**EXPLANATORY STATEMENT**

**Presented by  
Andrew Barr MLA  
Minister for Gaming and Racing**

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## **Background to the amendments - Review of the governance provisions of the GMA**

The Control Act provides for the Commission as part of its functions to review the ACT's legislation and policies related to gaming and racing. In March 2010 the Minister for Gaming and Racing, Andrew Barr MLA, requested the Commission to undertake a review of the club governance provisions in the GMA.

In conducting reviews of legislation and policies the Commission must, in accordance with section 8 of the *Gambling and Racing Control Act 1999*, engage in community consultation. In order to fulfil this requirement and ensure an open and transparent process the Commission released in May 2010 an Issues Paper to commence the first stage of the review's public consultation. The paper was forwarded directly to stakeholders, advertised in *The Canberra Times* and made available on the Commission's website. The Commission also participated in an industry seminar on the review facilitated by ClubsACT.

At the conclusion of this first six week stage of public consultation the Commission had received nine submissions from industry and one from an associated organisation. Following its analysis of submissions and based on its research of the issues, the Commission developed a draft report that outlined its draft conclusions and recommendations.

The second four week stage of public consultation occurred in August/September 2010 and involved releasing the Commission's draft report (including recommendations) for comment. Two submissions were received from this process – one from industry and the other from an associated organisation.

The submissions received during both stages of consultation were considered by the Commission in finalising its conclusions and recommendations which were then provided to the Minister in a Review Report. The recommendations were adopted by Government and formed the basis for the drafting of the *Gaming Machine (Club Governance) Amendment Bill 2011* (the Bill).

### **Overview of the Bill**

The Bill amends the GMA to improve the transparency and accountability of the club industry. These improvements are achieved through adjustments and additions to the governance related provisions of the GMA.

The key amendments are:

- a new requirement that club directors must act in good faith in the best interests of the club and for a proper purpose;
- new provisions protecting club directors from being removed from a club's board by an associated organisation;
- a minimum percentage of club directors must be elected by voting members;
- new disclosure requirements for clubs; and
- new powers for the Commission to ensure club constitutions are consistent with the gaming laws.

The Bill also includes a number of minor and technical amendments.

## NOTES ON SPECIFIC PROVISIONS

### Part 1 Preliminary

#### 1. Name of the Act

This clause provides that the name of the Act is the *Gaming Machine (Club Governance) Amendment Act 2011*

#### 2. Commencement

This clause provides that the amending Act commences on 1 July 2011, with the exception of some clauses. Clauses 9, 10, 11, 21, 26 and 28 will commence on 1 July 2012. The reasons for delaying the commencement of these particular amendments are discussed in the notes for those provisions.

A commencement date of 1 July 2011 for the majority of amendments will provide sufficient time for the Commission to advise stakeholders of the changes made by the Bill and allow stakeholders to make or commence any changes necessary. It will also provide a convenient commencement for the start of a new financial year.

#### 3. Legislation Amended

This clause identifies the *Gaming Machine Act 2004* and the *Gaming Machine Regulation 2004* as the legislation amended by this Act.

### Part 2 Gaming Machine Act 2004

#### 4. Grounds for refusing initial licence application by club

##### Section 14(1)(a)

Section 14 provides the grounds by which the Commission may refuse to issue a gaming machine licence.

Clause 4 provides that replacement section 14(1)(a) broadens the existing provision to allow the Commission to refuse to issue a licence where the supply of *any* good or service is related to the level of gaming machine performance. Previously it was limited to payments for the rental or lease of the club's premises.

This broadened scope is necessary to prevent goods or service providers, such as food or beverage suppliers or gaming machine manufacturers, from becoming defacto gaming machine operators which could occur if payments to them were related to the level of gaming machine performance. An example of an acceptable method of payment would be for a fixed or specified fee that was not related in any way to the level of gaming machine activity.

Section 14(1)(a) has also been amended to remove the concept of payments being 'unreasonable'. The concept of a reasonable cost in this context has proved difficult to assess objectively. It is also considered unnecessary given the existing obligations in section 55 concerning the appropriate use of club funds more broadly.

In relation to a disclaimer of opinion, the Auditing Standards ASA 705 states that:

The auditor shall disclaim an opinion when the auditor is unable to obtain sufficient appropriate audit evidence on which to base the opinion, and the auditor concludes that the possible effects on the financial report of undetected misstatements, if any, could be both material and pervasive.

The auditor shall disclaim an opinion when, in extremely rare circumstances involving multiple uncertainties, the auditor concludes that, notwithstanding having obtained sufficient appropriate audit evidence regarding each of the individual uncertainties, it is not possible to form an opinion on the financial report due to the potential interaction of the uncertainties and their possible cumulative effect on the financial report.<sup>2</sup>

Therefore, an adverse or disclaimer of opinion indicates that material and pervasive misstatements exist in the corporation's financial reports or that insufficient audit evidence or multiple uncertainties prevent the auditor from forming an opinion. In both these circumstances significant risks exist where the corporation seeks to be, or already is, a gaming machine licensee. These circumstances are indicative of serious financial and governance issues within an organisation. The risks and concerns of unethical or unlawful conduct are outlined in the comments above in relation to new section 21(1)(f).

As a prescribed requirement for a corporation to be an eligible person, this new paragraph therefore provides for the Commission to consider current audit opinions when assessing whether a corporation or current licensee is an eligible person. This enables the Commission to either refuse to issue a licence or take disciplinary action (such as a suspension or cancellation) when these circumstances apply to an organisation.

#### **6. New section 21(4)**

Clause 6 inserts a new section that defines the terms 'AUASB' and 'Auditing Standard ASA 705' used in section 21.

#### **7. Conditions about inequitable benefits**

Section 53 makes it a condition of a club's licence that nobody should derive a benefit from the club other than the types of benefits prescribed as permissible in this section.

#### **Section 53(4)(a)**

Clause 7 amends the existing section 53(4)(a) to clarify that a person may only take a benefit if they are offered the benefit in the course of acting on behalf of the club and the benefit is directly related to the person's normal role and duties.

Previously this section could be interpreted as allowing a person within the club to receive benefits completely unrelated to their role, as long as they were acting on behalf of the club. For example, it was possible that a member of a club's cleaning staff could represent the club at an international conference or event at the club's expense which would not be appropriate. By linking the concept of acting on behalf of the club with the requirement that the benefit relates to their role, it ensures that

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<sup>2</sup> Auditing and Assurance Standards Board (2009) Auditing Standard ASA 705 - Modifications to the Opinion in the Independent Auditor's Report, p.11  
[http://www.auasb.gov.au/admin/file/content102/c3/ASA\\_705\\_27-10-09.pdf](http://www.auasb.gov.au/admin/file/content102/c3/ASA_705_27-10-09.pdf)

inconsistency with a gaming law, it is considered appropriate that this provision requires such amendments to be made without the need to seek the concurrence of members. It is expected that such amendments would be approved by a club's managing committee or board as the controlling authority of a club.

Section 53B(2) provides that section 53B is a corporations legislation displacement provision for the purposes of section 5G of the Corporations Act. This means that a club incorporated under the Corporations Act may amend its constitution to include a provision to amend the constitution in the circumstances described in section 53B(1) despite being inconsistent with the Corporations legislation.

This clause introducing new sections 53A and 53B will commence on 1 July 2012. The delayed commencement will allow clubs time to amend their constitutions to include the provision required by section 53B(1).

#### **10. Annual report of clubs Section 54(a)**

Section 54 outlines the annual reporting requirements for licensees. These requirements are a condition of holding a gaming machine licence.

Clause 10 replaces the existing section 54(a) by expanding the reporting requirements relating to the arrangements entered into by the club and its influential persons. (Influential persons include executive officers, an influential owner or others with like influence.)

The new section requires that the position (but not the name) of the influential person, the purpose of the arrangement or consultancy and the total monetary value of the arrangement or consultancy for the year be reported in the club's annual report.

It also requires that contractual arrangements or consultancies with the licensee over the prescribed amount (currently \$49,999) must be reported but should now include the purpose of the arrangement or consultancy and the total amount for the relevant financial year.

These new reporting requirements will assist members to scrutinise the major financial decisions made by the licensee in relation to the remuneration of influential persons. This improved transparency and accountability will help ensure that payments and remuneration of influential persons are appropriate and reasonable.

The new reporting requirements will commence on 1 July 2012. This is to ensure that clubs are fully informed about what they will need to disclose to their members prior to engaging in arrangements captured by the new reporting requirements.

#### **11. New section 54(c)**

Clause 11 inserts section 54(c) which provides for some additional annual reporting requirements in relation to the receipt of benefits. If a person receives a benefit such as those permitted by section 53(4) then the club must report the person's position, a description of the benefit, the purpose of the benefit, the monetary value of the benefit and the name of the person paying the expense. For example, if a club director was paid by a service provider to go on a trip interstate to look at another club's operations then the details of this trip would now need to be reported.

**18. New sections 147A to 147D**

Clause 18 inserts four new sections relevant to existing section 147.

**New section 147A – Associated organisation declaration–condition**

The new section 147A imposes a number of conditions on associated organisations.

**Section 147A(a)**

This section requires that an associated organisation continually meet each requirement for the declaration as outlined in section 147(2). The requirements under section 147(2) effectively act as criteria to assess whether entities are appropriate to be an associated organisation to a club. Given the significant role that associated organisations can have in the governance of a club it is appropriate that they should continue to meet the requirements for the initial declaration. Failing to do so would indicate that the entity is no longer appropriate to be an associated organisation.

**Section 147A(b)**

This section requires that an associated organisation not do anything that would, if the Commission were considering whether to declare the entity as an associated organisation for a club, cause the Commission to refuse to make the declaration. This provision requires that an associated organisation not undertake any activity or practice that would result in the Commission refusing to declare the entity as an associated organisation. For example, if the directors of an associated organisation were convicted of fraud or the entity had a history of regulatory non-compliance.

**Section 147A(c)**

This section requires that associated organisations not attempt to remove a director from the club's board. This provision clearly prohibits an associated organisation from removing a director, or taking action that attempts to remove a director, from a club board.

It complements section 147(2)(ba) which prevents the Commission from making a declaration if an entity has the power to remove a director. Section 147A(c) ensures that regardless of whether a formal power to remove directors actually exists, associated organisations must not do anything to attempt to remove a director of a club.

This amendment aims to preserve a club director's ability to come to decisions that are in the interests of the club free of undue pressure from an associated organisation.

The notes accompanying this provision highlights the powers of the Commission under sections 22 and 23 of the Control Act to enforce this provision on the basis that it involves the enforcement of a gaming law.

**New Section 147B Associated organisation–warning notice**

This new section provides for the Commission to give an associated organisation a warning notice and an opportunity to respond in circumstances where a legislative breach has occurred.

The provision allows members a guaranteed voice on their board of directors – an important governance requirement for clubs.

**19. Section 148 heading**

Clause 19 provides for the replacement of the previous heading of ‘Keeping records relating to club elections’ for section 148 with ‘Club elections–record-keeping’.

**20. New section 148A**

**Club directors–acting in good faith**

This new section requires club directors to exercise their powers and discharge their duties in the best interests of the club and for a proper purpose. This ensures that regardless of any other roles or responsibilities a director may have, when performing their role as a director of a club they must act with the *club’s* best interests foremost in mind. This is an important safeguard against club directors being pressured or forced to act in a way that may be in the best interests of another entity (such as an associated organisation or other corporation) or another person but which may not necessarily be in the best interests of the club.

This is effectively a mirror provision to section 181(1) of the Commonwealth’s *Corporations Act 2001* (Corporations Act) and has been included in the GMA for two reasons. The first is to ensure that *all* club directors are required to act in this manner. The GMA does not require all clubs to be incorporated under the Corporations Act and smaller clubs are generally only incorporated associations. This new section therefore ensures that this key provision in the Corporations Act applies to all club directors.

The second reason for its inclusion in the GMA is that enables the Commission, as the local regulatory authority, to take timely action (including encouraging remedial action) if a director does not comply with these requirements.

**21. New section 148B**

**Club constitution–consistency with gaming laws**

This new section requires the Commission to direct a club to amend their constitution where it is considered on reasonable grounds to be inconsistent with the gaming laws.

Section 148B(1) outlines that this power only applies if the Commission believes on reasonable grounds that a club’s constitution contains provisions that are inconsistent with a gaming law or where provisions grant a power which if exercised would be inconsistent with a gaming law.

Section 148B(2) requires the Commission to direct the club to remove the inconsistency in their constitution. This direction must be in writing. It is important to note that while the Commission must direct a club to amend their constitution in these circumstances, the Commission is not empowered to require a particular form of words or to prescribe the exact manner in which the constitution should be amended. The decision to issue a direction is a reviewable decision (see clause 26 of this Bill).

current arrangements where such contributions are eligible claims. However, by increasing the minimum contribution requirement it ensures that other community contributions are not accordingly reduced by licensees.

#### **24. Problem gambling community contributions**

##### **New section 171A(1A)**

Section 171A allows licensees to claim \$4 for every \$3 of problem gambling assistance community contributions as an incentive to make contributions in this area. Consistent with ensuring that payments to the Problem Gambling Assistance Fund are over and above the existing level of mandatory community contributions, new section 171A(1A) excludes payments to the Problem Gambling Assistance Fund from this incentive scheme. This means that while a licensee may include their payments to the Problem Gambling Assistance Fund as part of their problem gambling community contributions, they cannot claim the payments at the value of \$4 for every \$3 as they would other problem gambling community contributions.

#### **25. Reviewable decisions**

##### **Schedule 1, new items 34A and 34B**

Clause 25 inserts two of the three new decisions introduced by this Bill to the schedule of reviewable decisions in Schedule 1 of the GMA. The decisions numbered 34A and 34B are, respectively, if the Commission suspends or repeals the declaration that an entity is an associated organisation for a club. In this case the associated organisation may seek to have the decision reviewed by the ACT Civil and Administrative Tribunal (ACAT).

#### **26. Reviewable decisions**

##### **Schedule 1, new item 34C**

The decision numbered 34C relates to a decision by the Commission to issue a direction to a club to amend its constitution where it conflicts with a gaming law. The club may seek to have the decision reviewed by ACAT. Consistent with the delayed commencements of clause 9 (which introduces new sections 53A and 53B) and clause 21 (introducing section 148B) this clause will commence on 1 July 2012.

#### **27. Dictionary, new definitions**

Clause 27 inserts three new definitions to the dictionary which relate to new terms in this Bill.

### **Part 3 Gaming Machine Regulation 2004**

#### **28. Section 73 heading**

This clause provides for a minor consequential amendment to the *Gaming Machine Regulation 2004*, namely a change to the heading of section 73. The new heading has an amended reference to the section of the Act – now section 54(aa) rather than section 54(a)(ii). Consistent with the delayed commencement of clauses 10 and 11 this clause will commence on 1 July 2012.

Debate (on motion by **Mr Smyth**) adjourned to the next sitting.

### **Gaming Machine (Club Governance) Amendment Bill 2011**

**Mr Barr**, pursuant to notice, presented the bill, its explanatory statement and a Human Rights Act compatibility statement.

Title read by Clerk.

**MR BARR** (Molonglo—Minister for Education and Training, Minister for Planning, Minister for Tourism, Sport and Recreation and Minister for Gaming and Racing) (10.31): I move:

That this bill be agreed to in principle.

The government recognises that clubs play a significant role in our community. It is also recognised that clubs, by providing gambling opportunities through gaming machines, have an obligation to operate in a responsible manner that accords with accepted government and community standards. As such it is important that the expectations of the community for transparent and accountable governance are being met by all of our clubs.

The combination of measures in the Gaming Machine (Club Governance) Amendment Bill 2011 will help to achieve this by, among other things, requiring all club directors to act in the best interests of their club, ensuring there are appropriate levels of disclosure and guaranteeing member representation on club boards.

The bill also provides some important safeguards in relation to the role of associated organisations. Together, the measures in this bill will improve transparency and accountability in the club sector. The provisions in this bill have been developed following a public review of existing governance provisions in the Gaming Machine Act by the ACT Gambling and Racing Commission.

The commission undertook a two-stage consultation process which focused on four key policy issues: firstly, the role and powers of associated organisations; secondly, obligations of club directors; thirdly, powers of the commission in relation to the governance of clubs; and, fourthly, club director election processes.

After considering submissions from both periods of consultation, the commission prepared a final review report with recommendations for amendments to the Gaming Machine Act in these areas. I now table for the information of members the commission's review report. The report will also be publicly accessible on the commission's website.

The government has accepted all of the commission's recommendations which are reflected in the drafting of this bill. A number of the provisions in this amendment bill relate to associated organisations. These entities, which are like-minded bodies that assist clubs to meet their objects, are declared as such by the commission for this

new Problem Gambling Assistance Fund as community contributions from 1 July 2011 which is consistent with the current practice of claiming contributions to problem gambling assistance. As payments to the fund are intended to be over and above the current level of community contributions, the bill increases the minimum required contribution from the existing seven per cent of net gaming machine revenue to eight per cent. I commend the bill to the Assembly.

Debate (on motion by Mr Smyth) adjourned to the next sitting.

**Administration and Procedure—Standing Committee  
Report 3—application for citizen's right of reply: Mr Ernest Hocking**

MR SPEAKER: I present the following paper:

*Administration and Procedure—Standing Committee—Report 3—Application for Citizen's Right of Reply. Mr Ernest Hocking, dated 4 May 2011, together with a copy of the extracts of the relevant minutes of proceedings.*

Motion (by Ms Bresnan) agreed to:

That the report be adopted.

*Response incorporated at Appendix 1.*

**Climate Change, Environment and Water—Standing  
Committee  
Report 5**

MS HUNTER (Ginninderra—Parliamentary Convenor, ACI Greens) (10.39): I present the following paper:

*Climate Change, Environment and Water—Standing Committee—Report 5—Report on Annual and Financial Reports 2009-2010, dated 2 May 2011, together with a copy of the extracts of the relevant minutes of proceedings.*

I move:

That the report be noted.

Just to run through some of the recommendations that the committee included in this year's report on annual and financial reports, we did focus on a number of issues to do with improving the sorts of information provided by the department and agencies that come under our portfolio areas, and of course our portfolio areas include environment, that is, environment protection, conservation, sustainability, climate change, energy and water.

The first recommendation really was around ensuring that the Department of Environment, Climate Change, Energy and Water included analysis of agency performance that is cross-referenced with the relevant budget output. This assists when trying to go back through to really have a good look and to be able to understand what has been included in that report.

## Scrutiny of Bills Comment

In Scrutiny of Bills Report Number 37 of 16 June 2011 the matter was raised whether the power conferred on the Gambling and Racing Commission under proposed section 147C of the Act (clause 18 of the Bill) should be qualified by imposing the condition that the Commission should have a reasonable belief before acting.

While it is considered that there is already sufficient obligation on the Commission to act in a reasonable manner when making administrative decisions, it is agreed that a minor amendment will be tabled to incorporate this suggestion.

It is also noted that a licensee has the option of seeking an external review of the Commission's decision under this proposed section if it considers that the decision is incorrect or too harsh in the circumstances.

### **The national scheme dimension of the Bill**

The Committee considers that the explanatory statement should identify all respects in which a provision of the Bill affects the normally applicable laws that relate to the powers and procedures for the making, promulgation and interpretation of Territory laws. If there are no such provisions, then this should be indicated.

In this respect, the Committee notes that subclause 7(2) of the Bill provides that a number of Territory laws “do not apply to the Education and Care Services National Law (ACT) or to the instruments made under that Law”, being the *Criminal Code 2002*, the *Freedom of Information Act 1989*, and the *Legislation Act 2001*. Subclause 7(3) of the Bill provides that a number of Territory laws “do not apply to the Education and Care Services National Law (ACT) or to the instruments made under that Law, except to the extent that that Law and those instruments apply to the Regulatory Authority and the employees, decisions, actions and records of the Regulatory Authority”, being the *Annual Reports (Government Agencies) Act 2004*, the *Auditor-General Act 1996*, the *Financial Management Act 1996*, the *Ombudsman Act 1989*, the *Public Sector Management Act 1994*, and the *Territory Records Act 2002*.

The displacement of these laws, and in particular those affected by subclause 7(1), is a matter of concern, in that these laws create or afford protection to certain human rights. So far as concerns the laws affected by subclause 7(1), the Committee notes that sections 263 and 264 of the national law provide for the application of the Commonwealth Freedom of Information Act and of the Privacy Act. The Committee also notes that the displacement of the laws mentioned in subclause 7(3) is of a limited nature.

The explanatory statement should also explain whether any amendment to the adopted national law will apply in the Territory, and also whether any regulation made under that law will apply. There should also be an explanation of what capacity there will be for the Legislative Assembly to be made aware of any amendment or regulation and for the Assembly to make an amendment or reject any amendment to the national law or regulation.

*The Committee makes no further comment on these provisions.*

<b>GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011</b>
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This Bill would amend the *Gaming Machine Act 2004* and the *Gaming Machine Regulation 2004* in relation to the governance of clubs in the ACT.

*Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?*

In this connection, the Committee notes that, while the power of the commission to be conferred by proposed section 148B (see clause 21 of the Bill) is conditioned on the commission believing in a state of affairs “on reasonable grounds”, the power to be conferred on the commission by proposed section 147C is not qualified in this way.

*The Committee recommends that the Minister explain why the two powers are treated differently.*

**Debate Speech Two*****Gaming Machine (Club Governance) Amendment Bill 2011*****Improving the Transparency of Clubs**

Mr Speaker, members of clubs and the wider community have an interest in the operation and management of clubs in the ACT. There are community benefits in a healthy club industry with good governance practices that provide transparency and accountability. *The Gaming Machine (Club Governance) Amendment Bill* introduces measures which will improve the level of governance in the ACT club industry.

One important measure is in relation to member representation on club boards. The Bill provides for a minimum level of member representation on club boards by requiring that at least twenty five percent of directors be elected by members. Currently, clubs that have an approved associated organisation are able to have all their directors on a board appointed by their associated organisation. Although this does not occur in practice, the Bill ensures that members will continue to have input into the board's decision making process through a set minimum level of representation.

In regard to enhancing the transparency of club operations, the Bill includes new reporting requirements about the disclosure of information about contracts, consultancies and benefits. The Bill requires that a club's annual report contain details of any contractual arrangement or consultancy entered into with influential persons including club directors

and executives. The position of the influential person, the purpose of the arrangement or consultancy and the total monetary value of the arrangement or consultancy for the year will need to be included in a club's annual report.

In addition, the Bill includes additional reporting requirements on the benefits received by club staff and directors. If a person receives a benefit in the course of acting on behalf of a club then under the new requirements the club must report:

- the recipients's position;
- a description of the benefit;
- the purpose of the benefit;
- the monetary value of the benefit; and
- the name of the person paying the expense.

For example, if a club director went on a trip interstate to look at new gaming machine technology and their expenses were paid for by the manufacturer then the details of this trip would need to be disclosed in the club's annual report.

These new reporting requirements will assist members in scrutinising the major financial decisions made by the licensee in relation to the remuneration of influential persons. It will also assist members to monitor any additional benefits received by clubs directors and staff in performing their duties. This improved transparency and accountability will also help ensure that the payments and remuneration of influential persons and the benefits taken by directors and staff are appropriate and reasonable.

To make sure that clubs are fully informed about what they will need to disclose to their members prior to engaging in arrangements captured by the new reporting requirements these new reporting requirements will commence on 1 July 2012. In the intervening period the Gambling and Racing Commission will work closely with industry to ensure that the new requirements are well understood.

Mr Speaker, as organisations that exist for the benefit of their members and the community and which are granted exclusive access to class C gaming machines, it is reasonable to expect clubs to abide by the laws of the Territory. Where a club's constitution explicitly permits activities that are contrary to gaming laws, the club or an individual could be inadvertently encouraged to breach gaming laws while complying with the club's constitution.

The Bill helps prevent licensees, club members and staff from unnecessary disciplinary action for breaching a gaming law in this way by requiring that club constitutions are consistent with gaming laws. This will provide an opportunity for clubs to rectify club constitutions without reference to a disciplinary process. As with all new annual reporting requirements these changes will not commence until 1 July 2012. Over the next year, the Commission will work with the club industry to ensure that all constitutions are reviewed and updated as necessary.

Mr Speaker, good financial stability of a club is not only an indicator of the effectiveness of the club's governance arrangements but also an important safeguard for members. A club in dire financial trouble, such as insolvency, is a potential disaster for its members, creditors, the industry's reputation and the community. A corporation that is not able

to pay its debts when they become due and payable should not be operating and is not suitable to be a gaming machine licensee due to the high risk that winnings, especially large ones, will not be honoured. The risk of other unethical or unlawful conduct such as unreasonably encouraging gambling activity, providing credit to gamblers or allowing underage or excluded persons to gamble is also increased.

This Bill provides for the Commission to refuse a licence when the corporation applying is, in the opinion of an auditor, not able to pay all of its debts as and when they become due and payable. Where an existing licensee is in this position where an auditor has provided an adverse opinion, the Commission may take disciplinary action, including possible suspension or cancellation of the licence if the circumstances are sufficiently serious.

In closing, Mr Speaker, as we have heard this Bill includes important additional safeguards for club members and the community and offers a platform from which industry can further improve its governance arrangements. It importantly ensures that a minimum acceptable standard is met by all club licensees for the ultimate benefit of members and their club.

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Government and/or Opposition  
&  
Cross Bench  
Amendments and Speaking Notes

To be inserted on receipt



# Andrew Barr MLA - Media Statement

## Strong club governance requirements

Today the Legislative Assembly passed the Government's Gaming Machine (Club Governance) Amendment Bill which will improve the transparency and accountability of licensed clubs in the ACT

These reforms provide a minimum standard of club governance for the benefit of members and their clubs. They also provide the ACT Gambling and Racing Commission as regulator with the appropriate powers to ensure that these standards are being met.

Clubs play a significant role in the community and it is important that the expectations of the Government and the community of transparent and accountable operations are being met by our clubs.

These new measures will help achieve this by, among other things, requiring all club directors to act in the best interests of their club, ensuring there are appropriate levels of disclosure of benefits and guaranteeing a minimum level of member representation on club boards.

The amendments are based on the recommendations of a review of club governance arrangements conducted by the independent Gambling and Racing Commission.

The Government accepted all of the commission's recommendations which were the subject of considerable consultation with the club industry and other stakeholders.

Other key reforms include:

- Prohibiting associated organisations from removing club directors;
- New and enhanced disclosure requirements in annual reports;
- Powers for the commission to act when a club becomes insolvent; and
- Requiring that club constitutions are consistent with gaming laws.

The majority of amendments are due to commence on 1 July 2011. However, some provisions have been delayed to enable industry to adjust. A copy of the commission's review report is available from the commission's website at [www.gamblingandracing.act.gov.au](http://www.gamblingandracing.act.gov.au)

Ends

**Gaming Machine (Club Governance) Amendment Bill 2011****QUESTIONS AND ANSWERS****INDEX**

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- Q2 Who will be affected by the amendments?
- Q3 How will this Bill benefit the community?
- Q4 What is an associated organisation?
- Q5 Who will be responsible for compliance?
- Q6 What will be the cost of implementation?
- Q7 Why was this Bill developed?
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- Q10 When would the Commission take action against an associated organisation?
- Q11 Why is Government imposing these additional regulations on the Clubs industry?
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- Q14 Have clubs been allowed time to transition to the new requirements?

**GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011****Questions and Answers****Question 1:**

What is the purpose of this Bill?

**Answer:**

The purpose of this Bill is to improve transparency and accountability in the club sector. This is achieved through a number of key reforms, including:

- requiring that club directors act in the best interests of their club;
- prohibiting associated organisations from removing club directors;
- requiring that at least a quarter of club directors are elected by club members;
- new and enhanced disclosure requirements;
- powers for the Commission to act when a club becomes insolvent; and
- requiring that club constitutions are consistent with gaming laws.

**Question 2:**

Who will be affected by the amendments?

**Answer:**

The amendments will directly affect club boards and their directors as well as ordinary voting members.

- Club Boards will need to make sure that their club constitutions do not conflict with any of the gaming laws. They will also need to make sure that the club's annual report includes more details and information about who has received benefits in the club and the contracts the club has entered into.
- Club directors will need to make sure that they act in the best interests of the club when they perform their duties as a club director.
- Ordinary voting members are now guaranteed the ability to vote for at least 25% of the club's board.

**Question 3:**

How will this Bill benefit the community?

**Answer:**

This Bill will benefit the community by improving the transparency and accountability of licensed clubs. In particular, the Bill will ensure that the community members of clubs will have a say in a club's governance and more information to scrutinise the performance of their club board.

- For example, club members will have a guaranteed right to vote for at least 25% of a club's board. This will ensure that there are some independent voices on the club's board when it comes to making decisions such as allocating club funds.
- New disclosure provisions will require clubs to report more details about the benefits people take from the club, remunerations and the value and nature of large contracts and consultancies.

**Question 4:**

What is an associated organisation?

**Answer:**

An associated organisation is an entity separate to a club that has been declared suitable to have influence over a club's governance. Associated organisations generally provide stability and security for clubs while pursuing shared objects in a mutually beneficial relationship. A well known example is football clubs which are often associated with a licensed club.

To be declared an associated organisation an entity and its relationship with the club must be assessed by the ACT Gambling and Racing Commission. Most importantly, the Commission must be satisfied that the entity is not for profit and would help the club achieve its objects.

Prior to this Bill, the Commission had no power to revoke a declaration when an associated organisation ceased being beneficial to a club. The Bill now allows the Commission to investigate and monitor associated organisations and take action, including issuing a warning or suspending or revoking the declaration when necessary. This will protect clubs from associated organisations that over time cease to be beneficial, become a risk to the club or begin to pursue objects that contradict the club's.

**Question 5:**

Who will be responsible for compliance?

**Answer:**

The ACT Gambling and Racing Commission is responsible for ensuring that clubs and other gaming machine licensees comply with the Gaming Machine Act.

**Question 6:**

What will be the cost of implementation?

**Answer:**

In most cases the only cost to a club will be the minimal costs associated with making additional disclosures in their annual reports. In terms of the cost to government, the Gambling and Racing Commission already has a comprehensive compliance audit program in place. The cost of including these changes into the existing audit program is minor and they will be absorbed by the Commission.

**Question 7:**

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Why was this Bill developed?

**Answer:**

This Bill was developed following a review by the ACT Gambling and Racing Commission of the current governance requirements in the Gaming Machine Act. The Minister for Gaming and Racing requested that the Commission to undertake this review after concerns were raised about the adequacy of the existing requirements, in particular the role of associated organisations in the governance of a club. The Government accepted all of the Commission's recommendations from that review and this Bill amends the Gaming Machine Act in line with those recommendations.

**Question 8:**

Would this Bill have prevented the problems surrounding the proposed sale of the Canberra Labor Club?

**Answer:**

In late 2009, the Gambling and Racing Commission investigated whether the Canberra Labor Club had breached provisions of the Gaming Machine Act in relation to the proposed sale of the Club. While the Commission found evidence that attempts were made to direct and influence the Club's Board in relation to the sale process, there was no evidence that the Board did not make its own decisions on the sale.

One of the key issues of concern to the Commission however was that the Secretary of the ACT Branch of the ALP had the power to veto proposed changes to the Memorandum and Articles of Association of the Canberra Labor Club. The Secretary also had the power to remove any of the six Directors of the Club that are nominated by the ACT Branch of the ALP.

This Bill addresses those concerns. In particular, associated organisations will no longer have the power to remove directors from a club's board and the Commission will have the power to make clubs change their constitutions if they conflict with a gaming law.

**Question 9:**

What consultation was undertaken in the development of this Bill?

**Answer:**

Two periods of community consultation were conducted by the ACT Gambling and Racing Commission as part of its review process. The first period consultation over a six week period commenced in May 2010 and invited responses to an Issues Paper. The paper was forwarded directly to stakeholders, advertised in *The Canberra Times* and made available on the Commission's website. Ten submissions were received by the Commission and taken into account in the draft Review Report. The Commission also participated in an industry seminar on the review facilitated by ClubsACT.

The second period of consultation commenced in August 2010 and sought responses to the draft Review Report which included draft recommendations. Two submissions were received in this process. The Commission's final Review Report was tabled with the Bill and is available from the Commission's website - [www.gamblingandracing.act.gov.au](http://www.gamblingandracing.act.gov.au)

**Question 10:**

When would the Commission take action against an associated organisation?

**Answer:**

The Commission would only take action against an associated organisation if a breach of the gaming laws had occurred. For instance, action may be taken if an associated organisation unlawfully removed a director from a club board or if the directors of an associated organisation were convicted of fraud. In both these cases gaming laws exist that protect clubs from associated organisations that become a risk to the club.

**Question 11:**

Why is Government imposing these additional regulations on the Clubs industry?

**Answer:**

Clubs play a significant role in the community and as such there is a community expectation that they operate in a transparent and accountable way. While the club industry has taken some steps to adapt to the increasing importance of governance practices in the not-for-profit and corporate sectors, the Gambling and Racing Commission's regulatory experience and review of the existing governance provisions found that there were areas where further improvements could be made.

These improvements include, among other things, ensuring club directors act in the best interests of their club by introducing a clear and locally administered requirement that they do so, ensuring that there are full and appropriate levels of disclosure and guaranteeing member representation on club boards...

**Question 12:**

Does this Bill duplicate corporations law?

**Answer:**

Yes. The Bill echoes section 181(1) of the Commonwealth's Corporations Act 2001. This provides a locally administered requirement that, regardless of any other roles or responsibilities a club director may have, when performing their role as a director of a club they must act with the club's best interests foremost in mind.

This has been done for two reasons. The first is to ensure that all club directors are required to act in this manner. The GMA does not require all clubs to be incorporated under the Corporations Act and smaller clubs are generally only incorporated associations. This new section therefore ensures that this key provision in the Corporations Act applies to all club directors.

The second reason for its inclusion in the GMA is that it enables the Commission, as the local regulatory authority, to educate directors about their responsibilities and take timely action (including encouraging remedial action) if a director does not comply with these requirements.

However, the Bill's requirement does not share the Corporation's Act civil penalty where directors may be held personally liable. In the proposed amendment rather than taking action directly against an individual, the ACT Gambling and Racing Commission may take disciplinary action against the licensee which would encourage the club to resolve any issue with a particular director or number of directors.

**Question 13:**

What penalties exist for breaches of the proposed new provisions?

**Answer:**

There are no new penalties, but some amendments will allow the Commission to take disciplinary action under existing provisions. Disciplinary action can include monetary penalties or suspending or cancelling a licence.

**Question 14:**

Have clubs been allowed time to transition to the new requirements?

**Answer:**

The majority of the new requirements will commence on 1 July 2011. This will be sufficient time for the Commission to advise stakeholders of the changes made by the Bill and allow stakeholders to make or commence any changes necessary. It will also provide a convenient commencement for the start of a new financial year.

The Bill has a delayed commencement of one year for those amendments where clubs will need time to become compliant with new requirements.

## Summary of Key Amendments

### **Club directors now required to act in the best interests of their club**

- Club directors will now be required to exercise powers and discharge duties in good faith in the best interests of the club and for a proper purpose.
- This allows the Commission, as the local regulator, to take action in relation to what may be a significant issue for the ACT, but a low priority for ASIC.
- It also provides directors with a clearly defined responsibility that is administered by a local regulator and this is likely to assist directors in resisting undue external influence on their decision making.

### **Club constitutions must now be consistent with gaming laws**

- The new requirement that club constitutions must be consistent with gaming laws will help prevent clubs from unknowingly encouraging unlawful activity.
- The Commission can direct a club to change its constitution if it is inconsistent and the club must do so within a specified time.

### **Restrictions on associated organisations**

- Associated organisations now must not have the power to (and not attempt to) remove a director from a club's board.
- If this occurs, the Commission will be able to suspend or revoke a declaration provided to an associated organisation.
- The Commission also has the ability to monitor and investigate associated organisations to ensure they continue to be a benefit to their club.

### **Guaranteed member representation on club boards**

- The Bill inserts a new provision requiring that, if a club holds an election of directors to the club's board, then the club must ensure that at least 25% of the directors are elected by the voting members of the club.

**Enhanced disclosure requirements**

- Additional information is now required to be disclosed in club annual reports ensuring that there is appropriate disclosure regarding contracts, consultancies and benefits taken from clubs.

**Consumers protected from insolvent clubs**

- Where a licensee is found to be no longer solvent the Commission may take disciplinary action to protect consumers which could include suspending or cancelling the licence.

**Problem Gambling Assistance Fund**

- New amendments allow licensees to claim payments to the new Problem Gambling Assistance Fund as community contributions. To ensure that payments to other community contributions are maintained, the required minimum level of community contributions has been proportionally increased from 7 to 8 percent of net gaming machine revenue.

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**Baker, Lisa**

2011/10192

c/s

**From:** adam.samuelson@act.gov.au  
**Sent:** Friday, 1 July 2011 1:56 PM  
**To:** ACT Record Services  
**Cc:** Samuelson, Adam  
**Subject:** Request for new file

**Mail from:** <http://intact/apps/RecordServices/request/>

fileType: close

closePart: 2011/2340 10191

AmendTitle:

origDept: **ECONOMIC DEVELOPMENT DIRECTORATE - EDD**

origBranch: **ACT GAMBLING & RACING COMMISSION**

origSection: **Legislation and Policy Review**

origGroup:

mdb: **TVKAAA**

tvkFunction: \* mandatory selection from thesaurus

tvkActivity: \* mandatory selection from thesaurus

sentence: \* record class number and the name of the relevant Records Disposal Schedule  
 eg TARDIS 3.5.1 R 9 G 1-11.1 RTA

tvkSubject: ? optional selection from thesaurus

freeText:

crossRef:

class: **In-Confidence**

inConfidenceType: **Cabinet**

National:

authName:

authTitle:

authDesignation:

limitedAccessOfficer:

createdBy: **Adam Samuelson**

createdByPhone: **70080**

createDate: **1/07/2011**

physicalLocation: **Level 2 Nara**

actionOfficer:

notes: **\*\* Two new parts for this file please \*\* Thank you.**

submitted on: **1/07/2011** by: **ACTGOV\Adam Samuelson**

Open in MSWord

to <http://intact:80/apps/RecordServices/request/Default.asp>

Len(request.Form) = 764

# **ACT GAMBLING AND RACING COMMISSION**

## **REPORT OF THE REVIEW OF THE GOVERNANCE PROVISIONS OF THE *GAMING MACHINE ACT 2004***

**NOVEMBER 2010**

## **Executive Summary**

This report outlines the results of the Gambling and Racing Commission's review of the governance provisions of the *Gaming Machine Act 2004* (GMA). The review examined the policy issues surrounding the governance of clubs in the ACT with this report providing the outcomes of the review along with recommendations for possible further action.

Where appropriate the report includes discussion on issues or comments that were raised in response to the Commission's two stages of public consultation that occurred through the circulation of the Commission's Issues Paper and then the draft Review Report.

This report does not cover minor or technical issues or changes in drafting policy that will be addressed at the time that any new legislation is drafted.

### **Scope of the Review**

The review focused on the governance of clubs in the ACT and in particular the provisions relating to governance in the primary legislation in this area, the GMA. The Commission has fulfilled the Minister for Gaming and Racing's request to cover, but not be limited to, a number of specific governance issues and these are set out in the introduction to this report.

### **The role and powers of associated organisations**

The GMA currently gives associated organisations the power to appoint and remove the directors of a club. It is possible that a club and its associated organisation may experience a divergence of direction or a conflict over a specific matter. In this situation appointed directors, and in particular those that can be removed by an associated organisation, may experience pressure to act in a way that is not in the club's best interests. That this situation may arise does not amount to a systemic failure and the Commission considers that wholesale change to the role of associated organisations is unwarranted.

However, it is the Commission's view that it is appropriate to limit some of the powers of associated organisations. This is necessary to mitigate the risks arising from potential conflicts of interest between clubs and their associated organisations, including the ability of associated organisations to remove directors from a club and the maximum proportion of directors that they can appoint.

### **Obligations of club directors**

It is a key duty of a director to act in the best interests of their organisation. This is codified in corporations law and is the primary means by which directors are held to account. The responsibility for enforcement of corporations law lies with the Australian Securities and Investments Commission (ASIC) which has a range of priorities nationally and internationally. There is a risk that the kind of issues which may occur at club level in the ACT, although potential breaches, may not warrant the application of the resources required to investigate and take enforcement action. Given the importance of 'best interests' provisions as a key mechanism for holding directors to account, the Commission is of the view that the GMA should be amended to require directors to discharge their powers

**Recommendation 5**

The Commission recommends that the Minister write to ClubsACT requesting that the ClubsACT Code of Governance be reviewed and updated to include 'best practice' provisions to improve club accountability and transparency to their members. The Minister could require the Commission to monitor the outcomes of the review including the application of the results across the industry and provide advice back to the Minister in due course whether legislative reform is required in this area.

**Recommendation 6**

The Commission recommends that amendments to sections 14(1)(a), 53(4)(a), 53(4)(b), 54 and 55(d) of the GMA be undertaken as outlined in the review report.

The review focused on the relevant policy issues concerning the governance of clubs in the ACT. This report on the review outcomes concentrates on these policy issues and does not cover minor or technical changes in drafting policy that will be addressed at the time that any new legislation is drafted.

### **1.2 Consultation process**

There were two stages of consultation as part of this review. During the first stage the Commission called for submissions in response to an Issues Paper that was forwarded directly to stakeholders and was advertised in *The Canberra Times* as well as being made available on the Commission's website. In addition, the Commission participated in an industry seminar on the review facilitated by ClubsACT.

At the conclusion of the first stage of public consultation the Commission had received nine submissions from industry and one from an associated organisation.

Following its analysis of submissions and based on its research of the issues the Commission developed a draft report that outlined its conclusions and draft recommendations.

The second stage of public consultation involved the Commission's draft report (including recommendations) being circulated for comment.

Two submissions were received from this process – one from industry and the other from an associated organisation.

The comments made in the submissions from both stages of consultation have been considered by the Commission in finalising its conclusions and recommendations.

### **1.3 The Review Report**

This report has been written to reflect the developmental process that occurred with the review over the two stages of consultation. It documents the manner in which the Commission came to its final conclusions and recommendations by identifying the issues that were considered and the comments and arguments that were received under the consultation process.

In the 2008-09 financial year licensed clubs made compulsory and voluntary community contributions to the value of \$13.8m which includes both monetary and in-kind contributions.<sup>4</sup> In-kind contributions include club services and facilities provided to organisations without charge or at less than the market rate. For example, some licensed clubs provide meeting rooms to organisations at no charge. This is considered an in-kind contribution and the monetary value of the room at the regular room hire rate is recorded as a community contribution.

Of clubs' total community contributions in 2008-09, 70.10% were for sport and recreation purposes, 15.41% went to non-profit activities while 8.33% was contributed to charitable and social welfare and 1.62% to community infrastructure.<sup>5</sup>

## 2.2 Gaming machine licensing requirements

To obtain a gaming machine licence in the ACT clubs must be 'eligible' clubs as defined by the GMA. For the purposes of this review, the relevant elements of this definition are that clubs must:

- be incorporated (either as a corporation under the *Corporations Act 2001* (C'th) or as an incorporated association under the *Associations Incorporation Act 1991*);
- have eligible objects as their main objects;<sup>6</sup>
- be conducted mainly to achieve their eligible objects; and
- keep and maintain the club and its facilities for the benefit of members generally.

These provisions ensure that, in accordance with the community gaming model, only not-for-profit organisations which have been established for a common purpose for the benefit of members may operate gaming machines.

<sup>4</sup> ACT Gambling and Racing Commission (2009) *Community Contributions made by Gaming Machine Licensees 1 July 2008 to 30 June 2009*, pp. 20-21.

<sup>5</sup> ACT Gambling and Racing Commission (2009) *Community Contributions made by Gaming Machine Licensees Attachment D*, pp. 22-23.

<sup>6</sup> Eligible objects are outlined in Section 145 of the GMA and include anything that furthers or promotes recreation, social, religious, political, literary, scientific, artistic, sporting or athletic purposes and cultural or educational purposes.

officer of a corporation exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.<sup>7</sup> The *Corporations Act 2001* also sets out other requirements concerning things such as the election of directors and the conduct and recording of board meetings and board decisions.

In addition to the governance provisions outlined earlier, the key governance provision in the GMA for directors is the requirement for a club's board to have complete control over the club's business or operations. Disciplinary action, including suspension or cancellation of a club's gaming machine licence, can be taken against a licensee if it is found that the club's board did or does not have complete control over a significant aspect of the club's business or operations.<sup>8</sup> This provision is central to the community gaming model as it is intended to prevent clubs from being controlled by external parties, and in effect, directed to act in a way that is not in the best interests of the club and its members.

Regardless of provisions in corporations law and the GMA, it is also arguable that directors have an obligation under common law to act in the best interests of their club. In this regard this common law obligation applies to clubs incorporated under the *Associations Incorporations Act 1991* rather than the *Corporations Act 2001*.

#### 2.4 The role of the club membership

The GMA provides that the membership of a club is the fundamental foundation of the club. This is despite the significance of the relationship between a club and its associated organisation. Under the GMA clubs must exist to provide benefits to their members and to pursue a common purpose.

Although some clubs have an open or "democratic" approach to the voting rights of their membership (ie all ordinary members have voting rights), this is not a requirement of the GMA. The GMA only requires that a club have at least 300 voting members, with not more than 5% of those being life members.<sup>9</sup> In practice, many clubs have a number of different membership categories, only some of which have voting rights. General members without voting rights often form the vast majority of the membership.

Where a club has an approved associated organisation,<sup>10</sup> voting members may not have the capacity to appoint all directors of the club's board. However, voting members of clubs that are corporations (including those with directors appointed by an associated organisation) have some avenues of control through corporations law. For example, section 203D of the *Corporations Act 2001* allows voting members to remove any board member by resolution at a general meeting. Voting members may also nominate and elect a new board member in the same way.

In terms of responsibilities, members of a club (in similar terms to the shareholders of a company) have their liability for a club's debt limited to the member's subscriptions payable

<sup>7</sup> Section 181 *Corporations Act 2001* (C'th).

<sup>8</sup> Sections 14(h) and 39A of the *Gaming Machine Act 2004*.

<sup>9</sup> The GMA's 5% limit on life memberships within the voting membership was intended to ensure the voting membership was not dominated by a small and disproportionately powerful group.

<sup>10</sup> Section 147 of the *Gaming Machine Act 2004*.

powers to monitor associated organisations, nor does it have an explicit power to revoke an approval.

## 2.7 Principles of good corporate governance

Corporate governance is the arrangement and nature of processes that direct and control an organisation.

Ensuring good corporate governance is becoming increasingly integral to managing any organisation. A sound approach to governance helps to ensure that an organisation acts in the interest of its members or shareholders, makes effective decisions and maintains transparency and accountability.

While this review has focused on only some aspects of corporate governance, the Commission has examined these within the context of the broader discussions on corporate governance. In this regard the Commission has reviewed a number of industry and government documents that provide useful commentary or guidance on corporate governance such as those by the Organisation for Economic Cooperation and Development (OECD), the Australian Sports Commission (ASC)<sup>12</sup> and the Australian Stock Exchange (ASX)<sup>13</sup>.

Despite the fact that much of the discourse on corporate governance uses language specific to corporations and their shareholders, the principles of good corporate governance are also applicable to community based not-for-profit organisations and their members. In addition, the Commission notes that there is also the view that where organisations receive benefits from the government they should be held accountable to these principles. This is illustrated by the Australian Sports Commission (ASC) which has a “clearly stated position with respect to the governance of national sporting organisations to which the ASC provides taxpayer moneys”.<sup>14</sup> In return for receiving a benefit from taxpayers the ASC expects funded organisations to comply with the principles of governance contained in the ASC’s good practice guide for sporting organisations.

While clubs are not taxpayer funded, clubs are granted a monopoly over more profitable class C gaming machines by the Government as part of the community gaming model where hotels and taverns are restricted to less profitable class B gaming machines and other organisations (including the casino) are prohibited from operating gaming machines altogether. In addition, the club industry in the ACT, in comparison to commercial pubs and taverns, receives tax concessions through lower tax rates on gaming machine revenue. As with any other form of tax concession, the impact of these lower rates in conjunction with

<sup>12</sup> The ASC provides funding from taxpayers to not-for-profit sporting organisations nationally. These sporting organisations are typically supported by volunteers and controlled by volunteer boards.

<sup>13</sup> The ASX principles are not mandatory, however if ASX listed companies do not comply with the ASX good governance principles then they are required to explain why. See ASX (2007) *Corporate Governance Principles and Recommendations*, Second Edition p. 5.  
<http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/body.aspx?z=1&p=-1&v=1&uid=>

<sup>14</sup> Australian Sports Commission (2007) *Governance Principles: A Good Practice Guide for Sporting Organisations*, p. 1.

[http://www.ausport.gov.au/data/assets/pdf\\_file/0004/193027/ASC\\_Governance\\_Principles\\_2007.pdf](http://www.ausport.gov.au/data/assets/pdf_file/0004/193027/ASC_Governance_Principles_2007.pdf)

For example, in relation to board elections the ClubsACT Code provides:

We are committed to promoting fair and democratic elections and maximising voting member involvement by following appropriate procedures for the conduct of club elections and for the conduct of ballots (required for the application of an initial/new licence, as well as for the amendment, transfer or a surrender of a licence).<sup>19</sup>

The ClubsACT Code provides a basic reference document covering fundamental principles of club operations. It is not a 'best practice' document and is mainly written in generic terms. There have been no changes to the Code since its inception in 2005. While a complaints mechanism has been established under the Code<sup>20</sup> there is no pro-active reporting on, monitoring or auditing of compliance with the Code by the industry.

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<sup>19</sup> ClubsACT (2005) Code of Governance for the ACT Club Industry, p. 7.

<sup>20</sup> ClubsACT (2005) Code of Governance for the ACT Club Industry, p. 9.

The Issues Paper identified three possible approaches to governance (including the status quo) and sought feedback on these and any other alternative approaches from stakeholders and the community. Underpinning the approaches were the following key issues:

- the role and powers of associated organisations;
- obligations of club directors;
- powers of the Commission; and
- democratic election processes.

In light of the submissions received in response to the Issues Paper the Commission eliminated a number of options for potential change to club governance and developed a model that in the Commission's view would improve governance through increased accountability and transparency while taking account of the industry's concerns. Consistent with the model developed, draft conclusions and recommendations were circulated for comment as part of a second round of public consultation.

This chapter provides commentary on the key issues that underpin the approach to club governance by providing a description of these fundamental matters along with stakeholder views where appropriate and the Commission's conclusions and recommendations.

### 3.1 The role and powers of associated organisations

#### 3.1.1 Issue

The GMA currently gives associated organisations the power to appoint and remove the directors of a club. In light of the potential for a conflict of interest to emerge between the club and the associated organisation over a particular matter this review has considered what powers associated organisations should have to appoint and/or remove directors of clubs.

#### 3.1.2 Discussion

It is possible that a club and its associated organisation may have a significant disagreement or conflict over a particular matter or competing interest. In these circumstances, directors who have been appointed by the associated organisation (and in particular who can be removed or sanctioned in some way by that organisation) may experience significant pressure to act in a way that they may consider is not in the club's best interests.

In this regard, there is a possible risk to a club board's compliance with the requirement in the GMA<sup>24</sup> to have complete control over the club's business or operations and the requirements under corporations law<sup>25</sup> for directors to act in the best interests of the club (where the club is incorporated under the *Corporations Act 2001* (C'th)).

Issues of control over a corporation's Board of Directors occur not only in the Territory's club industry but also more broadly in the corporate sector. While there are some unique elements to this issue in terms of particular provisions in the GMA, the issue of external

<sup>24</sup> See Section 14(1)(h) of the GMA.

<sup>25</sup> See Part 2D.1, Division 1 of the *Corporations Act 2001*.

Commission considers that all club boards should have some 'independent' directors (ie. appointed by a different method) while noting that good corporate governance principles suggest a majority of directors should be independent. The Commission also recognises that to be effective in their role as 'custodians' of a club's objects, there arguably needs to be a majority of directors appointed by the associated organisation on the board.

The GMA does not limit the number or proportion of directors that may be appointed by an associated organisation. While no club's constitution currently provides for all of its directors to be appointed by an associated organisation the Commission considers that it is important to ensure this cannot occur in the future. The Commission considers that it would be appropriate for the GMA to establish a minimum percentage of board directors to be elected by the voting membership, with this being set initially at 25%.

In its second stage consultation submission the industry supported this view and stated that it would be a worthwhile measure to establish a minimum number of directors which were elected by the voting members. The industry agreed that such a mechanism would ensure an appropriate opportunity for the members of a club to influence the composition of the board and allow some level of independence to the board.<sup>26</sup>

The Commission considers that the minimum of 25% of directors being appointed by the voting members could be increased over time if this was considered desirable or necessary.

While the Commission accepts the rationale for allowing associated organisations to appoint directors, it is less clear that they should be able to remove directors. The Commission considers that the threat of removal exacerbates the risks posed by the potential for a conflict of interest. In other words, in light of the pressure it may bring about, the associated organisation's power to remove directors could be considered a greater risk to the club's interests than it is a benefit.

The ClubsACT second stage consultation submission supported this argument and stated that:

"ClubsACT also believes removing the right of associated organisations to remove directors is an appropriate measure and in line with efforts to improve governance throughout the industry."<sup>27</sup>

Corporations law currently provides a process for members to remove and replace directors.<sup>28</sup> In a situation where a director is not performing satisfactorily, or for some other reason, the membership may choose to call a general meeting and vote to remove the director, and where appropriate, elect a replacement. The Commission considers that these powers are adequate and it is difficult to envisage a situation where the interests of the club could only be served by an associated organisation removing a director. If a director nominated by the associated organisation is removed by the membership, it would not be intended for the GMA to prevent the associated organisation from nominating the replacement director.

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<sup>26</sup> ClubsACT second stage consultation submission, p. 1.

<sup>27</sup> ClubsACT second stage consultation submission, p. 2.

<sup>28</sup> Section 203D *Corporations Act 2001* (C'th).

international priorities mean there is a risk that the kind of breaches that may occur at a club level in the ACT may not warrant the application of resources by ASIC to investigate and, if necessary, take enforcement action. This places the Commission in a difficult position where it must rely on an external regulator with national priorities to take action on issues that may not be of national importance, yet from an ACT regulatory perspective, have a high local significance.

The Commission also notes that it is not a requirement for all clubs to be corporations (ie. subject to corporations law) and there are currently 14 clubs in the ACT that fall under the relevant threshold and are only incorporated associations<sup>30</sup>. The directors of these clubs are therefore not subject to corporations law requiring directors to act in the best interests of the club and only have common law duties to this effect. While it is technically possible for the Commission to commence action against a club on a common law basis it would be highly unusual (and costly) for a regulator to do so.

The industry was strongly opposed to further regulation in this area on the basis that it was a duplication of existing Federal controls and was considered by industry as unnecessary. The industry raised concerns of potential conflicts between ASIC and Commission investigations particularly in relation to prosecuting individual directors.

However, the Commission's argument is that the Federal regulator, ASIC, does not always have available resources for this level of investigation based on its national priorities. Also, as outlined above, not all ACT club licensees are subject to corporations law. ClubACT's suggestion in its submission that all club licensees be required to incorporate under federal law regardless of size is considered by the Commission to be impractical as it would represent a significant financial burden, both immediate and on-going, for small operators.

### 3.2.3 Conclusion

Given the importance of a 'best interests' type of provision as the key mechanism for holding directors to account, the Commission is of the view that such a provision should be included in the GMA. Advice obtained by the Commission indicates in general terms that such a provision could be drafted without creating ambiguity or conflict with Federal Corporations law.

The industry's opposition to the suggestion of a broadening of the Commission's powers is not unexpected and is duly noted, however, it is envisaged that any action taken by the Commission would be co-ordinated with ASIC (and not duplicated) with ASIC's role being a priority. The Commission would largely focus its efforts on licensees to ensure that their directors were making decisions in the best interests of the corporation.

Importantly, such a provision in the GMA would consolidate the regulatory control of this aspect of a club's operation within the Gambling and Racing Commission's powers as the existing local regulator and would remove any ambiguity with those licensees that are not covered by corporations law.

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<sup>30</sup> Section 186 of the *Gaming Machine Act 2004* provides a (continuing) transitional arrangement that licensees with annual gross revenue of less than \$500,000 do not need to be incorporated under the *Corporations Act 2001 (C'th)*.

gaming laws, ie. it would only act in circumstances where the board and its members had failed to make rules that were consistent with the gaming laws.

The Commission currently has a general directions power in the GMA which could be used by the Commission to direct a club to change its constitution. However, given the significance of a direction to change a constitution, the Commission considers that it would be more appropriate for the Commission to have a clearly defined, limited and specific power. The Commission is also of the view that a specific legislated power would more clearly communicate the expectations and requirement of clubs to have constitutions that do not conflict with the gaming laws.

ClubsACT's submission to the second stage of consultation supported the notion that a club's constitution should be consistent with the law.

"There can be no argument with the principle that the constitution of a club should not include provisions which are inconsistent with applicable law, whether it be ACT or federal law. Certainly ClubsACT does not disagree with the Commission's view that the constitutions of clubs should not have provisions which allow for (or encourage) unlawful activity."<sup>32</sup>

It also acknowledged the general power of direction that the Commission has in relation to gaming machine licensees. However, the industry somewhat surprisingly opposed the specific and transparent power to explicitly require a particular provision in a club's constitution to be made consistent with a gaming law.

The industry's argument that the law would always prevail over a constitution, while sound, does not address the Commission's main argument which holds that preventing a breach of the law is always preferable to taking action for non-compliance after the event.

The Commission notes that in practice clubs often have difficulties making changes to their constitutions and consequently it may not be sufficient for the Commission to direct a constitution be changed for that change to be enacted. For example, the Commission recognises the difficulties in holding a general meeting and securing a quorum to vote on what may be a technical change to a club's constitution (which may at least partially explain a number of club constitutions that have outdated provisions such as references to liquor or gaming Acts that have long since been repealed).

To address this issue and to ensure the power to require change was effective, club constitutions would need to be amended to include a provision which enables the constitution to be amended without a vote by members if the club has been directed to amend its constitution by the Commission. In turn, having this sort of provision in a club constitution would need to be a condition for holding a gaming machine licence.

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<sup>32</sup> ClubsACT second stage consultation submission, p. 4.

vulnerable to change over time which may result in the associated organisation not being a benefit to the club. The Commission currently has no powers to monitor associated organisations and therefore has no capacity to assess whether over time an associated organisation is continuing to help a club achieve its eligible objects.

Moreover, in the event that the Commission was to have serious concerns about the relationship between an associated organisation and a club it has no explicit capacity in the GMA to investigate an associated organisation or suspend or revoke their approval. The Commission notes that current legislative practice is for legislation to ensure that where there is a power to make an approval there should also be a specific and transparent provision for suspending or revoking an approval. This ensures that there is clarity about the nature of the approval (including its duration) and procedural fairness to the organisation if the decision-maker acts to suspend or revoke the approval.

### *3.3.2.3 Conclusion*

If associated organisations are to continue having a dominant role in some clubs' governance, the Commission considers that it is appropriate for it to have some powers to monitor them, particularly the extent to which they are continuing to help clubs achieve their objects. In the event that an associated organisation is no longer considered to meet the requirements of an initial approval under the GMA, the Commission is of the view that it should be able to investigate and suspend or revoke their status as an associated organisation. Obviously the necessary review procedures should be available to the relevant body.

ClubsACT in their second stage consultation submission supported in-principle this view but held back their final position pending the drafting of any legislative amendment. Their submission stated:

"The principle that the Commission should have the power to revoke or suspend the approval of an associated organisation if the circumstances that led to the approval in the first place change in a material way is supported by ClubsACT.

However, it is the firm view of ClubsACT that the powers of investigation, including the information that can be compelled by the Commission, needs to be very clearly codified in the legislation."<sup>33</sup>

The Commission considers that good drafting practice will ensure that any legislative change will clearly identify the information that could be accessed and the requirements that would need to be satisfied in order for an investigation to be initiated or any adverse action to be taken.

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<sup>33</sup> ClubsACT second stage consultation submission, pp. 4-5.

does not represent an ideal governance arrangement for a community based club that has been established for the benefit of its members.

The ClubsACT Code of Governance, released in April 2005, provides some generic guidance for member clubs in terms of operations and legislative compliance. It does not provide any guidance on 'best practice' or benchmarking for industry members to strive for to achieve improved open management practices.

The unique corporate relationship between club members and their board does not necessarily encourage good governance arrangements through open board election processes. One of the reasons for this is that club members do not have a direct financial interest in the club's operations.

In a corporation other than a club the shareholders have a direct financial interest in the performance of the company. This financial interest provides a strong incentive for shareholders to hold boards accountable for their decisions and is one of the safeguards against ineffective performance and governance within a company. In contrast, members of clubs have no direct financial interest in their clubs and can only benefit from improved or additional facilities. For this reason, and as the Productivity Commission has noted, "the governance arrangements in clubs may be weaker than those in most private commercial businesses".<sup>34</sup>

The Commission also notes that while members in small not-for-profit organisations, such as the small licensed clubs, are more likely to have a strong non-financial interest and a direct connection to the organisation, this is less likely to be the case for members in large clubs. In effect, as a club grows and diversifies the direct connection and the non-financial interest of the membership is likely to be weakened.

The Commission notes that while the industry in stage one consultation submissions opposed requiring more democratic election processes in the GMA there are a number of very successful clubs in the ACT that provide voting rights to all ordinary members and who in turn elect all of the board directors.

#### *3.4.3 Conclusion*

As not-for-profit community organisations that receive significant tax concessions and exclusive use of class C gaming machines, clubs have a responsibility to develop and maintain systems of governance that are transparent and accountable. Clubs might primarily achieve better governance by fostering transparency in decision making processes and moving towards a model of complete accountability to members where this does not currently occur.

In order to improve existing governance arrangements the Commission does not consider that a legislative approach that provides a 'one size fits all' is yet necessary.

Instead, the opportunity exists for the ACT club industry to address this issue itself. In doing so it could demonstrate its commitment to generally improving its current control

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<sup>34</sup> Productivity Commission (1999) *Australia's Gambling Industries: Inquiry Report*, p. 21.27.

## 4. Other Regulatory Issues

A number of provisions in the GMA relating to club governance in general were also considered as part of this review. Specifically, sections 13, 14, 53, 55, 145 and 146 of the GMA were considered to determine whether these sections needed enhancing or clarifying to improve their operations.

Based on the Commission's regulatory experience with these provisions, it was concluded that some of the above listed sections do not need any modification while in contrast a number of sections would benefit from enhancement or clarification. Further, it was concluded that some sections should be repealed.

No submissions from stage one of the consultation process commented on the need to review these provisions. However ClubsACT in their second stage consultation submission supported the recommended changes.

The following amendments are proposed to the identified sections of the GMA:

- i) *Section 14(1)(a)*: Currently this section provides that a ground for refusing to issue a gaming machine licence exists if payments for the rental or lease of the club's premises are unreasonable or are related to the level of gaming machine performance.

It is proposed that this section be amended to remove the provision relating to payments having to be reasonable as this provision is extremely difficult to enforce and adds little value. Further, the remainder of the section should be enhanced by broadening the restriction on payments relating to gaming machine performance to apply to all goods and services (including the supply of gaming machines and venue rental or lease payments). This would ensure that third party suppliers do not become de facto gaming machine operators by directly obtaining a proportion of gaming machine revenue.

- ii) *Section 53(4)(a)*: In relation to inequitable benefits, currently this section provides that a person is entitled to a benefit if it was obtained in the course of acting on behalf of the club.

It is proposed that this section be clarified by adding to the description of acting on behalf of the club that it includes a person performing their normal duties as an employee or director of the club.

- iii) *Section 53(4)(b)*: In relation to inequitable benefits, currently this section qualifies section 53(4)(a) of the GMA by specifying that the benefit may consist of reasonable food or refreshment or out-of-pocket expenses reasonably incurred and authorised by a resolution of the club's management committee or board.

It is proposed that this section be clarified and enhanced by providing that it includes an expense paid by someone else in relation to the person's duties (such as free entry to a conference) and authorised by a resolution of the club's



**ACT**

Government

Economic Development

000096

**BRIEF**

Ref: GRC 2011/20

**SUBJECT: Meeting with ClubsACT**

To: Minister for Economic Development

- Director-General, Economic Development Directorate

From: Chief Executive Officer, Gambling and Racing Commission

Date: 30 August 2011

**Critical date and reason**

2 September 2011 to ensure that information for your meeting with ClubsACT is received in a timely manner.

**Purpose**

1. To brief you for your meeting with ClubsACT scheduled for 2:00pm on 5 September 2011.

**Background**

2. You have previously written to ClubsACT seeking to establish quarterly meetings to discuss topics of interest relevant to the club industry. This is the first of these meetings.

**Issues**

3. A summary of current issues that ClubsACT may wish to discuss is provided at Attachment A.

**Consultation**

4. ACT Treasury was consulted for the preparation of this brief and provided input in relation to the gaming machine reallocation scheme.

**Financial**

5. Nil resulting from this brief.

Response from clubs regarding governance changes

The Commission held a seminar on 26 July 2011 in conjunction with ClubsACT on the recent changes to the governance provisions of the *Gaming Machine Act 2004*.

- While supportive of many of the governance changes, clubs continue to oppose some elements, such as the Commission having the power to direct them to amend their constitution if it conflicts with a gaming law. However, the industry has agreed to work with the Commission to implement the amendments with the intention of raising any outstanding concerns when the governance provisions are reviewed in two years time.
- Some concern was raised regarding the restrictions on which benefits may be taken by club employees and directors of clubs.
  - To address these concerns the Commission has provided all clubs and ClubsACT with an information sheet outlining the circumstances when it is acceptable to receive a benefit under the Act.
  - This information sheet, along with Question and Answer information, has been provided on the Commission's website.
- In addition the Commission has written to all licensees to provide guidelines on the changes required to their constitutions under the governance provisions.



**ACT**  
Government

Chief Minister and Cabinet



**RECEIVED**  
20.6.11

000093

Mr David Dawes  
Director-General  
Economic Development

Dear Mr Dawes

**Scrutiny of Bills and Subordinate Legislation Committee Report  
No 37 of 2011**

I attach for your information the above report that was circulated out of session on Thursday, 16 June 2011 and which is expected to be tabled in the Legislative Assembly on Tuesday, 21 June 2011. An advance copy of the report has been emailed to your agency's Assembly Liaison Officer.

The report contains comments on the Gaming Machine (Club Governance) Amendment Bill 2011 that is administered by the Economic Development Directorate.

Where possible, Government responses to comments regarding Bills should be forwarded to the Committee Chair by the relevant Minister within one calendar month of the Scrutiny Report being tabled in the Assembly, that is by Thursday, 21 July 2011. However, I note that this Bill has been listed for debate in the Assembly on Thursday, 23 June 2011. Therefore, a response should be provided, if possible, before debate of the Bill.

It would be appreciated if a copy of any response made is also forwarded to the Assembly Secretariat (for the Deputy Clerk) at the same time as delivering the response to the Committee Chair. If provided in an envelope, please address it to the Scrutiny of Bills and Subordinate Legislation Committee.

Should there be any queries regarding this matter, please contact me on 62050230 or Kas Paul on 6205 0543.

Jada DUNN

Acting Director

17 Cabinet & Intergovernmental Relations

June 2011

000091



Legislative Assembly for the ACT

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

## Scrutiny Report

16 JUNE 2011

Report 37



**STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
(performing the duties of a SCRUTINY OF BILLS AND  
SUBORDINATE LEGISLATION COMMITTEE)**

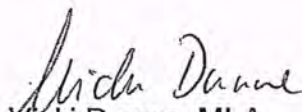
Mrs Vicki Dunne MLA (Chair), Mr John Hargreaves MLA (Deputy Chair), Ms Meredith Hunter MLA

Mr Shane Rattenbury, MLA  
Speaker  
Legislative Assembly for the Australian Capital Territory  
CANBERRA ACT 2601

Dear Mr Speaker

Please find enclosed a copy of Report 37 of the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee). Under its resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that you may give directions for its printing, circulation and publication. I seek your approval to print, publish and circulate Report 37.

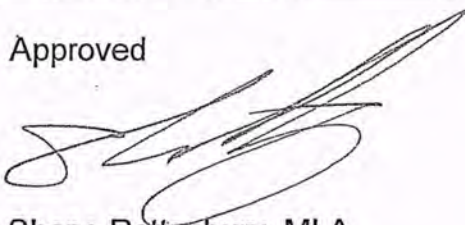
Yours sincerely

  
Vicki Dunne, MLA  
Chair

16 June 2011

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Approved

  
Shane Rattenbury, MLA  
Speaker

16 June 2011

## TERMS OF REFERENCE

The Standing Committee on Justice and Community Safety (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
  - (i) is in accord with the general objects of the Act under which it is made;
  - (ii) unduly trespasses on rights previously established by law;
  - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
  - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
  - (i) unduly trespass on personal rights and liberties;
  - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
- (e) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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## Background

The object of the Bill would be achieved by the enactment of clause 6.

### 6 Adoption of Education and Care Services National Law

The Education and Care Services National Law, as in force from time to time, set out in the schedule to the Victorian Act—

- (a) applies as a territory law; and
- (b) as so applying may be referred to as the Education and Care Services National Law (ACT); and
- (c) so applies as if it were part of this Act.

*Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?*

**Report under section 38 of the *Human Rights Act 2004***

The Bill for this Act contains 23 clauses, and each of these is explained. The national law as set out in the Victorian Act contains 324 sections, and the Explanatory Statement explains these provisions by incorporating notes on the provisions that were prepared by the Victorian government. There is however no citation to a source – such as a website – where may be found the text of the adopted Victorian Act and its schedule.

The Explanatory Statement contains a section headed “Human Rights compliance with the *ACT Human Rights Act 2004*” and which at the outset states that:

[i]n relation to addressing Human Rights compliance the following general statements are made about a number clauses, that relate to similar issues, for convenience, rather than addressing these issues in several places.

The following three paragraphs refer to a large number of sections of the national law that engage the right to privacy and reputation (HRA section 12). These sections are divided into three groups and in relation to each group it is argued that in no case is the limitation on the right unlawful or arbitrary. There is no reference to HRA section 28 or proportionality analysis that would satisfy the terms of section 28; for example, there is no consideration in respect of any of these limitations of whether there are “any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve” (paragraph 28(2)(e)). Some other elements of the section 28 analysis are adverted to, although not explicitly.

### **The national scheme dimension of the Bill**

The Committee considers that the explanatory statement should identify all respects in which a provision of the Bill affects the normally applicable laws that relate to the powers and procedures for the making, promulgation and interpretation of Territory laws. If there are no such provisions, then this should be indicated.

In this respect, the Committee notes that subclause 7(2) of the Bill provides that a number of Territory laws “do not apply to the Education and Care Services National Law (ACT) or to the instruments made under that Law”, being the *Criminal Code 2002*, the *Freedom of Information Act 1989*, and the *Legislation Act 2001*. Subclause 7(3) of the Bill provides that a number of Territory laws “do not apply to the Education and Care Services National Law (ACT) or to the instruments made under that Law, except to the extent that that Law and those instruments apply to the Regulatory Authority and the employees, decisions, actions and records of the Regulatory Authority”, being the *Annual Reports (Government Agencies) Act 2004*, the *Auditor-General Act 1996*, the *Financial Management Act 1996*, the *Ombudsman Act 1989*, the *Public Sector Management Act 1994*, and the *Territory Records Act 2002*.

The displacement of these laws, and in particular those affected by subclause 7(1), is a matter of concern, in that these laws create or afford protection to certain human rights. So far as concerns the laws affected by subclause 7(1), the Committee notes that sections 263 and 264 of the national law provide for the application of the Commonwealth Freedom of Information Act and of the Privacy Act. The Committee also notes that the displacement of the laws mentioned in subclause 7(3) is of a limited nature.

The explanatory statement should also explain whether any amendment to the adopted national law will apply in the Territory, and also whether any regulation made under that law will apply. There should also be an explanation of what capacity there will be for the Legislative Assembly to be made aware of any amendment or regulation and for the Assembly to make an amendment or reject any amendment to the national law or regulation.

*The Committee makes no further comment on these provisions.*

<b>GAMING MACHINE (CLUB GOVERNANCE) AMENDMENT BILL 2011</b>
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This Bill would amend the *Gaming Machine Act 2004* and the *Gaming Machine Regulation 2004* in relation to the governance of clubs in the ACT.

*Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?*

In this connection, the Committee notes that, while the power of the commission to be conferred by proposed section 148B (see clause 21 of the Bill) is conditioned on the commission believing in a state of affairs “on reasonable grounds”, the power to be conferred on the commission by proposed section 147C is not qualified in this way.

*The Committee recommends that the Minister explain why the two powers are treated differently.*

each suburb. Given these factors the average cost to residential property associated with the adoption of market indexes under codification is likely to be small or nil (footnote omitted).

The reference here to “residential property” is to such property considered in the aggregate. Some individual owners of residential leases will of course suffer a loss under this scheme when compared to earlier schemes. Moreover, an owner will pay the same LVC as a neighbour would pay for an identical site notwithstanding that the value of the former property is less than the neighbour; for example where the former lease is affected by the operation of the *Tree Protection Act 2005*, or the *Heritage Protection Act 2004*. These examples are mentioned because they illustrate that the value of a lease may, subsequent to its purchase by the lease-holder seeking to vary the lease, be adversely affected by legislative change.

*The Committee draws attention to this matter and recommends that the Minister explain what consideration was given to compensation or amelioration of the scheme in respect of lease-holders who will suffer loss arising out of the operation of the scheme proposed.*

**Does a clause of the Bill inappropriately delegate legislative power?**

The wide nature of the matters that may be prescribed by regulation

A number of significant topics may or must be prescribed by regulation. The Committee notes the powers:

- to prescribe a variation as a chargeable variation (proposed section 276);
- to determine a lease variation charge (proposed subsection 276D(1));
- to approve guidelines in relation to lease variation charges (proposed section 276E);
- to prescribe matters in relation to the application of proposed section 277A; and
- to prescribe the amount by which the commissioner for revenue must increase a lease variation charge for a chargeable variation of a nominal rent lease (proposed section 279).

(The power to determine a lease variation charge (proposed subsection 276D(1)) is dealt with more extensively immediately below).

These are situations in which the Assembly may wish to consider varying the normal scheme that applies where delegated legislation is disallowable. There are at least two options.

To preclude the possibility of the subordinate law taking legal effect on its making,<sup>2</sup> its operation might be delayed until after the time for its disallowance has expired. For example, it might be provided that:

<sup>2</sup> For example, a disallowance would not alter the legal effect of a charge that was imposed on a person under the disallowed regulation.

There is thus raised an issue that has been addressed in past Reports. In *Scrutiny Report No 14 of 1999*,<sup>6</sup> the Committee noted that many scrutiny committees operate according to the principle that “[i]t is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so”.<sup>7</sup> This approach reflects the long-standing constitutional position that “the raising and expenditure of public revenue have long been under the control of Parliament”.<sup>8</sup>

Given that proposed subsection 276D(1) appears to confer a discretion on the Treasurer as to whether or not a charge will be imposed, it is open to the objection that the Assembly would in effect have conferred on the Treasurer a power to levy a tax.

There may be no constitutional objection to a law of the Assembly, “whether expressly or by implication, and whether directly or indirectly”,<sup>9</sup> conferring a taxing power on the Treasurer. The strength and longevity of the constitutional principle is, however, such that the Treasurer should offer a justification for proposed subsection 276D(1).

It might be considered that proposed subsection 276D(1) has in effect authorised the levying of a tax, and simply left it to the Treasurer to determine its rate. On this basis, there is still an issue to be raised.

The Senate Committee has accepted that:

[w]here the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations than by enabling statute. If a compelling case can be made for the rate to be set by subordinate legislation, the Committee seeks to impose some limit on the exercise of this power. For example, the Committee will seek to have the enabling Act prescribe either a maximum figure above which the relevant

<sup>6</sup> See too *Scrutiny Report No 5 of 2000*.

<sup>7</sup> This quotation is from Senate Standing Committee for Scrutiny of Bills, *The Work of the Committee during the 37th Parliament May 1993 – March 1996*, (June 1997), at 62. This Committee also said “[t]he vice to be avoided is taxation by nonprimary legislation”.

<sup>8</sup> *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 579 per Brennan J. The basis of the principle is explained simply by McHugh J in *Combet v Commonwealth* [2005] HCA 61 at [44]: “For centuries before the enactment of the Constitution, the Crown conducted the day to day business of government - as theoretically it still does today. But the business of government, ancient and modern, requires access to a continual supply of money. Taxation of the income or property of the subject is an obvious way of raising money for the business of government. Historically, taxation and loans have been the principal means by which governments have raised money. From an early period in the history of English constitutional law, however, the House of Commons insisted on its right to control the levying of direct taxes on the subjects of the Crown and others. It “repeatedly asserted that taxes were not to be imposed without its consent” [Maitland, *The Constitutional History of England*, (1908) at 181.]. By the 17th century, the House of Commons had also insisted on its right to control the levying of indirect taxation [Saunders, “Parliamentary Appropriation”, in Saunders et al, *Current Constitutional Problems in Australia*, (1982) 1 at 2.]. These demands of the Commons culminated in the promulgation of the Bill of Rights 1689 (UK) and its insistence “that levying money for or to the use of the Crown by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal”. As a result, for more than three centuries, a fundamental rule of English constitutional law has been that the Crown cannot levy a tax without parliamentary authorisation [*Attorney-General v Wilts United Dairies Ltd* (1920) 37 TLR 884 at 886.]

<sup>9</sup> Atkin LJ in *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884 at 886.

**Disallowable Instrument DI2011-51 being the Public Place Names (Belconnen) Amendment Determination 2011 (No. 1) made under section 3 of the *Public Place Names Act 1989* amends the notice published in the Commonwealth of Australia Gazette No. P25, dated 31 August 1988, by revoking a specified street name in the Division of Belconnen.**

### Disallowable Instruments—Comment

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

*Has this instrument been validly made?*

**Disallowable Instrument DI2011-48 being the Electricity Feed-in (Renewable Energy Premium) Rate Determination 2011 (No. 1) made under section 10 of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* revokes DI2010-42 and determines that the Premium Rate for Micro Renewable Energy Generators is 45.7 cents per kilowatt hour (exclusive of GST).**

The Committee notes that this instrument is made under section 10 of the *Electricity Feed-in (Renewable Energy Premium) Act 2008*, which provides:

#### **10 Determination of premium rate**

(1) For each financial year, the Minister must, not later than 3 months before the financial year, determine the premium rate for amounts payable by an electricity supplier under section 6 (Feed-in from renewable energy generators to electricity network) during the year.

(2) A determination is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

(3) In making a determination, the Minister—

(a) must seek the advice of the Independent Competition and Regulatory Commission to assist the Minister to determine the premium rate; and

(b) must give priority to the following:

(i) the desirability of costs under this Act impacting equitably on all electricity users;

(ii) the need to encourage the generation of electricity from renewable sources;

(iii) the need to reduce emissions from greenhouse gases;

(iv) the need to reduce the likely effects of climate change;

(v) the desirability of eligible entities being able to recoup investment on renewable energy generators within a reasonable time; and

(c) must have regard to the following:

(i) the amounts payable under this Act by an electricity distributor;

(ii) the amounts payable under this Act by an electricity supplier;

This instrument makes various amendments to the *Public Sector Management Standards 2006*, at least in part as a response to the report by Dr Alan Hawke, titled *Governing the City State: One ACT Government – One ACT Public Service* Report, released on 15 February 2011, which provided 76 recommendations around reforming the ACT Public Service.

Section 5 of the instrument inserts a new Part 2.1 into the Standards, including the following provision:

**7 Consumption of alcohol**

An officer must not drink alcohol while on duty or on government premises during core hours without prior approval of a senior manager on special occasions, like Christmas parties, the Melbourne Cup and farewells.

This amendment seems to prohibit the consumption of alcohol by officers on special occasions (without the prior approval of a senior manager) but does this mean that the consumption of alcohol outside of special occasions is permitted? While the Committee accepts that this might be a far-fetched interpretation of the provision, the Committee notes that the Explanatory Statement for the instrument does not shed any light on this issue, as it does not deal with the new section 7.

Also included in the new Part 2.1 is section 8, which provides:

**8 Alcohol in government vehicles**

- (1) Alcohol must not be carried in or on government vehicles except where prior approval has been given for a special occasion by a senior manager.
- (2) Alcohol must not be consumed in or on a Government vehicle.

The Committee notes that the inconsistent capitalization of the “G” in “Government” is in the original instrument.

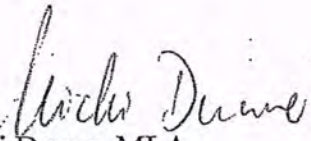
The Committee notes that a later provision in the Standards also deals with the carrying and consumption of alcohol in Government vehicles. Subsection 541(3) of the Standards provides:

- (3) A driver of an ACTPS vehicle must not:
  - (a) smoke in an ACTPS vehicle;
  - (b) consume alcohol in an ACTPS vehicle; or
  - (c) carry alcohol in or on an ACTPS vehicle unless special approval has been given by the relevant Chief Executive.

The Committee seeks the Minister’s advice as to how the two provisions mentioned above are intended to interact. The Committee notes that neither “Government vehicle” (or “government vehicle”) or “ACTPS vehicle” appear to be defined. The Committee also notes that the Explanatory Statement for this instrument is of no assistance in relation to this issue.

- Scrutiny Report 36, concerning the Animal Welfare Legislation Amendment Bill 2011, dated 1 May 2011.

The Committee wishes to thank Ms Le Couteur for her helpful comments.

  
Vicki Dunne, MLA  
Chair

16 June 2011



**ACT**  
Government

Chief Minister and Cabinet

Mr David Dawes  
Director-General  
Economic Development

Dear Mr Dawes

**Scrutiny of Bills and Subordinate Legislation Committee Report  
No 37 of 2011**

I attach for your information the above report that was circulated out of session on Thursday, 16 June 2011 and which is expected to be tabled in the Legislative Assembly on Tuesday, 21 June 2011. An advance copy of the report has been emailed to your agency's Assembly Liaison Officer.

The report contains comments on the Gaming Machine (Club Governance) Amendment Bill 2011 that is administered by the Economic Development Directorate.

Where possible, Government responses to comments regarding Bills should be forwarded to the Committee Chair by the relevant Minister within one calendar month of the Scrutiny Report being tabled in the Assembly, that is by Thursday, 21 July 2011. However, I note that this Bill has been listed for debate in the Assembly on Thursday, 23 June 2011. Therefore, a response should be provided, if possible, before debate of the Bill.

It would be appreciated if a copy of any response made is also forwarded to the Assembly Secretariat (for the Deputy Clerk) at the same time as delivering the response to the Committee Chair. If provided in an envelope, please address it to the Scrutiny of Bills and Subordinate Legislation Committee.

Should there be any queries regarding this matter, please contact me on 62050230 or Kas Paul on 6205 0543.

Sara Burns  
Acting Director  
17 Cabinet & Intergovernmental Relations

June 2011