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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

LEGISLATION AMENDMENT BILL 2002

EXPLANATORY MEMORANDUM

Circulated by the authority of
Jon Stanhope MLA
Attorney-General

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Legislation Amendment Bill 2002

General Outline

Background

1 The Legislation Amendment Bill 2002 completes the establishment of the legislative framework for the Public Access to Legislation project. It will complete the framework by—

(a) including in the *Legislation Act 2001* the remaining provisions of the *Interpretation Act 1967* (in updated form) and the provisions of the *Administration Act 1989* and the *Statutory Appointments Act 1994*; and

(b) making consequential amendments of other Acts; and

(c) providing for the repeal of the Interpretation Act, the Administration Act and the Statutory Appointments Act.

2 Under the Public Access to Law project—

(a) the ACT legislation register (an approved Internet website at www.legislation.act.gov.au) has been in operation since 12 September 2001; and

(b) ACT legislation is being published on the legislation register (more than 50% of current ACT Acts and subordinate laws have already been republished at least once in fully, up-to-date, authorised form on the register);

(c) information about ACT legislation is being published regularly on the legislation register (a legislation update table and 'what's new' service are currently published weekly); and

(d) new and amending legislation is being notified on the legislation register; and

(e) bills and explanatory statements have been published on the legislation register since the beginning of the current Legislative Assembly; and

(f) most of the provisions dealing with the 'life cycle' of ACT legislation have been clarified updated, simplified where practicable, and brought together in a single Act (the *Legislation Act 2001*).

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3 The ‘life cycle’ of legislation includes the making (where relevant), notification, commencement, tabling and disallowance (where relevant), operation, interpretation, proof, republication, amendment and repeal of legislation and instruments made under legislation.

4 When the Legislation Act was enacted, its provisions superseded—

- many of the provisions of the *Interpretation Act 1967*
- the *Subordinate Laws Act 1989* and the *Legislation (Republication) Act 1996*
- the provisions of the *Evidence Act 1971* about legislation.

The *Subordinate Laws Act 1989* and *Legislation (Republication) Act 1996* were, therefore, repealed by the *Legislation (Consequential Provisions) Act 2001*.

5 The *Statute Law Amendment Act 2001* subsequently transferred most of the remaining provisions of the Interpretation Act to the Legislation Act. The Legislation Amendment Bill 2002 represents the final stage of transferring provisions from the Interpretation Act to the Legislation Act and therefore provides for the repeal of the Interpretation Act. Although most of the provisions of the Interpretation Act will be reproduced in the Legislation Act, some will be transferred elsewhere (see the comments below in relation to clause 30).

6 The Legislation Amendment Bill 2002 also proposes to repeal the *Administration Act 1989* and the *Statutory Appointments Act 1994* and transfer their provisions to the Legislation Act. As a result, the Legislation Act will also bring together the general legislative provisions about statutory appointments and the exercise of functions by the Executive (including the making of statutory instruments).

Purpose

7 The Bill continues the process of bringing together, clarifying, updating and, where practicable, simplifying the legislation dealing with the 'life cycle’ of ACT legislation. Most of the enhancements made by the Bill are of a technical nature. There are however, 3 noteworthy issues relating to statutory interpretation dealt with by the Bill.

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8 First, the Bill deals more fully with the status of Legislation Act provisions, particularly their application and displacement. Some of the provisions of the Act will be declared to be 'determinative' provisions. The idea, essentially, is that these provisions will deal with subjects of such importance to our system of government and law that they should not be readily set aside under other legislation (for example, the requirement that newly-made laws should be publicly notified). Traditionally rules of this kind have been set down in interpretation legislation subject to displacement if a 'contrary intention' is found in another Act. The problem is that in some cases it may be easy to 'find' a contrary intention where none was intended by the legislature.

9 In seeking to protect these important principles, the Bill recognises that the Legislative Assembly cannot bind successor Assemblies except through constitutionally entrenched provisions under the Self-Government Act, section 26. In other words, the Legislation Act is subject to amendment and repeal by the Legislative Assembly, and that the Assembly is free to choose the form of that amendment or repeal. On the other hand, the preservation of important values embodied in the Legislation Act requires that certain provisions of the Act should not be lightly set aside.

10 In addition, as the Legislation Act underpins the ACT statute book and ACT legislative drafting practice, the achievement of legislative policy with a reasonable degree of certainty is based, at least in part, on the ability of policy developers, drafters, law makers and users of legislation to be able to rely on provisions of the Legislation Act with confidence. If important provisions of the Legislation Act cannot be relied on in drafting, enacting and interpreting ACT legislation, the contribution that the Legislation Act can make to the simplification and accessibility of ACT laws will not be realised.

11 Second, the Bill restates in an updated form some of the basic principles of statutory interpretation. The provisions about statutory interpretation have been revised to reflect significant developments in statutory interpretation made by the courts since the existing provisions on which they are based were included in the Interpretation Act almost 20 years ago. However, in permitting the discretionary, unrestricted use of extrinsic materials proposed section 142 anticipates developments that may happen at common

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law. These issues are further discussed below in relation to proposed new chapter 14 (Interpretation of Acts and statutory instruments).

12 The 3 substantive interpretive provisions proposed to be included in the Legislation Act are as follows:

(a) proposed section 140, which deals with the *purposive approach* to the interpretation of legislation;

(b) proposed section 141, which deals with legislation being read in the context of all of its provisions;

(c) proposed section 142, which deals with the use of *extrinsic materials* (that is, materials not forming part of the legislation eg Hansard, explanatory memoranda, committee reports, treaties etc) in the interpretation of legislation.

13 These proposed sections are the only recent restatement in Australia of some of the fundamental rules of statutory interpretation. The sections do not represent a dramatic change in the rules of statutory interpretation, but take into account developments in the common law that have happened since the existing provisions were enacted in the 1980's. Overall, the effect of the common law developments has been to firmly establish the purposive approach to the interpretation of legislation, to stress the importance of legislation being read in context (including in the context of all its provisions), and to make obsolete many of the statutory restrictions applying to the use of extrinsic materials. The proposed sections are consistent with all of these developments in the common law.

14 Third, the Bill inserts new provisions (proposed sections 170 and 171) confirming the application of the common law privilege against selfincrimination and legal professional privilege. They will require Acts and statutory instruments to be interpreted to preserve these privileges and remove any need to restate expressly in individual Acts that the privileges have been preserved. The new provisions are stated to be 'determinative provisions' under proposed new section 5 (see the discussion below in relation to clause 6). There are 2 main reasons for this proposal:

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- to remove any doubt about the continuing application of the privileges to ACT laws that do not expressly deal with the issue; and
- to ensure that, if the important principles represented by the privileges are to be displaced by legislation, the legislation doing so must make an express statement displacing the privileges, or demonstrate a manifest intention to do so.

The new provisions will help ensure that the privileges are not inadvertently displaced and that cases in which they are sought to be displaced will be subject to Legislative Assembly scrutiny.

15 The privileges against exposure to forfeiture and ecclesiastical censure have also been considered. These have traditionally been associated with the privileges against selfincrimination and exposure to a penalty. The privilege about forfeiture relates to an estate in land such as a lease. The effect of this privilege is that a lessee could not be obliged to reveal documents or disclose information that would have the tendency to establish liability to forfeiture of the lease (for example, by showing that a covenant of the lease had been breached). A leading author in this field (McNicol S. B., *Law of Privilege* (1992) at p 202) indicates that in the ACT the privilege was abolished in civil proceedings by the *Evidence Act 1971*, section 95 (1). The *Evidence Act 1971* has now been largely displaced by the *Evidence Act 1995* (Cwlth), which deals comprehensively with privilege in part 3.10. *Cross on Evidence*, *Australian Edition* (para 25130) says that the privilege appears to have been impliedly abolished in ACT courts following the enactment of the Commonwealth Evidence Act, section 128. That section provides for a narrower range of privilege.

16 The privilege against exposure to ecclesiastical censure relates to various sanctions formerly imposed by courts exercising ecclesiastical jurisdiction on both clergy and lay people. Holdsworth points out that in the period after the Conquest the ecclesiastical courts exercised a wide and vague control over religious beliefs and morals (*A History of English Law*, 7th rev edn, pp 616 and 619). This included such things as adultery, sorcery, swearing and other subjects now dealt with under the general law such as bigamy, defamation, and perjury. After 1660, however, the jurisdiction gradually fell

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into disuse. In *Phillimore v Machon* (1876) 1 P D 481 an unsuccessful attempt was made to revive the jurisdiction in proceedings relating to a false oath. Lord Penzance noted (at 487) that counsel had been unable to cite any instance of a similar suit within the last 200 years. He said (at 489) that, if the jurisdiction has not expired, it had long slumbered in peace. Despite this, in *Redfern v Redfern* [1891] P 139, Bowen LJ affirmed the availability of the privilege at least where the requirement to answer a question would tend to prove a person guilty of adultery (McNicol indicates that so far as adultery is concerned, the privilege has been abolished in the ACT, p 203). Later decisions have confined *Redfern v Redfern* to the particular provisions of the divorce legislation before the court and expressed the view that the jurisdiction of the ecclesiastical courts must now be treated as obsolete. In *Elliott v Albert* [1934] 1 KB 650 at 666 Maugham LJ regarded the possibility of ecclesiastical censure as a 'fanciful' suggestion. In *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 at 257 Goddard LJ regarded it as 'purely fantastic' to suppose that a person not in holy orders might be exposed to ecclesiastical penalties. While the third edition of Halsbury's Laws of England (the relevant title being published in 1955) indicates that the power of ecclesiastical courts to 'correct' lay persons guilty of moral offences has fallen into disuse, the fourth edition significantly makes no reference to the subject at all. So far as the law of Australia is concerned, *Ex parte The Reverend George King* (1861) 2 Legge 1307 held that English ecclesiastical law had no force in New South Wales. However, Mortensen says that in the so-called *Red Book Case*, Roper CJ Equity in the NSW Supreme Court and Dixon in the High Court both suggested that an Anglican establishment had been received but that on the grant of responsible government the then Church of England became disestablished ('Church Legal Autonomy' (1994) 14 Qld Lawyer 217 at 219). McNicol (at 202) says it is very doubtful whether the privilege against self-exposure to ecclesiastical censure applies in Australia today. Strong support for the view that recognition of this privileges in modern Australia is not justified may be found in the judgment of Justice Murphy in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 345-345, although his finding on these points was not needed for this particular case. Finally, the view expressed by *Cross on Evidence, Australian Edition* (par 25130) about the implied repeal of the privilege against exposure

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to forfeiture by the *Evidence Act 1995* (Cwlth), section 128 also seems to apply to the privilege against exposure to ecclesiastical censure.

17 The privileges against exposure to forfeiture and ecclesiastical censure would, therefore, seem either to have no place in the common law or so little potential application as not to require express preservation by the Legislation Act.

Notes on clauses

Clause 1

18 This clause provides for the Bill's name.

Clause 2

19 This clause provides for the Bill's commencement.

20 It should be noted that subclause (1) provides for the commencement of the Bill on the day after the day it is notified under the Legislation Act. This represents a change in the previous practice of commencing bills on their notification day (unless a retrospective commencement is justified or a prospective commencement is needed). This changed practice is explained in relation to amendments made by clauses 12 and 13.

21 Subclause (2) allows for the consequential amendment of provisions of other Acts that have not yet commenced (see eg the amendments of the *Workers Compensation Act 1951* in schedule 2).

Clause 3

22 The Act is expressed to amend the *Legislation Act 2001*. However, clause 29 provides for the consequential amendment of the Acts mentioned in schedule 2 and clause 30 provides for the repeal of the *Administrative Act 1989*, the *Interpretation Act 1967* and the *Statutory Appointments Act 1994*.

Clause 4

23 Proposed chapter 14 would enlarge the existing scope of the Legislation Act by including provisions about the interpretation of Acts and statutory instruments (that is, instruments made under Acts). Clause 4, therefore, revises Legislation Act, section 5 to reflect this

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enlarged scope of the Act as amended (see proposed subsections (2) (c) (iii) and (3). The opportunity has also been taken to spell out in greater detail the scope of the Act generally (see proposed subsection (3)). The amendment does this by introducing the concept of the 'life cycle' of legislation as a convenient, shorthand term for the area of the Legislation Act's operation.

Clause 5

24 The proposed renumbering of sections 3, 4 and 5 is intended to allow new sections to be inserted in part 1.1 and at the same time keep, as far as possible, the normal numbering of provisions. Under the Legislation Act, section 89 (4), section 2 (Commencement) has already been repealed.

Clause 6

Proposed sections 4, 5 and 6

25 This clause remakes existing section 6 as section 4 and inserts new sections 5 and 6. Proposed sections 4, 5 and 6 are intended to clarify the relationship between the Legislation Act and other Acts and statutory instruments. Proposed section 4 describes, in general terms, the relationship between the Legislation Act and the statute book as a whole. Proposed section 5 defines the concepts of 'determinative' and 'non-determinative' provisions. Proposed section 6 uses these concepts to provide a rule about the interaction between particular provisions of the Legislation Act and those of other Acts and statutory instruments. It should, however, be noted that the provisions of the Legislation Act apply to itself (see next paragraph).

Proposed section 4 Application of Act

26 Proposed section 4 differs from existing section 6 in 2 ways. First, section 4 (1) expressly provides that the Act applies to itself. This confirms, for example, that provisions such as Legislation Act, section 97 apply to the Legislation Act itself in the same way as they apply to other Acts. The effect of section 97 (1) is that if an Act refers generally to 'an Act' the reference includes the Act itself. Some examples of this confirmed operation of section 4 are as follows:

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- the Legislation Act may be republished under chapter 11 (Republication of Acts and statutory instruments)
- the requirements of chapter 7 (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) apply to regulations made under the Legislation Act itself.

27 Second, section 4 (2) is included to emphasise the fundamental significance of the Legislation Act to the ACT statute book as a whole. It is not simply that the Legislation Act (like interpretation Acts in other jurisdictions) enables enactments to be shortened (and simplified) because of the definitions and other provisions it contains. Bills and instruments (particularly those prepared in the Parliamentary Counsel's Office) are always drafted with the provisions of the Legislation Act in mind. In effect, the Legislation Act does not simply operate into the future in its relationship with other Acts and instruments, it also reaches back, as it were, to the very earliest stages of the drafting process. No ACT Act or statutory instrument can be properly understood in isolation from the Legislation Act.

28 The examples to section 4 (2) are intended to illustrate some of the possible ways in which the Legislation Act complements other Acts and instruments. The relationship may arise from a simple definition (see example 1) or it may be a network of provisions supporting administrative arrangements such as fees for an Act (see example 2). In both cases, the Legislation Act may be seen as reaching out across the statute book and intersecting with every ACT Act and statutory instrument.

29 Section 4 (3) identifies the section as a 'determinative provision' (see proposed section 6 discussed below).

Proposed section 5 Determinative and non-determinative provisions

30 This proposed section defines the concepts of determinative and non-determinative provisions. These concepts are used in proposed section 6. The definitions of ***determinative provision*** and ***non-determinative provisions*** in proposed section 5 (2) and (3) together have the effect of providing that a determinative provision

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is identified, and may only be identified, by express declaration. See, for example, proposed section 4 (3), which provides:

(3) This section is a determinative provision.

This will make the task of identifying determinative provisions an easy one. A determinative provision will always contain a provision like proposed section 4 (3). To assist Legislation Act users, a note referring to sections 5 and 6 appears next to each of these provisions (other than in section 6 itself).

Proposed section 6 Legislation Act provisions must be applied

31 Proposed section 6 uses the concept of determinative and non-determinative provisions to define further the relationship between the Legislation Act and the rest of the ACT statute book.

32 Proposed section 6 (1) provides that a provision of the Legislation Act must be applied to an Act or statutory instrument, in accordance with the terms of the provision, except so far as it is displaced. The subsection complements the provision made by section 4 (2) that Acts and statutory instruments are taken to be made on the basis that they operate in conjunction with this Act.

33 There are several features of section 6 (1) that should be noted. First, the subsection uses mandatory, and not directory language, to express the Legislative Assembly's intention embodied in it (see Legislation Act, section 146 (2)). Second, although the subsection would normally be relevant to Acts other than the Legislation Act, the subsection must also be applied to the Legislation Act itself (see Legislation Act, sections 4 (1) and 97 (1)). Third, the reference in section 6 (1) to a provision of the Legislation Act being applied in accordance with its terms is a reference to the fact that the provision may not, in its terms, be applicable to the Act or statutory instrument to which it is sought to be applied. The reference is not intended to suggest that the provisions of proposed chapter 14 (Interpretation of Acts and statutory instruments) do not apply to Legislation Act provisions and, in particular, that Legislation Act provisions are not to be read in the context of the Legislation Act as a whole (see proposed section 141). Finally, the subsection acknowledges that Legislation Act provisions may

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be displaced either completely or partly. However, except so far as they are displaced, they must be applied in accordance with their terms. When, how, and the extent to which, a Legislation Act provision may be displaced is dealt with in the following provisions of section 6.

34 Traditionally, interpretation Acts have contained provisions laying down rules that are expressed to be subject to a 'contrary intention'. In other words, the rule in an interpretation Act is intended to apply presumptively unless another law contains a provision indicating that the interpretation Act provision is not intended to apply in a particular case. In the past, some provisions of the *Interpretation Act 1967* have been expressed to be subject to a contrary intention while others have made no reference to the matter. More recently, the Interpretation Act has been amended to remove the scattered references to contrary intention and insert the following general provision:

> **3 Displacement of Act by contrary intention**
>
> This Act applies to an Act except so far as the contrary intention appears in this Act or the Act concerned.

Section 6 is intended to build on this practice and move another stage forward.

35 A number of existing provisions of the Legislation Act imply that more is required to displace their operation than for other provisions. For example, contrast section 146 (4) and (5) (Meaning of ***may*** and ***must***). Section 146 (5) indicates that the application of the section to certain laws and instruments is subject to a 'contrary intention'. On the other hand, section 146 (4) provides that it applies to other laws unless the law 'expressly provides' that section 146 does not apply. Similar language is used in other provisions (see, for example, sections 44 (3), 47 (1) (b) (i), 47 (4)(b), 75 (2), 79 (2), 84A (4), 92, 132 (4), 133 (2), 179 (3), 231 (2) and 236 (2)). Further analysis of these provisions suggests that reliance on 'express' provision alone would unjustifiably narrow the appropriate scope for displacement having regard to the concept of parliamentary sovereignty.

36 Accordingly, section 6 (2) provides for the displacement of a determinative provision expressly or by 'manifest contrary intention' while section 6 (3) provides for the displacement of a non-determinative provision expressly or by 'contrary intention'.

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37 The term ‘manifest’, which is used in relation to the displacement of determinative provisions, is intended to signify a contrary intention that is clearly deliberate, that is, the displacement is by unmistakable and unambiguous language. In other words, if there is any reasonable doubt whether the contrary intention exists, the determinative provision should be taken not to have been displaced. Usages of the term ‘manifest’ in other areas of the law have been considered. In particular, the following passage from the joint judgment of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v R* (1994) 179 CLR 427 at 437 is of particular relevance:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be *clearly manifested by unmistakable and unambiguous language*. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights. (emphasis added)

38 Similarly the concept of displacement by ‘necessary implication’ has also been considered (used, for example, by the High Court in a number of cases considering the privilege against selfincrimination and legal professional privilege). The ‘manifest contrary intention’ required to displace a determinative provision is intended to be stronger than an indication of a ‘necessary implication’.

39 The Bill therefore divides the provisions of the Legislation Act into 2 groups—

- first, those that are to be applied except so far as displaced by express provision or manifest contrary intention (identified in the Legislation Act by being expressly declared to be ‘determinative provisions’); and
- second, those that are to be applied except so far as displaced by express provision or a contrary intention (the remaining Legislation Act provisions).

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40 To enable these changes to be implemented throughout the Act, a number of consequential amendments are provided in schedule 1. First, each reference in a provision to the effect that it is displaced by another law that makes express provision to the contrary has been omitted and the provision amended to declare that it is a determinative provision. Second, express references to 'contrary intention' have been omitted from the Act, because they are no longer required.

41 Although it might seem to follow that determinative provisions are somehow more 'fundamental' to the scheme of the Legislation Act than provisions displaced by a contrary intention, this is not necessarily the case. For example, the rationalisation across the ACT statute book that follows from the use of standard definitions in the dictionary, part 1 is an important feature of the operation of the Legislation Act. But the nature of definitions is such that a 'contrary intention' seems to be the most appropriate displacement mechanism. However, even if the determinative provisions may properly be described, on the whole, as 'more fundamental' to the scheme of the Legislation Act than the other provisions, the fact remains that all the provisions of the Legislation Act have the force of law. The distinction between determinative and non-determinative provisions is simply that non-determinative provisions may be more readily displaced than determinative provisions. Proposed section 6 (4) is intended to emphasise that the distinction between the 2 kinds of provisions lies in the degree of 'deliberation' required to displace them.

42 Proposed section 6 (5) expressly provides that the section applies despite any presumption or rule of interpretation (see also the comments about proposed section 6 (7), which deals with the non-application of a particular rule of interpretation).

43 Proposed section 6 (6) is intended to create a presumption in favour of the concurrent operation of a Legislation Act provision to the maximum extent possible, whether the provision is a determinative or non-determinative provision.

44 Section 6 (7) is an extension of this presumption. It is included to exclude the strict application (in this context) of the common law rule of statutory construction '*expressio unius est exclusio alterius*' ('the expression of one is the exclusion of the other'). That rule might otherwise have created a contrary presumption to the effect that the treatment

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of an aspect of a subject matter in a provision of an Act or statutory instrument impliedly excluded the treatment of another aspect of the same (or similar) subject matter in a provision of the Legislation Act, simply by not mentioning it. As with section 6 (6), section 6 (7) applies to any provision of the Legislation Act, whether determinative or non-determinative.

45 By proposed section 6 (8), section 6 itself is declared to be a 'determinative provision', requiring an express statement or manifest contrary intention in an Act or statutory instrument for its displacement.

46 To assist Legislation Act users further, 4 examples appear at the end of section 6. The examples illustrate the different kinds of displacement and how the provisions about non-displacement work.

Clause 7

47 The Legislation Act, section 19 deals with the contents of the ACT legislation register. Section 19 (3) presently authorises the parliamentary counsel to enter additional material in the register if the parliamentary counsel considers that it is likely to be useful to users of the register. The clause inserts a new subsection (4A) into section 19 to make it clear that the parliamentary counsel can enter the additional material in the register in any way the parliamentary counsel considers is likely to be helpful to users of the register. To simplify the operation of the register for users, it has been found necessary to deal with some additional material within existing categories of material on the register rather than adding further categories to deal with it. The examples to proposed section 19 (4A) illustrate the proposed operation of the subsection. The amendment will assist in ensuring that the widest range of material is made available on the ACT legislation register. Wherever necessary, notes will be included in the register to clearly indicate the status of any additional material included in the register and avoid any possible confusion by register users.

Clause 8

48 Clause 8 remakes section 45, which deals with the power to make rules of court. In its present form, section 45 has a limited operation. The replacement section enhances the

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operation of the section in the following respects. First, the replacement section does not require an express power to make rules of court for particular legislation for the section to operate in relation to the legislation. Instead the power to make rules of court comes from the vesting of jurisdiction by the legislation. Under the section the power to make rules of court extends to making rules with respect to any matter necessary or convenient to be prescribed for carrying out or giving effect to the court's jurisdiction under the legislation. Second, the section applies to the making of rules for tribunals as well as courts. Third, proposed subsection (2) clarifies the relationship between the section and the general power under the Legislation Act, section 44 to make statutory instruments (including rules) for an Act or statutory instrument. Fourth, proposed subsection (3) declares the section to be a determinative provision (see proposed section 6 discussed above). Finally, the replacement section extends to making rules of court for jurisdiction given by Commonwealth laws as well as ACT laws. Overall, the replacement section will remove the need to extend rule-making powers to deal expressly with additional jurisdiction given by ACT and Commonwealth laws.

Clause 9

49 Clause 9 amends section 46 to deal with a possible practical problem arising out of the operation of the ACT legislation register. One of the features of the register is the ready availability of statutory forms that people are required to use in dealings with government or the courts. To enable the register to work effectively in relation to forms, clause 9 amends section 46 to require registrable forms to be remade with any changes rather than simply being amended. If it were possible to amend forms, users of the register who wanted to find out the current form to be used would need to—

- search for the current form on the register; and
- search for any amendments of the form; and
- revise the form to take account of any amendments.

The amendment made by the clause will ensure that users can continue to go to the current version of the form on the register and use it with confidence.

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50	Proposed section 46 (3) provides that section 46 is a determinative provision. This means that the rules laid down by section 46 (1), (2) and (3) cannot be changed except as indicated in proposed section 6 (2).

Clause 10

51	Clause 10 remakes section 47. While the initial reason for remaking the section was to accommodate the introduction of the concept of determinative provisions (see proposed sections 5 and 6), the opportunity has also been taken to incorporate a number of minor improvements in the section.

52	Although proposed section 47 extends over nearly 3 pages of text, its essential purposes can be described quite simply. It is intended—

- to regulate the circumstances in which a law or instrument made by one entity may be adopted as the law or instrument of another entity; and
- to provide access to the text of the adopted law or instrument.

53	Why adopt a law or instrument? In some circumstances it is simpler to adopt someone else's law or instrument rather than remake it. For example, in some technical areas such as aircraft maintenance it is easier to require an airline to comply with the manufacturer's voluminous service manuals and related documentation (including periodic updates) than seek to reproduce the detail of the requirements directly in a law or instrument. A second reason to adopt a law or instrument is to achieve a uniform national approach to dealing with a common problem. See, for example, the *Consumer Credit Act 1995* which adopts the Consumer Credit Code from the *Consumer Credit (Queensland) Act 1994* (Qld). And even for so-called technical areas, it may be desirable for various reasons (eg safety) to use adoption to ensure that things like aircraft maintenance are done in a uniform way throughout Australia (and perhaps internationally).

54	Although there may be good practical reasons to adopt a law or instrument, there are also a number of policy issues relevant to the adoption of laws and instruments from another source. If the law or instrument is adopted on the basis that future changes will automatically apply, this means that the entity who makes the changes becomes a

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‘lawmaker’ not only where the law or instrument originally applied but also where it has been adopted. To this extent the Legislative Assembly is by-passed. The same problem does not arise, however, if the Legislative Assembly chooses to apply one of its own laws to operate in relation to another subject. Consider, for example, the application of provisions of the *Electoral Act 1992* by the *Referendum (Machinery Provisions) Act 1994*. Similarly, if a law or instrument is adopted as in force at a particular time (with perhaps the Legislative Assembly or a person authorised by the Assembly making future changes), the lawmaking role and function of the Assembly is not compromised. Another important policy consideration is that the adopted law or instrument needs to be accessible to those affected by it. These policy considerations are reflected in existing section 47 and its proposed replacement.

55 Proposed section 47 (2) provides, in effect, that an ACT law (see the definition of ***ACT law*** in proposed section 47 (10)) may be applied as in force at a particular time or as in force from time to time. (The way in which a law or instrument might be applied as in force ‘from time to time’ is illustrated in example 2 to section 47 (9).)

56 On the other hand, proposed section 47 (3) provides that a law from another jurisdiction, or an instrument not subject to Assembly scrutiny, may only be applied as in force at a particular time (see the definitions of ***law of another jurisdiction*** and ***instrument*** in section 47 (10)). Because of section 47 (9), section 47 (3) is a determinative provision. In other words, bearing in mind the policy issues already mentioned, the rule in section 47 (3) will always apply unless an Act, subordinate law or disallowable instrument expressly excludes it in a particular case or indicates a ‘manifest’ intention that another inconsistent rule is to apply.

57 Proposed subsection (4) provides a default rule for the operation of proposed subsection 47 (3). Unless subsection (3) is displaced, an instrument (the ***applying instrument***) that applies a law of another jurisdiction or an instrument as in force at a particular time is taken to apply the law or instrument as in force at the time the applying law is made. Proposed subsection (4) includes an example of its operation.

58 Proposed section 47 (5) and (6) lay down a number of requirements to ensure that the policy requirements for accessibility are satisfied whether the law or instrument is

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applied as in force at a particular time (see section 47 (5)) or as in force from time to time (see section 47 (6)). In each case the law or instrument is taken to be a notifiable instrument. If the law or instrument applies as in force from time to time, each amendment of the law or instrument is also a notifiable instrument. Similarly, if the law or instrument is remade and further amended, or is remade in another law or instrument, the law as remade and amended will also be a notifiable instrument. These requirements about notification apply subject to any displacement or modifications provided by the 'authorising law' (see section 47 (1)) or, if the 'relevant instrument' (see section 47 (1)) is a subordinate law or disallowable instrument, the relevant instrument (see section 47 (7)). This means that the requirements may be displaced or applied in a changed way. However, the displacement or changed application is subject to scrutiny by (and justification to) the Legislative Assembly. Again, section 47 (5) and (6) are determinative provisions because of section 47 (9).

59 Proposed section 47 (8) makes it clear that a power to apply a law or instrument authorises the making of changes or modifications to the law or instrument as it is applied. Accordingly, it is not necessary to expressly provide this power in the 'authorising law' (see section 47 (1)).

Clause 11

60 Clause 11 amends section 61 to deal with another practical problem arising out of the operation of the ACT legislation register. Section 61 is about the notification of registrable instruments. Section 61 (2) requires the parliamentary counsel to notify the making of a registrable instrument if—

- the maker of, or appropriate person for (see section 61 (9)), the instrument asks the parliamentary counsel to notify the making of the instrument; and
- the person complies with the requirements prescribed under the regulations.

61 Many of the requirements prescribed under the regulations are technical requirements relating to the form of the instrument itself (see *Legislation Regulations 2001*). These requirements are designed to enhance the accessibility of instruments available on the register, but do not go to matters that are fundamental to the register's operation.

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Accordingly, proposed section 61 (8A) will make it clear that the parliamentary counsel has a discretion to notify an instrument even though a prescribed requirement has not been complied with. Proposed section 61 (8B) complements this by making it clear that failure to comply with a prescribed requirement in relation to a registrable instrument does not affect the validity of the instrument's notification. Proposed section 61 (8C) identifies the section as a 'determinative provision' (see proposed section 6 discussed above).

Clauses 12 and 13

62 These clauses amend the general rules in section 73 about commencement. For Acts and registrable instruments (that is, instruments required to be notified on the ACT legislation register), the section presently provides a default commencement of the notification day of the Act or instrument. (The default commencement applies in the absence of a provision providing for a later or earlier commencement.) This default commencement is consistent with the position that previously applied under the Interpretation Act and before 1999 under the Self-Government Act.

63 In addition to this default commencement, the Legislation Act, section 74 provides that, if an Act commences on a day, it commences at the beginning of the day. The section is consistent with the position that generally applies under interpretation legislation and reflects the common law rule that the law does not generally recognise parts of a day. According to the common law rule a part of a day is generally counted as the whole day. Under the rule, for example, if something is done on a day, it is taken to have been done for the whole of a day.

64 The interaction of the existing default commencement in section 73 and the time of commencement under section 74 creates a practical issue for users of the ACT legislation register. This issue, which has always existed, has been made more acute by the instant access to the law provided by the register. The issue can best be illustrated by an example. If someone searches the register at some time on a day for the law about bail applying under the *Bail Act 1993*, the person cannot be certain that an Act amending the Bail Act will not be notified later that day (particularly if a bill has been passed by the

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Legislative Assembly and is awaiting notification). If an amending Act is in fact notified later that day and does not have a postponed (or retrospective) commencement, the amending Act operates back to the first moment of that day. In theory at least, notification of the amending Act may alter the legal effect of something done in reliance on the then existing law earlier in the day. Even if this is not the case, it is not satisfactory that a person cannot rely on a search made of the legislation register on a day to work out with confidence their rights and liabilities on that day. The issue is particularly acute with subordinate laws because they are generally not made after a public process (unlike Acts).

65 To deal with this issue, clauses 12 and 13 propose to amend section 73 to change the default commencement of Acts and registrable instruments to the day after the day they are notified under the Legislation Act. This legislative change will be supported by a change to the standard commencement provisions used in ACT legislation. These will be changed to provide, in relevant cases, for commencement on the day after the day of notification rather than the day of notification.

Clause 14

66 Clause 14 revises section 74 to recognise that an Act or statutory instrument may commence at a time on a day other than the first moment of a day. For example, an Act may provide that it commences at 8 pm on a day. Although the cases in which an Act or statutory instrument would commence at another time on a day are likely to continue to be rare, they nevertheless arise from time to time.

Clause 15

67 Very often legislation allows for its provisions to come into operation at different times. It is also not uncommon for Acts to contain provisions (***commencement provisions***) that authorise the Minister to fix a future date or time for most of the provisions of the Act to commence. To ensure that the commencement provision is itself in operation so its powers are available, the Legislation Act, section 75 (1) provides in effect that the commencement provision of a law comes into operation when the making of the law is notified. Section 75 (1) also provides in effect that the provision of a law that gives it its

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name commences at the same time. (In the case of an Act, this is the section that reads, for example, 'This Act is the *Electoral Amendment Act 2000*.'.) Because these provisions cannot affect rights and liabilities, the Bill does not propose to change the time of their commencement.

68 Sometimes an Act provides that 1 or more of its provisions are to commence retrospectively. For example, an Act passed by the Legislative Assembly on 9 August 2001 and notified in the following week might provide that a provision is taken to have commenced on 1 July 2001. In this situation, it would seem strange for one part of the Act to be in force while the name and commencement provisions of the Act had no legal effect. Proposed section 75 (2) therefore provides that, if any provisions of a law commence retrospectively, the name and commencement provisions commence when the earlier or earliest of the retrospective provisions commence. The operation of this provision is illustrated by an example at the end of section 75 (2).

69 Proposed section 75 (3) provides that section 75 is a determinative provision. This means that the rules laid down by section 75 (1) and proposed section 75 (2) cannot be changed except as indicated in proposed section 6 (2).

Clause 16

70 Clause 16 amends section 77, which deals with commencement by commencement notice. The clause makes the following amendments of section 77. First, the clause revises the language and coverage of section 77 to bring it more closely into line with the definition of ***commencement notice*** in section 11. Second, the clause amends the section consequentially on the default commencement proposed by clauses 12 and 13. Third, the clause amends the section to recognise cases in which a commencement notice commences a law or notifiable instrument at a time earlier than the time applying under the default commencement. These cases are likely to be very rare, and can only happen under specific authority given by an Act. Finally, the amendment includes a subsection declaring the section to be a determinative provision (see proposed section 6 discussed above).

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Clause 17

71 Clause 17 remakes section 85, which deals with when a repeal takes effect. Under the current section a repeal takes effect at the end of the day when the repeal happens. This rule is appropriate for cases in which a law is repealed and not replaced. However, it is not satisfactory in cases in which a law is repealed as part of its remaking. In these cases the rule results in the repealed law and the remade law both operating in the day when the remade law commences. To avoid this result, replacement section 85 provides that in these cases the repeal takes effect when the remade law commences.

Clause 18

72 Clause 18 remakes Interpretation Act, section 7. Section 7 deals with the binding effect of Acts.

73 It is assumed that Acts of the Legislative Assembly are binding on all residents and others who find themselves in the ACT. Not so many years ago, however, it was understood that an Act would not bind the government itself (or the 'Crown' as it was often described) unless the Act expressly provided or necessarily implied that this was its intention. However, because of a decision in the High Court in 1990 (*Bropho v Western Australia* 171 CLR 1), the States and Territories reconsidered the matter and the ACT enacted rules that more or less reversed the previous understanding of the law. Proposed section 121 would have substantially the same effect as existing section 7 except that the proposed section refers primarily to 'government' (a more generally understood concept) rather than the 'Crown'. While the Crown was once said to be 'indivisible', the reality of the Australian federal system is that the administration of the ACT must take account of the activities (including business activities) of the Commonwealth, States and other Territories. The opportunity has been taken in remaking section 7 to clarify what acts and omissions of government employees and contractors etc (***government entities***) are covered by any immunity of the government (see definitions of ***authorised*** and ***government entity*** in proposed section 121 (6)). Proposed section 121 (5) provides that section 121 is a determinative provision (see proposed section 6 discussed above).

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Clause 19

Background to new chapter 14

74 As part of the process of relocating provisions from the Interpretation Act to the Legislation Act, the enacted law relating to statutory interpretation has been restated to make it clearer and more coherent. The new provisions also take account of recent court decisions about statutory interpretation.

75 To place these provisions in context it may be helpful to say something about the respective roles of the courts and the Legislative Assembly in the area of statutory interpretation. Under our system of government and law it is not only the role but also the constitutional duty of the courts to decide the meaning of legislation; in Marshall CJ's memorable phrase, 'to say what the law is' (*Marbury v Madison* (1803) 1 Cranch 137 at p 177 [5 US 87 at p 111], mentioned with approval in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at p 35 per Brennan J). However, it has long been accepted that a Parliament can make rules about the interpretation of its statute book. Interpretation Acts have had a long history in Anglo-Australian law and in some cases their rules have negated common law rules (see Pearce and Geddes, *Statutory Interpretation in Australia* 5th ed (2001), par 6.14). But from time to time it has been asked whether Parliament might do more to ensure that the words of its legislation are understood in the way it intended. In the 1980s most Australian jurisdictions, including the ACT (see Interpretation Act, section 11B), liberalised rules about the use of extrinsic materials (materials beyond the Act concerned). Also in that period, most Australian jurisdictions, including the ACT (see Interpretation Act, section 11A) also laid down rules clarifying the status of a purposive construction: requiring it to prevail over a construction that did not promote the statutory purpose or object. Even where legislation seeks to confirm an existing common law rule, enactment of a rule in interpretation legislation can play a useful educative role: it can send a strong message to statute users that legislation is drafted with this assumption particularly in mind.

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Proposed section 137 Meaning of ***Act*** in ch 14

76 Chapter 14, as its heading indicates, applies to the interpretation of both Acts and statutory instruments. But to simplify the language of the chapter as far as possible, proposed section 137 defines 'Act' to include a statutory instrument.

Proposed section 138 Purpose and scope of ch 14

77 Proposed section 138 (1) states that the purpose of chapter 14 is to provide guidance about the interpretation of Acts (and statutory instruments). Proposed section 138 (2) and (3) is intended to make clear that chapter 14 complements the common law to the extent that the common law is not inconsistent. There are, for example, many common law presumptions (or legal assumptions) relevant to statutory interpretation. Those identified by Pearce and Geddes include:

- the presumption that when general matters are referred to in conjunction with a number of specific matters of a particular kind, the general matters are limited to things of the like kind to the specific matters ('ejusdem generis')
- the presumption that an express reference to 1 matter indicates that other matters are excluded ('expressio unius est exclusio alterius')
- the presumption that legislation is not to invade common law rights.

78 Proposed section 138 (4) emphasises that the statutory provisions are to operate alongside the common law as it continues to evolve.

Proposed part 14.2 Key principles of interpretation

79 The heading to proposed part 14.2 emphasises the significance of its provisions by describing them as 'key' principles of interpretation. Apart from the interpretive provision in proposed section 139, the part contains 3 substantive sections:

- proposed section 140, which deals with the *purposive approach* to the interpretation of legislation;
- proposed section 141, which deals with legislation being read in the context of all of its provisions;

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- proposed section 142, which deals with the use of *extrinsic materials* (that is, materials not forming part of the legislation) in the interpretation of legislation.

Together these 3 proposed sections deal with some of the most significant aspects of the interpretation of legislation.

Proposed section 139 Meaning of *working out the meaning of an Act*

80 The 3 proposed substantive sections of part 14.2 operate ‘ [I]n working out the meaning of an Act’. Proposed section 139 defines what this phrase means.

81 The purpose of proposed section 139 is to indicate that the 3 proposed substantive sections are intended to have the broadest operation. They are, for example, not intended to be applied only in cases of ambiguity or uncertainty. As will be seen from the discussion below in relation to the proposed sections, in most respects this broad operation reflects the position at common law.

82 However, as explained in the general outline in one respect the application of proposed section 139 to proposed section 142 may go further than the existing common law. The cases mentioned below in relation to section 142 only allow recourse to material for the purpose of finding out the ‘mischief’ that the statute being interpreted was intended to cure. This restriction is not present in the existing Interpretation Act provision (section 11B) that section 142 replaces. For the reasons explained in the general outline proposed section 139 adopts the same broad approach to the scope of the substantive sections of the part.

Proposed section 140 Interpretation best achieving Act’s purpose

83 Proposed section 140 re-enacts Interpretation Act, section 11A and makes changes to take account of subsequent judicial interpretation. Section 11A was inserted into the Interpretation Act in June 1982. The section, as presently in force, provides:

> **11A Regard to be had to purpose or object of Act**
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

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84 In 1990 3 High Court judges found that the Victorian equivalent of section 11A did not require an interpretation that would *best* achieve the object of the Act (*Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 262 per Dawson, Toohey and Gaudron JJ). Proposed section 140 would remedy this deficiency. The proposed section indicates that the interpretation that would best achieve the purpose of an Act is to be preferred to any other. A provision similar to proposed section 140 has been in existence in the *Acts Interpretation Act 1954* (Qld), section 14A for a number of years.

85 Section 140 does not distinguish between different kinds of statutes and is consistent with the approach adopted by the courts in recent times in dealing with revenue and penal statutes. For example, Gibbs J (as he then was) in *Beckwith v R* (1976) 135 CLR 569 explained the modern approach to the interpretation of penal statutes as follows:

> The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute *the ordinary rules of construction must be applied*, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences...The rule is perhaps one of last resort. (emphasis added)

Proposed section 140 provides one of 'the ordinary rules of construction' that must be applied in the interpretation of revenue and penal statutes.

86 Proposed section 140 (2) makes it clear that the section applies whether or not the Act's purpose is expressly stated in the Act and despite any presumption or rule of interpretation. The subsection includes an example of the latter point.

Proposed section 141 Legislative context

87 Section 141 addresses the vice of reading statutory words and provisions in isolation. Statutory words and provisions need to be read in context (see Pearce and Geddes, par 4.2). The courts have frequently recognised that statutory words (like all words) derive their 'colour and content' from their context (eg *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461 per Viscount Simonds). It is now axiomatic that, under the common law, Acts must be read as a whole (see *CIC Insurance* case

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discussed in the next paragraph). However, the common law has, at least in the past, maintained obstacles in the way of interpreters taking account of certain provisions of Acts. Provisions of Acts that, on the traditional view, were not to be taken account of in the absence of ambiguity in the provision concerned, included the long title to the Act (see Pearce and Geddes, par 4.37), any preamble to the Act (see Pearce and Geddes, par 4.39), headings (see Pearce and Geddes, par 4.41-4.42) and punctuation (see Pearce and Geddes, par 4.44). To this might be added objects clauses (see *Leask v Commonwealth of Australia* (1996) 187 CLR 579 at 591 per Brennan CJ).

88 In 1997 the High Court made it clear that such limitations in relation to particular provisions of an Act, to the extent that they still existed, no longer applied. In *CIC Insurance Ltd v Bankstown Football Club Ltd*, 4 members of the court held as follows:

> It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cwlth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, *the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise*, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy: (*Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315). Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* ((1986) 6 NSWLR 363 at 388), if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent: *Cooper Brookes (Wollongong) Pty Ltd v FCT* ((1981) 147 CLR 297 at 320-1.)

((1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ, with whom Gaudron J generally agreed. Emphasis added.)

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89 In this case and others the High Court has made it clear that even *extrinsic* material may be considered and may have an effect on interpretation without there being an ambiguity in the provision concerned.

90 Proposed section 141 is not then intended to alter the common law. It is consistent with the ruling that ‘context be considered in the first instance’. Nevertheless, by its inclusion amongst other ‘key principles’ in the Legislation Act the Legislative Assembly is highlighting the particular importance of reading statutory provisions in the context of the whole Act in which they are contained.

91 Another feature of the proposed section is the way in which it clarifies *what is* the legal context that must be considered. Because the obligation in section 141 is limited to consideration of ‘the Act’, the provision gives clear guidance to statute users. (But see proposed section 142 which *permits* recourse to ‘extrinsic’ material.) It needs to be noted that ‘the Act’ for section 141 includes only the material forming part of the Act. By sections 126 and 127, an Act is taken to include certain material but not other. For instance, a heading to a section is part of an Act if the Act is enacted after 1 January 2000 or the heading is amended or inserted after that date. Examples and punctuation are also part of an Act, but a note is not.

92 The fact that material forming part of an Act must be considered by a statute user does not mean, of course, that all material forming part of the Act has equal weight. Courts are accustomed to weighing the indications of meaning provided by different parts of an Act. Thus, for instance, a heading can generally be expected to be given less weight than a substantive provision (see Pearce and Geddes, par 4.41-4.42).

Proposed section 142 Non-legislative context

93 Proposed section 142 re-enacts Interpretation Act, section 11B with some changes. Section 11B deals with the use of extrinsic materials in the interpretation of legislation (that is, materials not forming part of the legislation being interpreted). The changes made in re-enacting section 11B consist largely in bringing proposed section 142 up-to-date with developments in the common law.

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94 To explain the changes, some historical background is needed. Section 11B (1) currently provides in part:

> (1) … if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to the material—
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when—
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

95 This provision, like similar legislation in most jurisdictions of Australia, clearly allows the use of extrinsic material. However, the provision's application is subject to significant restrictions. As the High Court stated in relation to the Commonwealth equivalent to section 11B (*Acts Interpretation Act 1901* (Cwlth), s 15AB):

> Reliance is also placed on a sentence in the second-reading speech of the Minister when introducing the Consequential Provisions Act, but that reliance is misplaced. Section 15AB of the Acts Interpretation Act 1901 (Cwlth), as amended, does not permit recourse to that speech for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or is unreasonable.

(*Re Australian Federation of Construction Contractors; ex parte Billing* (1986) 68 ALR 416 at 420, per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ)

96 Section 11B is now largely redundant because of changes to the common law made by the High Court in several recent cases. Beginning with *CIC Insurance Ltd v Bankstown Football Club Ltd* ((1997) 187 CLR 384), which was quoted above in relation to proposed section 141, the High Court made it clear that no ambiguity or obscurity was necessary for a court to take account of a law reform report. Further, and importantly, consideration of this material helped the court in interpreting the provision in a way that departed from its ordinary (or apparent) meaning. Then, in *Newcastle City Council v*

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GIO General Ltd ((1997) 191 CLR 85), the High Court had regard to an explanatory memorandum as well as a law reform report in similar circumstances. In this case the court made clear that, even though the conditions in s 15AB were *not* satisfied, the common law independently authorised recourse to the material concerned. Toohey, Gaudron and Gummow JJ held that:

> In the interpretation of s 40, the Court may consider the Explanatory Memorandum relating to the Insurance Contracts Bill 1984 which was laid before the House of Representatives by the responsible Minister. The common law, *independently of s 15AB* of the *Acts Interpretation Act 1901* (Cwth), permits the Court to do so in order to ascertain the mischief which the statute was intended to cure.

((1997) 191 CLR 85 at 99 (Emphasis added) McHugh J similarly held in a separate judgment ((1997) 191 CLR 85 at 112).

97 In *Attorney-General v Oates* ((1999) 198 CLR 162 at 175), the High Court held that at common law, irrespective of the statutory conditions laid down in the relevant extrinsic materials provisions, the 'legislative history' could be considered to find out 'the mischief'. In this case the court considered various materials including a presentation speech made by a Minister (at 176-177).

98 In each of these cases, the High Court has said that, independently of statutory provisions such as section 11B, the common law authorises recourse to material that is evidence of 'the mischief'. The court has explained that 'the mischief' refers to 'the problems for the resolution of which a statute is enacted' (*North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595 at 614n, followed in *Attorney-General v Oates* (1999) 198 CLR 162 at 175n).

99 Interpretation Act, section 11B (3) contains matters to which a court is required to have regard in deciding whether extrinsic material should be considered and, if so, the weight to be given to it. The Victorian provision about the use of extrinsic materials (*Interpretation of Legislation Act 1984*, section 35) does not contain an equivalent provision. As the use of extrinsic materials is discretionary under proposed section 142, there seems to be no justification in providing directions to the court about when extrinsic

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materials should be used in interpreting legislation. Such directions are, in any event, unlikely to have significant practical effect.

100 The purpose of proposed section 142 (2) is to make it clear that an express provision of an Act providing that particular extrinsic material may be considered does not raise an inference that other extrinsic material (whether of the same or similar kind) may not be used in interpreting the Act or another Act. The operation of the subsection is illustrated by example 8 in the examples to the section.

101 In summary, proposed section 142 complements proposed section 141. Under section 141 the provisions of an Act *must* be read in the context of the Act as a whole in working our the meaning of the Act. There are no restrictions on the kinds of provisions that may be considered or the purposes for which they may be considered. Similarly, under section 141 in working out the meaning of an Act any material not forming part of the Act *may* be considered if the material is relevant. Apart from the test of relevance, there are no restrictions on the kinds of extrinsic material that may be considered or the purposes for which they may be considered. The intended broad operation of proposed section 142 is illustrated by the examples to the section.

Clause 20

102 Proposed section 151 restates the effect of Interpretation Act, section 36. The proposed section is intended to provide a way of working out whether something has been done within a period provided or allowed by law. The section identifies the point when the period starts and allows it to be extended to the first available working day if the last day is not a working day. The proposed section includes some examples to illustrate its operation.

103 Proposed section 152 deals with a situation where an obligation is imposed by law to do something within a period or before a particular time. What effect does the expiry of the period have on the obligation? Proposed section 152 makes it clear that the obligation continues until the thing is done. The proposed section is adapted from the Interpretation Act, section 33B where it forms part of a section about continuing offences. However, the language of Interpretation Act, section 33B (1) indicates that the

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rule it lays down need not be limited to the criminal law. For this reason proposed section 152 is intended to be located in a part of the Legislation Act that does not limit its subject matter to a particular branch or area of law. The remaining part of Interpretation Act, section 33B is dealt with in proposed section 193 (which is discussed below).

Clause 21

Outline of proposed part 15.4

104 Proposed part 15.4 (sections 170 and 171) would provide an interpretative presumption preserving the established common law privileges against selfincrimination or exposure to a penalty and in relation to communications between lawyers and their clients.

Common law privileges against selfincrimination and exposure to a civil penalty

105 The privilege against selfincrimination gives a person the right to refuse to make a statement or produce a document on the ground that to do so would expose the person to a risk of being convicted of a criminal offence. The privilege may arise in the course of judicial, quasi-judicial and non-judicial proceedings, including, for example, court hearings, royal commissions, police searches and investigations by officials.

106 Justice Murphy stated the predominant rationale offered for the privilege as follows: ‘The privilege against self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination.’ (*Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 346). It is sometimes now said that an even stronger justification for the privilege is ‘the principle, fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way’ (*Environment Protection Authority v Caltex Refining Co. Pty Ltd.* (1993) 178 CLR 477 at 527, per Deane, Dawson and Gaudron JJ; see also at 544, per McHugh J).

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107 The privilege against exposure to a civil penalty gives a person the right to refuse to make a statement or produce a document on the grounds that to do so would expose the person to liability for a civil penalty. It may also arise in the context of judicial, quasi-judicial or non-judicial proceedings, and shares essentially the same rationale as the privilege against selfincrimination (see Pearce and Geddes, par 5.24).

108 The privileges against selfincrimination and exposure to a penalty cover statements or documents that would expose the person required to give or produce them (though not anyone else—an important qualification) to a 'real and appreciable danger' of incrimination or liability for a civil penalty (see McNicol S. B., *Law of Privilege* (1992) at 174-192). The exposure to incrimination or a penalty may be direct or indirect. An example of indirect exposure would be the potential for the conviction of the person at a later trial because of the police following up a line of inquiry disclosed by a document produced in the course of a search. In this case, privilege might be claimed against the production of a document even if the document itself would be inadmissible or worthless as evidence in the later trial. The privileges do not, however, extend protection in relation to 'real' (non-verbal) evidence. On indirect exposure and 'real' evidence, see *Sorby v Commonwealth* (1983) 152 CLR 281 at 292, per Gibbs CJ.

109 It has recently been held that these privileges do not, however, extend to corporations (*Environment Protection Authority v Caltex Refining Co. Pty Ltd.* (1993) 178 CLR 477 and *Trade Practices Commission v Abbco Ice Works Pty Ltd & Ors* (1994) 52 FCR 96). Confirming these decisions, the privilege has subsequently been abolished by the *Evidence Act 1995* (Cwlth), section 187 for corporations in relation to requirements under Commonwealth and ACT laws, and in proceedings in federal and ACT courts.

110 As previously noted, the privileges against self-exposure to forfeiture and ecclesiastical censure do not to require express preservation by the Legislation Act.

Client legal privilege (legal professional privilege)

111 Justice McHugh summarised the accepted view of the nature of this privilege by saying that '[l]egal professional privilege is the shorthand description for the doctrine that prevents the disclosure of confidential communications between a lawyer and client, and

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confidential communications between a lawyer and third parties when they are made for the benefit of a client unless the client has consented to the disclosure. To be protected by the privilege, a communication must be made solely for the purpose of contemplated or pending litigation or for obtaining or giving legal advice.' (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550).

112 It is important to emphasise that since the 18th century, the privilege has been held to be that of the lawyer's *client*. As such, it may be waived by the client, but not by the lawyer (*Baker v Campbell* (1983) 153 CLR52 at 85, per Murphy J). In that case, Justice Murphy used the more accurate term 'client legal privilege'. This term was subsequently adopted in the *Evidence Act 1995* (Cwlth), part 3.10, division 1, which heads the provisions dealing with the privilege 'Client legal privilege'. The Commonwealth Evidence Act approach is followed in proposed section 171.

113 The High Court has expressed the justification for the privilege, as traditionally accepted, 'that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline…The existence of the privilege reflects, to the extent that it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.' (*Grant v Downs* (1976) 135 CLR 674 at 685, per Stephen, Mason and Murphy JJ).

114 However, there are 'powerful considerations which suggest that the privilege should be confined within strict limits', in part because 'the privilege is an impediment, not an inducement, to frank testimony, and it detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise' (*Grant* at 685, 686, per Stephen, Mason and Murphy JJ). Indeed, in the opinion of a leading writer, no single rationale for the privilege has been settled on by the courts, and indeed no consistent underlying rationale for the doctrine has been offered (Desiatnik R. J. *Legal Professional Privilege in Australia* (1999) at 39-50).

115 Nevertheless, legal professional privilege is an established part of the common law; it is regarded as so entrenched that 'it is not to be exorcised by judicial decision' (*Grant* at

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685, per Stephen, Mason and Murphy JJ). Moreover, the scope of this privilege, which had its origin in judicial proceedings alone, has now expanded (like that of the privileges against selfincrimination and exposure to a penalty) to allow the privilege to be claimed against disclosure of evidence in a non-judicial context such as a police search under a search warrant (*Baker v Campbell* (1983) 153 CLR 52).

Statutory abrogation and qualification of privileges

116 Despite the continued recognition and even expansion (in some respects) of the privileges at common law, the privileges are of course subject to legislation. They may be expressly preserved, displaced completely or partly, or preserved in a changed form. In the context of proceedings in ACT courts the privileges have been preserved in a changed form by the Commonwealth Evidence Act. The *Evidence Act 1995* (Cwlth), part 3.10, division 1 restates the law of legal professional privilege (in modified form) as 'client legal privilege'. The Evidence Act (Cwlth), section 128, also qualifies the law relating to the privileges against selfincrimination and exposure to a penalty by giving the court the express options of allowing the claim outright or requiring the relevant evidence to be given despite its incriminating character (or capacity to expose the witness to a penalty). If the evidence is required to be given, the court must give a certificate preventing the evidence from being used in later proceedings against the witness.

117 Proposed sections 170 (2) and 171 (2) make it clear that the proposed sections are not intended to affect the operation of the provisions of the Commonwealth Evidence Act that deal with the privileges.

118 In other respects it is proposed that proposed sections 170 and 171 operate as determinative provisions. Under the sections the privileges against selfincrimination or exposure to a civil penalty and in relation to client legal privilege will require an express statutory statement or 'manifest contrary intention' for their displacement. This is similar to the position at common law that requires an express statutory statement or a 'necessary' (or 'clear') implication for the displacement of the privileges. It is intended that the requirement of a 'manifest contrary intention' should be, if anything, more

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demanding than an implication that is ‘necessary’ or ‘clear’ (see comments above about proposed section 6).

119 By providing the test that applies to other ‘determinative provisions’ for the overriding of the privileges, it is intended to standardise the approach taken by the courts to the application of the privileges in a statutory context. The following are examples of provisions of other Acts in relation to which the view is taken that either or both of the privileges are displaced (at least in part) by express statement or a manifest contrary intention:

- *Administrative Appeals Tribunal Act 1989*, section 37 (7) (Lodging material documents)

  (7) This section has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents.

- *Building and Construction Industry Training Levy Act 1999*, section 34 (2) (Powers of inspectors)

  (2) A person is not excused from providing information or from producing a document or other record when requested to do so under subsection (1) on the ground that providing the information or producing the document or record may tend to incriminate the person or expose the person to a civil penalty, but the information or the production of the document is not admissible in evidence against the person in any proceedings, other than proceedings for an offence against section 36 [False or misleading information].

- *Business Names Act 1963*, section 13 (3) (Duty to furnish information)

  (3) A person shall not be excused from furnishing information where required to do so under subsection (1) on the ground that the information might tend to incriminate him or her or make the person liable to a penalty but the information furnished by him or her shall not be admissible in evidence against the person in any proceedings civil or criminal.

- *Legal Practitioners Act 1970*, section 116 (1) (Obligation to comply with inspector’s requirements)

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(3) A person is not entitled to refuse to comply with a requirement made of him or her under subsection (1) on the ground of legal professional privilege. [Subsection (1) requires certain information and documents to be given to an investigator.]

- *Royal Commissions Act 1991*, section 37 (3) (Refusal to be sworn or give evidence)

(3) It is not a reasonable excuse for the purposes of paragraph (1) (b) for a person to refuse or fail to answer a question on the ground that the answer to the question might tend to incriminate the person. [Subsection (1) provides that a witness before a commission 'shall not, without reasonable excuse, refuse or fail—…(b) to answer a question that the [witness] is required…to answer'.]

Removal of provisions preserving privileges—consequential amendments

120 Proposed sections 170 and 171 will help in simplifying and shortening ACT laws by making it clear that it is unnecessary to expressly restate in individual Acts that the privileges have been preserved. The consequential amendments in schedule 2 relating to the privileges are designed to achieve this aim by omitting provisions that do no more than expressly preserve the privileges. The place of the omitted provisions will be taken by the directions in proposed sections 170 and 171 that an Act or statutory instrument must be interpreted to preserve the privileges.

Clause 22

Outline of proposed chapter 18

121 Clause 22 provides for a new chapter 18 that would include a number of sections relocated from the Interpretation Act.

Proposed section 188 Meaning of ***Territory law*** in ch 18

122 Proposed section 188 defines law for the chapter to restrict it to an Act or a subordinate law, or a provision of an Act or subordinate law.

Proposed section 189 Reference to offence includes reference to related ancillary offences

123 Most offences are expressed to prohibit what might be called a 'core' offence, for example, stealing, making a false statement or discharging a prohibited substance into the

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environment. Around these core offences there is a wider range of conduct that the law also seeks to prohibit, for example *attempting* to steal, *inciting* a person to make a false statement or *aiding and abetting* (that is, assisting) in the discharge of a prohibited substance into the environment. These wider activities are often referred to as 'ancillary' offences. It would, for example, be possible to create an offence in the terms "A person who steals, attempts to steal or aids and abets another person to steal is guilty of an offence'. Indeed, at one time offences were sometimes cast in terms similar to these. It is obvious, however, that the repetition of the ancillary offences for each core offence not only adds many words to the legislation but also tends to conceal the focus of the provision, namely, the core offence itself.

124 For these reasons the *Crimes Act 1900*, part 9 creates a number of ancillary offences dealing with such things as attempts (section 182), incitement (section 183) and aiding and abetting (section 180). But in creating these offences part 9 adopts 2 different approaches. In some cases, for example attempts, the ancillary offence is equated with the core offence. In other words, a person who is convicted of an attempt is dealt with as if the core offence had been committed. One consequence of this is that a person who attempts to commit an offence against an Act commits an offence against the Act itself. In other cases, however, the offence is not against the Act creating the core offence but against the Crimes Act. Incitement is an example of this.

125 In most cases, the fact that some offences under the Crimes Act, part 9 are offences against the Crimes Act itself does not cause any problems. There are some situations, however, where legislation can be simplified if the ancillary offences against the Crimes Act are dealt with as if they were offences against the Act creating the relevant core offence. For example, the *Building Act 1972*, section 63B (Conduct of directors, servants and agents) contains a number of rules to link the criminal conduct of individuals (such as directors and employees of a corporation) acting in the course of their duties with the corporation they are associated with. For this purpose the rules in section 63B refer to 'an offence against this Act'. As we have already noted, however, some significant criminal acts committed in relation to the Building Act would not be an offence against that Act but against the Crimes Act, part 9. The fact that a director or

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employee of a corporation in the course of their duties with the corporation may have been an accessory after the fact, or engaged in incitement or conspiracy, is obviously relevant to the conduct of the corporation.

126 Proposed section 189 therefore provides that references such as those in the Building Act, section 63B are taken to include ancillary offences against the Crimes Act, part 9.

Proposed section 190 Indictable and summary offences

127 Proposed section 190 replaces Interpretation Act, section 136. The legal system of the ACT recognises 2 kinds of offences: indictable offences (generally, serious offences that are heard before a judge and jury) and summary offences (generally, less serious offences that are heard before a magistrate). Proposed section 190 (1) defines an indictable offence as either an offence punishable by imprisonment for longer than 1 year or declared by law to be indictable. The provision for an offence to be declared to be indictable reflects the fact that some serious offences that are not punishable by imprisonment may provide for fines of such magnitude that it is appropriate that they be dealt with before a judge and jury. Proposed section 190 (2) defines a summary offence as any other offence. In other words, an offence punishable by imprisonment for not longer than 1 year or not declared by law to be indictable. The terms ***indictable offence*** and ***summary offence*** are provided for as signpost definitions in the dictionary, part 1. This means that the definitions in proposed section 190 will apply across the statute book (see Legislation Act, section 144).

Proposed section 191 Offences against 2 or more laws

128 Proposed section 191 replaces Interpretation Act, section 33F. It deals with the situation where an act or omission is an offence against 2 or more laws. The proposed section provides that a person cannot be punished twice for a single act or omission. Proposed section 191 (1) deals with cases where each of the laws in question is a Territory law. Proposed section 191 (2) provides for cases where the act or omission is an offence against both a Territory law and a law of another jurisdiction (the Commonwealth, a State, another Territory or New Zealand).

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Proposed section 192 When must prosecutions begin

129 Proposed section 192 replaces *Interpretation Act 1967*, section 33H. The proposed section provides time limits for bringing prosecutions for offences. The offences mentioned in proposed section 192 (1) may be prosecuted at any time. Any other offence may be prosecuted within 1 year after the day of commission of the offence (see proposed section 192 (2) (a)). But if a Territory law makes special provision about when a prosecution may be brought (whether longer or shorter than 1 year), the period specially provided applies (see proposed section 192 (2) (b)). The time limits that apply under proposed section 192 (2) will be affected, however, if there has been an inquest or inquiry into a matter that relates to an offence. In that case, the period of 1 year to bring the prosecution begins to run when the coroner's report is made or the report of an inquiry or royal commission is given to the Chief Minister. The time limits in proposed section 192 are identical to the time limits presently applying under Interpretation Act, section 33H.

Proposed section 193 Continuing offences

130 Proposed section 193 reenacts Interpretation Act, section 33B (2) in clearer language. It provides for a continuing offence for a failure to do something if—

- the thing is required to be done under a law within a particular period or before a particular time; and
- failure to comply with the requirement is an offence against the law.

Although the deadline for compliance has passed, the person who failed to meet the deadline continues to be required to do the thing. In the meantime, the person commits a fresh offence for each day that the thing remains undone.

Clause 23

131 The proposed renumbering of chapters 18, 19 and 20 (and the consequential renumbering of parts and divisions) is intended to allow a new chapter 18 (Offences) to be inserted and at the same time keep the normal numbering of chapters, parts and divisions.

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Clause 24

132 This clause remakes Legislation Act, section 206 to provide that, if a law provides for a maximum or minimum period of appointment, the instrument of appointment must state the period for which the appointment is made. The remade section will remove the need to include a provision to this effect in every law that provides for a maximum or minimum period of appointment

Clause 25

133 This clause remakes Legislation Act, section 216 to require acting appointments to state the period for which the appointment is made if a law provides for a maximum or minimum period of appointment.

Clause 26

134 This clause re-enacts provisions of the *Statutory Appointments Act 1994* without substantive change. That Act is repealed by clause 30. The transfer of the Statutory Appointments Act provisions to the Legislation Act will bring together in the same Act all the general provisions about statutory appointments. As existing appointment provisions in ACT laws are revised to bring them fully into line with the provisions about appointment in the Legislation Act, notes will be included drawing attention to the relocated provisions. This practice should assist in raising awareness of (and compliance with) the provisions.

135 The provisions of the Statutory Appointments Act (***SAA)*** to which the proposed sections of new division 19.3.3 correspond are indicated in the headings of the sections. For example, proposed section 229 corresponds to Statutory Appointments Act, section 5 (‘SAA s 5’). Statutory Appointments Act, section 4 (2), which is about the application of that Act to appointments under the *Auditor-General Act 1996*, is proposed to be transferred to the Auditor-General Act by an amendment in schedule 2 to the Bill. Statutory Appointments Act, section 3A is a transitional provision that is no longer needed.

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Clause 27

136 This clause provides for the renumbering of a part (part 18.6) to allow a new part 18.6 to be inserted by the next clause.

Clause 28

137 This clause re-enacts the provisions of the *Administration Act 1989* without substantive change. That Act is repealed by clause 30. The transfer of the Administration Act provisions to the Legislation Act will bring together in the same Act general provisions about the exercise of functions by the Executive (including the making of statutory instruments) and provisions about delegation. It will also allow the present overlapping provisions in the Administration Act and the Legislation Act to be simplified (see, for example, the remaking of Legislation Act, section 41 in schedule 1).

138 The provisions of the Administration Act (***AA***) to which the proposed sections of new part 19.6 correspond are indicated in the headings of the sections. For example, proposed section 254A corresponds to Administration Act, section 5 ('AA s 5'). The section has, however, been significantly simplified relying on other provisions of the Legislation Act (eg the provisions about delegations in existing part 18.4). The application of the section to functions under disallowable instruments and other statutory instruments has also been clarified.

Clause 29

139 Clause 29 proposes a number of consequential amendments of other Acts. Details of these amendments are set out below.

Clause 30

140 Clause 30 repeals the Administration Act, the Interpretation Act and the Statutory Appointments Act, and declares them to be laws to which Legislation Act, section 88 applies. This declaration will save any past effect of the repealed Acts. Because of the amendments made already by the *Legislation (Consequential Provisions) Act 2001* and the *Statute Law Amendment Act 2001*, the remaining substantive provisions of the Interpretation Act to be repealed by clause 30 consist of—

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- section 1 (Name of Act) (not needed)
- section 2 (Application of Act) (see proposed section 4 (presently section 6))
- section 3 (Displacement of Act by contrary intention) (see proposed sections 5 and 6)
- section 7 (Acts to bind the Crown) (see proposed section 121)
- section 11A (Regard to be had to purpose or object of Act) (see proposed section 139)
- section 11B (Use of extrinsic material in interpreting an Act) (see proposed section 141)
- section 20 (References to the Sovereign) [A search of ACT legislation indicates that there are few references to the Sovereign. There can be no doubt about the meaning of the few references that remain and no legal consequences attach to them.]
- section 30A (Periodic reports) (see proposed amendment of the *Coroners Act 1997* in schedule 2)
- section 33B (Continuing offences) (see proposed sections 152 and 193)
- section 33C (Joinder of charges) (see *Crimes Act 1900*, proposed section 434B in schedule 2)
- section 33F (Offences under 2 or more laws) (see proposed section 191)
- section 33G (Application of certain sections of Cwlth Crimes Act to Territory Acts) (see *Crimes Act 1900*, proposed sections 434A and 445 in schedule 2)
- section 33H (When must prosecutions begin?) (see proposed section 192)
- section 36 (Reckoning of time) (see proposed section 151)
- part 5 (Former UK Acts) (see proposed amendments of the *Imperial Acts (Repeal) Act 1988* in schedule 2)
- section 64 (References to Standards Association of Australia) [The effect of this section is preserved by the declaration under section 88.]

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- schedule 2 (Rules for interpreting former UK Acts) (see proposed amendments of the *Imperial Acts (Repeal) Act 1988* in schedule 2).

Schedule 1 Minor and consequential amendments of Legislation Act 2001

General

141 Most of the amendments contained in the schedule declare various provisions of the Legislation Act to be determinative provisions, omit references to a contrary intention or make other minor consequential amendments (eg provide for the consequential renumbering of subsections). Other kinds of amendments are outlined in the following paragraphs.

Amendment of s 4 (2)

142 This amendment is consequential on the relocation of provisions of the Administration Act and the Statutory Appointments Act to the Legislation Act.

Amendment of s 19 (3)

143 This amendment omits an unnecessary word.

Amendments of s 24 (3) (b) and (c)

144 This amendment enables the footer on authorised versions of laws and instruments on the ACT Legislation register to be simplified.

Amendment of s 41

145 The relocation of provisions of the Administration Act to the Legislation Act enables section 41 to be simplified. Existing section 41 (1) is covered by proposed section 253.

Amendment of s 56 (4) (c)

146 This amendment corrects a minor typographical error.

Amendment of s 61 (2)

147 This amendment makes it clear that regulations made under section 61 (2) can deal with the form of instruments to be registered.

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Amendment of s 64 heading

148 This amendment substitutes a more helpful heading.

Amendment of s 73 (5) (d)

149 This amendment clarifies the relationship between Legislation Act, sections 73 and 81. Under section 81 instruments made under a law between its notification and commencement can commence before the commencement of the law in certain circumstances.

Amendment of s 77 (1)

150 This amendment brings the language of section 77 (1) more closely into line with the definition of ***commencement notice*** in section 11.

Amendment of s 78

151 This amendment remakes the section to clarify its operation in minor respects and include examples. The remade section also declares the section to be a determinative provision.

Amendment of s 81 (1) (a) and (b) and (4) (a)

152 These amendments are consequential on the changed default commencement day under the amendments made by clauses 12 and 13.

Amendment of s 89 (8), def of appropriation Act

153 This amendment is consequential on amendments of the *Financial Management Act 1996* made last year.

Amendment of s 89 , example 1

154 This amendment brings an example more closely into line with current legislative drafting practice.

Amendment of s 91 (9) (e)

155 This amendment corrects a reference to a defined term (see dictionary, part 2, definition of ***current legislative drafting practice***).

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Amendment of s 91 (9), examples 4 and 5

156 This amendment brings 2 examples more closely into line with current legislative drafting practice in relation to the making of amendments.

Amendment of s 92 , new example

157 This amendment inserts an example to clarify its operation.

Amendment of s 98 (1), example

158 This amendment revises an example to more accurately reflect the status of former NSW Acts.

Amendment of s 136

159 This amendment is consequential on the remaking of the section as proposed section 190 in new chapter 18 (Offences).

Amendment of ch 15, note to chapter heading

160 This amendment is consequential on the relocation of remaining provisions of the Interpretation Act to the Legislation Act.

Amendment of s 157

161 This amendment remakes the section to omit an unnecessary reference to contrary intention and include an example to illustrate the operation of the section.

Amendment of s 160, new s 160 (3)

162 This amendment clarifies the relationship between section 160 (2) and proposed section 6.

Amendments of s 161

163 These amendments are consequential on the relocation of the provisions of the Administration Act and the Statutory Appointments Act to the Legislation Act.

Amendments of s 176 (3)

164 This amendment remakes the subsection to remove a reference to a contrary intention and includes a new note drawing attention to proposed section 45.

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Replacement of s 177

165 This amendment remakes the section to correct an error in the description of the parties to whom it applies and removes a reference to a contrary intention.

Renumbering of s 185 and s 187 to s 191

166 The schedule renumbers sections 185 to 191 downwards so that sufficient numbers are available for a new chapter 18. At the same time, existing chapters 18, 19 and 20 are to be renumbered because of the new chapter.

Amendment of s 199 (3)

167 This amendment inserts a new example to illustrate the operation of the subsection.

Amendment of s 199, new s 199 (4A)

168 This amendment includes a subsection to make it clear that section 199 (3) and (4) do not affect any quorum requirement applying to a body. The new subsection also includes an example of its operation.

Amendments of s 219 (1) and s 221 (2)

169 These amendments insert examples to illustrate the operation of the subsections.

Amendment of s 231 (2) and s 236 (2)

170 These amendments are consequential on the introduction of the concept of the determinative provisions.

Amendment of s 250 (3)

171 This amendment makes a minor simplification of language.

Amendment of s 251 (2) (b)

172 This amendment omits a redundant word.

Amendment of s 255 (1)

173 This amendment inserts a note drawing attention to proposed section 46 (3).

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Amendment of s 260 and 261

174 This amendment remakes section 260 (renumbered as section 300) to bring it more closely into line with part 18.4. It also allows the regulations to permit delegations of functions under part 11.3 to be made to a public servant prescribed under the regulations. This will permit increased flexibility in the management of the republication of ACT laws subject to Assembly scrutiny. The parliamentary counsel will, of course, continue to be responsible for the exercise of editorial powers under the Legislation Act (see section 238).

175 The amendment also remakes section 261 (renumbered as section 301) to include references to the Administration Act and the Statutory Appointments Act.

Renumbering of s 262 to s 274

176 The schedule renumbers sections 262 to 274. The intention is to leave a gap in section numbers before the chapters dealing with miscellaneous and transitional matters. The purpose of the gap is to leave room for additional provisions to be added to the Act in the future.

Amendments of s 264

177 The amendment of section 264 (1) is intended in part to save the effect of instruments made in reliance on the powers conferred by the *Subordinate Laws Act 1989*, section 8 that were in force when section 264 came into operation. The amendment also corrects a minor typographical error and consequentially updates cross-references.

Amendments of s 267 and s 268

178 These amendments amend section 267 (Transitional regulations) and section 268 (Modification of ch 20’s operation) to enable the sections to apply in relation to the amendments and repeals made by the Bill. The amendments also extend the time within which transitional or modifying regulations may be made.

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Amendments of dictionary, part 1, new definitions of *by-laws*, *environmental protection authority*, *for*, *national capital authority*, *rules* and *working day*

179 Schedule 1 proposes to insert a number of new definitions into the dictionary, part 1. Part 1 contains definitions of commonly-used words and expressions. The definitions will be available to apply throughout the ACT statute book (see Legislation Act, section 144).

Amendment of dictionary, part 1, definitions of *former NSW ACT* and *former UK Act*

180 This amendment remakes the definitions to more accurately reflect the status of these Acts and include additional information to assist users of the Legislation Act.

Amendment of dictionary, part 1, definitions of *indictable offence* and *summary offence*

181 The schedule amends the definitions of ***indictable offenc***e and ***summary offenc***e in the dictionary, part 1 to reflect the number of the section where the definitions are proposed to be located.

Amendment of dictionary, part 1, definition of *judge*

182 This amendment amends the definition of ***judge*** so that judges of the Supreme Court can be referred to in legislation as 'judge' without having to specify that the judge is a judge of the Supreme Court. (The ACT has no other judges.)

Amendment of dictionary, part 1, definition of *repeal*

183 This amendment makes it clear that the repeal of an instrument includes its revocation.

Amendment of dictionary, part 1, definition of *statutory office-holder*

184 This amendment makes it clear that the defined term does not cover public servants.

Amendment of dictionary, part 2, new definition of *authorising law* and definition of *law*

185 These amendments correct a signpost definition.

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Amendment of dictionary, part 2, new definitions of *determinative provision* and *non-determinative provision*

186 In accordance with usual drafting practice, the schedule proposes inserting new signpost definitions of ***determinative provision*** and ***non-determinative provision*** into the dictionary, part 2.

Schedule 2 Consequential amendments

187 This schedule proposes consequential amendments of other Acts.

Sch 1, pt 2.1 Associations Incorporations Regulations 1991

188 This part omits provisions made redundant by the Legislation Act (see dictionary, part 1, definitions of ***functions*** and ***power***) and updates a reference to the Interpretation Act.

Sch 2, pt 2.2 Auditor-General Act 1996

189 This part amends the *Auditor-General Act 1996* consequentially on the relocation of the provisions of the Statutory Appointments Act to the Legislation Act. Proposed clause 7 re-enacts Statutory Appointments Act, section 4 (2) with necessary consequential changes.

Sch 1, pt 2.3 Bail Act 1992

190 These amendments are consequential on proposed section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.4 Building Act 1972

191 These amendments are consequential on the following proposed sections of the Legislation Act:

- section 121 (Binding effect of Acts)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.5 Casino Control Act 1988

192 These amendments are consequential on proposed section 189 (Reference to offence includes reference to related ancillary offences).

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Sch 2, pt 2.6 Children and Young People Act 1999

193 These amendments are consequential on proposed section 171 (Client legal privilege).

Sch 2, pt 2.7 Classification (Publications, Films and Computer Games) (Enforcement) Act 1995

194 This amendment is consequential on proposed section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.8 Clinical Waste Act 1990

195 These amendments are consequential on proposed section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.9 Competition Policy Reform Act 1996

196 This amendment updates a reference to the Interpretation Act.

Sch 2, pt 2.10 Consumer Credit (Administration) Act 1996

197 These amendments are consequential on proposed section 171 (Client legal privilege).

Sch 2, pt 2.11 Coroners Act 1997

198 The *Coroners Act 1997*, section 102 requires the Chief Coroner to give a report to the Attorney-General for presentation to the Legislative Assembly each financial year. Section 102 (2) provides that the report is a periodic report for the purposes of the Interpretation Act, section 30A. Because there do not appear to be any other Acts that rely on section 30A, there seems to be no reason to re-enact the section. Proposed new section 102 therefore remakes the existing section and incorporates provisions adapted from section 30A.

Sch 2, pt 2.12 Crimes Act 1900

199 The amendment of section 185 omits a definition of ***summary offence***. The definition is no longer needed because the term is to be defined in the Legislation Act, section 190 and dictionary, part 1 (see also Legislation Act, section 144).

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200 Section 246 is no longer needed because of Legislation Act, proposed section 171 (Client legal privilege). The amendment of part 10 includes a new note drawing attention to the Legislation Act provision.

201 The amendment of section 336 is consequential on Legislation Act, proposed section 170 (Privileges against self incrimination and exposure to civil penalty). Remade section 336 includes a note drawing attention to the provisions of the Legislation Act about common law privileges.

202 The amendment of part 22 proposes to include the following provisions presently in the *Interpretation Act 1967*:

- section 434A (Application of certain sections of Cwlth Crimes Act to Territory laws)—presently Interpretation Act, section 33G. [However, proposed section 434A does not mention the *Crimes Act 1914* (Cwlth), section 14 or 33H. The *Criminal Code 2001* contains an amendment omitting the reference to section 14 from the Interpretation Act, section 33G. Section 33H is proposed to be re-enacted in the Legislation Act, section 192.]
- section 434B (Joinder of charges)—presently Interpretation Act, section 33C.

203 Proposed new section 445 is intended to ensure that the relocation of the provisions presently in the Interpretation Act, section 33G does not affect the meanings that they currently have.

Sch 2, pt 2.13 Crimes (Forensic Procedures) Act 2000

204 This part omits a definition of ***summary offence***. The definition is not needed because the expression is to be defined in the Legislation Act, section 190 and the dictionary, part 1 (see also Legislation Act, section 144). The part also adds the expression to a note drawing attention to the Legislation Act definition.

Sch 2, pt 2.14 Criminal Code 2001

205 This amendment omits an amendment of the Interpretation Act that is no longer needed because of the proposed repeal of that Act.

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Sch 2, pt 2.15 Debits Tax Act 1997

206 This amendment is consequential to the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121.

Sch 2, pt 2.16 Discrimination Act 1991

207 These amendments are consequential on the following proposed sections of the Legislation Act:

- section 170 (Privileges against selfincrimination and exposure to civil penalty)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.17 Electoral Act 1992

208 These amendments are consequential on the proposed replacement of Interpretation Act, section 36 by Legislation Act, section 151 (Reckoning of time). The amendments will ensure that the time limits for nominations that presently apply under the Electoral Act continue to apply.

Sch 2, pt 2.18 Electricity Safety Act 1971

209 These amendments are consequential on the following proposed sections of the Legislation Act

- section 171 (Client legal privilege)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.19 Environment Protection Act 1997

210 This amendment is consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts). The opportunity has also been taken to bring the drafting of the Environment Protection Act section more closely into line with current drafting practice.

Sch 2, pt 2.20 Fair Trading (Consumer Affairs) Act 1973

211 These amendments are consequential on the following proposed sections of the Legislation Act:

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- section 171 (Client legal privilege)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.21 First Home Owner Grant Act 2000

212 These amendments are consequential on Legislation Act, proposed section 171 (Client legal privilege).

Sch 2, pt 2.22 Fisheries Act 2000

213 These amendments are consequential on Legislation Act, proposed section 171 (Client legal privilege).

Sch 2, pt 2.23 Forfeiture and Validation of Leases Act 1905

214 This amendment is consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts).

Sch 2, pt 2.24 Gas Safety Act 2000

215 These amendments are consequential on the following proposed sections of the Legislation Act:

- section 171 (Client legal privilege).
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.25 Guardianship and Management of Property Act 1991

216 This amendment is consequential on Legislation Act, proposed section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.26 Health Records (Privacy and Access) Act 1997

217 These amendments are consequential on Legislation Act, proposed section 171 (Client legal privilege).

Sch 2, pt 2.27 Imperial Acts (Repeal) Act 1988

218 The proposed amendments of the *Imperial Acts (Repeal) Act 1988* are intended to provide a temporary location for the interpretation provisions currently located in the

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Interpretation Act 1967, part 5 and schedule 2. Since the conversion of all remaining Imperial Acts into ACT enactments because of the Interpretation Act, section 65, the *Imperial Acts (Repeal) Act 1988* has become obsolete. The amendments proposed by schedule 2 will substantially remake the *Imperial Acts (Repeal) Act 1988* and rename it as the *Former UK Acts (Interpretation) Act 1988*. As previously indicated, it is likely that the location of the interpretation provisions in the remade Act will only need to be temporary because the former UK Acts will be amended as required to remove references and provisions not relevant to the ACT. When this process is complete, the *Former UK Acts (Interpretation) Act 1988* will be repealed. A similar process was completed for former NSW Acts by the *Statute Law Amendment Act 2001 (No 2*) and the former interpretation provisions of the Interpretation Act that applied to former NSW Acts were repealed by the Statute Law Amendment Act.

Sch 2, pt 2.28 Independent Competition and Regulatory Commission Act 1997

219 These amendments are consequential on the following proposed provisions of the Legislation Act:

- section 170 (Privileges against selfincrimination and exposure to civil penalty)
- division 19.3.3 (Appointments—Assembly consultation).

Sch 2, pt 2.29 Lakes Act 1976

220 This amendment is consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts).

Sch 2, pt 2.30 Landlord and Tenant Act 1899

221 This amendment is consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts)

Sch 2, pt 2.31 Land (Planning and Environment) Act 1991

222 This amendment is consequential on the relocation of the provisions of the Statutory Appointments Act to the Legislation Act.

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Sch 2, pt 2.32 Limitation Act 1985

223 These amendments are consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts).

Sch 2, pt 2.33 Liquor Act 1975

224 This amendment is consequential on Legislation Act, proposed section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.34 Low-Alcohol Liquor Subsidies Act 2000

225 This amendment is consequential on Legislation Act, proposed section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.35 Occupational Health and Safety Act 1989

226 These amendments are consequential on Legislation Act, proposed section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.36 Perpetuities and Accumulations Act 1985

227 This amendment is consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts).

Sch 2, pt 2.37 Public Health Act 1997

228 These amendments are consequential on Legislation Act, proposed section 170 (Privileges against selfincrimination and exposure to civil penalty).

Sch 2, pt 2.38 Public Interest Disclosure Act 1994

229 This amendment is consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts).

Sch 2, pt 2.39 Public Sector Management Act 1994

230 These amendments are consequential on the proposed relocation of the provisions of the Statutory Appointments Act to the Legislation Act, proposed section 170 (Privileges against selfincrimination and exposure to civil penalty).

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Sch 2, pt 2.40 Race and Sports Bookmaking Act 2001

231 These amendments are consequential on the following proposed sections of the Legislation Act:

- section 171 (Client legal privilege)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.41 Residential Tenancies Act 1997

232 This amendment is consequential on the proposed relocation of the provisions of the Statutory Appointments Act to the Legislation Act.

Sch 2, pt 2.42 Roads and Public Places Act 1937

233 This amendment is consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts).

Sch 2, pt 2.43 Sale of Motor Vehicles Act 1977

234 This amendment is consequential on the proposed replacement of Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts).

Sch 2, pt 2.44 Surveyors Act 2001

235 These amendments are consequential on the proposed relocation of the provisions of the Statutory Appointments Act to the Legislation Act.

Sch 2, pt 2.45 Taxation Administration Act 1999

236 The first proposed amendment of the *Taxation Administration Act 1999* is consequential on the proposed replacement of the Interpretation Act, section 7 by Legislation Act, section 121 (Binding effect of Acts).

237 The other proposed amendment of the *Taxation Administration Act 1999* is merely to adjust consequentially a cross-reference to the provisions of the Legislation Act about service of documents (which are proposed to be renumbered from part 18.5 to part 19.5).

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Sch 2, pt 2.46 Tobacco Act 1927

238 These amendments are consequential on the following proposed sections of the Legislation Act:

- section 170 (Privileges against selfincrimination and exposure to civil penalty)
- section 171 (Client legal privilege).

Sch 2, pt 2.47 Tree Protection (Interim Scheme) Act 2001

239 These amendments are consequential on the following proposed sections of the Legislation Act:

- section 171 (Client legal privilege)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.48 Utilities Act 2000

240 These amendments are consequential on the following proposed sections of the Legislation Act:

- section 171 (Client legal privilege)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.49 Victims of Crime (Financial Assistance) Act 1983

241 These amendments are consequential on Legislation Act, proposed section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.50 Waste Minimisation Act 2001

242 These amendments are consequential on the following proposed sections of the Legislation Act:

- section 171 (Client legal privilege)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.51 Water and Sewerage Act 2000

243 These amendments are consequential on the following proposed sections of the Legislation Act:

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- section 171 (Client legal privilege)
- section 189 (Reference to offence includes reference to related ancillary offences).

Sch 2, pt 2.52 Workers Compensation Act 1951

244 These amendments are consequential on Legislation Act, proposed section 189 (Reference to offence includes reference to related ancillary offences).

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