

## EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Regional Development and Territories,  
Parliamentary Secretary to the Deputy Prime Minister and  
Minister for Infrastructure, Transport and Regional Development

*Seat of Government (Administration) Act 1910*

### ***Australian Capital Territory National Land (Leased) Ordinance 2022***

The *Australian Capital Territory National Land (Leased) Ordinance 2022* (the Ordinance) regulates leases by the Commonwealth upon National Land. Amongst other matters, the Ordinance provides for the granting of leases, variation of lease purposes, restrictions on dealing with certain leases, subleasing and the termination of leases. The Ordinance combines the relevant provisions of the *City Area Leases Ordinance 1936*, the *Leases Ordinance 1918*, the *Leases (Special Purposes) Ordinance 1925*, the *City Area Leases Regulations* and the *Leases Regulations* into a single updated set of leasing provisions that will apply to leases of all National Land in the Australian Capital Territory (ACT). Most of these provisions are updated versions of laws that applied to National Land under the *National Land Ordinance 1989* (NLO).

#### Authority

The Ordinance is made under paragraph 12(1)(d) of the *Seat of Government (Administration) Act 1910*. That provision empowers the Governor-General to make ordinances for the peace, order and good government of the ACT with respect to **National Land**, as defined by the *Australian Capital Territory (Planning and Land Management) Act 1998*.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that a power in an Act to make a legislative instrument includes the power to repeal or amend the instrument, subject to any conditions that apply to the initial power. The Ordinance repeals and replaces the NLO.

#### Purpose and operation

Prior to ACT self-government in 1989, a range of Ordinances, regulations and applied NSW laws governed the management by the Commonwealth of land in the ACT. As part of the transition to ACT self-government, most land within the ACT became Territory Land, and most of the land management laws became ACT enactments, able to be amended or repealed by the Legislative Assembly of the ACT.

The NLO gave effect to the provisions of 13 pre-self-government laws in relation to **National Land** over which the Commonwealth retained responsibility. The *Australian Capital Territory (Planning and Land Management Act) 1998* defines **National Land** to mean land in the ACT declared by the Minister, by notice in the Commonwealth Gazette, to be National Land (section 27(1)). Such land must be used, or intended to be used, by or on behalf of the Commonwealth (section 27(2)). Specified land whose management is vested in a person or

body by an Act is also National Land (section 27(3)). The ACT Government manages the remaining land (***Territory Land***, defined in section 28), which comprises most of the ACT. The initial declarations of National Land were notified on 2 March 1989 and there has been a series of amendments since then.

Under the *Legislative Instruments Act 2003*, all legislative instruments, such as Ordinances, are repealed automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Sunsetting ensures that legislative instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

The NLO is due to be repealed on 1 April 2022 pursuant to paragraph 51(1)(c) *Legislation Act 2003* and the *Legislation (Deferral of Sunsetting – ACT Self-Government Instruments) Certificate 2019*.

The laws applied by the NLO fall into three categories: leased land, unleased land (including public places and roads), and lake areas (Lake Burley Griffin). This Ordinance deals with matters previously covered by the applied provisions of the following laws that were given effect by the NLO:

- *City Area Leases Ordinance 1936*
- *the Leases Ordinance 1918*
- *the Leases (Special Purposes) Ordinance 1925*
- *the City Area Leases Regulations*
- *the Leases Regulations*.

The other laws that were given effect by the NLO are covered by the *Australian Capital Territory National Land (Leased) Ordinance 2022* and the *Australian Capital Territory National Land (Lakes) Ordinance 2022*.

As was the case in 1989 when the NLO was made, consistency in the management of National Land and Territory Land, as far as that is appropriate, has been a key policy aim in developing the Ordinance. The provisions reflect more modern drafting principles and are more consistent with updated ACT legislation applying to Territory Land, but their substance is in large part unchanged.

### Consultation

With the Attorney-General’s approval, the Department of Infrastructure, Transport, Regional Development and Communications (the Department) conducted a thematic review in 2018-2019 of the NLO and seven other sunsetting instruments relating to the administration of the ACT. As part of the review, the Department sought comments from a wide range of agencies, including the National Capital Authority (NCA), the Australian Federal Police, the Departments of Finance, Defence, Foreign Affairs and Trade, Prime Minister and Cabinet, and Veterans’ Affairs, the former Department of Environment and Energy, and the ACT Government.

The Department also convened a working group, comprising representatives from the NCA, the Department of Finance and the ACT Government, to consider the provisions of the NLO and the applied pre-self-government laws in detail.

Public consultation was undertaken via the release of exposure drafts of the Ordinance inviting submissions between 23 October and 7 November 2021. Four submissions were received regarding leased and unleased Ordinances and comments related to style and clarity and did not require any content changes to the Ordinance.

The Department has by way of letter to the Office of Best Practice Regulation certified that the NLO is operating effectively and efficiently, and that a Regulation Impact Statement is not required for the NLO to be remade.

Other matters

The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003* (Cth).

The Ordinance commences on 1 April 2022.

A detailed explanation of the provisions of the Ordinance is set out in Attachment A.

The Ordinance is compatible with human rights. A Statement of Compatibility with Human Rights is at Attachment B.

**Details of the proposed *Australian Capital Territory National Land (Leased) Ordinance 2022***

**Part 1—Preliminary**

**Section 1 – Name**

Section 1 provides that the name of the Ordinance is the *Australian Capital Territory National Land (Leased) Ordinance 2022* (the Ordinance).

**Section 2 – Commencement**

This section provides for the Ordinance to commence on 1 April 2022.

**Section 3 – Authority**

Section 3 states that the Ordinance is made under the *Seat of Government (Administration) Act 1910*.

**Section 4 – Schedules**

Section 4 provides that each instrument that is specified in a Schedule to the Ordinance is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule to the Ordinance has effect according to its terms.

**Section 5 – Simplified outline of this Ordinance**

Section 5 gives a simplified outline of the Ordinance.

**Section 6 – Definitions**

Section 6 defines terms used in the Ordinance. Definitions of particular note are as follows:

***Building Act*** means the *Building Act 2004* (ACT), as in force at the commencement of this Ordinance.

***Land Titles Act*** means the *Land Titles Act 1925* (ACT), as in force at the commencement of this Ordinance.

***Minister*** is defined so as to allow for the division of responsibilities between the Minister responsible for administering Part II of the *Australian Capital Territory (Planning and Land Management) Act 1988* (being the Minister responsible for the NCA) and the Minister administering section 27 of the *Planning and Land Management Act* where the land is required for Commonwealth purposes other than for the special purposes of Canberra as the National Capital (being the Minister for Finance).

***National Capital Plan*** means the plan prepared by the NCA under Part III of the *Australian Capital Territory (Planning and Land Management) Act 1988*.

***National Land*** has the same meaning as in the *Australian Capital Territory (Planning and Land Management) Act 1988*.

***Planning and Land Management Act*** means the *Australian Capital Territory (Planning and Land Management) Act 1988*.

**rules** means rules made under section 59 of this Ordinance.

### Section 7 – Application and administration of Ordinance

Subsection 7(1) provides that the Ordinance applies to National Land.

Subsections 7(2) and 7(3) deal with the division of responsibility for the management of National Land. Subsection 7(2) provides that, with the approval of the Minister, the NCA is to manage those areas of unleased National Land which are designated in writing by the Minister as land required for the special purposes of Canberra as the National Capital. Subsection 7(3) provides that all other areas of National Land are to be managed by the Minister administering section 27 of the Planning and Land Management Act in so far as that section relates to the declaration of such areas as National Land.

The section also provides that the management of National Land does not include the management or regulation of water taking as that responsibility sits with ACT Government. With regards road transport laws on National Land nothing in this section limits the performance of the Minister administering the *National Land (Road Transport) Ordinance 2014*.

### Section 8 – Interaction with Territory Acts

Subsection 8(1) provides that unless the contrary intention appears, nothing in the Ordinance has effect in relation to Territory Land, or makes unlawful conduct that is lawful under a Territory Act. A note to the section explains that the Ordinance could have effect with respect to Territory Land, for example, where a lessee of Territory Land is required to pay part of the cost of erecting a fence (as per section 37).

Subsection 8(2) defines ***Territory Act*** as an Act passed by the Legislative Assembly for the Australian Capital Territory, or a law that is an enactment within the meaning of paragraph 8(2)(b). This definition is unchanged from the NLO.

### Section 9 – Occupancy or use of existing buildings

Section 9 applies if the Minister grants a lease of National Land on which there are improvements but a certificate of regularisation has not been issued in relation to a building forming part of those improvements. Subsection 9(2) provides that a person may occupy or use, or permit another person to occupy or use, the building or a part of the building whether or not a certificate of occupancy has been issued.

Subsection 9(3) provides that nothing in this section prevents or restricts the application of the *Building Act 2004* (ACT) to the alteration, after the grant of the lease, of the improvements on the land or the construction of other improvements on the land.

## **Part 2 – Leases of National Land**

### **Division 1 – Grants of leases**

## Section 10 – Power of the Minister to grant leases

Section 10 provides the Minister may grant Commonwealth leases of National Land, provided the lease purposes are consistent with the National Capital Plan. A lease must not exceed 99 years and is also subject to the terms, conditions and covenants specified in the lease, required by this Ordinance and prescribed by the rules.

The Minister may grant a lease by auction, tender, ballot or direct grant. Subsection 10(6) stipulates that if a lease is to be granted by auction, tender or ballot, the Minister must publish notice of the intention to conduct the auction, tender or ballot not less than 10 business days before doing so.

Subsection 10(7) provides that such notice must be published on the NCA's website: [www.nca.gov.au](http://www.nca.gov.au) (for a lease of National Land managed by the NCA) or on the website of the Department whose Minister is responsible for all other areas of National Land, as per subsection 7(3) (for a lease of any other National Land).

Subsections 10(8) to (10) provide that the Minister may cancel, vary or combine the processes for granting leases under this section, and may grant a lease by any permitted method or methods.

Subsections 10(11) to (14) provide the rules may restrict eligibility for the grant of a lease to a specified class of people and the Minister must not grant a lease unless satisfied the person is eligible, and has the ability to carry out the terms, conditions and covenants of the lease.

A lease granted under this section may also include provisions requiring the lessee to develop the land in a specified way, enter into a development deed or give security for the performance of their obligations under the lease.

## Section 11 – Grant of lease for diplomatic purposes

Section 11 provides that a lease is granted or made for *diplomatic purposes* if it is granted to, or made with, the Government of a foreign country (or their accredited agent) for their diplomatic, official, consular or official residence use.

A lease granted under this section may authorise the lessee to enter into, for diplomatic purposes, arrangements with the Government (or agent) of another foreign country with respect to the whole or part of the land including subleasing or subdividing the land.

## Section 12 – Failure to accept and execute lease

This section applies if a person offered a lease under this ordinance fails to accept and execute the lease or pay any money required within 20 business days after being given the lease for execution.

Subsection 12(2) provides the Minister may, by notice in writing, withdraw the offer or otherwise terminate the person's right to the lease. The notice must provide grounds and specify the day of effect (not less than 20 business days after the notice is given). A person whose right to be granted a lease has ended under this section has no claim for compensation or for the recovery of money paid to the Commonwealth in relation to the grant of the lease.

Subsection 12(5) provides that if a bid or application for a grant of a lease had been made by an agent of the proposed lessee then notice may be given to the agent of the proposed lessee.

## **Division 2 – Rent review and relief from lease obligations**

### Section 13 – Review of Ministerial determination of rent

This section applies if the Minister has undertaken a rent review, given the lessee notice of the outcome of the review and the lease does not provide a binding mechanism for independent determination (if the Commonwealth and the lessee cannot agree) on the amount of the rent, as reviewed.

Subsection 13(2) provides the lessee may, within 20 business days of being given notice (or a longer period as the Minister allows) apply to the Minister to reconsider the reviewed rent. The Minister may confirm the rent as reviewed or substitute another amount they consider appropriate.

Subsection 13(3) stipulates the making of an application does not affect the obligation of the lessee to pay the rent, as reviewed, or prevent the taking of action to enforce the obligation.

### Section 14 – Reduction of rent and relief from conditions

Section 14 provides a lessee (the *applicant*) may apply to the Minister for a rent reduction or relief from compliance with a lease provision. The application must specify the lease and the reduction or relief sought and be accompanied by any prescribed fee.

In considering an application, the Minister must have regard to all information provided in the application (and any other matter the Minister considers relevant). The Minister may approve, subject to any conditions, or refuse the application.

## **Division 3 – Lease variations**

### Section 15 – Scope of Division

Section 15 provides that this Division does not apply to a lease granted solely for diplomatic purposes, regardless of when the lease was granted.

### Section 16 – Meaning of *variation* in relation to a lease

In this Division, a *variation* of a lease is a consolidation or subdivision of the lease or any variation of the purpose for which the land under the lease may be used or of a related term, condition or covenant of the lease.

### Section 17 – Process for variation of lease

Section 17 provides a Lessee (the *applicant*) may apply to the Minister for a variation of the lease. The application must be accompanied by the prescribed fee. The Minister may approve the application as sought, or on different terms, or refuse the application. If approved, the Minister must also determine the amount of any lease variation charge.

In considering an application, the Minister must have regard to the National Capital Plan (any lease variation must be consistent with the National Capital Plan), all information provided and any other matter the Minister considers relevant.

Paragraphs 17(7)(a) and (b) provide the Minister must make a decision within 4 months after receiving the application or a longer period agreed between the Minister and the applicant. If

further information has been requested the time period for the Minister to make a decision is then the later of those provided by paragraphs 17(7)(a), (b) or 20 business days after the day the applicant provides the further information. If the Minister does not make a decision within the relevant period subsection 17(8) provides that the Minister is taken to have refused the application (that is, there will be a deemed refusal).

The Minister must give the applicant written notice of the decision. If the Minister approves the application the notice must specify the lease variations, how the lease variation charge has been calculated, the day the charge must be paid and include instruments to give effect to the lease variations. Such instruments may include a surrender of the old lease and a grant of a new lease.

Subsection 17(11) provides that if the Minister refuses the application then the notice must include reasons for the refusal (except in the case of a deemed refusal taken to be made under subsection 17(8)).

#### Section 18 – Amount of lease variation charge

Section 18 provides a table and the formula for working out the amount of a **lease variation charge**. When doing so an improvement in relation to the land comprised in the lease is not to be taken into account, however the value of any work carried out by way of clearing, filling, grading, draining, levelling or excavating the land may be.

Subsection 18(3) provides that a variation of a lease by way of **consolidation** means the surrender of 2 or more leases held by the same lessee and the grant of a new lease or leases to the lessee to consolidate the parcels of land comprised in the surrendered leases.

Subsection 18(4) provides a variation of a lease by way of **subdivision** means the surrender of one or more leases held by the same lessee, and the grant of new leases to the lessee to subdivide the parcels of land in the surrendered leases.

Subsection 18(7) provides that the lease variation charge may be nil.

#### Section 19 – Payment of lease variation charge

Section 19 provides a lease variation charge must be paid no later than 60 days after notice of the Minister's decision has been given to the lessee (or by a later day if so specified in the Minister's decision). Any approval of a variation of lease under section 17 lapses if the amount of the lease variation charge is not paid by due date. In addition, the Minister must not execute an instrument that gives effect to a variation of lease unless the lessee has paid the lease variation charge.

#### Section 20 – Minister may remit or refund lease variation charge

Section 20 provides the Minister may remit or refund a lease variation charge if satisfied it is fair and reasonable to do so. The Minister may do so on their own initiative or on written application by the lessee.

### **Division 4 – Restrictions on dealing with certain leases**

#### Section 21 – Scope of Division



Section 21 provides that this Division does not apply to a lease granted solely for diplomatic purposes, regardless of when the lease was granted.

#### Section 22 – Division 4 leases – restricted periods and dealings

Section 22 provides a table containing Division 4 leases and restricted periods. For each kind of **Division 4 lease** set out in column 1 of an item in the table, the **restricted period** is the period set out in column 2 of the item.

Subsection 22(2) provides a **dealing** is an assignment or transfer of the lease, a parting with possession of the land comprised in the lease (or any part of it) or a dealing prescribed by the rules. However, subject to section 27 (about arrangements made to avoid the restriction on dealings in this Division), the grant of a sublease is not a dealing in relation to a Division 4 lease.

Subsection 22(4) provides the Minister may, by notifiable instrument, exempt a Division 4 lease from the application of this Division in relation to a particular dealing.

The Ordinance also allows the Minister to amend or repeal a notifiable instrument made under this section. The use of a notifiable instrument in this section is appropriate as the decision does not alter the law but rather is administrative in nature. A notifiable instrument is an instrument that is likely to be of long-term public interest for which public accessibility and centralised management is desirable. A notifiable instrument made under this Ordinance is available from [www.legislation.gov.au](http://www.legislation.gov.au).

#### Section 23 – Consent to dealings in Division 4 leases

A dealing in a Division 4 lease during the restricted period (as set out in the table in subsection 22(1)) that is made or entered into without the written consent of the Minister has no effect.

Subsection 23(3) provides a lessee or other party to a proposed dealing (the **applicant**) may apply to the Minister for consent to a dealing in a Division 4 lease.

The Minister may consent to the dealing unconditionally, subject to reasonable conditions or refuse consent. The Minister must not consent unless satisfied the proposed lessee is eligible (where the grant of a lease is restricted to a specified class of people), has given security required for the performance of their obligations (where the lease contains building and development provisions) and has the ability to carry out the terms, conditions and covenants of the lease.

Subsection 23(7) declares the validity of a dealing in a Division 4 lease made with the Minister's consent is not affected by a defect or irregularity in relation to the giving of the consent, or because a ground for the consent had not arisen.

#### Section 24 – Registration of Division 4 leases

Section 24 provides that if a lease is a Division 4 lease, the Minister must advise the registrar-general accordingly, who in turn may make a memorial in the land titles register noting the lease is a Division 4 lease and the restricted period for the lease.

The restriction in Subsection 23(1) does not apply to a dealing in a Division 4 lease if the dealing is registered under the Land Titles Act.

## Section 25 – Certificates of compliance and discharge of liability

Section 25 provides a lessee under a Division 4 lease that contains a building and development provision may apply to the Minister for a certificate of compliance.

The Minister must issue a **full certificate of compliance** if satisfied that the building and development provision has been fully complied with. If the Minister is satisfied that the building and development provision has been partly complied with (and it is appropriate to issue a certificate) the Minister must issue a **partial certificate of compliance** in relation to the lease. A partial certificate of compliance may be issued subject to a condition that the lessee provide to the Minister security (in a specified form and amount) against failure to complete outstanding work specified in the certificate.

Subsection 25(6) provides a lessee under a Division 4 lease that is an instalment lease may apply to the Minister for a certificate stating the liability for instalments has been discharged. If satisfied that all instalments have been paid, The Minister must, issue a certificate stating that the lessee's liability for instalments under the lease has been discharged.

If the Minister issues any certificate under this section, then the Minister must also give a copy to the registrar-general. In the case of a discharge of liability certificate or a full certificate of compliance the registrar-general may make a memorial in the land titles register stating that the restriction on dealings under subsection 23(1) no longer applies to the lease.

## Section 26 – Dealings entered into subject to Minister's consent

Section 26 provides that nothing in this Division prevents a dealing that is entered into in relation to a Division 4 lease from being made conditional on obtaining the Minister's consent under subsection 23(5).

The consent requirement in subsection 23(1) is not contravened if the dealing is made conditional on obtaining the Minister's consent under subsection 23(5) and an application for the Minister's consent is made within 3 months and the Minister then consents to the dealing within 6 months (after the day the dealing is entered into).

## Section 27 – Arrangements to avoid restrictions on dealings

Section 27 provides any arrangement entered into that is intended to, or has the effect of, avoiding or preventing restriction under, or the effect of, this Division, whether directly or indirectly, on a dealing in a Division 4 lease is of no effect.

## Section 28 – Validity of certain dealings with leases not affected by this Division

Section 28 provides that nothing in this Division affects the validity of a dealing in relation to a Division 4 lease if the dealing is made in one of the following listed circumstances:

- (a) the lessee has died;
- (b) the dealing is made under any of the following orders:
  - (i) an order of Division 1 of the Federal Circuit and Family Court of Australia;
  - (ii) an order of another court having jurisdiction under the *Family Law Act 1975*;
  - (iii) an order under the *Domestic Relationships Act 1994* (ACT), adjusting the property interests of the parties in a domestic relationship;

- (c) the dealing happens by operation of, or under, a law relating to bankruptcy or insolvency;
- (d) the dealing is the transfer or assignment of the lease by a mortgagee in exercising the mortgagee's power of sale;
- (e) the dealing in the lease occurs by operation of law.

## **Division 5 – Subleasing**

### Section 29 – Leased land to be held as undivided parcel

Section 29 provides the land comprised in a lease must be held and occupied by or from the lessee as one undivided parcel (unless section 30 applies). Subsection 29(2) provides the land comprised in a lease may be sublet and may be transferred, assigned or mortgaged, along with any interest in the land, unless this Ordinance or the lease provides otherwise.

### Section 30 – Power of lessee to sublet part of building

Section 30 provides any part of a building on land comprised in a lease may, subject to the lease, any sublease of the land and this Ordinance, be sublet separately from the remainder of the building. A sublease may cover both part of a building on land comprised in a lease; and another part of the land comprised in the lease that does not have the building on it.

## **Division 6 – Improvements**

### Section 31 – Application of Division

This Division applies to an improvement if the improvement is on land that is or was subject to a lease, the improvement was undertaken or acquired by the Commonwealth (or the Territory), and the Commonwealth has received, or is entitled to receive, payment for the improvement under the lease or in connection with the grant of the lease.

Some improvements are excluded. Subsection 31(2) provides that this Division does not apply to improvements to land if the improvements contravene the lease of the land or where works approval is required for the improvements but has not been obtained or where occupation or use of the improvements is or would be unlawful under the Building Act.

Subsection 31(3) provides that despite the exclusion relating to a lack of works approval the Division applies to improvements the occupation or use of which is allowed under section 9 of this Ordinance. Subsection 9(2) allows the lawful occupancy or use, in certain circumstances, of buildings for which there is no certificate of occupancy or certificate of regularisation

### Section 32 – Renewing lessee not liable to pay for improvements

Section 32 applies if at the expiry of a lease a lessee is granted a further lease and there are improvements on the leased land. Subsection 32(2) provides that, subject to any contrary provision in the lease, the lessee is not liable to pay to the Commonwealth the value of the improvements.

### Section 33 – Commonwealth to pay lessee for certain improvements

Section 33 deals with the Commonwealth's liability to pay for improvements. The section applies if a lease expires (and the lessee is not granted a further lease) and there are improvements (to which this Division applies) on the leased land and no provision in the lease precluding or limiting payment for the improvement.

Subsection 33(2) provides the Commonwealth is liable to pay to the lessee the market value of the improvements on the land. Where a further lease for only part of the land is granted the payment is for any improvements on the part of the land not included in the further lease.

Subsection 33(3) provides the period within which the Commonwealth must pay the lessee for the improvements. Payment must be made within 3 months after the expiry of the lease (where it is not proposed to grant a further lease of the land to any person). If the Commonwealth leases the land to another person then payment must be made within 3 months after the grant of that lease. In any other case payment must be made within 6 months of the expiry of the lease.

Subsections 33(4) and (5) provide for the deduction of leasing expenses from the payment to the lessee. Subsection 33(4) applies if the Commonwealth is liable to make a payment for improvements under this section, and before the expiry of the *original lease* the Minister offers a further lease but the lessee does not accept and instead the Commonwealth grants a lease to another person. In that instance the Minister must deduct from the payment to the lessee the amount of any reasonable expenses incurred in relation to the grant of the lease to the other person.

Subsection 33(4) does not apply if the original lease was granted for diplomatic purposes.

Subsection 33(6) and (7) require the Commonwealth to account for revenue received from improvements. Subsection 33(6) applies if a lease expires and there are improvements on the land comprised in the lease and during the *relevant period* after the expiry of the lease and before the Commonwealth leases the land to another person, the Commonwealth receives revenue from the improvements. In that instance the Commonwealth must pay to the lessee an amount equal to the revenue received for the relevant period less any reasonable maintenance and other costs incurred by the Commonwealth in relation to the improvements for that period.

#### Section 34 – Payment for improvements where lease surrendered or terminated

Section 34 applies if a lease is surrendered or terminated and a full certificate of compliance has been issued for that lease. Subsections 33(1) to (3) apply in relation to the lease as if the term of the lease had expired on the day the lease was surrendered or terminated.

Subsection 34(3) provides for the deduction of expenses to be made from the payment to the lessee for improvements. The Minister must deduct from the payment an amount to cover any reasonable expenses incurred for the surrender or termination of the lease and the grant of a lease to another person.

#### Section 35 – Determining market value of improvements

Section 35 provides for the determination of the market value of improvements.

Subsection 35(1) defines **assessment day** as the day the term expired (if the term of the lease has expired) or the day the lease was terminated or surrendered (if the lease has been terminated or surrendered).

Subsection 35(2) defines the **market value** of improvements on land as the amount by which the improvements increase the value of the lease of the land (based on the assumption of the lease, together with the improvements, being offered for sale on the open market on the day before the assessment day on the reasonable terms and conditions that a genuine seller might require).

If the Commonwealth is required to pay a lessee the market value of improvements the Minister must, as soon as reasonably practicable after the assessment day, determine the market value of the improvements on the land (as at the assessment day) and give the lessee written notice of the determination (within 20 business days after the day the determination is made). In determining the market value of the improvements, the Minister must assume where a lease has expired that a further lease of the land had been granted subject to the same provisions, and term. Where a lease was terminated or surrendered the Minister is to assume that the lease had not been terminated or surrendered.

## **Division 7 – Shared infrastructure and access**

### Section 36 – Scope of Division

Unless otherwise specified, this Division applies to a lessee of Territory Land in the same way it applies to a lessee of National Land and to land, whether it is National Land or Territory Land.

### Section 37 – Fences

Section 37 applies to a lessee if the land comprised in the lessee's lease adjoins another parcel of land (the **adjoining land**) (that is not part of the lessee's lease) and one of the parcels is National Land and there is no fence on the common boundary.

Subsection 37(2) provides the Minister may direct a fence be erected. If the adjoining land is not subject to a lease, then by way of notice to the lessee to erect a fence on the common boundary. If, however the adjoining land is subject to a lease then by way of notice to the lessees to jointly erect the fence.

Subsection 37(3) provides a direction must specify the type and standard of the fence, the part of the boundary on which it is to be erected and provide a time for completion (within 20 business days after the day the direction is given or such longer period allowed by the Minister).

Subsection 37(4) provides if a compliant fence is not erected within the time period provided the Minister may, at the cost of the lessee, cause the fence to be erected and the lessee must pay to the Minister, on demand, an amount determined by the Minister as the cost of erecting the fence or as the proportion of the cost payable by the lessee. This subsection does not apply to a continuing lease granted under the *Leases Ordinance 1918* (see section 70).

Subsection 37(5) applies where a works approval (or approved plans under the Building Act) show a fence on a common boundary between 2 parcels of land and one of the parcels of land is National Land and both parcels of land are leased. In that case one of the lessees may erect a fence in compliance with the works approval and may, by proceedings in a court of competent jurisdiction (commenced within 6 months after commencement of the erection of the fence) recover half the cost of doing so (less depreciation) from the other lessee.

### Section 38 – Party walls

Section 38 applies if a works approval (or approved plans under the Building Act) show a party wall to be erected between 2 parcels of land, one of which is National Land.

Subsection 38(2) defines **party wall** as a wall or structure designed for the common use of 2 or more buildings and erected (or to be erected) on a common boundary, or part of that boundary, between 2 parcels of land, and extending laterally into each of those parcels of land. It includes any wall that is completely or partly used to support 2 or more buildings, if the wall was erected in connection with a building for which there is a certificate of occupancy under the Building Act.

Subsection 38(3) provides the lessee of each parcel of land may, during the term of the lease erect, maintain and use a party wall in the position shown on the works approval or approved plans and use that wall for the support of the building or buildings provided for in those plans. The lessees of the 2 parcels of land may agree on who will erect the party wall and how the cost is proportioned.

Subsections 38(5) to (8) deal with the payment of costs of party walls. If the lessee of one parcel of land (the **first lessee**) has, at their expense, erected a party wall, the lessee of the other parcel must immediately after beginning to erect a building on the other parcel of land pay to the first lessee a proportion of the cost of the erection of the party wall (a reasonable allowance must be made for depreciation of the party wall if time has elapsed). If the lessees cannot agree about the apportionment, the Minister may, at the request of either lessee, determine by notice the cost (and proportion) of erecting the party wall. The amount payable agreed by the lessees, or determined by the Minister is a debt due and recoverable in any court of competent jurisdiction.

### Section 39 – Road access to and from leased land

Section 39 provides the Minister must ensure that each lessee has direct access to the leased land. Access may be from a road or a road related area by way of an access track (or other way) that the lessee may use for entry or exit only, at any time without charge.

Access from a road related area must not interfere with a building, garden or stockyard on the land through which the vehicle access is provided and must be located so as to minimise the damage or inconvenience to any lessee of that land.

The section provides definitions for **road** and **road related area** with reference to the *Australian Capital Territory National Land (Unleased) Ordinance 2022* and the *Road Transport (General) Act 1999 ACT*.

## **Division 8 – Financial matters relating to leases**

### Section 40 – Survey fees

Section 40 provides that the Minister may arrange for a survey of the land contained in a lease and the lessee must pay the reasonable cost of the survey if the Minister so demands (unless if the lease is a continuing lease and the transitional section 71 applies).

### Section 41 – Assessment of value of leases and lands

Section 41 provides the Minister may, from time to time, assess the value of a lease or the land comprised in a lease. To do so the Minister may authorise persons to enter onto the land at reasonable times and on reasonable notice, with such equipment necessary. The Minister must give the lessee a copy of the assessment within a reasonable time after the assessment has been carried out.

Subsection 41(4) provides this section does not apply to a lease granted for diplomatic purposes.

### Section 42 – Recovery of amounts owing

If an amount is owing by a lessee under this Ordinance or a lease, the Minister may, on behalf of the Commonwealth, recover the amount as a debt due from the lessee to the Commonwealth in a court of competent jurisdiction.

## **Division 9 – Use of land for unauthorised purposes**

### Section 43 – Use of land for leased purpose

Where a lease has been granted section 43 provides that National Land, or a building or structure on the land, must not be used for a purpose other than that authorised by the lease.

### Section 44 – Injunctions to restrain use of leased land for unauthorised purpose

Section 44 applies if National Land has been used, is being used (or is proposed to be used) for a purpose other than a purpose authorised by a lease granted in relation to the land and the use is by, or permitted by, a lessee, sublessee or licensee of the land.

Subsection 44(2) provides the Minister (or anyone else whose interests are, or would be, affected by the use) may apply to the Supreme Court for an injunction to restrain the use of the land for the unauthorised purpose. On application the Supreme Court may grant an injunction restraining the lessee, the sublessee, the licensee or any other person from the use of the land and/or requiring them to do any specified thing.

### Section 45 – Keeping of touring vehicles on land used for residential purposes

Subsection 45(1) defines a *touring vehicle* as a caravan or mobile home, whether or not fixed to the ground.

Subsection 45(2) provides that a person commits an offence if they keep 2 or more touring vehicles on leased National Land (under a lease for residential purposes only) without approval. The penalty is 1 penalty unit.

Strict liability applies to the physical elements of the offence of being on leased National Land, under a lease for residential purposes only and without approval.

Subsection 45(3) provides that a person who contravenes subsection 45(2) commits a separate offence each day during which the contravention continues.

Subsection 45(5) provides a lessee may apply to the Minister for approval to keep 2 or more touring vehicles on the land comprised in the lease.

There is a safety element to this section, with the prohibition on keeping more than one touring vehicle on leased National Land (without approval on a residential lease) required to prevent or repair damage to the land or prevent danger to a member of the public using the land. The financial penalty of 1 penalty unit, is reasonable, proportionate and in-line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Power*. It is appropriate to have strict liability applying to a regulatory offence that also has a low penalty.

## **Division 10 – Surrender of leases**

### Section 46 – Lessee may surrender lease or part of land in lease

Section 46 provides a lessee may, at any time, apply to the Minister to surrender the lease or part of the land comprised in the lease. The Minister may agree to accept the surrender subject to any appropriate conditions.

Subsection 46(3) provides the surrender of a lease does not entitle the lessee to a refund or remission of any rent already paid or owing. However, the Minister may authorise the payment by the Commonwealth to the lessee of an amount equal to a full or part refund. The lessee of a surrendered lease may also be entitled to compensation for improvements under section 34.

### Section 47 – Commencement of further lease granted after surrender of lease

Section 47 applies if a lessee surrenders one or more leases and is granted in substitution a further lease (the *new lease*). It does not matter whether or not the new lease contains the land, or part of the land, comprised in the surrendered lease.

Subsection 47(3) provides that subject to subsection (4), the commencement date of the new lease is to be the same as the surrendered lease or leases. This is the case if only one lease is surrendered or if two or more leases are surrendered and they have the same commencement date.

Subsection 47(4) provides if the lease or leases are surrendered in connection with the Minister's approval of a variation of lease under Division 3, the commencement date of the new lease is the date determined by the Minister.

## **Division 11 –Termination of leases**

### Section 48 – Minister's power to terminate lease

Subsection 48(1) provides that the Minister may terminate the lease by written notice to the lessee (the *termination notice*) if the lessee contravenes the lease and the Minister has complied with the required steps prescribed in section 49.

Subsection 48(2) provides that if the lease does not provide a period for rectifying the contravention the termination notice takes effect after 10 business days (starting after the day



the notice is given). If the lease does provide a period for rectifying the contravention the termination notice takes effect the later of 10 business days (starting after the day the notice is given), or the period specified in the lease for rectifying the contravention. As soon as reasonably practicable after the Minister gives the termination notice to a lessee the Minister must also give a copy to the registrar-general and any person with a registered interest in the lease or in the land comprised in the lease.

A note to this section explains the special rules applying to the termination of continuing leases are provided in section 69 (for continuing leases granted under the *Leases Ordinance 1918*) and section 72 (for other continuing leases).

#### Section 49 – Steps before giving termination notice

Section 49 provides that the Minister must not terminate a licence under subsection 48(1) unless the notice required by subsection 49(2) has been given and the Minister has considered the reasons (if any) submitted by the licensee as to why they consider the licence should not be terminated. The written notice required under subsection 49(2) must state the Minister is considering terminating the licence, specify the contraventions and invite the licensee to submit written reasons, within 15 business days, as to why they consider the licence should not be terminated. As soon as reasonably practicable after the Minister gives a notice to a lessee, the Minister must also give a copy to any person with a registered interest in the lease or in the land comprised in the lease.

#### Section 50 – Recovery of lands by Commonwealth

Subsection 50(1) defines a person as an **unlawful occupier** if the person was a lessee of National Land and the lease has expired, been surrendered or terminated and the person remains in possession or occupation of the land.

Subsection 50(2) provides the Minister may, by written notice (a **demand notice**) given to an unlawful occupier, demand that the unlawful occupier give possession of the land to the Commonwealth within the reasonable period (not less than 10 business days after the day the demand notice is given) specified in the notice.

Subsection 50(3) provides the Minister may, if a demand notice is not complied with, apply to the Magistrates Court for an order that possession of the land be given to the Commonwealth. The court may issue a warrant authorising a police officer, within the period ending 20 business days after the day the warrant is issued, to enter the land to recover possession of the land for the Commonwealth.

#### Section 51 – Evidence of ending of lease

Section 51 provides that the Minister may certify in writing that a lease mentioned in the certificate has expired, been surrendered or terminated. The certificate is prima facie evidence of the matters stated in it.

### **Division 12 – General provisions applying to leases**

#### Section 52 – Reservation of minerals

Subsection 52(1) provides the reservation to the Commonwealth in every lease of all minerals and other substances in, on or under the land comprised in the lease, including gold, silver, copper, tin, other metals, ores and substances containing metals, gems, precious stones, coal,

limestone, shale, mineral oils, valuable earths and substances, earth, sand, gravel, stones and clay.

Subsection 52(2) provides that nothing in subsection (1) prevents the extraction of minerals or other substances from National Land that is authorised under a works approval or a permit granted under the *Australian Capital Territory National Land (Unleased) Ordinance 2022*.

#### Section 53 – no right to use, flow and control of water

Section 53 provides that a lease granted after the commencement of this Ordinance does not give a right to water use, flow and control.

#### Section 54 – Power of entry onto certain leased lands

Section 54 provides the Minister may enter upon and inspect the land contained in the lease and any improvements on it for the purpose of ascertaining compliance by the lessee. To do so the Minister must reasonably believe that a lessee has, or may have, contravened or is, or may be, contravening a term, condition or covenant of the lease, The Minister must also give the lessee not less than 2 business days' notice before entering the land.

This section does not apply to a lease granted for diplomatic purposes (to that part of the premises under the lease being used for diplomatic purposes) or in the case of any other lease to any part of the land being used only for residential purposes.

#### Section 55 – Leased land to be kept clean

Subsection 55(1) provides a lessee must at all times keep the land comprised in the lease clean, tidy and free from debris, rubbish and other unsightly or offensive matter. If a lessee does not do so the Minister may, by written notice direct the lessee to remove any matter and to restore the land to a clean and tidy condition. Any work must be carried out in the period specified in the cleaning direction, being not less than 20 business days after the day the direction is given. If a lessee contravenes a direction the Minister may cause the required work to be carried out and recover the costs of doing so from the lessee.

#### Section 56 – Right to construct civil works and operate services

Section 56 provides the Minister may authorise the entry of persons onto any land contained in a lease for the purpose of carrying out construction works and maintenance on the land. Such works include stormwater drainage, street lighting and the supply of electricity, gas, sewerage, water or other utilities. Any authorised person carrying out these works must minimise the inconvenience caused to the lessee and the damage to the land.

### **Part 3 – Miscellaneous**

Part 3 contains miscellaneous provisions, including those dealing with delegations and rulemaking powers. Although drafted, provisions providing for administrative review of the Minister's decisions have not been included at this time. This is due to doubt regarding the ability of the Administrative Appeals Tribunal (AAT) to review decisions made under ACT Ordinances. The *Administrative Appeals Tribunal Amendment Act 2005* deleted the definition of **ACT enactment** in subsection 3(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). As it stands the definition of **enactment** in subsection 3(1) of the AAT Act expressly excludes an Ordinance from the Australian Capital Territory. A subsequent amendment to

this Ordinance, containing the administrative review provisions, can be made following an amendment to the AAT Act to confirm the AAT can review decisions made under ACT Ordinances.

#### Section 57 – Ministerial applications – supply of further information

Section 57 provides that the Minister may request an applicant give further information within a reasonable specified period. The Minister may refuse to consider the application until that information is provided. The application is taken to be withdrawn if the applicant does not provide the information within the specified period. The applicant may also withdraw the application at any time prior to the Minister making a decision.

#### Section 58 – Delegation

Section 58 provides for delegation of the powers of the Minister under the Ordinance. Subsection 58(1) concerns the Minister administering Part II of the Planning and Land Management Act (being the Minister responsible for the NCA) who may delegate functions, powers or duties under this Ordinance (other than the power to make rules under section 59) to the NCA chief executive, or an SES employee, or acting SES employee, or an APS Executive Level 1 or 2 employee, or an equivalent position, in the NCA.

Subsection 58(2) concerns the Minister administering section 27 of the Planning and Land Management Act in so far as it relates to the declaration of land as National Land where the land is required for Commonwealth purposes other than for the special purposes of Canberra as the National Capital (being the Minister for Finance). The Minister may delegate functions, powers or duties under this Ordinance to the Secretary of the Department or an SES employee, or acting SES employee, or an APS employee at the Executive Level 2 position, in that Department.

***APS employee, SES employee and acting SES employee*** are defined in section 2B of the *Acts Interpretation Act 1901*.

#### Section 59 – Rule-making power

Subsection 59(1) allows the Minister to make rules, by legislative instrument prescribing matters required or permitted by the Ordinance, or as necessary or convenient. Subsection 59(2) provides that the rules may include the setting of fees.

Subsection 59(3) sets limits confirming the rules may not create an offence or civil penalty, provide powers of arrest or detention, or of entry, search or seizure, or impose a tax, or directly amend the text of this Ordinance.

#### Section 60 – NCA chief executive may prescribe fees

Subsection 60(1) allows the NCA chief executive to prescribe fees by legislative instrument, in relation to those areas of National Land managed by the NCA under subsection 7(2). However, subsection 60(2) provides that subsection 72(1) does not apply where a fee for a matter is prescribed by the rules.

This provision allows for further flexibility while ensuring accountability as any fee set would be way of a disallowable instrument.

#### Section 61 – NCA chief executive may approve forms

Subsection 61(1) allows the NCA chief executive to approve, by legislative instrument, a form for the purpose of the Ordinance. Subsection 61(2) provides if there is an approved form, it must be used. However, there is no requirement for forms to be formally approved.

#### **Part 4 – Application, saving and transitional provisions**

Part 4 of the Ordinance contains application, savings and transitional provisions. It is unnecessary to specify certain matters in the Ordinance, due to the saving effect of section 38 of the *Interpretation Ordinance 1967* which applies to the NLO. These matters include the commission of any criminal offence under the NLO applied provisions, the obligation to repair damage or pay the Commonwealth's costs to remediate damage under the RPP Ordinance, and the protection of the Commonwealth from liability under section 15 of the *Protection of Lands Ordinance 1937*. Those provisions continue to have effect in relation to things done before the commencement of this Ordinance.

#### Section 62 – Transitional—definitions

Section 62 defines terms used in Part 4. Definitions of particular note are as follows:

***applied provisions***, in relation to National Land, has the same meaning as in the old law. The old law is defined below as meaning the *National Land Ordinance 1989*.

***City Area Leases Ordinance*** means the *City Area Leases Ordinance 1936*, as applied by the old law.

***continuing lease*** means a lease granted or continued, or purported to have been granted or continued, under an applied provision that was in force, or purportedly in force, immediately before the transition time.

***Leases Ordinance*** means the *Leases Ordinance 1918*, as applied by the old law.

***Leases (Special Purposes) Ordinance*** means the *Leases (Special Purposes) Ordinance 1925*, as applied by the old law.

***old law*** means the *National Land Ordinance 1989*, as in force immediately before the transition time. The *National Land Ordinance 1989* was repealed by the *Australian Capital Territory National Land (Leased) Ordinance 2022*.

***transition time*** means the time at which this Ordinance commences.

#### Section 63 – Transitional—continuing leases

Section 63 provides for the transitional treatment of continuing leases under this Ordinance. A continuing lease continues in force after the transition time subject to the terms, conditions and covenants applying immediately before the transition time and has effect as if it had been granted under this Ordinance.

Subsection 63(2) provides that without limiting section 7 of the *Acts Interpretation Act 1901*, the repeal of the old law, and the commencement of this Ordinance, do not affect the validity of a continuing lease or any of the terms, conditions or covenants it was subject to immediately before the transition time.

Subsection 63(3) provides for the particular treatment of some continuing leases. Leases granted before 1 January 1971 under the City Area Leases Ordinance that became nominal

rent leases by the operation of sections 12 and 18 of that Ordinance continue in effect after the transition time as nominal rent leases. In addition, the relief under subsection 29(3) of the City Area Leases Ordinance from restrictions imposed by covenant on the sale of certain leases granted on or after 1 January 1974 under that Ordinance continues in effect, as does the discharge of liability in relation to breach of such a covenant conferred by subsection 29(5) of that Ordinance.

Subsection 63(4) provides that mortgages and subleases continue to apply after the transition time despite the repeal of the old law. Specifically, a mortgage continues to apply in relation to a mortgage granted under section 19 or 19AA of the City Area Leases Ordinance that was in force immediately before the transition time (as does the section). In relation to a sublease granted before 1 January 1971 that was in effect immediately before the transition time the conversion of references to ground rent in the sublease to references to rates by section 30A of the City Area Leases Ordinance continues to apply after the transition time (as does the section).

#### Section 64 – Transitional—applications made before transition time

Section 64 provides that the applied NLO provisions continue to apply to an application for the exercise of a power, or the performance of a function or duty, made under the applied NLO provisions before the transition time and still undetermined immediately before the transition time. This provision extends to any review by a court or tribunal of a decision in relation to such an application.

#### Section 65 – Transitional—actions under applied provisions

Section 65 provides that an action taken under the applied NLO provisions before the transition time is taken to have been done for the purposes of the corresponding provision of this Ordinance, and this Ordinance applies accordingly.

#### Section 66 – Transitional—delegations

Section 66 provides that delegations made under the applied NLO provisions and in force immediately before the commencement of this Ordinance continue to be in force after the Transition time as if it had been made for the purposes of a corresponding provision of the Ordinance.

#### Section 67 – Transitional—use of land for industrial purposes

Section 67 applies in relation to a continuing lease, granted under the City Area Leases Ordinance, containing a provision for the land comprised in the lease to be used for a purpose set out in subsection 8A(1) of that Ordinance. Despite the repeal of the old law, section 8A of the Ordinance continues to apply after the transition time to the land comprised in the continuing lease.

#### Section 68 – Transitional—rent review under continuing leases granted under the Leases Ordinance

Section 68 applies in relation to a continuing lease that was granted under the Leases Ordinance subject to a condition or agreement that the rate at which the rent is to be payable for any period of the lease may be determined by the Minister.

Subsection 68(2) provides that section 13 (about variation of rent under a lease) of this Ordinance does not apply to the continuing lease.

Subsection 68(3) provides that despite the repeal of the old law, the following listed applied provisions of the Leases Ordinance continue to apply after the transition time in relation to a variation of the rent under the lease:

- (a) section 3AA (Minister may vary rent);
- (b) section 3AAA (Appeals by lessees);
- (c) section 3AAB (Fair rent);
- (d) section 3AB (Reduction of rent and relief from conditions).

#### Section 69 – Transitional—dealings with, and termination of, continuing leases granted under the Leases Ordinance

Division 4 of Part 2 (about restrictions on dealings with certain leases), subsections 48(1) and (2) (Minister’s power to terminate lease) and section 49 (steps before giving termination notice) of this Ordinance do not apply to a continuing lease granted under the Leases Ordinance.

Subsection 69(2) provides that despite the repeal of the old law regulations 19 and 20 of the Leases Regulations continue to apply to an assignment, sublease or parting with possession of the land comprised in the continuing lease, or part of that land, entered into or occurring after the transition time. Regulation 22 of the Leases Regulations also continues to apply in relation to the determination of the continuing lease after the transition time.

#### Section 70 – Transitional— cost of erection of fences in relation to continuing leases granted under the Leases Ordinance

Section 70 provides that subsection 37(4) of this Ordinance (dealing with the Minister erecting a fence and recovering the cost from the lessee) does not apply in relation to a continuing lease granted under the Leases Ordinance.

#### Section 71 – Transitional—survey fees

Section 71 applies to a continuing lease granted under the Leases Ordinance or the Leases (Special Purposes) Ordinance. The obligation to pay survey fees under subsection 40(2) of this ordinance does not apply to a such a continuing lease. However, subsection 71(3) provides the obligation to pay survey fees continues to apply after the transition time in relation to a continuing lease under which section 3A of the Leases Ordinance or section 5C of the Leases (Special Purposes) Ordinance applies.

#### Section 72 – Transitional—termination of continuing leases other than those granted under the Leases Ordinance

Section 72 applies in relation to a continuing lease other than a continuing lease granted under the Leases Ordinance. Subsection 72(2) provides the Minister may (despite subsection 48(1) of this Ordinance) give a termination notice, in relation to a contravention of a provision of the lease, if the lease expressly provides the Commonwealth is entitled to terminate or the Commonwealth, as lessor would have the common law right to terminate.

### **Schedule 1 – Repeals**

#### ***National Land Ordinance 1989***

## **1 The whole of the Ordinance**

Schedule 1 repeals the whole of the *National Land Ordinance 1989*.

## Attachment B

### **Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

#### ***Australian Capital Territory National Land (Leased) Ordinance 2022***

The *Australian Capital Territory National Land (Leased) Ordinance 2022* (the Ordinance) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The Ordinance is concerned with regulating leases by the Commonwealth upon National Land. Amongst other matters, the Ordinance provides for the granting of leases, variation of lease purposes, restrictions on dealing with certain leases, subleasing and the termination of leases. The Ordinance combines the relevant provisions of the *City Area Leases Ordinance 1936*, the *Leases Ordinance 1918*, the *Leases (Special Purposes) Ordinance 1925*, the *City Area Leases Regulations* and the *Leases Regulations* into a single updated set of leasing provisions that will apply to leases of all National Land in the ACT. Most of these provisions are updated versions of laws that applied to National Land under the *National Land Ordinance 1989* (NLO).

The Ordinance is made under section 12(1)(d) of the *Seat of Government (Administration) Act 1910*. That provision empowers the Governor-General to make ordinances for the peace, order and good government of the ACT with respect to **National Land**, as defined by the *Australian Capital Territory (Planning and Land Management) Act 1998*. The Ordinance repeals the *National Land Ordinance 1989* (NLO), which it replaces.

Prior to ACT self-government in 1989, a range of Commonwealth Ordinances, regulations and applied NSW laws governed the management of land in the ACT. As part of the transition to ACT self-government, most land within the ACT became Territory Land, and most of the existing Commonwealth land management laws became ACT enactments, able to be amended or repealed by the Legislative Assembly of the ACT. The NLO gave effect to the provisions of 13 pre-self-government laws in relation to National Land over which the Commonwealth retained responsibility.

#### **Human rights implication**

The Ordinance engages the following rights:

- The right to the presumption of innocence under Article 14(2) *International Covenant on Civil and Political Rights* (ICCPR)
- The right to privacy under Article 17 ICCPR.

#### **The right to the presumption of innocence - Article 14(2) ICCPR**

The presumption of innocence imposes on the prosecution the burden of proving a charge beyond reasonable doubt. This fundamental duty is unchanged in the Ordinance. However, section 45 (Keeping of touring vehicles on land used for residential purposes) provides that a



person commits an offence if they keep 2 or more touring vehicles on leased National Land (under a lease for residential purposes only) without approval. Strict liability applies to the physical elements of the offence of being on leased National Land, under a lease for residential purposes only and without approval. Strict liability offences do not require the prosecution to prove a mental element, such as intention or recklessness, on the part of the offender. This offence is regulatory in nature, and strict liability is necessary to ensure the integrity of the regulatory regime by allowing for effective enforcement.

There is a safety element to this section, with the prohibition on keeping more than one touring vehicle on leased National Land (without approval on a residential lease) required to prevent or repair damage to the land or prevent danger to a member of the public using the land. The financial penalty of 1 penalty unit, is reasonable, proportionate and in-line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Power*. It is appropriate to have strict liability applying to a regulatory offence that also has a low penalty.

The limitations on the right to the presumption of innocence arising from strict liability elements of the offence is necessary to allow for effective enforcement of regulatory provisions. The limitations are reasonable and proportionate.

#### The right to privacy - Article 17 ICCPR

An applicant for a lease of National Land must provide certain personal information, including their name and contact details. As government agencies, the National Capital Authority (NCA) and the Department of Finance are subject to obligations under the *Privacy Act 1988* that limit the collection, use and disclosure of personal information. Accordingly, any limitation on an applicant's right to privacy is reasonable, necessary and proportionate.

#### **Conclusion**

The Ordinance is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Assistant Minister for Regional Development and Territories,  
Parliamentary Secretary to the Deputy Prime Minister  
and Minister for Infrastructure, Transport and Regional Development  
The Hon Nola Marino MP**