

2010

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

PROTECTION OF PUBLIC PARTICIPATION REGULATION 2010

SL2010 - 10

EXPLANATORY STATEMENT

Circulated by authority of
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Protection of Public Participation Regulation 2010

Overview of Regulation

Under section 10 of the *Protection of Public Participation Act 2008*, the Executive may make regulations for the Act. Section 9 of the Act provides that a civil penalty must be worked out in accordance with a regulation.

The Protection of Public Participation Regulation 2010 identifies factors that must be considered in working out a civil penalty under section 9 of the Act. A civil penalty is available when a court is satisfied that proceedings have been commenced for an improper purpose, as defined in section 6 of the Act, in order to discourage public participation, as defined in section 7. Section 9 allows a court, either on its own initiative or on application by the Territory, to order the party who began the improper proceedings to pay a civil penalty.

Clause Notes

Clause 1 – Name of Regulation – states the title of the regulation as the Protection of Public Participation Regulation 2010.

Clause 2 – Commencement – states that the regulation commences the day after its notification.

Clause 3 – Notes – provides that notes in the regulation are explanatory only, and are not part of the regulation.

Clause 4 – Working out financial penalty—Act, s 9(3) – provides that, in working out a financial penalty for the purposes of the Act, a court must consider a series of factors related to the nature and consequences of the conduct under consideration. These factors are included because they draw the court's focus towards the hardships imposed on defendants, and the gains won by plaintiffs as a result of improper proceedings.

For example, an improper lawsuit might result in court costs so high that an advocate organisation which has been targeted by proceedings will be effectively bankrupted. In that situation the relative costs to the defendant, described in paragraph 4(1)(b) of the regulation, would have been substantial, and the general deterrent effect on public participation (paragraph 4(1)(a)) is likely to be strong. Paragraph 4(1)(c) is included to account for situations in which a plaintiff obtains a pecuniary or other benefit from improper proceedings. That benefit must be considered in determining the size of the penalty.

Paragraph 4(1)(d) invites the court to consider whether improper proceedings will cause lasting or permanent disruption to any party's ability to engage in public participation. Paragraph 4(1)(e) recognises that, even in cases where proceedings are improper, there may be conduct before the proceedings begin that should either moderate or exacerbate the overall conduct of a party. If either party made a genuine

attempt to resolve the dispute that gave rise to the proceedings, that conduct should be considered in assessing a penalty under section 9 of the Act.

Paragraphs 4(2) through 4(3) clarify that the factors which guide the determination of penalties under the regulation are not intended as a limit on what the court may take into account, and explain that penalties under the *Public Participation Act 2008* are intended to supplement, rather than limit, any other available remedies or penalties that may apply to the circumstances.