

## Local Government Amendment Bill 2009

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Western Australia

LEGISLATIVE COUNCIL

## **Local Government Amendment Bill 2009**

**A Bill for**

**An Act to amend the *Local Government Act 1995*.**

The Parliament of Western Australia enacts as follows:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11

**Part 1 — Preliminary matters**

**1. Short title**

This is the *Local Government Amendment Act 2009*.

**2. Commencement**

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

**3. Act amended**

This Act amends the *Local Government Act 1995*.

1 **Part 2 — Amendments about introductory matters and**  
2 **the constitution of local government**

3 **4. Section 2.7 amended**

4 In section 2.7(1)(a) delete “directs and controls” and insert:

5

6 governs

7

8 **5. Section 2.25 amended**

9 (1) In section 2.25(2) delete “Minister.” and insert:

10

11 Minister, unless all of the meetings are within a period  
12 of 3 months.

13

14 (2) After section 2.25(2) insert:

15

16 (3A) Leave is not to be granted in respect of —

17 (a) a meeting that has concluded; or

18 (b) the part of a meeting before the granting of  
19 leave.

20

21 (3) In section 2.25(4):

22 (a) delete “first”;

23 (b) delete “council.” and insert:

24

25 council, unless all of the meetings are within a 2 month  
26 period.

27

**Local Government Amendment Bill 2009**

**Part 2** Amendments about introductory matters and the constitution of local government

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- 1 (4) After section 2.25(4) insert:  
2  
3 (5A) If a council holds 3 or more ordinary meetings within a  
4 2 month period, and a member is absent without leave  
5 throughout each of those meetings, the member is  
6 disqualified if he or she is absent without leave  
7 throughout the ordinary meeting of the council  
8 immediately following the end of that period.  
9
- 10 (5) In section 2.25(5)(b):  
11 (a) delete “while” (first occurrence);  
12 (b) at the beginning of subparagraph (i) insert:  
13  
14 while  
15  
16 (c) after subparagraph (ii) insert:  
17  
18 (iia) while the member is suspended under  
19 section 5.117(1)(a)(iv); or  
20  
21 (d) after subparagraph (i) insert:  
22  
23 or  
24
- 25 (6) After section 2.25(5) insert:  
26  
27 (6) A member who before the commencement of the *Local*  
28 *Government Amendment Act 2009* section 5 was  
29 granted leave during an ordinary meeting of the council  
30 from which the member was absent is to be taken to  
31 have first obtained leave for the remainder of that  
32 meeting.  
33



- 1   **6.     Section 2.27 amended**  
2       (1)   In section 2.27(4)(a) delete “28” and insert:  
3  
4           14  
5  
6       (2)   In section 2.27(6) delete paragraph (b) and all of the subsection  
7           after it and insert:  
8  
9                   (b)   applies to the State Administrative Tribunal  
10                   asking for a declaration as to whether or not the  
11                   member is disqualified and gives a copy of the  
12                   application to the CEO,  
13                   the member is taken to have been disqualified for the  
14                   reasons indicated in the CEO’s notice.  
15  
16       (3)   After section 2.27(6) insert:  
17  
18           (7A)   If subsection (6) applies to a member the CEO is to  
19           give the member a written notice to that effect.  
20  
21       (4)   In section 2.27(7) delete “A person other than the CEO” and  
22           insert:  
23  
24           The CEO or any other person  
25  
26       (5)   After section 2.27(9) insert:  
27  
28           (10)   This section as in force immediately before the  
29           commencement of the *Local Government Amendment*  
30           *Act 2009* section 6 applies to and in respect of a notice  
31           given under section 2.27(3) before that  
32           commencement.  
33

**Local Government Amendment Bill 2009**

**Part 2** Amendments about introductory matters and the constitution of  
local government

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- 1 **7. Section 2.39 amended**  
2 (1) In section 2.39 delete “A commissioner” and insert:  
3  
4 (1) A commissioner  
5  
6 (2) At the end of section 2.39 insert:  
7  
8 (2) Subsection (1) does not prevent the appointment of a  
9 person under Schedule 2.4 clause 4 to fill a vacancy in  
10 the office of commissioner.  
11

1                   **Part 3 — Amendments about functions of**  
2   **local governments**

3   **8.       Section 3.27 amended**

4       (1)   After section 3.27(1) insert:

5  
6           (2A)   In subsection (1) land includes Crown land the subject  
7                   of a pastoral lease within the meaning of the *Land*  
8                   *Administration Act 1997* section 3.

9  
10       (2)   After section 3.27(3) insert:

11  
12           (4A)   For the purposes of subsection (3), planting pasture on  
13                   land for grazing does not amount to cultivating the  
14                   land.

15  
16   **9.       Section 3.47 amended**

17       In section 3.47(2b):

- 18           (a)   after paragraph (b) delete “and”;
- 19           (b)   after paragraph (b) insert:
- 20  
21                   (ca)   for prescribed non-perishable goods —  
22                                   one month;

23  
24   **10.     Section 3.58 amended**

25       (1)   After section 3.58(3)(a)(i) insert:

26  
27           and

28

**s. 10**

---

- 1 (2) In section 3.58(4):  
2 (a) delete paragraph (c) and insert:  
3  
4 (c) the market value of the disposition —  
5 (i) as ascertained by a valuation carried out  
6 not more than 6 months before the  
7 proposed disposition; or  
8 (ii) as declared by a resolution of the local  
9 government on the basis of a valuation  
10 carried out more than 6 months before  
11 the proposed disposition that the local  
12 government believes to be a true  
13 indication of the value at the time of the  
14 proposed disposition.  
15  
16 (b) after paragraph (a) insert:  
17  
18 and  
19  
20 (3) In section 3.58(5):  
21 (a) delete paragraph (a) and insert:  
22  
23 (a) a disposition of an interest in land under the  
24 *Land Administration Act 1997* section 189 or  
25 190; or  
26  
27 (b) after paragraph (b) insert:  
28  
29 or  
30

1   **11.   Section 3.64 amended**

2           In section 3.64(d) after “members” insert:

3

4           and deputy members

5

1 **Part 4 — Amendments about elections and other polls**

2 **12. Section 4.17 amended**

3 (1) In section 4.17(3) delete all the words before “the council may,”  
4 and insert:

5  
6 If a councillor’s office becomes vacant under  
7 section 2.32 and under subsection (4A) this subsection  
8 applies,  
9

10 (2) After section 4.17(3) insert:

11  
12 (4A) Subsection (3) applies —

13 (a) if —

14 (i) the office is for a district that has no  
15 wards; and

16 (ii) at least 80% of the number of offices of  
17 member of the council in the district are  
18 still filled;

19 or

20 (b) if —

21 (i) the office is for a ward for which there  
22 are 5 or more offices of councillor; and

23 (ii) at least 80% of the number of offices of  
24 councillor for the ward are still filled.  
25

26 **13. Section 4.30 amended**

27 (1) In section 4.30(1):

28 (a) delete paragraph (c) and insert:

29  
30 (c) has made a successful eligibility claim that still  
31 has effect under section 4.33.  
32

- 1                   (b) after paragraph (a) insert:  
2  
3                   and  
4
- 5           (2) After section 4.30(2) insert:  
6
- 7           (3) For the purposes of subsection (1)(c) an eligibility  
8           claim is successful if it is accepted under section 4.32,  
9           whether or not the acceptance is before the close of  
10          enrolments, as defined in section 4.39(1).
- 11          (4) A person who is eligible under subsection (1) to vote at  
12          an election held less than 50 days after the  
13          commencement of the *Local Government Amendment*  
14          *Act 2009* section 13 is eligible to vote at that election.  
15
- 16   **14. Section 4.32 amended**
- 17          (1) In section 4.32(4) delete “Within” and insert:  
18  
19          Except as provided for in subsection (5A), within  
20
- 21          (2) After subsection (4) insert:  
22
- 23          (5A) If a claim is made before the close of enrolments as  
24          defined in section 4.39(1), but less than 14 days before  
25          the close of nominations as defined in section 4.49(a),  
26          the CEO is to decide whether to accept or reject the  
27          claim before the close of nominations.  
28

**s. 15**

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1 **15. Section 4.33 amended**

2 (1) Delete section 4.33(1a) and (2) and insert:

3

4 (2A) Unless subsection (2B) or (3) applies, if an enrolment  
5 eligibility claim made by a person on the basis of  
6 occupation of rateable property within the electorate is  
7 accepted under section 4.32(4) or (8), the claim expires  
8 on the day 6 months after the holding of the second  
9 ordinary elections of the local government after the  
10 claim is accepted.

11 (2B) If an enrolment eligibility claim on the basis of  
12 occupation of rateable property within the electorate  
13 is —

14 (a) made within the period of 49 days before the  
15 election day for ordinary elections of the local  
16 government; and

17 (b) accepted under section 4.32(4) or (8) before the  
18 election day,

19 the claim expires on the day 6 months after the holding  
20 of the third ordinary elections of the local government  
21 after the claim is accepted.

22 (2) For the purpose of subsection (2A) or (2B), an election  
23 that would have been held on a particular day but for  
24 the suspension of the council of the local government is  
25 to be regarded as having been held on that day.  
26

27 (2) In section 4.33(3) delete “subclause (1a)” and insert:

28

29 subsection (2A) or (2B)  
30



1   **16.   Section 4.43 amended**

2           In section 4.43(3b) after “altered” insert:

3

4           under this section or section 4.44A

5

6   **17.   Section 4.44A inserted**

7           After section 4.43 insert:

8

9           **4.44A.   Alteration of rolls**

10           (1)   The returning officer may alter the owners and  
11               occupiers roll by including the name of an elector  
12               whose enrolment eligibility claim was made under  
13               section 4.32(1) before the close of enrolments, as  
14               defined in section 4.39(1), but accepted after that time.

15           (2)   If the returning officer is not the CEO, the returning  
16               officer may direct the CEO to make an alteration to the  
17               roll described in subsection (1) and the CEO is to  
18               comply with that direction.

19

20   **18.   Section 4.48 amended**

21           Delete section 4.48(2) and insert:

22

23           (2)   If the election is to fill the office of elector mayor or  
24               president, a person can only be a candidate if the  
25               person was an elector of the district who, as at the close  
26               of enrolments and at the time of nomination, was  
27               qualified under section 2.19 to be elected as a member  
28               of the council.

29

**s. 19**

---

1 **19. Section 4.59 amended**

2 In section 4.59:

3 (a) in paragraph (b) delete “candidates.” and insert:

4

5 candidates; and

6

7 (b) after paragraph (b) insert:

8

9 (c) the provision of information as to expenditure  
10 incurred in relation to an election by or for the  
11 benefit of candidates.

12

1           **Part 5 — Amendments about administration**

2   **20.       Section 5.11A inserted**

3           After section 5.10 insert:

4  
5   **5.11A.   Deputy committee members**

6           (1)   The local government may appoint\* a person to be a  
7           deputy of a member of a committee and may terminate  
8           such an appointment\* at any time.

9           \* Absolute majority required.

10          (2)   A person who is appointed as a deputy of a member of  
11          a committee is to be —

12           (a)   if the member of the committee is a council  
13           member — a council member; or

14           (b)   if the member of the committee is an  
15           employee — an employee; or

16           (c)   if the member of the committee is not a council  
17           member or an employee — a person who is not  
18           a council member or an employee; or

19           (d)   if the member of the committee is a person  
20           appointed under section 5.10(5) — a person  
21           nominated by the CEO.

22          (3)   A deputy of a member of a committee may perform the  
23          functions of the member when the member is unable to  
24          do so by reason of illness, absence or other cause.

25          (4)   A deputy of a member of a committee, while acting as  
26          a member, has all the functions of and all the protection  
27          given to a member.

28

**s. 21**

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1 **21. Section 5.36 amended**

2 (1) In section 5.36(4) delete “If” and insert:

3

4 Unless subsection (5A) applies, if

5

6 (2) After section 5.36(4) insert:

7

8 (5A) Subsection (4) does not require a position to be  
9 advertised if it is proposed that the position be filled by  
10 a person in a prescribed class.  
11

12 **22. Section 5.37 amended**

13 (1) In section 5.37(3) delete “If” and insert:

14

15 Unless subsection (4A) applies, if

16

17 (2) After section 5.37(3) insert:

18

19 (4A) Subsection (3) does not require a position to be  
20 advertised if it is proposed that the position be filled by  
21 a person in a prescribed class.  
22

23 **23. Section 5.43 amended**

24 In section 5.43:

25 (a) after paragraph (g) insert:

26

27 (ha) the power under section 9.49A(4) to authorise a  
28 person to sign documents on behalf of the local  
29 government;

30

31 (b) after paragraph (h) delete “or”.

1   **24.     Section 5.47 replaced**

2           Delete section 5.47 and insert:

3

4           **5.47.    Superannuation regulations**

5                   The Governor may make regulations about any matter  
6                   relating to the provision of superannuation by a local  
7                   government.

8

9   **25.     Section 5.48 amended**

10           In section 5.48(1) delete the definition of *employee* and insert:

11

12                   *employee* includes an employee of WALGA;

13

14   **26.     Section 5.62 amended**

15           In section 5.62(1):

16

17           (a)   after paragraph (ea) insert:

18

19                   (eb)   the relevant person is a council member and  
20                   since the relevant person was last elected the  
21                   person —

22

23                           (i)   gave to the relevant person a gift that  
24                           section 5.82 requires the relevant person  
25                           to disclose; or

26

27                           (ii)  made a contribution to travel undertaken  
28                           by the relevant person that section 5.83  
29                           requires the relevant person to disclose;

30

31                           or

32

33           (b)   after each of paragraphs (a) to (e) insert:

34

35                   or

36

**s. 27**

---

1 **27. Section 5.63 amended**

2 In section 5.63(1)(b) delete “arising from” and insert:

3

4 in

5

6 **28. Section 5.78 amended**

7 Delete section 5.78(2)(b) and insert:

8

9 (b) disclose the actual value, amount or extent of  
10 any asset, income, interest, debt or disposition  
11 referred to in section 5.79, 5.80, 5.81, 5.84,  
12 5.85 or 5.86.

13

14 **29. Section 5.82 amended**

15 In section 5.82(1) after “description” insert:

16

17 and the amount

18

19 **30. Section 5.83 amended**

20 Delete section 5.83(1) and insert:

21

22 (1) A relevant person is to disclose in an annual return —  
23 (a) the description and the amount of each financial  
24 or other contribution that has been made to any  
25 travel undertaken by the person at any time  
26 during the return period; and  
27 (b) the name and address of the person who made  
28 each contribution to which paragraph (a)  
29 applies.

30

1 **31. Section 5.96 amended**

2 In section 5.96 delete “information and” and insert:

3

4 information and, unless regulations prescribe otherwise,

5

6 **32. Part 5 Division 8 heading replaced**

7 Delete the heading to Part 5 Division 8 and insert:

8

9 **Division 8 — Local government payments and gifts to**  
10 **its members**

11

12 **33. Section 5.98 amended**

13 After section 5.98(1) insert:

14

15 (2A) A council member who attends a meeting of a  
16 prescribed type at the request of the council is entitled  
17 to be paid —

18 (a) the prescribed minimum fee for attending a  
19 meeting of that type; or

20 (b) where the local government has set a fee within  
21 the prescribed range for meetings of that type,  
22 that fee.

23

24 **34. Section 5.100A inserted**

25 After section 5.99A insert:

26

27 **5.100A. Gifts to council members**

28 A local government cannot give a gift to a council  
29 member unless —

30 (a) the gift is given in prescribed circumstances;  
31 and

**s. 35**

---

1 (b) the value of the gift is less than a prescribed  
2 amount.  
3

4 **35. Section 5.101A inserted**

5 After section 5.101 insert:

6  
7 **5.101A. Regulations about payment of expenses**

8 Regulations may be made about the method of  
9 payment of an expense for which a person can be  
10 reimbursed.  
11



1       **Part 6 — Amendments about financial management**

2       **36.       Section 6.14 amended**

3               In section 6.14(2):

- 4                   (a)   delete paragraphs (a) and (b);  
5                   (b)   after paragraph (c) insert:

6  
7                               and  
8

9       **37.       Section 6.25 amended**

10               In section 6.25 insert in alphabetical order:

11  
12                               **owner** —

- 13                   (a)   in relation to land in a retirement village as  
14                       defined in the *Retirement Villages Act 1992*  
15                       means —  
16                               (i)   the owner, as defined in that Act  
17                               section 3(1); or  
18                               (ii)  a mortgagee in possession of the land;  
19                               or  
20                               (iii) a trustee, executor, administrator,  
21                               attorney or agent of a person mentioned  
22                               in this paragraph who is in possession of  
23                               the land;  
24                   (b)   otherwise has the meaning given in section 1.4;  
25

1   **38.     Section 6.29 replaced**

2           Delete section 6.29 and insert:

3

4           **6.29.   Valuation and rates on mining and petroleum**  
5           **interests**

6           (1) In this section —

7                 **relevant interest** means —

8                     (a) a mining tenement held under the *Mining*  
9                         *Act 1978* (whether within the meaning given to  
10                         that term by that Act or by the *Mining*  
11                         *Act 1904*); or

12                    (b) a permit, drilling reservation, lease or licence  
13                         held under the *Petroleum and Geothermal*  
14                         *Energy Resources Act 1967*.

15           (2) Regardless of any determination made under  
16                 section 6.28(1), the basis for a rate on a relevant  
17                 interest is to be the unimproved value of the land,  
18                 except as provided for in subsection (3).

19           (3) Subsection (2) does not apply to a relevant interest in a  
20                 portion of land on which capital improvements are  
21                 located if —

22                     (a) the Minister has determined under  
23                         section 6.28(1) that the gross rental value of the  
24                         land is to be used as the basis for a rate on that  
25                         interest; and

26                     (b) the determination expressly excludes the  
27                         application of subsection (2).

28           (4) The Minister cannot determine under section 6.28(1)  
29                 that the gross rental value of the land is to be used as  
30                 the basis for a rate on a relevant interest in a portion of  
31                 land if another estate in that portion of land is rateable  
32                 on the basis of the gross rental value of the land.

- 1           (5) For the purpose of subsection (3)(b) a determination is  
2           to be taken to expressly exclude the application of  
3           subsection (2) if the determination —  
4           (a) was made before the commencement of the  
5           *Local Government Amendment Act 2009*  
6           section 38; and  
7           (b) specifically applies to the particular relevant  
8           interest.  
9

10 **39. Section 6.33 amended**

- 11       (1) In section 6.33(1):  
12           (a) in paragraph (a) delete “zoned” and insert:  
13             
14           zoned, whether or not  
15             
16           (b) in paragraph (b) delete “the predominant” and insert:  
17             
18           a  
19             
20       (2) After section 6.33(4) insert:  
21             
22           (5) A differential general rate that a local government  
23           purported to impose under this Act before the *Local*  
24           *Government Amendment Act 2009* section 39(1)(a)  
25           came into operation is to be taken to have been as valid  
26           as if the amendment made by that paragraph had been  
27           made before the purported imposition of that rate.  
28

1 **40. Section 6.68 amended**

2 Delete section 6.68(2) and insert:

3

4 (2) A local government is not required to attempt under  
5 section 6.56 to recover money due to it before  
6 exercising the power of sale where the local  
7 government —

8 (a) has a reasonable belief that the cost of the  
9 proceedings under that section will equal or  
10 exceed the value of the land; or

11 (b) having made reasonable efforts to locate the  
12 owner of the property is unable to do so.

13 (3A) A local government is to ensure that a decision to  
14 exercise a power of sale without having, within the  
15 period of 3 years prior to the exercise of the power of  
16 sale, attempted under section 6.56 to recover the  
17 money due to it and the reasons for the decision are  
18 recorded in the minutes of the meeting at which the  
19 decision was made.  
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**Part 7 — Other amendments**

**41. Section 8.2 amended**

(1) In section 8.2(1) delete “local government” (first occurrence) and insert:

local government, a member of a council, a CEO or an employee

(2) Delete section 8.2(2) and insert:

(2) A person who fails to comply with a notice under subsection (1) commits an offence.

**42. Section 9.16 amended**

(1) After section 9.16(1) insert:

(2A) If a person who is given a notice under section 9.13 about an alleged offence involving a vehicle gives information in accordance with section 9.13(6) about another person who was the driver or person in charge of the vehicle at the time of the alleged offence, the period of 28 days for giving that other person an infringement notice runs from the time the information was given.

(2) After section 9.16(2) insert:

(3) An infringement notice given before the commencement of the *Local Government Amendment Act 2009* section 42(1) and purporting to be under this section is to be taken to have been as valid as if the amendment made by that subsection had been made before the notice was given.

1 **43. Sections 9.49A and 9.49B inserted**

2 At the beginning of Part 9 Division 3 insert:

3

4 **9.49A. Execution of documents**

5 (1) A document is duly executed by a local government  
6 if —

7 (a) the common seal of the local government is  
8 affixed to it in accordance with subsections (2)  
9 and (3); or

10 (b) it is signed on behalf of the local government  
11 by a person or persons authorised under  
12 subsection (4) to do so.

13 (2) The common seal of a local government is not to be  
14 affixed to any document except as authorised by the  
15 local government.

16 (3) The common seal of the local government is to be  
17 affixed to a document in the presence of —

18 (a) the mayor or president; and

19 (b) the chief executive officer or a senior employee  
20 authorised by the chief executive officer,

21 each of whom is to sign the document to attest that the  
22 common seal was so affixed.

23 (4) A local government may, by resolution, authorise the  
24 chief executive officer, another employee or an agent  
25 of the local government to sign documents on behalf of  
26 the local government, either generally or subject to  
27 conditions or restrictions specified in the authorisation.

28 (5) A document executed by a person under an authority  
29 under subsection (4) is not to be regarded as a deed  
30 unless the person executes it as a deed and is permitted  
31 to do so by the authorisation.

1 (6) A document purporting to be executed in accordance  
2 with this section is to be presumed to be duly executed  
3 unless the contrary is shown.

4 (7) When a document is produced bearing a seal  
5 purporting to be the common seal of the local  
6 government, it is to be presumed that the seal is the  
7 common seal of the local government unless the  
8 contrary is shown.

9 **9.49B. Contract formalities**

10 (1) Insofar as the formalities of making, varying or  
11 discharging a contract are concerned, a person acting  
12 under the authority of a local government may make,  
13 vary or discharge a contract in the name of or on behalf  
14 of the local government in the same manner as if that  
15 contract was made, varied or discharged by a natural  
16 person.

17 (2) The making, variation or discharge of a contract in  
18 accordance with subsection (1) is effectual in law and  
19 binds the local government concerned and other parties  
20 to the contract.

21 (3) Subsection (1) does not prevent a local government  
22 from making, varying or discharging a contract under  
23 its common seal.  
24

25 **44. Various references to “Executive Director” amended**

26 In the provisions listed in the Table delete “Executive Director”  
27 (each occurrence) and insert:  
28

29 Departmental CEO  
30

**s. 45**

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**Table**

s. 5.108(1), (2)(a) and (3)	s. 5.110(2)(b)
s. 5.111(1) and (2)	s. 5.112(1), (2), (3), (4) and (5)
s. 5.114(1) and (2)	s. 5.115(1) and (2)
s. 5.116(1), (2), (3), (4), (5) and (6)	s. 5.117(4) and (5)
s. 5.118(2)	s. 5.119(1)
s. 9.69A	

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**45. Schedule 2.5 amended**

In Schedule 2.5 clause 7(10) delete “procedure.” and insert:

procedure, and other procedure and practice.

**46. Schedule 3.1 amended**

In Schedule 3.1 Division 1:

(a) after item 5A insert:

5B. Ensure that graffiti that is —

- (a) applied with the consent of the owner or occupier; and
- (b) visible from a public place; and
- (c) considered by the local government to be unsightly or offensive,

is obliterated in a manner acceptable to the local government.

(b) delete item 6 and insert:

6. Take specified measures for preventing or minimising the movement of sand, silt, clay or rocks on or from the land if, in



1                   the opinion of the local government, that movement would be  
2                   likely to adversely affect other land.

3

4   **47.       Schedule 3.2 amended**

5                   In Schedule 3.2:

6                   (a)   in item 7 delete “(The cost cannot then be recovered from  
7                   the owner.)”;

8                   (b)   after item 7 insert:

9

10               8.    Obliterate graffiti that is visible from a public place and that has  
11               been applied without the consent of the owner or occupier.

12

1 **Part 8 — Consequential amendments**

2 **48. *Local Government Amendment Act 2004* amended**

3 (1) This section amends the *Local Government Amendment*  
4 *Act 2004*.

5 (2) Delete section 19(2).

6 (3) Delete section 20.

7 (4) Delete section 38(3).

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