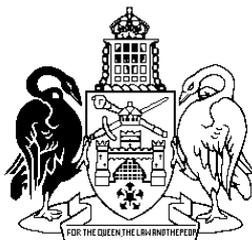


Legislative Assembly for the Australian Capital Territory



The electronic version of this report does not contain attachments, these can be obtained from the committee office

**Standing Committee on Justice and
Community Safety**

**(incorporating the duties of a
Scrutiny of Bills and Subordinate
Legislation Committee)**

SCRUTINY REPORT NO. 2 OF 2000

29 February 2000

TERMS OF REFERENCE

- (1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).
- (2) The Committee will consider whether:
 - (a) any instruments of a legislative nature which are subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act:
 - (i) meet the objectives of the Act under which it is made;
 - (ii) unduly trespass on rights previously established by law;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contain matter which should properly be dealt with in an Act of the Legislative Assembly.
 - (b) the explanatory statement meets the technical or stylistic standards expected by the Committee.
 - (c) clauses of bills introduced in the Assembly:
 - (i) do not unduly trespass on personal rights and liberties;
 - (ii) do not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
 - (d) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.
- (3) The Committee shall consist of four members.
- (4) If the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation.
- (5) The Committee be provided with the necessary additional staff, facilities and resources.
- (6) The foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

MEMBERS OF THE COMMITTEE

Mr Paul Osborne, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Mr Trevor Kaine, MLA
Mr Harold Hird, MLA

Legal Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan
Assistant Secretary (Scrutiny of Bills and
Subordinate Legislation): Ms Celia Harsdorf

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comments on them.

ACTEW/AGL Partnership Facilitation Bill 1999

This is a Bill for an Act to facilitate the process and establishment of joint venture partnerships between the subsidiaries of ACTEW and the Australian Gas Light Company to supply multi-utility services.

Children and Young People Amendment Bill 2000

This Bill would amend sections 71 and 72 of the *Children and Young People Act 1999* to change the age of criminal responsibility in the Territory from 8 to 10 years, and to fix 10 years as the age at which a young person may be arrested.

Cotter Repeal Bill 2000

This Bill would repeal the *Cotter River Act 1914*.

Duties Amendment Bill 2000

This Bill would amend the *Duties Act 1999* to exempt from duty certain motor vehicle registration applications. The object of the Bill is to ensure that registration applications that are required under the National Vehicle Registration Scheme reforms to be introduced by the *Road Transport (Vehicle Registration) Act 1999* will be exempt from duty.

Land (Planning and Environment) Amendment Bill 2000

This Bill would amend provisions of the *Land (Planning and Environment) Act 1991* to reform certain aspects of the system for development assessment.

Land (Planning and Environment) Amendment Bill 2000 (No 2)

This Bill would amend sections 184B and 187B of the *Land (Planning and Environment) Act 1991* to delay until 30 September 2000 a change in the calculation of the change of use charge for a variation of nominal rent lease. Currently, subsection 184(2) provides that the charge shall be 75% of the value added to the lease by the variation. Subsection 184B(1) provides, in effect, that the rate would be increased to 100% on 31 March 2000. (Similar provisions are found in section 187B.) The effect of the Bill would be to change the date 31 March 2000 to 30 September 2000.

Bills - Comment

The Committee has examined the following Bills and offers these comments.

Utilities Bill 1999

This is a Bill for an Act to regulate the public or private utilities that supply electricity, gas, water or sewerage services in the Territory. The lynchpin of the scheme is the requirement that each utility must be licensed in respect of the utility services it provides. Conditions relating to the operation of the utility will attach to each licence. The Independent Competition and Regulatory Commission (ICRC) may approve or determine codes of practice in relation to the operations of utilities.

The responsible Minister may issue directions in relation to licence conditions and in respect of the contents of the codes of practice. These directions are disallowable by the Assembly. Customer contracts will be enforceable, and in this respect a critical function of the proposed Essential Services Consumer Council (ESCC) will be to provide an independent complaints handling mechanism. The Act will also provide that utilities may be obliged by Ministerial direction to take action that conforms to a Government program. The costs of this action will be at a price agreed to or the result of arbitration.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Power to dispense with the law

By clause 22 the Minister would have power to exempt a person from the requirement for a licence. The justification for this power is stated in a Note in the Bill and on its face is a persuasive reason. It is also noted that an exemption instrument is disallowable by the Assembly.

The Committee adds that such justifications might also be stated in the Explanatory Memorandum.

The right to property

Network operations

The performance of network operations by utilities, such as the installation and the maintenance of network facilities, will, from time to time, entail an interference with the enjoyment of property interests of many people.

A utility may acquire land, or an interest in land (such as an easement), in accordance with the *Lands Acquisition Act 1994*. The protections in this Act will be a sufficient protection of the right to property.

The powers of a utility in relation to the installation and the maintenance of network facilities are provided for in clauses 102 and 103. There are obligations to give notice to land-holders, to minimise damage, to remove property and waste, and to restore the land. There are particular provisions concerning the lopping of trees.

The Committee considers that these provisions strike a reasonable balance between the rights of a land-holder and the interests of a utility.

A controller's powers

Under defined circumstances (see clause 130), the Minister may appoint a controller for all or part of the operations of a utility. A person who suffers loss because of an act or omission of a controller is entitled to compensation (clause 138).

On their face, the Committee does not find these provisions to be objectionable.

Offences of strict liability

Two provisions create offences of strict liability.

- As the Explanatory Memorandum notes, clause 119 makes it an offence to interfere with a network or a network facility “regardless of the intention of the person concerned”.
- Subclause 121(1) makes it an offence to contaminate water in a water network. Subclause 121(3) has the effect that this is an offence of strict liability

The Committee considers that the Explanatory Memorandum should offer some justification where a strict liability offence is created.

The right to bring civil suit for recovery of customer debts & the burden of discharged debts

A customer debt is the amount payable by the customer to a utility in relation to the provision of a utility service to the premises of the customer (clause 179). Such a debt would ordinarily be recoverable by a utility in a court. In relation to debts in relation to residential premises, this would usually be the Magistrates’ court. It appears however that a customer might raise a number of issues of the payment of the debt by way of making a complaint under Part 12 to the ESCC (see below).

In this context, there are two aspects of the Bill to be noted.

First, the effect of clause 166 is that a utility must give 7 days notice to a customer of its intention to bring judicial proceedings for the recovery of a customer debt. At the same time the utility must give to the customer information concerning the latter’s right to make a complaint to the ESCC, and of the effect of section 12B of the *Magistrates Court (Civil Jurisdiction) Act 1982*. The effect of the latter (if enacted into law by Part 8 of Schedule 1 of the Utilities (Consequential Amendments) Bill 2000) would be to remove the jurisdiction of the Magistrates court if the customer made a complaint, and to place the matter in the hands of the Council. Thus, by making a complaint, a customer would prevent a utility from taking action in a court.

There appears to be no similar restriction on the ability of a customer, or of any other person, to commence legal proceedings in the courts in respect of matters that may be the subject of complaint to the Council. There is thus a question whether the restrictions in clause 166 are in breach of the principle, stated in Article 14.1 of the ICCPR that “All persons shall be equal before the courts and tribunals”.

Secondly, the effect of clauses 202 and 203 is that a customer in debt to a utility may obtain from the Council a direction that utility services are not to be withdrawn, and that the debt, up to an amount of \$10,000, is discharged. These provisions operate where withdrawal or payment would cause substantial hardship to the customer.

It appears that the utility carries the losses it would suffer as a result of these provisions. The Explanatory Memorandum does not offer a justification for these provisions

Reversal of onus of proof

Subclause 121(1) makes it an offence to contaminate water in a water network. By subclause 121(2), it is a defence “if the defendant proves that the alleged act of contamination was undertaken with the authority of the responsible utility”.

It is accepted that, in general, the prosecution carries the burden of proof in relation to the facts in issue in a criminal matter; see *Woolmington v DPP* [1935] AC 462 at 481, a principle endorsed by a majority of the High Court in *Chugg v Pacific Dunlop* (1990) 170 CLR 249 at 257. The Committee considered this general issue in its Report No 8 of 1999.

Subclause 121(2) reverses the onus of proof, and places it on the defendant, in relation to

the fact of whether the alleged act of contamination was undertaken with the authority of the responsible utility.

The Committee queries the need to reverse the onus of proof. This is not a case where the relevant fact – that is, whether the contamination was undertaken with the authority of the responsible utility – is a matter in respect of which the defendant has knowledge peculiar to her or him. The utility will have this knowledge, and may easily adduce evidence of an absence of authority given to the defendant.

It would be preferable in terms of the basic principle in *Woolmington* to provide in subclause 121(1) that it is an offence to contaminate water in a water network “without the authority of the responsible utility”.

Enforcement powers

The Bill contains provisions that confer powers of search, entry and seizure, and powers in relation to the obtaining of information and of documents. The Committee refers to the powers of

- the chief executive in relation to the enforcement of the technical codes, in clauses 69-72;
- the ICRC inspectors under Part 10;
- persons authorised by utilities in order for the latter to carry out network operations under Part 7 – see clauses 111-114; and
- the Council upon the handling of a complaint under Part 12.

The Committee has reviewed these provisions against the benchmarks it stated in earlier Reports and is satisfied that the provisions are reasonable. It is noted that the privilege against self-incrimination is abrogated (see for example, clause 161), but there is a derivate use restriction on the use of any information so obtained. Legal professional privilege is protected (see for example clause 162).

Paragraph 2 (c) (ii) – insufficiently defined administrative powers

The exercise of discretions in relation to licensing

By subclause 35(2) the discretion of the ICRC to grant a licence to a utility is quite limited. The limitations are clearly related to the objects of regulation. But other related powers are not so confined.

Where the services are provided to franchise customers (which in practice will include householders), the ICRC may grant a licence “only with the written approval of the Minister”. It appears that the Minister’s discretion in this respect is unconfined in terms of the matter to which he or she may have regard. On the face of it, it is desirable to give guidance. The Explanatory Memorandum does not address this issue.

The discretion of the ICRC under clause 36 to vary a licence is not subject to any explicit limitation other than a requirement that the ICRC is “satisfied that the variation is appropriate”. On the face of it, it is desirable to give guidance. The Explanatory Memorandum does not address this issue.

The discretion of the ICRC under clause 37 to exempt a utility from compliance with a condition of its licence is not subject to any explicit limitation. Having regard to the dispensing character of this discretion, it is desirable to give guidance. The Explanatory Memorandum does not address this issue.

It is noted that the discretion of the ICRC under clause 38 to approve of the transfer of a licence *is* related back to the limitations on the power to grant stated in subclause 35(2). It is not apparent why a similar restriction should not apply to the unconfined powers noted above.

As a drafting point, the Committee notes that there is some variation in the way the discretions are expressed. For example, under subparagraph 55(2)(b)(iii), the ICRC may approve an industry code (being one in respect of which a draft was submitted by a utility) if satisfied that “the code is appropriate”. On the other hand, under subparagraph 56(1)(b)(ii) – the ICRC may determine an industry code if satisfied that “it is necessary or convenient to determine the code”. It is not apparent why there should be this difference in expression.

Paragraph 2 (c) (iii) – non-reviewable decisions affecting rights

Licensing powers

There is no explicit provision for review of the exercise of review by a body such as the Administrative Appeals Tribunal. The Assembly may consider, however, that such review may not be appropriate given the technical expertise required to regulate utilities, and that the adversarial/hearing focus of that body is not suitable for the consideration of the merits of a licence application and so forth. A utility dissatisfied with ICRC action may seek judicial review, and may complain to the Ombudsman.

The Committee also notes that judicial review would be facilitated by provisions in the Bill that require the ICRC to give reasons for its decisions; see clauses 35(4), 36(5) and 38(4).

The Committee cannot however appreciate why a similar requirement does not exist in relation to the power in clause 40 to revoke a licence.

A similar point may be made in relation to the power of the ICRC to vary a licence on its own initiative under clause 36. In this case, it may be thought that the matter is covered by clause 43(6), but the Committee is not clear as to whether a revocation would always follow a review under clause 43.

Codes

There is no explicit provision for review of a refusal by the ICRC to approve an industry code (being one in respect of which a draft was submitted by a utility) (clause 55). But this may not be a power appropriate for review by the AAT, and judicial review would be facilitated by the provisions that the ICRC to give reasons for its refusal (subclause 55(4)).

There is no explicit provision for review of a refusal by the ICRC to determine an industry code (clause 56). But this may not be a power appropriate for review by the AAT. In this case, there is no provision that the ICRC to give reasons for its decision.

There is no explicit provision for review of a decision of the chief executive to give directions about technical codes (clause 67). But this may not be a power appropriate for review by the AAT, and judicial review would be facilitated by the provisions that the ICRC to give reasons for its refusal (subclause 67(4)).

Standard customer contracts

There is no explicit provision for review of a refusal by the ICRC to approve a standard customer contract (being one in respect of which a draft was submitted by a utility) (clause 86). But this may not be a power appropriate for review by the AAT, and judicial review would be facilitated by the provisions that the ICRC to give reasons for its refusal (subclause 86(4)).

There is no explicit provision for review of a refusal by the ICRC to determine the terms of a standard customer contract (clause 87). But this may not be a power appropriate for review by the AAT. In this case, there is no provision that the ICRC to give reasons for its decision.

The complaints mechanism

Part 12 creates a scheme for an independent complaints handling mechanism. The ESCC has the function of both assisting the parties to a complaint to resolve it, and to determine an unresolved complaint (see paragraph 165(1)(b)).

The Council comprises a Chairperson, a Deputy Chairperson, and one or more other members. There are no qualifications, legal or otherwise, for membership.

Clause 180 states the kinds of complaints that may be made to the Council. It is apparent that it is intended that a complaint may be made about an actual or potential withdrawal of a utility service because of non-payment of a customer debt; (see clauses 179, 202). The procedure of the Council is designed to be informal and expeditious, although it may, if it chooses to do so, conduct hearings and exercise powers in relation thereto in much the same way as a court would act.

The Committee draws attention to two aspects of this scheme.

Subclause 180(2) provides that a utility may *not* make a complaint to the Council under Part 12. This is a scheme designed to assist only one party to the kinds of disputes that may arise under the Act. There is thus a question whether the restrictions in clause 166 are in breach of the principle, stated in Article 14.1 of the ICCPR that “All persons shall be equal before the courts and tribunals”.

This issue has more point if regard is had to the significant powers the Council may exercise against a utility. The provisions in respect of customer debts are noted above. By clause 204, the Council may direct a utility to pay an amount of up to \$10,000 (or more, if the regulations so prescribe) to a complainant in respect of loss or damage consequent upon certain actions of a utility (as defined widely in clause 201).

Apart from the question that arises under Article 14 of the ICCPR, there is an issue as to

whether a body of this kind, should have such significant powers. It is not constituted as would be a court, or even as would be an adjudicative tribunal such as the Administrative Appeals Tribunal. Yet the Council would adjudicate legal disputes, may give directions to utilities as to action they must take, and may award against utilities substantial amounts in damages.

To put the question in constitutional terms, does the vesting of such powers breach the spirit of separation of powers? This doctrine does not apply in the Territory to the same extent as it does in the Commonwealth jurisdiction. It is nevertheless likely that some elements of the doctrine do apply. A court might find that there are circumstances in which a Territory law is invalid because the law vests in a body such as the ESCC a power that should be vested in a court. (This is a very complex issue. There is a brief review of the issues in Vicki Mullen, “Fundamental rights and the separation of state legislative and judicial power” (1999) 2 *Constitutional Law & Policy Review* 1.)

The Committee suggests to the Assembly that it may wish to consider this issue as a matter of policy. Should the Council, constituted as it is, have such significant adjudicative powers in the context of disputes between citizens?

Personal information data protection

The Bill would create a regime for the protection of personal information that is acquired by a utility in relation to the provision of a utility service. This is noteworthy as another step in the imposition on the private sector of obligations in this regard.

The central provision is subclause 48(3), the effect of which is that a utility must deal with such information in accordance with the Information Privacy Principles (IPPs) as they are stated in the *Privacy Act 1988* (Commonwealth).

The Note in the Bill to clause 48 states that the complaints and remedies scheme in the *Privacy Act* are not available to a person who considers that a utility has breached an IPP.

But the Bill contains its own quite comprehensive scheme. A person may complain to the ESCC under Part 12 that a utility has contravened clause 48 (paragraph 180(1)(c)). Such a contravention is a decision of a kind to which clause 201 applies. Thus, the Council might make an award of damages of up to \$10,000 against a utility if it found that there had been a contravention of clause 48. There have not yet been developed any principles to guide a body such as the Council in the assessment of damages.

This is then a very strong scheme for protection of personal information.

Paragraph 2 (c) (v) – insufficient scrutiny of legislative power

Incorporation by reference

The Committee notes that clause 52 would permit an industry code to deal with a matter by incorporating matter in a stated document as that latter is in force or existing “from time to time”.

Industry codes are, however, disallowable by the Assembly, and at that point the appropriate action to be taken may be best considered.

Directions to a utility to conform to a government program

It has been noted that the Act would provide that utilities may be obliged by Ministerial direction to take action that conforms to a Government program. The costs of this action will be at a price agreed to or the result of arbitration. Part 13 is headed Community Service Obligations, but the kinds of government programs in issue are not so limited.

Two aspects may be noted.

First, the Ministerial directions (see clause 216) are not disallowable by the Assembly. The issue for the Assembly is whether they should be.

Secondly, a direction under clause 216 has no effect unless the Treasurer certifies that the Territory will pay to the utility the costs it incurs in complying with the direction as those costs are stated in the direction, or, where a dispute about the costs is determined by arbitration (see clause 220), the costs as so determined (see clause 218). The issue for the Assembly is whether moneys should be appropriated in this manner.

Utilities (Consequential Amendments) Bill 2000

This is a Bill for an Act to make certain provisions that would be consequent upon the enactment of the Utilities Act 2000. Schedules to the Bill state the Acts and regulations that would be amended by this proposed Act. There would, in particular, be substantial amendment to the *Independent Competition and Regulatory Commission Act 1997*.

Paragraph 2(c)(iv) – inappropriate delegation of legislative power

Henry 8th clauses

There is a Henry VIIIth provision in subclause 4(5) of the Bill. (The nature of such clauses is explained in Report No 14 of 1999.) It is, however, a very limited power. The clause provides that the regulations may modify the operation of this proposed Act so as to make provision for any matter that is not, or is not adequately, dealt with in the Act.

The Committee does not find this provision objectionable, but it re-states its view that an Explanatory Memorandum should identify and justify a Henry VIIIth provision. This Explanatory Memorandum does not do this.

Subordinate Legislation - No Comment

The Committee has examined the following subordinate legislation and offers no comment on them.

Subordinate Law No. 30 of 1999 being the **Lands Acquisition Regulations 1999** made under the *Lands Acquisition Act 1994* amends the regulations to provide for the calculation of the interest payable on any unpaid compensation under sections 76 and 96 of the Act.

Subordinate Law No. 31 of 1999 being the **Land (Planning and Environment) Regulations Amendment** made under the *Land (Planning and Environment) Act 1991* amends the definition of *exempt building or structure* to make it clear that it does not include a satellite dish or microwave antenna that is for receiving purposes only and adds new items to Schedule 1 to prescribe circumstances in which the installation or alteration of satellite dishes and microwave receivers in residential and non-residential areas is exempt from development approval.

Subordinate Law 32 of 1999 being the **Motor Vehicle (Third Party Insurance) Regulations Amendment** made under subsection 88 (1) of the *Motor Traffic Act* amends the regulations by inserting a new regulation to apply, with effect from 1 December 1999, the Goods and Services Act (GST) to the portion of policies (issued between that date and 30 June 2000) extending beyond 30 June 2000; and make other provisions concerning *A New Tax System (ANTS)* impacts on CTP scheme cost for policies issued between those dates.

Subordinate Law No 33 of 1999 being the **Motor Traffic Regulations Amendment** made under the *Motor Traffic Act 1936* amends the regulations to remove from Regulation 26Z the reference to 1 December 1999 as the date the regulation ceases to have effect. Regulation 26Z (1) is a temporary adjustment to the provisions of Part 15 of the Act (Transitional Provisions about Traffic Infringement Notices) to allow infringement notices currently issued by the police using handheld Autocite terminals to comply with the new infringement notice requirements.

Subordinate Law No 34 of 1999 being the **Land (Planning and Environment) Regulations Amendment** made under section 175 of the *Land (Planning and Environment) Act 1991* inserts a new regulation 11AB to make farm tourism and any other rural business on a rural lease, a prescribed activity if they are secondary to the primary use of the land use of the land authorised by the lease, and approved under Part VI of the Act. The new regulation also defines farm tourism as “operating a craft workshop, a shop, a guest house, an outdoor recreation facility, an overnight camping area or other activity for tourists”.

Subordinate Law No 35 of 1999 being the **Victims of Crime Regulations 1999** made under section 19 of the *Victims of Crime Act 1994* provides for interim regulations for the victims services scheme established by the contract between the Department of Justice and Community Safety and the Australian Capital Territory Health and Community Service for the provision of services to eligible victims of crime.

Subordinate Law No 36 of 1999 being the **Emergency Management Regulations 1999** made under the section 80 of the *Emergency Management Act 1999* provides for the definition of the class of persons whose contributions to the ambulance levy are recognised as exempt contributions under the provision of subsection 54(1).

Subordinate Law No 37 of 1999 being the **Motor Traffic Regulations Amendment** made under section 218 of the *Motor Traffic Act 1936* amends Part 2 of Schedule 1 by omitting item 48 and replacing this item with six new items to cover the offences that now appear in sections 119 and 119AA of the Act.

Subordinate Law No 1 of 2000 being the **Public Health Regulations 2000** made under the *Public Health Act 1997* makes various regulations in relation to communicable disease control; cervical cytology; cancer reporting, drug preparation and supply; general sanitation and private hospitals.

Subordinate Law No 2 of 2000 being the **Land (Planning and Environment) Regulations Amendment** made under the *Land (Planning and Environment) Act 1991* amends the regulations in various ways to reflect many of the outcomes of several reviews of the development assessment and land administration functions carried out under the Act.

Determination No. 265 of 1999 made under section 287 of the *Land (Planning and Environment) Act 1991* revokes Determination No. 134 of 1999 and determines fees payable for the purposes of the Act.

Determination No. 266 of 1999 made under subsection 3 (1) of the *Justices of the Peace Act 1989* appoints specified persons as Justices of the Peace.

Determination No. 268 of 1999 made under section 5 of the *Plumbers, Drainers and Gasfitters Board*

Act 1982 appoints specified persons to be members of the Plumbers, Drainers and Gasfitters Board for a period of three years and pursuant to section 9 appoints a specified person to be a deputy member of the Board for a period of three years.

Determination No. 269 of 1999 made under subsection 161 (5) of the *Land (Planning and Environment) Act 1991* revokes Determination No. 23 of 1994 and determines the criteria for the direct sale of land for rural purposes.

Determination No. 270 of 1999 made under subsection 171A (2) of the *Land (Planning and Environment) Act 1991* revokes Determination No. 23 of 1998 and determines the fees for and the conditions under which the Executive shall grant a further rural lease under subsection 171A (1) of the Act.

Determination No. 271 of 1999 made under paragraph 186C (2) (a) of the *Land (Planning and Environment) Act 1991* approves the form of the Land Management Agreement.

Determination No. 272 of 1999 made under subsection 39D (1) of the *Bookmakers Act 1985* revokes Determination No. 138 of 1995 and determines the maximum number of sports betting licences that may be granted by the Bookmakers Licensing Committee to be unlimited.

Determination No. 274 of 1999 made under sections 40 and 42 of the *University of Canberra Act 1989* approves Statute No. 38, Courses and Awards Amendment Statute (No. 2) 1999 which amends the Courses and Awards Statute 1995.

Determination No. 275 of 1999 made under subregulation 26O (2) of the Motor Traffic Regulations of the *Motor Traffic Act 1936* declares the period Friday 24 December 1999 to the last moment of Monday 3 January 2000 (inclusive) as a holiday period.

Determination No. 276 of 1999 made under section 16 of the *Independent Pricing and Regulatory Commission Act 1997* varies the requirements specified on 12 August 1999, in relation to the conduct of the investigation into ACTION fares referred to the Independent Pricing and Regulatory Commission.

Determination No. 279 of 1999 made under section 5 of the *Electricity Act 1971* appoints specified persons as deputy members of the Electrical Licensing Board for a period of three years, and appoints specified persons as Chairperson and Deputy Chairperson of the Electrical Licensing Board for a period of three years.

Determination No. 280 of 1999 made under section 66 of the *Gaming Machine Act 1987* revokes Determination No. 152 of 1999 and determines a new fee of \$100 to reflect the extension of the period from 12 months to 2 years to be paid under subsections 34A (2) and 34C (2) of the Act to accompany an application for an 'approved technician' or an 'approved attendant'.

Determination No. 282 of 1999 made under Item 2 (1) of Schedule 1 to the *Gambling and Racing Control Act 1999* appoints a specified person as a member of the Gambling and Racing Commission for the period from 1 January 2000 to 30 November 2002.

Determination No. 283 of 1999 made under Item 2 (1) of Schedule 1 to the *Gambling and Racing Control Act 1999* appoints a specified person as a member of the Gambling and Racing Commission for the period from 1 January 2000 to 30 November 2002.

Determination No. 284 of 1999 made under Item 2 (1) of Schedule 1 to the *Gambling and Racing Control Act 1999* appoints a specified person as a member of the Gambling and Racing Commission for the period from 1 January 2000 to 30 November 2002.

Determination No. 285 of 1999 made under Item 2 (1) of Schedule 1 to the *Gambling and Racing Control Act 1999* appoints a specified person as member and Chairperson of the Gambling and Racing Commission for the period from 1 January 2000 to 30 November 2002.

Determination No. 286 of 1999 made under subsection 41(f) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Accreditation and Registration Council until 31 December 2003.

Determination No. 287 of 1999 made under subsection 41(d) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Accreditation and Registration Council until 31 December 2003.

Determination No. 288 of 1999 made under subsection 41(a) of the *Vocational Education and Training Act 1995* appoints a specified person as Chairperson of the Accreditation and Registration Council until 31 December 2003.

Determination No. 289 of 1999 made under subsection 41(b) of the *Vocational Education and*

Training Act 1995 appoints a specified person as a member of the Accreditation and Registration Council until 31 December 2003.

Determination No. 290 of 1999 made under subsection 41(b) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Accreditation and Registration Council until 31 December 2003.

Determination No. 291 of 1999 made under subsection 41(c) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Accreditation and Registration Council until 31 December 2003.

Determination No. 292 of 1999 made under subsection 41(e) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Accreditation and Registration Council until 31 December 2003.

Determination No. 302 of 1999 made under subsection 36 (1) of the *Motor Traffic Act 1936* revokes Determination No. 164 of 1999 and determines the maximum taxi fares payable for the purposes of the Act.

Determination No. 303 of 1999 made under section 16 of the *Building Act 1972* approves courses and qualifications specified in column 1 of the Schedule to the instrument.

Determination No. 305 of 1999 made under section 4 of the *Public Place Names Act 1989* determines the names of certain public places in the Division of Nicholls.

Determination No. 1 of 2000 made under section 4 of the *Public Place Names Act 1989* amends Belconnen Way and Fairfax Street as published in Commonwealth of Australia Gazettes Nos 13 of 18 February 1968 and No. 25 as published on 24 May 1956 respectively in the Divisions of O'Connor and Macquarie.

Determination No. 2 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the names of certain public places in the Division of Amaroo.

Determination No. 3 of 2000 made under subsection 22 (3) of the *Rates and Land Tax Act 1926* revokes Determination No. 179 of 1999 and determines that the rate of interest for the purposes of subsection 22 (3) shall be 13.08 per cent per annum (in relation to amounts of rates and land tax which are unpaid).

Determination No. 4 of 2000 made under section 23 of the *Rates and Land Rent (Relief) Act 1970* revokes Determination No. 180 of 1999 and determines the rate of interest for the purposes of subsection 23 (1) in relation to amounts deferred as the result of a deferment under section 3, at 5.4 percent per annum; and in relation to amounts unpaid after the date of revocation of a deferment, at 13.08 percent per annum as from 16 January 2000.

Determination No. 7 of 2000 made under section 18 of the *Public Health Act 1997* declares the management or control of boarding houses in which more than two boarders are lodged for payment to be a public health risk activity.

Determination No. 8 of 2000 made under section 18 of the *Public Health Act 1997* declares the business of hairdressing to be a public health risk activity.

Determination No. 10 of 2000 made under section 137 of the *Public Health Act 1997* determines fees payable for the purposes of the Act for the licensing of public health risk activities in relation to the operation of a hairdressing business and the management or control of a boarding house.

Determination No. 11 of 2000 made under the *Public Health Act 1997* is a code of practice which applies to owners and operators of hairdressing businesses as well as hairdressers who carry out the actual cutting and treatment of hair.

Determination No. 12 of 2000 made under section 217A of the *Motor Traffic Act 1936* determines fees for impounding and seizure of vehicles in relation to the new "burnout" legislation.

Determination No. 13 of 2000 made under subsection 30 (1) of the *Electoral Act 1992* appoints a specified person to be the Acting Electoral Commissioner until 31 March 2000.

Subordinate Legislation - Comment

The Committee has examined the following subordinate legislation and offers these comments on them.

Retrospectivity and section 7 of the *Subordinate Laws Act 1989*

Determination No. 267 of 1999 made under subsection 7 (1) of the *Health Professions Boards (Procedures) Act* and paragraph 8 (1) (a) and subsection 8 (2) of the *Medical Practitioners Act 1930* appoints a specified person to be a member of the Medical Board of the ACT for a period

commencing on the date of the instrument to and including 5 June 2000.

The Committee notes that this instrument appointing a specified person to be a member of the Medical Board of the ACT was signed on 18 November 1999, appeared in the *Gazette* on 1 December 1999 and was to take effect from 18 November 1999.

Determination No. 273 of 1999 made under section 8 of the *Milk Authority Act 1971* appoints a specified person as Chairperson of the Board of the ACT Milk Authority effective until 25 October 2000.

The Committee notes that this instrument appointing a specified person as Chairperson of the Board of the ACT Milk Authority was signed on 30 November 1999, appeared in the *Gazette* on 15 December 1999 and was to take effect from 30 November 1999.

Determination No. 278 of 1999 made under paragraph 38 (2) (b) of the *Legal Practitioners Act 1970* appoints specified persons as members of the Professional Conduct Board of The Law Society of the Australian Capital Territory for a period of three years commencing from the date of the instrument.

The Committee notes that this instrument appointing members of the Professional Conduct Board of The Law Society of the Australian Capital Territory was signed on 14 December 1999, appeared in the *Gazette* on 22 December 1999 and was to take effect from 14 December 1999.

Determination No. 293 of 1999 made under subsection 40(f) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority until 31 December 2003.

Determination No. 294 of 1999 made under subsection 40(g) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority until 31 December 2003.

Determination No. 296 of 1999 made under subsection 40(a) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority until 31 December 2003.

Determination No. 297 of 1999 made under subsection 40(b) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority until 31 December 2003.

Determination No. 298 of 1999 made under subsection 40(b) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority until 31 December 2003.

Determination No. 299 of 1999 made under subsection 40(c) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority until 31 December 2003.

Determination No. 300 of 1999 made under subsection 40(c) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority until 31 December 2003.

Determination No. 301 of 1999 made under subsection 40(e) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority until 31 December 2003.

The Committee notes that the above instruments of appointment to the Vocational Education and Training Authority were signed on 17 December 1999, however did not appear in the *Gazette* until 22 December 1999.

Determination No. 304 of 1999 made under subsection 3 (1) of the *Justices of the Peace Act 1989* appoints specified persons as Justices of the Peace.

The Committee notes that the above instrument of appointments of Justices of the Peace was signed on 14 December 1999, however was not gazetted until 13 January 2000.

Determination No. 5 of 2000 made under section 16 of the *Hotel School Act 1996* appoints a specified person as a member of the Board of the Australian International Hotel School and reappoints specified persons as Chairperson, Deputy Chairperson and members of the Board effective until 25 October 2002.

The Committee notes these appointments were made on 5 January 2000 but the instrument was not gazetted until 14 January 2000.

Determination No. 6 of 2000 made under subsection 48 (1) of the *Public Trustee Act 1985* appoints a specified person to be a member of the Public Trustee Investment Board for the period of 3 years commencing on the date of the instrument.

The Committee notes that the above instrument of appointment was made on 6 January 2000, however was not gazetted until 20 January 2000.

Comment

In each of the above cases, there is a gap in time between the date on which the instrument purports to come into effect and the date of gazettal of the instrument. To this extent, the instrument purports to be retrospective.

There is, however, no mention in the explanatory statement of the possible effect of section 7 of the *Subordinate Laws Act 1989* on any occurrences decided during the relevant period of retrospectivity.

The possible effect of section 7 of the *Subordinate Laws Act 1989* appears to be of particular relevance to these appointments. It provides as follows:

- “7. A subordinate law shall not be expressed to take effect from a date before the date of its notification in the *Gazette* where, if the law so took effect -
- (a) the rights of a person (other than the Territory or a Territory authority) existing at the date of notification would be affected in a manner prejudicial to that person; or
 - (b) liabilities would be imposed on a person (other than the Territory or a Territory authority) in respect of any act or omission before the date of notification;
- and where any subordinate law contains a provision in contravention of this subsection, that provision is void and of no effect.”

In the case of each instrument, the Committee considers that the Assembly should be advised that no person's rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant period of retrospectivity.

No reference to Committee

Determination No. 277 of 1999 made under subsection 15E (1) of the *Nature Conservation Act 1980* appoints specified persons to be a member, Chairperson and Deputy Chairperson to the Flora and Fauna Committee until 11 January 2000.

The Committee notes that there appears to have been no consultation with the relevant committee in relation to these appointments.

Are these instruments disallowable?

Determination No. 281 of 1999 made under Item 1 of Schedule 1 to the *Gambling and Racing Control Act 1999* appoints a specified person to act as the Chief Executive for the period from 1 January 2000 to 30 June 2000.

The Committee notes that the instrument appoints a specified person to act as the Chief Executive, however gives no indication that the appointment is to the Gambling and Racing Commission. Item 1 of Schedule 1 specifies the person appointed Chief Executive must be a person employed under the *Public Sector Management Act 1994* and the appointment is for a term not exceeding six months. For the purposes of subsections 6 (a) and (b) of the *Statutory Appointments Act 1994* this instrument does not appear to be a disallowable instrument (as the person appointed is a public servant) and therefore not required to be tabled under section 10 of the *Subordinate Laws Act 1989*. The Committee also notes that the explanatory statement indicates that the specified person is appointed a member, not the Chief Executive, to the Gambling and Racing Commission.

Determination No. 9 of 2000 made under subsection 5 (1) of the *Administration Act 1989* declares that the Minister for Health and Community Care delegates to the Director of Environmental Health, Health Protection Service of the Australian Capital Territory Department of Health and Community Care certain powers as detailed in the Schedule to the instrument.

The Committee notes that this instrument delegates certain powers to an officer of the Department of Health and Community Care. For the purposes of the *Administration Act 1989* and the *Subordinate Laws Act 1989* this instrument does not appear to be a disallowable instrument and therefore not required to be tabled.

GOVERNMENT RESPONSES

The Committee has received a response from the Minister for Health and Community Care in relation to Scrutiny of Bills Report No 15 of 1999 concerning comments on Determination Nos 249, 250 and 251.

The Committee thanks the Minister for his response. The Committee is grateful that the Minister has confirmed that no person's rights had been prejudicially effected or any liabilities imposed on any person during the relevant period of retrospectivity. It also notes that the Minister has advised that future appointments relevant to section 7 of the *Subordinate Laws Act 1989* will state that the appointment takes effect on notification in the *Gazette*.

The Committee has received a response from the Minister for Education in relation to page 11 of the Scrutiny of Bills Report No 12 of 1999 concerning comments on the Children and Young People Bill 1999.

The Committee thanks the Minister for his response.

Paul Osborne, MLA
Chair

February 2000