Legislative Assembly for the Australian Capital Territory

Standing Committee on Legal affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

scrutiny report no. 18

27 August 2002

Terms of reference

The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

(a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):

  (i) is in accord with the general objects of the Act under which it is made;

  (ii) unduly trespasses on rights previously established by law;

  (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

  (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;

(b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee

(c) consider whether the clauses of bills introduced into the Assembly:

  (i) unduly trespass on personal rights and liberties;

  (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

  (iii) 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) report to the Assembly on these or any related matter and 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, publication and circulation.

Members of the Committee

Mr Bill Stefaniak, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Kerrie Tucker, MLA

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

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 comment on them.

Law Reform (Miscellaneous Provisions) Bill 2002

This Bill would amend the *Law Reform (Miscellaneous Provisions) Act 1955* to abolish the common law offences and torts concerning the doctrines of maintenance, champerty and being a common barrator.

Financial Management Amendment Bill 2002

This Bill would amend the *Financial Management Act 1996* in ways designed to improve the regulatory framework for the fiscal operations of the Territory.

Legal Practitioners Amendment Bill 2002

This Bill would amend the *Legal Practitioners Act 1970* to restrict certain forms of advertising by solicitors.

Public Access to Government Contracts Amendment Bill 2002

This Bill would amend the *Public Access to Government Contracts act 2002* to specify agency reporting requirements under the Act.

Bill - Comment

The Committee has examined the following Bill and offers these comments on it.

Cooperatives Bill 2002

This is a Bill to provide a legislative framework for the formation, registration and management of cooperatives.

Para 2(c)(i) – undue trespass on rights and liberties

Search powers

Clause 395 provides for an inspector to enter certain premises only with the consent of the occupier. There is, however, no provision made with the object of making that consent informed. In this way, the provisions of the Bill compare unfavourably with what is generally provided for in ACT laws; and see *Report No 17 of 2002*.

The protection in respect of the privilege against self-incrimination (see clauses 399 and 407) conform to what is generally provided in this respect.

The protection in respect of the client legal privilege appears to be much narrower. The privilege is that of the client, not of the lawyer. The Bill (clauses 402 and 408) appears to permit only a lawyer to claim the privilege, yet there might be many circumstances in which a lawyer would not be able to make a claim. It is not apparent why there should be such a restriction, and in this respect these provisions compare unfavourably with what is generally provided for in ACT laws. (The Bill also refers to legal professional privilege rather than to client legal privilege. Why this is so is again not apparent.)

Para 2(c)(iii) - review of administrative decisions

Under the Bill, there would be vested in the Registrar of Cooperatives a number of discretionary powers the exercise of which might affect adversely the interests of a person. In respect of only a few of these powers - although these do appear to be ones where the affect could be considerable - there is provision for the person affected to seek review by the Administrative Appeals Tribunal; see clause 460.

Those powers in respect of which there is no provision for review are found in clauses 122(4), 184(3), 192, 196, 256(6), 256(7), 262, 305, 321, 325(1), 327(2), 330, 374, 377(2), 385(1), 386, 421(1), 422(1), 424, 427, and 440(1). The exercise of these powers could affect adversely the interests of a person in a substantial way. In addition, see (below) those clauses that confer a dispensing power on the Registrar.

Para 2(c)(vi) - delegated legislative power insufficiently subject to parliamentary scrutiny

There are some powers of a legislative nature delegated by the Bill where it might be appropriate to provide not merely that an exercise of the powers is notifiable, but also that it is subject to disallowance by the Assembly. See

- subclause 106(4) - power of the Registrar to approve model rules for cooperatives
- subclause 280(2) - power to amend subclause 280(1) in relation to a maximum level of share interest in a trading cooperative, and
- subclause 367 - power of the Minister to declare a law of a State a cooperatives law.

Para 2(c)(iv)- inappropriate delegation of legislative power

Henry 8th clauses

A number of clauses enable the provisions of the Act to be altered by a regulation.

A wide power seems to be conferred in clause 11. Subclause 11(1) provides:

> (1) A provision of the Corporations Act applied by this Act is taken to apply with—
>
> (a) any changes provided by this Act; and
>
> (b) any other changes that may be necessary or desirable for the effective application of the Act.

Subclause 11(4) provides:

> (4) The regulations may make changes that are necessary or desirable for the effective operation of the applied provisions of the Corporations Act, and the changes take effect accordingly (except to the extent of any inconsistency with this Act).

The "necessary or desirable" formula would appear to confer an extensive power of amendment of provisions of the *Corporations Act*. Since provisions of this Act are incorporated into and would be read as one with the provisions of this Bill, this is in effect a power to amend the provisions of the Bill.

Another extensive power to amend statute law is found in clause 375. That in subclause 471(3) may be narrower. There is a much narrower Henry 8th provision in subclause 12(2).

The power in subclause 280(2) is specific, but is in respect of a matter of substance - being power to amend subclause 280(1) which fixes a maximum level of share interest in a trading cooperative. This Henry 8th clause is not merely designed to enable the provision of the statute to be adjusted to the circumstances.

Dispensing powers

A number of clauses confer on the registrar a discretion to dispense with some requirement of the law in favour of some person. These provisions are problematic in that the confer on an administrative official a power to (in effect) alter the provisions of a statute.

The only instance of a dispensing power where there has been an attempt to spell out the relevant factors is in clause 146, which provides:

> 146 Registrar may give exemptions for div 7.2
>
> (1) The registrar may, in writing, exempt the board of a trading cooperative from this division or a provision of this division.
>
> (2) The registrar may give the exemption only if the registrar is satisfied that compliance would be inappropriate in the circumstances or would impose an unreasonable burden.

In all other cases there is a bare power to dispense with some requirement of the law in favour of some person. Dispensing powers that are unconfined are found in clauses 142, 241, 276(2), 289, 297, 301(4), 318(2), and Schedule 3, clause 44.

Drafting points

- In clause 44, the Bill provides, in effect, for a presumption that certain powers have been properly exercised. Clause 446 provides that proof of appointment of the Registrar is not required. The operation of the 'presumption of regularity' would appear to make such specific provision unnecessary. The harm that might follow is that a court might consider that specific provision having been made, the

'presumption of regularity' cannot apply in other circumstances that might arise under the Bill.

- In subclause 338(4), it is provided that "The registrar may certify about any matter under this section only if the matter has been proved to the registrar's satisfaction". Again, would not this be the case anyway? If specific provision is made, what might be the consequence in respect of other powers of the Registrar?

INTERSTATE AGREEMENTS

Human cloning and other unacceptable practices

The Committee has received a letter dated 20 August 2002 from the Minister for Health advising that the Council of Australian Governments committed itself to develop nationally consistent legislation to ban human cloning and other unacceptable practices, to regulate assisted reproductive technology (ART) and to regulate research using excess ART embryos. The Government intends to develop, in consultation with all other Australian jurisdictions, nationally consistent legislation for this purpose.

The ACT Government intends to introduce the legislation as soon as is practicable.

The Committee thanks the Minister for Health for his letter (copy attached).

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments from:

- The Minister for Economic Development, Business and Tourism, dated 9 July 2002, in relation to comments in Scrutiny Report No. 15 of 2002 regarding the Hotel School Act – DI2002-35 (Report No. 15 of 2002).
- The Minister for Urban Services, dated 20 August 2002, in relation to comments in Scrutiny Report No. 17 of 2002 regarding the Plant Diseases Bill 2002.
- The Treasurer, dated 26 August 2002, in relation to comments in Scrutiny Report No. 17 regarding the Revenue Legislation Amendment Bill 2002.

Copies of the responses are attached.

The Committee thanks the Minister for Economic Development, Business and Tourism, the Minister for Urban Services and the Treasurer for their helpful responses.

The Committee notes that the Minister for Urban Services has undertaken to draw to the attention of the Attorney-General the comments of the Committee in connection with obligations that might be imposed on inspectors and the like when they seek the consent of an occupier of premises for the inspector to make a search of the premises and to seize various items. The Committee regards this as an important issue and looks forward to a response from the Attorney-General. It is noted that a similar issue has arisen in respect of the Cooperatives Bill 2002 which is the subject of report in this Report No. 18 of 2002.

Bill Stefaniak MLA
Chair

August 2002

Jon Stanhope MLA
CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR HEALTH MINISTER FOR COMMUNITY AFFAIRS MINISTER FOR WOMEN
MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Standing Commitee on Legal Affairs
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Bill

You may recall that, on 5 April 2002, I hosted the Council of Australian Governments' meeting in Canberra. At that meeting, COAG committed itself to develop nationally consistent legislation to ban human cloning and other unacceptable practices, to regulate assisted reproductive technology (ART) and to regulate research using excess ART embryos.

In accordance with section 9 of the *Administration (Interstate Agreements) Act 1997*, I am writing to advise you that the Government intends to develop, in consultation with all other Australian jurisdictions, nationally consistent legislation for this purpose.

As a member of COAG, the Government has committed itself to introduce the legislation to the Legislative Assembly as soon as is practicable.

I have enclosed a copy of the COAG Communique of 5 April 2002 for your information.

Yours sincerely

Jon Stanhope MLA
Minister for Health

20 AUG 2002

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COUNCIL OF AUSTRALIAN GOVERNMENTS' MEETING

5 APRIL 2002

CANBERRA

COMMUNIQUE

INTRODUCTION

The Council of Australian Governments (COAG) today held its 11th meeting in Canberra. The Council, comprising the Prime Minister, Premiers and Chief Ministers and the President of the Australian Local Government Association (ALGA), had wide ranging discussions on important areas of national interest.

This *Communique* sets out the agreed outcomes of the discussions.

HUMAN CLONING, ASSISTED REPRODUCTIVE TECHNOLOGY (ART) AND RELATED MATTERS

The Council agreed that the Commonwealth, States and Territories would introduce nationally-consistent legislation to ban human cloning and other unacceptable practices. The Council noted the Commonwealth intends to introduce legislation by June 2002.

The Council agreed that research involving the use of excess assisted reproductive technology (ART) embryos that would otherwise have been destroyed is a difficult area of public policy, involving complex and sensitive ethical and scientific issues. Having noted the range of views across the community, including concerns that such research could lead to embryos being created specifically for research purposes, the Council agreed that research be allowed only on existing excess ART embryos, that would otherwise have been destroyed, under a strict regulatory regime, including requirements for the consent of donors and that the embryos were in existence at 5 April 2002. Donors will be able to specify restrictions, if they wish, on the research uses of such embryos.

The regulation restricting the use of embryos created after 5 April 2002 will cease to have effect in three years, unless an earlier time is agreed by the Council. The Council also agreed to establish an Ethics Committee with membership jointly agreed by the Council to report to the Council within 12 months on protocols to preclude the creation of embryos specifically for research purposes, with a view to reviewing the necessity for retaining the restriction on embryos created on or after 5 April 2002. The Council also agreed to request the National Health and Medical Research Council (NHMRC) to report within 12 months on the adequacy of supply and distribution for research of excess ART embryos which would otherwise have been destroyed.

The Council agreed that research involving the destruction of existing excess ART embryos be permitted under a strict regulatory regime to enable Australia to remain at

the forefront of research which may lead to medical breakthroughs in the treatment of disease. It was further agreed that the regulatory regime governing the use of excess ART embryos that would otherwise have been destroyed will be reviewed within three years. Research would need to have approval from an ethics committee and be in accordance with NHMRC and Australian Health Ethics Committee guidelines. This arrangement will be administered by the NHMRC as the national regulatory and licensing body.

Details of the agreed arrangements on the bans on human cloning and other unacceptable practices and the regulatory regime governing research involving the destructive use of existing excess ART embryos are attached.

FOOT AND MOUTH DISEASE

The Council considered a report from its Foot and Mouth Disease (FMD) Taskforce that had been commissioned in June 2001. The report noted that Australia is free from major exotic animal diseases such as FMD and bovine spongiform encephalopathy (BSE or 'mad cow disease') but that, if there was an outbreak of one of these diseases in Australia, there would be a major impact on the agricultural sector, rural and regional Australia and the national economy.

The Council agreed that major animal disease emergencies, and their consequences, must be tackled on a national basis. COAG agreed a national coordination framework to ensure close integration of responsibilities and actions within and across jurisdictions which builds on existing animal disease and emergency management plans. The detailed arrangements would be settled in a Memorandum of Understanding between Heads of Government, by mid 2002.

COAG agreed that further work is required to improve national prevention, preparedness and response capability. This high priority activity is being coordinated through the Primary Industries Ministerial Council.

COAG considers it important for industry to continue to develop and implement as soon as possible industry-wide and farm-level measures which would reduce the likelihood of disease establishment, rate and extent of spread and impact.

A full-scale national simulation will be held in September 2002 to test peak-level arrangements across and within jurisdictions and emergency roles and linkages across all relevant agencies. The simulation will not involve any substantial field operations.

COAG also agreed that a further report be submitted to COAG by December 2002 which draws together the key matters arising from the national simulation, progress on improving prevention, preparedness and response capacity, an assessment by each jurisdiction of its preparedness status against agreed performance criteria, and an assessment of funding implications for each level of government. A report would also be prepared on managing relief and recovery arrangements.

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NATIONAL ACTION PLAN FOR SALINITY AND WATER QUALITY, AND PROPERTY RIGHTS

The Council reviewed progress in implementing the National Action Plan for Salinity and Water Quality (NAP) in Australia agreed on by COAG on 3 November 2000. The Council noted that all jurisdictions except Western Australia have signed the Intergovernmental Agreement that sets out the overarching commitments and obligations of the NAP.

The Council noted that Bilateral Agreements are in place with South Australia, Victoria, Tasmania and Queensland, that the Bilateral Agreement with New South Wales is ready for signing, and that a range of key policy tools to support the implementation of the NAP have either been agreed or substantially progressed. These include national criteria for accrediting integrated regional Natural Resource Management plans, a national framework for Natural Resource Management standards and targets and a national monitoring and evaluation framework. Council noted that although regional planning is progressing well in South Australia, Victoria and New South Wales, there was a need for a greater urgency in this task with the objective of achieving accreditation of a significant number of plans by June this year.

The Council noted that funding for priority projects in South Australia totalling $15.1 million had been provided and that foundation funding, priority actions and capacity building activities totalling $15.8 million were approved by Commonwealth and Victorian Ministers in February 2002.

Council members emphasised their ongoing commitment to working with communities to undertake an integrated approach to natural resource management on a regional scale.

The Council agreed to accelerate the implementation of the NAP including by:

- signing of the Intergovernmental Agreement by all parties that have not yet done so;
- concluding the remaining Bilateral Agreements by the end of June 2002, including progress on foundation funding, capacity building and priority projects; and
- making substantial progress on regional plans in all jurisdictions by the end of 2002.

The Council agreed to support arrangements that include adequate:

- local government representation on regional bodies;
- local government involvement in the development of integrated natural resource management regional plans; and
- awareness of regional objectives in local planning.

The Council noted water has been a key driver in regional and national development and, in recognition of the need to address adverse economic and environmental consequences of past water management policies and practices, in 1994 COAG adopted a strategic framework for reforms to national water governance. A key part

of these reforms has been the development of a system of water property rights on a jurisdiction by jurisdiction basis.

The Council also noted that substantial progress is being made on the national water reforms. Water management is currently in a transition phase as jurisdictions implement new water allocation arrangements. There have been a number of calls for clarification to water property rights.

Council reaffirmed the importance of water property rights issues in dealing with the nation's salinity and water quality problems. Council further noted that during this transitional period, there may be a lack of information in the community about the nature of property rights, including responsibilities of water users. There also needs to be consideration of the implications of changes to water property rights for investment and the impacts of the changes on water users, particularly farmers.

In order to clarify these issues jurisdictions agreed to report to COAG by September 2002 on opportunities and impediments to better define and implement water property rights regimes (including water trading markets and where appropriate the responsibilities of water users); and how they are addressing uncertainties.

RECONCILIATION

The Council reaffirmed its continuing commitment to advance reconciliation and address the social and economic disadvantages experienced by many indigenous Australians.

The Council considered a report on progress in implementing the reconciliation framework agreed by the Council in November 2000 (will be available at www.dpmc.gov.au/docs/comm_state_index.cfm). The report shows that all governments have made progress in addressing the COAG priorities of leadership, reviewing and re-engineering programmes to assist indigenous families and promoting indigenous economic independence. Ministerial councils have also made progress in developing action plans and performance reporting strategies, although this has been slower than expected.

To underpin the commitment to reconciliation and to drive future work, the Council agreed to a trial of a whole-of-governments cooperative approach in up to 10 communities or regions. The aim of these trials will be to improve the way governments interact with each other and with communities to deliver more effective responses to the needs of indigenous Australians. The lessons learnt from these cooperative approaches will be able to be applied more broadly. This approach will be flexible in order to reflect the needs of specific communities, build on existing work and improve the compatibility of different State, Territory and Commonwealth approaches to achieve better outcomes. The selection of communities and regions will be discussed between the Commonwealth, States and Territories, the communities and the Aboriginal and Torres Strait Islander Commission and be announced by mid 2002.

The Council also agreed to commission the Steering Committee for the Review of Commonwealth/State Service Provision to produce a regular report against key indicators of indigenous disadvantage. This report will help to measure the impact of

changes to policy settings and service delivery and provide a concrete way to measure the effect of the Council's commitment to reconciliation through a jointly agreed set of indicators.

The Council noted that it would continue to review progress under the reconciliation framework, and that the next detailed report on progress achieved by governments and ministerial councils would be provided to the Council no later than the end of 2003.

PUBLIC LIABILITY INSURANCE

Recent developments in the provision of insurance for public liability, medical indemnity and terrorism risks have raised a number of issues for all levels of government. The Council noted that the Commonwealth has initiated a number of processes for examining these issues.

- A Commonwealth-State ministerial meeting on public liability insurance took place on 27 March and will meet again in May 2002.

- A national Medical Indemnity Forum, to be chaired by the Commonwealth Minister for Health and Ageing, Senator the Hon Kay Patterson, will be held on 23 April.

- The Commonwealth has been undertaking consultations with key stakeholders, including the States and Territories, on the withdrawal of insurance cover for terrorist acts.

The Council noted the responsibility of the insurance industry to act transparently and responsibly in setting insurance premium rates. The Council asked the Australian Competition and Consumer Commission and the Australian Prudential Regulation Authority to examine the situation with a view to ensuring that these objectives are achieved.

The Council also noted that a number of States and Territories have taken action to address issues within their own jurisdictions in relation to public liability insurance, medical indemnity insurance and the withdrawal of insurance for terrorism risk.

The Council agreed that it is important to address concerns about public liability, medical indemnity and terrorism insurance in a nationally-coordinated way and from a whole-of-government perspective. Accordingly, the chair of the Heads of Treasuries, in consultation with the chair of the Australian Health Ministers' Advisory Council and the secretary to the Standing Committee of Attorneys-General, will brief Commonwealth-State senior officials in July 2002 on progress in addressing issues associated with public liability, medical indemnity and terrorism insurance.

In relation to public liability insurance, the Council endorsed the outcomes of the 27 March Commonwealth-State ministerial meeting on public liability insurance, as set out in the joint *communique* released following that meeting, and noted that:

- a Heads of Treasuries Insurance Working Group has been asked to consult with each jurisdiction's operational areas affected by public liability insurance with a

view to developing practical measures for consideration by governments by 30 April 2002;

- each jurisdiction will delegate a minister to represent the interests of its jurisdiction; and

- the relevant Commonwealth, State and Territory ministers and the President of ALGA will meet again in May 2002.

The Council places a high priority on constructive tort law reform. It was agreed that the law reform proposals considered by the 27 March ministerial meeting on public liability insurance and any additional proposals arising from the Medical Indemnity Forum should be progressed as a matter of priority. This will be progressed by Heads of Treasuries in consultation with departments of Attorneys-General.

In relation to medical indemnity insurance, there are two separate, but interrelated issues: rapidly rising premiums; and the financial viability of the medical defence organisations (MDOs). Both threaten the withdrawal of medical services. The Council noted that, in relation to the MDOs, the Commonwealth has announced assistance to help stabilise the financial position of Australasian Medical Insurance Limited. It was agreed that the Commonwealth and the States and Territories should work together with the medical profession and medical indemnity insurance industry to find ways to address the financial difficulties confronting the medical indemnity industry.

Issues associated with rising premiums for medical indemnity insurance will be examined by the Medical Indemnity Insurance Forum, to be chaired by the Commonwealth Minister for Health and Ageing, on 23 April. The Council agreed that solutions in this area will require coordinated and comprehensive reforms by all jurisdictions.

The possible withdrawal of insurance cover for terrorism events could have implications for a wide range of insurance products. The Commonwealth has been consulting with key stakeholders on the impact of the changed practices in this area and is currently considering the issues arising from these consultations. The Commonwealth will be concerned not to stifle the re-emergence of market provision of terrorism risk insurance, and will consult the States and Territories regarding what action may be needed to address the withdrawal of terrorism cover in the immediate term.

FUTURE MEETINGS

The Council agreed they would have a strategic discussion of one broad issue of national public policy at each of their future meetings, in addition to its normal agenda. It further agreed to meet at least annually and, depending on the circumstances, would meet more often if required.

Council of Australian Governments
5 April 2002

ATTACHMENT

ARRANGEMENTS FOR NATIONALLY-CONSISTENT BANS ON HUMAN CLONING AND OTHER UNACCEPTABLE PRACTICES, AND USE OF EXCESS ASSISTED REPRODUCTIVE TECHNOLOGY (ART) EMBRYOS

The Council agreed that the Commonwealth, States and Territories would introduce nationally-consistent legislation to ban human cloning and other unacceptable practices. The Council noted the Commonwealth intends to introduce legislation by June 2002.

It is also intended that this legislation establish a national regulatory regime in relation to the use of excess ART embryos. Given the pace of scientific developments in this area, the Council also agreed that arrangements for research using excess ART embryos will be reviewed within three years.

The arrangements agreed by the Council are as follows.

A nationally-consistent ban on the cloning of a human being[1]

1. The following wording is to be used as the basis for a nationally-consistent ban on the cloning of a human being:

   1.1 A person must not:

   a) create, or attempt to create, a human clone by means of a technological or other artificial process; or

   b) cause a human embryo clone to be placed in the body of a human or animal for any period of gestation.

   1.2 For the purposes of establishing that a human clone or human embryo clone is a genetic copy:

   a) it is sufficient to establish that the set of genes in the nucleus of the human cell has been copied; and

   b) it is not necessary to establish that the copy is an identical genetic copy.

   1.3 It is not a defence that the human clone or human embryo clone did not or could not survive.

   "Human clone" means a human that is a genetic copy of another living or dead human.

   "Human embryo clone" means a human embryo that is a genetic copy of a living or dead human.

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[1] It is important to read this prohibition in conjunction with the proposed prohibition on the creation of embryos for purposes other than assisted reproduction by processes other than the fertilisation of a human ovum by a human sperm, as discussed in Chapters 4 and 6 of the Technical Report to Health Ministers on Human Cloning, Assisted Reproductive Technology and Related Matters (the Health Ministers' report).

"Embryo" is a developing organism from the completion of fertilisation, or initiation of development by any other means, until eight weeks when the organism becomes known as a foetus.

Nationally-consistent regulation of certain unacceptable practices

2. The following practices are unacceptable and should be prohibited in Australia[2].

2.1 A person must not create or develop an embryo outside the body of a woman:

a) for purposes other than assisted reproduction; or

b) by a process other than the fertilisation of a human ovum by human sperm.

2.2 A person must not create or develop an embryo for assisted reproduction that contains genetic material from more than two people.

2.3 A person must not create or develop an embryo for assisted reproduction that uses any precursor cells of eggs or sperm from an embryo or foetus.

2.4 A person must not maintain an embryo outside the body of a woman after the 14th day of its development excluding any time in which its development has been suspended.

2.5 A person must not alter the genome of a cell of a human being or in vitro embryo such that the alteration is inheritable.

2.6 A person must not conduct embryo flushing.

3. A person must not:

a) create or develop a hybrid embryo; or

b) place a hybrid embryo in the body of a human or animal for any period of gestation.

"Hybrid embryo" means a single living organism which has a mixed genetic origin as a consequence of combining cells derived from humans and other species.

3.2 A person must not:

a) place a human embryo in an animal or in any human body cavity other than the female human reproductive tract; or

b) place an animal embryo in a human for any period of gestation.

3.3 A person must not give or offer valuable consideration to any person for donation of gametes or embryos of that person or of any other person.

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[2] All of the prohibitions reflected in 2.2-2.9 must be read subject to 2.1, which bans the creation or development of a cloned embryo to any stage. The ban on human cloning prohibits the implantation of a cloned embryo in a woman (refer Health Ministers' report, Chapter 3).

"Valuable consideration" includes a discount or priority in the provision of a service but does not include the disbursement of any reasonable expense incurred by a person in connection with a donation of his or her reproductive material.

4. The prohibited practices will be comprehensively reviewed within three years of nationally consistent legislation taking effect, taking into account changes in technology, the potential therapeutic uses for such technology and any changes in community standards.

A nationally-consistent approach to research involving human embryos

5. Research involving human embryos should be regulated through nationally-consistent legislation.

6. The following principles should underpin nationally-consistent legislation:

   6.1 legislation should ensure appropriate ethical oversight of research involving embryos based on nationally-consistent standards;

   6.2 the nationally-consistent standards should be clear, detailed and describe the ethical issues to be taken into account, research which may be permitted and the conditions upon which it may be permitted (that is, the "rules" to be observed by researchers undertaking work with embryos) and should be based on National Health and Medical Research Council (NHMRC) guidelines as devised by the Australian Health Ethics Committee (AHEC);

   6.3 these national standards should be applied consistently throughout Australia, recognising that jurisdictions may use different mechanisms to establish that proposals comply with the national standards;

   6.4 the system should provide for public reporting of research involving embryos so as to improve transparency and accountability to the public; and

   6.5 the system should enable appropriate monitoring of compliance with the national standards and provide legislated penalties for non-compliance.

7. There is a range of legislative options that could meet these principles including systems of accreditation, licensing or mandating of compliance with the revised AHEC guidelines.

A nationally-consistent approach to the development and/or use of embryos for the derivation of stem cells

8. Research with existing stem cell lines will be permitted to continue in Australia subject to observance of conditions set by NHMRC/AHEC.

9. Research and possible therapeutic applications which involve the destruction of existing excess ART embryos (or which may otherwise not leave the embryo in an implantable condition) will be permitted in accordance with the regulatory regime at Appendix 1.

10. The ban on the development of embryos for purposes other than for assisted reproduction will be maintained and reviewed within three years taking into account the

implications for therapeutic use of embryonic stem cells (as detailed in the Health Ministers' report, Chapter 4).

A nationally-consistent approach to ART

11. Accreditation by the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia should provide the basis for a nationally-consistent approach to the oversight of ART clinical practice in Australia, noting that compliance with the NHMRC/AHEC Ethical Guidelines on ART is a key requirement of RTAC accreditation.

12. Individual jurisdictions may choose to mandate RTAC accreditation in legislation or supplement requirements for RTAC accreditation with an additional layer of oversight (for example, through a system of licensing or accreditation of ART service providers).

13. Non-legislative measures should be implemented to improve clarity regarding the role of Human Research Ethics Committees in relation to innovative practice and to increase public reporting of research and innovative practice (as detailed in the Health Ministers' report, Chapter 5).

APPENDIX 1

REGULATORY REGIME CRITERIA FOR RESEARCH USES OF EXCESS ASSISTED REPRODUCTIVE TECHNOLOGY (ART) EMBRYOS

Governments agree to put in place a strict regulatory regime under nationally-consistent legislation and administered by the National Health and Medical Research Council (NHMRC) as the national regulatory and licensing body. The NHMRC would issue a licence for a person to use an excess embryo from an ART programme for research or therapy that damages or destroys the embryo. A licence would only be issued where that project has the approval of an ethics committee established, composed and conducted in accordance with NHMRC guidelines, and that the approval is given on a case by case basis that:

- there is a likelihood of significant advance in knowledge or improvement in technologies for treatment as a result of the proposed procedure;
- the significant advance in knowledge or improvement in technologies could not reasonably be achieved by other means;
- the procedure involves a restricted number of embryos and a separate account of the use of each embryo is provided to the ethics committee and the national licensing body;
- all tissue and gamete providers involved and their spouses or domestic partners, if any, have consented to research for each embryo used, including by specifying restrictions, if they wish, on the research uses of such embryos; and
- the embryo had been created prior 5 April 2002.

These regulations will be reviewed within three years.

The regulation restricting the use of embryos created after 5 April 2002 will cease to have effect in three years, unless an earlier time is agreed by the Council.

- The Council also agreed to establish an Ethics Committee with membership jointly agreed by the Council to report to the Council within 12 months on protocols to preclude the creation of embryos specifically for research purposes, with a view to reviewing the necessity for retaining the restriction on embryos created on or after 5 April 2002.
- The Council also agreed to request the NHMRC to report within 12 months on the adequacy of supply and distribution for research of excess ART embryos which would otherwise have been destroyed.

Ted Quinlan MLA

DEPUTY CHIEF MINISTER

TREASURER MINISTER FOR ECONOMIC DEVELOPMENT, BUSINESS AND TOURISM

MINISTER FOR SPORT, RACING AND GAMING MINISTER FOR POLICE, EMERGENCY SERVICES AND CORRECTIONS

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

I am writing in response to issues raised in the Scrutiny of Bills Report No 15 of 2002 regarding the numbering of disallowable instruments and, in particular, Disallowable Instrument DI2002-35, made under section 16 of the *Hotel School Act 1996*.

In that report the Committee queried "why, given that disallowable instruments are numbered sequentially, the above disallowable instruments seem to include an extra numbering system."

The inclusion of a number in the title, for example "No 1", is to make the instrument more accessible to members of the public by giving it a unique and meaningful name. It is also to satisfy the requirements of the *Legislation Regulations 2001*, regulation 4 (2) (f) (Requirements for notification of registrable instruments etc). The *Legislation Regulations 2001*, regulation 4 (2) (f) and (3) effectively require registrable instruments to have a unique title that includes the year the instrument is made.

As a number of instruments may be made under the same authorising provision in any year, the inclusion of consecutive numbers in their titles is a meaningful way of distinguishing one instrument from another. This approach is also consistent with current drafting practice for Acts and subordinate laws. Therefore the inclusion of that number is not part of an extra numbering system, but rather an integral part of a unique and meaningful title.

However, under the *Legislation Act 2001*, section 59, registrable instruments (including disallowable instruments) must also carry a number which reflects, as near as practicable, the order in which they are notified under the Act. Different serial numbers and letters are used to distinguish the different kinds of instruments. For example, this year's subordinate laws are numbered SL2002- ##; disallowable instruments are numbered DI2002- ##; notifiable instrument NI2002- ## and so on.

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These 'notification numbers' provide a unique point of reference for each instrument but, unlike the numbers used in the actual titles of the instrument, they are not designed for searching an instrument by subject or title.

I trust that this information clarifies the situation for the Committee.

Yours sincerely

Ted Quinlan MLA 9 July 2002

Bill Wood MLA

MINISTER FOR URBAN SERVICES MINISTER FOR THE ARTS
MINISTER FOR DISABILITY, HOUSING AND COMMUNITY SERVICES

MEMBER FOR BRINDABELLA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.17 of 2002. I offer the following response in relation to the matters raised by your Committee on the Plant Diseases Bill 2002.

Entry powers by consent – clauses 21, 23, 26 and 28
The Committee suggests that these provisions could be improved by requiring inspectors to provide occupiers with information about the extent of the inspector's powers to collect evidence and seize things.

No comparable legislation requires provision of information about powers on inspection. For example, the *Environment Protection Act 1997*, the *Tree Protection (Interim Scheme) Act 2001* and the *Domestic Animals Act 2000* all have similar provisions in relation to obtaining consent, and similar provisions relating to powers on inspection once entry is gained. None of these Acts, administered by Urban Services, require inspectors to provide information to occupiers about the extent of their powers.

The procedure suggested by the Committee would not impose a significant administrative burden in itself, but it would create another point of difference between the procedures under this Act and other legislation, making it more difficult to administer as part of the suite of legislation administered by Urban Services.

Rather than amend this legislation at this time, it would be preferable to give consideration to this suggestion in the broader context of inspector powers in all legislation. The suggestion of the Committee will be drawn to the attention of the Attorney-General and his Department.

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Notifiable and Disallowable Instruments

The Committee asks why one group of identified declarations are merely notifiable, while another identified group are disallowable. The notifiable declarations are a declaration that a thing is a disease (clause 5), declaration that an animal is an insect (clause 6) and declaration of places of entry and quarantine stations (clause 9).

Each of these three declarations are more administrative in character, whereas the others (in clauses 8, 10, 12 and 15) are more legislative in character. The powers to make declarations of diseases and insects is an extension of the broad definitions of these two things in the relevant sections. The effective use of the power is merely to clarify whether a given example is within the definition. The power to declare quarantine stations and points of entry is an administrative power, used to support a declaration of quarantine, and need not be overseen by the Assembly.

Clause 17 and Clause 44

These two provisions are related in purpose, and their justification is similar. Clause 17 prevents a challenge to a decision to impose a quarantine or importation restriction, or an order made in support of a quarantine or importation restriction. Clause 44 is specifically directed to challenge decisions under the Bill under the *Administrative Decisions (Judicial Review) Act 1989* (the ADJR Act). Clause 44 supports the operation of Clause 17, in excluding judicial review and the associated processes established under the ADJR Act, such as the statement of reasons provisions.

These provisions are not lightly put forward by the Government. They are, however, necessary to meet the objectives of this legislation, namely the effective control of the outbreak of a disease or pest in the Territory. In the event of an outbreak, it is essential that the Government deploy a rapid and effective response. This will typically involve quarantine of a property (or a range of properties) and making orders for the containment, treatment and eradication of the disease or pest. In many situations, any delay or interference in the response will make it ineffective, as the disease or pest will continue to spread.

Litigation, particularly by way of injunction or similar orders, has potential to cause delay, and divert resources away from where they are most needed to deal with the outbreak. This has potentially very serious consequences for agriculture, both within the Territory and across New South Wales and the rest of Australia.

While there is potential for losses to be incurred by a person affected by a quarantine, this must be balanced against the risk to the livelihood of many others, and the damage to the economy of the nation.

Clause 17 is similar to section 20 in the *Animal Diseases Act 1993*, where, for the same reason, access to the Courts to challenge quarantine orders is restricted. These provisions meet the national standard for such legislation, and are included in legislation relating to animal and plant diseases in other jurisdictions.

Thank you for raising these matters. I trust I have been of assistance.

Yours sincerely

Bill Wood

Bill Wood MLA
Minister for Urban Services
20.8.02

Ted Quinlan MLA

DEPUTY CHIEF MINISTER

TREASURER MINISTER FOR ECONOMIC DEVELOPMENT, BUSINESS AND TOURISM

MINISTER FOR SPORT, RACING AND GAMING MINISTER FOR POLICE, EMERGENCY SERVICES AND CORRECTIONS

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Scrutiny of Bills and Subordinate Legislation Committee
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

I am writing in response to the comments in the Scrutiny of Bills Report No 17 of 2002 concerning the **Revenue Legislation Amendment Bill 2002**. Your Committee noted that Part 2 of the Bill, which amends the *Payroll Tax Act 1987*, is to be taken to commence on 1 July 2002. The Committee noted that the retrospectivity was still a matter for the Assembly and that the early announcement did not in itself justify a retrospective commencement date. The Committee also noted that the early announcement may not have reached those affected by the changes.

The proposed changes, and their retrospective commencement date, were announced in the Legislative Assembly on 25 June 2002. Each payroll taxpayer was also individually notified of the proposed changes in the "Payroll Tax Forms 2002-2003" booklet which was posted to them by the ACT Revenue Office in mid-July 2002. The matter of retrospective operation clearly remains a matter for the Assembly as the explanatory paragraphs in this booklet state that "**If passed**, these changes will apply retrospectively from 1 July 2002".

Businesses already calculate and record the proposed changes for *Income Tax Assessment Act 1936* (Cwlth) purposes. The calculation of fringe benefits for ACT payroll tax requirements has been out of step with the Commonwealth and the other jurisdictions, and this retrospective amendment brings the ACT legislation into line. In addition, it would provide administrative cost savings for employers paying payroll tax across jurisdictions, whereby the preparation of two different fringe benefits calculations is eliminated. Similar provisions commenced in Victoria on 1 July 2001, WA on 1 January 2002, Queensland, SA and NSW on 1 July 2002.

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Payroll tax is an annual tax paid by monthly returns. The amount payable varies and is dependant upon changing staff numbers and their entitlements. A reconciliation is done at the end of June each year and this would be facilitated by having the same criteria applying uniformly across all jurisdictions and for the whole financial year.

I trust that the above explanation addresses the Committee's concerns.

Yours sincerely

Ted Quinlan MLA
Treasurer