

**STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

REPORT NO. 10 OF 1996

24 July 1996

TERMS OF REFERENCE

- (1) A Standing Committee for scrutiny of bills and subordinate legislation be appointed.
- (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) its 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) its explanatory memorandum meets the technical or stylistic standards expected by the Committee.
- (3) The Committee shall consist of three 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

Ms Rosemary Follett, MLA (Chair)
Mr Harold Hird, MLA (Deputy Chair)
Mr Paul Osborne, MLA

Legal Advisor: Emeritus Professor Douglas Whalan, AM
Secretary: Mr Tom Duncan

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.

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

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CANBERRA ACT 2601
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STANDING COMMITTEE ON SCRUTINY OF
BILLS AND SUBORDINATE LEGISLATION

Telephone: (06) 2050171
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Mr Greg Cornwell, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear Mr Cornwell,

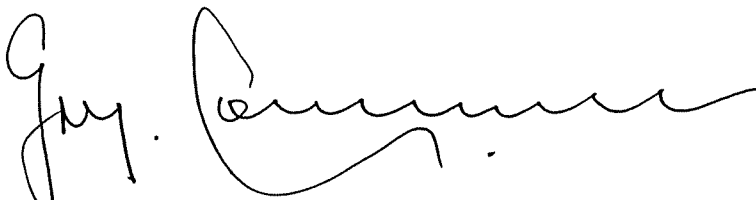
Please find enclosed a copy of Report No. 10 of 1996 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. I seek your approval to print and circulate Report No. 10 of 1996.

Yours sincerely,



Rosemary Follett, MLA
Chair

22 July 1996



Approved
Greg Cornwell, MLA

24 July 1996

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comment:

Animal Diseases (Amendment) Bill 1996

This Bill repeals the *Apiaries Act 1928* and widens the definition of "animal" to include both vertebrates and invertebrates.

Animal Welfare (Amendment) Bill 1996

This Bill phases out the keeping of battery hens, removes compliance with a code of practice as a defence, provides for public access to inspection reports, amends the provisions relating to inspections and removes the requirements for notice to be given prior to inspections.

Classification (Publications, Films and Computer Games) (Enforcement) (Amendment) Bill 1996

This Bill allows the Director of the Classification Board to grant exemptions and to approve organisations under part VII of the Principal Act, makes technical amendments and some consequential amendments to the *Business Franchise ("X" Videos) Act 1990* and the *Taxation (Administration) Act 1987*.

Food (Amendment) Bill 1996

This Bill provides that eggs must not be sold if hens are kept in a manner that constitutes an offence and that eggs must carry a label indicating the conditions in which the hens are kept.

Land (Planning and Environment) (Amendment) Bill 1996

This Bill provides for the making of orders relating to pest plants or pest animals, which may be declared as such by the Minister, repeals Acts dealing with noxious weeds and rabbit destruction and makes consequential amendments to other relevant Acts.

Liquor (Amendment) Bill (No. 2) 1996

This Bill makes amendments to the provisions relating to licensing and enforcement matters, provides for approved training, permits the Registrar to determine occupancy loadings and amends the provisions relating to the offence of selling or supplying liquor to intoxicated persons.

Motor Traffic (Amendment) Bill 1996

This Bill repeals the existing definition of "Commonwealth vehicle" and replaces it with a new definition, establishes "pelican crossings", enables the Registrar to exempt certain vehicles from registration, provides that persons

resident in the ACT for less than 3 months may continue to drive a vehicle notwithstanding its interstate registration, allows police to retain possession of a motor vehicle until a person charged with drink driving can drive with safety and corrects a number of minor matters.

Motor Traffic (Alcohol and Drugs) (Amendment) Bill 1996

This Bill repeals the existing definition of "Commonwealth vehicle" and replaces it with a new definition to maintain consistency with changes made to the *Motor Traffic Act 1936*.

Bills - Comments

The Committee has examined the following Bills and offers the following comments:

Approved forms, Appeals from the Exercise of Discretions and "Without Reasonable Cause"

Community Referendum Bill 1996

This Bill provides for electors to initiate changes to the law through the referendum process.

As the Presentation Speech states, this "Bill is identical to the Community Referendum Bill introduced" last year. In its Report No 16 of 1995 the Committee made some comments on last year's Bill. For the convenience of Members, the Committee repeats last year's comments in this Report.

Approved Forms

Subclause 5 (2) provides that a sponsoring committee comes into existence when the Commissioner accepts "a notice in the approved form" containing specified information.

There is no definition of "approved form" in the definition clause, clause 3, nor do the Schedules contain an appropriate form.

Who is to approve forms and what process is there for approval of forms?

Appeals from the Exercise of Discretions

Clause 35 provides for review by the Administrative Appeals Tribunal of a number of decisions made by the Electoral Commissioner.

However, clause 14 gives the Attorney-General a very important power to give or refuse a certificate to a sponsoring committee that has prepared a proposed law as to whether that proposed law gives effect to the registered legislative proposal and is in a form suitable for presentation to the Legislative Assembly.

Subclause 17 (4) applies the same process to an amendment prepared by a sponsoring committee.

Subclause 18 (2) provides that the Electoral Commissioner is not to submit a proposed law to a referendum, if the Attorney-General advises the Commissioner that the Assembly has enacted a law that gives effect to the objects of the proposed law.

Paragraph 19 (5) (b) provides in similar terms to subclause 18 (2).

Finally, clause 31 gives the Chief Minister very detailed discretions relating to proposed laws being inconsistent with each other.

There appears to be no independent review of these significant aspects of the referendum process.

Each Member of a Sponsoring Committee Commits an Offence

Clause 40 deals with vacancies in the office of contact officer of a sponsoring committee.

Subclause 40 (3) provides that if a vacancy occurs in the office of contact officer the sponsoring committee must fill the vacancy within 14 days.

Then subclause 40 (4) provides as follows:

"If a sponsoring committee fails, without reasonable cause, to comply with subsection (3), each member of the committee is guilty of an offence punishable, on conviction, by a fine not exceeding 2 penalty points."

It is the sponsoring committee as an entity that has the right to prove "reasonable cause" for not having complied with the requirement to fill the office. Yet each individual member of the sponsoring committee is guilty of the offence.

What if one member of a 10 member sponsoring committee happened to become ill in hospital or overseas for 14 days or so and a vacancy occurred which that member could not have known about? That person will have committed an offence and appears to have no "reasonable cause" defence, unless the sponsoring committee as a whole has such a defence.

Would it perhaps be more appropriate for each individual member to be able to demonstrate that he or she had "reasonable cause" for not complying with subclause 40 (3) relating to the non-compliance, rather than the sponsoring committee as an entity being able to do so?

No Fixed Dates Of Commencement

Consumer Credit (Administration) Bill 1996

This Bill establishes the administrative framework for the operation of the *Consumer Credit Act 1995*, the national uniform credit legislation in the Code and the functions in the *Credit Act 1985*.

Consumer Credit (Administration) (Consequential Provisions) Bill 1996

This Bill provides transitional and savings provisions for the introduction of the new national uniform credit legislation, including making changes to the *Consumer Credit Act 1995*, the *Credit Act 1985* and the Credit Regulations.

The substantive provisions of the *Consumer Credit Act 1995* have not been brought into effect by the Minister under subsection 2 (2) of that Act, but, as the law stands at present, they will commence automatically on 5 September 1996 on the operation of the subsection 2 (3) of that Act.

However, subsection 2(3) is repealed by clause 4 of the Consumer Credit (Administration) (Consequential Provisions) Bill 1996. Subclause 2 (1) of the Consumer Credit (Administration) (Consequential Provisions) Bill 1996 provides that clause 4 (and thus the repeal) commences on notification of the Bill in the *Gazette*. Thus, provided notification occurs before 5 September 1996, a notice by the Minister in the *Gazette* will then be required to bring the *Consumer Credit Act 1995* into operation.

Subclause 2 (2) of the Consumer Credit (Administration) (Consequential Provisions) Bill 1996 provides that its remaining substantive provisions commence on the commencement of clause 3 of the Consumer Credit (Administration) Bill 1996.

The Consumer Credit (Administration) Bill 1996 does not fix a commencement date for its substantive provisions, nor does it contain the usual automatic commencement date after a set period.

Subclause 2 (2) of the Consumer Credit (Administration) Bill 1996 provides that the substantive provisions of that Bill "commence on a day fixed by the Minister by notice in the *Gazette*". As noted above, such a notice will also trigger the commencement of the remaining substantive provisions of the Consumer Credit (Administration) (Consequential Provisions) Bill 1996.

However, the absence of the usual automatic commencement provisions is explained in the Presentation Speech, where the Minister stated that the Consumer Credit Code is now set to commence throughout Australia on 1 November 1996.

Presumably, the present intention is for the Minister to give notices of commencement for 1 November 1996 for the Consumer Credit (Administration) Bill 1996 and for the *Consumer Credit Act 1995*, if it has not automatically commenced on 5 September 1996. This would bring the whole package into operation on that date.

However, the arrangements that the present provisions make permit the commencement of the legislation to be delayed. Presumably, this is to cover the position if any hiccups occur in relation to the Australia-wide commencement on 1 November 1996.

Is the Repetition of Section 76 Necessary?

Legal Practitioners (Amendment) Bill (No. 2) 1996

This Bill gives the Law Society a discretion to issue an unrestricted practising certificate, even though the legal practitioner does not have professional indemnity insurance.

On the passing of this Bill the form of section 23 of the Principal Act will be as follows:

"Subject to

- (a) sections 24, 24A, 24B, 25, 26, 27 and 76; and
- (b) sections 23A, 76 or 83;

the Law Society shall, upon payment of the fee and the contribution and levy (if any) payable under this Act, issue to the applicant a practising certificate of the kind sought by the applicant."

Because of the possibilities that an unrestricted practising certificate may now be issued where the applicant has the professional indemnity insurance either under that provided for under Part IX or that provided for under Part X or may, at the discretion of the Law Society, be issued where the solicitor does not have any such cover, these complications may perhaps require the appearance of section 76 in both paragraph 23 (a) and paragraph 23 (b).

But perhaps the matter could be checked.

Was this Omission Intended?

Long Service Leave (Building and Construction Industry) (Amendment) Bill 1996

This Bill increases the level of long service leave for service occurring on or after the commencement of the present Bill, but does not alter long service leave that accrues up to that time.

The amendment is effected by giving a definition of "defined fraction". The "defined fraction" for service up until the present amendment commences will remain at 13/15 and the fraction for future service will be 13/10.

The Committee notes that the amendment appears to have been made to all of the relevant provisions in the Principal Act, except those in paragraphs 53 (1A) (c) and (d) where the fraction remains as 13/15.

Were these omissions intentional?

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

The Committee has examined the following subordinate legislation and offers no comment:

Determination No. 95 of 1996 made under section 10 of the *Food Act 1992* appoints a named individual as an analyst for the purposes of the Act.

Determination No. 99 of 1996 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 167 of 1995 dealing with payments under the *Payroll Tax Act 1987* and determines, as from 1 July 1996, the wages thresholds below which no employer is required to lodge returns, determines the payroll tax levels to 30 June 1997, 30 June 1998 and from 1 July 1998 and determines the payroll tax rates for the 1996-97, 1997-98 and 1998-99 and future financial years.

Determination No. 100 of 1996 made under section 99 of the *Taxation (Administration) Act 1987* revokes clauses 8 and 9 of Determination No. 90 of 1991 dealing with payments under the *Stamp Duties and Taxes Act 1987* and determines that as from 1 July 1996 until 31 December 1998 payments under sections 56A and 57 shall be at the rate of \$3.00 per \$100.00 of market or purchase value of motor vehicles and shall revert to \$2.50 after that date.

Determination No. 101 of 1996 made under section 99 of the *Liquor Act 1975* revokes Determination No. 64 of 1995 and determines fees payable under the Act.

Determination No. 102 of 1996 made under section 39B of the *Bookmakers Act 1985* determines the location of a sports betting venue.

Determination No. 103 of 1996 made under section 39B of the *Bookmakers Act 1985* varies the directions for the operation of the sports betting venue at the Bruce Outdoor stadium by deleting the present provision relating to the times of betting and inserting times of betting for 28 June 1996.

Determination No. 104 of 1996 made under subsection 161 (5) of the *Land (Planning and Environment) Act 1991* revokes Determination No. 4 of 1993 and determines criteria for the direct grant of a Crown lease for use by Commonwealth Government Departments or agencies.

Determination No. 107 of 1996 made under section 41 of the *Dentists Registration Act 1931* revokes Determination No. 117 of 1993 and determines fees payable under the Act.

Determination No. 108 of 1996 made under section 83A of the *Nature Conservation Act 1980* revokes Determination No. 50 of 1995 and determines fees payable under the Act.

Determination No. 109 of 1996 made under section 63 of the *Animal Diseases Act 1993* determines a fee under section 40 for the issuing and recording of emergency tail tags.

Determination No. 110 of 1996 made under section 110 of the *Animal Welfare Act 1992* revokes Determination No. 47 of 1995 and determines fees payable under the Act.

Determination No. 111 of 1996 made under section 5A of the *Lakes Act 1976* determines a fee for a permit under section 26 to use a power boat.

Determination No. 112 of 1996 made under section 42 of the *Stock Act 1991* revokes Determination No. 52 of 1995 and determines fees payable under the Act.

Determination No. 113 of 1996 made under section 7 of the *Pounds Act 1928* revokes Determination No. 51 of 1995 and determines fees payable under the Act.

Determination No. 115 of 1996 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 41 of 1995 and determines a new fee under the Act.

Determination No. 116 of 1996 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 43 of 1995 and determines fees for drivers' licences.

Determination No. 117 of 1996 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 46 of 1995 and determines fees for number plates.

Determination No. 118 of 1996 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 45 of 1995 and determines fees for parking labels.

Determination No. 119 of 1996 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 166 of 1995 and determines fees for registration of motor vehicles both under the Act and under the *Road Transport Charges (Australian Capital Territory) Act 1993* (Commonwealth).

Determination No. 122 of 1996 made under section 40A of the *Dog Control Act 1975* revokes Determination No. 84 of 1995 and determines fees payable under the Act.

Determination No. 123 of 1996 made under section 27B of the *Hawkers Act 1936* revokes Determination No. 86 of 1995 and determines fees payable under the Act.

Determination No. 124 of 1996 made under section 39B of the *Architects Act 1959* revokes Determination No. 58 of 1994 and determines fees payable under the Act.

Determination No. 125 of 1996 made under section 45A of the *Plumbers, Drainers and Gasfitters Board Act 1982* revokes Determination No. 88 of 1995 and determines fees payable under the Act.

Determination No. 127 of 1996 made under subsection 57 (1) of the *Motor Vehicles (Dimensions and Mass) Act 1990* and paragraph 2 (b) of the *Road Transport Charges (Australian Capital Territory) Act 1993* (Commonwealth) revokes Determination No. 187 of 1995 and determines fees payable under the Acts.

Determination No. 128 of 1996 made under paragraph 12C (c) of the *Liquor Act 1996* appoints a specified person as a member of the Liquor Licensing Board of the Australian Capital Territory until 31 December 1996.

Determination No. 129 of 1996 made under section 104 of the *Electricity Act 1971* revokes Determination No. 1 of 1995 and determines fees payable under the Act.

Determination No. 130 of 1996 made under section 80 of the *Energy and Water Act 1988* revokes Determination No. 33 of 1995 and determines fees payable under the Act.

Determination No. 131 of 1996 made under section 287 of the *Land (Planning and Environment) Act 1991* revokes Determination No. 124 of 1995 and determines fees payable under the Act.

Determination No. 132 of 1996 made under section 116 of the *Unit Titles Act 1970* revokes Determination No. 54 of 1995 and determines fees payable under the Act.

Determination No. 133 of 1996 made under section 52A of the *Surveyors Act 1967* revokes Determination No. 53 of 1995 and determines fees payable under the Act.

Determination No. 137 of 1996 made under subsection 32 (3) of the *Betting (ACTTAB Limited) Act 1964* determines the percentage of the amount of the bets accepted by the Company during the preceding month to be paid to the Territory under subsection 32 (1) at 3.50%.

Determination No. 138 of 1996 made under subsection 32 (3) of the *Betting (ACTTAB Limited) Act 1964* determines the percentage of the amount of the bets accepted by the Company during the financial year to be paid to the Territory under subsection 32 (1) at 0.50%.

Determination No. 139 of 1996 made under subsection 7 (1A) of the *Lotteries Act 1964* revokes Determination No. 78 of 1995 and determines fees payable under the Act.

Determination No. 140 of 1996 made under subsection 34 (2) of the *Gaming Machine Act 1967* revokes Determination No. 79 of 1995 and determines an increased fee to be paid under subsection 34 (2) for the issue of a repairer's certificate.

Determination No. 141 of 1996 made under section 4 of the *Motor Omnibus Services Act 1955* revokes Determination No. 24 of 1996 and determines fees payable under the Act.

Determination No. 142 of 1996 made under section 83 of the *Pesticides Act 1989* revokes Determination No. 88 of 1994.

Subordinate Law No. 10 of 1996 being the Supreme Court Rules (Amendment) amends the rules relating to the taking of evidence outside Australia consequent upon changes being made to the *Evidence Act 1905* of the Commonwealth.

Subordinate Legislation - Comments

The Committee has examined the following subordinate legislation and offers the following comments:

Determination No. 105 of 1996 made under section 132 of the *Casino Control Act 1988* purports to revoke "the determination of fees dated 28 June 1995" and determines licence fees for employees.

Was there such a Determination and why were the Guidelines not Followed?

The Committee makes comments under two heads.

First, Determination No. 105 of 1996 purports to revoke a "determination of fees dated 28 June 1995". As the Committee did not appear to have received a copy of such a determination upon which to report, it asked the Legislative Assembly Secretariat to do a check. This was kindly done and it was found that the Legislative Assembly records do not appear to record such a determination ever being tabled and a check of the relevant *Gazettes* both before and after that date also drew a blank. Further, a check made with the *Gazette* Office also drew a blank.

Does such a determination actually exist? If such a determination was, in fact, made, its validity and effect need to be considered.

Is it invalid or did it become invalid either through not being gazetted as required by paragraph 6 (1) (a) of the *Subordinate Laws Act 1989* or through not having been laid before the Legislative Assembly within 15 sitting days through the operation of paragraph 6 (1) (c) and subsection (6) of that Act?

Have licence fees been invalidly collected from employees of the casino? If so, this may be a case where, although the casino patrons cannot get their money back, perhaps the casino employees may be a little luckier and can get their money back.

Secondly, when the Committee reported on the latest relevant determination that we have been able to find prior to the present determination (Determination No. 95 of 1994 reported on in the Committee's Report No 12 of 1994), the Committee drew attention to the fact that Determination No. 95 and its Explanatory Statement did not comply with the *Guidelines for the Preparation of Disallowable Instruments* (ACT Attorney-General's Department May 1993).

The present Determination No. 105 of 1996 and its Explanatory Statement also breach the *Guidelines* in several respects. For example, the determination does not give the number of the determination that it is revoking nor does it refer to the *Gazette* in which that determination was published. These details are also not given in the Explanatory Statement. In addition, no list of new and old fees is provided, nor is the basis for the increase given.

Perhaps if the Committee's advice given in its 1994 Report had been followed, the possible problems with the present determination may have been discovered and avoided.

Determination No. 106 of 1996 made under the *Health Act 1993* revokes Determination of Fees and Charges No. 21 of 1996 and determines fees for radiation safety and analytical services.

Determination No. 136 of 1996 made under the *Health Act 1993* also revokes Determination of Fees and Charges No. 21 of 1996 and determines new fees and charges under the Act.

Undated Determination, but the Earlier one Well and Truly Revoked

The Committee makes two comments.

First, the Committee notes that both of these determinations revoke Determination No. 21 of 1996. Thus that determination is well and truly revoked. However, as both came into effect on 1 July 1996, it is suggested that there is no fall-out from this enthusiasm for revocation.

Secondly, however, it is noted that Determination No. 106 of 1996 is not dated. Its Explanatory Statement also has provision for dating, but it, too, is not completed. The consequences of the failure to date the determination itself perhaps need to be checked.

Determination No. 114 of 1996 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 40 of 1995 and determines new fees under the Act.

An Inconsistency Repeated from Last Year

In Report No. 8 of 1995 the Committee made the following comment on Determination No. 40 of 1995 that is being revoked by the present determination:

"Subsection 27 (1) of the Act provides as follows:

27 (1) The Registrar may grant to a person -

- (a) who intends to use a motor vehicle as a taxi, other than a restricted taxi, on payment of the determined fee, a licence to use the vehicle as a taxi, other than a restricted taxi; or
- (b) who intends to use a motor vehicle as a motor omnibus, on payment of the determined fee, a licence to use the vehicle as a motor omnibus.

In Determination No. 40 of 1995 the relevant section for the grant or renewal of a taxi licence is given as subsection 27 (1) whereas the relevant section for a motor omnibus is more detailed and given as paragraph 27 (1) (b).

In the revoked determination [that is, the determination that was being revoked by Determination No. 40 of 1995] the taxi licence reference was also in the detailed form and referred to a fee under paragraph 27 (1) (a).

It is suggested that no question of validity is involved, but, when the next determination of fees is made, perhaps consideration could be given to restoring consistency."

The Committee notes that its advice has not been followed and the inconsistency remains in Determination No. 114 of 1996. Perhaps the Committee could say that it looks forward to the matter being corrected in the 1997 determination.

Determination No. 120 of 1996 made under section 9A of the *Roads and Public Places Act 1937* revokes Determination No. 89 of 1995 and determines fees for opening up or breaking the surface of a carriage way or public place.

Determination No. 135 of 1996 made under section 9A of the *Roads and Public Places Act 1937* also revokes Determination No. 89 of 1995 and determines fees for the use of unleased land and air space over unleased land.

Repeat of a Mistake. Two Revocations and a Possible Puzzle about Fees for Use of Unleased Land

The Committee makes three comments about these two determinations.

A Mistake Repeated from Last Year

The Committee notes that Determination No. 120 of 1996 refers to Determination No. 89 of 1995 being published in the *Gazette*.

Last year the Committee drew attention in its Report No. 8 of 1995 to the fact that there were references in some 14 determinations to determinations being published in the *Gazette*. Determination No. 120 was one of the 14 listed.

As pointed out last year, this practice of publication no longer occurs and there is merely notification in the *Gazette* of the making of a determination and a statement as to where a copy can be bought. Most of the relevant determinations for this year have been corrected, but the mistake is repeated in Determination No. 120 of 1996.

Also, as the Committee pointed out last year, there is no problem of invalidity involved as the statement occurs in a revocation provision.

The Committee repeats its suggestion of last year that "when the next determination is made under the Act, perhaps a correction should be made".

Determination No. 89 of 1995 Revoked Twice

The Committee notes that Determination No. 120 of 1996 revoked Determination No. 89 of 1995. Determination No. 120 specifically sets its date of commencement as 1 July 1996.

However, Determination No. 135 of 1996 also revokes Determination No. 89 of 1995. There is no specific date set in the determination itself for its commencement. Thus, applying paragraph 6 (1) (b) of the *Subordinate Laws Act 1989* it would have commenced on its date of notification in the *Gazette*, which was 28 June 1996.

Thus the revocation effected by Determination No. 135 "got in first" and revoked Determination No. 89 of 1995 as from its date of commencement.

Both Determination No. 89 of 1995 and Determination No. 120 of 1996 determined fees for opening up or breaking the surface of a carriage way or public place. Determination No. 135 did not deal with these matters, but set fees for the use of unleased land and air space over unleased land.

Thus it appears that for the short period of time from the revocation of Determination No. 89 of 1995 by Determination No. 135 on 28 June 1996 until Determination No. 120 of 1996 reinstated such fees on its commencement on 1 July 1996, there was no authority for the collection of any fees for opening up or breaking the surface of a carriage way or public place.

The effect of this possible gap in legal authority for collection of fees needs to be considered, including the amounts and legality of the collection of any such fees.

The effect of this possible gap in legal authority for collection of fees needs to be considered, including the amounts and legality of the collection of any such fees.

What is the Legal Authority for the Fees Determined by Determination No. 135 of 1996?

Determination No. 135 of 1996 was made under section 9A of the *Roads and Public Places Act 1937* and, as mentioned above, set fees for the use of unleased land and air space over unleased land.

The Schedule to Determination No. 135 of 1996 states that the "Relevant Section for which fee is payable" is section 15. The reprint of the *Roads and Public Places Act 1937* as at 31 January 1996, which is the latest reprint available to the Committee, does not contain a section 15.

Has there been an amendment to the Act since that date, which added section 15 and authorised the setting of fees? If not, what is the legal authority for the setting of the fees?

Determination No. 121 of 1996 made under section 3F of the *Building and Services Act 1924* revokes Determination No. 165 of 1995 and determines fees for the disposal of garbage at ACT Government landfills.

Determination No. 126 of 1996 made under subsection 22A (1) of the *Cemeteries Act 1933* revokes Determination No. 81 of 1995 and determines fees payable under the Act

Guidelines not Followed

The Explanatory Statements for the above two determinations do not comply with the *Guidelines for the Preparation of Disallowable Instruments* (Attorney-General's Department May 1993). The *Guidelines* state as follows (at page 16):.

"Fees and Charges

First, if you are preparing a determination of fees or charges then the explanatory statement **must** include a comparative list of old fees or charges (if any) and the new fees or charges.

There could be a variety of reasons such as an increase in the Consumer Price index, the Government's budget strategy for the year in question; *the need to recover* the full cost of providing the services or items; *bringing* the fees or charges in line with those applying elsewhere."

As the *Guidelines* state (at page 14):

"The purpose of an explanatory Statement is to explain your disallowable instrument in simple terms. It is used by members of the Legislative Assembly and members of the public to understand the background to the instrument and its effect."

The Committee applies these guidelines to the present determinations.

First, the Committee applies them to Determination No. 121 of 1996.

There is no comparative table of old and new fees for the disposal of garbage and very little explanation for any changes. In the present determination some of the charges have been increased, others remain the same, at least one (shredded tyres) seems to have been deleted and several fees have been added. Also, the definitions that were in the previous determination have been deleted and there is no explanation given for this.

Secondly, the Committee applies them to Determination No. 126 of 1996 made under the *Cemeteries Act 1933*.

There is no comparative table of old and new fees. However, here the fact that two new fees have been introduced is mentioned.

Determination No. 134 of 1996 made under section 65 of the *Building Act 1972* revokes "Determination of Fees No. 139 notified in *Gazette* No. S139 on 27 June 1995" and determines fees payable under the Act.

The Committee notes that the determination revokes Determination No. 139 of 1995. In fact, Determination No. 139 of 1995 is a determination made under the *Bookmakers Act 1985*, so there must be a mistake in the present determination. Probably the determination that it was intended to revoke was Determination No. 48 of 1995.

As the *Gazette* in which Determination No 48 of 1995 appeared was No. S139 and the date was 27 June 1995, a Court may well decide that Determination No. 48 was intended and that Determination No. 139 has not been revoked.

However, perhaps a check should be made to confirm these views.

Determination No. 143 of 1996 made under subsection 8 (2) of the *Radiation Act 1983* appoints a specified person as a member of the Radiation Council for a period of three years.

Determination No. 144 of 1996 made under subsection 8 (2) of the *Radiation Act 1983* appoints a specified person as a member of the Radiation Council for a period of three years.

Reappointments Appear to Follow on Committee's Comments

In its Report No. 7 of 1996 the Committee drew attention to the fact that two appointments to the Radiation Council under the *Radiation Act 1983* appeared to breach the provisions of subsection 8 (2) of the Act.

Subsection 8 (2) provides that such appointments can be made for a period not exceeding three years and the two appointments concerned were made for a period "from and including 20 May 1996 up to and including 20 May 1999."

The Committee suggested that the validity of the appointments should be checked.

The Committee has not yet had a reply to its Report, but it seems that the Committee's comment was valid, as the present two appointments are made of the same two people and their appointments are made "from and including 20 May 1996 up to and including 19 May 1999". This period complies with the provisions of subsection 8 (2) as it complies with the provision that an appointment cannot be made for a period exceeding three years.

The Committee makes two comments.

First, it is noted that these new appointments were signed on 26 June 1996 and notified in the *Gazette* on 5 July 1996.

There is thus a period of retrospectivity of operation involved and section 7 of the *Subordinate Laws Act 1989* may be relevant. 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."

As the Committee stated in its Report No. 7 of 1996:

"The Radiation Council has very significant powers and functions. They include granting exemptions, granting and cancelling licences in relation to possession and use of radioactive materials, granting and cancelling registration of irradiating apparatus, arrangements relating to transportation, storage and disposal of radioactive materials and requiring someone to undergo a medical examination."

The effect of section 7 and of the back-dating of the two present appointments in relation to any meetings, decisions or actions that may have been taken during the period of back-dating, when it appears the previous appointments may have been invalid, needs to be considered.

Secondly, the Committee notes that the Explanatory Statement makes no mention of the fact that the present appointments seem to have been made because of problems with the earlier instrument, nor does it make the customary comment about the Committee's part in the matter.

Determination No. 145 of 1996 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and section 7 of the *Nurses Act 1988* appoints a specified person as Chairperson of the Nurses Board for a period of three years.

Determination No. 146 of 1996 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and section 7 of the *Nurses Act 1988* appoints a specified person as a member of the Nurses Board for a period of three years.

Determination No. 147 of 1996 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and section 7 of the *Nurses Act 1988* appoints a specified person as a member of the Nurses Board for a period of three years.

Determination No. 148 of 1996 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and section 7 of the *Nurses Act 1988* appoints a specified person as a member of the Nurses Board for a period of three years.

Determination No. 149 of 1996 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and section 7 of the *Nurses Act 1988* appoints a specified person as a member of the Nurses Board for a period of three years.

No Mention in the Explanatory Statement of Consultation under the *Statutory Appointments Act 1994*

There is no mention in the Explanatory Statement, which covers all 5 of these instruments, whether there was a need to consult the relevant Committee of the Legislative Assembly nominated by the Speaker as is required under the *Statutory Appointments Act 1994*.

If there was such a requirement, was it complied with?

Subordinate Law No. 11 of 1996 being the Supreme Court Rules (Amendment) amends the rules relating to applications in the Administration and Probate jurisdiction of the Court by simplifying the procedure.

A Possible Tiny Mistake

There is a possible tiny mistake in an amendment of Rule 1 of Order 72 of the Supreme Court Rules.

Part of Rule 1(1) of Order 72 presently provides as follows:

"1. (1) In this Part, unless the contrary intention appears:

'Office of the Registrar', or 'Registrar's office' means the office of the Registrar of Probates and Administrations, or of the Acting Registrar of Probates and Administrations;" (Emphasis added.)

Part of clause 3 of the present amendment provides as follows:

"3. Rule 1 of Order 72 of the Principal Rules is amended -

(a) by omitting from the definition of 'Office of the Registrar' or 'Registrar's office' in subrule (1) 'and Administrations, or the Acting Registrar of Probates and Administrations';"

Because the word "of" is not omitted, the amended provision would read somewhat strangely as:

"1. (1) In this Part, unless the contrary intention appears:

'Office of the Registrar', or 'Registrar's office' means the office of the Registrar of Probates of;" (Emphasis added.)

If there is a mistake here, perhaps it is the kind of minor mistake that can be overcome in a reprint by the application of the provisions of the Legislation (Republication) Bill 1996 when it becomes law.

Rosemary Follett, MLA
Chair

July 1996

