

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

REPORT NO. 12 OF 1994

23 August 1994

TERMS OF REFERENCE

- (1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;
- (2) the Committee shall with respect to any instrument of a legislative nature which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act consider whether the instrument -
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; or
 - (e) the explanatory statement accompanying it meets the technical or stylistic standards to which such an instrument or explanatory statement ought, in the opinion of the Committee, to conform;
- (3) the Committee shall with respect to the clauses of Bills introduced into the Legislative Assembly consider whether such Bills -
 - (a) unduly trespass on personal rights and liberties;
 - (b) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers;
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny; or
 - (f) the explanatory memorandum accompanying it meets the technical or stylistic standards to which such a Bill or explanatory memorandum ought, in the opinion of the Committee, to conform;
- (4) the Committee shall consist of three members;
- (5) 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;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) 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

Mrs E. Grassby, MLA (Chairperson)
Mr G. Humphries, MLA (Deputy Chairperson)
Ms H. Szuty, MLA

Legal Advisor: Emeritus Professor D. Whalan, AM
Secretary: Mr T. Duncan
Deputy Secretary: Ms B. Irvin

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The terms of reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and subordinate legislation that comply with the high ideals set out in the terms of reference.

SUBORDINATE LEGISLATION

General Comment

This is the time of the year when many instruments are made varying fees and charges for the new financial year. The Committee is pleased that there has been a significant improvement in the standard of the instruments prepared this year. There has also been a marked improvement in the explanatory statements. The Committee feels that this improvement has been helped by the Guidelines for the Preparation of Disallowable Instruments (May 1993) prepared in the Attorney-General's Department and the Seminar on the Role and Operation of the Standing Committee on Scrutiny of Bills and Subordinate Legislation held on 3 November 1993.

Subordinate Legislation - No Comment

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

Determination No. 44 of 1994 made under clause 4 of the Homebuyer Housing Assistance Program made under section 12 of the *Housing Assistance Act 1987* revokes Determination No. 105 of 1993 and determines new fees.

Determination No. 45 of 1994 made under section 4 of the *Public Place Names Act 1989* determines the names, origin and significance of streets in the Division of Nicholls.

Determination No. 46 of 1994 made under section 4 of the *Public Place Names Act 1989* determines the names, origin and significance of streets in the Division of Hume.

Determination No. 47 of 1994 made under section 4 of the *Motor Omnibus Services Act 1955* revokes Determination No. 78 of 1993 and determines new charges under the Act.

Determination No. 50 of 1994 made under section 6B of the *Scaffolding and Lifts Act 1957* revokes Determination No. 97 of 1993 and determines new fees payable under the Act.

Determination No. 51 of 1994 made under section 4A of the *Machinery Act 1949* revokes Determination No. 62 of 1993 and determines new fees payable under the Act.

Determination No. 55 of 1994 made under subsection 22A(1) of the *Cemeteries Act 1933* revokes Determination No. 77 of 1993 and determines new fees payable under the Act.

Determination No. 56 of 1994 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 94 of 1993 and determines new fees for the purposes of subsection 149A(2) and section 150B of the Act.

Determination No. 57 of 1994 made under section 27B of the *Hawkers Act 1936* revokes Determination No. 83 of 1993 and determines new fees payable under the Act.

Determination No. 58 of 1994 made under section 39B of the *Architects Act 1959* revokes Determination No. 89 of 1993 and determines new fees payable under the Act.

Determination No. 59 of 1994 made under section 45A of the *Plumbers, Drainers and Gasfitters Board Act 1982* revokes Determination No. 90 of 1993 and determines new fees payable under the Act.

Determination No. 61 of 1994 made under section 9A of the *Roads and Public Places Act 1937* revokes Determination No. 92 of 1993 and determines fees payable under the Act for breaking up the surface of a road or public place and repairing it.

Determination No. 62 of 1994 made under subsection 57(1) of the *Motor Vehicles (Dimensions and Mass) Act 1990* revokes Determination No. 120 of 1993 and determines new fees payable under the Act.

Determination No. 63 of 1994 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 36 of 1991 and Determinations Nos 93 and 169 of 1993 and determines fees and the periods of time covered by those fees for voucher parking in specified locations under section 163C of the Act.

Determination No. 64 of 1994 made under section 12 of the *Clinical Waste Act 1990* revokes Determination No. 86 of 1993 and determines a new fee for the issue or renewal of a licence to transport clinical waste.

Determination No. 65 of 1994 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 96 of 1993 and determines new fees payable under the Act.

Determination No. 66 of 1994 made under section 21 of the *Prostitution Act 1992* revokes Determination No. 21 of 1993 and determines the fee for an application for registration of a brothel or escort agency.

Determination No. 67 of 1994 made under section 105A of the *Liquor Act 1975* revokes Determination No. 76 of 1993 and determines new fees payable under the Act.

Determination No. 68 of 1994 made under section 90A of the *Sale of Motor Vehicles Act 1977* revokes Determination No. 153 of 1993 and determines new fees payable under the Act.

Determination No. 69 of 1994 made under subsection 12(1) of the *Trade Measurement (Administration) Act 1991* revokes Determination No. 70 of 1993 and determines new fees payable under the Act.

Determination No. 70 of 1994 made under section 263 of the *Credit Act 1985* revokes Determination No. 71 of 1993 and determines new fees payable under the Act.

Determination No. 71 of 1994 made under subsection 139(1) of the *Real Property Act 1925* revokes Determination No. 63 of 1993 and determines new fees payable under the Act.

Determination No. 72 of 1994 made under section 62 of the *Registration of Births, Deaths and Marriages Act 1963* revokes Determination No. 64 of 1993 and determines new fees payable under the Act.

Determination No. 73 of 1994 made under section 4A of the *Business Names Act 1963* revokes Determination No. 66 of 1993 and determines new fees payable under the Act.

Determination No. 74 of 1994 made under section 126 of the *Associations Incorporation Act 1991* revokes Determination No. 65 of 1993 and determines new fees payable under the Act.

Determination No. 75 of 1994 made under section 37 of the *Instruments Act 1933* revokes Determination No. 67 of 1993 and determines new fees payable under the Act.

Determination No. 79 of 1994 made under section 20 of the *Boxing Control Act 1993* determines fees payable under the Act.

Determination No. 80 of 1994 made under section 110 of the *Animal Welfare Act 1992* revokes Determination No. 13 of 1993 and determines new fees payable under the Act.

Determination No. 86 of 1994 made under section 40A of the *Dog Control Act 1975* revokes Determination No. 150 of 1993 and determines new fees payable under the Act.

Determination No. 87 of 1994 made under section 83A of the *Nature Conservation Act 1980* revokes Determination No. 56 of 1993 and determines new fees payable under the Act.

Determination No. 88 of 1994 made under section 83 of the *Pesticides Act 1989* revokes Determination No. 77 of 1992 and determines new fees payable under the Act.

Determination No. 89 of 1994 made under section 7 of the *Pounds Act 1928* revokes Determination No. 60 of 1992 and determines new fees and charges payable under the Act.

Determination No. 90 of 1994 made under section 47A of the *Rabbit Destruction Act 1919* revokes Determination No. 61 of 1992 and determines a new fee payable under the Act.

Determination No. 91 of 1994 made under section 42 of the *Stock Act 1991* revokes Determination No. 57 of 1992 and determines new fees payable under the Act.

Determination No. 92 of 1994 made under section 39 of the *Water Pollution Act 1984* revokes Determination No. 58 of 1992 and determines new fees payable under the Act.

Determination No. 93 of 1994 made under section 10 of the *Racecourses Act 1935* revokes the determination of fees notice of which was published in *Gazette* No. S14 on 25 July 1989 and determines new fees payable under the Act.

Determination No. 94 of 1994 made under section 17 of the *Health Act 1993* revokes Determination of Fees and Charges No. 19 of 1994 and determines new fees and charges.

Determination No. 97 of 1994 made under section 4 of the *Public Place Names Act 1989* determines the names, origin and significance of streets in the Division of Dunlop.

Determination No. 98 of 1994 made under section 4 of the *Public Place Names Act 1989* determines the names, origin and significance of streets in the Division of Holt.

Determination No. 100 of 1994 made under section 4 of the *Public Place Names Act 1989* determines the names, origin and significance of streets in the Division of Dunlop.

Determination No. 101 of 1994 made under subsection 36(1) of the *Motor Traffic Act 1936* revokes Determination No. 170 of 1992 and determines new taxi fares.

Determination No. 105 of 1994 made under section 55A of the *Bookmakers Act 1985* authorises named persons to maintain prescribed equipment.

Determination No. 108 of 1994 made under section 4 of the *Public Place Names Act 1989* determines the names, origin and significance of streets in the Division of Ngunnawal.

Declaration No. 109 of 1994 made under section 19 of the *Credit Act 1985* exempts South Australian Asset Management Corporation from subsections 155(1) and (2) of the *Credit Act 1985* so far as the transactions arise out of an obligation between the State Bank of South Australia and a debtor that was entered into or incurred prior to 1 July 1994.

Declaration No. 110 of 1994 made under section 19 of the *Credit Act 1985* exempts South Australia Asset Management Corporation from the operation of Parts III and IV of the *Credit Act 1985* to the extent that it enters into contracts for the refinancing of or otherwise related to or arising out of an obligation between the State Bank of South Australia and a debtor that was entered into or incurred prior to 1 July 1994.

Instrument No. 111 of 1994 being an *Instrument of Approval* made under section 87 of the *Occupational Health and Safety Act 1989* approves the National Code of Practice for Health Care Workers and other People at Risk of the Transmission of Human Immunodeficiency Virus and Hepatitis B in the Workplace for application in the ACT.

Determination No. 112 of 1994 made under section 15 of the *Casino Control Act 1988* determines the annual casino licence fee.

Determination No. 113 of 1994 made under section 16 of the *Casino Control Act 1988* determines the rate of tax payable on the gross profit derived by the casino licensee.

Declaration No. 114 of 1994 made under section 19 of the *Credit Act 1985* declares that section 52, subsections 54(2) and 55(1) and paragraphs 59(1)(b) and 59(1)(f) and clause 1(n) of Schedule 7 of the Act have no effect in relation to Citibank Limited to the extent that it enters into continuing credit contracts for the use of the Citibank Gold Visa Card and Citibank Gold Mastercard Facility.

Subordinate Law No. 19 of 1994 being the *Public Health (Cancer Reporting) Regulations* makes cancer a notifiable disease and provides for the keeping of a cancer register.

Subordinate Law No. 20 of 1994 being the *Supreme Court (Amendment) Rules* inserts Part 12A which provides for appeals to the Court from the Land and Planning Appeals Board.

Subordinate Law No. 21 of 1994 being the *Supreme Court (Amendment) Rules* makes a number of minor amendments to the principal Rules.

Subordinate Law No. 22 of 1994 being the *Land (Planning and Environment) Regulations (Amendment)* makes provisions relating to the renewal of an approval to conduct a home business and amends provisions relating to the extension of time for processing of applications relating to controlled activities.

Subordinate Law No. 23 of 1994 being the *Boxing Control Regulations (Amendment)* prescribes two particular boxing contests and thus permits them to go ahead.

Subordinate Law No. 24 of 1994 being the *Motor Traffic Regulations (Amendment)* repeals the existing Schedule to the principal Regulations and substitutes a new Schedule of penalties.

Subordinate Law No. 25 of 1994 being the *Bookmakers Regulations (Amendment)* prescribes matters relating to the conduct of on-course telephone betting.

Subordinate Law No. 26 of 1994 being the *Crown Proceedings Regulations (Amendment)* declares the *Crown Proceedings Act 1993* of the Northern Territory, the *Crown Proceedings Act 1992* of South Australia and the *Crown Proceedings Act 1993* of Tasmania to be corresponding laws for the purposes of the *Crown Proceedings Act 1992*.

Subordinate Law No. 27 of 1994 being the *Motor Traffic (Third Party Insurance) Regulations (Amendment)* increases the premium rate relating to a trader's plate, repeals part II of Schedule 1 to the principal Regulations and substitutes a new Schedule of third party insurance premiums.

Subordinate Law No. 28 of 1994 being the *Coroners Regulations* specifies certain operations and procedures which will be exempted from the provisions of the requirements for the Coroner to hold an inquest.

Subordinate Legislation - Comment

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

References to Revoked Determinations As Well As Relevant Gazette Would Have Been Helpful

Determination No. 48 of 1994 made under section 55 of the *Bookmakers Act 1985* revokes Determination No. 100 of 1993 and sets a new fee for the purposes of subsection 24(2) of the Act.

Determination No. 81 of 1994 made under section 65 of the *Building Act 1972* revokes Determination No. 176 of 1993 and determines new fees payable under the Act.

Determination No. 83 of 1994 made under section 52A of the *Surveyors Act 1967* revokes Determination No. 73 of 1992 and determines new fees payable under the Act.

Determination No. 84 of 1994 made under section 116 of the *Unit Titles Act 1970* revokes Determination No. 80 of 1993 and determines new fees payable under the Act.

Although there are references to the relevant Gazettes in which the revoked determinations appeared, there are no references to the particular determinations that are being revoked. Perhaps it may be useful to repeat what the Committee said last year in its equivalent report, Report No. 13 of 1993. That report stated:

"In all of these determinations there is a reference to the *Gazette* in which the revoked determinations appeared, but the determinations that are being revoked are not identified by their unique numbers.

Provided that there are no problems with any of the determinations or no confusion can arise, this does mean that the determinations being revoked are adequately identified for revocation purposes. However, it also means that Members of the Assembly or of the community do have greater problems in checking details of changes.

Moreover, as the Committee pointed out in Report No. 10 of 1992 (at pages 15-16), confusion can occur when there is more than one relevant determination in a particular *Gazette*. ...

The Guidelines for the Preparation of Disallowable Instruments ... makes the point very well when it states (at page 11):

'Revocation of Previous Instruments. It is important that you clearly identify the previous instrument (if there is one) which the new instrument replaces. Use the number inserted by the Gazette Officer and identify the Gazette in which the previous instrument was notified.

This will enable a member of the Assembly or a member of the community who wishes to check back on the previous situation to do so easily.

A suitable form of words to ensure that a previous instrument is fully identified is provided by the following example -

"Under section 10 of the *Motor Traffic Act 1936* I revoke Determination No. 3 of 1993 dated 4 February 1993 and notified in *Gazette* No. 5 of 8 February 1993 and determine ...".

No Reference To Revoked Determination And No Comparison Of Previous And Present Fees

Determination No. 49 of 1994 made under section 18A of the *Lotteries Act 1964* revokes Determination No. 99 of 1993 and determines new fees for the purposes of subsection 7(1A) of the Act.

The comments made under the previous head about the determination failing to mention the number of the determination that is being revoked is also relevant here. The determination that is being revoked appears to be Determination No. 99 of 1993.

In addition, the present explanatory statement breaches another of the Guidelines, which provides as follows (Matters that must be included at page 16):

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

The present explanatory statement does not give a comparative schedule of the past and present fees.

The explanatory statement does comply, in part, with the next guideline that "the explanatory statement **must** explain the reason for the variation in the fees or charges". It states that the "increase is in line with the increase in the Consumer Price Index", but does not indicate the level of this increase. In fact, when the fees in the two determinations are compared, it is found that the increases vary from nil % to 3.44%.

Is This Matter Covered Elsewhere?

Determination No. 52 of 1994 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 133 of 1993 and determines new fees for the purposes of the Act.

Determination No. 53 of 1994 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 133 of 1993 and determines new fees for the purposes of the Act.

Determination No. 54 of 1994 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 133 of 1993 and determines new fees for the purposes of the Act.

These three determinations all revoke and replace Determination No. 133 of 1993. Various aspects of the fee determinations are hived off into separate determinations. They appear to cover most aspects of the items that were covered by Determination No. 133 of 1993, but a check needs to be made.

Determination No. 53 of 1994 covers Driving Licences and Records and the Records part contains items such as the replacement of defaced certificates and licences. One Record-type item covered by the revoked Determination No. 133 of 1993 that does not appear in this list is one dealing with the getting of certified copies. Is this now dealt with elsewhere?

References To Another Act Needed

Determination No. 60 of 1994 made under subsection 12A(1) of the *Dangerous Goods Act 1984* revokes Determination No. 84 of 1993 and determines new fees payable under the Act.

The Committee makes two comments.

First, it is noted that there is an unusual set-up for the fees relating to dangerous goods. The basic provisions are in the Dangerous Goods Act, 1975 (New South Wales) and the Dangerous Goods Regulations 1978 of NSW as amended. The Dangerous Goods Act 1984 then applies the New South Wales provisions to the Australian Capital Territory, provides for the determination of fees by the Minister (section 12A) and for some other matters not presently relevant.

The statutory provisions to which the power in section 12A is applied in the present determination are, in fact, all in the Dangerous Goods Act, 1975 (New South Wales). The Schedule to the present determination lists the provisions and the list is headed "Section of the Dangerous Goods Act 1984". However, none of the provisions listed is in the Dangerous Goods Act 1984. Fortunately, at the foot of the Schedule there is a Note referring to the New South Wales Act as applied and modified in the Australian Capital Territory. But it might be more helpful to a Member or member of the community endeavouring to check up on the determination, if the heading actually referred to the Act the provisions of which are cited.

Secondly, the first item in the Schedule provides as follows:

"Issue or renewal of licence -

8(1) for the keeping of dangerous goods on premises \$44.00".

Subsection 8(1) of the Dangerous Goods Act, 1975 (New South Wales) does provide for the issuing of licences, but they are renewed under subsection 27(1). Perhaps that provision should also be referred to, as it was in the determination being revoked, Determination No. 84 of 1993.

Was Another Determination Made?

Determination No. 76 of 1994 made under section 8 of the *Registration of Deeds Act 1957* revokes Determination No. 68 of 1993 and determines new fees payable under the Act.

In its Report No. 13 of 1993 the Committee drew attention to the fact that Determination No. 68 of 1993 was made under the *Deeds Act 1957*, a non-existent Act.

A helpful reply was received from the Attorney-General dated 7 October 1993 (attached to Report No. 18 of 1993), which said this about the determination:

"The Committee also questioned the validity of Determination No. 68 of 1993 because of the reference in that determination to the non-existent Deeds Act 1957. I confirm that the Committee's suggestion that the relevant Act is the Registration of Deeds Act 1957 is correct.

In order to remove any possibility of invalidity I propose to revoke Determination No. 68 of 1993 and make a further determination under the Registration of Deeds Act 1957.

I trust this information is of assistance to the Committee."

The Committee has not been able to find a replacement determination and, if there was one made, it has not been expressly revoked by the present determination. Was one made? If not, have fees been collected under Determination No. 68 of 1993?

Was There Authority For The Collection Of Fees?

Determination No. 77 of 1994 made under regulation 31 of the Adoption Regulations determines a fee of \$21, which is the "fee to accompany an application for a certificate of an entry in the register of births under regulation 24(3)(b)" (explanatory statement).

The explanatory statement goes on to state that the "fee for an equivalent service under the repealed Adoption of Children Act 1965 was \$20". If any fees have been collected between the repeal of the *Adoption of Children Act 1965* and the making of the present determination, what was the authority for collecting them?

Possible Source Of Power Problems And Misplaced Explanatory Statement

Determination No. 82 of 1994 made under section 15 of the *Roads and Public Places Act 1937* revokes Determination No. 176 of 1993 and determines new fees payable under the Act.

The Committee makes four points.

First, this determination is made under section 15 of the *Roads and Public Places Act 1937*. In the reprint of the Act that the Committee has, section 15 deals with penalties for breaches of the Act. So, unless there has been a recent amendment made, the determination is not made under a relevant power.

The Committee notes that the Schedule to the determination refers to section 15E of the Act. Section 15E(1) does provide for permit fees to be prescribed, where a Minister approves of a grant to place an object "in, over or across the place" (paragraph 15E(2)(b)). Does this provision apply here? Has subsection 14(1) of the *Interpretation Act 1967* (definition of "prescribed"), which seems to require a regulation to be made rather than a determination, been ameliorated to allow the making of a determination? Incidentally, is the determination intended to cover more matters than are envisaged by section 15E?

The Committee also notes that there is a wide power given in the Act for the Minister to make determinations. Section 9A confers the usual fee-making power in the following terms:

"9A. The Minister may, by notice in writing published in the *Gazette*, determine fees for the purposes of this Act."

Would this power be appropriate in the present circumstances?

Secondly, the Committee notes that the determination breaches the Guidelines by not referring to the determination that it is purporting to revoke. Although the determination fails to give the number of the determination that it revokes, it refers to *Gazette* No. S173 of 24 December 1993 and the only determination in that *Gazette* is determination No. 176 of 1993, which is not made under the *Roads and Public Places Act 1937*, but is made under the *Building Act 1972* and has already been properly revoked by Determination No. 81 of 1994.

This raises a third possible problem. Determination No. 176 of 1993 was made under section 65 of the *Building Act 1972*, but, in the middle of references to sections of the *Building Act 1972*, there are references to subsection 15E(1) of the *Roads and Public Places Act 1937* and, under that heading, fees are set out for the same purposes as the present determination. As this aspect of the determination seems to have been made under the wrong Act, there may be a question of validity. If there was invalidity, were fees collected under the provision?

Finally, the Committee notes that the explanatory statement states that the old and new "rates are listed below". Unfortunately, there are no rates listed. However, on checking back, the Committee found that the final page of the explanatory statement for Determination No. 81 of 1994 dealt with this matter.

Reference To Revoked Determination Missing And More Detail In Explanatory Statement Would Have Been Helpful

Determination No. 85 of 1994 made under section 287 of the *Land (Planning and Environment) Act 1991* revokes Determinations Nos 79, 143 and 145 of 1993 and determines new fees payable under the Act.

The Committee makes three points here.

First, two out of the three revocations complied with the Guidelines by giving both the number of the determination and the *Gazette* in which they appeared, but the third number is not given. It appears to be Determination No. 79 of 1993. As there are many instruments made every year under the *Land (Planning and Environment) Act 1991*, correct references would be particularly helpful to Members and to the community.

Secondly, the explanatory statement gives helpful comparisons between the old and new fees in most cases, but could perhaps have been a little more helpful in relation to the fees set under sections 210 and 226. In the entries for these sections the old and new fees both state "Varies based on activity". While this is true, the explanatory statement could have indicated the levels of changes for each of the fees.

In fact, those for section 210 appear not to have changed this year. However, the base fees for section 227, as set out in the present determination, do appear to have been increased. Put very shortly, the fees that were \$1,030 are now \$1,060, those for \$3,100 are now \$3,200, that for \$290 becomes \$300 and that for \$135 becomes \$140.

Thirdly, in a helpful letter of 14 June 1994, the Attorney-General, Mr Connolly, said that:

"the Committee correctly pointed out that the determination of fees included in Determination No. 145 of 1993 made for the purposes of section 226 of the *Land (Planning and Environment) Act 1991* should have been made under section 287 of that Act. I am advised that Determination No. 145 will also be revoked and a new determination made to rectify the matter."

The present Determination No. 85 of 1994 does so, although the customary reference to the Committee's part in the revocation and remaking is not made in the explanatory statement.

Correcting The Name Of A Park - Fulfilment Of Undertakings But No Mention Of Committee In Explanatory Statement

Determination No. 96 of 1994 made under section 4 of the *Public Place Names Act 1989* revokes Determination No. 18 of 1994 and determines the name of a public place that is Territory land to be "Beau and Jessi Park".

In Report No. 5 of 1994 the Committee noted inconsistencies in the naming of this park and the Committee received a helpful letter from the Attorney-General, Mr Connolly, of 14 June 1994 (attached to Report No. 11 of 1994), in which he confirmed that there were mistakes and indicated that there would be a revocation and remaking.

The present determination does that and fulfils the undertaking given to the Committee. However, the explanatory statement does not contain the customary reference to the Committee's part in the matter.

Repealing A Duplicated Determination Of Fees - Fulfilment Of Undertakings But No Mention Of Committee In Explanatory Statement

Determination No. 78 of 1994 made under section 3F of the *Building and Services Act 1924* revokes Determination No. 178 of 1993.

In Report No. 1 of 1994 the Committee drew attention to the fact that there seemed to be two Determinations numbered 178 of 1993. The Committee received a helpful letter of 5 April 1994 from the Attorney-General, Mr Connolly, (attached to Report No. 4 of 1994) confirming that the Committee was correct and indicating that the determination made under the *Building and Services Act 1994* would be revoked.

The present determination does that and fulfils the undertaking given to the Committee. However, as with the previous Determination, the explanatory statement does not contain the customary reference to the Committee's part in the matter.

Was Fee Collected At The Determined Level?

Determination No. 99 of 1994 made under section 14 of the *Buildings (Design and Siting) Act 1964* revokes Determination No. 102 of 1993 and determines new charges under the Act.

There is a very helpful and detailed explanatory statement. In explaining an increase that is out of line with most of the increases, footnote (2) indicates that a base figure of \$15.50 had appeared in Determination No. 102 of 1993, whereas the correct fee should have been \$51.50.

Perhaps confirmation should be sought that, in fact, the actually determined fee of \$15.50 was charged during the year.

Revoked Determination Numbers Not In Determinations, But Reasons Why This Was Not Possible Explained In Very Detailed Explanatory Statements

Determination No. 102 of 1994 made under section 55 of the *Optometrists Act 1956* revokes Determination No. 113 of 1993 and other relevant determinations and determines fees payable under the Act.

Determination No. 103 of 1994 made under section 57 of the *Pharmacy Act 1931* revokes Determination No. 116 of 1993 and other relevant determinations and determines fees payable under the Act.

Determination No. 104 of 1994 made under section 54 of the *Chiropractors and Osteopaths Act 1983* revokes Determination No. 118 of 1993 and other relevant determinations and determines fees payable under the Act.

The provisions of the Acts under which these three determinations are made have undergone major amendments during the last 12 months. These have been made largely, but not only, as a result of the need to make changes to provide for the operation of the *Mutual Recognition Act 1992*.

The numbers of the determinations that are being revoked are not mentioned in the determination itself, for the very good reason that many of them were in force before a proper system of numbering was in force. Where there is a relevant numbered determination of recent years then it is mentioned in the explanatory statement and any appropriate *Gazette* provisions are also mentioned in the explanatory statements. However, in some cases, the appropriate determinations of fees provisions seem to be lost in the mists of time before self-government.

The explanatory statements go to very great trouble to mention all of this and explain the ways in which the statutory amendments impact on the fees. They also give appropriate tables comparing the old and new fees.

In all three cases the determinations and the explanatory statements go to considerable trouble in sorting out the problems and give helpful advice for Members and the public who wish to understand what has occurred with these fees.

Reference to Revoked Determination As Well As Relevant Gazette Would Have Been Helpful

Determination No. 106 of 1994 made under section 80C of the *Co-Operative Societies Act 1939* revokes Determination No. 52 of 1993 and sets new fees payable under the Act.

Although the explanatory statement is very helpful, the revocation clause in the Determination itself does not follow the Guidelines for the Preparation of Disallowable Instruments issued by the Attorney-General's Department in May 1993.

Perhaps it is sufficient to quote the comment made about last year's equivalent revocation and new determination of fees in Report No. 13 of 1993. Report No. 13 stated:

"In this case there is a reference to the *Gazette* in which the revoked determination ... was published and that revoked determination is referred to in full in the explanatory statement. For completeness, it would have been even more helpful if the suggestion made in the Committee's Report No. 9 of 1992 ... had been followed that:

'It would be helpful if the revocation clause referred to the number of the Determination that is being revoked to avoid any possible doubt.'

This would also be helpful, because not everyone making a check would have the explanatory statement readily available to him or her."

Licence Fees Under The Casino Control Act 1988 - Existing Determinations Not Revoked And Guidelines Not Followed

Determination No. 95 of 1994 made under section 132 of the *Casino Control Act 1988* determines licence fees for employees.

The present determination appears to breach the Guidelines for the Preparation of Disallowable Instruments in several respects.

First, it does not mention that there is an existing determination that covers the fees determined by this determination. Thus there is no revocation of the current determination, which appears to be Determination No. 141 of 1992. Possibly a court would decide that the present determination has impliedly repealed Determination No. 141 of 1992, but a check should be made.

Secondly, flowing on from the first omission, the explanatory statement also does not follow the Guidelines in a number of respects. In particular, it does not contain a comparison of the existing and new fees.

Fees Under The Adoption Act 1993

Determination No. 107 of 1994 made under section 118 of the *Adoption Act 1993* determines fees for the supply of information.

As with Determination No. 95 of 1994 discussed under the previous heading, here, too, this determination has been made as there was not an existing determination of these fees.

In its Report No. 13 of 1993 the Committee sought confirmation that Determination No. 75 of 1993, which deals with the same fees as the present determination, was valid. In a helpful letter of 2 November 1993 (attached to Report No. 20 of 1993), the Attorney-General confirmed the Committee's view that it was valid. Thus the present determination should have revoked Determination No. 75 of 1993. So, in this case also, confirmation should perhaps be sought that a court could well hold that the present determination impliedly repealed Determination No. 75 of 1993.

However, perhaps surprisingly given the failure to revoke the existing determination, in this case the explanatory statement does give a comparison between the previous and new fees, so does comply with the Guidelines in this respect.

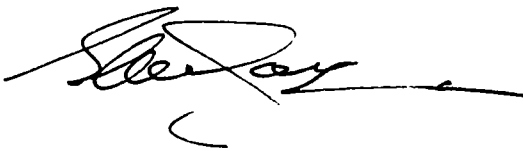
GOVERNMENT RESPONSES

The Committee has received responses to comments made concerning:

- Determination No. 26 of 1994 made under the *Public Place Act 1989* (Report No. 9 of 1994);
- Determination No. 32 of 1994 made under the *Motor Omnibus Services Act 1955* (Report No. 9 of 1994);

- Determinations Nos 27 and 29 of 1994 made under the *Electricity and Water Act 1988* and Determination No. 28 of 1994 made under the *Water Rates Act 1959* (Report No. 9 of 1994);
- Nurses (Amendment) Bill 1994 (Report No. 11 of 1994);
- Physiotherapists (Amendment) Bill 1994 (Report No. 11 of 1994);
- Veterinary Surgeons (Amendment) Bill 1994 (Report No. 11 of 1994);
- Administrative Appeals (Consequential Provisions) Bill 1994 (Report No. 11 of 1994);
- Commercial and Tenancy Tribunal Bill 1994 (Report No. 11 of 1994);
- Annual Reporting (Government Agencies) Bill 1994 and the Annual Reporting (Government Agencies) (Consequential Provisions) Bill 1994 (Report No. 11 of 1994);
- Mental Health (Treatment and Care) Bill 1994 (Report No. 11 of 1994);
- Lands Acquisition Bill 1994 (Report No. 11 of 1994); and
- Nature Conservation (Amendment) Bill 1994 (Report No. 11 of 1994).

The Committee thanks the Attorney-General for his positive responses.



Ellnor Grassby, MLA
Chairperson

23 August 1994



Government of the
Australian Capital
Territory

Terry Connolly MLA

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Mrs Elnor Grassby MLA
Presiding Member
Standing Committee on Scrutiny of Bills and
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ACT Legislative Assembly
1 Constitution Avenue
CANBERRA ACT 2601


Dear Mrs Grassby

In its Report No. 9 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation drew to attention some apparent errors in Determination No. 26 of 1994 made under section 4 of the Public Place Names Act 1989.

I am advised that, with the exception of the stated birth dates of 2 of the Barclay sisters, the errors are correctly identified and that action will be taken to make corrections. The quality of determinations made under the Public Place Names Act has improved significantly over past months and I am assured by the Department of the Environment, Land and Planning that further efforts will be made to improve the quality of determinations under that Act.

The Committee, in commenting on Determination No. 32 of 1994 made under section 4 of the Motor Omnibus Services Act 1955, observed that a second determination of the same number had not been revoked as I indicated would occur in my letter to the Committee dated 5 April 1994. A determination for this purpose has been made by the Minister for Urban Services and is expected to be notified in the Gazette soon and be tabled in the Assembly at its next sitting.

The Committee also commented on Determinations No. 27 and 29 of 1994 made under the Electricity and Water Act 1988 and Determination No. 28 of 1994 made under the Water Rates Act 1959. The Committee requested advice as to which of the prior determinations Determinations No. 27, 28 and 29 were intended to revoke.

ACT Electricity and Water advises that-

Determination No. 27 revokes Determination No. 53 of 1992 which was published in Gazette No. 21 of 27 May 1992 and Determination No. 39 of 1993 which was published in Special Gazette No. S76 of 7 May 1993;

Determination No. 28 revokes Determination No. 54 of 1992 which was published in Gazette No. 21 of 27 May 1992; and

Determination No. 29 revokes Determination No. 144 of 1992 which was published in Special Gazette No. S153 of 2 September 1992.

ACT Electricity and Water apologises for the inconvenience to the Committee and indicates that regard will be had to the Guidelines for the Preparation of Disallowable Instruments when preparing future determinations as the Committee suggests.

In its Report No. 11 of 1994 the Committee commented on the Nurses (Amendment) Bill 1994, the Physiotherapists (Amendment) Bill 1994, the Veterinary Surgeons (Amendment) Bill 1994 ("the health professions Bills") and the Administrative Appeals (Consequential Provisions) Bill 1994.

The Committee pointed out that the Administrative Appeals (Consequential Provisions) Bill 1994 includes amendments of the Nurses Act 1988, the Physiotherapists Registration Act 1977 and the Veterinary Surgeons Registration Act 1965, which would not be consistent with the provisions of those Acts, as amended by the health professions Bills.

I am advised that the potential for the inconsistency was recognised during the simultaneous development of the Bills. Each of the Bills was drafted on the basis of the law as it presently stands rather than on any assumption about whether a particular Bill might precede or follow another. This is the usual practice.

In order to ensure that the amendments proposed in the health professions Bills and the Administrative Appeals (Consequential Provisions) Bill 1994 are capable of proper integration it was always intended that the progress of the Bills be monitored and that appropriate amendments be made to the Bills as necessary. Which Bills will require amendment will depend upon the sequence in which the Bills are dealt with by the Assembly and are proposed to come into force.

Also in Report No. 11 of 1994 the Committee commented on the Commercial and Tenancy Tribunal Bill 1994 ("the Bill"). In particular, the Committee drew attention to the possible retrospective effect of a number of paragraphs of clause 6 of the Bill, which apply the Bill to certain types of disputes about a lease regardless of whether the lease in dispute was entered into before, on or after the commencement of the Bill.

The extent of the retrospective effect of the provisions of the Bill, identified by the Committee, is not disputed. However, the Government believes that there are sound policy reasons for proceeding with those provisions in their existing form.

In particular, it is the Government's view that, because of the unfair and onerous nature of key money and ratchet clause provisions, such provisions should not be permitted to operate or be enforced, once the Code has come into

force, regardless of when the lease in which those provisions are contained was entered into.

Similarly, in cases of "harsh and oppressive" conduct, where the conduct giving rise to a dispute occurs on or after the substantive commencement of the Code, the Government believes that it is necessary to ensure that parties to a lease may seek resolution of the dispute and, if necessary, obtain relief, irrespective of when the lease was entered into.

As the Committee noted, subclause 8(4) is to the effect that the Bill applies to disputes referred to in paragraph 6(f) whether or not the conduct giving rise to the dispute occurred before, on or after the commencement of the Bill. However, as a matter of policy, it is the Government's view that all disputes concerning leases of the type to which the Bill applies should be dealt with utilising the new mediation and Tribunal hearing mechanisms established by the Bill. It is, therefore, necessary to ensure that disputes which would, prior to the commencement of the Bill, have been within the jurisdiction of the Magistrates Court to hear, but which, by virtue of clause 7, may no longer be heard by that Court, may be dealt with under the provisions of the Bill.

As noted by the Committee, clause 10 of the Bill preserves the rights of persons who have commenced proceedings in the Magistrates Court or Supreme Court, to continue with those proceedings.

Finally, in Report No. 11 the Committee indicated that the Annual Reporting (Government Agencies) Bill 1994 and the Annual Reporting (Government Agencies) (Consequential Provisions) Bill 1994 would need to be changed as a consequence of the Public Sector Management Act 1994, the Public Sector Management (Consequential Provisions) Act 1994 and the complementary Commonwealth legislation. I am advised that Government amendments to the Bills will be prepared for this purpose.

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Terry Connolly', with a long horizontal flourish extending to the right.

Terry Connolly

11 JUL 1994



Government of the
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Dear Mrs  Grassby

In its Report No. 11 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation raised two questions in relation to the Mental Health (Treatment and Care) Bill 1994. The first of these questions concerned the reference, in clause 4, to an information statement described in paragraph 50(1)(a). The Committee is correct in noting that the reference should in fact be a reference to paragraph 50(1)(b). It is proposed to seek the assistance of the Clerk of the Assembly for an amendment by way of Standing Orders.

The Committee also queried, in relation to paragraph 50(1)(b) of the Bill, if there is a specific right to seek a second medical opinion contained in the Bill. I consider it not to be necessary to specifically provide for this right in the Bill as it is a right that every person has as a matter of course. The purpose of clause 50 is to ensure that persons who are admitted to a mental health facility are informed of their rights - not to create those rights. This provision, in line with recommendation 26 of the "Balancing Rights" Report of the ACT Mental Health Review Committee, is in the same terms as sections 18, 19 and 20 of the *Mental Health Act 1986* (Victoria).

There are provisions in the Mental Health (Treatment and Care) Bill to assist a person in exercising their right to a second opinion. Clause 52 provides that the responsible person must ensure that all persons admitted to, or receiving treatment at, a mental health facility are able to communicate with whomever they wish to communicate. Clause 45 ensures that any person who is detained under the emergency detention and care provisions is able to access, and be accessed by, the Community Advocate and their lawyer during any period of detention. Clause 34 provides that a person who is subject to a mental health order is able to access, and be accessed by, the Community Advocate and their lawyer at all times.

In addition, the Bill specifically provides that a person may make an application to the Mental Health Tribunal on their own behalf (clause 13). If it is appropriate to do so, the Tribunal will order an assessment (clause 16), which will be conducted by a mental health professional. The Bill also contains review provisions which can lead to a further assessment and the variation or revocation of a mental health order.

Further, under the Medicare Agreement 1993-1998 the States and Territories have agreed to develop a Public Patients' Hospital Charter in order to fulfil the Medicare principles and commitments. The ACT Charter, due to be finalised and distributed shortly, will clearly state that patients "have the right to seek a second medical opinion before making a decision". This charter will be displayed and distributed throughout public health facilities in the ACT in poster and pamphlet format and translated into 6 languages.

In the light of these factors I am of the view that these provisions adequately protect the rights of mentally dysfunctional persons.

In Report No.11 the Committee also commented on a difference between clauses 21 and 25 of the Lands Acquisition Bill 1994. A certificate given by the Executive pursuant to clause 21 advises the Legislative Assembly that a procedure has been adopted to acquire land as a matter of urgency or to prevent the disclosure of information that would be prejudicial to the Territory. The adoption of the procedure specified in clause 21 does not provide for reconsideration, whereas clause 25 provides for the consideration by the Assembly of an instrument under subclause 24(1) which confirms or varies a pre-acquisition declaration. Clause 25 will only apply where a person applies for reconsideration of a pre-acquisition declaration by the Executive and the Executive either confirms or varies the declaration. The instrument by which the Executive confirms or varies the declaration may be disallowed by the Assembly.

The Committee commented on the term "Commonwealth" in clauses 99 and 100. It is considered that the references are appropriate as section 29 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cwth) provides that the Executive on behalf of the Commonwealth has the responsibility for the management of Territory land and may, subject to section 9 of the *Seat of Government (Administration) Act 1910* (Cwth), grant, dispose of, acquire, hold and administer estates in Territory land. However, the Executive performs these functions on behalf of the Commonwealth and the land remains Commonwealth land.

The Committee also commented on the relevance of the *Public Sector Management Act 1994* to the Nature Conservation (Amendment) Bill 1994 and, in particular, to the appointment of a Secretary to the proposed Flora and Fauna Committee. The Bill has been examined and no changes are considered necessary as a consequence of the Act.

I trust this information is of assistance to the Committee.

Yours sincerely



Terry Connolly

16 AUG 1994

