STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

REPORT NO. 12 of 1991

7 August 1991

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

MEMBERS OF THE COMMITTEE

Mrs E Grassby, MLA (Presiding Member)
Mr B. Collaery, MLA
Mr B Stefaniak, MLA

Acting Secretary: Ms B Irvin
Legal Advisor: Emeritus Professor D Whalan

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

(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) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
(c) make rights, liberties and/or obligations unduly dependent upon non–reviewable decisions;
(d) inappropriately delegate legislative powers; or
(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(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.

ROLE OF THE COMMITTEE

The Committee examines all Bills and delegated 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 delegated legislation that comply with the high ideals set out in the Terms of Reference.

SUBORDINATE LEGISLATION

Subordinate legislation upon which no comment is offered.

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

ACT Determination No. 19 of 1991 made under section 21(1) of the ***ACT Institute of Technical and Further Education Act 1987*** determines TAFE fees to take effect from 1 July 1991.

ACT Determination No. 22 of 1991 made under section 39B of the ***Architects Act 1959*** determines the fees for registration as an architect and the annual practising certificate.

ACT Determination No. 23 of 1991 made under section 55 of the ***Bookmakers Act 1985*** determines the Standing Licence application fee and fixes the turnover levy.

ACT Determination No. 24 of 1991 made under section 65 of the ***Building Act 1972*** determines fees payable under the Act.

ACT Determination No. 25 of 1991 made under section 22A(1) of the ***Cemeteries Act 1933*** determines fees payable under the Act.

ACT Determination No. 28 of 1991 made under section 12A(1) of the ***Dangerous Goods Act 1984*** determines fees payable under the Act.

ACT Determination No. 29 of 1991 made under section 40A of the ***Dog Control Act 1975*** determines fees payable under the Act.

ACT Determination No. 30 of 1991 made under section 27B of the ***Hawkers Act 1936*** determines fees payable under the Act.

ACT Determination No. 31 of 1991 made under section 5A of the ***Lakes Act 1976*** determines fees payable under the Act.

ACT Determination No. 32 of 1991 made under section 105A of the ***Liquor Act 1975*** determines fees payable under the Act.

ACT Determination No. 34 of 1991 made under section 4A of the ***Machinery Act 1949*** determines fees payable under the Act.

ACT Determination No. 36 of 1991 made under section 217A of the ***Motor Traffic Act 1936*** determines fees payable under section 163C of the Act.

ACT Determination No. 38 of 1991 made under section 57(1) of the ***Motor Vehicles (Dimension and Mass) Act 1990*** determines fees payable under section 29(c) of the Act.

ACT Determination No. 39 of 1991 made under section 83A of the ***Nature Conservation Act 1980*** determines the licence fees payable under the Act.

ACT Determination No. 40 of 1991 made under section 83(1) of the ***Pesticides Act 1989*** determines fees payable under the Act.

ACT Determination No. 41 of 1991 made under section 45A of the *Plumbers Drainers and Gasfitters Board Act 1982* determines fees payable under the Act.

ACT Determination No. 42 of 1991 made under section 7 of the *Pounds Act 1928* determines fees payable under the Act.

ACT Determination No. 43 of 1991 made under section 47A of the *Rabbit Destruction Act 1919* determines fees payable under regulation 25.

ACT Determination No. 44 of 1991 made under section 139(1) of the *Real Property Act 1925* determines fees payable under section 72A of the Act.

ACT Determination No. 45 of 1991 made under section 9A of the *Roads and Public Places Act 1937* determines fees payable under the Act for the breaking up the surface of a road or public place.

ACT Determination No. 50 of 1991 made under section 42 of the *Stock Act 1991* determines fees payable under the Act.

ACT Determination No. 52 of 1991 made under section 39 of the *Water Pollution Act 1984* determine the fees payable under section 19(a)(g) of the Act.

ACT Determination No. 53 of 1991 made under section 46A of the *Weights and Measures Act 1929* determines fees payable under the Act.

ACT Determination No. 54 of 1991 made under section 64A of the *Adoption of Children Act 1965* determines fees payable under the Act.

ACT Determination No. 55 of 1991 made under section 2A of the *Associations Incorporation Act 1953* determines fees payable under the Act.

ACT Determination No. 56 of 1991 made under section 4A of the *Business Names Act 1963* determines fees payable under the Act.

ACT Determination No. 57 of 1991 made under section 37 of the *Instruments Act 1933* determines fees payable under the Act.

ACT Determination No. 59 of 1991 made under section 62 of the *Registration of Deaths, Births and Marriages Act 1963* determines fees payable under the Act.

ACT Determination No. 60 of 1991 made under section 8 of the *Registration of Deeds Act 1957* determines fees payable under the Act.

ACT Determination No. 61 of 1991 made under section 12 of the *Clinical Waste Act 1990* determines a fee payable under the Act.

ACT Determination No. 64 of 1991 made under section 80C of the *Co–operative Societies Act 1939* determines fees payable under the Act.

ACT Regulations 1991 No. 13 being Occupational Health and Safety Regulations (Amendment) insert provisions relating to injury and dangerous occurrence reporting and recording requirements into the principal regulations.

ACT Regulations 1991 No. 14 being Magistrates Court Rules (Amendment) prescribe a new fee and increase a number of other fees.

ACT Regulations 1991 No. 15 being Magistrates Court (Civil Jurisdiction) (Fees) Regulations (Amendment) increase a number of fees.

ACT Regulations 1991 No. 16 being Small Claims Regulations (Amendment) increase the fees for instituting claims in the small claims jurisdiction.

ACT Regulations 1991 No. 17 being Magistrates Court (Civil Jurisdiction) Regulations (Amendment) vary the prescribed rates of interest.

Subordinate legislation upon which comment is offered.

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

(a) Minor problems with explanatory statements.

The explanatory statements with this large number of determinations are generally very helpful in that they set out the fees in a schedule and give the old fees and the new fees alongside one another. Thus members of the Assembly can see at a glance the changes that are being made under the authority that the Assembly has conferred under the relevant legislation. However, there are a few possible flaws in the explanatory statements for the following legislation.

(1) Possibly incomplete explanatory statements.

ACT Determination No. 26 of 1991 made under section 37B of the *City Areas Leases Act 1936* determines certain fees relating to the use of leases.

ACT Determination No. 51 of 1991 made under section 116 of the *Unit Titles Act 1971* determines certain fees under the Act.

The explanatory statements state the authority under which the determinations are made and that the fees under the various provisions are varied. There is no listing of the fees comparing the new with the old.

(2) Possibly defective explanatory statement.

ACT Determination No. 27 of 1991 made under section 163 of the *Credit Act 1985* determines fees payable under the Act.

The explanatory statement refers to a "Credit Registration Application Fee (s. 15)". There is no appropriate reference in section 15, which merely provides that "a reference to credit in relation to a loan contract shall not be read as including a reference to credit provided under a credit sale contract or a continuing credit contract.".

There is also no reference in the Determination itself to section 15. If the reference in the explanatory statement were to section 156, it would make sense, and no alteration would need to be made to the Determination.

(3) Incomplete explanatory statement.

ACT Determination No. 33 of 1991 made under section 18A of the *Lotteries Act 1964* determines lotteries fees payable under the Act.

The explanatory statement states that "The various fees which apply under the *Lotteries Act 1964* are as set out below.".

Then follows a helpful list of fees for lotteries varying from a prize value of $1,001 to those in excess of $10,000. The old and new fees are given. Unfortunately, the list does not include the fees for the two smallest values, namely, "more than $400 but not more than $500" (fee of $11 set in the Determination) and "more than $500 but not more than $1,000 (fee of $27 set in the Determination).

Admittedly, these last two fees have not been increased in the present Determination. However, the list purports to be comprehensive and, to that extent, is slightly misleading.

(4) Transposed explanatory statements.

ACT Determination No. 37 of 1991 made under section 217A of the *Motor Traffic Act 1936* determines fees payable under the Act.

ACT Determination No. 65 of 1991 made under section 217A of the *Motor Traffic Act 1936* determines fees payable under the Act.

The explanatory statements for these two Determinations appear to have been transposed.

Determination No. 37 deals with registration and inspection of vehicles. Explanatory statement No. 37 does not appear to deal with these matters, but with the fees for licences, number plates and records. The converse is true with Determination No. 65 and its explanatory statement. In all other respects, the statements appear to be entirely satisfactory.

(5) Explanatory statements not in usual form and not so helpful.

ACT Determination No. 62 of 1991 made under section 80 of the *Electricity and Water Act 1988* determines fees payable under the Act.

ACT Determination No. 63 of 1991 made under section 33A of the *Water Rates Act 1959* determines fees payable under the Act.

The explanatory statements for these two Determinations do not follow the now usual formula of setting out the previous and new fees alongside one another, so that Members of the Assembly can see the extent of the changes at a glance. They were prepared in that form last year.

The explanatory statement for Determination No. 63 states that "These fees have risen about 5% in line with the Consumer Price Index for the year ending March 1991".

The three fees fixed by determination No. 63 have increased by that percentage or less this year.

The explanatory statement for Determination No. 62 states as follows:

> "Most fees have risen by about 5%, in line with inflation for the year to the end of the March quarter 1991.
>
> However, where the review indicated fees were set well below the actual cost of providing a service, the rises have been of a different order. For example, the fee payable for the supply of a plan of existing drainage issued under regulation 20 of the regulations has risen from $7 to $15."

Of the 17 fees involved in Determination No. 62 it appears that one has stayed at nil, 6 have increased by 5%, 9 have increased by percentages ranging from 11.1% to 212.5% and one cannot be calculated because a fixed fee has been converted to an hourly fee. Thus the comment that "most fees have risen by about 5%" does not appear to be entirely accurate.

The Committee suggests that the practice followed last year with the explanatory statements for these Determinations and with the majority of other Determinations this year, should be followed in the future, so that Members can quickly assess the variations in the fees.

(b) Some possible problems with Determinations themselves.

(1) A possible gap in a Determination.

ACT Determination No. 35 of 1991 made under section 4 of the *Motor Omnibus Services Act 1955* determines fares payable under the Act.

Clause 1 of the Determination provided that the Revocation and Determination commenced on 1 July 1991.

Several provisions (flowing, for example, from the definitions of "Dependent spouse", "Sickness beneficiary", "Special beneficiary" and "Unemployed person") rely on people being paid under the provisions of the Commonwealth *Social Security Act 1947*.

The *Social Security Act 1947* was repealed on the commencement of the Commonwealth *Social Security Act 1991*, the cornerstone of the new social security regime, which coincidentally also commenced on 1 July 1991.

The basis of the fares that depend on these provisions will need to be looked at. Not only will the aspects of collection of these fares since 1 July 1991 need to be considered, but also the granting of appropriate fares for people under the new *Social Security Act 1991* will need to be considered.

(2) Possible problems with two Motor Vehicle Determinations.

ACT Determination No. 47 of 1991 made under section 90A of the *Sale of Motor Vehicles Act 1977* determines a fee payable under the Act.

ACT Determination No. 48 of 1991 made under section 90A of the *Sale of Motor Vehicles Act 1977* determines fees payable under the Act.

Determination No. 47 revokes:

> "the determination of fees and charges made by the instrument published in the Commonwealth of Australia Gazette No. S243 on 24 August 1988 only in respect of section 14(2) of the Act [and then determines new fees under section 14(2)]".

Firstly, the relevant Determination in Commonwealth Gazette No. S243 is Determination No. 44 of 1988 and it has items under four statutory provisions in it. Two (those for sections 14(1) and 72) were revoked and redetermined by Determination No. 46 of 1990. This left in place fees under section 14(2) (now revoked and reset by the present Determination) and fees for the issue of a licence for 12 months ($60) or part thereof ("the amount that bears the same proportion to $60 as the number of days of the licence bears to 365") under section 59.

Secondly, the present Determination and Explanatory Statement for No. 47 did not match up. The explanatory statement states that the present Determination revokes:

> "all existing fee determinations under the *Sale of Motor Vehicles Act 1977* as published in the *Commonwealth of Australian* (sic) Gazette No. S56 on 1 August 1990" (Emphasis added).

It then goes on to say that the present Determination

> "sets fees for the purpose of the grant and renewal of a licence to operate as a motor vehicle dealer. Included in the licence fee is a component for compensatory damages which covers consumers against motor vehicle dealers who fail to honour warranty as a result of bad title."

It then lists former and new charges of "Licence Fee (s. 14)" (without indicating which subsection of section 14), "Compensation Fund (not revenue trust a/c) (s. 59)", "Duplicate Licence/Amendment (s. 72)" and "Register Inspections (s. 78)".

The one point upon which the Determination and the explanatory statement almost agree is about the fee under section 14, except that the explanatory statement does not say which subsection of section 14.

Applying the fees table part of the explanatory statement, the increase in the section 59 Compensation Fund amount from $60 (as set by Determination No. 44 of 1988) to $63 or the increase from $25 (as set by Determination No. 46 of 1990) to $26 for a copy under section 72 are not in Determination No. 47 of 1991. (The later Determination No. 48 does purport to increase the section 72 fee from $25 to $26. No reference to an "Amendment" in section 72 as the explanatory statement suggests has been found.) Nor does there appear to be a reference to the Register Inspections fee of $5 in either Determination Nos. 47 or 48.

Determination No. 48 purports to:

> "revoke the determination of fees and charges made by the instrument published in the *Commonwealth of Australia Gazette* No. S56 on 1 August 1990 [and then goes on to set fees under sections 14(1) and 72]." (Emphasis added).

The determination has not been located in "Commonwealth of Australia Gazette No. S56 on 1 August 1990".

The Committee has been able to find an apparently appropriate determination in the Australian Capital Territory Gazette of 1 August 1990 and perhaps it was intended to revoke it.

The explanatory statement for Determination No. 48 also does not match up entirely with the Determination. It states that:

> "This instrument revokes all existing fee determinations under the *Sale of Motor Vehicles Act 1977* as published in the Commonwealth of Australian [sic] Gazette No. S56 on 1 August 1990." (Emphasis added.)

It then says that the:

> "determination sets fees for the purpose of the grant and renewal of a licence to operate as a motor vehicle dealer."

It then lists former and present charges in exactly the same form as the explanatory statement for Determination No. 47.

Some of the problems with Determination No. 48 and its explanatory statement seem to be as follows. The Determination purports to revoke a Determination that seems not to exist. Then it sets fees under sections 14(1) and 72. The explanatory statement states that the Determination sets fees for the grant and renewal of licences. The Determination does not refer to renewals, which seem to be dealt with in section 14(2) in any event. This seems to be confirmed by the fact that Determination No. 47 did set a fee under section 14(2) for "Renewal of a licence". The same problems with the statement of the old and new charges that existed with the explanatory statement for No. 47 also seem to apply here.

The Committee seeks clarification of these Determinations and their explanatory statements.

(3) A tiny error in a Determination.

ACT Determination No. 49 of 1991 made under section 6B of the *Scaffolding and Lifts Act 1957* determines fees payable under the Act.

In paragraph (b)(i) of "Notification of intention to commence building, excavation or compressed air work" (on page 121 of the Gazette) the phrase "of the work" has been typed in the first column instead of the second column, with the result that neither column makes good sense. The Committee considers that the mistake does not affect validity.

(4) A Determination apparently made under an incorrect section.

ACT Determination No. 58 of 1991 made under section 130 of the *Real Property Act 1925* determines fees payable under the Act.

The Determination refers to section 130. Section 130 seems to be the wrong section as it refers to powers of attorney. Section 139 may be the correct section for, as amended, it refers to the "Power of Minister to determine fees".

(5) Still no reply after more than a year and yet further questions.

ACT Determination No. 21 of 1991 made under section 48 of the *Health Services Act 1990* cancels ACT Determination of Fees and Charges No. 16 of 1991 and determines hospital, nursing home and various other charges to take effect on 1 July 1991.

ACT Determination No. 66 of 1991 made under section 48 of the *Health Services Act 1990* deletes the word "week" from items T. 2(a) and T. 2(b) of Determination No. 21 of 1991 and inserts the word "day".

In its Reports Nos. 11, 12 and 16 of 1990 and Reports No. 7 and 11 of 1991 the Committee sought answers to questions about the predecessors of Determination No. 21 above. More than a year has now gone by since the Committee first raised matters about such a Determination in its Report No. 11 of 1990 and no formal response has been received. The questions raised range from minor typographical errors to possible invalidity and the effect of possible retrospectivity affecting the legality of the collection of fees.

The simple verbal errors and sexist language of the previous Determinations have been repeated yet again in the present Determination.

There is a number of additional items that appear for the first time in Determination No. 21. The explanatory statement states that these charges have not "previously been gazetted". Some (or perhaps all) have apparently been charged before this Determination was made, as the explanatory statement mentions increases in some of these fees.

The Committee asks what legal authority existed for charging and collecting these fees and charges before the making of the present Determination.

Determination No. 66 substituted the word "day" for "week" in relation to a fee. Previously the relevant part of Item T, as it appeared in Determination No. 21, read as follows:

"2. Casual attendance:

(a)	child under 18 months,	$25.00 per <u>week</u>
(b)	child 18 months and over	$24.00 per <u>week</u>

(Emphasis added)

By changing the word "week" to "day" Determination No. 66 increases the fee or charge seven–fold if a seven day week, rather than a working week, is envisaged. The explanatory statement states as follows:

> "Fees of this nature have been gazetted only for information. The fees have not increased since January 1991 and have not been gazetted in the past."

The legal authority for the fees will presumably be given in answer to the first question asked above. Depending upon the answer to that question, the Committee would like to know if anyone was charged fees of $25.00 or $24.00 daily rather than the determined weekly fees from the time that Determination No. 21 of 1991 came into force on 1 July 1991 until the change was made by Determination No. 66.

(c) Committee's involvement not mentioned.

ACT Determination No. 67 of 1991 made under section 4 of the *Public Place Names Act 1989* determines a number of place names, revokes two street names and corrects a number of comments about other names.

The Determination appears to be in order. However, in its Report No. 5 of 1991 the Committee drew attention to several errors that are corrected in the Determination. On a previous occasion when the Committee drew attention to errors in a place names Determination a letter was received dated 14 January 1991. A letter does not appear to have been received on this occasion. It is also appropriate for the Committee's part in drawing attention to a need for corrections to be mentioned in the relevant explanatory statement. This has not happened here.

(d) Very helpful explanatory statement.

ACT Determination No. 68 of 1991 made under section 64A of the *Adoption of Children Act 1965* determines fees relating to the assessment of applicants for intercountry adoption.

This is the first time that such fees have been determined and the explanatory statement will be very helpful to Members of the Assembly.

It sets out the fees, explains that they are based on full cost recovery and mentions that that they are comparable with those in New South Wales. It then goes on to explain in detail what is received for each fee. In short, it is truly an explanatory statement.

Ellnor Grassby, MLA
Presiding Member

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