

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

REPORT NO. 17 OF 1996

28 November 1996

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Civic Square, London Circuit
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. 17 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. 17 of 1996.

Yours sincerely,



Rosemary Follett, MLA
Chair

27 November 1996



Approved
Greg Cornwell, MLA

28 November 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.

BILLS

Bills - No Comment

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

Blood Donation (Transmittable Diseases) (Amendment) Bill 1996

This Bill changes the name of the Principal Act to reflect other changes made by this Bill to have a number of specified transmittable diseases covered by the Act and to which diseases can be added by regulation.

Canberra Institute of Technology (Amendment) Bill 1996

This Bill amends the Principal Act consequent upon the enactment of the Hotel School Bill 1996.

Casino Control (Amendment) Bill 1996

This Bill redefines junket gaming as provided for in the Principal Act by replacing it with commission-based gaming.

Criminal Injuries Compensation (Amendment) Bill 1996

This Bill provides for the payment of a levy on persons convicted of a criminal offence in the Territory.

Discrimination (Amendment) Bill 1996

This Bill establishes the Discrimination Tribunal, which will carry out the hearing functions under the Principal Act, introduces procedures to speed up resolution of complaints and makes other consequential and minor amendments.

Hotel School Bill 1996

This Bill establishes the Australian International Hotel School as a statutory corporation.

Land (Planning and Environment) (Amendment) Bill (No. 4) 1996

This Bill amends the Principal Act and related Acts to reflect responses made to the Stein Report and other follow-up action.

Magistrates Court (Amendment) Bill (No. 2) 1996

This Bill amends the Principal Act to make it clear that it is the Administrator under the *Remand Centres Act 1976*, and not a court, that has the authority to make decisions about interstate removal of persons remanded into his or her custody.

Motor Traffic (Amendment) Bill (No 3) 1996

This Bill provides for the introduction of a road rescue fee.

Ozone Protection (Amendment) Bill 1996

This Bill re-inserts the provision that permits the servicing of equipment containing CFCs by persons holding a licence under the Principal Act.

Remand Centres (Amendment) Bill (No. 2) 1996

This Bill provides that the Administrator under the Act, and not a court, has the authority to make decisions about interstate removal of persons remanded into his or her custody.

Roman Catholic Church Property Trust (Amendment) Bill 1996

This widens the objects of the Roman Catholic Church Property Trust, provides for the variation or blending of trusts where the original terms for the use of trust property have become impossible or inexpedient and provides that the bishop alone may execute instruments on the Trust's behalf.

Trading Hours (Amendment) Bill (No. 2) 1996

This Bill provides for an exemption from restricted trading hours for the period 9 December in each year to 8 January in the following year.

Workers' Compensation (Amendment) Bill (No. 2) 1996

This Bill provides workers' compensation coverage for any one worker under one insurance policy, determines the worker's State or Territory for compensation purposes and extends compensation coverage for work overseas.

Bills - Comments

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

Motor Traffic (Amendment) Bill (No 4) 1996

This Bill introduces controls on the parking of heavy vehicles on residential land.

Inter-relationship of Present Bill with the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996

Clause 18 of the Bill makes amendments to section 256 of the *Land (Planning and Environment) Act 1991*.

The Committee suggest that the inter-relationship between the amendments being made to section 256 of the *Land (Planning and Environment) Act 1991* by the present Bill and those that are being made to the section by the *Land (Planning and Environment) (Amendment) Bill (No. 3) 1996* that is also presently before the Assembly needs to be considered.

There appear to be three possible problems.

First, paragraphs 18(d), (e) and (f) of the present Bill make amendments to subsection 256(4A) as it is at present in the Principal Act. They amend section 256 as follows:

"(d) by omitting from paragraph (4A)(a) 'or';

(e) by adding at the end of paragraph (4A) (b) 'or';

(f) by inserting after paragraph (4A)(b) the following paragraph:

'(c) the Minister administering the *Motor Traffic Act 1936* ;';"

However, an amendment that would be effected by clause 19 and the Schedule to the *Land (Planning and Environment) (Amendment) Bill (No. 3) 1996* omits and substitutes subsection (4A) in the following form:

"(4A) Before deciding whether to make an order the Minister shall consider any submissions against whom the order is sought."

It can be seen that the amendments in the present Bill do not fit in at all with the new subsection (4A) as it would be omitted and substituted in the *Land (Planning and Environment) (Amendment) Bill (No. 3) 1996* in such a way as to make sense.

Thus, if the *Land (Planning and Environment) (Amendment) Bill (No. 3) 1996* was passed before the present Bill, the amendments made by the present Bill would be nonsensical.

On the other hand, if the present Bill was passed first and was then followed by the *Land (Planning and Environment) (Amendment) Bill (No. 3) 1996*, the effects of the amendments made by the present Bill would disappear by the substitution of the new form of subsection (4A) set out above.

Secondly, there is also a problem between paragraphs 18(a), (b) and (c) of the present Bill and clause 19 and the Schedule to the *Land (Planning and Environment) (Amendment) Bill (No. 3) 1996* relating to the amendments that both Bills make to subsection 256(3). As the problem is very similar to that with subsection 256(4A), the Committee will not set it out in detail.

Thirdly, paragraph 18(g) of the present Bill makes amendments to subsection 256(4C) by amending the provision as it appears in the Principal Act in such a way as to read as follows:

"(4C) The Registrar shall cause a copy of each order made under subsection (4B) to be given to -

- (a) the Minister; and
- (b) in the case of an order relating to the parking of heavy vehicles on residential land pursuant to Division 4 of Part X of the *Motor Traffic Act 1936* - the Minister administering that Act;

as soon as practicable after the order is made."

However, a provision in clause 19 and the Schedule to the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996 simply omits subsection 256(4C).

Thus, if the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996 was enacted first, it appears that the provisions in the present Bill would fall on barren ground or rather fall in a hole as the ground they were intended to cultivate would have been washed away by the repeal.

On the other hand, if the present Bill was enacted before the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996, the later passing of the repeal in the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996 would simply wash away the amendments made by the present Bill.

Perhaps a check should be made about the inter-relationship between the amendments being made by the present Bill and those being made by the Land (Planning and Environment) (Amendment) Bill (No. 3) 1996.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Determination No. 209 of 1996 made under section 6 of the *Surveyors Act 1967* appoints 5 specified persons to be members of the Surveyors Board.

Determination No. 212 of 1996 made under section 39B of the *Bookmakers Act 1985* provides for the location for the operation of a sports betting venue at Canberra Racecourse for 29 September 1996.

Determination No. 213 of 1996 made under section 39B of the *Bookmakers Act 1985* determines directions for the operation of a sports betting venue at Canberra Racecourse for 29 September 1996.

Determination No. 214 of 1996 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of streets in the Division of Ngunnawal.

Determination No. 216 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 217 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 218 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 219 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 220 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 221 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 222 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 223 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 224 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 225 of 1996 made under section 121 of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a member of the Mental Health Council.

Determination No. 226 of 1996 made under section 99 of the *Taxation (Administration) Act 1987* determines the criteria for stamp duty concessions under the "KickStart Housing Assistance Program".

Determination No. 228 of 1996 made under section 97 of the *Land (Planning and Environment) Act 1991* appoints a specified person as a member of the ACT Heritage Council.

Determination No. 229 of 1996 made under section 47 of the *Ozone Protection Act 1991* sets fees for the issue and renewal of licences to deal with substances in relation to the wholesale storing and sale of halons.

Determination No. 230 of 1996 made under section 39B of the *Bookmakers Act 1985* determines directions for the operation of a sports betting venue at Bruce Outdoor Stadium for sports betting at Canberra Cosmos home games on a number of specified dates.

Determination No. 232 of 1996 made under section 4 of the *Public Place Names Act 1989* amends Determination No. 98 of 1994 by omitting four street names in the Division of Holt.

Determination No. 233 of 1996 made under section 15 of the *Boxing Control Act 1993* determines a Code of Practice for the conduct of boxing contests.

Determination No. 234 of 1996 made under section 62 of the *Registration of Births, Deaths and Marriages Act 1963* repeals Determination of Fees No. 67 of 1995 and determines new fees under the Act.

Determination No. 235 of 1996 made under section 126 of the *Associations Incorporation Act 1991* repeals Determination of Fees No. 59 of 1995 and determines new fees under the Act.

Determination No. 236 of 1996 made under section 4A of the *Business Names Act 1963* repeals Determination of Fees No. 60 of 1995 and determines new fees under the Act.

Determination No. 237 of 1996 made under section 37 of the *Instruments Act 1933* repeals Determination of Fees No. 63 of 1995 and determines new fees under the Act.

Determination No. 238 of 1996 made under section 8 of the *Registration of Deeds Act 1957* repeals Determination of Fees No. 68 of 1995 and determines new fees under the Act.

Determination No. 239 of 1996 made under regulation 31 of the Adoption Regulations repeals Determination of Fees No. 58 of 1995 and determines the new fee for the purposes of regulation 24(3)(b).

Determination No. 241 of 1996 made under section 11A of the *Public Health Act 1928* repeals Determination of Fees No. 5 of 1995 and determines new fees under the Public Health (Barbers' Shops) Regulations, the Public Health (Boarding Houses) Regulations, the Public Health (Dairy) Regulations and the Public Health (Piggeries) Regulations.

Determination No. 242 of 1996 made under section 7 of the *Milk Authority Act 1971* appoints 4 specified persons to be members of the Milk Authority for a period of 3 years.

Determination No. 243 of 1996 made under section 8 of the *Milk Authority Act 1971* appoints a specified person to be Chairperson of the Milk Authority for a period of 3 years.

Determination No. 244 of 1996 made under section 63 of the *Tenancy Tribunal Act 1994* appoints a specified person as Acting President of the Tenancy Tribunal.

Determination No. 245 of 1996 made under subsection 189(1) of the *Credit Act 1985* appoints a specified person to act as a member and Chairperson of the Credit Tribunal.

Determination No. 246 of 1996 made under section 99 of the *Taxation (Administration) Act 1987* repeals Determination No. 90 of 1991 and determines that for the purposes of paragraphs 30(b) and 30(c) of the *Stamp Duties and Taxes Act 1987* the determined amount of tax payable in respect of a premium is 10% of the premium.

Determination No. 248 of 1996 made under section 19B of the *Meat Act 1931* repeals Determination of Fees No. 16 of 1995 and determines a fee under the Act.

Determination No. 249 of 1996 made under section 217A of the *Motor Traffic Act 1936* determines a registration fee for golf carts.

Determination No. 250 of 1996 made under section 263 of the *Credit Act 1985* and section 140 of the *Credit (Administration) Act 1996* repeals Determination No. 62 of 1995 and determines fees under the *Credit (Administration) Act 1996*.

Determination No. 251 of 1996 made under section 39B of the *Bookmakers Act 1985* determines the location of a sports betting venue at the National Convention Centre for the period 1-3 November 1996.

Determination No. 252 of 1996 made under section 39B of the *Bookmakers Act 1985* determines the directions for the operation of a sports betting venue at the National Convention Centre for the period 1-3 November 1996.

Determination No. 253 of 1996 made under section 39B of the *Bookmakers Act 1985* determines the location of a sports betting venue at the Canberra Casino on 5 November 1996.

Determination No. 254 of 1996 made under section 39B of the *Bookmakers Act 1985* determines the directions for the operation of a sports betting venue at the Canberra Casino on 5 November 1996.

Determination No. 257 of 1996 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of streets in the Division of Ngunnawal.

Determination No. 258 of 1996 made under section 3 of the *Mental Health (Treatment and Care) Act 1994* extends the operation of the Act for a further period of two years as provided for in subsection 3(2) of the Act.

Determination No. 263 of 1996 made under section 25 of the *Gungahlin Development Authority Act 1996* appoints a specified person as Chief Executive Officer of the Gungahlin Development Authority for a period of 2 years.

Determination No. 265 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 266 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 267 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 268 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 269 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 270 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 271 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 272 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 273 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 274 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a member of Treatment Assessment Panels for a period of 12 months.

Determination No. 275 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a Presiding member of Treatment Assessment Panels for a period of 12 months.

Determination No. 276 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as a Presiding member of Treatment Assessment Panels for a period of 12 months.

Determination No. 277 of 1996 made under section 131 of the *Drugs of Dependence Act 1989* appoints a specified person as an acting Presiding member of Treatment Assessment Panels for a period of 12 months.

Instrument No. 255 of 1996 made under section 87 of the *Occupational Health and Safety Act 1989* revokes Approval Nos. 126 and 127 of 1992 and approves the adoption of the Exposure Standards for Atmospheric Contaminants in the Occupational Environment [NOHSC:1003 (1995)] and sets the exposure standard for chrysotile.

Instrument No. 256 of 1996 made under section 87 of the *Occupational Health and Safety Act 1989* revokes the approval of National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment [NOHSC:1006 (1992)] and approves the National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment [NOHSC:1006 (1995)].

Subordinate Law No. 21 of 1996 being the Land (Planning and Environment) Regulations (Amendment) repeals and substitutes the provisions relating to the remuneration paid to the Chairperson, Acting Chairperson and members of the Appeals Board.

Subordinate Law No. 22 of 1996 being the Supreme Court Rules (Amendment) makes amendments to the principal Rules in relation to privileged documents, counsel's fees and supporting affidavits for the reseal of a foreign grant.

Subordinate Law No. 23 of 1996 being the Liquor Regulations (Amendment) updates references to the dates for areas that are declared "dry" for the Summernats to cover the 1996 Summernats and declared a "dry" area for the Praise Corroboree.

Subordinate Law No. 24 of 1996 being the Consumer Credit Regulations made under the *Consumer Credit Act 1995* provides for the transfer of proceedings between the Credit Tribunal and the courts and sets the maximum annual percentage rate for all classes of credit contract.

Subordinate Law No. 25 of 1996 being the Consumer Credit (Administration) Regulations made under the *Consumer Credit (Administration) Act 1995* sets the maximum level of commission that a finance broker may receive and prescribes the particulars that must be kept in the register of undertakings that are given in relation to unfair conduct.

Subordinate Law No. 26 of 1996 being the Drugs of Dependence Regulations (Amendment) made under the *Drugs of Dependence Act 1989* adds a specified drug to the list of prohibited substances and specifies the trafficable and commercial quantities of that drug.

Subordinate Legislation - Comments

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

Determination No. 215 of 1996 made under section 14 of the *Gungahlin Development Authority Act 1996* appoints a specified person as a member of the Gungahlin Development Authority for a period of three years.

Date of Commencement and Effects Flowing from that Date

Determination No. 215 of 1996 appoints a specified person as a member of the Gungahlin Development Authority for a period of three years.

Some of the problems that the Committee reported on in its Report No. 16 of 1996 on Determination No. 197 of 1996 (which also made appointments to the Gungahlin Development Authority) appear to apply to this determination. The Committee applies the relevant points made in Report No. 16 to the facts of the present determination.

The Explanatory Statement for Determination No. 215 of 1996 states as follows:

"The appointment takes effect from 25 September 1996 for a term of 3 years."

Some consequences flow from the accuracy or inaccuracy of this statement.

Subsection 6(1) of the *Subordinate Laws Act 1989* is relevant. Subsection 6(1) provides as follows:

- "6(1) A subordinate law -
- (a) shall be notified in the *Gazette*;
 - (b) takes effect on the day of notification or, if the law otherwise provides, as so provided; and
 - (c) shall be laid before the Legislative Assembly within 15 sitting days after the date of notification." (Emphasis added.)

Determination No. 215 of 1996 is dated 27 September 1996, but does not specify a date on which the determination is to take effect. Thus, applying subsection 6(1), the date of its notification in the *Gazette* is the relevant date for its commencement.

The determination was notified in the *Gazette* on 1 October 1996, so that would appear to be the date upon which it, and thus the appointment, commenced.

If nothing was done by the appointee until 1 October 1996, there are no practical problems. But, if he was involved in any activities or paid any fees for work in relation to the Authority before that date, then the validity of those activities or payment of fees would need to be considered.

Determination No. 227 of 1996 made under the *Health and Community Care Services Act 1996* repeals Determinations of Fees and Charges Nos. 21, 106 and 136 of 1996 and determines fees and determines new fees and charges under the Act.

What is the Effect of the Retrospectivity in this Determination?

The Explanatory Statement states that Determination Nos. 106 and 136 of 1996, which were to commence on 1 July 1996, were invalid. To remedy this, the present determination, Determination No. 227 of 1996, provides that it is "to have effect from 1 July 1996".

It was signed on 5 October 1996 and appeared in the *Gazette* on 9 October 1996.

The Committee raised some questions about Determinations Nos. 106 and 136 in its Report No. 10 of 1996. The Attorney-General, Mr Humphries, responded in a letter of 15 October 1996, to which the Attorney-General very helpfully attached the Government Solicitor's advice. The response and advice are attached to the present report.

The Government Solicitor's advice was that both Determination No. 106 and Determination No. 136 were invalid. The Committee respectfully agree with that opinion.

The Government Solicitor's advice went on to advise that retrospective determinations should be made to rectify the gap in the law for the collection of fees and charges since 1 July 1996.

After advising that Determination No. 136 of 1996 was invalid, the advice in relation to that determination states as follows:

"The Department may not be required to refund the fees and charges already collected. A retrospective determination of the same fees and charges backdated to 1 July 1996 will resolve this problem of invalidity. I recommend that this determination be prepared as soon as possible."

The Committee will consider retrospectivity in a moment, but interpose two questions at this point on the first sentence of this quote. As Determinations 106 and 136 were invalid, under what legal authority were those fees and charges collected and under what legal authority were they retained? If there was no such authority, why shouldn't the Department "be required to refund the fees and charges already collected"?

The opinion then goes into the reasons for the determinations being invalid and the Committee respectfully agrees with that reasoning. However, the opinion then goes on to state:

"Determinations of fees and charges for the service covered in Determinations 106 and 136 should be made under section 32 of the *H & CCSA*. ...These new determinations can be given retrospective operation and should be backdated to 1 July 1996."

That advice was followed and, as noted at the beginning of this comment, Determination No. 227 of 1996 was signed on 5 October 1996, appeared in the *Gazette* on 9 October 1996 and provided that it is "to have effect from 1 July 1996".

The Committee respectfully suggests that the validity of the retrospective effect of Determination No. 227 of 1996 be reconsidered. In particular, the Committee suggests that the possible effect of section 7 of the *Subordinate Laws Act 1989* be considered.

By virtue of the provisions of subsection 6(19) of the *Subordinate Laws Act 1989* the present determination is a subordinate law, as it is a determination of fees and charges made by a Minister under a provision of an Act, namely, section 32 of the *Health and Community Care Services Act 1996*.

Section 7 of the *Subordinate Laws Act 1989* 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."

The Committee suggests that it could be argued that the back-dating of the present determination breaches section 7 as it appears to impose liabilities back to 1 July 1996 that did not exist before the making of the present determination.

Unfortunately, some background is necessary in support of this argument. The intention of the original of section 7 of the *Subordinate Laws Act 1989*, section 48 of the *Commonwealth Acts Interpretation Act 1901*, was to outlaw retrospectivity in delegated legislation that prejudiced individuals and favoured the state, but which would permit retrospectivity that favoured individuals at the expense of the state.

In the 1989 Ordinance (which, on self-government, became our *Subordinate Laws Act 1989*) we inherited the original form of section 7. In that original form (which has since been updated in the Commonwealth legislation to ensure that the section achieves its original intention) the section had been very narrowly interpreted in an elderly decision of the High Court (*Australian Coal and Shale Employees Federation v. Aberfield Coal Mining Co. Ltd* (1942) 66 CLR 161). For prejudicial retrospectivity to be invalid a provision had, as Starke J put it (at p. 185), to be "expressed to take effect from a date before its notification" in the *Gazette*.

The Aberfield decision has been much criticised over the years. But, if the decision were still to be followed in interpreting the ACT legislation (and the High Court has not followed such a literal interpretation line in recent years), then it could be argued that there could still be some circumstances in which retrospective delegated legislation that prejudices individuals could be valid in the ACT.

However, in the present case, it can perhaps be argued that the provisions of Determination No. 227 of 1996 are within even the very narrow terms of the Aberfield decision, as the determination states that the determination is "to have effect from 1 July 1996". It can be argued that this is within the dictum of Starke J as it is "expressed to take effect from a date before its notification" in the *Gazette*.

The Committee suggests that it is appropriate for the validity of Determination No. 227 of 1996 to be considered. If it is decided that its terms breach the terms of section 7, then the appropriate manner to validate the collection of the relevant fees and charges retrospectively would be by a Bill, which would be directly subject to Parliamentary debate.

Determination No. 231 of 1996 made under section 8 of the *Radiation Act 1983* appoints a specified person as a member of the Radiation Council for a period of 3 years.

Another possible Problem with Section 7 of the *Subordinate Laws Act 1989*

In its Reports Nos. 7 and 10 of 1996 the Committee made comments on earlier appointments to the Radiation Council by Determinations Nos. 68, 69, 143 and 144 of 1996. Determinations Nos. 143 and 144 replaced the earlier two, as they appeared to be invalid as breaching the permitted period of appointment of 3 years.

In relation to the Committee's queries made in Reports Nos. 7 and 10 of 1996, two very helpful responses of 16 September and 18 November 1996 from the Attorney-General, Mr Humphries, were received by the Committee.

Determination No. 231 of 1996 was made on 6 October 1996 and stated that the appointment period was for "three years, from the date of this instrument".

Although the present determination provided that it commenced on 6 October 1996, it was not gazetted until 11 October 1996. The effect of section 7 needs to be considered in relation to any actions or decisions in this short period, if any, of the Radiation Council in which the present appointee took part.

Determination No. 240 of 1996 made under the *Health and Community Care Services Act 1996* repeals Determination of Fees and Charges No. 227 of 1996 and determines fees and charges under the Act.

What is the Effect of the Period from the Determination's taking Effect until its Gazetted?

Determination No. 240 of 1996 was signed on 17 October 1996, appeared in the *Gazette* on 23 October 1996 and states that it was "to take effect from 17 October 1996". The Explanatory Statement was not signed until 21 October 1996, but that date is not legally relevant.

The effect of the period between its taking effect on 17 October 1996 and its notification in the *Gazette* on 23 October 1996 needs to be considered.

Because of the provisions of subsection 6(19) of the *Subordinate Laws Act 1989* the present determination is a subordinate law, as it is a determination of fees and charges made by a Minister under a provision of an Act. Hence the other provisions of the *Subordinate Laws Act 1989* apply to it.

The possible effect of section 7 of the *Subordinate Laws Act 1989* appears to be of particular relevance. 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."

Determination No 240 of 1996 appears to impose liabilities on persons other than the Territory or a Territory authority in relation to the payment of fees and charges as from 17 October 1996. As it was not notified in the *Gazette* until 23 October 1996, the effect of section 7 needs to be considered in relation to the payment of those fees and charges.

In dealing with Determination No. 227 of 1996 earlier in this report the Committee went into considerable detail about the effect of section 7 of the *Subordinate Laws Act 1989*. Much of what was said is relevant to the present determination.

The Committee merely reiterates that it is appropriate for the effect of the period from 17 October 1996 until 23 October 1996 on the liability of any person to pay any fees and charges levied under Determination No. 240 of 1996 to be considered.

Determination No. 247 of 1996 made under section 99 of the *Taxation (Administration) Act 1987* repeals Determination No. 187 of 1996 and determines rates of stamp duties payable on securities that are liable for duty in the ACT.

Corrections Made but Committee's Part Not referred to

In its Report No. 12 of 1996 the Committee drew attention to the fact that Determination No. 187 of 1996 appeared to contain inaccurate cross-references and that the

"determination has significant financial consequences for the ACT and the effects of the cross-references are a significant part of the determination."

The Committee has not yet had a response to its comments, but the present Determination appears to correct the matters to which the Committee drew attention. Unfortunately, the usual courtesy of referring in the Explanatory Statement to the Committee's part in the process has not been complied with.

As the new edition of the Guidelines for the Preparation of Disallowable Instruments (ACT Attorney-General's Department September 1996) states, such mention in the Explanatory Statement

"enables the Committee to quickly recognise that the disallowable instrument is in response to comments it has previously made."

Determination No. 259 of 1996 made under section 14 of the *Gungahlin Development Authority Act 1996* revokes the appointments made by ACT Determination No. 197 of 1996 of specified persons as members of the Gungahlin Development Authority.

Determination No. 260 of 1996 made under section 16 of the *Gungahlin Development Authority Act 1996* revokes the appointments made by ACT Determination No. 198 of 1996 of two specified persons as Chairperson and Deputy Chairperson of the Gungahlin Development Authority.

Determination No. 261 of 1996 made under sections 14 and 15 of the *Gungahlin Development Authority Act 1996* appoints 10 specified persons as members of the Gungahlin Development Authority for a period of 3 years from 19 August 1996.

Determination No. 262 of 1996 made under section 16 of the *Gungahlin Development Authority Act 1996* appoints 2 specified persons as Chairperson and Deputy Chairperson of the Gungahlin Development Authority from 19 August 1996.

Revocation and Re-appointments made Following Committee Comments

As the Explanatory Statements very properly state Determinations Nos. 259 and 260 of 1996, which revoked Determinations 197 and 198 of 1996, and Determinations Nos. 261 and 262 of 1996, which make re-appointments, have been made following comments of the Committee in its Report No. 16 of 1996.

The Explanatory Statements give quite detailed explanations of the matters involved, including mentioning that Determinations Nos. 261 and 262 of 1996 have been made retrospective to 19 August 1996.

No doubt the matter would have been considered when the retrospectivity was being inserted in the determinations, but there is no mention in the Explanatory Statements of the possible effect of section 7 of the *Subordinate Laws Act 1989* on any occurrences decided during the relevant period of retrospectivity.

Confirmation is sought that no person's rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant period of retrospectivity.

Public Sector Management Standards 4/1996 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner for Public Administration with the Approval of the Chief Minister amended a number of Standards dealing with leave and allowances.

Missing Explanatory Statement

Unfortunately, there was no Explanatory Statement attached to these Standards.

Public Sector Management Standards 9/1996 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner for Public Administration with the approval of the Chief Minister makes a minor amendment to the reference to the Standards relating to Entry to Workplace Programs and more significant changes relating to leave for attendance at sporting events.

Is there an Incorrect Page Reference for an Amendment?

The first page reference in Schedule A to the instrument is to page 116 of the 1996 consolidated reprint of the Standards. There is a minor amendment to paragraph B:13 of the item headed "Entry to the workforce programs". The amendment is to "remove 'and' from the second last dot point".

The relevant passage does not appear on page 116, but on page 118. Thus there seems to be an incorrect reference in the amendment.

It is a tiny point, but could be inconvenient for anyone looking for the effect of the amendment.

GOVERNMENT RESPONSES

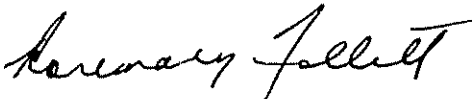
The Committee has received three responses in relation to comments made concerning:

- Determinations Nos. 43-46 of 1996 made under the *Occupational Health and Safety Act 1989* (Report No. 6 of 1996).
- Determinations Nos. 160-163 of 1996 made under the *Occupational Health and Safety Act 1989* (Report No. 11 of 1996).
- Community Referendum Bill 1996 (Report No. 10 of 1996).
- Determination No. 134 of 1996 made under the *Building Act 1972* (Report No. 10 of 1996).
- Uncollected Goods Bill 1996 (Report No. 12 of 1996).
- Firearms Bill 1996 (Report No. 12 of 1996).
- Determinations Nos. 106 and 136 of 1996 made under the *Health Act 1993* (Report No. 10 of 1996).

- Determinations Nos. 68 and 69 of 1996 made under the *Radiation Act 1983* (Report No. 7 of 1996).
- Determinations No. 143 and 144 of 1996 made under the *Radiation Act 1983* (Report No. 10 of 1996).
- Determination No. 61 of 1996 made under the *Health Promotion Act 1995* (Report No. 7 of 1996).
- Instrument No. 186 of 1996 made under the *Health Promotion Act 1995* (Report No. 12 of 1996).
- Administrative Appeals Tribunal (Amendment) Bill 1996 (Report No. 16 of 1996).
- Motor Traffic (Amendment) Bill 1996 (Report No. 16 of 1996).
- Public Sector Management (Amendment) Bill (No. 2) 1996 (Report No. 16 of 1996).
- Stamp Duties and Taxes (Amendment) Bill 1996 (Report No. 16 of 1996).
- Witness Protection Bill 1996 (Report No. 16 of 1996).
- Determinations No. 197 and 198 of 1996 made under *Gungahlin Development Authority Act 1996* (Report No. 16 of 1996).

Copies of the responses are attached.

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



Rosemary Follett, MLA
Chair

27 November 1996



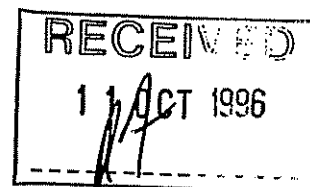
Gary Humphries MLA

Tom Deane

Attorney General
Minister for the Environment, Land
and Planning
Minister for Police
Minister for Emergency Services
Minister for Arts and Heritage
Minister for Consumer Affairs

Member for Molonglo
Australian Capital Territory

Ms Rosemary Follett MLA
Chair
Standing Committee on Scrutiny of Bills
and Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601



Dear Ms Follett

I refer to the Standing Committee's Reports Nos 6 (21 May 1996), 10 (24 July 1996), 11 (27 August 1996) and 12 (3 September 1996).

I am now in a position to respond to a number of the matters raised in these Reports.

In Reports Nos 6 and 11 you have commented on Determinations Nos 43-46 and 160-163. Some of the determinations appoint members to the Occupational Health and Safety Council, the remainder make standing arrangements for persons to act as members of the Council in the event of a vacancy or if a member is unable to perform duty. You have queried whether these determinations are in fact disallowable instruments. As you have pointed out the functions of the Council that are specified in the *Occupational Health and Safety Act 1989* appear to be exclusively advisory. Accordingly, there is a question as to the status of appointments to it. Advice on this matter is being obtained and any further appointments to the Council will be processed in accordance with the advice. You have also commented on the inadvertent retrospectivity that has arisen from the appointments being expressed to run from the date the determinations were signed. I am advised that during the periods in question the Council did meet, but the business that was transacted was in relation to purely advisory functions and

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accordingly it does not appear the retrospectivity gives rise to issues that need to be pursued. I am also advised the members of the Council do not receive remuneration.

You have also queried the acting arrangements that are made by some of the Determinations. In particular you have drawn attention to acting appointments which are expressed to be for 3 years which as you have pointed out appears to be in breach of section 22(1)'s stipulation that a person who acts during a vacancy will not continue to do so for more than 12 months. I am advised that what is intended by the determinations is that during the period of 3 years the person will be available to act if that is necessary. It is not intended the person will act for 3 years and no member has acted for a period that calls into question compliance with the stipulation in section 22.

Finally, you have drawn attention to Determination No 46 which makes acting appointments which are expressed to be for a period of 6 months. You pointed out the instrument would not be disallowable if none of the appointments were for second or subsequent consecutive periods. I am advised that some of these appointments were for subsequent periods. Accordingly, it was decided the instrument should be treated as disallowable.

In Report No 10 you have commented on the *Community Referendum Bill 1996*. Firstly you have queried the process for the approval of forms and also asked who will approve them. Clause 3(2) of the *Community Referendum Bill* provides for expressions used in the Bill to have the same meaning as they have in the *Referendum (Machinery Provisions) Act 1994*. In turn section 3(2) of the *Machinery Provisions Act* provides for expressions used to have the same meaning as they have in the *Electoral Act 1992*. Finally section 3 of the *Electoral Act* provides that "approved" means approved by the Commissioner by notice in the Gazette.

You have also queried why the exercise of various discretions under the Bill are subject to merits review, but others are not. To take one example the Attorney-General's discretion under clause 14 is not the subject of merits review. The clause calls for the Attorney-General to certify that a proposed law is consistent with the registered legislative proposal and that it is suitable for presentation to the electors. The certificate is to be given only if the Attorney-General is satisfied the proposed law is consistent with the objects of the registered legislative proposal and is in a form that is suitable for presentation to the Assembly. In my view these are not matters that lend themselves to merits review. However, that is not to say the Attorney-General will have an unsupervised power. I consider the Supreme Court would be able to review any exercise of the discretion under the *Administrative Decisions (Judicial Review) Act 1989*.

In the circumstances of clause 14 and the other clauses instanced in your Report review under the *Judicial Review Act* appears appropriate and adequate.

You have also drawn attention to clause 40. I am giving further consideration to this and will advise you further in due course.

In Report No 10 you have commented on Determination No 134 which determines fees payable under the *Building Act 1972*. You have noted the determination states it is revoking Determination No 139 of 1995 which is made under the *Bookmakers Act 1985* when in fact the previous determination under the *Building Act* is Determination No 48 of 1995. You have expressed the view that a Court would probably conclude that in fact Determination No 48 was the determination that was revoked and have asked that this be checked. This has been done and I am advised the opinion expressed in your Report is correct.

In Report No 12 you have commented on the *Uncollected Goods Bill 1996*. Your first comment deals with an editorial error in the Bill. This error is to be attended to under Standing Order 191. You have also pointed out it may be necessary for the provisions of the Bill to be amended to ensure they are consistent with the *Firearms Bill 1996*. This matter will be kept under review.

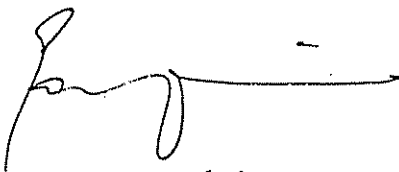
Finally you have suggested it would be advisable for authorised officers to have proper identification. This matter will be attended to by way of a Government amendment.

In Report No 12 you have commented on the *Firearms Bill 1996*. Your first comment concerns an incorrect cross-reference to subsection 98(4) in clause 77(5)(d), I can confirm the cross-reference should be to subsection 98(5). The paragraph is to be amended accordingly.

Your second comment concerns clause 114 which enables, but does not require, a medical practitioner to provide advice to the Registrar in certain circumstances. I reiterate the statement in the Bill's explanatory memorandum that I consider the provision appropriate and in the community's best interests. It is also consistent with the provisions of the *Firearms Bill 1996* (NSW).

Finally you have queried whether the regulations will make provision for compensation. I can confirm that the regulations will address this issue.

Yours sincerely



Gary Humphries
Attorney-General

- 4 OCT 1996



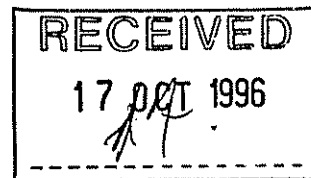
Rory Humphries MLA

Tom Deane

Attorney General
Minister for the Environment, Land
and Planning
Minister for Police
Minister for Emergency Services
Minister for Arts and Heritage
Minister for Consumer Affairs

Member for Molonglo
Australian Capital Territory

Ms Rosemary Follett MLA
Chair
Standing Committee on Scrutiny of Bills
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CANBERRA ACT 2601



Rosemary
Dear Ms Follett

I refer to the Standing Committee's Report No 10 (24 July 1996) in which you have commented on Determinations Nos 106 and 136 which determine fees and charges under the *Health Act 1993*. You pointed out that both determinations revoke Determination No 21 of 1996 and also queried whether the fact that Determination No 106 is undated has any consequences.

Your comments led to a re-examination of a number of matters concerning the determinations. You will see from the attached copy of an advice from the Government Solicitors' Office that Determinations Nos 106 and 136 are considered to be invalid due to the repeal of Part V of the *Health Act* which was effected on 1 July 1996 by the *Health and Community Care Services (Consequential Provisions) Act 1996*. Section 8 of that Act preserved the operation of determinations made under Part V of the *Health Act*. Accordingly, Determination No 21 was not affected by the repeal.

As a result it has been necessary for a further determination of fees and charges to be made under the *Health and Community Care Services Act 1996*. I am advised that this determination, which was notified in the Gazette on 9 October 1996 as Determination No 227 of 1996, also revokes Determination No 21 of 1996 and that in accordance with the advice of the Government Solicitors' Office it has been made retrospective to 1 July 1996.

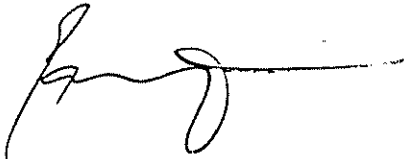
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These developments overtake your query concerning the fact that Determination No 106 is undated. However, you will see the Government Solicitors Office is of the view that this does not affect the validity of the determination.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Gary Humphries', with a long horizontal stroke extending to the right.

Gary Humphries
Attorney-General

1 5 OCT 1996

Documents
Enclosed

1 Copy of 234 70536



AUSTRALIAN CAPITAL TERRITORY
GOVERNMENT SOLICITOR

Your Reference:

Our Reference: 96-2-283668
Dr Douglas Jarvis
Ph: (06) 207 0635

1st Floor
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CANBERRA CITY 2601

10 September 1996

Vicki Crispe
A/g Cabinet Liaison Officer
Department of Health and Community Care
GPO Box 825
CANBERRA ACT 2601

VALIDITY OF DETERMINATION NO. 106 OF 1996 AND 136 OF 1996

I refer to your request for advice dated 9 August 1996 (received 13 August 1996) in relation to the above matter.

BACKGROUND

In Report No. 10, dated 24 July 1996, the Standing Committee on Scrutiny of Bills and Subordinate Legislation (the Committee) commented on Determination No. 106 of 1996 and Determination No. 136 of 1996. Both of these determinations were made under the *Health Act 1993* [HA]. The Committee also noted that both determinations revoked Determination No. 21 of 1996.

You sought advice on the following:

Determination No. 106 of 1996:

The Committee noted that Determination No. 106 had not been dated - nor had the Explanatory Statement.

Q1. Does the failure to date the determination affect its validity?

Determination No. 136 of 1996:

This Determination was made under Part V of the HA, which was repealed by the *Health and Community Care Services (Consequential Provisions) Act 1996* [H & CCS (CP) A]. It is dated 28 June 1996 and is stated to take effect from 1 July 1996.

Q2. Given that Part V of the HA was repealed on 1 July 1996, is the determination valid?

Q3. If the determination is invalid what are the consequences of the Department continuing to collect fees and charges?

SHORT ANSWERS

Determination No. 106 of 1996:

A1. No. The validity of this determination is not affected by the failure to actually write the date. However it is invalid due to the specified date of commencement. A retrospective determination of the same fees and charges backdated to 1 July 1996 should be made.

Determination No. 136 of 1996:

A2. No.

A3. The Department may not be required to refund the fees and charges already collected. A retrospective determination of the same fees and charges backdated to 1 July 1996 will resolve this problem of invalidity. I recommend that this determination be prepared as soon as possible.

REASONING

When an Act or part of an Act is repealed, any subordinate laws made under that Act are also repealed unless the amending Act contains a saving clause to keep the subordinate laws in force : D Pearce *Delegated Legislation in Australia and New Zealand* 1977 para [528].

As stated above Part V of the HA was repealed on 1 July 1996 by the H & CCS (CP) A. Section 8 of the H & CCS (CP) A provides:

8. A determination under section 17 or 18 of the *Health Act 1993*, in force immediately before the commencement of this Act shall, on that commencement, have effect as if it were a determination made by the Minister under section 32 or 33. respectively, of the *Health and Community Care Services Act 1996*.

In general, a determination of fees and charges made under the HA would continue to operate as if it were a determination made under the H & CCS

A. However, given that Determinations 106 and No. 136 were not to take effect until 1 July 1996 they were not "in force immediately before the commencement" of the H & CCS A. As a result, they are not valid determinations.

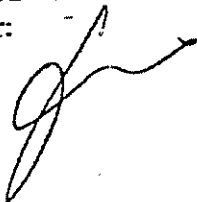
Determinations of fees and charges for the services covered in Determinations 106 and 136 should be made under section 32 of the H & CCS A. In relation to the radiation and pathology services covered by Determination No. 106 it is my opinion that these are "health services" for the purposes of the H & CCS A (refer to my advice on this issue dated 10 September 1996 Reference 96-2-283480).

These new determinations can be given retrospective operation and should be backdated to 1 July 1996.

If you have any further inquiries do not hesitate to contact Tara McNelly on 207 0681.

ACT Government Solicitor

Per:



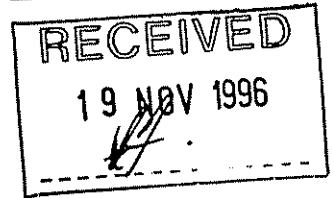


Gary Humphries MLA

→ *Tom Duncan
Secretary*

Attorney General
Minister for the Environment, Land
and Planning
Minister for Police
Minister for Emergency Services
Minister for Arts and Heritage
Minister for Consumer Affairs

Member for Molonglo
Australian Capital Territory



18 NOV 1996

Ms Rosemary Follett MLA
Chair
Standing Committee on Scrutiny of Bills
and Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601

Roseman
Dear Ms Follett

I refer to the Standing Committee's Reports Nos. 7 (4 June 1996), 10 (24 July 1996), 12 (12 September 1996) and 16 (2 October 1996).

I am now in a position to respond to a number of the matters raised in these Reports.

In Report No 7, you commented that the period of appointment to the Radiation Council specified in Determinations No 68 and 69 of 1996 should be examined as they appeared to exceed the terms of appointment allowed by the *Radiation Act 1983* by 1 day. Fresh appointments were made by Determinations No. 143 and 144. In my response of 16 September 1996, I noted that legal advice was being sought concerning the validity of any business conducted by the Council during the currency of determinations No. 68 and 69. The Government Solicitor's Office has advised that decisions made by the Council during the two meetings during the presumed currency of the determinations are valid. A copy of the legal advice is attached at "A".

Determinations No. 143 and 144 are the subject of comment in your Report No. 10. As set out in the Government Solicitor's Office advice, the meetings of the Radiation Council that took place during the presumed currency of Determinations No. 68 and 69 were validly conducted. Accordingly, I do not believe section 7 of the *Subordinate Laws Act 1989* is applicable.

You also pointed out that the explanatory statements for Determinations No. 143 and 144 did not refer to the role of your Committee. This matter has been brought to the attention of those responsible.

In Report No. 7, you queried the validity of an appointment of a specified person as Deputy Chairperson of the Health Promotion Board by Determination No. 61 of 1996. Determination No. 61 purported to appoint that person Deputy Chairperson under subsection 10(1) of the *Health Promotion Act 1995*. Had the instrument been valid, it would have commenced on the date of its appearance in the Special Gazette, on 15 May 1996. As you correctly pointed out, subsection 10(1) provides for the appointment of members of the Board. Appointment of a Deputy Chairperson is dealt with by subsection 8(2). The appointment of that person as Deputy Chairperson was therefore probably invalid. The person was also not validly appointed as a member. However, that person had been appointed as an acting member of the Board on 10 January 1996. The Government Solicitor's Office has advised that the acting appointment would have subsisted until a valid appointment was made. Therefore, the involvement of that person, as a member, in the activities of the Board would have been valid notwithstanding the invalidity of Determination No. 61. A copy of the advice is attached at "B".

In response to your comments concerning the appointment in Report No. 7, Determination 186 of 1996 appointed that person as a member of the Health Promotion Board under subsection 10(1) of the *Health Promotions Act*, and as Deputy Chairperson of the Board under subsection 8(2) of the *Health Promotions Act*. Determination No. 186 was notified in the *Gazette* on 15 August 1996.

In Report No. 12, you have raised three matters concerning Determination No. 186.

Firstly, you have queried the period of retrospectivity from 21 July 1996, the date of the instrument, to 15 August 1996, the day the instrument was notified in the *Gazette*. As set out above, the person was validly appointed as an acting member in January 1996. If the period of retrospectivity is struck down by section 7 of the *Subordinate Laws Act*, it would appear that the person's activities as a member would nonetheless be valid by virtue of the acting appointment.

Secondly, you have also queried whether the person performed duties as Deputy Chairperson between 21 July and 15 August. I am advised that she did not.

Finally, you have queried the indefinite nature of the appointment as Deputy Chair. This matter is addressed in the Government Solicitor's Office advice.

In Report No. 16, you drew attention to a cross-reference by paragraph 19A(1)(c) of the Administrative Appeals Tribunal (Amendment) Bill 1996 to section 37(1A) of the *Administrative Appeals Tribunal Act 1989*. Section 37(1A) is, you pointed out, repealed by clause 19B of the Bill. You queried whether the cross-reference should, instead, be to subsection 37(6A), inserted by clause 19(h) of the present Bill. I can confirm that the cross-reference should have been to new subsection 37(6A). This matter will be attended to.

In Report No. 16, you suggested that new item '7E' of Schedule 7 of the *Motor Traffic Act 1936*, which is inserted by clause 15 of the Motor Traffic (Amendment) Bill 1996 may be incorrect in its reference to the new section 13M. As you suggested, item '7E' should refer to the new section 13J rather than new section 13M. This matter will be attended to.

In Report No. 16, you queried whether the retrospective application of the provisions of the *Commonwealth Merit Protection (Australian Government Employees) Act 1984* to the employees of Territory instrumentalities by the Public Sector Management (Amendment) Bill (No. 2) 1996 would retrospectively validate any decisions that may have been prejudicial to an individual.

The Public Sector Management Act unintentionally excluded the employees of Territory Instrumentalities from coverage by the Merit Protection (Australian Government) Employees Act. I am advised that this error was only discovered recently. Clause 9 of the Bill is intended to amend the error and validate any actions and decisions made by the Merit Protection and Review Agency in relation to the affected employees.

I am advised that the only employees who were affected by the omission in the Public Sector Management Act were a small number of Totalcare employees and the employees of ACT Electricity and Water.

I am advised that no appeals were made to the Merit Protection and Review Agency by the relevant employees of Totalcare.

ACTEW employees would only have had access to review of grievance complaints under the Merit Protection (Australian Government Employees) Act for a period of 12 months between July 1994 and July 1995, had the omission not occurred. On 1 July 1995, the *Electricity and Water (Corporatisation) (Consequential Provisions) Act 1995*, which provided in section 7 for the establishment of internal grievance review mechanisms to replace those presumed to be provided by the Public Sector Management Act, came into force. Two appeals were made by ACTEW employees during the relevant 12 month period. The first was an appeal against a promotion. The appeal was not upheld. The second appeal concerned a disciplinary matter.

The original decision was upheld with a slight variation, which did not alter the outcome. It would appear that in each case the original, valid, decision stood.

You also queried whether the reference by clause 2(2) of the Public Sector Management (Amendment) Bill to section 8 was correct. I can confirm that the reference was incorrect. The reference should have been to section 9. This matter will be attended to.

In Report No. 16, you queried whether the reference to 'paragraph 64G(a)' in the definition of 'duty-free threshold' in the proposed subsection 64F(1) of the Stamp Duties and Taxes (Amendment) Bill 1996 was correct. The reference should have been to 'paragraph 64G(1)(a)'. Subsection 64F(1) will be amended accordingly.

In Report No. 16, you suggested that clause 26 of the Witness Protection Bill 1996 should refer not to 'section 26', but to 'section 25'. I can confirm that the reference by clause 26 should be to 'section 25'. Clause 26 will be amended accordingly.

In Report No. 16, you pointed out that the appointments of members, a Chairperson and Deputy Chairperson, of the Gungahlin Development Authority by Determinations No. 197 and 198 of 1996 did not commence on 16 August 1996, as stated in the explanatory statement, but on 3 September 1996, the day that the determinations were notified in the *Gazette*. You noted that the validity of any actions undertaken by the Authority, and any remuneration paid for work done by the Authority prior to 3 September 1996, would need to be checked.

I am advised that the Authority did meet before 3 September 1996 to transact general administrative work but that no fees have been paid for this meeting. I am also advised that the instruments of appointment will be revoked and further instruments made to recognise that the Authority commenced operation on 19 August 1996.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Gary Humphries', with a long horizontal line extending to the right.

Gary Humphries
Attorney General

Attachment "A"



AUSTRALIAN CAPITAL TERRITORY
GOVERNMENT SOLICITOR

Your Reference:

Our Reference: 96-2-286535
Ms Tara McNeilly
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21 October 1996

Vicki Crispe
A/g Cabinet Liaison Officer - Executive Coordination
Department of Health and Community Care
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CANBERRA ACT 2601

APPOINTMENT OF MEMBERS TO THE RADIATION COUNCIL -
VALIDITY OF DETERMINATIONS MADE UNDER THE RADIATION ACT
1983

I refer to your request for advice dated 5 September 1996 in relation to the above matter.

BACKGROUND

In its Report No. 7 of 3 June 1996 the Standing Committee on the Scrutiny of Bills and Subordinate Legislation noted that two appointments (by way of instrument) to the Radiation Council exceeded the three year term allowed in the *Radiation Act 1983* (RA). The Committee queried the validity of these appointments.

The Committee's comments were sent to the Radiation Council which arranged for the determinations to be re-gazetted, amending the date of the appointment. The original instruments were signed on 14 May 1996 and the replacements signed on 26 June 1996.

The Radiation Council meets on a monthly basis and there have been two meetings since the original appointments.

You sought advice on the following:

- Q1. Are the determinations as first gazetted valid?
- Q2. If the determinations are not valid, are the decisions of the Council made at the meetings of 22 May 1996 and 26 June 1996 valid?

SHORT ANSWERS

A1. No. The R A specifically provides that appointments are to be for a period not exceeding 3 years. Re-gazettal of appointments for a period not exceeding three years was necessary for the purposes of technically complying with the legislation.

A2. Possibly. The answer to this question ultimately depends on the interpretation given to the provisions in the R A guiding appointments to the Council and the powers and functions which can be exercised by the members of the Council. It is my view that the Council's decisions are valid.

REASONING

A1. Validity - determinations as first gazetted

As pointed out in Report No. 7 of 1996, section 36 of the *Interpretation Act 1967* (IA) provides:

"36. (1) Where, in an Act, a period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of that day or of the day of that act or event."

The language used in the instruments of appointment evinces a "contrary intention" and the IA does not apply. The use of "for a period of three years, from and including 20 May 1996 up to and including 20 May 1999" effectively makes the appointment for a period of three years and one day.

A2. Validity - decisions of Council made on 22 May 1996 and 26 June 1996

In Report No. 10 of 1996 the Standing Committee noted that the Radiation Council has "very significant powers and functions". A question arises as to whether the invalid appointments affected the Council's ability to make decisions regarding these matters.

Section 8 of the RA guides the appointment of the members of the Radiation Council. It provides in part:

"8.

...

(2) The members of the Council shall be appointed by the Minister.

(3) Subject to this Act, a member of the Council appointed under subsection (2) holds office for such period, not exceeding 3 years, as is specified in the instrument of appointment and is eligible for re-appointment.

(4) The performance of the functions, or the exercise of the powers, of the Council is not affected by reason only of there being a vacancy or vacancies in the membership of the Council.

..."

Subsection 8(4) of the RA is particularly relevant here. In a sense there were "vacancies" in the membership of the Radiation Council during the period when the appointments were invalidly made. As such, the Council could perform its functions and exercise its powers during this time and any decisions made are therefore valid. See also subsection 26(4) of the IA which provides:

"26.

...

(4) Where an Act confers a power or function, or imposes a duty, on a body, whether incorporated or unincorporated, the exercise of the power or the performance of the function or duty is not affected merely because of a vacancy or vacancies in the membership of the body."

Alternatively the validity of the Council's decisions can be reviewed in terms of common law principles relating to improperly constituted bodies. Subsection 8(3) of the RA sets out the procedural requirements for Council appointments. The characterisation of these requirements as either mandatory or directory is relevant, as is the overall scheme of the RA.

Subsection 8(3) of the RA serves an important function in outlining a feature of Council membership. However, the powers and functions of the Council exist independently of this provision and can arguably be exercised even when there are irregularities in appointment. In my opinion it is likely that this provision would be characterised as directory only.

An issue then arises as to the extent of compliance with the provision. "[A] directory interpretation of a statutory requirement still necessitates, as a condition of validity, that there should be substantial compliance with the requirement": *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 256 per Stephen J.

The original instruments of appointment can be viewed as an attempt (albeit an unsuccessful one) to comply with the requirements of the subsection. The later instruments rectify this former mistake. Given these circumstances, it is my view that the requirements have been met and that a court would be unlikely to find that the Council's decisions during May and June are void and of no effect.

If you have any inquiries or would like to discuss this matter further do not hesitate to contact me on 207 0681.

ACT Government Solicitor

Per:

T. McNeill



**AUSTRALIAN CAPITAL TERRITORY
GOVERNMENT SOLICITOR**

Attachment "3"

Your Reference:

Our Reference: 96-2-288309
Ms Pamela Mathie
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CANBERRA CITY 2601

27 September 1996

Nick Hillman
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Healthpact
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By facsimile 205 0962

**APPOINTMENT OF HELEN KAY TO THE HEALTH PROMOTION
BOARD**

I refer to your minute requesting advice on the above matter dated 18 September 1996.

Background

On 10 January 1996 Helen Kay was appointed under section 15(1) of the *Health Promotion Act 1995* ('the Act') 'to act as a member of the ACT Health Promotion Board until the members of the Board are appointed under section 10' (see *Gazette* No. 1, 10 January 1996).

On 15 May 1996 notice was given in the *Special Gazette* (No. S89) of the making of an instrument appointing Ms Kay 'as Deputy Chairperson of the ACT Health Promotion Board' under section 10(1) of the Act (Instrument No. 61 of 1996).

On 4 June 1996 the Standing Committee on Scrutiny of Bills and Subordinate Legislation ('the Committee') in their report No. 7 of 1996 suggested that the validity of Ms Kay's appointment as a member of the Board and Deputy Chairperson was in doubt having regard to Instrument No. 61.

2.

On 15 August 1996 notice was given in the *Special Gazette* (No. S204) of the making of instruments appointing Ms Kay:

A 'as a member of the ACT Health Promotion Board for a period of three years commencing on the date of this instrument' under section 10(1) of the Act (the instrument is dated 21 July 1996; and

B 'Deputy Chairperson of the ACT Health Promotion Board' under section 8(2) of the Act.

In its latest report the Committee states that the following matters require consideration:

1. the retrospective commencement of the instrument at A above on 21 July 1996 and in contrast the commencement of instrument B on 15 August 1996;
2. the effects of the involvement of Ms Kay in the activities of the Board between 21 July 1996 and 15 August 1996; and
3. the effect of the appointment of Ms Kay as Deputy Chairperson for an indefinite period.

Response to the Committee's latest report

I will address each point by the Committee in turn.

Retrospective effect of the instrument at A

Sections 6 and 7 of the *Subordinate Laws Act 1989* ('the Subordinate Laws Act') applies to an instrument of appointment as if it were a subordinate law (by virtue of section 5 of the *Statutory Appointments Act 1994* and section 10 of the Subordinate Laws Act). Under section 6(1)(b) of the Subordinate Laws Act instruments take effect on the day of notification in the *Gazette* unless the instrument itself states a date for commencement. Accordingly, the appointment in the instrument at A commenced on 21 July 1996 and the appointment in the instrument at B commenced on 15 August 1996.

Section 7 of the Subordinate Laws Act provides in effect that an instrument will be void if it is expressed to commence at an earlier date than the date of notification in the *Gazette* in circumstances where the rights of a person would be prejudiced or liabilities would be imposed on a person. Section 7 provides:

'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.'

It would seem that the only person directly affected by the instrument at A, other than the Territory, is Ms Kay. As the instrument does not prejudice her rights or impose any liabilities on her, in my view, section 7 has no application and the instrument at A is valid notwithstanding that it has retrospective operation.

Effect of involvement of Ms Kay in the activities of the Board between 21 July 1996 and 15 August 1996

To address the issue of the involvement of Ms Kay in the activities of the Board between 21 July 1996 and 15 August 1996 one needs to consider the effect of the all the instruments referred to in the background section of this advice.

The first instrument

On 10 January 1996 Helen Kay was appointed under section 15(1) of the *Health Promotion Act 1995* ('the Act') 'to act as a member of the ACT Health Promotion Board until the members of the Board are appointed under section 10'. The effect of this first instrument is that Ms Kay became an acting member of the Board on 10 January 1996.

The second instrument

On 15 May 1996 notice was given in the *Special Gazette* (No. S89) of the making of an instrument appointing Ms Kay 'as Deputy Chairperson of the ACT Health Promotion Board' under section 10(1) of the Act.

Section 8(1) sets out the members of the Board, it states:

'8. (1) The Board shall have 9 members, as follows:

- (a) a Chairperson;
- (b) a member with expertise in business or accountancy;
- (c) a member with expertise in media or communications;
- (d) a member with expertise in employee relations or occupational health and safety;
- (e) a member with expertise in community health;
- (f) a member with expertise in environmental health;
- (g) a member with expertise in sport or recreation;
- (h) a member with expertise in the arts or culture generally;
- (j) a public servant member.'

Section 10(1) provides for the appointment of members, it states:

'10. (1) The Minister shall appoint the members of the Board by instrument as part-time members for a period of 3 years.'

It would seem that there were at least 8 members validly appointed to the Board on 15 May 1996. It is doubtful whether the intended ninth member, Ms Kay, was validly appointed because the instrument of appointment purported to appoint her 'Deputy Chairperson' and not a member. If she was not, by that instrument, validly appointed as a member then, in my view, she continued to be an acting member of the Board pursuant to the first instrument (which appointed her as an acting member).

The first instrument states that she is to continue acting 'until the members of the Board are appointed under section 10'. It is a little unclear what is meant by these words, they could mean until one or all the members are appointed or variants in between or until a member with similar expertise to herself is appointed. I prefer the latter interpretation because it most closely sits with the legislative intention that the Board is to be composed of persons with different expertise, see also sections 10(3) and 15(1) & (4). I understand that Ms Kay has expertise in community health. On this basis, if the second instrument did not have the effect of appointing Ms Kay a member of the Board then there remained one vacancy on the Board, namely, a member with expertise in community health. As Ms Kay had been appointed on an acting basis to fill this membership position she continued to be an acting member until 21 July 1996 when she was appointed as member.

In summary, irrespective of whether the second instrument validly appointed Ms Kay as a member of the Board her involvement in Board activities for the whole period between 15 May 1996 (the purported commencement of the second instrument) and 21 July 1996 (the commencement of the third instrument appointing her a member) cannot be impeached on the basis that she did not have a valid appointment to participate in the Board proceedings. In other words, she was either validly appointed a member on 15 May 1996 or alternatively she continued to be an acting member of the Board.

The remaining issue in respect of the second instrument is whether it had the effect of appointing Ms Kay, Deputy Chairperson. Section 8(2) of the Act provides:

'8. (2) The Minister shall, by instrument, appoint a Deputy Chairperson from among the members of the Board.'

Assuming the second instrument did not have the effect of appointing Ms Kay a member of the Board then she remained as an acting member of the Board. There may be an issue of whether an acting member can be appointed Deputy Chairperson. For the purposes of this advice I do not consider it necessary to decide the point (for reasons set out below) but if this were possible, then the second instrument may have had the effect of appointing Ms Kay.

being an acting member, Deputy Chairperson. However, there must be some doubt about the effectiveness of the instrument because it purports to appoint Ms Kay Deputy Chairperson under section 10(1) and not the correct section being 8(2).

I have been advised by you that prior to the second instrument there was no Deputy Chairperson and that between 15 May 1996 (the purported commencement of the second instrument) and 15 August 1996 (the commencement of the third instrument appointing Ms Kay, Deputy Chairperson) the Chairperson was never absent from duty (if he or she had been then the Deputy Chairperson under section 3 of the Act would have fulfilled his or her duties). Accordingly, it is of no practical importance whether or not Ms Kay was appointed Deputy Chairperson on 15 May 1996 or 15 August 1996.

Effect of the appointment of Ms Kay as Deputy Chairperson for an indefinite period

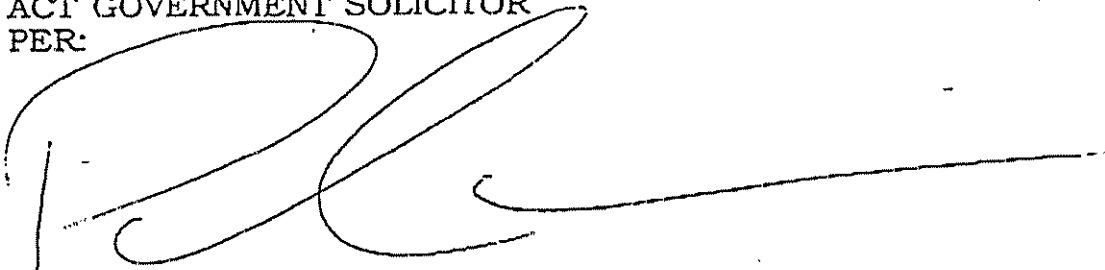
Section 8(2) enables the Minister to appoint a member, Deputy Chairperson. The Act does not state for what period a person is to be appointed to this position. In contrast section 10(1) provides for the appointment of members for a period of three years. Under section 28 of the *Interpretation Act 1967* where a person has power to make an appointment they also have the power to remove the person appointed.

If Ms Kay ceased to be a member then she would cease to be entitled to be a Deputy Chairperson and her appointment to this position would need to be revoked. However, there is no impediment to the Minister deciding during the period of Ms Kay's appointment as member that there should be a new Deputy Chairperson in which case the appointment of Ms Kay as Deputy Chairperson could be revoked and another member appointed Deputy Chairperson.

In summary, the Act does not require the appointment of Deputy Chairperson to be for a particular period of time. The Minister has the flexibility of determining the duration of Ms Kay's appointment as Deputy Chairperson, subject to the requirement that she cannot remain Deputy Chairperson if she ceases to be a member of the Board.

I trust this advice will assist you in responding to the latest report by the Committee. If you wish to discuss any of the matters contained herein please do not hesitate to contact me on 2070636.

ACT GOVERNMENT SOLICITOR
PER:



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