

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

REPORT NO. 16 OF 1996

. 2 October 1996

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Civic Square, London Circuit
CANBERRA ACT 2601
GPO Box 1020

STANDING COMMITTEE ON SCRUTINY OF
BILLS AND SUBORDINATE LEGISLATION

Telephone: (06) 2050171
Facsimile: (06) 2053109

Mr Greg Cornwell, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear Mr Cornwell

Please find enclosed a copy of Report No. 16 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. 16 of 1996.

Yours sincerely



Rosemary Follett, MLA
Chair

2 October 1996



Approved
Greg Cornwell, MLA

2 October 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:

Air Pollution (Amendment) Bill (No. 2) 1996

This Bill authorises the issue of a permit to burn plant matter for the purposes of conserving biological diversity or ecological integrity and repeals a provision made redundant by an amendment to the *Bushfire Act 1936*.

Appropriation Bill 1996-97

This Bill provides for the appropriation of moneys for the financial year 1996-97.

Bushfire (Amendment) Bill 1996

This Bill provides for the preparation and execution of bushfire fuel management plans for Government land prone to bushfires.

Children's Services (Amendment) Bill 1996

This Bill amends the Principal Act to make it clear that the best interests of a child are the paramount consideration in the exercise of any jurisdiction or power affecting or concerning a child.

Classification (Publications, Films and Computer Games) (Enforcement) (Amendment) Bill (No. 2) 1996

This Bill amends the Principal Act to include provisions for the licensing of distributors of "X" classified films and amends some enforcement provisions.

Cremation (Amendment) Bill 1996

This Bill restores the provision that permits a non-public servant medical practitioner to be appointed as a medical referee.

Electoral (Amendment) Bill (No. 3) 1996

This Bill amends the Principal Act to bring the ACT election funding and financial disclosure laws into line with those of the Commonwealth.

Land (Planning and Environment) (Amendment) Bill (No. 3) 1996

This Bill, along with the Administrative Appeals Tribunal (Amendment) Bill 1996, transfers the functions of the Land and Planning Appeals Board to the Administrative Appeals Tribunal.

Bills - Comments

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

Administrative Appeals Tribunal (Amendment) Bill 1996

This Bill, along with the Land (Planning and Environment) (Amendment) Bill (No 3) 1996, transfers the functions of the Land and Planning Appeals Board to the Administrative Appeals Tribunal, provides for the hearing of questions of law, changes the provisions relating to fees and charges and witnesses expenses, provides that forms are no longer to be made by regulation and makes a number of other minor amendments to the Principal Act.

Will this Reference Still be Necessary?

New section 19A (inserted by clause 9 of the present Bill) sets out the method of exercise of the powers of the AAT. Paragraph 19A (1) (c) refers to the giving of directions and, among other provisions, it refers to subsection 37(1A), which deals with directions to a person to lodge additional copies of documents.

Later on the present Bill, clause 19(b) repeals subsection 37 (1A). Should the cross-reference to subsection 37(1A) remain in paragraph 19A (1) (c) of the Bill?

As a follow-up, the Committees notices that clause 19 (h) of the present Bill inserts subsection (6A) in section 37. It also deals with the giving of directions to a person to lodge additional copies of documents.

The Committee wonders if there should be a cross-reference to this new subsection 37 (6A) in paragraph 19A (1) (c), perhaps instead of the repealed subsection 37 (1A).

Motor Traffic (Amendment) Bill (No. 2) 1996

This Bill changes procedures for the examination of learner drivers wishing to obtain a provisional licence and provides for the accreditation of driving instructors who may conduct examinations for provisional licences.

Is there a Possible Gap in the Review Process or is there a Mistaken Reference?

The Bill inserts new Part 1B into the Principal Act and provides for the accreditation of driving instructors.

A number of discretions are conferred on the Registrar in relation to the accreditation, suspension or cancellation of accreditation, further suspension or cancellation, disqualification and requiring an accredited driving instructor to undertake an approved training course.

Clause 15 of the Bill provides for the insertion in Part II of Schedule 7 of the Act of a number of items which allow people to seek review of the Registrar's decisions by the Administrative Appeals Tribunal of the new discretions inserted in the Act.

New item 7E provides as follows:

"7E Subsection 13M (1) Further suspending or
cancelling accreditation"

Clause 13M of the Bill provides as follows:

"13M. (1) Where a person's accreditation is suspended or cancelled, the person shall not, without reasonable cause, fail to return his or her certificate of accreditation to the Registrar within 7 days after the day on which suspension or cancellation takes effect.

Penalty: 5 penalty points.

(2) After the expiration of a period for which a person's accreditation has been suspended, the Registrar shall, on request, return the person's certificate of accreditation unless -

- (a) the accreditation is further suspended or is sooner cancelled; or
- (b) the period for which the accreditation was in force has expired."

It would appear that the reference in item 7E to "Subsection 13M (1)" may not be correct, as that subsection merely relates the return of a certificate of accreditation and not to a decision actually relating to "Further suspending or cancelling accreditation".

It might just be possible to argue that a reference to "Subsection 13M (2)" could be appropriate, if the Registrar refused to return the certificate of accreditation.

However, the Committee offers a more likely explanation.

The Committee notes that there is no item dealing with clause 13J, which deals with further suspension or cancellation in the following terms:

"13J. (1) Where, while a driving instructor's accreditation is suspended, the instructor does a thing, or fails to do a thing, for which his or her accreditation could, had it been in force, have been suspended or cancelled, the Registrar may suspend the instructor's accreditation for a further period not exceeding 9 months or cancel it.

(2) A suspension or cancellation under subsection (1) takes effect at the expiration of the period of 7 days after the date of the relevant notice under section 217C [which deals with notices of decision which can lead to an application for review by the AAT under section 217D]."

If it is decided that the argument can be sustained that item 7E can remain, provided it refers to "Subsection 13M(2)" instead of "Subsection 13M(1)", then it is suggested that there is a need to insert an item to deal with a right to review under section 13J, which deals directly with discretionary decisions of the Registrar to impose a further suspension or a cancellation of an instructor's accreditation.

If the argument about "Subsection 13M (2)" cannot be sustained, it is suggested that the reference in item 7E should simply be changed to "Subsection 13J".

Further support for the Committee's argument that this is what should happen, comes from the Explanatory Memorandum, which refers to "new section 13J" in connection with new review provisions, but contains no reference to "new Section 13M".

Public Sector Management (Amendment) Bill (No. 2) 1996

This Bill widens the obligations of public employees in relation to conduct, makes amendments relating to the engagement of former officers and employees, streamlines the making of amendments to Management Standards, restores a reference to the *Merit Protection (Australian Government Employees) Act 1984* (Commonwealth) as affecting employees of a Territory instrumentality and makes minor corrections.

Retrospectivity, but does the Retrospectivity Provision apply to the Correct Provision?

Part XI of the Principal Act deals with rights of review and investigations of grievances and includes provisions applying the Commonwealth *Merit Protection (Australian Government Employees) Act 1984* to ACT matters.

The definition of "employee" in section 223 of the Act excluded the operation of the Commonwealth Act in relation to employees of Territory instrumentalities.

Clause 9 of the Bill amends section 223 of the Act in such a way as to apply the Commonwealth Act to employees of Territory instrumentalities. Both the Presentation Speech and the Explanatory Memorandum indicate that the provision is made retrospective to 1 July 1994.

The Committee makes two comments.

First, the Explanatory Memorandum states as follows:

"This amendment commences retrospectively from 1 July 1994 to ensure effective operation of any actions and decisions made since this date by the Merit Protection and Review Agency."

Neither the Presentation Speech nor the Explanatory Memorandum indicates whether any decisions made may have been prejudicial to individuals and will be retrospectively validated.

Secondly, the Committee doubts if the intention to make it retrospective to 1 July 1994 has, in fact, been carried out in the Bill.

As noted above, the amendment is carried out by clause 9 of the Bill. However, subclause 2 (2) of the Bill provides that

"Section 8 shall be taken to have commenced on 1 July 1994."
(Emphasis added.)

Clause 8 actually deals with the reappointment of retired officers and there is no indication in either the Presentation Speech or the Explanatory Memorandum that that provision was to be made retrospective. In contrast, the Committee can find no provision in the Bill that provides for clause 9 to be made retrospective.

Perhaps these two matters could be checked.

Stamp Duties and Taxes (Amendment) Bill (No 3) 1996

This Bill provides for the introduction of stamp duty on hiring arrangements.

This Reference Perhaps Needs Checking

New Clause 64F is an interpretation clause and, among other definitions, there is a definition of "duty-free threshold". The definition refers to "the determination made for the purposes of paragraph 64G (a)".

This reference appears to be inaccurate and should be checked.

Witness Protection Bill 1996

This Bill puts in place arrangements for the ACT to participate in the Commonwealth Government's National Witness Protection Program.

Is this Reference Correct?

Clause 26 permits the Minister, by notice in the *Gazette*, to authorise an approved authority, as defined in clause 3, to exercise functions conferred on the Chief Police Officer of the ACT under arrangements entered into by the Chief Police Officer. Clause 26 refers to such arrangements being entered into

"under section 26 or the corresponding provision of a complementary witness protection law."

The reference to section 26 appears to be inaccurate. It does not sit well in clause 26 of the Bill and section 26 of the Commonwealth *Witness Protection Act 1994*, which perhaps might have been a candidate, is not a possibility, as it deals with something quite different, namely, preventing the Commissioner of Police and other people from disclosing information.

Should the reference perhaps be to section 25?

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Determination No. 201 of 1996 made under subsection 57 (2A) of the *Motor Vehicles (Dimensions and Mass) Act 1990* determines dimensions and width of vehicles under ss. 9 and 10 of the Act that must be complied with.

Determination No. 202 of 1996 made under subsection 57 (2) of the *Motor Vehicles (Dimensions and Mass) Act 1990* revokes Determinations 82, 83, 84, 85 and 86 of 1990 and determines the gross mass of vehicles and trailers and the mass that may be carried by an axle under ss. 24 and 25 of the Act that must be complied with.

Determination No. 203 of 1996 made under subsection 57 (1) of the *Motor Vehicles (Dimensions and Mass) Act 1990* determines a fee payable under the Act in relation to final infringement notices.

Determination No. 204 of 1996 made under section 12 of the *Trade Measurement (Administration) Act 1991* revokes Determination No. 71 of 1995 and determines fees and charges payable under the Act.

Determination No. 205 of 1996 made under section 90A of the *Sale of Motor Vehicles Act 1977* revokes Determination No. 69 of 1995 and determines fees and charges payable under the Act.

Determination No. 206 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. 207 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 Conder.

Determination No. 208 of 1996 made under section 44A of the *Business Franchise (Tobacco and Petroleum Products) Act 1984* revokes Determination No. 184 of 1996 and determines fees and charges payable under the Act.

Determination No. 210 of 1996 made under section 12 of the *Housing Assistance Act 1987* makes amendments to the Rent Relief Program by reducing to \$100 the income threshold that attracts a rental contribution by independent persons and excludes students from the Program.

Subordinate Law No. 20 of 1996 made under the *Land (Planning and Environment) Act 1991* changes the general rate of betterment payable under section 184 from 100% to 75% and for local centres meeting defined criteria to 50% and makes consequential amendments.

Subordinate Legislation - Comments

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

Determination No. 197 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 three years.

Determination No. 198 of 1996 made under section 16 of the *Gungahlin Development Authority Act 1996* appoints two specified persons as the Chairperson and Deputy Chairperson respectively of the Gungahlin Development Authority.

Determination No. 199 of 1996 made under paragraph 10 (1) (w) of the *Remuneration Tribunal Act 1995* specifies that the Chief Executive Officer, Chairperson, Deputy Chairperson and Members of the Gungahlin Development Authority are office holders and appointments for which the Remuneration Tribunal is to determine the remuneration and allowances payable.

Determination No. 200 of 1996 made under section 14 of the *Remuneration Tribunal Act 1995* makes an interim determination of the fees for the Chairperson and Members of the Gungahlin Development Authority to take effect from 19 August 1996.

On what Date Did these Appointments take Effect and are there Consequences Flowing from that Date of Effect?

Determination No. 197 of 1996 appoints 10 specified persons as members of the Gungahlin Development Authority for a period of three years and Determination No. 198 of 1996 appoints two specified persons as the Chairperson and Deputy Chairperson of the Authority.

The Committee will deal only with Determination No. 197 of 1996, but, if the matters raised are valid for it, they also apply to Determination No. 198 of 1996.

The Explanatory Statement for Determination No. 197 of 1996 states as Follows:

"The appointments take effect from 16 August 1996 for a term of 3 years."

The accuracy of this statement in the Explanatory Statement needs to be checked, as several consequences flow from its accuracy or inaccuracy.

Subsection 6 (1) of the *Subordinate Laws Act 1989* appears to be relevant in this checking process. 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. 197 of 1996 is dated 16 August 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* would appear to be the relevant date for its commencement.

Determination No. 197 of 1996 was notified in the *Gazette* on 3 September 1996, so that would appear to be the date upon which it, and thus the appointments, commenced. Determination No. 198 of 1996 was also notified in the *Gazette* on 3 September 1996. As mentioned above, the same arguments apply to it and it, too, appears to have commenced on 3 September 1996.

If nothing was done until 3 September 1996 either by the appointed Members of the Authority or by the two Members who, in addition to ordinary membership, were also appointed as Chairperson and Deputy Chairperson in their capacity as such office holders, there may be no problems. But, if they were involved in any activities in relation to the Authority before that date, then the validity of any such actions would need to be considered.

If, in fact, Determination No. 197 of 1996 and Determination No. 198 of 1996 didn't commence until 3 September 1996, there could also be flow on effects in relation to Determination No. 200 of 1996, which sets the fees to be paid to the Chairperson and the Members.

If any daily fees were paid under Determination No. 200 of 1996 for work undertaken prior to 3 September 1996, the validity of any such payments made to persons whose membership did not take effect until 3 September 1996 would need to be checked.

Determination No. 211 of 1996 made under section 12 of the *Housing Assistance Act 1987* establishes a new housing assistance program called the KickStart Housing Assistance Program to extend home purchase to tenants of ACT Housing through an ACT Government and private sector joint venture.

Is there Independent Review of these Discretions?

This new KickStart Housing Assistance Program confers a number of important discretions of the Commissioner for Housing.

There are other discretions, but three examples of these are as follows:

- The definition of "Income" in subclause 2.1 provides that the Commissioner may include or exclude income as the Commissioner decides.
- Subclause 3.4 provides that the Commissioner may decide that an applicant "has obtained unconditional approval from an Approved Lender notwithstanding that such approval may be subject to limitations or conditions".
- Clause 9 provides that the Commissioner "may approve not more than two banks or other financial institutions as lenders for the purposes of this Program" and "may withdraw approval of a lender at any time ... if the lender fails to comply with subclause 9.2; or on any other grounds as the Commissioner sees fit".

In the case of discretions relating to the "Income" and "approval of an unconditional approval, even although it is not unconditional" provisions, favourable or unfavourable decisions on these matters could be fundamental to the applicant getting or not getting an opportunity to buy a house.

In the case of approval or withdrawal of approval of a bank or other institution as an Approved Lender, there could be substantial commercial significance in the exercise of the Commissioner's discretion. Although the Program itself makes no mention of the arrangements that are in place, the Explanatory Statement mentions that there "exists, at this time, an exclusive arrangement between the ACT Government and Advance Bank and St George Bank for the provision of the services of Approved Lenders under this program".

Given the significance of the discretions, the Committee asks whether these (and other discretions in the Program) are subject to independent review. This question is asked under Clause 2(a)(iii) of the Committee's Terms of Reference which provides that the "Committee will consider whether ... [these provisions of the Program] make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions".

GOVERNMENT RESPONSES

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

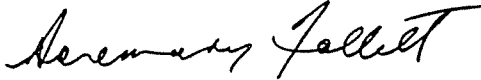
- Instrument No. 16 of 1996 made under the *Credit Act 1985* (Report No. 3 of 1996).
- Determinations Nos 35 - 42 of 1996 made under the *Land (Planning and Environment) Act 1991* (Report No. 6 of 1996).

- Determinations Nos. 34 and 80-83 of 1996 made under the *Agents Act 1968* (Reports Nos. 6 and 9 of 1996).
- Instrument No. 53 of 1996 made under the *Betting (Totalizator Administration) Act 1964* (Report No. 6 of 1996).
- Instrument No. 61 of 1996 made under the *Health Promotion Act 1965* (Report No. 7 of 1996).
- Determinations Nos 68 and 69 of 1996 made under the *Radiation Act 1983* (Report No. 7 of 1996).
- Crimes (Amendment) Bill (No. 2) 1996 (Report No. 9 of 1996).
- Gungahlin Development Authority Bill 1996 (Report No. 9 of 1996).
- Gungahlin Development Authority (Consequential Provisions) Bill 1996 (Report No. 9 of 1996).
- Determination No. 76 of 1996 made under the *Housing Assistance Act 1987* (Report No. 9 of 1996).
- Determinations Nos 145-149 of 1996 made under the *Health Professions Boards (Procedures) Act* and the *Nurses Act 1988* (Report No. 10 of 1996).
- Determinations Nos 120 and 135 of 1996 made under the *Roads and Public Places Act 1937* (Report No. 10 of 1996).
- Determination No. 121 of 1996 made under the *Building and Services Act 1924* (Report No. 10 of 1996).
- Determination No. 126 of 1996 made under the *Cemeteries Act 1933* (Report No. 10 of 1996).
- Subordinate Law No. 11 of 1996 being the Supreme Court Rules (Amendment) (Report No. 10 of 1996).
- Determination No. 151 of 1996 made under the *Land (Planning and Environment) Act 1991* (Report No. 11 of 1996).
- Determinations Nos. 153 and 154 of 1996 made under the *Plumbers, Drainers and Gasfitters Board Act 1982* (Report No. 11 of 1996).
- Determination No. 158 of 1996 made under the *Gas Act 1992* (Report No. 11 of 1996).

- Determination No. 159 of 1996 made under the *Clinical Waste Act 1990* (Report No. 11 of 1996).
- Determinations Nos 171, 172 and 173 of 1996 made under the *Tenancy Tribunal Act 1996* (Report No. 12 of 1996).
- Determinations Nos 174, 175, 176, 177, 178 and 179 made under *Credit Act 1985* (Report No. 12 of 1996).

Copies of the responses are attached. In relation to the response dated 23 September 1996 the Committee would be interested in seeing the advice provided by the Government Solicitor's Office concerning appointments made of Acting Presidents of the Tenancy Tribunal and to act as Chairperson of the Credit Tribunal.

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

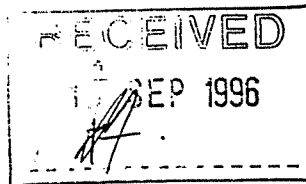


Rosemary Follett, MLA
Chair

2 October 1996



Gary Humphries MLA



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

→ Jean Duncan
c/o Secretary

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 ^{Rosemary}Follett

I refer to the Standing Committee's Reports Nos 3 (3 April 1996), 6 (21 May 1996), 7 (4 June 1996), 9 (25 June 1996) and 10 (24 July 1996). I am now in a position to respond to most of the matters raised in these Reports that your Committee has sought assistance with.

In Report No 3 you have commented on Instrument No 16 of 1996. I apologise for the delay in this response, however, as the Instrument was made following consultation with all Credit Act jurisdictions it was necessary for your comment to be raised with authorities inter-state.

You will recall the Instrument is a declaration under section 19 of the *Credit Act 1985*. It relaxes the operation of section 122 of the Act which prohibits canvassing at a person's place of residence by, in effect, allowing canvassing by post, telephone or telex. Your comment sought clarification as to whether canvassing by facsimile would be included by the reference to "telephone". I am advised that canvassing by facsimile would not be included.

The nationally uniform Consumer Credit Code is scheduled to commence on 1 November 1996. The Code will supersede the Credit Act. Section 145 of the

ACT Legislative Assembly,
London Circuit, Canberra ACT 2601
GPO Box 1020, Canberra ACT 2601

Phone (06) 205 0133 Fax (06) 205 0427

Printed on recycled paper

Code makes it an offence to harass a person in attempting to get that person to apply for credit. Section 146 makes it an offence to canvass, in person or in the person of an employee or agent, at a place of residence for the purpose of inducing a person who resides at the residence to apply for or obtain credit. Section 146 does not apply if the person who visits is selling door-to-door.

As the matters dealt with in the Instrument will shortly be replaced by the provisions of the Code I do not propose to pursue this matter.

In Report No 6 you have commented on a number of appointments to the Heritage Council made by Determinations Nos 35 - 42 of 1996 and have sought confirmation that consultation occurred with the appropriate Assembly Committee as required by the *Statutory Appointments Act 1994*. I can confirm the Standing Committee on Economic Development and Tourism was consulted and had no objections to the appointments.

The policy area has been advised that in future the explanatory statement for an appointment should include details on compliance with the Statutory Appointments Act.

In Reports Nos 6 and 9 you have commented on appointments to the Agents Board made by Determinations Nos 34 and 80 - 83 of 1996. You have pointed out the instruments involve brief periods of retrospectivity. As is suggested in the Reports the retrospectivity arises because the instruments appoint the appointees from the date the instrument is signed which is a few days prior to the day on which it was notified in the Gazette.

I am advised that no question of a person having suffered any detriment arises from these appointments, indeed the Board took no action during the periods in question.

I can also advise that the *Guidelines on the Preparation of Disallowable Instruments*, which as you know will shortly be re-issued, draws the attention of officers to the necessity of avoiding the retrospectivity that can arise when an appointment is expressed to commence on the date the instrument is signed which will almost invariably be a few days before it is notified in the Gazette.

In Report No 6 you have commented on an appointment to the ACT Totalizator Agency Board. As you know the Board has been replaced following the passage of the *Betting (Corporatisation) (Consequential Amendments) Act 1996* which was part of the legislation enacted to bring ACTTAB Limited into existence as a territory owned corporation. In the circumstances a number of the matters raised in your report do not appear to require further consideration. I am attaching a copy of advice from the Government Solicitors Office which specifically deals with the question of the short period of retrospectivity that was involved in the appointment.

In Report No 7 you have questioned the validity of an appointment to the Health Promotion Board made by Determination No 61 of 1996. Legal advice on the validity of the appointment has confirmed that it should be re-made. I understand a fresh appointment will be notified in the Gazette shortly. I am advised that the Board did conduct business during the period this appointment was thought to be on foot. The appointee participated in that business. However, I am advised a sufficient number of validly appointed members also participated in the business for it to be accepted as validly conducted.

In Report No 7 you have commented that the period of appointment to the Radiation Council specified in Determinations Nos 68 and 69 of 1996 should be re-examined as it appeared to exceed that allowed by the *Radiation Act 1983* by 1 day. The comment has been noted and fresh appointments have been made by Determinations No 143 and 144 of 1996. Legal advice on the business conducted by the Council during the currency of Determinations Nos 68 and 69 and the corrective action, if any, that should be taken is being obtained.

In Report No 9 you have commented on the *Crimes (Amendment) Bill (No 2) 1996*. This Bill was passed by the Assembly on 26 June 1996. However, in view of the seriousness of the comments made by the Committee I think I should nevertheless respond formally to the Report. As you know the Bill deals with the examination by a medical practitioner of a person in lawful custody.

The Report puts the view that the Bill reduces the existing rights of a person who is in lawful custody and that it operates retrospectively. This view is based on the assumption that in the ACT such a person previously had the right to refuse to provide a sample of blood, saliva or hair. I do not take that view. My main reason for disagreeing is that until the NSW case of *Fernando* in 1995, the only authoritative decision on the question was that no such right existed. The leading case on the question was *Queen v Franklin* (1979) 122 SASR 101 where it had been held that the "examination" in the existing section included the taking of a blood or hair sample - if necessary, without the consent of the person.

The ACT provision was revised in 1994, and no change was made to the consent aspect because, based on *Franklin*, the sample could be taken without consent. The present amendment simply makes the original intention of the legislature clear, given that a decision of a NSW court on a similar section had cast doubt on whether that intention had been given effect to. In 1995 the NSW legislature passed a similar amendment. In the absence of a decision by a higher level ACT court which follows *Fernando* and not *Franklin* I do not believe that any right can be said to have been vested in a person in the ACT as a result of the NSW court decision.

Even accepting the view that a person in custody's rights are affected by the provision I do not see the provision as having a retrospective operation as the

law will operate only on and from the day it commences. It must, however, apply at that time to all persons in the category to which it is to apply in the future. My view is that the provision does not operate retrospectively simply because it places a fresh obligation on an existing class of person. Had the amendment excluded a person already in custody at the time of commencement, it would lead to the unacceptable result that of two people sharing a cell one could be subject to the provision whilst the other would not.

In Report No 9 you have commented on the *Gungahlin Development Authority Bill 1996* and the *Gungahlin Development Authority (Consequential Provisions) Bill 1996*. In particular you queried whether the responsibilities of the Chief Executive of the Gungahlin Development Authority are clear. You also pointed out that an offence provision did not contain a defence of without reasonable excuse.

As you know the Bills were passed by the Assembly on 26 June 1996, however, MLAs may find the following information helpful.

The Government considers the responsibilities of the Chief Executive Officer (CEO) are clearly set out in the legislation. Certain specific issues were raised in your report which relate mainly to the rights and obligations of the members of the Authority. Most of these members will be Ministerial nominees who will discharge their functions on a part-time basis. One member, however, will be the CEO of the Authority appointed by the Minister. He or she will be under a contract of employment and the Act sets out some further conditions of his or her appointment.

Because the CEO will be an ex-officio member of the Authority, not all the provisions relating to members will be applicable to him or her. The Act deals with this situation by making provisions for the members generally, but excluding the CEO from the definition of member, except where a provision is to be specifically applicable to him or her.

In particular, the responsibilities of the CEO, both as a member and as CEO are clear, although in relation to disclosure of interests they parallel each other (because he or she will have responsibilities both to the Minister and to the Authority) and their breaches bear, as indeed they must, different consequences.

The provisions of section 21 (Termination of members' appointment) clearly do not apply to the CEO because the term "member" is used in its defined sense so as to exclude the CEO. If the CEO was included as a member for the purposes of the provision his or her status as a member could not, in any event, be affected by action taken under the provision. Any termination action taken against him or her would immediately be rendered ineffective because the Act would still provide that he or she was a member by virtue of holding the office of CEO.

While the CEO cannot be dismissed as a member while he or she is CEO of the Authority, a breach of the provisions of the Act would constitute misbehaviour and place his or her employment in jeopardy under section 29.

You also commented on the absence of a "without reasonable excuse" defence in section 21. This matter was attended to by an amendment to the Bill.

You also pointed out that a clerical oversight had occurred in the *Gungahlin Development Authority (Consequential Provisions) Bill 1996*. This matter was attended to under Standing Order 191.

In Report No 9 you have commented on Determination No 76 of 1996 which amends the Public Rental Housing Assistance Program. You have pointed out there is an error in the citation of one of the previous Determinations. I have been advised the error is to be brought to the attention of those who obtain the Determination from ACT Publications by way of a corrigendum.

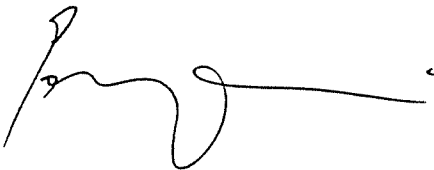
I can also advise the Program is currently being comprehensively reviewed. Once the review is complete the intention is that all existing Determinations will be revoked and a fresh Program will be determined.

In Report No 10 you have commented on Determinations Nos 145-149 which effect a number of appointments to the Nurses Board. You have queried whether there was consultation with an Assembly Committee in accordance with the *Statutory Appointments Act 1994*. I have been advised the Standing Committee on Social Policy was consulted and had no objections to the appointments.

The policy area has been advised that in future the explanatory statement for an appointment should include details on compliance with the *Statutory Appointments Act*.

I can also advise the *Guidelines on the Preparation of Disallowable Instruments* will draw attention to the necessity for explanatory statements for instruments of appointment to include a reference to the consultation phase of an appointment.

Yours sincerely



Gary Humphries
Attorney-General

16 SEP 1996

Documents
Enclosed



AUSTRALIAN CAPITAL TERRITORY
GOVERNMENT SOLICITOR

Your Reference:

Our Reference: 96-2-281197
Dr Douglas Jarvis
Ph: (06) 207 0635

1st Floor
GIO House
City Walk
CANBERRA CITY 2601

30 July 1996

Chris Vevers
GBE Policy Unit
Business and Regional Development Bureau
GPO Box 158
CANBERRA ACT 2601

OPINION ON SCRUTINY OF BILLS REPORT NO. 6/1996 -
DETERMINATION NO. 53 OF 1996 (APPOINTMENT OF MR. GRAEME
CAMAGE AS A MEMBER OF THE ACT TOTALIZATOR
ADMINISTRATION BOARD)

I refer to your faxed request for advice dated 18 July 1996 in relation to the above matter.

BACKGROUND

Mr. Graeme Clement Camage was appointed as a member of the ACT Totalizator Administration Board by way of Instrument No. 53 of 1996. This appointment took effect as of 30 April 1996. The term of Mr. Camage's office was not specified in the Instrument.

The Instrument was gazetted in *Special Gazette* No. S82 of 3 May 1996.

Section 7 of the *Subordinate Laws Act 1989* provides (as relevant):

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

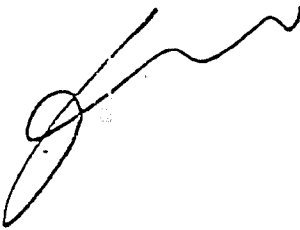
(b) liabilities would be imposed on a person (other than the Territory or a Territory authority) in respect of any act or omission before the date of notification;..

The Instrument of Appointment is a disallowable instrument for the purposes of section 10. As such, the provisions in sections 6 and 7 regarding gazettal and retrospectivity apply.

The Instrument was notified in the *Gazette* as required by section 6(1). The appointment took effect on 30 April 1996 as specified in the Instrument. The restrictions on retrospective operation in section 7 do not apply as no rights have been affected prejudicially and no liabilities have been imposed.

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

ACT Government Solicitor
Per:

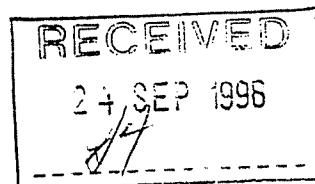




Gary Humphries MLA

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

Rosemary

Dear Ms Follett

I refer to the Standing Committee's Reports Nos 10 (24 July 1996), 11 (27 August 1996) and 12 (3 September 1996). I also refer to the statement you made in the Legislative Assembly on 3 September 1996 when tabling Report No 12.

I am now in a position to respond to a number of the matters raised in these Reports. However, before I do so I think I should make some general comments on the standard of disallowable instruments and explanatory statements that have been placed before the Assembly in recent times. This was the subject of your statement of 3 September.

Your recent Reports have indicated there has been a decline in the standard of disallowable instruments and explanatory statements. Reports Nos 10, 11 and 12 contain a number of examples of this. I anticipate the following steps should help overcome some of the difficulties that have emerged.

As you know the *Guidelines for the Preparation of Disallowable Instruments* have recently been reviewed and brought up to date. In particular, the Guidelines contain additional information on statutory appointments that are subject to

ACT Legislative Assembly,
London Circuit, Canberra ACT 2601
GPO Box 1020, Canberra ACT 2601

Phone (06) 205 0133 Fax (06) 205 0427

Printed on recycled paper

the *Statutory Appointments Act 1994* [the Appointments Act]. I understand an advance copy of the Guidelines has been provided to your Committee's Secretary. Further copies will be provided as soon as they are printed. In the meantime the Guidelines have been circulated throughout the ACT Public Service by electronic mail.

As a number of comments in your recent Reports have related to appointments to which the Appointments Act applies the portions of the Guidelines that relate to making appointments have been collated and separately circulated by electronic mail.

In addition, the Chief Executive of my Department has written to his colleagues to suggest means for increasing awareness of the need for careful attention to all necessary requirements in preparing instruments for the setting of fees or making appointments.

These measures are of course in addition to comments provided by your Committee which serve as a primary source of information to agencies.

When Guidelines were first issued in 1993 there was a marked improvement in the standard of disallowable instruments. My Department will keep the matter under review and if there is not an improvement in the near future in response to the above measures and the comments of your Committee further consideration will need to be given to the matter.

In Report No 10 you have pointed out that Determinations Nos 120 and 135 made under the *Roads and Public Places Act 1937* incorrectly refer to Determination No 89 of 1995 as having been published in the Gazette when it was in fact notified. This matter has been brought to the attention of those responsible.

Determinations Nos 120 and 135 also effected multiple revocations of Determination No 89 of 1995. You asked that the effect of the possible gap in legal authority to collect fees that results from this multiple revocation be considered. I can advise that during the period when there may have been a gap in legal authority no fees were collected.

You have also pointed out that Determination No 135 refers to a non-existent section of the Act. This matter is still under consideration and I will write to you further when the results of that consideration is complete.

In Report No 10 you have pointed out the explanatory statements for Determination No 121 made under the *Building and Services Act 1924* and Determination No 126 made under the *Cemeteries Act 1933* do not comply with the Guidelines in that insufficient explanation of fees is provided and no comparison is made with the fees set in the previous year's determination. This matter has been brought to the attention of those responsible.

In Report No 10 you commented on an editorial error in Subordinate Law No 11 of 1996 being Supreme Court Rules (Amendment). This matter has been brought to the attention of the Supreme Court so that any necessary action can be taken.

In Report No 11 you have asked whether there was consultation with an Assembly Committee as required by the *Statutory Appointments Act 1994* in relation to appointments effected by Determination No 151 [ACT Heritage Council] and Determinations Nos 153 and 154 [Plumbers, Drainers and Gasfitters Board].

I can advise the Standing Committee on Economic Development and Tourism was consulted concerning the appointment to the Heritage Council and had no objections to the appointment; the Standing Committee on Public Accounts was consulted concerning the appointment to the Plumbers, Drainers and Gasfitters Board and had no objections.

Those responsible for the preparation of the explanatory statements for these appointments have been advised that the statement should refer to the consultation phase of the appointment process.

In Report No 11 you have commented on Determination No 158 made under the *Gas Act 1992* and Determination No 159 made under the *Clinical Waste Act 1990*. In each case you have pointed out the determinations incorrectly refer to the determination that is being revoked as having been published in the Gazette when in fact they were notified. You have also pointed out that the mistake is a repetition of one that occurred last year.

Those responsible for the preparation of these determinations have been advised of the correct form for the determinations.

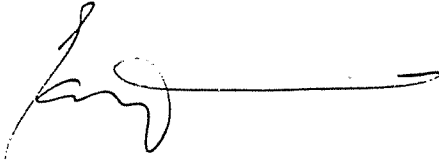
In Report No 12 you have commented on appointments made of Acting Presidents of the Tenancy Tribunal [Determinations Nos 171, 172 and 173] and on appointments to act as Chairperson of the Credit Tribunal [Determinations Nos 175, 176, 177, 178 and 179].

You have queried whether it is possible for multiple appointments to be made to these positions. I am advised the appointments were made on the advice of the Government Solicitors Office that multiple appointments, of this nature, were possible, pursuant to the provisions of the Acts concerned.

You have also queried the lack of a specified term for the appointments. The appointments are standing appointments, that is, they were made against the possibility that a vacancy might arise or that the incumbent might be absent or otherwise unable to perform their duty. As set out in your Report the provisions under which the appointments were made limit the period that an appointee may act continuously during a vacancy to 12 months. I am advised

this provision does not require that a period for an appointment be specified in the instrument of appointment rather, in circumstances where the appointee is acting as a result of a vacancy in the office, it places a limitation on the time during which the appointee may continuously act.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gary', followed by a long horizontal line extending to the right.

Gary Humphries
Attorney-General

23 SEP 1995