

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

REPORT NO. 8 OF 1995

22 August 1995

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

Mr Paul Osborne, MLA (Chair)
Mr Andrew Whitecross, MLA (Deputy Chair)
Mr Harold Hird, MLA

Legal Advisor: Emeritus Professor Douglas Whalan, AM
Secretary: Mr Tom Duncan
Deputy Secretary: Ms Beth Irvin

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.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Subordinate Law No. 20 of 1995 being the *Land (Planning and Environment) Regulations (Amendment)* amends the provisions relating to the calculation of betterment on applications for lease variations depending upon the dates when the applications were made.

Subordinate Law No. 21 of 1995 being the *Motor Vehicle (Third Party Insurance) Regulations (Amendment)* amends the principal Regulations to increase the maximum Compulsory Third Party premiums that can be charged.

Subordinate Law No. 22 of 1995 being the *Poisons and Drugs Regulations (Amendment)* adds two items to the restricted substances list and indicates who may be eligible to prescribe or supply them.

Subordinate Law No. 23 of 1995 being the *Stamp Duties and Taxes Regulations (Amendment)* prescribes four named institutions that can pay stamp duty by lodging returns.

Subordinate Law No. 24 of 1995 being the *Electricity and Water (Modification) Regulations* modifies section 33 of the *Electricity Act 1971* to provide that work specified in section 33 must be tested and accepted by a person authorised by the Chief Executive.

Subordinate Law No. 25 of 1995 being the *Rates and Land Tax Regulations (Repeal)* repeals redundant regulations.

Subordinate Law No. 26 of 1995 being the *Motor Traffic Regulations (Amendment)* increases penalties for parking and traffic infringements.

Public Management Standard - 5/1995 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner with the approval of the Chief Minister amends Public Sector Management Standard - 1/1994 consequent upon the corporatisation of ACTEW.

Public Management Standard - 6/1995 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner with the approval of the Chief Minister amends Public Sector Management Standard - 1/1994 by providing for changes to base rates of pay and providing a consolidated set of pay rates for the ACT Government Service.

Determination No. 41 of 1995 made under section 217A of the *Motor Traffic Act 1936* determines an administrative charge for parking and traffic infringements for the purposes of subsection 4(10).

Determination No. 42 of 1995 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 6 of 1994 and Determination No. 2 of 1995 and determines registration fees for motor vehicles.

Determination No. 43 of 1995 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 53 of 1994 and Determination No. 151 of 1994 and determines registration fees for drivers' licences.

Determination No. 46 of 1995 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 126 of 1994 and determines fees for number plates.

Determination No. 48 of 1995 made under section 65 of the *Building Act 1972* revokes Determination No. 81 of 1994 and determines new fees payable under the Act.

Determination No. 54 of 1995 made under section 116 of the *Unit Titles Act 1970* revokes Determination No. 84 of 1994 and determines new fees payable under the Act.

Determination 57 of 1995 made under section 59A of the *Administrative Appeals Act 1989* revokes Determination No. 36 of 1994 and determines application fees and charges payable under the Act for copies of instruments.

Determination No. 59 of 1995 made under section 126 of the *Associations Incorporation Act 1991* revokes Determination No. 74 of 1994 and determines new fees payable under the Act.

Determination No. 61 of 1995 made under section 74 of the *Coroner's Act 1956* revokes Determination No. 35 of 1994 and redetermines fees payable under the Act.

Determination No. 63 of 1995 made under section 37 of the *Instruments Act 1933* revokes Determination No. 75 of 1994 and determines a new fee and redetermines two fees payable under the Act.

Determination No. 65 of 1995 made under section 248A of the *Magistrates Court Act 1930* revokes Determination No. 34 of 1994 and determines new fees payable under the Act.

Determination No. 67 of 1995 made under section 62 of the *Registration of Births, Deaths and Marriages Act 1963* revokes Determination No. 72 of 1994 and determines new fees payable under the Act.

Determination No. 68 of 1995 made under section 8 of the *Registration of Deeds Act 1957* revokes Determination No. 76 of 1994 and determines new fees payable under the Act.

Determination No. 70 of 1995 made under section 37 of the *Supreme Court Act 1933* revokes Determination No. 33 of 1994 and determines new fees payable under section 37A of the Act.

Determination No. 72 of 1995 made under section 101 of the *Weapons Act 1991* revokes Determination No. 74 of 1993 and determines new fees payable under the Act.

Determination No. 73 of 1995 made under section 54 of the *Podiatrists Act 1994* determines fees payable under the Act.

Determination No. 79 of 1995 made under section 66 of the *Gaming Machine Act 1987* revokes Determination No. 147 of 1992 and determines a new fee to be paid under subsection 34(2) for the issue of a repairer's certificate.

Determination No. 81 of 1995 made under subsection 22A(1) of the *Cemeteries Act 1933* revokes Determination No. 55 of 1994 and determines new fees payable under the Act.

Determination No. 84 of 1995 made under section 40A of the *Dog Control Act 1975* revokes Determination No. 86 of 1994 and determines new fees payable under the Act.

Determination No. 93 of 1995 made under section 55 of the *Psychologists Act 1994* determines fees payable under the Act.

Determination No. 94 of 1995 made under section 7 of the *Skin Penetration Procedures Act 1994* approves "The Skin Penetration Procedures Code" as a Code of Practice under the Act.

Determination No. 95 of 1995 made under section 22 of the *Animal Welfare Act 1992* approves the "Code of Practice for the Welfare of Greyhounds in the ACT" as a Code of Practice under the Act.

Determination No. 96 of 1995 made under section 22 of the *Animal Welfare Act 1992* approves the "Code of Practice for the Welfare of Farmed Deer" as a Code of Practice under the Act.

Determination No. 97 of 1995 made under section 22 of the *Animal Welfare Act 1992* approves the "Code of Practice for the Handling of Companion Animals in Pounds and Shelters in the ACT" as a Code of Practice under the Act.

Determination No. 98 of 1995 made under section 22 of the *Animal Welfare Act 1992* approves the "Code of Practice for the Welfare of the Goat" as a Code of Practice under the Act.

Determination No. 99 of 1995 made under section 18 of the *Nature Conservation Act 1980* by the Flora and Fauna Committee determines criteria for assessing whether the Committee should recommend that the Minister should declare a species to be vulnerable or endangered, or an endangered community or that there is a threatening process that may render a species vulnerable or endangered.

Determination No. 101 of 1995 made under section 12 of the *Housing Assistance Act 1987* varies the Public Rental Housing Assistance Program to provide for a new definition of income for the purposes of the Program.

Determination No. 102 of 1995 made under section 64 of the *Nature Conservation Act 1980* determines criteria that the Conservator of Flora and Fauna must observe in granting a licence.

Determination No. 104 of 1995 made under section 4 of the *Public Place Names Act 1989* revokes Determination No. 96 of 1991 and determines the name, origin and significance of the public place that is Territory land as the Division of Mulanggari in the District of Gungahlin.

Determination No. 105 of 1995 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of new streets in the District of Garran.

Subordinate Legislation - Comment

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

Determinations were not Published in the Gazette. Errors Reported on by the Committee Corrected. Were some Fees Missing from a Determination being Revoked and are there Flaws in a Determination and its Predecessor?

Determination No. 47 of 1995 made under section 110 of the *Animal Welfare Act 1992* revokes Determination No. 80 of 1994 and determines new fees payable under the Act.

Determination No. 50 of 1995 made under section 83A of the *Nature Conservation Act 1980* revokes Determination No. 87 of 1994 and determines new fees payable under the Act.

Determination No. 51 of 1995 made under section 7 of the *Pounds Act 1928* revokes Determination No. 89 of 1994 and determines new fees and charges payable under the Act.

Determination No. 52 of 1995 made under section 42 of the *Stock Act 1991* revokes Determination No. 91 of 1994 and determines new fees payable under the Act.

Determination No. 55 of 1995 made under section 39 of the *Water Pollution Act 1984* revokes Determination No. 92 of 1994 and determines new fees payable under the Act.

Determination No. 64 of 1995 made under section 105A of the *Liquor Act 1975* revokes Determination No. 160 of 1994 and determines new fees and redetermines other fees payable under the Act.

Determination No. 76 of 1995 made under section 4 of the *Motor Omnibus Services Act 1955* revokes Determination No. 47 of 1994 and determines new charges payable under the Act.

Determination No. 82 of 1995 made under section 12 of the *Clinical Waste Act 1990* revokes Determination No. 64 of 1994 and determines a new fee for the issue or renewal of a licence to transport clinical waste.

Determination No. 83 of 1995 made under subsection 12A(1) of the *Dangerous Goods Act 1984* revokes Determination No. 60 of 1994 and determines new fees payable under the Act.

Determination No. 86 of 1995 made under section 27B of the *Hawkers Act 1936* revokes Determination No. 57 of 1994 and determines new fees payable under the Act.

Determination No. 87 of 1995 made under section 57 of the *Motor Vehicles (Dimensions and Mass) Act 1990* revokes Determination No. 62 of 1994 and sets new fees payable under the Act.

Determination No. 88 of 1995 made under section 45A of the *Plumbers, Drainers and Gasfitters Board Act 1982* revokes Determination No. 59 of 1994 and determines new fees payable under the Act.

Determination No. 89 of 1995 made under section 9A of the *Roads and Public Places Act 1937* revokes Determination No. 61 of 1994 and determines new charges payable under the Act.

Determination No. 90 of 1995 made under the *Health Act 1993* revokes Determination No. 28 of 1995 and determines new fees and charges payable under the Act.

Non-Publication

The Committee illustrates a minor inaccuracy that occurs in all of these determinations by selecting a random sample.

Determination No. 76 of 1995 made under the *Motor Omnibus Services Act 1955* revokes Determination No. 47 of 1994. The determination and the explanatory statement both state that Determination No. 47 was "published in the Australian Capital Territory Special Gazette No S124 of 27 June 1994".

Anyone looking for it in that *Gazette*, as the Committee did, would be disappointed, as it was not published in that *Gazette*. All that was published there was a notification indicating that a determination had been made altering charges payable under the *Motor Omnibus Services Act 1955* and stating where a copy of the determination could be bought.

As this is a revocation, no question of invalidity arises because of this error. However, when the next determination is made under the Act, perhaps a correction should be made.

With the following exceptions, these same comments apply to the other determinations mentioned under this heading.

In relation to Determination No. 88 of 1995 made under the *Plumbers, Drainers and Gasfitters Board Act 1982* and Determination No. 90 made under the *Health Act 1993*, the determinations themselves inaccurately state that the determination being revoked was published in the *Gazette* but the explanatory statement accurately states that the revoked determination was merely notified in the *Gazette*.

The Committee makes more significant comments about Determination No. 88 of 1995 later in this report. The Committee also makes a favourable comment about Determination No. 90 of 1995.

Correction of Errors Pointed out by the Committee

Determinations under the Dangerous Goods Act

In its Report No. 12 of 1994 the Committee referred to the fact that there is an unusual set-up for the fees relating to dangerous goods. The basic provisions appear in the New South Wales Act and regulations and these are applied in the ACT by our *Dangerous Goods Act 1984*. This means that the provisions under which fees are levied are not in our Act, but in the New South Wales legislation.

In last year's determination No. 60 of 1994, there was no reference to the New South Wales legislation and this meant that confusion could have occurred if a person looked for the relevant provisions in our ACT legislation.

The Committee was pleased to note that its suggestions have been adopted in this year's determination, Determination No. 83 of 1995, and possible confusion has been eliminated.

Determinations made under the Health Act 1993

In its Report No. 2 of 1995 the Committee drew attention to two small mistakes in Determination No. 28 of 1995, which is revoked by Determination No. 90 of 1995.

The Committee is pleased to note that the mistakes have been corrected in the latest determination.

Were there Fees Missing from Last Year's Determination?

The Committee makes two further comments about Determination No 87 made under the *Motor Vehicles (Dimensions and Mass) Act 1990* and the determination that it revokes, Determination No. 62 of 1994.

First, the Committee notes that, although all the other references in the determination and the explanatory statement are correct, the explanatory statement erroneously states that the determination is revoking fees made under the *Motor Vehicles Act 1936*. It is, of course, revoking a determination of fees made under the *Motor Vehicles (Dimensions and Mass) Act 1990*.

Secondly, the following fees need to be considered.

Among other fees fixed under heading **1. Lodgement Fees** there is a fee for "Examination of vehicle NOT the subject of a permit application 72.00" and a fee for "Route Survey where an application has NOT been lodged 72.00".

Under heading **4. Escort Fee** there is a fee fixed for "Normal working hours (per hour) 36.00" and "Outside normal working hours (per hour) plus \$100.00 36.00".

Under heading **5. Special Fees** there is a solitary fee fixed being a "Call out Fee 107.00".

As is required by the *Guidelines for the Preparation of Disallowable Instruments* of May 1993 prepared by the Attorney-General's Department, the explanatory statement for the present determination very properly sets out the new fees to be charged under the present determination for the year 1995-96 and gives the fees that were charged for the year 1994-95.

The present explanatory statement indicates that there were fees being charged during 1994-95 for all of the services under headings **1, 4 and 5** that have set out above.

However, neither the copy of the revoked determination, Determination No. 62 of 1994, nor the explanatory statement for that determination that the Committee scrutinised last year refers to any of these fees.

Furthermore, a search of the determination for the 1993-94 year, Determination No 120 of 1993 (which was revoked by Determination No. 62 of 1994), shows that some, but not all, of the fees apparently missing from Determination No. 62 of 1994 were included in that earlier determination.

The following questions seem relevant. Did the Committee simply get flawed copies of Determination No. 62 of 1994 and its explanatory statement to scrutinise last year? If there were flawed copies, were the ones tabled in the Assembly also flawed? Or were some fees missed last year? Were any fees collected in relation to the missing items, and, if so, what amounts were involved? If so, under what authority were they collected?

Is this Determination Flawed in one Respect and was its Predecessor Flawed in Another Respect?

Determination No. 88 of 1995 made under section 45A of the *Plumbers, Drainers and Gasfitters Board Act 1982* revokes Determination No. 59 of 1994 and purports to determine new fees under the Act.

The Committee notes from the explanatory statement that the present determination and its Schedule, among other licence fees, intended to set fees for licences for a Sprinkler Fitter. The explanatory statement indicates that the projected fees for the 1995-96 year were to be \$75.00 for a 1 year licence and \$300.00 for a 5 year licence. In brackets it is indicated that the respective licences for 1994-95 under the revoked Determination of Fees No. 59 of 1994 were \$72.00 and \$288.00.

However, an inspection of Determination of Fees No. 59 of 1994 shows that there were no fees set at all for Sprinkler Fitter licences. Thus, if any licence fees were charged during the 1994-95 year for Sprinkler Fitter licences, there appears to have been no legal authority for them to be collected under determination No. 59 of 1994.

This matter needs to be looked at as it appears that fees may have been collected without any legal authority in the case of Determination No. 59 of 1994 and may be presently being collected without authority under Determination No. 88 of 1995.

A Slight Inconsistency

Determination No. 40 of 1995 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 150 of 1994 and determines registration fees for vehicle licences and permits.

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

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

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

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

In the revoked determination the taxi licence reference was also in the detailed form and referred to a fee under paragraph 27(1)(a).

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

Is the Present Determination Correct or the one that is being Revoked Correct?

Determination No. 44 of 1995 made under clause 4 of the HomeBuyer Housing Assistance Program made under section 12 of the *Housing Assistance Act 1987* revokes Determination No. 44 of 1994 and determines registration fees.

The Committee notes that the non-refundable fee to register as an eligible person under the Program is determined “for the purposes of clause 4.1” in the present determination. In the determination that is being revoked the fee was stated as being determined “for the purposes of clause 4.2”.

Perhaps a check should be made to see which is correct. If it is decided that the present determination referring to clause 4.1 is correct, a decision needs to be made as to whether the fees collected under the inaccurately revoked determination (and perhaps fees collected under even earlier determinations of fees) have been validly collected.

A tiny Error

Determination No. 45 of 1995 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 127 of 1994 and determines registration fees for parking labels.

The Determination and the explanatory statement both state that the determination being revoked, Determination No. 127 of 1994, was “dated 16 August 1994”. As the Committee pointed out in its Report No. 14 of 1994, Determination No. 127 was, in fact, not dated.

Advice was later received from the then Attorney-General, Mr Connolly, on 1 November 1994 that the "Government Solicitor's Office has advised that the failure to date the determination does not affect its validity".

Provided that that advice that the incomplete instrument was valid is correct, then there is no problem with the fees collected under the determination. The slight inaccuracy in the present determination would also have no effect, as the instrument being revoked is very adequately identified by number and *Gazette* entry.

Committee's Suggestions Taken Up

Determination No. 49 of 1995 made under section 287 of the *Land (Planning and Environment) Act 1991* revokes Determination No. 167 of 1992 and Determination No. 20 of 1995 and determines new fees payable under the Act.

In its Report No. 1 of 1995 the Committee made a number of comments and suggestions following its scrutiny of Determination No. 20 of 1995 that is revoked by the present determination.

The Committee is pleased to note that the matters to which it drew attention have been addressed in the present determination.

Two Tiny Mistakes

Determination No. 53 of 1995 made under section 52A of the *Surveyors Act 1967* revokes Determination No. 83 of 1994 and determines new fees payable under the Act.

The Committee makes two minor comments.

First, although the determination itself is properly signed and dated, the two pages of the Schedule are not dated, but are both authenticated by the Minister's initials.

Secondly, the *Surveyors Act 1967* is accurately referred in all places in the determination itself and in the explanatory statement, but the heading on the two pages of the Schedule call it the *Surveyors Act 1991*.

These two tiny deficiencies do not affect validity, but should perhaps be corrected next time a determination is made.

Committee's Question Answered

Determination No. 56 of 1995 made under section 118 of the *Adoption Act 1993* revokes Determination No. 107 of 1994 and determines new fees payable under the Act.

In its Report No. 12 of 1994 the Committee raised questions about the implied repeal of Determination No. 75 of 1993. A question had been raised about the validity of that determination and the then Attorney-General, Mr Connolly, confirmed that it was valid. As it was valid, it could have been expected that it would have been expressly revoked when a new determination, Determination No. 107 of 1994, was made. This was not done.

The Committee felt that the 1993 determination had probably been impliedly repealed, but suggested in its Report No. 12 of 1994 that confirmation of this implied repeal should be sought. The Attorney-General, Mr Connolly, confirmed the Committee's view in his letter of 7 October 1994.

As this matter has been satisfactorily resolved there is no problem with the present Determination.

No Explicit Revocation or Explanation of Increase in Fees

Determination No. 58 of 1995 made under regulation 31 of the Adoption Regulations determines the fee to accompany an application for a certificate of an entry in the register of births under regulation 24(3)(b).

Unfortunately, this determination and its explanatory statement do not comply with the *Guidelines for the Preparation of Disallowable Instruments* in at least four respects.

Neither the determination nor the explanatory statement refers to the predecessor of the present determination.

Thus, first, the determination does not explicitly revoke Determination No. 77 of 1994 and the explanatory statement does not refer to it either.

Secondly, neither refers to the *Gazette* entry relevant to Determination No. 77.

Therefore this passage in the *Guidelines* at (p. 11) has not been complied with

“It is important that you clearly identify the previous instrument (if there is one) which the new instrument replaces. Use the number inserted by the *Gazette* officer and identify the *Gazette* in which the previous instrument was notified.

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

Quite possibly a court would decide that the previous instrument has been impliedly revoked by the present instrument, but this matter should be checked.

Thirdly, the explanatory statement does not indicate that the fee has been increased from \$21 to \$22.

Fourthly, the explanatory statement does not indicate the basis of the increase in fees. Therefore the explanatory statement does not comply with the following passage in the *Guidelines* (at page 16):

"Fees and Charges

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

Also the explanatory statement **must** explain the reason for the variation in the fees or charges. There could be a variety of reasons such as an increase in the Consumer Price Index; the Government's budget strategy for the year in question; recovery of the full cost of providing the services or items; brings the fees or charges in line with those applying elsewhere."

These aspects, too, would be helpful to a member of the Assembly or of the public.

Information about Minor Changes in Fees Followed Through as Indicated in Earlier Years

Determination No. 60 of 1995 made under section 4A of the *Business Names Act 1963* revokes Determination No. 73 of 1994 and determines new fees payable under the Act.

Determination No. 62 of 1995 made under section 263 of the *Credit Act 1995* revokes Determination No. 70 of 1994 and determines new fees payable under the Act.

Determination No. 66 of 1995 made under section 139 of the *Real Property Act 1925* revokes Determination No. 71 of 1994 and determines new fees payable under the Act.

Determination No. 69 of 1995 made under section 90A of the *Sale of Motor Vehicles Act 1977* revokes Determination No. 68 of 1994 and determines new fees and charges payable under the Act.

Determination No. 71 of 1995 made under section 12 of the *Trade Measurement (Administration) Act 1991* revokes Determination No. 69 of 1994 and determines new fees and charges payable under the Act.

The explanatory statements for the revoked determinations involved here state that

"Minor fees under \$20 are reviewed on a two yearly basis."

The explanatory statements for the present determinations repeat this statement. The Committee notes that those comments have been complied with in relation to the fees that have been increased this year where there was no increase last year or have not been increased where there was an increase last year.

In relation to other increases the explanatory statements for these and most other determinations state that the increases "have generally been increased by 4% in accordance with the anticipated movement in 1995/96 of the Consumer Price Index".

This is "generally" so, but sometimes the increase is above this percentage. For instance, in Determination No. 66 above the increase in the fee for inspecting the Register Book was from \$24 to \$27, which is an increase of 12.5%. Perhaps this increase relies on the other comment in the explanatory statement that some fees are "set with a view to full cost recovery and having regard to charges levied for similar interstate services".

Further Identification in the Gazette Entry Would be Helpful and was a Determination Properly Revoked?

Determination No. 74 of 1995 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 131 of 1994 and determines the rates of stamp duties payable on securities that are liable for duty in the ACT.

Determination No. 75 of 1995 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 15 of 1995 and determines the rate of duty payable on changes in the beneficial ownership of marketable securities under section 49F of the *Stamp Duties and Taxes Act 1987*.

Determination No. 92 of 1995 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 23 of 1993 and under section 23 of the *Business Franchise (Liquor) Act 1993* determines the meaning of low alcohol liquor and high alcohol liquor for the purposes of section 9 and 17 of that Act.

Why Fuller Identification Would be Helpful

Determinations are made under the *Taxation (Administration) Act 1987* on a range of matters and in respect of a number of Acts, as the above determinations exemplify.

Determinations of this kind are no longer published in full in the ACT *Gazette*. A *Gazette* notification states that a determination has been made, indicates where it can be purchased and gives information under the three headings of "Act under which Determination made, Description of Determination and Number and year of Determination".

Acting on a suggestion made by the Committee, some previous determinations made under the *Taxation (Administration) Act 1987* have included an extended description in the *Gazette* entry under the heading "**Description of Determination**".

Determination No. 74 of 1995 deals with the rates of stamp duties to be paid under the provisions of the *Stamp Duties and Taxes Act 1987* and among other things, includes the well-publicised decision to halve the rate of certain duties on listed securities. In passing, the Committee notes that this is also true of Determination No. 75 of 1995. These are determinations that may be of greater interest to members of the Assembly and to members of the public than many other determinations.

The *Gazette* description of Determination No. 131 of 1994 that is revoked by Determination No. 74 stated:

| Act under which Determination made | Description of Determination | Number and year of Determination |
|---|--------------------------------------|---|
| Taxation (Administration) Act 1987 | Stamp Duties (Marketable Securities) | No. 131 of 1994 |

A member of the public who wished to get this particular stamp duties determination would not have had to purchase all the determinations under the *Taxation (Administration) Act 1987* to get the relevant one.

However, in the case of the present determination, the description under the heading of "**Description of Determination**" is merely the uninformative word "Determination". The phrase "Stamp Duties (Marketable Securities)" is added to the headings of the Determination itself and its explanatory statement, but this is not much use to the reader of the *Gazette*.

Unfortunately, both Determination No. 75 of 1995 and its predecessor, Determination No. 15 of 1995, that is being revoked are both somewhat uninformative. In fact not only do the entries in the *Gazette* merely say under "**Description of Determination**" "Determination", but the actual determinations and explanatory statements do not spell out the content in their headings.

Perhaps thought should be given to using the helpful previous form given in the revoked Determination No. 131 of 1994.

Was this Determination Properly Revoked?

The first part of Determination No. 92 of 1995 provides that, under subsection 99(1) of the *Taxation (Administration) Act 1987*, Determination No. 23 of 1993 is revoked.

When Determination No. 23 of 1993 was made it was made under section 23 of the *Business Franchise (Liquor) Act 1993* using exactly the same words as are used in the second part of Determination No. 92 of 1995, namely:

“Under section 23 of the *Business Franchise (Liquor) Act 1993* I DETERMINE, for the purposes of section 9 and subsection 17(1) of the Act, the following types of liquor.”.

Of course, as the present explanatory statement explains, the purpose of the 1995 determination is to change the types of liquor from those in the 1993 determination.

Interestingly, the explanatory statement for Determination No. 23 of 1993 states in part:

“Section 23 of the [Business Franchise] Act provides for the Minister to determine the types of liquor applicable to the calculation of franchise fees. This Determination therefore provides for the determined type of liquor referred to in sections 9(2) and 17(1) of the Act.”

By chance, in the same *Gazette* in which Determination No. 23 of 1993 appeared, Determination No. 22 of 1993 determined the rates of fees and its explanatory statement stated as follows:

“The *Taxation (Administration) Act 1987* provides for a consolidated system for the administration of ACT fees and taxes, whilst the *Business Franchise (Liquor) Act 1993* provides for the payment of fees for liquor trading in the ACT.

The *Business Franchise (Liquor) Act* also provides for different rates for different types of liquor.

Section 99(1) of the *Taxation (Administration) Act* allow[s] the Minister to determine the differential rates applicable to the determined types of liquor.”.

These comments are consistent with the statements in the explanatory statement for the present 1995 determination that:

“Section 99(1) empowers the Minister to determine these taxes, duties and fees [It] is the *Business Franchise (Liquor) Act 1993* which provides for different rates for different levels of alcohol content liquor”.

It would seem to follow that Determination No. 22 of 1993 or any successor to it (which deals with the percentage of duty payable) would need to be revoked under subsection 99(1) of the *Taxation (Administration) Act 1987*. But perhaps it is the *Business Franchise (Liquor) Act 1993* that is relevant for either making or unmaking the rules as to types of liquor under the *Business Franchise (Liquor) Act 1993*.

Was a mistake made in the making process in 1993 or has there been a change since to make it necessary for the 1993 "types of liquor" determination to be revoked by subsection 99(1) of the *Taxation (Administration) Act 1987* instead of the Act under which it was made, namely, the *Business Franchise (Liquor) Act 1993*?

In summary, if the 1993 and 1995 determinations of the types of liquor were both made under section 23 of the *Business Franchise (Liquor) Act 1993*, why was the revocation of the "types of liquor" determination effected under subsection 99(1) of the *Taxation (Administration) Act 1987*?

Irrelevant Matter in the Determination Should be Ignored

Determination No. 77 of 1995 made under section 80C of the *Co-operative Societies Act 1939* revokes Determination No. 106 of 1994 and sets new fees payable under the Act.

The determination sets new fees by mentioning the relevant section of the Act in column 1, the matter for which the fee is set in column 2 and the relevant fee in column 3. The determination does not refer to a column 4, but there is one and it contains amounts of the 1994-95 fees that were set in Determination No. 106 of 1994 that is revoked by the present determination.

This comparison of 1994-95 fees with the 1995-96 fees is repeated in the explanatory statement which is where the comparison should be. They are irrelevant in the determination itself.

Their inclusion in the determination itself possibly occurred because of the "curse of the word processor" and should be ignored. Nevertheless, it is probably better to have too much information than to have too little!

Wrong Determination has been Revoked

Determination No. 78 of 1995 made under section 18A of the *Lotteries Act 1964* revokes Determination No. 48 of 1994 and sets new fees payable under the Act.

The present determination revokes:

"determination No. 48 of 1994, notice of which appeared in the Australian Capital Territory Gazette No: S124 of 27 June 1994 in respect of the fee payable under section 7(1A) of the Act."

In fact the determination that actually fixed the fees under the *Lotteries Act 1964* last year was Determination No. 49 of 1994. Determination No. 48 of 1994 fixed fees under the *Bookmakers Act 1985*.

The other matters referred to in the passage quoted are accurate. In the circumstances, a court may decide that a simple mistake has occurred. Thus a court may decide that Determination No. 49 was intended to be revoked and that Determination No. 48 has not been revoked by the present determination.

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

Something Seems to be Missing From the Revocation Clause

Determination No. 80 of 1995 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 63 of 1994 and determines fees and the periods of time covered by those fees for parking in specified locations under section 163C of the Act.

The revocation clause of this determination states as follows:

“Under section 217A of the *Motor Traffic Act 1936* I **REVOKE** Determination No. 63 of 1994 dated 22 June 1994 and notified in the Australian Capital Territory Gazette No. S126 of 27 June 1994 so far as they are payable for the purposes of Section 163C(2) of the Act and relate to those car parks specified in the Schedule.”.

Something seems to have gone wrong with the drafting. As the explanatory statement indicates, there should be a reference to fees in the sentence. Perhaps the intention of the clause is reasonably clear.

But a check should be made to confirm that the clause is effective despite this apparent defect. A check might also be in order in case the “curse of the word processor” strikes again in the same place next year.

Is the Explanation of New Fees Accurate?

Determination No. 85 of 1995 made under section 111 of the *Gas Act 1992* revokes Determination No. 101 of 1993 and determines fees payable under paragraphs 90(1)(b) and 91(1)(b) of the Act.

The explanatory statement for the present determination states as follows:

This determination sets fees for the purposes of the *Gas Act 1992* and has the effect of increasing fees payable for the testing of Gas Meters for authorised distributors and consumers. Previously fees had only been set for authorised distributors.

The fees for authorised distributors may show slight variations due to rounding off, but are in line with the CPI increase of 4%.”. (Emphasis added.)

The provisions relevant to the fees payable for testing gas meters are subsections 90(1) and (2) and subsection 91(1) of the *Gas Act 1992*.

They provide as follows:

“Testing meters for consumers

90. (1) If a consumer -

- (a) requests an authorised distributor to arrange for the accuracy of a meter through which the distributor reticulates gas to the consumer to be tested; and
- (b) pays the determined fee to the authorised distributor;

the distributor shall, as soon as practicable after receiving the request, inform the Controller of the request and give the Controller an amount equal to the determined fee.

Penalty: \$500.

(2) After being informed that a customer has made such a request and on receiving that amount, the Controller shall test the accuracy of the meter in accordance with the Manual. (Emphasis added.)

Testing meters for authorised distributors

91. (1) Where an authorised distributor -
- (a) requests the Controller to arrange for the accuracy of a meter through which the authorised distributor reticulates gas to a consumer to be tested; and
 - (b) pays to the Controller the determined fee;

the Controller shall, as soon as practicable, test the accuracy of the meter in accordance with the Manual.”. (Emphasis added.)

The Committee notes that Determination No. 101 of 1993, which is revoked by the present determination, provided as follows:

“Under paragraph 111(1)(a) of the *Gas Act 1992*, I **DETERMINE** that the fees payable for testing meters for consumers, as provided for under paragraph 90(1)(b) of the Act, and for authorised distributors, as provided for under paragraph 91(1)(b) of the Act, shall be in accordance with the attached Schedule.” (Emphasis added.)

These provisions seem to suggest that, contrary to what the emphasised passage quoted above from the explanatory statement states, fees were, in fact, determined for both consumers and authorised distributors by Determination No. 101 of 1993.

If this is so, then the increases to consumers in the present determination are of a considerably higher order than 4%. The relevant fees for consumers under the present determination (with those in the revoked Determination No. 101 of 1993 in brackets) are as follows: \$264 (\$150), \$70 (\$30), \$54 (\$25) and \$27 (\$15).

Indeed, even taking into account the "slight variances due to rounding off" mentioned in the explanatory statement, the increases in the case of the fees for authorised distributors seem to be a little more than the stated 4%. The fees for authorised distributors, the previous fees (in brackets) and the percentage increases appear to be roughly as follows: \$160 (150) 6.66%, \$32 (\$30) 6.66%, \$27 (\$25) 8% and \$16 (\$15) 6.66%.

As against this, of course, it is true that the previous fees were fixed 2 years ago and there was no increase last year.

Indeed, it might be relevant that the explanatory statement for Determination No. 101 of 1993 mentioned that the fees set then were "in line with those currently in force in New South Wales". Do the present increases perhaps fit in with increases over the border?

Is this Determination Made Under the Wrong Section?

Determination No. 91 of 1995 made "Pursuant to section 9 of the *Building (Design and Siting) Act 1964*" purports to revoke Determination No. 99 of 1994 and determine new fees payable under the Act.

The Determination states that it is made "Pursuant to section 9 of the *Building (Design and Siting) Act 1964*" to revoke Determination No. 99 of 1994 and determine new fees under the Act.

The explanatory statement states that it is "made under section 14 of the *Building (Design and Siting) Act 1964*".

The reprint of the renumbered Act dated 31 January 1995 appears to agree with the explanatory statement, as, in that reprint, it is section 14 that confers power on the Minister to determine fees.

Perhaps a check should be made to see if the determination was validly made.

Corrections of Errors Pointed Out by the Committee and the Committee's Part Properly Acknowledged

Determination No. 100 made under section 15F of the *Workers' Compensation Act 1951* amends Protocol No. 1 of 1995 for occupational rehabilitation.

Determination No. 103 of 1995 made under subsection 32(2) of the *Betting (Totalizator Administration) Act 1964* revokes Determination No. 4 of 1995 and determines that the percentage of turnover to be paid by the ACTTAB to the Territory under subsection 32(1) is to be 5.75%.

In its Report No. 1 of 1995 the Committee pointed out errors that had been made in both of these Determinations.

The present instruments correct the mistakes and their explanatory statements very properly mention the Committee's contributions to the process.

GOVERNMENT RESPONSE

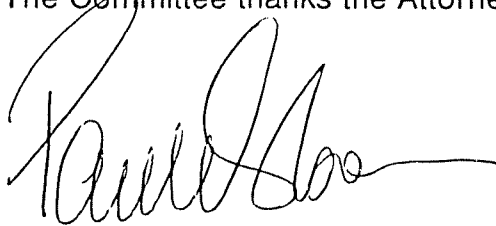
The Committee has received a response to comments made concerning:

- Determinations Nos 166 and 167 of 1994 made under the *Casino Control Act 1988* (Report No. 1 of 1995);
- Determination No. 1 of 1995 made under the *Electricity Act 1971* (Report No. 1 of 1995);
- Determination No. 4 of 1995 made under the *Betting (Totalizator Administration) Act 1964* (Report No. 1 of 1995);
- Determination of fees No. 19 of 1995 made under the *Electoral Act 1992* (Report No. 1 of 1995);
- Determination No. 20 of 1995 made under the *Land (Planning and Environment) Act 1991* (Report No. 1 of 1995);
- Determination of fees and charges No. 28 of 1995 made under the *Health Act 1993* (Report No. 2 of 1995);
- Crimes (Amendment) Bill 1995 (Report No. 4 of 1995);
- Infants' Custody and Settlements (Repeal) Bill 1995 (Report No. 4 of 1995); and
- Periodic Detention Bill 1995 (Report No. 4 of 1995).

The Committee has also received a letter from the Attorney-General concerning the removal of gender specific items from ACT legislation.

A copy of the responses are attached.

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



Paul Osborne, MLA
Chair
22 August 1995



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

Mr Paul Osborne MLA
Presiding Member
Standing Committee on Scrutiny of Bills
and Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
Canberra ACT 2601

Dear Mr Osborne *Paul*

Last year my predecessor, Terry Connolly MLA, wrote to the Committee about progress in the removal of gender specific terms from ACT legislation and undertook to write again at this time.

Progress has now slowed appreciably. As might be expected this is because the more frequently amended legislation has been attended to and the decreasing volume of legislation which remains is that which is less frequently or rarely amended.

Accordingly, I believe that it is now appropriate to act to remove gender specific terms from the remaining legislation. I have therefore requested that the first Statute Law Revision (Miscellaneous Provisions) Bill in 1996 should contain amendments for this purpose. I expect that the Bill will be introduced in the first half of next year.

In the meanwhile the existing arrangements to systematically remove gender specific terms will continue.

Yours sincerely

Gary Humphries
Attorney General

26 JUL 1995

ACT Legislative Assembly,
London Circuit, Canberra ACT 2601
GPO Box 1020, Canberra ACT 2601
Phone: (06) 205 0133 Fax: (06) 205 0427

Printed on one-sided paper




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

Mr Paul Osborne MLA
Presiding Member
Standing Committee on Scrutiny of Bills and
Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601

Dear Mr  Osborne

In its Report No. 1 of 1995, the Committee commented on Determination No. 166 and No. 167 of 1994 made under the *Casino Control Act 1988*.

The Committee made two comments on Determination No. 166. Firstly, the Committee commented on preceding determinations not expressly revoked by 166 and secondly on a mix up of explanatory statements for Determinations No. 166 and No. 167. The following paragraphs address the first comment and then the second.

In relation to Determination No. 166, the Committee noted two preceding determinations also made under section 16 of the *Casino Control Act*:

- an unnumbered determination notified in ACT Gazette No. S72 on 29 May 1992; and
- Determination No. 113 of 1994.

The Committee questioned why Determination No. 166 expressly revokes the first mentioned determination but makes no reference to the more recent Determination No. 113.

It is acknowledged that Determination No. 166 of 1994 does not expressly revoke Determination No. 113 of 1994 as it should do. However, legal advice from the Government Solicitor's Office confirms that Determination No. 166 is still valid although it does not expressly revoke Determination No. 113 of 1994. The advice states that Determination No. 113 is revoked by implication by Determination No. 166.

ACT Legislative Assembly,
London Circuit, Canberra ACT 2601
GPO Box 1070, Canberra ACT 2601
Phone (06) 205 0133 Fax (06) 205 0427

In its Report No. 1 of 1995, the Committee also commented on Determination No. 166 in relation to Determination No. 167. The Committee noted that the explanatory statements for these determinations were reversed so that the statement relevant to Determination No. 167 was numbered as the statement for Determination No. 166 and vice versa.

I am advised that the explanatory statements for determinations 166 and 167 of 1994 were inadvertently swapped. I apologise for this error but I am assured that checks have been put in place to ensure the error is not repeated.

In its Report No. 1 of 1995, the Committee mentions that the checking of Determination No. 1 of 1995 made under section 104 of the *Electricity Act 1971* was hampered because it appeared that the Act had not been reprinted after being renumbered by the *Electricity (Amendment) Act 1994*.

The amending Act commenced operation in October 1994, a time when the Assembly was entering its busiest period. During the last 2 months of each year very little reprinting occurs because the resources of the Parliamentary Counsel's Office are stretched to the limit in endeavouring to cope with the legislative program before the Assembly rises. The burden on the Office is particularly heavy when the end of the year also coincides with the end of the term of the Assembly. Reprinting activity then increases over the summer months and many Acts have in fact been reprinted over the last 4 months.

In the particular case of the *Electricity Act 1971*, I am advised that a reprint was published by the Government Printer on 14 March 1995 and therefore would probably have been available while the report was being prepared. In any case, the Parliamentary Counsel's Office works closely with the Assembly Secretariat and is happy to assist informally in such cases.

In its Report No. 1 of 1995, the Committee commented on Determination No. 4 of 1995. The Committee identified an error relating to the word "preceding" in Determination No. 4 of 1995 made pursuant to subsection 32(2) of the *Betting (Totalizator Administration) Act 1964*. Arrangements have been made to correct the error by revoking Determination No. 4 of 1995 and making another determination.

In its Report No. 1 of 1995, the Committee commented on Determination of Fees No. 19 of 1995 made under section 8 of the *Electoral Act 1992*. The Committee sought confirmation that payment direct to the Electoral Commission constitutes payment "to the Territory".

Legal advice from the Government Solicitor's Office confirms that payment of fees to the Electoral Commission under Determination No. 19 of 1995 is payment to the Territory. The advice states that the reference made to the "Electoral Commission" in the determination is a specific reference as to whom the determined fees should be paid which does not alter the

obligation of the Commission to account to the Territory for the fees it has received.

In its Report No. 1 of 1995, the Committee commented on Determination No. 20 of 1995 which determines fees payable under the *Land (Planning and Environment) Act 1991*.

The Committee identified an incorrect empowering citation in the explanatory statement. I confirm that the Committee is correct and the reference in the schedule to the Determination is accurate. The error in the explanatory statement is regretted.

The Committee pointed out that certain fees were a repeat of fees specified in the revoked determination. The purpose of making Determination No. 20 of 1995 was to introduce three new fees. It was considered advisable to issue a complete schedule rather than include the new fees in an addendum to the existing schedule. The explanatory statement of Determination No. 20 repeats references to current and previous fees made in the explanatory statement for the preceding Determination No. 85 of 1994. It is recognised that this repetition was not helpful and could be misleading. The repetition is regretted.

The Committee drew attention to the failure to specify in the explanatory statement that a new fee had been included in the schedule for the grant of a license to a community organisation. The Committee's comments have been noted. This omission will be rectified in the explanatory statement for the next determination.

The Committee also commented that the use of the phrase "varies based on an activity" is not helpful. I am advised that the Committee's comment has been noted and a more helpful explanation will be given with future fee schedules.

Finally, the Committee sought advice as to whether a fee had been missed⁸ from Determination No. 20 of 1995. A fee has not been omitted. The format used in the fee schedule is misleading in that the term "Business promotion" was intended to indicate a category and the fees specified in paragraphs (i), (ii) and (iii) are the only fees charged for that category.

The fees schedule is being revised and a further determination will be made at the end of June 1995. The issues identified by the Committee will be rectified at that time.

In its Report No. 2 of 1995, the Committee commented on the Determination of Fees and Charges No. 28 of 1995 made under the *Health Act 1993*. The Department of Health and Community Care have noted the two minor errors in the Determination identified by the Committee.

The Government Solicitor's Office has advised that the two errors will not affect the intended operation of the Determination. The Department of Health and

Community Care has indicated that it will correct the errors in July 1995, when the Determination will be revoked and replaced.

In its Report No. 4 of 1995, the Committee commented on the Crimes (Amendment) Bill 1995. The Committee has suggested that there is an element of retrospectivity in the application of proposed section 3A(8) to offences whether they are committed before or after the commencement of the section. The Committee compares this provision with another amendment relating to the year and a day rule, which does not contain the same commencement provision.

I acknowledge that to alter an element of an offence after the offence has been committed would be retrospective and unacceptable. The year and a day amendment alters an element of the offence, and so, to avoid any retrospectivity, that amendment applies only from the date of commencement of the section.

Subsection 3A(8) is, however, procedural only. It only applies where the place of commission is not an element of the offence: subsection 3A(8)(a). The subsection inserts a rule of evidence - a presumption that the offence occurred in the charging state. The presumption is rebuttable by the accused proving, on the balance of probabilities, that the necessary nexus with the Territory, provided for in the legislation, does not exist. Section 3A(8)(c) ensures that no disadvantage would be suffered by a defendant and his/her legal representative who may be in the process of preparing a case when the section was commenced.

An additional consideration is that if the provision were drafted so that it only applied after a particular date, the problem would shift from a problem of 'place of commission' to a problem of 'date of commission'. In the case of some offences, and particularly murder, the date of commission may well be uncertain or unknown.

In its Report No. 4 of 1995 the Committee commented on the Infants' Custody and Settlements (Repeal) Bill 1995. The Committee asked whether all aspects of the repealed Act are redundant. In order to answer the Committee's question I have addressed the provisions of the *Infants' Custody and Settlements Act 1956* (the Act) in some detail below.

Part I of the Act deals with formal matters. Part II of the Act deals with custody and maintenance of infants. As noted by the Committee, this area has been subsumed by the *Family Law Act 1975*, although maintenance of children born after 1 October 1989 is now dealt with in the first instance by the Child Support Agency pursuant to the *Child Support Assessment Act 1989*.

Part III of the Act deals with consents to infants' marriage settlements. This is a provision that has been overtaken by time. As you may be aware the Act is based on the NSW *Infants' Custody and Settlements Act 1899*. In that era it was a social reality that women, in contemplation of or upon marriage, transferred their property to their husbands or to their husband's family. The effect of Part III was to extend the contractual capacity of "infant" women (that is, women who had attained the age of seventeen

years but had not reached majority) and "infant" men (that is, men who had attained the age of twenty years but who had not reached majority) to enter into contracts and the like either in contemplation of or upon marriage, with the sanction of the court. Therefore a woman who was not otherwise old enough to have legal capacity to divest herself of any property she may have owned was able to do so under this section, as indeed was a man.

It is interesting to note however, that the English courts, in interpreting the law in England upon which both the NSW and ACT provisions were based, held that the Act only contemplates settlements in favour of the "settlor" and the "settlor's children" and that a gift by an infant to an intended husband, though worded as a settlement, would not be sanctioned. (Re Burston [1892] 9 W.N. 36; 11 Austn Digest 56)

The only class of person to whom this Part could possibly have any application are females aged 17 who are attempting to make a settlement in contemplation of or after having been married. Pursuant to section 13, Part III applies to "male infants who have attained the age of twenty years and female infants who have attained the age of seventeen years." As the age of majority is now 18 this Part has no application to males. The class of persons to whom this Part could apply is further reduced owing to the fact that under the Commonwealth Marriage Act anyone under 18 years requires the consent of their parents and the court to marry. In the unlikely event that a woman under 18 would seek to make this sort of settlement, the normal common law rules would probably permit it, provided it was for her benefit.

This part of the Act is redundant in both a social and legal sense. It was repealed in NSW in 1970. The capacity of minors to enter into contracts is well covered by the common law in combination with some specific statutes. Generally, in the ACT a person under 18 can enter into a contract but she or he may not be bound by it. There are exceptions to this rule that arise mostly in relation to contracts that benefit the minor.

Part IV of the Act relates to the terms of settlements of damages recovered on behalf an infant and the appointment of trustees for this settlement. This power is contained in the *Magistrates Court (Civil Jurisdiction) Act 1982* (sections 93 and 94) and in Part II of the Supreme Court Rules, particularly Order 26, Rule 9. Section 25 of the *Public Trustee Act 1985* provides that monies paid into court in a settlement involving a child will automatically go to the public trustee, unless the court otherwise orders.

Lastly, Part V of the Act contains two general provisions relating to the custody and property of infants. The first provision, (section 17) states that where a court is considering the custody of an infant or the administration of property belonging to the infant, the welfare of the infant shall be the paramount consideration. This principle is clearly preserved in both the *Family Law Act* and the *Children Services Act 1986*.

Section 18 in Part V specifies that the mother of an infant has the same powers as the father to apply to the court. In the Family Law Act, the Childrens Services Act, the *Supreme Court Act 1933*, and the Magistrates Court (Civil Jurisdiction) Act, and indeed in all contemporary legislation, the right of a person to make an application in relation to a child is not dependent on whether they are the child's father or mother. The fact that a mother has an equal right to apply to a court as a father is implicit. Factors determining who can make applications with respect to children now generally focus on the interest of the applicant in the welfare of the child.


The Attorney-General's Department has not uncovered any contemporary use of these provisions, and it is quite conceivable that some of the provisions, for example those in Part III, have never been used in the Territory. However, I cannot discount completely accidental or mistaken use of the law by those who are unfamiliar with ACT practice.

The predominant usage of the Act was for custody and maintenance matters before the introduction of the *Family Law Act 1975* and after 1975 for the same matters in relation to ex-nuptial children. From 1987, when the Family Law Act covered ex-nuptial children in the Territory, extensive consultation within the legal community indicated that the Act was not used at all. Accordingly, all aspects of the Act are considered to be redundant.

In its Report No. 4 of 1995, the Committee commented on the Periodic Detention Bill 1995. I note the Committee's concerns of a potential overlap of amendments to be made to the Coroners Act 1956 by the *Intoxicated Persons (Consequential Amendments) Act 1994* and the Periodic Detention Bill. I understand that the Parliamentary Counsel's Office is liaising with the Clerk of the Legislative Assembly to ensure appropriate formal amendments are made to the Periodic Detention Bill.

I trust this information is of assistance to the Committee.

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

- 8 AUG 1995