

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

REPORT NO. 6 OF 1996

21 May 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:

Drugs of Dependence (Amendment) Bill 1996

This Bill amends Schedule 5 of the Act by excluding certain varieties of cannabis from the list of prohibited plants.

Statutory Appointments (Amendment) Bill 1996

This Bill provides that the Minister must not make an appointment subject to the Act until either the recommendation of the relevant committee of the Legislative Assembly is received or 30 days have elapsed since consultation.

Bill - Comment

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

Legislation (Republication) Bill 1996

This Bill provides for formal amendments to be made to Acts and subordinate laws in the course of republishing them and for the republications to have an authorised status.

The Meaning of Subordinate Law

This Bill covers the republication process for subordinate laws as well as for Acts. In pursuing this aim clause 5 of the Bill gives this definition of "law":

"law" means an Act or a subordinate law."

"Subordinate law" is defined in this way in subsection 14 (1) of the *Interpretation Act 1967*:

"14 (1) In an Act, unless the contrary intention appears -

'subordinate law' means an instrument of a legislative nature (including regulations, rules or by-laws) made under an Act." (Emphasis added.)

However, "subordinate law" is defined in this way in subsection 6 (19) of the *Subordinate Laws Act 1989*:

6 (19) In this section -

'subordinate law' means -

(a) regulations, rules or by-laws; or

- (b) a determination made by a Minister pursuant to a provision of an Act empowering him or her to determine, by notice in writing, fees or charges for the purposes of the Act." (Emphasis added.)

In one sense, the definition of the *Subordinate Laws Act 1989* is wider than that in the *Interpretation Act 1967*, as it includes Ministerial determinations in addition to regulations, rules and by-laws. But, on the other hand, the definition in the *Interpretation Act 1967* covers all instruments "of a legislative nature". This phrase widens the definition and opens up the legislative/administrative instrument debate, which has loomed large in statutory interpretation litigation.

As there is no separate definition of "subordinate law" in the present Bill, it is appropriate to consider which of the two definitions applies to the present Bill.

Given the specific reference in subsection 6 (19) of the *Subordinate Laws Act 1989* to "In this section", and the fact that there does not appear to be any "contrary intention" expressed in the Bill that would exclude the operation of the meaning in subsection 14 (1) of the *Interpretation Act 1967*, it probably means that the meaning in the *Interpretation Act 1967* would be applied to the provisions of the Bill.

However, perhaps this matter should be considered to ensure that there is no doubt about the intention in the Bill.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Subordinate Law No. 6 of 1996 being the **Boxing Control Regulations (Amendment)** exempted a specified fistboxing contest from the provisions of the *Boxing Control Act 1993*.

Public Sector Management Standard 1/1996 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner for Public Administration with the Approval of the Chief Minister provides for the reinsertion of specified cemetery allowances.

Determination No. 32 of 1996 made under section 39B of the *Bookmakers Act 1985* determines the location of a sports betting venue in the forecourt area between the main western entrance of the Bruce Outdoor Stadium and the rear of the Mal Meninga Stand.

Determination No. 33 of 1996 made under section 39B of the *Bookmakers Act 1985* varies the directions for the operation of the sports betting venue at the Bruce Outdoor Stadium by inserting provisions relating to betting times and dates in April, May and June 1996.

Determination No. 59 of 1996 made under section 101 of the *Weapons Act 1991* determines fees relating to inoperable weapons for the purposes of the Act.

Subordinate Legislation - Comments

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

Determination No. 35 of 1996 made under sections 97 and 101 of the *Land (Planning and Environment) Act 1991* appoints a named person to be a member and Chairperson of the ACT Heritage Council for a period of 3 years.

Determination No. 36 of 1996 made under sections 97 and 101 of the *Land (Planning and Environment) Act 1991* appoints a named person to be a member and Deputy Chairperson of the ACT Heritage Council for a period of 2 years.

Determination No. 37 of 1996 made under section 97 of the *Land (Planning and Environment) Act 1991* appoints a named person to be a member of the ACT Heritage Council for a period of 2 years.

Determination No. 38 of 1996 made under section 97 of the *Land (Planning and Environment) Act 1991* appoints a named person to be a member of the ACT Heritage Council for a period of 2 years.

Determination No. 39 of 1996 made under section 97 of the *Land (Planning and Environment) Act 1991* appoints a named person to be a member of the ACT Heritage Council for a period of 2 years.

Determination No. 40 of 1996 made under section 97 of the *Land (Planning and Environment) Act 1991* appoints a named person to be a member of the ACT Heritage Council for a period of 2 years.

Determination No. 41 of 1996 made under section 97 of the *Land (Planning and Environment) Act 1991* appoints a named person to be a member of the ACT Heritage Council for a period of 3 years.

Determination No. 42 of 1996 made under section 97 of the *Land (Planning and Environment) Act 1991* appoints a named person to be a member of the ACT Heritage Council for a period of 3 years.

Comments on Consultation, Inaccurate References to Act in *Gazette* and Retrospectivity in Relation to Appointments to the ACT Heritage Council

The Committee makes 3 comments.

Was there Consultation under the *Statutory Appointments Act 1994*

There is a very helpful Explanatory Statement for each of these instruments. However, in none of them is there confirmation that there has been consultation with the relevant Committee of the Legislative Assembly nominated by the Speaker as is required under the *Statutory Appointments Act 1994*.

A number of recent Explanatory Statements have included such confirmation. Such a statement assures members of the Legislative Assembly and members of the public that the requirements of the *Statutory Appointments Act 1994* have been complied with.

Did consultation in compliance with the law occur in the present cases.

Retrospectivity Explained in the Explanatory Statement

All of these appointments were signed on 21 November 1995 and were to take effect from that date. However, they were not published in the *Gazette* until 26 April 1996.

Section 7 of the *Subordinate Laws Act 1989* renders a subordinate law void and of no effect if it prejudices rights of any person (other than the Territory or a Territory authority) existing at the date of the notification or imposes liabilities on any person (other than the Territory or a Territory authority) in respect of any act or omission before the date of the notification.

Each of the Explanatory Statements helpfully advises that:

"Neither circumstance [under s. 7] will arise from the act of appointing the person named herein to the specified position(s)."

This resolves any difficulty about possible breach of section 7.

Determination No. 34 of 1996 made under sections 9 and 10 of the *Agents Act 1968* appoints a specified person to be a member and Chairperson of the Agents Board for a period of three years.

Determination No. 43 of 1996 made under subsection 13 (1) of the *Occupational Health and Safety Act 1989* appoints a named person to be a member of the Occupational Health and Safety Council for a period of six months.

Determination No. 44 of 1996 made under subsection 13 (1) of the *Occupational Health and Safety Act 1989* appoints two named persons to be members of the Occupational Health and Safety Council for a period of three years.

Determination No. 45 of 1996 made under subsection 22 (1) of the *Occupational Health and Safety Act 1989* appoints two named persons to be acting members of the Occupational Health and Safety Council for a period of three years.

Determination No. 46 of 1996 made under subsection 22 (1) of the *Occupational Health and Safety Act 1989* appoints four named persons to be acting members of the Occupational Health and Safety Council for a period of six months.

Some possible Problems with these Determinations

The Committee makes comments under three headings.

Are these Determinations Disallowable Instruments

The Explanatory Statements for all 5 determinations state that the Instruments of Appointment "have been prepared following consultation with the Legislative Assembly Committee nominated by the Speaker, as required by the *Statutory Appointments Act 1994*". The provision requiring consultation is at section 4 of the Act.

As well as requiring consultation under section 4, section 5 of the *Statutory Appointments Act 1994* provides as follows:

"5. An instrument by which an appointment referred to in section 4 is made is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*."

This means that the provisions of sections 6 (the notification, tabling and disallowance section) and 7 (the retrospectivity section) of the *Subordinate Laws Act 1989* apply to instruments covered by the *Statutory Appointments Act 1994*.

However, there are arguments in relation to some or all of the determinations made under the *Occupational Health and Safety Act 1989* that they may not qualify as disallowable instruments.

Relevant parts of section 6 of the *Statutory Appointments Act 1994* provide as follows:

"Sections 4 [the consultation section] and 5 [the disallowance section] do not apply in relation to -

(a) ...

- (b) an appointment of a person to act in a statutory office for a period not exceeding 6 months, not being an appointment of the person to act in the office for a second or subsequent consecutive period; or
- (c) an appointment of a person to a statutory office the only function of which is to advise the appointing Minister."

Section 10 of the *Occupational Health and Safety Act 1989* provides as follows:

"10 (1) The Council has the following functions:

- (a) to advise the Minister on matters relating to occupational health and safety;
- (b) to inquire into and report to the Minister on matters referred to the Council by the Minister in relation to occupational health and safety;
- (c) such other functions as are prescribed.

(2) Without limiting the generality of paragraph (1) (a), the matters on which the Council may advise the Minister include the following matters:

- (a) the operation of this Act, the regulations and the associated laws;
- (b) the approval of codes of practice, and the variation of codes of practice, under section 87;
- (c) the provision of education and training in relation to occupational health and safety;
- (d) the promotion of occupational health and safety."

In the case of all 4 of the determinations made under the *Occupational Health and Safety Act 1989* it could perhaps be argued that, as the functions of the Occupational Health and Safety Council are to "advise the appointing Minister", the determinations come within the exception in paragraph 4 (c) of the *Statutory Appointments Act 1994* cited above. This could possibly be answered by noting that paragraph 10 (1) (c) does permit other functions to be prescribed.

In addition to this argument, there is another that applies only to Determination No. 46 of 1996. It appoints 4 named persons as acting members under subsection 22 (1) for a period of 6 months and may escape the application of the *Statutory Appointments Act 1994* by applying the provisions of paragraph 6 (b) of the *Statutory Appointments Act 1994* also cited above. The Committee says the instrument may escape, because it is not known whether, in fact, the present appointees are first appointees or appointees "for a second or subsequent consecutive period".

In the case of Determination No. 34 of 1996, it is suggested that neither of the above arguments applies and that it is covered by the *Statutory Appointments Act 1994*. First, the Agents Board is not restricted to advising the "appointing Minister", but has very wide powers in relation to registration of agents and the issue and revocation of licences and other matters. Secondly, it is an instrument of appointment of a person as a member and Chairperson of the Agents Board for a period of 3 years.

Perhaps these questions should be considered.

Retrospectivity

Determination No. 34 of 1996 was signed on 23 April 1996, was published in the *Gazette* on 24 April 1996 and appointed the person a member and Chairperson of the Agents Board from 22 April 1996 to 21 April 1999 inclusive. Thus, if there is any retrospectivity problem, it is for a very short period.

Determinations Nos 43, 44, 45 and 46 of 1996 were all signed on 29 February 1996, but were not published in the *Gazette* until 24 April 1996. All 4 stated that the appointments were "from the date of this instrument".

Subsection 6 (1) of the *Subordinate Laws Act 1989* states 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."

Section 7 of the *Subordinate Laws Act 1989* provides as follows:

"7. A subordinate law shall not be expressed to take effect from a date before the date of its notification in the *Gazette* where, if the law so took effect -

- (a) the rights of a person (other than the Territory or a Territory authority) existing at the date of notification would be affected in a manner prejudicial to that person; or
- (b) liabilities would be imposed on a person (other than the Territory or a Territory authority) in respect of any act or omission before the date of notification;

and where any subordinate law contains a provision in contravention of this subsection, that provision is void and of no effect."

The fact that the notification in the *Gazette* in all 5 cases was later than the date when the instruments stated they were to take effect (that is they were all notified on 24 April 1996 and were to come into effect from 22 April 1996 in the case of Determination No. 34 of 1996 and 29 February 1996 in the other 4 cases) is relevant.

The question of the effect of these periods of retrospectivity needs to be considered in all 5 cases.

Is there an Invalidity Problem with Determination No. 45 of 1996

Determination No. 45 of 1996 provides that, under subsection 22 (1) of the *Occupational Health and Safety Act 1989*, 2 named persons are appointed

"to be acting members of the Occupational Health and Safety Council for a period of three years from the date of this instrument."

Subsection 22 (1) of the *Occupational Health and Safety Act 1989* provides as follows:

"22 (1) The Minister may appoint a person to act as a member of the Council, other than the Chairperson or Deputy Chairperson -

- (a) during a vacancy in the office of the member, whether or not an appointment has previously been made to the office;
- (b) during any period or periods when the member is absent from duty or from the Territory or is, for any reason, unable to perform the duties of the office;

but a person appointed to act during a vacancy shall not continue so to act for more than 12 months."

The present acting appointments have been made for a period of 3 years. Do these appointments breach the "12 months" rule in subsection 21 (1).

Unfortunately, the Explanatory Statement does not indicate whether the appointees are appointed in relation to paragraphs 21 (1) (a) or 21 (1) (b).

If they are not, in fact, appointed to fulfil obligations under paragraph 21 (1) (b), there appears to be no problem of invalidity.

However, if they are to cover vacancies under paragraph 21 (1) (a), the appointments appear to breach the "12 months" rule in subsection 21 (1). If this is so, the consequences of this breach need to be considered.

There are 2 aspects to this - the positions of the "members" and the effect of any action in which they may have been involved.

First, so far as the "members" themselves are concerned, they may have received remuneration or other compensation for acting and the position relating to that will need to be considered.

Secondly, however, as far as any matters that the "members" have been involved in are concerned, subsection 22 (4) of the *Occupational Health and Safety Act 1989* may be of assistance. It provides as follows:

"22 (4) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid on the ground that -

- (a) the occasion for the person's appointment had not arisen;
- (b) there is a defect or irregularity in connection with the person's appointment;
- (c) the person's appointment had ceased to have effect; or
- (d) the occasion for the person to act had not arisen or had ceased."

The matter of the validity and effect of the appointments needs to be considered.

Determination No. 47 of 1996 made under section 63 of the *Tenancy Tribunal Act 1994* appoints a named person to be the Acting President of the Tenancy Tribunal from 8 February 1996 to 31 December 1999.

Appointment as Acting President Tenancy Tribunal, Consultation and Retrospectivity

The Committee makes 3 comments.

The Appointment is of the Acting President

The heading to the determination states that it concerns "Appointment of the President of the Tribunal". In fact, it makes an appointment of a named person as Acting President.

Was there Consultation under the *Statutory Appointments Act 1994*

As with the appointments to the Heritage Council, here, too, there is a very helpful Explanatory Statement. However, it does not confirm that there has been consultation with the relevant Committee of the Legislative Assembly nominated by the Speaker under the *Statutory Appointments Act 1994*.

Perhaps this should be checked here, too.

Retrospectivity

The Committee noted that this appointment as Acting President was signed on 8 February 1996 and that the appointment is for the period from 8 February 1996 to 31 December 1999 inclusive. However, the appointment was not published in the *Gazette* until 3 May 1996.

As noted under the previous item, section 7 of the *Subordinate Laws Act 1989* renders a subordinate law void and of no effect if it prejudices the rights of any person (other than the Territory or a Territory authority) existing at the date of the notification or imposes liabilities on any person (other than the Territory or a Territory authority) in respect of any act or omission before the date of the notification.

Unfortunately, the Explanatory Statement for the present instrument does not address this matter of retrospectivity.

Perhaps the matter should be considered.

Determination No. 48 of 1996 made under subsection 185 (2) of the *Credit Act 1985* appoints a named person to be the member of the Australian Capital Territory Credit Tribunal to be appointed under paragraph 185 (1) (c) as a member qualified to represent the interests of persons who deal with credit providers and finance brokers from 15 February 1996 to 15 February 1997.

Determination No. 49 of 1996 made under subsection 185 (2) of the *Credit Act 1985* appoints a named person to be the member of the Australian Capital Territory Credit Tribunal to be appointed under paragraph 185 (1) (b) as a member qualified to represent the interests of credit providers and finance brokers from 15 February 1996 to 15 February 1997.

Determination No. 50 of 1996 made under subsection 189 (1) of the *Credit Act 1985* appoints a named person to act as a member and as acting Chairperson of the Australian Capital Territory Credit Tribunal from 15 February 1996 to 15 February 1997.

Determination No. 51 of 1996 made under subsection 189 (1A) of the *Credit Act 1985* appoints a named person as an acting member of the Australian Capital Territory Credit Tribunal appointed under paragraph 185 (1) (b) as a member qualified to represent the interests of credit providers and finance brokers from 15 February 1996 to 15 February 1997.

Determination No. 52 of 1996 made under subsection 189 (1A) of the *Credit Act 1985* appoints a named person as an acting member of the Australian Capital Territory Credit Tribunal appointed under paragraph 185 (1) (b) as a member qualified to represent the interests of credit providers and finance brokers from 15 February 1996 to 15 February 1997.

Consultation, Retrospectivity and Two Persons Appointed under Paragraph 185 (1) (b) and None under Paragraph 185 (1) (c)

The Committee makes 3 comments.

Was there Consultation under the *Statutory Appointments Act 1994*

As with the determinations dealt with under the 2 previous items here, too, there are helpful Explanatory Statements. However, once again, they do not mention whether there has been consultation with the relevant Committee of the Legislative Assembly nominated by the Speaker under *the Statutory Appointments Act 1994*.

Perhaps this should be checked here, too.

Retrospectivity

The Committee notes that all of these appointments were signed on 14 February 1996 and all are for the period from 15 February 1996 to 15 February 1997 inclusive. However, the appointments were not published in the *Gazette* until 3 May 1996.

As with the 2 previous items, section 7 of the *Subordinate Laws Act 1989* is relevant. The Committee shall not repeat what has already been said about the effect of section 7.

Here, too, unfortunately the Explanatory Statements for the present instruments do not address this matter of retrospectivity.

Perhaps the matter should be considered.

Two Persons Appointed to be Acting Members under Paragraph 185 (1) (b) but None under Paragraph 185 (1) (c)

Paragraph 185 (1) (b) of the *Credit Act 1985* provides that there is to be a member of the Credit Tribunal appointed as a member qualified to represent the interests of credit providers and finance brokers and paragraph 185 (1) (c) provides that there is to be a member of the Credit Tribunal appointed as a member qualified to represent the interests of persons who deal with credit providers and finance brokers.

Determination No. 48 of 1996 appoints a named person as a member for the purpose of paragraph 185 (1) (c) and Determination No. 49 of 1996 appoints a named person as a member for the purpose of paragraph 185 (1) (b).

The Committee notes that Determination No. 51 of 1996 and Determination No. 52 of 1996 appoint acting members to act during a vacancy or when a member is unable to perform the functions of the office for any reason. However, the Committee notes that both appointees are appointed for the purpose of paragraph 185 (1) (b) and none of the present determinations appoints an acting member for the purpose of paragraph 185 (1) (c).

Was it intended that there should be 2 acting appointments in the one case and none in the other.

Determination No. 53 of 1996 made under section 11 of the *Betting (Totalizator Administration) Act 1964* appoints a named person "as a member of the ACT Totalizator Administration Board as of 30 April 1996".

Comments in Explanatory Statement, Length of Appointment and Retrospectivity

The Committee makes comments under 3 headings.

Comments in Explanatory Statement

The Explanatory Statement states that :

"Subsection 1 (b) provides for membership of no fewer than 2 nor more than 4 other members appointed by the Minister."

The Committee makes 2 points.

First, in fact, it is paragraph 11 (1) (b) that provides for the appointments of ordinary members of the Totalizator Administration Board and not subsection 1 (1). The determination itself does correctly refer to section 11.

Secondly, the reference to "other members" in the Explanatory Statement leaves a puzzle, because the Explanatory Statement does not mention the membership of the Board apart from these "other members". Paragraph 11 (1) (a) solves this puzzle, by providing that the Chief Executive Officer of ACTTAB is also a member of the Board.

Length of Appointment and Validity

As cited in the summary of the determination given above, the determination simply states that the person concerned is appointed "as a member of the ACT Totalizator Administration Board as of 30 April 1996".

Section 12 of the *Betting (Totalizator Administration) Act 1964* provides as follows:

"12 (1). A member holds office for the period, not exceeding 5 years, specified in the instrument of appointment.

(2) A member is eligible for re-appointment."

The validity of the determination needs to be considered.

First, as no period of appointment is specified, the appointment appears to be for an indefinite period of time. Does the fact that an appointment cannot be made for a period "exceeding 5 years" render the present appointment invalid.

Secondly, subsection 12 (1) requires that the period of appointment is to be "specified in the instrument of appointment". Does the failure to comply with this requirement render the appointment invalid.

Retrospectivity

Retrospectivity appears to be an issue here, too, although the period is very short.

As noted above, the appointment is "as from 30 April 1996", but the appointment was not published in the *Gazette* until 3 May 1996.

The Committee shall not repeat the effect of section 7 of the *Subordinate Laws Act 1989*, that is set out above.

However, the effect of the retrospectivity between 30 April 1996 and 3 May 1996 needs to be addressed.

A handwritten signature in cursive script, reading "Rosemary Follett".

Rosemary Follett, MLA
Chair

21 May 1996

