STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

REPORT NO. 4 OF 1997

22 April 1997

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Civic Square, London Circuit
CANBERRA ACT 2601
GPO Box 1020

STANDING COMMITTEE ON SCRUTINY OF
BILLS AND SUBORDINATE LEGISLATION

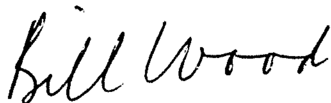
Telephone: (06) 2050171
Facsimile: (06) 2053109

Mr Greg Cornwell, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear Mr Cornwell

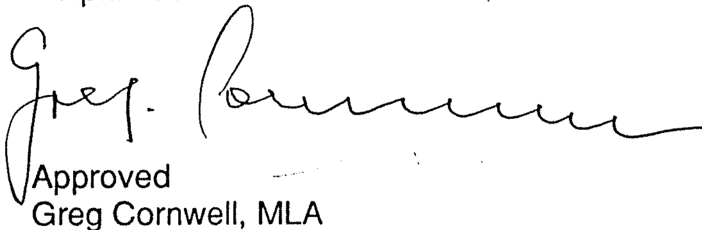
Please find enclosed a copy of Report No. 4 of 1997 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. I seek your approval to print and circulate Report No. 4 of 1997.

Yours sincerely



Bill Wood, MLA
Chair

22 April 1997



Approved
Greg Cornwell, MLA

22 April 1997

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 Bill Wood, MLA (Chair)
Mr Paul Osborne, MLA (Deputy Chair)
Mr Harold Hird, 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 comments:

Auditor-General (Amendment) Bill 1997

This Bill adds requirements for the Auditor-General, when conducting a performance audit, to assess relative costs and benefits, including social costs and benefits and environmental costs and benefits having regard to ecologically sustainable development.

Canberra Institute of Technology (Amendment) Bill 1997

This Bill changes the terms and conditions of appointment of the Director and Acting Director of the Canberra Institute of Technology.

Crimes (Amendment) Bill (No. 2) 1997

This Bill makes amendments relating to seizure of firearms and relating to domestic violence.

Debits Tax Bill 1997

This Bill provides for the introduction of a debits tax regime in the ACT from 1 July 1997.

Domestic Violence (Amendment) Bill 1997

This Bill amends the definition of "domestic violence" and makes amendments relating to firearms and firearms licences.

Land (Planning and Environment) (Amendment) Bill 1997

This Bill provides that third party objectors can apply to the AAT if their interests rather than their rights are affected by a decision and provides that any person at all may bring an action in the Supreme Court to restrain an actual or "a threatened or an apprehended contravention of or failure to comply with this Act".

Legislative Assembly (Members' Staff) (Amendment) Bill 1997

This Bill provides that the powers of the Chief Minister to approve the arrangements or conditions under which the staff of officeholders or members are employed must be in writing and provides that all instruments relating to the employment or termination of staff of officeholders or members are to be disallowable instruments.

Magistrates Court (Amendment) Bill 1997

This Bill makes amendments relating to the seizure of firearms and increases penalties for a breach of a restraining order or interim restraining order.

Prostitution (Amendment) Bill 1997

This Bill provides that the Registrar must give 28 days notice to operators that renewal details are due and operators must give the Registrar written notice of these details and the determined fee and must notify the Registrar within 7 days if the business ceases to operate.

Rates and Land Rent (Relief) (Amendment) Bill 1997

This Bill caps the pensioner concession for general rates, but retains protection for existing pensioners, increases the Minister's powers to defer rates, varies eligibility for joint ownership or life interests, abolishes rebates on hardship grounds and revokes special provisions relating to Griffith and Kingston.

Bills - Comment

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

Bail (Amendment) Bill 1997

This Bill provides for stricter procedures and criteria for the granting of bail to alleged domestic violence offenders.

A Possible Tiny Update

NOTE 1 to the Bill mentions that the Principal Act was reprinted on 29 February 1996 and also amended by Act No. 81 of 1996.

Since then a very helpful consolidation has been prepared by the Parliamentary Counsel's Office and reprinted as at 1 January 1997.

Perhaps a reference to this Reprint could be made in the NOTE.

Health and Community Care Services (Validation of Fees and Charges) Bill 1997

This Bill removes any doubt about the validity of two instruments, Determination of Fees and Charges No. 227 of 1996 and Determination of Fees and Charges No. 240 of 1996, which fixed fees and charges under the *Health and Community Care Services Act 1996*.

Retrospectivity

The Bill deals with two determinations of fees and charges under the *Health and Community Care Services Act 1996*.

Determinations Nos. 106 and 136 of 1996 were invalid and this meant that there was no valid determination for the collection of fees and charges under the Act from 1 July 1996.

Determination No. 227 of 1996 was notified in the *Gazette* on 9 October 1996, but provided that it was to take effect retrospectively as from 1 July 1996.

Determination No. 240 revoked Determination No. 227 and fixed new fees and charges. Determination No. 240 stated that it was to take effect from 17 October 1996, but was not notified in the *Gazette* until 23 October 1996.

This Bill removes any doubt about the possibility that Determinations Nos. 227 of 1996 and 240 of 1996 are invalid as being in breach of the *Subordinate Laws Act 1989* .

Mediation Bill 1997

This Bill provides for the registration of mediators, for the confidentiality of matters said or done during mediation and for the immunity of mediators who act in good faith.

The Committee makes two points.

Absence of Independent Review of Discretion to Register a Person as a Mediator

Clause 8 provides for the registration of mediators by an agency approved by the Minister under clause 4. A person who is refused registration may apply to the approved agency for a review of the decision and the agency must review its decision. That is, it is merely an internal review of the decision undertaken by the original decision maker.

Clause 10 provides that the approved agency which registered the mediator or another approved agency is to deal with applications for renewal of registration.

Clause 11 provides that an approved agency may cancel a mediator's registration in specified circumstances.

Registration as a mediator is a significant and possibly valuable commercial qualification. Failure to obtain initial registration or renewal or the consequences of a cancellation could be very important to the person concerned.

Unfortunately, the Bill does not provide for independent merits review of the exercise of these very significant discretions.

A Possible Tiny Typo

Subclause 12 (1) renders most matters dealt with in the mediation process inadmissible in any proceedings. Subclause 12 (2) provides for some exceptions to the rule of non-admissibility. Paragraph 12 (2) (e) provides that subclause 12 (1) does not apply where

> "(e) the proceedings are brought to enforce an agreement made in, or as a result of, a mediation session and disclosure of the evidence is necessary to determine the validity or the agreement or the interpretation of any of its terms." (Emphasis added.)

Perhaps the emphasised "or" should be "of".

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Determination No. 46 of 1997 made under section 50 of the *Nature Conservation Act 1980* determines criteria for the giving of a direction to the occupier of land to protect a native animal, native plant or native timber under section 47 of the Act.

Determination No. 47 of 1997 made under section 50 of the *Nature Conservation Act 1980* determines criteria for the giving of a direction to the owner of an animal to carry out treatment for a disease of a native animal or native plant under section 49 of the Act.

Determination No. 48 of 1997 made under subsection 39B (2) of the *Bookmakers Act 1985* revokes Determination No. 18 of 1996 and determines the directions for the operation of the sports betting venue at Bruce Outdoor Stadium at Canberra Raiders matches in the 1997 Super League competition and the ACT Brumbies matches in the 1997 Super 12 competition.

Determination No. 49 of 1997 made under section 6 of the *Trading Hours Act 1996* provided that large supermarkets had extended hours for trading (7 am until 10 pm) on 26 March 1997.

Determination No. 50 of 1997 made under section 6 of the *Trading Hours Act 1996* provided that large supermarkets had extended hours for trading (7 am until 10 pm) on 27 March 1997.

Determination No. 51 of 1997 made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and in accord with section 7 of the *Nurses Act 1988* appoints a specified person as Chairperson of the Nurses Board of the ACT for the period from 31 March 1997 to and including 27 June 1999.

Determination No. 52 of 1997 made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and in accord with section 7 of the *Nurses Act 1988* appoints a specified person as a member of the Nurses Board of the ACT for the period from 31 March 1997 to and including 27 June 1999.

Determination No. 53 of 1997 made under the *Motor Traffic Act 1936* revokes Determination No. 40 of 1997 and determines the road rescue fees payable under section 14AA of the Act.

Determination No. 54 of 1997 made under the *Health and Community Care Services Act 1996* revokes Determination of Fees and Charges No. 39 of 1997 and fixes fees and charges.

Determination No. 55 of 1997 made under section 4 of the *Public Place Names Act 1989* amends Determination No. 35 of 1997 by omitting a street name from that determination and inserts the name, origin and significance of a street in the Division of Conder.

Determination No. 56 of 1997 made under section 19A of the *Smoke-free Areas (Enclosed Public Places) Act 1994* revokes Determination No. 159 of 1995 and determines fees for the making of applications for the issue of a certificate of exemption and for renewal of such certificates.

Determination No. 57 of 1997 made under section 87 of the *Occupational Health and Safety Act 1989* approves the Steel Construction Code of Practice as a code of practice under section 87 of the Act.

Subordinate Law No. 3 of 1997 being the Liquor Regulations (Amendment) made under the *Liquor Act 1975* specifies three locations where sexually explicit entertainment may be conducted on licensed premises and extends the restricted trading hours trial for a further three months until 30 June 1997.

Subordinate Law No. 4 of 1997 being the Liquor Regulations (Amendment) made under the *Liquor Act 1975* updates the name of the Autumn Feast to the Food and Wine Frolic and fixes the date of the event as 16 March 1997.

GOVERNMENT RESPONSES

The Committee has received a response in relation to comments made concerning:

- Determination No. 47 of 1996 made under the *Tenancy Tribunal Act 1994* (Report No. 6 of 1996).

- Determinations Nos 48, 49, 50, 51 and 52 made under the *Credit Act 1985* (Report No. 6 of 1996).

- Determination No. 215 of 1996 made under the *Gungahlin Development Authority Act 1996* (Report No. 17 of 1996).

- Determinations Nos 261 and 262 of 1996 made under the *Gungahlin Development Authority Act 1996* (Report No. 17 of 1996).

- Public Sector Management Standards 4/1996 and 9/1996 (Report No. 17 of 1996).

- Canberra Tourism and Events Corporation Bill 1996 (Report No. 19 of 1996).

- Determination No. 280 of 1996 made under the *Lotteries Act 1963* (Report No. 19 of 1996).

A copy of the response is attached. The Committee thanks the Attorney-General for his helpful response.

The Committee has also received a response concerning Determination No. 227 of 1996 made under the *Health and Community Care Services Act 1996* (Report No. 17 of 1996). The Committee thanks the Attorney-General for providing the response and the legal opinion on which it was based. Having considered that response, it makes the following comments:

Introduction

The Committee notes that the Government has accepted that its legal advice from the Chief Solicitor is correct that Determination No. 227 of 1996 "is not invalidated by the retrospective nature of its operation". This conflicts with the possibility suggested by the Committee that the determination may be invalid because of its prejudicial retrospectivity affecting citizens.

This is a very significant matter in the making of Territory delegated legislation and has substantial consequences for the people of the Territory. It also has consequences for the Parliament's ability to scrutinise delegated legislation.

Large sums of money are collected in the Territory under the provisions in delegated legislation and, if this power can be exercised retrospectively to impose legal liability on citizens where none existed before, it could be regarded with concern by citizens in the Territory.

If the view of the Chief Solicitor is correct, it means that legal monetary or other burdens can be imposed retrospectively on Territory citizens by delegated legislation made by the Executive (or indeed, by the acts of a single Minister as in the present case), without any prior consideration by the Legislative Assembly. If this kind of retrospectivity is valid, people can have monetary burdens placed on them retrospectively where none existed before.

Opinions on either side of the argument could be obtained but it would not be profitable or appropriate for the Committee to get involved in a debate as to whether the view of the Chief Solicitor or the possibility suggested by the Committee is correct. Only the courts can decide what the law actually is. Unless confirmed by the passing of the Health and Community Care Services (Validation of Fees and Charges) Bill 1997 presently before the Assembly, it is open to anyone who had a legal liability (not expected or moral or possible liability) imposed retrospectively on them by Determination No. 227 to litigate the validity of the retrospectivity in that determination.

It is no longer possible for a Parliament to make all the law in our complicated society. Thus Parliament confers power on the Executive or on other people to make law on behalf of the Parliament. As it is law being made in Parliament's name, Parliament imposes certain restrictions on the making of that delegated legislation. It requires publication of making, tabling, disallowance and, in some instances, consultation with the Parliament (for instance, under the *Statutory Appointments Act 1994*).

One common restriction on the making of delegated legislation is that, to protect citizens, the Executive does not have power to make delegated legislation that imposes liabilities retrospectively on individuals. Benefits can be conferred retrospectively by delegated legislation, but not burdens. If the Executive wishes to impose burdens retrospectively, that must be done by the Parliament itself and be subject to parliamentary scrutiny, debate and publicity.

The Committee's suggestion was that section 7 of the *Subordinate Laws Act 1989* was intended to apply this restriction in the ACT and thus ensure that in our delegated legislation members of the public should know in advance what their legal liabilities will be. Lord Justice Buckley said as long ago as 1911 that if legislation "provides that at a past date the law shall be taken to have been that which it was not that ..... [legislation] I understand to be retrospective" (*West v Gwynne* [1911] 2 ch 1, 12). This is precisely what Determination No. 227 does.

Double Disallowance

The same problems that have arisen with determination No. 227 could also arise in relation to fees and charges levied under determinations made under many other ACT Acts. Retrospective liabilities could be imposed under a very large proportion of the Territory's delegated legislation. This is underlined by the view expressed by the Chief Solicitor that:

> "If the Assembly had intended the instrument [Determination No. 227] to be subject to the restriction against retrospectivity, it could have utilised the provisions of the SLA and declared determinations under section 32 [the fees and charges section of the *Health and Community Care Services Act 1996*] to be disallowable, attracting the provisions of section 10 of the SLA."

As such a determination is already disallowable under section 6 as a determination of fees and charges, applying the view expressed by the Chief Solicitor, it means that, unless an Act does declare a determination of fees and charges to be doubly disallowable, then prejudicially retrospective fees and charges can be imposed. A thorough, but not totally exhaustive, search of the Territory's statutes under which fees and charges can be levied failed to discover even one instance of double disallowability.

With respect, the illustration given by the Chief Solicitor of a Ministerial instrument under subsection 33 (2) of the *Health and Community Care Services Act 1996* does not appear in point. As the heading to section 33 states, the section deals with "Payment of fees, charges <u>and interest</u>" (Emphasis added). Fees and charges are payable on, or before, the due date and the instrument imposing them is disallowable as a "fees and charges" instrument (see subsection 6 (19) of the *Subordinate Laws Act 1989*).

If fees and charges are not paid, interest is payable at a rate fixed by a Ministerial instrument. As the heading to section 33 indicates, such an instrument is not a determination of fees and charges. Thus it is not caught by section 6 of the SLA and therefore the provision in section 33 follows the usual formula of providing that is made disallowable under the section 10 formula.

Possible consequences of Chief Solicitor's Opinion

(a) *Long term retrospectivity problem*

On the Chief Solicitor's view, it appears that almost all Acts, under which fees and charges can be imposed, escape the prohibition against prejudicial retrospectivity on individuals and it would be possible to impose prejudicial retrospectivity under any of those Acts.

It was done with Determination No. 227. Lest it be thought that it would be unthinkable to do so again under any of the large proportion of ACT Acts that would, under the Chief Solicitor's view, permit such prejudicial retrospectivity, we recall what happened in relation to another health service determination in 1991. The Committee suggested that Determination No. 8 of 1991 was invalid. The Chief Solicitor agreed with the Committee and the Committee and the Assembly were so informed.

However, the people who had been wrongly charged under the invalid determination did not automatically get their money back, as the law appeared to require. As the letter attached to the Committee's Report No. 17 of 1991 states:

> "ACT Health, upon advice from the Chief Solicitor, does not propose to make refunds, however, should a patient request a refund, the Board will consider the request on a case by case basis."

Were the relevant people ever told and did anyone get their money back that had been unlawfully taken from them?

If the Chief Solicitor is correct, prejudicial retrospectivity to individuals appears to be alive and well under a whole plethora of ACT Acts.

Let us now consider what is legally possible in the future, if the Government's advice is accurate.

In Determination No. 227 the retrospectivity was for about 3 months. But it need not have been for "only" 3 months. Why not wait and make it for 6 months or, indeed, for 6 years. Under the advice, it can apparently be done legally. Or why not impose fees retrospectively to cover any shortfall in hospital funding over a set period? These actions would be perfectly legal under the advice and, if the advice is correct, the courts would enforce the back payments of these fees.

Lest it be said that that would not happen and that, as indicated in the various responses to the Committee's concerns, in the present case the retrospectivity was simply to cover fees that "everyone expected to pay", let it be said that we are not considering "expectations" here, but the hard law and what would be legally possible.

(b) *Control of instruments by disallowance*

The Legislative Assembly can still control delegated legislation made in its name through disallowance. Thus, it could be argued that any excesses could be thwarted. But it is only partial control.

Delegated legislation must be tabled within 15 sitting days. Assume that a disallowable instrument containing prejudicial retrospectivity was made on 13 December 1996 (the day after the final sitting day for 1996). If the approved sitting pattern is followed, the 15th sitting day will be 15 May 1997. Even if the instrument were disallowed on the next sitting day, 17 June 1997, it will have been in force for more than 6 months. A lot of money could have been collected or a lot of actions taken in the meantime and, of course, we recall that anything done up until disallowance is legal and remains legal (see section 6 of the *Subordinate Laws Act 1989).*

(c) *Legislative / Administrative divide*

What has been considered so far assumes that what has been done has been done by an instrument such as Determination No. 227 of 1996 which at least is disallowable.

The Committee however, notes that one of the major arguments in the Government's advice is "that an instrument of an administrative nature including the Determination of fees in question here, may be given retrospective effect" (Emphasis added). There are also several other references to the fact that such instruments are administrative and not legislative.

The Committee has as its terms of reference to: "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." (Emphasis added).

If the Chief Solicitors advice is correct, almost none of the determinations of fees and charges under ACT Acts would be examined by this Committee. This would mean that approximately 25% of all delegated legislation (based on last years figures) would not be examined by this Committee in relation to issues of rights, liberties and other terms of reference set out above because they are administrative, not legislative, in nature. As Members would be aware, this Committee has pointed out numerous problems in determinations of fees over the years, and this would go unchecked if the Chief Solicitors view is correct.

Conclusion

As stated at the outset, it is not the Committee's intention to enter into a debate about whether the view of the Chief Solicitor is correct or whether the possibility of the Committee raised in earlier reports is correct, as only the courts can ultimately decide this.

Retrospectivity that prejudicially affects citizens is normally restricted to Acts that have been debated in the Parliament. Power to make prejudicial retrospective delegated legislation was something that even Henry VIII, who perfected the use of delegated legislation, did not insert in the Statute of Proclamations or the even worse Statute of Sewers.

Ultimately it is up to the Assembly whether it thinks that the Subordinate Laws Act should confer the right on the executive to make legislation retrospectively prejudicial to individuals and without consideration by the Scrutiny of Bills and Subordinate Legislation Committee. As it is a policy matter the Committee makes no comment on these matters.

It should also be noted that it is also the Committee's role to examine clauses of Bills introduced into the Assembly. As the Committee was not established until late 1989 and did not commence operation until early 1990, and the Subordinate Laws Ordinance (which became an Act upon self government) was made on 27 April 1989, this Committee did not examine the clauses of that Bill.

Of course, if Members of the Assembly were concerned about the Executive being able to make delegated legislation retrospectively and without reference to the Scrutiny Committee, it could (1) make an amendment to the Subordinate Laws Act to ensure that section 7 applied to all delegated legislation and (2) make an amendment to the terms of reference to include instruments of an administrative nature being considered by the Committee.

Bill Wood, MLA
Chair

22 April 1997

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 Harold Hird MLA
Acting Chair
Standing Committee on Scrutiny of Bills
and Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601

Dear ~~Mr Hird~~ Harold

I refer to the Standing Committee's Report No 17 (28 November 1996) in which you have commented on, amongst other things, Determination No 227 of 1996.

As you know Determination No 227 is currently before the Assembly following Mr Wayne Berry MLA having moved a motion for its disallowance. As set out in your Report Determination No 227 has been repealed by Determination No 240 of 1996.

In the course of the Assembly's debate of Mr Berry's motion both I and the Chief Minister, Mrs Kate Carnell MLA, urged the Assembly to reject the motion. We also indicated that, as your Report asks us to, we would be seeking further legal advice. The further legal advice is attached for your information.

You will see that the matter has been examined by the Chief Solicitor who is of the opinion that Determination No 227 is not invalidated by the retrospective nature of its operation.

The Government accepts this advice. The Government is also of the view that it has acted quite reasonably in this matter.

In the circumstances I think I should take this opportunity to set out my reasons for saying the Government has acted quite reasonably in this matter.

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In doing so I do not wish to be understood to be implying that the Committee has, contrary to its long-standing conventions, taken a partisan approach to this matter. I also appreciate that in its consideration of the matter, and, its Reports to the Assembly on it, the Committee has not entered into a debate on the merits of the Government's actions or policies.

Retrospective alteration of rights and obligations is generally considered contrary to fundamental legislative principles because people rightly expect to know their responsibilities and obligations at the time they decide to take a particular course of action. Great injustice can result from the retrospective imposition of new obligations. However, Determination No 227 will not cause injustice of that kind. No person has organised their affairs on the basis that the fees imposed by defective Determinations Nos 106 and 136 were not payable. In fact the issue of fairness arises if a limited group in the community is able to take advantage of an unfortunate mistake. The wider community would bear the cost of this group's windfall.

The Government's position is that it should act in the interests of the wider community.

On this occasion, the Government has acted lawfully to cure a technical defect which, if not corrected in this way, will result in a loss of considerable public funds which will have to be restored by other means. In the circumstances, I believe the decision of the Government is the appropriate response.

Yours sincerely

Gary Humphries
Attorney-General
18/2/97

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AUSTRALIAN CAPITAL TERRITORY GOVERNMENT SOLICITOR

1st Floor
GIO House
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CANBERRA CITY 2601

Your Reference:

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

10 September 1996

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

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

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

BACKGROUND

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

You sought advice on the following:

Determination No. 106 of 1996:

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

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CIVIC SQUARE ACT 2608
Telephone: (06) 2070666
Fax: (06) 2070650
DX 5602
CANBERRA

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

Determination No. 136 of 1996:

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

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

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

SHORT ANSWERS

Determination No. 106 of 1996:

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

Determination No. 136 of 1996:

A2. No.

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

REASONING

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

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

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

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

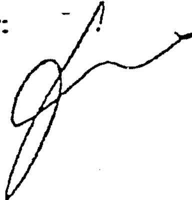
A. However, given that Determinations 106 and No. 136 were not to take effect until 1 July 1996 they were not "in force immediately before the commencement" of the *H & CCS A*. As a result, they are not valid determinations.

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

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

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

ACT Government Solicitor
Per:



GOVERNMENT SOLICITOR

SUBJECT: RETROSPECTIVE DETERMINATION OF FEES AND CHARGES UNDER THE HEALTH AND COMMUNITY CARE SERVICES ACT 1996

Ref: 97-2-296386

ATTORNEY-GENERAL

- Chief Executive

PURPOSE

The purpose of this minute is to inform you of the outcome of a review made by me of earlier advice provided by the Government Solicitor's Office in relation to the above matter.

BACKGROUND

An enabling provision for fees and charges for health services contained in the *Health Act 1993* was repealed as of 1 July 1996 by the *Health Services (Consequential Provisions) Act 1996* associated with the *Health and Community Care Services Act 1996*. The transitional provision failed to preserve certain existing determinations of fees and charges for health services (Nos 106 and 136 of 1996) which thus also fell with the repeal of the enabling provision. This office was asked for advice and was instructed that service receivers and service providers had paid and collected fees since that time in the belief that no problem existed. Advice was given to the Department of Health and Community Care confirming the position and recommending that in order to rectify the problem a fresh determination be made effective retrospectively to 1 July 1996.

The Department sought to do this by Determination No 227 of 1996 ("the Determination"). The Scrutiny of Bills Committee made some observations about the Determination in a report tabled in the Assembly on 3 December 1996. The Committee suggested that the Determination was a subordinate law by virtue of subsection 6(19) of the *Subordinate Laws Act 1989* ("the SLA") and that it was restricted from retrospective operation by section 7. The

Government Solicitor was again asked for advice by the Department and gave advice on 9 December 1996 that the Determination was an administrative instrument and not a subordinate law for purposes of the restriction on retrospectivity in section 7. The advice also sought to show how the Scrutiny of Bills Committee had erred in its reasoning to reach a different view.

Copies of the advices given by my office are attached.

In the Assembly Mr Berry moved the disallowance of the Determination on the basis of the Committee's report. Debate on the motion was adjourned on 5 December 1996. The effect of Mr Berry's motion is, by virtue of section 6 of *the SLA*, that the Determination may be disallowed by resolution of the Assembly, or if the Assembly does not deal with the motion within 15 sitting days of the date of Mr Berry's motion, then it will be deemed to have been disallowed.

ISSUES

The essence of the legal issue is whether the Determination can be made to have retrospective effect. By "retrospective effect" is meant that the instrument may provide that it takes effect at a date prior to its making and notification. The Determination does purport to do this. It was executed by the Minister in October 1996 but is expressed to be effective from 1 July 1996.

In my opinion the scheme established by *the SLA* points strongly to the conclusion that an instrument of an administrative nature, including the Determination of fees in question here, may be given retrospective effect.

First, *the SLA* distinguishes between a subordinate law, being an instrument of "a legislative nature including rules regulations and by laws" (the meaning given by section 14 of the *Interpretation Act 1967*), and two other kinds of subordinate instruments made under powers conferred by legislation. These are: (i) instruments of an administrative nature; and (ii) instruments determining fees or charges. In the scheme of *the SLA* administrative instruments are subject to certain kinds of regulation but not necessarily to the full regime to which legislative instruments are subject, including the restriction on retrospective operation. Instruments of an administrative nature are to be governed by Parts I, II and III of the *Interpretation Act* and are to be construed as valid to the extent permitted under their enabling provisions, an expression of the principle *ut res magis valeat quam pereat* (section 9). Importantly, if the enabling Act so provides, administrative instruments may be subject to the full

regime of *the SLA* even though they are not "subordinate laws" (section 10). Fee determinations, on the other hand, are, for the purposes of section 6 included in the special meaning given to "subordinate law" in that section alone (subsection 6(19)). Section 6 provides for commencement, tabling and disallowance by the Assembly of subordinate instruments.

Second, paragraph 6(1)(b) expressly provides for a subordinate law to take effect "on the day of notification or, if that law otherwise provides, as so provided". This provision is clearly intended to recognise the possibility of retrospective effect. The legislative history of the counterpart provision in the Commonwealth *Acts Interpretation Act 1901* supports this conclusion. Prior to 1937 the counterpart Commonwealth provision provided that a regulation could take effect on the date of notification "or on a later date specified in the regulation" (cf *Interpretation Act 1897* (NSW) section 41). In 1937 the Commonwealth provision was amended to wording corresponding to section 7 of *the SLA*, following the decision of the High Court in *Broadcasting Co of Australia v the Commonwealth* (1935) 52 CLR 52. Thus, when section 6 of *the SLA* is read with section 7 it is apparent that the scheme of *the SLA* is to permit retrospective effect in instruments of a legislative nature where the instrument is beneficial, to restrict retrospective effect when the instrument imposes liability or prejudices rights, but not to restrict retrospective effect in other kinds of instrument.

Third, *the SLA* does effectively provide a special safeguard in relation to fee determinations. They may, if non-legislative instruments, be free of the restriction on retrospective effect, but because of the special meaning given to "subordinate law" in section 6, they are subject to the scrutiny of the Assembly and to disallowance.

The common law has long recognised a principle of construction of statutes that in the absence of some clear indication to the contrary they are to be interpreted as not operating retrospectively. The leading case expressing this view by the High Court is *Maxwell v Murphy* (1957) 96 CLR 261. That principle applies equally to subordinate laws as to statutes, and has been referred to by the High Court in cases where it has found nevertheless that a regulation validly had retrospective effect (see the cases discussed in the leading Australian text, Professor Pearce's *Delegated Legislation* (1977), pp. 292-293). Thus, it could be predicted that a court in the ACT might recognise considerable force in the argument that this principle of construction might be applied to the enabling

provision in this case - section 32 of the *Health and Community Care Services Act 1996* - so that it should be construed so as not to authorise the making of a retrospective fee determination. However, I am not aware of any decision which is authority for the proposition that, as a general rule, provisions enabling subordinate instruments should be so construed, and none of the cases referred to in Pearce suggest this. As Pearce observes, these cases do not suggest that different rules should apply because the instrument in question is a regulation or a subordinate instrument (*Worrall v Commercial Banking Co of Sydney* (1917) 24 CLR 28; *Minister for the Army v Pacific Hotel P/L* (1943-44) 17 ALJ 403). The Court has looked to the subordinate instrument or regulation itself to find an intention of retrospectivity, rather than to the enabling provision. If the power is given to deal with a topic by subordinate instrument then the power is given to deal with it by the same retrospective enactment as Parliament would have had (*Marshall's Township v Johannesburg Consolidated Investment* [1920] AC 420). Retrospective operation may nevertheless be relevant to whether the subordinate instrument is necessary for or related to the purposes of the Act. In the *Broadcasting Co* case referred to earlier the High Court held that the regulation was invalid. The regulation retrospectively reduced the amount payable to wireless companies out of wireless fees paid to the government by members of the public. The regulation was made under an enabling provision expressed in the common "necessary or convenient" form, but, in the words of Professor Pearce, "the Court was not speaking at large in regard to the interpretation of a necessary or convenient power; it was directing its remarks to the regulation made under the particular Act." The need to correct an invalid order has been identified as a category of circumstance when an enabling provision may be construed to authorise a retrospective subordinate instruments (*Sabally and N'Jie v Attorney General* [1965] 1 QB 273 (although the instrument in question in that case was one providing for the governmental arrangements of a British colony and so was not closely comparable to the present fee determination); K Puttick *Challenging Delegated Legislation* (1988), p. 271f.

It may also be noted that, in the absence of clear intention to the contrary, a subordinate law could not in my opinion be expressed to take effect prior to the commencement of its enabling provision. The present case does not raise this consideration.

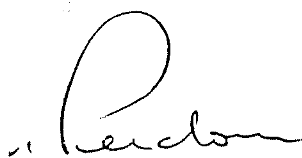
Without the context provided by *the SLA*, it would be necessary to fall back on these sorts of principles which might govern the construction of the enabling

provision, and in that circumstance I might have advised you that the clear course to remove all doubt would be to enact legislation to retrospectively validate the relevant fee determination. But I believe that in the ACT it is proper to construe an enabling provision of the kind in question here in the context of the scheme of *the SLA*.

If the Assembly had intended the instrument to be subject to the restriction against retrospectivity, it could have utilised the provisions of *the SLA* and declared determinations under section 32 to be disallowable, attracting the provisions of section 10 of *the SLA*. That proposition is reinforced when one considers that the next section of the *Health and Community Care Services Act 1996* does indeed make such provision in respect of the instruments it enables to determine interest rates payable on debts owed to the Health Service (subsection 33(3)). The Assembly cannot be taken to have intended that because the fee determination enabled by section 32 is a subordinate law for purposes of section 6 it must be also subject to the restriction on retrospectivity in section 7- which seems to be the view of the Scrutiny of Bills Committee - as that would be to fly in the face of the words of section 6 which give that extended meaning to the expression only "in this section".

CONCLUSION

In my opinion the Determination is not invalidated by the retrospective nature of its operation.



Chief Solicitor
13 February 1997

AUSTRALIAN CAPITAL TERRITORY
GOVERNMENT SOLICITOR

Your refs
Our refs 96-2-283668
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9 December 1996

Ms Vicki Crispe
Executive Coordination
Department of Health and Community Care
BY FAX 50843

CC Mr Robert Cruikshank
Legal Policy
Attorney General's Department
Level 3 GIO Building

RE: DETERMINATION NO 227 OF 1996 - SECTION 32 *HEALTH AND COMMUNITY CARE SERVICES ACT 1996* - SCRUTINY OF BILLS COMMITTEE REPORT - "SUBORDINATE LAW"

I have been asked to comment on the validity of the abovementioned Determination in the light of observations made by the Scrutiny of Bills Committee in a Report tabled in the Assembly on 3 December 1996. On the basis of the Report Mr Berry MLA moved a motion of disallowance of the Determination on 5 December 1996. The debate on the motion has been adjourned.

Short answer

The Committee has, with all due respect, applied the law incorrectly. If the law is applied correctly it appears that the instrument is not a subordinate law, is valid, and is not prevented from being retrospective by section 7 of the *Subordinate Laws Act*.

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Reasons

The essence of the Committee's concern about the Determination is set out in the following passage on page 15 of its Report:

> The Committe respectfully suggests that the validity of the retrospective effect of the Determination No 227 of 1996 be reconsidered. In particular the Committee suggests that the possible effect of section 7 of the *Subordinate Laws Act 1989* be considered.
>
> By virtue of the provisions of subsection 6(19) of the *Subordinate Laws Act 1989* the present Determination is a subordinate law, as it is a determination of fees and charges made by a Minister under a provision of an Act, namely section 32 of the *Health and Community Care Services Act 1996*.

In my opinion, with all due respect to the Committee, the statement "By virtue of subsection 6(19) of the *Subordinate Laws Act 1989* the Determination is a subordinate law" is incorrect in this context.

Subsection 6(19) reads in part as follows:

> **(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].

The important words are "In this section". Subsection 6(19) has the effect of extending the meaning of the expression "subordinate law" in section 6 of the Act. There are some curiosities in the wording of subsection 6(19), but one thing is clear: it does not give that meaning for other sections of the Act. In particular, it does not give that meaning for section 7 which deals with retrospectivity.

We must look to the meaning of "subordinate law" set out in the *Interpretation Act 1967*, not to subsection 6(19). In the *Interpretation Act* the meaning of the expression is given as -

> an instrument of a legislative nature (including rules, regulations or by-laws) made under an Act.

If the Determination is not a subordinate law in this sense, then the restriction on retrospectivity in section 7 does not apply to it.

The distinction between "legislative" and "administrative" is one which has long troubled lawyers and the courts. It is one easy to state, but not always easy to apply. The distinction is nonetheless real and well-established in the law. It is also clearly recognised elsewhere in the the *Subordinate Laws Act*: see subsection 9(1). It would occupy many pages to review all the authorities on the distinction. Suffice it to say that while a rule, a regulation or a by-law would most likely be an instrument of a legislative nature, I am reasonably confident that the instrument in question here - being a determination of fees and charges under section 32 - is an instrument of an administrative nature.

To answer the question one has to look to the character of the thing that the enabling provision authorises the instrument to do:*Commonwealth v Grunseit* (1943) 67 CLR 58; *Arnold v Hunt* (1943) 67 CLR 429; *Arthur Yates v Vegetable Seeds Committee* (1945) 72 CLR 37. The traditional test - repeatedly approved and applied by the courts ever since these cases - has been to look to see whether the enabling provision authorises the instrument to "determine the content of a rule of conduct or [to make] a declaration as to a power, right or duty" as distinct from merely "executing" or carrying out the law by "applying it in particular cases". In the former case there is a discretion as to what the law is, in the latter only a discretion as to how it is executed: cf *J R Hampton & Co v United States* (1928) 276 US 394, 407.

Section 32 reads as follows:

Charges for provision of health services and community care

32. (1) The Minister may, by notice in the *Gazette*, determine the fees and charges for or in connection with the provision of health and community care services.

(2) The Minister may determine different fees and charges for or in connection with the provision of different health and community care services in different localities or in different circumstances.

A legislative rule of conduct involves a well-known form of expression; it is usually in the form that "a person shall do X" or "a person shall not do Y". I do not believe that section 32 authorises the Minister to make, by determination, a rule of this kind. To adopt the distinction made by the High Court in *Grunseit*, the content of the law is defined by section 32 - the Minister may fix a charge for provision of health services; the application of that law to particular services will be done by the determination. By fixing a charge the Minister will be executing the law, not making it.

Section 32 may be seen to authorise the imposition of a rule of conduct in one sense; it may bind the department. It may mean that the health department may not charge more than $X or $Y for certain services. However, I do not believe that this is the kind of rule referred to when the Court has applied the test of a rule of conduct. To set a fee in this sense means no more than that the Minister may bind himself and his agents; the fee determination thus has the character of an administrative rule even though it may have, like many administrative instruments, a legal effect.

To apply the second aspect of the test we must ask whether the provision authorises the determination to declare any power, right or duty. The answer is clearly "No". The Minister may only determine what is to be paid when a service is provided, a fee or charge for or in connection with provision of a health service. He may say by the determination that "the fee for this service is $X and the fee for that service is $Y", but he may not impose any new liability or oblige a service to be given or received.

The application of the *Grunseit* test points strongly, in my opinion, to the conclusion that the determination is an administrative instrument, not a legislative one.

In several of the authorities in which the test has been applied the instrument in question has been a determination of fees or charges for goods or services: *Arnold v Hunt* (1943) 67 CLR 429; *Aerolinas Argentinas v FAC* (1993) 32 NSWR 595; *Aerolinas Argentinas v FAC* (1995-6) 63 FCR 100. In *Arnold* the instrument fixed the prices which were permitted to be charged by merchants for types of liquor. Two of three judges of the High Court observed that the instrument was of an executive character; the other did not decide. In the *Aerolinas Argentinas* cases the instrument fixed charges for use of, and provision of certain services at, airports. On both occasions the Court held that the instrument was administrative in character.

One case concerning a determination of fees and charges which can be clearly distinguished is *Queensland Laboratory* (1988) 84 ALR 615. Here the enabling provision was unusual because it provided that the instrument was deemed to be inserted into the Act as a schedule.

In some cases the Courts, in order to guide themselves in the characterisation of the instrument, have had regard to what I might term the "incidents" of legislative and administrative instruments. The Court has noted that an instrument is subject to executive control, that it must be published, or that it is subject to disallowance: eg *Arnold v Hunt; Aerolinas Argentinas v FAC* (1995-6) 63 FCR 100. In my opinion these incidents must be given little weight in themselves, and they may even point in different directions, as in *Aerolinas* .

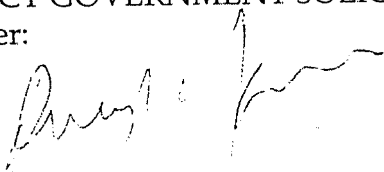
I note three further points about section 32 and its context. First, a determination under section 32 is not expressed to be a disallowable instrument for purposes of section 10 of the *Subordinate Laws Act* (which would have meant that it could not be retrospective). Second, subsection 32(2) is probably superfluous as different fees for different classes of matter are effectively authorised by section 27 of the *Interpretation Act 1967*. Third, section 33 provides that fees and charges are payable 28 days after an account has issued and imposes an additional liability to pay a determined rate of interest on amounts unpaid after that date. A determination of interest rate is expressed to be a disallowable instrument: subsection 33(3).

From a policy point of view it might appear undesirable that an instrument such as a determination of fees can be retrospective, but of course the safeguard in the *Subordinate Laws Act* is that such an instrument is subject to disallowance

by virtue of subsection 6(19). In the present case, where the instrument is attempting to regularise a situation resulting from the invalidity of previous instruments due to administrative error, there seems to be a good case for retrospectivity. It will simply mean that the position which all parties had assumed to exist, and had acted upon, will be restored.

The Committee in its Report makes no mention of the characterisation of the determination as a legislative or administrative instrument. It thus appears that the Committee may not have directed its collective mind to what, with all due respect, is the critical issue in this matter. I would therefore welcome an opportunity to have the Committee's views on it.

ACT GOVERNMENT SOLICITOR
Per:



Gary Humphries MLA

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

Member for Molonglo
Australian Capital Territory

BW 4/3 for SoB Ctee

Mr Bill Wood MLA
Chair
Standing Committee on Scrutiny of Bills
and Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601

Dear ~~Mr Wood~~ Bill

I refer to the Standing Committee's Reports No 6 (21 May 1996), 17 (28 November 1996) and 19 (24 December 1996).

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

Report No 6 contained a number of comments concerning the appointment of the Acting President of the Tenancy Tribunal by Determination No. 47 of 1996, made under *the Tenancy Tribunal Act 1994*.

Firstly, the Committee queries whether the Standing Committee on Legal Affairs had been consulted about the appointment, because the Explanatory Statement did not confirm that such consultation had occurred. Your predecessor also raised this issue when she tabled Report No. 6 in the Legislative Assembly. I responded by letter to the Committee's concerns on 6 June 1996. In that letter, I noted that I had directed my Department to review its procedures to ensure that guidelines for the making of statutory appointments were circulated by electronic mail throughout the ACT Public Service in August 1996.

Secondly, the Committee queried the period of retrospectively between 8 February 1996, when Determination No. 47 stated that the appointment of the Acting President of the Tenancy Tribunal was to begin, and 3 May 1996, when

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the Determination was notified in the *Gazette*. The ACT Government Solicitor has advised that the

> appointment of Mr Burns is valid and took effect on notification. The decisions made by him are remedied by s. 63(4) of the *Tenancy Tribunal Act 1994* and are therefore effective.

A copy of the advice is attached.

In Report No. 6, the Committee raised several queries concerning Determination Nos. 48, 49, 50, 51 and 52, made under the *Credit Act 1985*, which appointed named persons as members and acting members of the Credit Tribunal.

Firstly, the Committee queried whether the Standing Committee on Legal Affairs was consulted about the appointments. As I noted in relation to the appointment of the Acting President of the Tenancy Tribunal, I addressed the Committee's concerns by letter to your predecessor on 6 June 1996.

The Committee also queried the period of retrospectivity between 15 February 1996, the date on which the appointments were declared by the Determinations to commence, and 3 May 1996, when the Determinations were notified in the Gazette. I am advised that during the relevant period no matters were heard or decided by the persons appointed by the Determinations.

Finally, the Committee queried whether it was intended that there should be two acting appointments for the purposes of paragraph 185(1)(b) of the *Credit Act 1985* and none for the purposes of paragraph 185(1)(c). While the Act does not require the appointment of acting members, the consequence highlighted by the Committee was not intended. There has, since the appointments, been no occasion on which there has been a vacancy to be filled by a person appointed as acting member for the purposes of paragraph 185(1)(c) of the Credit Act. I am advised that the intended appointment will be made when new appointments to the Credit Tribunal are arranged. I am advised that these appointments are imminent.

The delay in responding to the Committee's queries concerning the Tenancy Tribunal and Credit Tribunal is regretted. The response could be prepared only after the Tribunals' records had been examined and in the case of the Tenancy Tribunal it was also necessary for legal advice to be obtained.

In Report No. 17, the Committee sought clarification as to whether the person appointed to the Gungahlin Development Authority by Determination No. 215 of 1996 under the *Gungahlin Development Authority Act 1996* had been involved in any activity of the Authority or paid any fees prior to 1 October 1996, when the Determination was notified in the *Gazette*. I am advised that the appointee was

not involved in any activity of the Authority before 1 October and that no fees were paid.

In Report No. 17, the Committee commented on a failure to address the issue of retrospectivity in the Explanatory Statements for Determination Nos. 261 and 262 made under the *Gungahlin Development Authority Act 1996*. I am advised that no rights have been affected in a manner prejudicial to any person nor liabilities imposed as a consequence of the appointments to the Authority taking effect retrospectively. I am also advised that the operational area concerned has been informed of the need to include such detail in an Explanatory Statement.

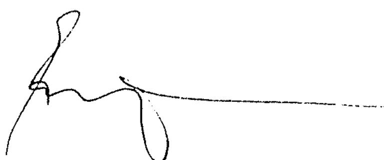
In Report No. 17, the Committee noted that an Explanatory Statement had not been attached to Public Sector Management Standard 4/1996. I am advised that arrangements have been made for the distribution of the Explanatory Statement to holders of the Standard to correct this oversight.

In Report No. 17, the Committee noted an incorrect page reference in Schedule A to the Public Sector Management Standards 9/1996. I am advised that a minute was sent to all holders of copies of the Public Sector Management Standards 9/1996 advising them of the error in the reference number and providing them with a copy of the amended version of the Schedule.

In Report No. 19, the Committee drew attention to an incorrect cross-reference in clause 5(2)(b) of the Schedule to the Canberra Tourism and Events Corporation Bill 1996. This matter has been attended to.

In Report 19, the Committee correctly noted that the Explanatory Statement attached to Determination 280 of 1996, made under the *Lotteries Act 1964*, was incorrect in its statement that the determination set the 'minimum' total prize value for exempt lotteries. The determination does set the maximum total prize value for exempt lotteries. I am advised that a corrected Explanatory Statement is to be prepared.

Yours sincerely



Gary Humphries
Attorney-General

3 MAR 1997

Documents
Enclosed

Attachment

AUSTRALIAN CAPITAL TERRITORY GOVERNMENT SOLICITOR

Your Reference:

Our Reference: Zac Chami
ph: 207 0404

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CANBERRA CITY 2601

7 January 1997

Mr Eugene Foo
Policy Officer
Policy and Legislation
ACT Consumer Affairs Bureau
L3, GIO House
City Walk
Canberra City 2601.

BY HAND

RE: STATUTORY APPOINTMENTS AND RETROSPECTIVITY

I refer to your request for advice dated 12 December 1996 regarding the above mentioned topic and with respect to the following questions;

1. Is the s53 interim order of Acting President Burns, delivered during the retrospective period an order which is either prejudicial to the rights of a person OR an imposition of a liability upon the person,

2. Is Acting President Burns's appointment invalidated under s7 of the *Subordinate Laws Act 1989*,

3. If 2. above is answered in the affirmative what should the Bureau do with respect to the appointment and the cases heard by Acting President Burns.

SHORT ANSWER

The issue raised, ie retrospectivity, is not applicable. The orders made by Acting President Burns during the period 8 February and 3 May 1996 were made ultra vires and not retrospectively. Consequently there is no need to answer questions 1 2 or 3 above.

The appointment of Mr Burns is valid and took effect on notification. The decisions made by him are remedied by s63(4) of the *Tenancy Tribunal Act 1994* and are therefore effective.

BACKGROUND

Mr John Burns was appointed as Acting President of the Tenancy Tribunal on 8 February 1996. Such appointment was not gazetted however until 3 May 1996. The period between such dates is, to use your words, the retrospective period.

During the retrospective period Mr Burns adjudicated more than one matter however only imposed a substantial order in the matter of Pipes Holdings -v- GBT. In that case a s53 interim order under the *Tenancy Tribunal Act 1994* was delivered.

REASONS

Little doubt exists that the appointment of Mr Burns to the position of Acting President of the Tenancy Tribunal, pursuant to s63 of the *Tenancy Tribunal Act 1994,* is an appointment to a statutory office within the meaning of s3 of the *Statutory Appointments Act 1994* (the SA Act). The procedure highlighted in s4 of the SA Act must therefore be observed. The instrument appointing the person to such office is a disallowable instrument under s5 of the SA Act. Since the instrument is disallowable and subject to the provisions of s10 of the *Subordinate Laws Act 1989*[1] then it is generally proscribed conduct for such an instrument (subordinate law) to act retrospectively. More particularly s7 of the Subordinate Laws Act States that:

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;

[1] The instrument is treated to be a subordinate law and s7 of the Subordinate laws Act 1994 applies.

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

It is clear that for s7 purposes a subordinate law must **be expressed to have effect prior to notification**[2] and have operation so as to prejudicially affect the rights, or impose liabilities upon, a person as from a prior date. It is also relevant to consider that s7 is predicated upon the notion that an instrument or a law shall not be couched in such terms that it has an operational effect from a time period which has passed. The rationale for the rule against retrospectivity is that a law "is prima facie to be construed as not attaching **new legal consequences** to facts or events which occurred before its commencement", *Fisher -v- Hebburn Ltd (1960) 105 CLR 188 @ 194.* In the case at hand the appointment[3] (subordinate law) of Mr Burns is not a law which was either expressed to have effect prior to notification **or** a law construed such that it creates new legal consequences to facts or events that occurred before its commencement. Consequently I am of the opinion that the matter does not touch upon retrospectivity but is one which concerns orders made ultra vires. Accordingly the order made by Mr Burns, in the nature of an injunction, on 8 February 1996 and presumably continued on 22 February, 6 March, 7 March and 21 March are ultra vires.

If a contrary view is taken, that is the appointment made on 8 February 1996 is in itself the expression by which the law takes effect, then it may be said in response that the appointment is drafted in a manner which makes it prospective ie 8 February 1996 to 31 December 1999. Further the instrument of appointment in no way cites that it is either to take effect before notification or even mentions notification. This response is supported by *Australian Coal and Shale Employees Federation -v- Aberfield Coal Mining Co. Ltd.*[4] wherein it was said that where a rule or regulation is not expressed to take effect prior to notification but it nevertheless appears that such a regulation or rule does act retrospectively then because the rule or regulation has not been notified it does not "take effect or come into force as a rule or regulation until the date of notification". Therefore any orders made between the period 8 February 1996 and 3 May 1996 are ineffectual as opposed to being retrospective.

---

[2] Had s7 read something similar to "A subordinate law shall not take effect from a date before the date of its notification............" then the retrospectivity argument would have applied. The additional words " be expressed to" however import into the section a totally different requirement before the type of retrospectivity envisaged under the section is activated.

[3] The appointment instrument states that "under S63 of the Tenancy Tribunal Act 1994, I appoint John Dominic Burns as Acting President of the Tenancy Tribunal from 8 February 1996 to 31 December 199 inclusive". Thus it does not contain express words giving the instrument effect before its notification.

[4] (1942) 66 CLR 161 per Starke J @ 185. See also Toowoomba Foundry P/L -v- Commonwealth (1945) 71 CLR 545 per Latham CJ @ 568.

Notwithstanding that the orders delivered by Acting Magistrate Burns were made ultra vires I am of the opinion that same may be remedied by resort to s63 of the Tenancy Tribunal Act. Such section, more particularly s63(4), prescribes that;

> Anything done in good faith by or in relation to a person purporting to act under subsection (2) is not invalid on the ground that—
>
> (a) the person's appointment was ineffective or had ceased to have effect; or
> (b) the occasion for the person to act had not arisen or had ceased.

ACT Government Solicitor
per: