

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

REPORT NO. 17 OF 1994

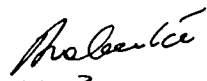
17 November 1994



LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

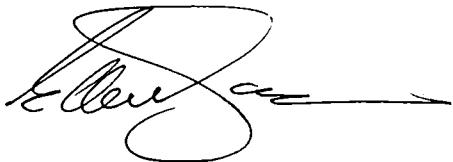
Standing Committee on Scrutiny of
Bills and Subordinate Legislation

Ms Roberta McRae, OAM, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601


Dear Ms McRae,

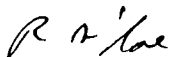
Please find enclosed a copy of Report No. 17 of 1994 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. I seek your approval to print and circulate Report No. 17 of 1994.

Yours sincerely,



Ellnor Grassby, MLA
Chairperson

17 November 1994



Approved
Roberta McRae, OAM, MLA
Speaker

(7 November 1994

Civic Square, London Circuit, Canberra ACT 2601
GPO Box 1020, Canberra ACT 2601
Telephone: (06) 20 50173 Facsimile: (06) 20 50442

TERMS OF REFERENCE

- (1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;
- (2) the Committee shall with respect to any instrument of a legislative nature which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act consider whether the instrument -
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; or
 - (e) the explanatory statement accompanying it meets the technical or stylistic standards to which such an instrument or explanatory statement ought, in the opinion of the Committee, to conform;
- (3) the Committee shall with respect to the clauses of Bills introduced into the Legislative Assembly consider whether such Bills -
 - (a) unduly trespass on personal rights and liberties;
 - (b) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers;
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny; or
 - (f) the explanatory memorandum accompanying it meets the technical or stylistic standards to which such a Bill or explanatory memorandum ought, in the opinion of the Committee, to conform;
- (4) the Committee shall consist of three members;
- (5) 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;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) 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

Mrs E. Grassby, MLA (Chairperson)
Mr G. Humphries, MLA (Deputy Chairperson)
Ms H. Szuty, MLA

Legal Advisor: Emeritus Professor D. Whalan, AM
Secretary: Mr T. Duncan
Deputy Secretary: Ms B. Irvin

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The terms of reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and subordinate legislation that comply with the high ideals set out in the terms of reference.

BILLS

Bills - No Comment

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

Acts Revision (Victims of Crime) Bill 1994

This Bill makes changes relating to bail, victims impact statements and parole consequent upon the passing of the *Victims of Crime Act 1994*.

Betting (Totalizator Administration) (Amendment) Bill 1994

This Bill provides that the Minister will make disallowable determinations to set the amounts that are to be paid to the Territory and to the Racecourse Development Fund from ACTAB turnover.

Casino Control (Amendment) Bill 1994

This Bill provides for separate taxation arrangements to apply to junket operations.

Dentists (Amendment) Bill 1994

This Bill amends the principal Act to permit the recognition of specialist dentists and provides for registration of dentists, specialist dentists and dental hygienists and disciplinary action that may be taken to comply with common standards agreed between States and Territories, removes sexist language and updates drafting in the Act.

Discrimination (Amendment) Bill (No. 3) 1994

This Bill prevents disclosure of matters raised in conciliation in subsequent proceedings under the Act or in proceedings in the Administrative Appeals Tribunal for review of decisions under the Act.

Evidence (Closed-Circuit Television) (Amendment) Bill (No. 2) 1994

This Bill extends the use of closed-circuit television to adult victims of alleged sexual or indecent assault for giving evidence.

Health Legislation (Consequential Amendments) Bill 1994

This Bill amends the *Health Professions Boards (Procedures) Act 1981*, the *Health Professions (Elections) Act 1980* and the *Health Complaints Act 1993* (including removing sexist language and updating drafting) consequent upon the passing of the *Psychologists Act 1994*, the *Podiatrists Act 1994* and the amendment of other health professions Acts to introduce national registration and standards.

Intoxicated Persons (Care and Protection) Bill 1994

This Bill provides a legislative framework for the care and protection of persons found intoxicated in a public place.

Intoxicated Persons (Consequential Amendments) Bill 1994

This Bill provides that the death of a client at a place licensed under the *Intoxicated Persons (Care and Protection) Act 1994* is to be treated as a death in custody under the *Coroners Act 1956* and repeals a redundant section of the *Crimes Act 1900*.

Motor Omnibus Services (Amendment) Bill 1994

This Bill facilitates the introduction of an automated ticketing system, includes provisions for the use of an infringement notice system in respect of fare evasion and other offences and removes sexist language.

National Environment Protection Council Bill 1994

This Bill is the ACT's complementary legislation to the Commonwealth's *National Environment Protection Council Act 1994* to set up the National Environment Protection Council.

Poisons and Drugs (Amendment) Bill (No. 3) 1994

This Bill deletes a reference to the National Health and Medical Research Council and substitutes the Australian Health Ministers' Advisory Council which will publish the Standard for the Uniform Scheduling of Drugs and Poisons from 18 December 1994 when this Bill is due to commence.

Psychologists Bill 1994

This Bill provides for the regulation of the practice of psychology in the Territory.

Tenancy Tribunal (Amendment) Bill 1994

This Bill removes duplicated provisions from the Act.

Victims of Crime Bill 1994

This Bill establishes a number of principles for treatment of victims of crime and provides for the appointment of a victims of crime co-ordinator.

Bills - Comment

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

Business Names (Amendment) Bill 1994

This Bill clarifies the powers of the Minister to determine fees, removes possible doubts about determinations of fees made in the past, removes sexist language and updates the drafting in the Act.

There May Be Prejudicial Retrospectivity

Clause 11 of the Bill inserts a savings provision that removes any doubts about the validity of past determinations of fees made by the Minister. This ensures that any fees that were collected in the past have been validly collected whether or not the determinations were valid.

If, in fact, previous determinations were invalid, then this clause would have a prejudicial retrospective effect in validating the collection of fees under those invalid determinations.

Limitation (Amendment) Bill 1994

This Bill amends the principal Act to provide that the choice of law changes made to the principal Act by the *Limitation (Amendment) Act 1993*, which commenced on 30 November 1993, are not to be effective in relation to proceedings instituted before 1 June 1994, unless those proceedings were completed before the commencement of the present Bill when it becomes an Act.

Possible Prejudicial Retrospectivity

The amendments that came into effect when the *Limitation (Amendment) Act 1993* commenced on 30 November 1993 provided that, where a cause of action arose before that date, but proceedings had not been commenced, new rules applied. The effect of this Bill is to postpone the application of those new rules until 31 May 1994 in relation to proceedings commenced during that period of 6 months, unless the proceedings were completed before the commencement of this Bill as an Act.

In effect, the Bill restores rights that were destroyed by the *Limitation (Amendment) Act 1993*. This restoration will be beneficial to those whose rights are restored by this Bill. But, on the other hand, it will be prejudicial to those against whom these rights are enforced.

Nature Conservation (Amendment) Bill (No. 2) 1994

This Bill updates nature conservation processes and procedures.

Should These Declarations Be Disallowable Instruments?

Clause 5 repeals and substitutes subsections 16 (1) and (2) of the Act. The new subsections provide as follows:

"(1) The Conservator may, by instrument, declare the members of a species of migratory animal to have special protection status if the protection of the species is the object, or part of the object, of an Act of the Commonwealth, or of an international agreement (however described) entered into by the Commonwealth.

(2) The Conservator shall, by instrument, declare the members of a species of native animal or native plant to have special protection status if -

- (a) he or she believes on reasonable grounds that the species is threatened with extinction; or
- (b) the Minister makes a declaration under section 21 that the species is endangered."

Such instruments do not appear to have been made disallowable instruments for the purposes of section 10 of the *Subordinate Laws Act 1989*.

The Committee makes two comments.

First, the presentation speech appears to address this matter in the following passage (on page 4):

"Native species threatened with extinction or migratory species subject to international agreement for their conservation are declared to have 'special protection status' and are subject to more stringent controls. It is proposed to allow amendment to aspects of these controls by disallowable instrument to allow greater flexibility in their application without lessening the Government's ability to fulfil its nature conservation responsibilities." (Emphasis added.)

The Bill does not appear to carry out the intention to make the instruments disallowable.

Secondly, the Committee notes that, later in the Bill (on page 10), clause 13 of the Bill inserts new section 45AA, which authorises the Conservator to:

"declare organisms of a particular kind to be prohibited organisms ... or declare organisms of a particular kind to be controlled organisms."

New subsection 45AA (4) provides that:

"A declaration under this section is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*."

Should this precedent be followed with the declarations made under section 16?

Rates and Land Tax (Amendment) Bill (No. 2) 1994

This Bill provides that only a person holding land direct from the Crown or a mortgagee in possession can take advantage of the principal place of residence exemption for land tax purposes, widens the provisions for the correction of errors, provides greater objection and appeal rights, removes sexist language and updates drafting of the Act.

Is There Potential For Prejudicial Retrospectivity?

Clause 5 (on pages 2 and 3) amends section 10 to widen the range of errors that may trigger a re-determination in two ways.

First, it will not be "a clerical error that was made when the unimproved value of that parcel was recently determined or redetermined" that will be able to be corrected, but any kind of error that occurs.

Secondly, "error" is to include not only "an error in the making of a valuation on which a determination is based", but also "the duplication of an error made in relation to an earlier determination" (paragraph 5 (b) which inserts new subsection 10 (4)).

If new subsection 10 (4) is to apply only to duplicated errors that occur in the system from now on, then there is no aspect of retrospectivity. However, if it were to apply to any errors of duplication that are presently in the system and that come to light after the insertion of this provision, then the provision could have a prejudicial effect on the rights of taxpayers. Of course, it could also be beneficial, if the error was one that had disadvantaged the taxpayer.

Perhaps confirmation could be given as to the intention of the provision.

Skin Penetration Procedures Bill 1994

This Bill provides for controls over premises in which skin penetration procedures are conducted and for controls of persons who perform skin penetration procedures to endeavour to protect clients from the possibility of contamination.

Is There A Mistake?

Clause 49 (on pages 24 and 25) creates an offence of interfering with things that have been seized and detained on premises. In all the other relevant clauses that deal with the seizure of things, there are references to "authorised officers". However, in subclause 49 (1) there is a reference to the position "[w]here a health officer has seized a thing". (Emphasis added.)

Perhaps the clause should refer to "an authorised officer" rather than "a health officer". Support for this view is gained from the fact that the explanation of subclause 49 (1) in the explanatory memorandum refers to "interference with an item seized by an authorised officer".

Statutory Offices (Miscellaneous Provisions) Bill 1994

This Bill amends provisions contained in a number of statutes and regulations relating to statutory office appointments, including updating provisions relating to the issue of identity cards.

Missing Provisions For Identity Cards - *Animal Nuisance Control Act 1975* and *Apiaries Act 1928*

The provisions relating to inspectors are updated in the *Animal Nuisance Control Act 1975* (on pages 12 and 13) and the *Apiaries Act 1928* (on page 16). However, being relatively old Acts, neither contains a provision for the issue of an identity card. The present provisions do not update this aspect of the Acts.

Both of the Acts involve the possibility of entry on to property and the issue of proper identify cards in such situations is now standard practice.

Missing Provisions For Identity Cards - *Consumers Affairs Act 1973*

The provisions of the *Consumer Affairs Act 1973* are amended in relation to the appointment of the Director of Consumer Affairs (on page 24). The equivalent to the identity card provisions in this Act is the investigating officer's certificate under section 15A. This is issued by the Director.

Although the provisions of the Act permit the Director to enter and inspect, there are no requirements that the Director have any identity certificate. There are two points of contrast between this position and the position with other Acts which are being amended by the present Bill.

The Committee gives the illustration of the *Bookmakers Act 1955*.

There is a Registrar of Bookmakers (new section 4 on page 17) and inspectors (new section 5 on pages 17 and 18).

The first contrast is that it is now the Chief Executive who issues identity cards and not the Registrar who is the equivalent of the Director in the *Consumer Affairs Act 1973* (new section 5AA on page 18). The second contrast is that the Registrar of Bookmakers is also to be issued with an identity card (new section 5AA on page 18).

The same pattern is adopted in the amendments to several other Acts in the Bill. These include, for example, *Building Act 1972*, *Casino Control Act 1988*, *Clinical Waste Act 1990*, *Dangerous Goods Act 1984*, *Lakes Act 1976*, *Nature Conservation Act 1980*, *Occupational Health and Safety Act 1989*, *Pesticides Act 1989* and *Sale of Motor Vehicles Act 1977*.

Are There Some Errors? - *Animal Welfare Act 1992*

The amendment to the *Animal Welfare Act 1992* has the following definition (on page 13):

" 'Authority' means the Animal Welfare Authority under section 6."

The Authority was created under section 6 in the Act before the current amendments, but the current amendments constitute the Authority under new section 5 (on page 14).

There may also be some errors in the definition of "identity card" (on page 13). There is a reference in paragraph (a) to an identity card being issued to the Authority or a delegate of the Authority "under section 6B", which does not appear to exist. Was new section 6A intended? Also, in paragraph (b), which deals with identity cards for inspectors and authorised officers, there is a reference to "section 79". Should the reference be to new section 78?

Are There Some Errors? - *Machinery Act 1949*

In the new definitions to be inserted in section 2 of the *Machinery Act 1949* (on page 44) there are references to the "Chief Inspector of Machinery under section 4" and "an inspector under section 4AA".

New provisions relating to these officers are being inserted in the Act (on pages 44 and 45) as sections 3 and 4 respectively. Should the cross-references in the definitions be changed?

This "may" May Not Be Deliberate - *Lakes Act 1976*

New section 6 of the *Lakes Act 1976* (on page 38) provides that the Chief Executive "shall create and maintain an office" for performing the functions of Delegate for Lakes and also provides that the "Delegate for Lakes shall be the public servant ...". (Emphasis added.)

But all this may be a mirage seen across any one of our lakes, because new subsection 6 (1) lamely provides that "there may be a Delegate for Lakes". (Emphasis added.)

Is the "may" deliberate? If so, what a pity if there is no appointment, as the title Delegate for Lakes seems to the Committee to be a magnificent title to have. It has much more panache to it than, for example, the Director of Rental Bonds created under the *Landlord and Tenant Act 1949* (on page 41)!

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Subordinate Law No. 31 of 1994 being the *Poisons and Drugs Regulations (Amendment)* lists restricted substances and classes of specialist doctors to be authorised by the Medical Officer of Health to prescribe or supply restricted substances.

Subordinate Law No. 32 of 1994 being the *Physiotherapists Registration Regulations (Repeal)* repeals the redundant principal Regulations that have now been superseded by a determination.

Subordinate Law No. 34 of 1994 being the *Supreme Court Rules (Amendment)* makes amendments to rules for discontinuance, the filing of affidavits relating to an application for winding up, the substitution of notes in three forms and repeals inappropriate rules.

Subordinate Law No. 35 of 1994 being the *Motor Vehicle (Third Party Insurance) Regulations (Amendment)* amends the regulations by removing existing classifications for Motor Vehicle Omnibuses and creating two new classes and fixing associated premium rates.

Determination No. 140 of 1994 made under the *Health Act 1993* revokes Determination of fees and charges No. 94 of 1994 and determines new fees and charges under the Act.

Determination No. 141 of 1994 made under the *Building Act 1972* adopts the Building Code constituted by the Building Code of Australia prepared and published by the Australian Uniform Building Regulations Co-ordinating Council as modified by the Schedule to the instrument adopting the Code and the seventh ACT Appendix to the Code.

Determination No. 142 of 1994 made under section 24 of the *Building Act 1972* revokes the instrument of adoption and modification of the Building Code dated 27 June 1994 and published in Special Gazette No. S129 and adopts all of the provisions of the Building Code prepared and published by the Australian Uniform Building Regulations Co-ordinating Council as replaced or supplemented by provisions from the ACT Appendix to the Building Code of Australia.

Determination No. 143 of 1994 made under section 24 of the *Building Act 1972* prepares and publishes an Australian Capital Territory Appendix to the Building Code of Australia.

Determination No. 145 of 1994 being the Commercial and Retail Leases Code of Practice approved under section 75 of the *Tenancy Tribunal Act 1994*.

Determination No. 146 of 1994 made under section 5KA of the *Bushfire Act 1936* approves a variation to the Rural Fire Control Manual.

Approval of Variation No. 26 to the Territory Plan made under section 26 of the *Land (Planning and Environment) Act 1991* enters a number of specified places in the Heritage Places Register.

Subordinate Legislation - Comment

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

Subordinate Law No. 33 of 1994 being the *Credit Regulations (Amendment)* prescribes the upper financial limit applicable to regulated credit sale and loan contracts at \$30,000 and the annual percentage rate applicable to regulated loan contracts at 8%.

Possible Error In Explanatory Statement

The explanatory statement to the regulation states in paragraph 2 that:

"Further, only credit sale and loan contracts with a percentage rate of less than 14% were covered by the Act."

Is the explanatory statement correct in saying that the Act covered loan contracts with a percentage rate of less than 14%?

Public Sector Management Standards No. 2 of 1994 made and approved under section 251 of the *Public Sector Management Act 1994* revokes rule 7.1 on page 933 and Schedule 1 to the Long Service Leave Standard on pages 938 to 948 inclusive and makes replacement Management Standards.

Public Sector Management Standards No. 3 of 1994 made and approved under section 251 of the *Public Sector Management Act 1994* makes a Standard Without General Application to confer an Additional Service Allowance for a specified period.

Retrospectivity But It Is Not Prejudicial To Individuals

These two Standards are made retrospective to 1 July 1994, when Public Sector Management Standards No. 1 of 1994 came into operation. As the explanatory statement explains, this retrospectivity is beneficial to individuals and thus does not breach section 7 of the *Subordinate Laws Act 1989*.

Determination No. 144 of 1994 made under section 12 of the *Housing Assistance Act 1987* sets up the Single Share Accommodation Scheme.

A Repealed Act Cited And A Reversal Of Dates

The Committee makes two comments.

First, paragraph (v) of the definition of "income" in clause 3.1 refers to allowable deductions in the assessment of income tax under the *Income Tax Assessment Act 1930* (Commonwealth). That Act was repealed many years ago. Perhaps the current Act, the *Income Tax Assessment Act 1936* (Commonwealth), might be a more appropriate Act to which to refer.

Secondly, the Committee notes that the Single Share Accommodation Scheme prepared as "a housing assistance program" under section 12 of the *Housing Assistance Act 1987* by the Commissioner for Housing was not signed by the Commissioner until 11 October 1994.

However, the approval by the Minister of the "above program called the 'Single Share Accommodation Scheme' prepared by the Commissioner for Housing" is dated 4 October 1994.

Perhaps the effect of this sequence of dates should be considered.

GOVERNMENT RESPONSES

The Committee has received responses to comments made concerning:

- Determination No. 76 of 1994 made under the *Registration of Deeds Act 1957* and Determination No. 77 of 1994 made under the *Adoption Regulations* (Report No. 12 of 1994);
- Determination No. 82 of 1994 made under the *Roads and Public Places Act 1937* (Report No. 12 of 1994);
- Determination No. 60 of 1994 made under the *Dangerous Goods Act 1984* (Report No. 12 of 1994);
- Determination No. 127 of 1994 made under the *Motor Traffic Act 1936* (Report No. 14 of 1994);
- Crimes (Amendment) Bill (No. 3) 1994 (Report No. 16 of 1994); and
- Legal Practitioners (Amendment) Bill 1994 (Report No. 16 of 1994).

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

A handwritten signature in black ink, appearing to read 'Ellnor Grassby', with a long horizontal flourish extending to the right.

Ellnor Grassby, MLA
Chairperson

17 November 1994



Government of the
Australian Capital
Territory

Terry Connolly MLA

ATTORNEY GENERAL

GPO Box 1020
Canberra ACT 2601

☎ (06) 2050011

Fax (06) 2050495

Mrs Ellnor Grassby MLA
Presiding Member
Standing Committee on Scrutiny of Bills and
Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601


Dear Mrs Grassby

Thank you for your letter of 19 October 1994 concerning my response to the Committee's comments in its Report No. 12 of 1994 relating to Determinations No. 76 and 77.

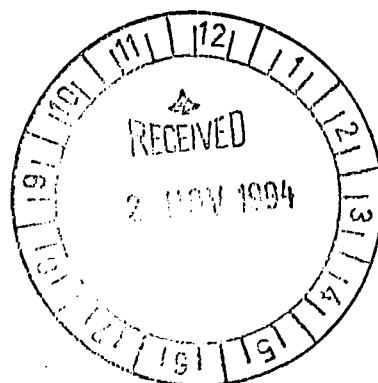
Although the advice of the Government Solicitor's Office regarding Determination No. 76 was provided orally that advice has now been confirmed in writing and I am pleased to provide a copy as requested by the Committee.

Turning to Determination No. 77 the Registrar-General advises that his Office has always maintained a discrete register of adoptions, however applications for birth certificates from that register were not recorded separately from the general register of births. As a consequence of the Committee's comments in Report No. 12 a separate record is now being maintained so as to ensure the delivery of statistics specific to adoption records.

Yours sincerely


Terry Connolly

1 NOV 1994





AUSTRALIAN CAPITAL TERRITORY
GOVERNMENT SOLICITOR

Your Reference:

Our Reference: 94-2-221630
K Y Sim
Ph: 2070634

1st Floor
GIO House
City Walk
CANBERRA CITY 2601

28 October 1994

Registrar General
ACT Registrars Office
Allara House
Constitution Avenue
CANBERRA CITY ACT 2601

Attention: Mr John Malouf

RE: REGISTRATION OF DEEDS ACT 1957 - DETERMINATION OF FEES
NO.68 OF 1993

I refer to your letter dated 21 October 1994 seeking urgent written advice to confirm the validity or otherwise of the Determination of Fees No. 68 of 1994 made under the Registration of Deeds Act 1957.

In Determination No. 68 of 1993 there is a misdescription of the title of the Act in the text of the Determination. Instead of the "Registration of Deeds Act 1957" the text merely refers to "the Deeds Act 1957". However, the correct title appeared in the title of the Determination. The Scrutiny Appeals Committee raised the issue as to whether this misdescription invalidates the Determination.

In my view, the misdescription does not invalidate the Determination for the following reasons:-

- (i) It does not create a confusion because there is no such Act in the Australian Capital Territory called "the Deeds Act 1957". In addition, the title of the Determination correctly named the Act. Therefore

there cannot be a confusion as to which Act the Minister proposes to make the Determination under.

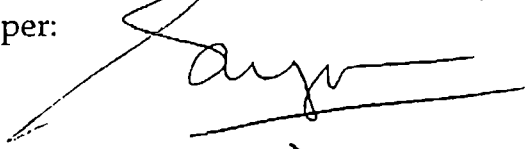
- (ii) If one were to read the Determination and the Schedule the references to various sections in the Determination and the Schedule correctly referred to the relevant sections in the Registration of Deeds Act 1957.

I should point out that it is not possible in cases of this nature to be absolutely certain that such a Determination will be upheld by the Court as being valid. In coming to the view that the validity of the Determination is not affected by the misdescription I drew an analogy with a case called Wright -v- McQualter (1970) 17 FLR 305. This is a decision of the Supreme Court of the Australian Capital Territory. In this case an instrument of delegation referred to section 3 of the Police Ordinance 1927 - 1956. Section 3 of the Police Ordinance was subsequently repealed by the Ordinances Revision Ordinance 1959. Therefore there was an issue as to whether the instrument of delegation was valid because it referred to a section of an Act which no longer existed. However, the power of the Minister to delegate his power of appointment could still be supported by section 12C of the Seat of Government (Administration) Act. In this case the Supreme Court held that the Instrument was valid because although the delegation referred to a section which has been repealed the Minister actually had the power of delegation in another Act. By drawing an analogy based on that case, the Minister in this case although referred to the Act as "the Deeds Act 1957" the Minister actually has the power under the "Registration of Deeds Act 1957" to make such a Determination. One would have thought that it was a much more serious error in the Wright's case where the section quoted did not exist at the time the Minister signed the instrument, whereas in this case the title of the Determination correctly cited the Act.

In any event, when the opportunity arises I would advise that you revoke and make a new Determination so as to avoid any doubt as to the validity of Determination No. 68 of 1993.

ACT GOVERNMENT SOLICITOR

per:





Government of the
Australian Capital
Territory

Terry Connolly MLA

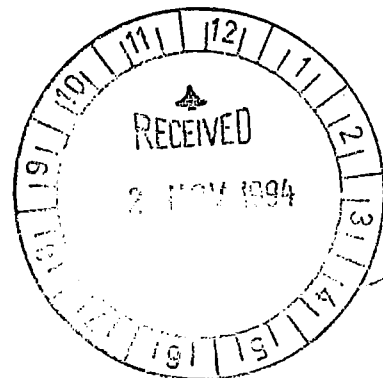
ATTORNEY GENERAL

GPO Box 1020
Canberra ACT 2601

☎ (06) 2050011

Fax (06) 2050495

Mrs Ellnor Grassby MLA
Presiding Member
Standing Committee on Scrutiny of Bills and
Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601



Dear Mrs *Ellnor* Grassby

In its Report No. 12 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on Determination No. 82 of 1994 made under section 15 of the Roads and Public Places Act 1937. The Committee raised a number of issues in relation to the Determination.

Firstly, the Committee questioned whether the Determination was made under a relevant power and whether a fee under subsection 15E(1), which is required to be prescribed, could be established otherwise than by regulation. I am advised that the power specified in the Determination is in error and that there is no amelioration which would allow section 9A of the Act to be utilised to specify a fee for the purposes of subsection 15E(1).

Accordingly, action has been initiated to revoke Determination No. 82 of 1994. It is proposed that in future permits will not be granted under the Roads and Public Places Act 1937 but a licence may be granted under the Land (Planning and Environment) Act 1991 which includes a power to use or occupy Territory Land. The schedule of fees determined under that Act is in the process of being amended.

Secondly, the Committee drew to attention that previous Determination No. 176 of 1993, which specified fees for the purposes of subsection 15E(1) of the Roads and Public Places Act 1937 had, in fact, been made under the Building Act 1972 and had previously been revoked. I am advised that the Committee's assessment that the fees were determined under the wrong Act is correct but no fees were collected under subsection 15E(1) during the period that Determination No. 176 was in operation nor have fees been collected under Determination No. 82.

Finally, the Committee noted that the explanatory statement for Determination No. 82 did not include a comparative statement of the old and new fees but that this statement was included with the explanatory statement for Determination No. 81 of 1994. I apologise for this confusion and advise that procedures have been introduced to prevent a recurrence.

In Report No. 12 of 1994 the Committee commented on several matters in relation to Determination No. 60 of 1994 made under subsection 12A(1) of the Dangerous Goods Act 1984. The Committee was concerned about the confusion in the determination between the Act and the Dangerous Goods Act 1975 (New South Wales) in its application in the Territory and about the failure to cite the correct section of the New South Wales Act in the first item in the Schedule to the Determination.

The advice of the Government Solicitor's Office has been sought and, because of the extent of that advice, I enclose a copy for the Committee's information. However it is not intended to adopt the advice of the Government Solicitor's Office and remake the determination at this time but rather to correct the drafting defects when the fees are next adjusted.

In its Report No. 14 of 1994 the Committee commented on Determination No. 127 of 1994 made under section 217A of the Motor Traffic Act 1936. The Committee was concerned that the determination was signed but not dated and noted that determination and the explanatory statement were not consistent in that they cited different determinations as being revoked.

The Government Solicitor's Office has advised that the failure to date the determination does not affect its validity. The incorrect reference in the explanatory statement to the revoked determination arose out of an administrative error and adjustments have been made to procedures in an effort to eliminate such instances.

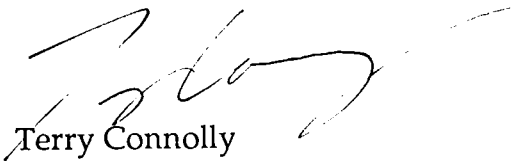
In its Report No. 16 of 1994 the Committee noted a tiny misprint in new section 349P of the Crimes (Amendment) Bill (No. 3) 1994. I am informed that the Clerk of the Assembly has been approached to correct the misprint by way of a Clerk's amendment under Standing Orders.

Also in Report No. 16 the Committee, in considering the Legal Practitioners (Amendment) Bill 1994, asked whether anyone has supposedly been reprimanded since 24 December 1993 when the power was removed from the Act.

The removal of the power was an oversight and its restoration is not made in contemplation of any particular matter. I am advised that the Court has not sought, since 24 December 1993, to reprimand any person practising as a barrister.

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Terry Connolly', written in a cursive style.

Terry Connolly

- 1 NOV 1994



AUSTRALIAN CAPITAL TERRITORY
GOVERNMENT SOLICITOR

FAXED

19.10.94

Your Reference:

94-2-209966

Our Reference:

Dr Doug Jarvis
Ph 2070635

1st Floor
GIO House
City Walk
CANBERRA CITY 2601

17 October 1994

Director's Office
ACT Department of Urban Services
MLC Building
8-10 Hobart Place
CANBERRA ACT 2601.

Facsimile: 2070650⁵⁰⁴⁵⁴

Attention: Ms Jenny Young

RE: DETERMINATION OF FEES FOR DANGEROUS GOODS ACT

I refer to the above matter and provide advice as to the comments made by the Scrutiny of Bills Committee.

Request for advice

2. You have requested advice as to the appropriate course of action in response to the comments of the Scrutiny of Bills Committee Report No. 12 of 1994 dated 23 August 1994.

Background

3. I note that the Scrutiny of Bills Committee Report No. 12 of 1994 has commented on the Schedule attached to Determination No. 60 of 1994. The Scrutiny of Bills Committee has commented that the Determination refers to provisions of the Dangerous Goods Act, 1975 (NSW) ("the NSW Act") under the heading "Section of the Dangerous Goods Act 1984" ("the ACT Act").

4. The Scrutiny of Bills Committee also noted that the renewal of licences is provided by section 27(1) of the NSW Act. However, the Determination does not refer to the relevant section for renewal of licences.

5. I note that the Determination of Fees No. 60 of 1994 was notified in

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Special Gazette No S125 on 27 June 1994. The Determination of Fees is authorised pursuant to section 12A of the ACT Act which provides that the Minister may determine fees for the purposes of the ACT Act by notice in writing published in the Gazette.

Advice as to the NSW Act

6. Section 8 of the Subordinate Laws Act 1989 provides that where an Act, such as the ACT Act, authorises provision to be made for any matter by a subordinate law, such as the payment of money for the issue or renewal of a licence as outlined by the Determination of Fees, the subordinate laws may apply any State Act, such as the NSW Act, with or without modification. That is, the Determination of Fees may authorise the issue and renewal of licences by applying the NSW law. Therefore the Determination of Fees can quote section numbers from the NSW Act.

7. It may be arguable that the Determination of Fees misquotes the relevant powers in that the section numbers are quoted from the NSW Act, but are quoted as if they refer to the ACT Act. In Johns v Australian Securities Commission and Others 116 ALR 567 at 576 Brennan J stated that "(w)hen a power is exercised, a mistake in the source of the power works no invalidity. Validity depends simply on whether a relevant power existed." In the event that the Determination of Fees misquotes the section numbers from the ACT Act the Determination of Fees is still valid.

8. It may avoid confusion if the following expression headed the Schedule to the instrument:

"Section of the Dangerous Goods Act 1975 (NSW) as applied by the Dangerous Goods Act 1984 (ACT)"

You may also consider it appropriate to amend the Note to the Schedule as follows:

"Note: Sections 10 and 12A(2) of the Dangerous Goods Act 1984 (ACT) provide that the provisions of the Dangerous Goods Act 1975 (NSW) and the Dangerous Goods Regulation 1978 apply in the Territory as laws of the Territory, as modified by the Dangerous Goods Act 1984 (ACT)."

Advice where the Power to Renew a Licence is Not Cited

9. The Determination of Fees does not specifically refer to the power to renew a licence in section 27(1) of the NSW Act. As discussed above, even where an instrument mistakes the source of power the instrument is valid if the power exists. Therefore the Determination of Fees is valid, despite not referring to section 27(1) of the NSW Act.

10. I note that it would avoid confusion if the Schedule referred to the power to renew licences pursuant to section 27(1) of the NSW Act. The Scrutiny Bills Committee has indicated that the format used in the previous Determination of Fees would be an appropriate method of referring to the authorising provision.

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Conclusion

11. Although the previous Determination is valid, it contains a number of imprecise drafting provisions. As a matter of law it is not necessary to resolve such ambiguities. However, as a matter of policy you may wish to redraft the Determination of Fees making the necessary amendments and notify the new issue in the *Gazette* to avoid any confusion by readers of the Determination of Fees. Such a redrafted Determination of Fees may be cleared through this Office.

If you wish to discuss this matter further, please do not hesitate to telephone Ms Kathryn Johnson of this Office Ph 2070404 who is your contact officer in regard to this matter.

ACT GOVERNMENT SOLICITOR

per:

Kathryn A Johnson