

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

**(INCORPORATING THE DUTIES OF A
SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

SCRUTINY REPORT NO. 9 OF 2001

19 JUNE 2001

TERMS OF REFERENCE

- (1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).
- (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) the 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) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.
- (3) The Committee shall consist of four members.
- (4) If the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation.
- (5) The Committee be provided with the necessary additional staff, facilities and resources.
- (6) The foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

MEMBERS OF THE COMMITTEE

MR PAUL OSBORNE, MLA (CHAIR)
MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)
MR TREVOR KAINE, MLA
MR HAROLD HIRD, MLA

LEGAL ADVISER: MR PETER BAYNE
SECRETARY: MR TOM DUNCAN
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)
ASSISTANT SECRETARY: MS CELIA HARSDORF
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comment on them.

Appropriation (HIH) Bill 2000-2001

This is a Bill for an Act to appropriate additional monies for the purposes of the Territory for the financial year that commenced on 1 July 2000.

Duties Amendment Bill 2001

This Bill would amend the *Duties Act 1999* to the effect of ensuring that the Act will apply to companies that were registered in the Territory prior to the planned commencement of a new *Corporations Law* of the Commonwealth, and to companies that, after this commencement, will be taken to be registered in the Territory.

Financial Management Amendment Bill 2001

This Bill would amend the *Financial Management Act 1996* to permit the Auditor-General to make an expedited audit of the financial statements of agencies for the year 2000-2001, and to modify the obligation of agencies to table financial statements.

Goods and Services Tax (Temporary Transitional Provisions) Amendment Bill 2001

This Bill would amend the *Goods and Services Tax (Temporary Transitional Provisions) Act 2000* to extend its operation until 30 June 2002.

Land (Planning and Environment) Amendment Bill 2001 (No 3)

This Bill would amend the *Land (Planning and Environment) Act 1991* to provide for the extension of the period in which a person seeking to take up a rural lease may do so at a concessional rate.

Subordinate Legislation - No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them.

Subordinate Law 2001 No 11 being the **Liquor Regulations Amendment** made under the *Liquor Act 1975* amends the *Liquor Regulations 1979* by repealing subregulation (4) of regulation 11 and creating a new subregulation 12 that prescribes areas in Belconnen, Tuggeranong, Gungahlin and Weston dry areas.

The regulation also inserts a new schedule 2 that contains maps of each of the prescribed areas.

Subordinate Law 2001 No 12 being the Liquor Regulations Amendment made under the *Liquor Act 1975* amends the *Liquor Regulations 1979* by amending subregulation (1) of regulation 11 which specifies the areas in the existing subregulation 11 (3) dry areas from noon on 2 January 2002 until noon on 7 January 2002 which covers the period of Summerhats 2002.

Subordinate Law 2001 No 13 being the Road Transport (Third-Party Insurance) Regulations Amendment made under the *Road Transport (General) Act 1999* amends the *Road Transport (Third-Party Insurance) Regulations 2000* by omitting regulation 11A, making a formal change to the wording of regulation 12, inserting a transitional regulation 14 which provides that the existing premium schedule will continue to apply to any third-party policy which is expressed to begin prior to 1 July 2001 and substituting a new premium schedule for the existing schedule to the principal Regulations.

Subordinate Law 2001 No 14 being the Dangerous Goods Regulations Amendment made under the *Dangerous Goods Act 1975* amends the *Dangerous Goods Regulations Amendment 1978* to improve Act Work-Cover's ability to regulate the sale and supply of shopgoods fireworks.

Subordinate Law 2001 No 17 being the Domestic Animals Regulations 2001 made under the *Domestic Animals Act 2000* allows for provisions identified in the Act to be enacted.

Determination No. 67 of 2001 made under section 55 of the *Bookmakers Act 1985* revokes Determination No. 207 of 2000 (notified in Gazette No. 26, dated 29 June 2000) and determines the fee for the purposes of section 39K of the Act for a sports betting licence.

Determination No. 68 of 2001 made under paragraph 55 (1) (a) of the *Bookmakers Act 1985* revokes Determination No. 206 of 2000 (notified in Gazette No. 26, dated 29 June 2000) and determines that the fee for the purposes of subsection 29 (1) of the Act is 1% of turnover less the GST credit.

Determination No. 69 of 2001 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* refers to the Independent Pricing and Regulatory Commission the matter of an investigation into motor vehicle fuel, including petroleum, diesel and gas, prices in the ACT.

Determination No. 83 of 2001 made under subsection 3 (2) of the *Agents Act 1968* declares that paragraph 71T (1) (c) (ii) of the Act applies to the payment of Mr Keith Sutton's reasonable and verified expenses in defending an appeal brought by the Agents Board in the ACT Supreme Court against a decision of the Administrative Appeals Tribunal concerning the Agents Board and Mr Sutton.

Determination No. 84 made under section 4 of the *Public Place Names Act 1989* determines a new division name of Jacka in the District of Gungahlin.

Determination No. 85 of 2001 made under paragraph 75 (1) (b) of the *Tenancy Tribunal Act 1994* is a variation to the Commercial and Retail Leases Code of Practice.

Determination No. 86 of 2001 made under section 126 of the *Associations Incorporation Act 1991* revokes Determination No. 202 of 2000 (notified in Gazette No. 26, dated 29 June 2000) and determines that the fees payable for the purposes of the Act are as set out in the Schedule.

Determination No. 87 of 2001 made under subsection 171A (2) of the *Land (Planning and Environment) Act 1991* revokes Instrument No. 88 of 2000 and determines the maximum term of a rural lease, and the conditions subject to which the Executive shall grant a further rural lease.

Determination No. 88 of 2001 made under subsection 39B (2) of the *Bookmakers Act 1985* varies Determination No. 50 of 1999 (notified in Gazette S15, dated 17 March 1999) by adding the ACT Brumbies playing a match against a touring international rugby team to the operational instructions for the times of betting at the stadium.

Determination No. 89 of 2001 made under subsection 14 (1) of the *Territory Superannuation Provision Protection Act 2000* authorises the payment of the amount of \$30,000,000.00 from the ACT Territory Public Account into a superannuation banking account.

Determination No. 90 of 2001 made under subsection 12 (1) of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to certain roads and road related areas used or impinged on by any competing vehicle participating in a 'green' special stage of the Subaru Rally of Canberra.

Determination No. 91 of 2001 made under section 58 of the *Medical Practitioners Act 1930* revokes Determination No. 178 of 1998 (notified in Gazette S176, dated 20 July 1998) and determines that the prescribes fees for the provision of the Act be in accordance with the schedule.

Determination No. 92 of 2001 made under section 4 of the *Public Place Names Act 1989* revokes Instrument No. 133 (notified in Gazette No. 21, dated 25 May 2001) and determines the name, origin and significance of a new street name in the Division of Narrabundah.

Determination No. 93 of 2001 made under subsection 18 (1) of the *Utilities Act 2000* declares, for the purposes of the Act, a person who owns or occupies premises at which the consumption of electricity exceeds 100 megawatt hours per annum to be a non-franchise customer.

Determination No. 94 of 2001 made under subsection 18 (4) of the *Utilities Act 2000* declares, for the purposes of the Act, a person who owns or occupies premises at which natural gas is consumed, to be a non-franchise customer.

Determination No. 95 of 2001 made under subsection 215 (1) of the *Road Transport (General) Act 1999* revokes all previous appointments of Nominal Defendant and appoints a specified person as Nominal Defendant.

Determination No. 96 of 2001 made under section 22 of the *Utilities Act 2000* exempts various bodies from the requirement for a relevant licence in relation to electricity, gas, water and sewerage processes. The notice extends the exemption until 30 June 2001 to allow new licensing arrangements to commence on 1 July 2001.

Determination No. 97 of 2001 made under subsection 15F (1) of the *Nature Conservation Act 1980* appoints specified persons as Chairperson and Deputy Chairperson of the Flora and Fauna Committee until 15 February 2004.

Determination No. 98 of 2001 made under subsection 15E (1) of the *Nature Conservation Act 1980* appoints specified persons as members of the Flora and Fauna Committee until 15 February 2004.

Determination No. 99 of 2001 made under section 96 of the *Road Transport (General) Act 1999* revokes Determination No. 29 of 2001 (notified in Gazette S10, dated 28 February 2001) and determines the fees payable, as specified in the Schedule, for transactions relating to vehicle registration under the *Road Transport (Vehicle Registration) Regulations 2000*.

Determination No. 100 of 2001 made under section 40A of the *Dog Control Act 1975* determines fees for the initial registration of a dog for the period 1 June 2001 to 20 June 2001 inclusive and temporarily replaces Determination No. 173 of 2000 for the stated period.

Determination No. 101 of 2001 made under section 4 of the *Public Place Names Act 1989* determines the name, original and significance of a street in the Division of O'Connor.

Determination No. 102 of 2001 made under section 85 of the *Dentists Act 1931* revokes fees determined by Instrument No. 224 of 1998 (notified in Gazette No. 39, dated 30 September 1998) and determines new fees for the annual renewal fee, the initial registration fee, the mutual recognition fee, and the entitlement to re-registration fee for dentists, specialist dentists and dental hygienists. The remaining fees are unaltered.

Subordinate Legislation - Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them.

Determination No. 70 of 2001 made under paragraph 13 (1) (c) and subsection 16 (a) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member and Chairperson of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 71 of 2001 made under section 16 (b) of the *Occupational Health and Safety Act 1989* appoints a specified person to be the Deputy Chairperson of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 72 of 2001 made under paragraph 13 (1) (c) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 73 of 2001 made under paragraph 13 (1) (a) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 74 of 2001 made under paragraph 13 (1) (a) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 75 of 2001 made under paragraph 13 (1) (a) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 76 of 2001 made under paragraph 13 (1) (a) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 77 of 2001 made under paragraph 13 (1) (b) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 78 of 2001 made under paragraph 13 (1) (b) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 79 of 2001 made under paragraph 13 (1) (a) of the *Occupational Health and Safety Act 1989* appoints a specified person to be a member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 80 of 2001 made under section 22 of the *Occupational Health and Safety Act 1989* appoints a specified person to be an acting member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Determination No. 81 of 2001 made under section 22 of the *Occupational Health and Safety Act 1989* appoints a specified person to be an acting member of the ACT Occupational Health and Safety Council for a period of three years effective from 26 April 2001.

Are these instruments disallowable?

The Committee notes that the explanatory statements give no indication as to whether or not the persons appointed as members are public servants. An instrument appointing a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994*.

Public Sector Management Standard No. 3 of 2001 made under subsection 215 (7) of the *Public Sector Management Act 1994* amends Public Sector Management Standard No. 1 of 1994 to declare an additional public holiday for a class of officers over the Christmas/New Year period with a table setting a default date for the additional holiday.

Incorrect reference to Instrument number

Schedule A to Management Standard No. 3 of 2001 is headed “Schedule A to Instrument 2/2001”. The Committee queries whether it should in fact read “Schedule A to Instrument 3/2001”. A small matter, however, which could prove to be misleading.

Determination No. 111 of 2001 made under subsection 6 (1) of the *Insurance Authority Act 2000* declares that the assets and liabilities of the Territory as recorded in the ACT Insurance Management Account as at 31 March 2001 vest in the Australian Capital Territory Insurance Authority as at 1 April 2001. This declaration will have a retrospective effect but no person will be prejudicially affected as section 7 of the *Subordinate Laws Act 1989* will not invalidate the retrospectivity.

Possible incorrect reference

The Committee draws attention to what appears to be an incorrect reference in the determination to subsection 6 (1) of the Act as the section under which the Minister may declare that stated assets or liabilities of the Territory vest in ACTIA. Subsection 6 (1) is in fact the meaning of *Territory entity*. Perhaps this should read subsection 36 (1)?

INTERSTATE AGREEMENTS

The Committee received a letter from the Deputy Chief Minister to advise that the government is participating in negotiations through the National Environment Protection Council to review the *National Environment Protection Act 1994* and to develop a National Environment Protection (Diesel Vehicle Emissions) Measure. In relation to the first matter, the final Report of the review will be tabled in the Assembly in August.

GOVERNMENT RESPONSES

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

- Tree Protection Bill 2001 (Report No. 5 of 2001) (Minister for Urban Services – 17 May 2001)
- Surveyors Act - Determination No. 33 of 2001 (Report No. 5 of 2001) (Minister for Urban Services – 17 May 2001)
- Nature Conservation Act - Notices (Report No. 5 of 2001) (Minister for Urban Services – 17 May 2001)
- Cemeteries and Crematoria Bill 2001 (Report No. 4 of 2001) (Minister for Urban Services – 15 May 2001)
- Canberra Institute of Technology Act – Determination No. 28 of 2001 (Report No. 5 of 2001) (Minister for Education – 22 May 2001).
- Drugs of Dependence Amendment Bill 2001 (Report No. 7 of 2001) (Minister for Health, Housing and Community Services – 4 June 2001).
- Race and Sports Bookmaking Bill 2001 (Report No. 5 of 2001) (Treasurer – 31 May 2001).
- Kingston Foreshore Authority Act – Determinations Nos 53 to 58 (Report No. 7 of 2001) (Treasurer – 14 June 2001).
- Health and Community Care Services Act – Determination No. 10 of 2001 (Report No. 3 of 2001) (Minister for Health, Housing and Community Services – 13 June 2001).

Copies of the responses are attached.

The Committee thanks the Treasurer, the Minister for Urban Services, the Minister for Health, Housing and Community Services and the Minister for Education for their helpful responses.

Tree Protection Bill

The Committee makes further comment on the reply of the Deputy Chief Minister of 17 May 2001 in relation to the *Tree Protection Bill 2001*

Clause 79 of the Bill provides that the Minister “may determine fees for this Act”. In relation to this provision, in Scrutiny of Bills Report No 5 of 2001, the Committee said: “One reading of this provision is that the power may be exercised only where some other provision of the Bill explicitly or implicitly provides for the imposition of a fee”. It pointed out that the note to clause 15 might not state the legal position correctly. That note stated that the Minister may under subclause 79(1) determine a fee in respect of the making of an application under clause 15 for an approval by a

person to engage in an activity that would damage a tree. The Committee considered that this was a matter to be clarified.

The response of the Minister states that “it is intended to make use of Part 6.3 of the *Legislation Act 2001* It allows the determination of fees for any provision of the Bill which requires it”. The Committee does not disagree with this view, but points out that the issue in a particular case will be whether the particular legislation concerned does require - or, more broadly - authorise the fee to be determined. There is nothing in Part 6.3 of the *Legislation Act* that bears on this issue.

The Committee still has two general concerns. Underlying them is the Committee’s understanding of what is a “fee” in this context. It may be seen from some of the provisions of Part 6.3 of the *Legislation Act* (see paragraph 56(3)(f), and subsection 57(2)) that the drafters of those provisions assumed that a fee is in the nature of a charge for a service. This is a primary meaning of the term ‘fee’, and in the context of most Bills some public officer will provide the service. The term may also be expanded slightly to cover a case where the charge is for the use of some privilege under the control of government; (see *Black’s Law Dictionary* (5th ed, 1979) 553).

The first concern is that the comment made in Scrutiny of Bills Report No 5 of 2001 remains valid. It is at least arguable that clause 79 will be effective only where some other provision of the *Tree Protection Bill 2001* expressly or by implication authorises or requires the levying of a fee. That is, a determination by the Minister cannot be simply attached to the action of a public officer that is in the nature of the provision of a service to the person liable to pay the fee. This view of the way clause 79 would work gains some support from these cases: *James v Cowan* (1930) 43 CLR 386 at 409, and *Springvale Washed Sand Pty Ltd v City of Springvale* [1969] VR 784 at 793-794.

A second concern arises if this is not the correct way to look at clause 79. Suppose that the Minister may fix on the action of a public officer acting under the Bill that is in the nature of the provision of a service, and then determine that a recipient of that service must pay a fee for the service. (Of course, the amount determined would not be a “fee” unless there was a ‘commercial’ relationship between what was provided and what has to be paid. Otherwise, the “fee” would be a tax.)

But if this is the result, then clause 79 is problematic on the ground that it does not provide the citizen with sufficient guidance as to when a fee might be determined under this Bill. In terms of the Committee’s terms of reference this might be seen as an “insufficiently defined administrative power” (para 2(c)(i), or as an “inappropriate delegation of legislative power” (para 2(c)(iv)).

The problem just mentioned might be dealt with to some extent were the relevant explanatory memorandum to indicate plainly just what services provided under the Bill might attract the imposition of a fee by the Minister acting under a provision such as clause 79. This would not accommodate the legal problem mentioned above. Nor, supposing that clause 79 will work in the way envisaged by the Government, would a statement in the explanatory memorandum bind a court in terms of just what fees might be imposed. But a statement in the memorandum would at least give the Assembly a better idea of just what it was authorising the Minister to do in the way of

imposing fees. If passed into an Act, a member of the public would also have a better idea of what fees he or she might be liable to pay.

Paul Osborne, MLA
Chair

June 2001