Auditor General's Report

Reports of the Performance Audit of the Redevelopment of Bruce Stadium

Report 11 Lawfulness of Expenditure

Auditing for the Australian Capital Territory

The Auditor-General is head of the Auditor-General's Office. He and his Office act independently of the Government. The Office assists the Auditor-General to carry out his duties, which are set out in the Auditor-General Act 1996, by undertaking audits of management performance and the financial statements of public sector bodies. The aim is to improve public sector management and accountability by firstly, ensuring the Legislative Assembly and the electorate are provided with accurate and useful information about the management of public sector resources and secondly, by providing independent advice and recommendations for improving the management of public resources.

PA98/11

September 2000

The Speaker
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601

Dear Mr Speaker

In accordance with *Section 17* of the *Auditor-General Act 1996*, I transmit to the Speaker my report titled *Bruce Stadium Redevelopment: Report 11 Lawfulness of Expenditure* for presentation to the Legislative Assembly by the Speaker. This Report is one of twelve reports arising from my performance audit of the Bruce Stadium redevelopment.

Yours sincerely,

John A Parkinson

GUIDE TO THE REPORTS OF THE AUDIT

The redevelopment of Bruce Stadium project involved a wide range of activities, including construction, financing, marketing, operating the stadium and bidding for and hosting Olympic soccer. Each of these activities was important to the redevelopment project and therefore was included in the performance audit.

For convenience of compilation and publication, the results of the Audit are provided in a series of reports. It should be noted that the reports are not intended to stand alone. For a complete understanding of the Audit's outcome, readers need to refer to all reports. The Audit has been reported in a series of 12 reports as outlined below. The reports are shown diagramatically in the accompanying chart.

Report 1 Summary Report This report précises all aspects of the Audit. It lists the Audit's objectives and opinions and contains chapters on the outcomes and components of the redevelopment, factors that contributed to the outcome and the Audit's methodology. The report contains synopses of each of the other reports of the Audit.

Report 2 Value for Money The question of whether the cost incurred in redeveloping the Stadium represents value for money is most important in the overall assessment of the redevelopment project. This report provides an opinion on whether the costs incurred in redeveloping the Stadium represent value for money for the Territory.

Report 3 Costs and Benefits This report provides an opinion on whether the economic benefits from redeveloping and operating the Stadium and hosting Olympic soccer are, or will be, greater than the costs incurred in redeveloping and operating the Stadium and hosting Olympic soccer.

Report 4 Decision to Redevelop the Stadium In July 1996, SOCOG invited the Territory to submit a bid to host Olympic soccer. In September 1996 the Executive agreed to submit a bid and to upgrade the Stadium should the bid be successful. This report provides an opinion on whether the decision to redevelop the Stadium was made with the aid of relevant, accurate and complete information. The report discusses redevelopment proposals in 1993 and 1994, the bids in 1995 and September 1996 and related capital works proposals.

Report 5 Selection of the Project Manager This report provides an opinion on whether the selection of the project manager for the redevelopment was based on sound management practices. The report summarises the Government's purchasing policy and includes a comparison of the selection process used with the policy. It discusses the tendering process, the probity review and the project management agreement.

Report 6 Financing Arrangements The total cost of the redevelopment was originally estimated at $27m. This was to be financed by a $12m appropriation with the balance to be provided by sales of Stadium products (eg a passholder program, naming rights and corporate suites) and borrowings. Considerable work was undertaken and costs incurred in efforts to have a financing structure developed. This report provides an opinion on whether the management of the financing arrangements to meet the costs of redeveloping the Stadium was effective. The report outlines the financial structures contemplated and comments on the utility of the final structure developed.

Report 7 Stadium Financial Model The Stadium financial model was a key document referred to in the decision to redevelop the Stadium and was used as an indicator of the commercial viability of the redeveloped Stadium and as a justification for several major decisions. This report provides an opinion on whether it was reasonable to use the model as a reliable primary document for decision making.

Report 8 Actual Costs and Cost Estimates This report provides an opinion on whether the actual costs of the redevelopment were contained within the cost estimates on which Executive decisions were based. It also includes reference to costs which were met from funds appropriated for other purposes and identifies the major items that contributed to cost increases. It explains some of the major factors that contributed to the actual costs being significantly in excess of original estimates.

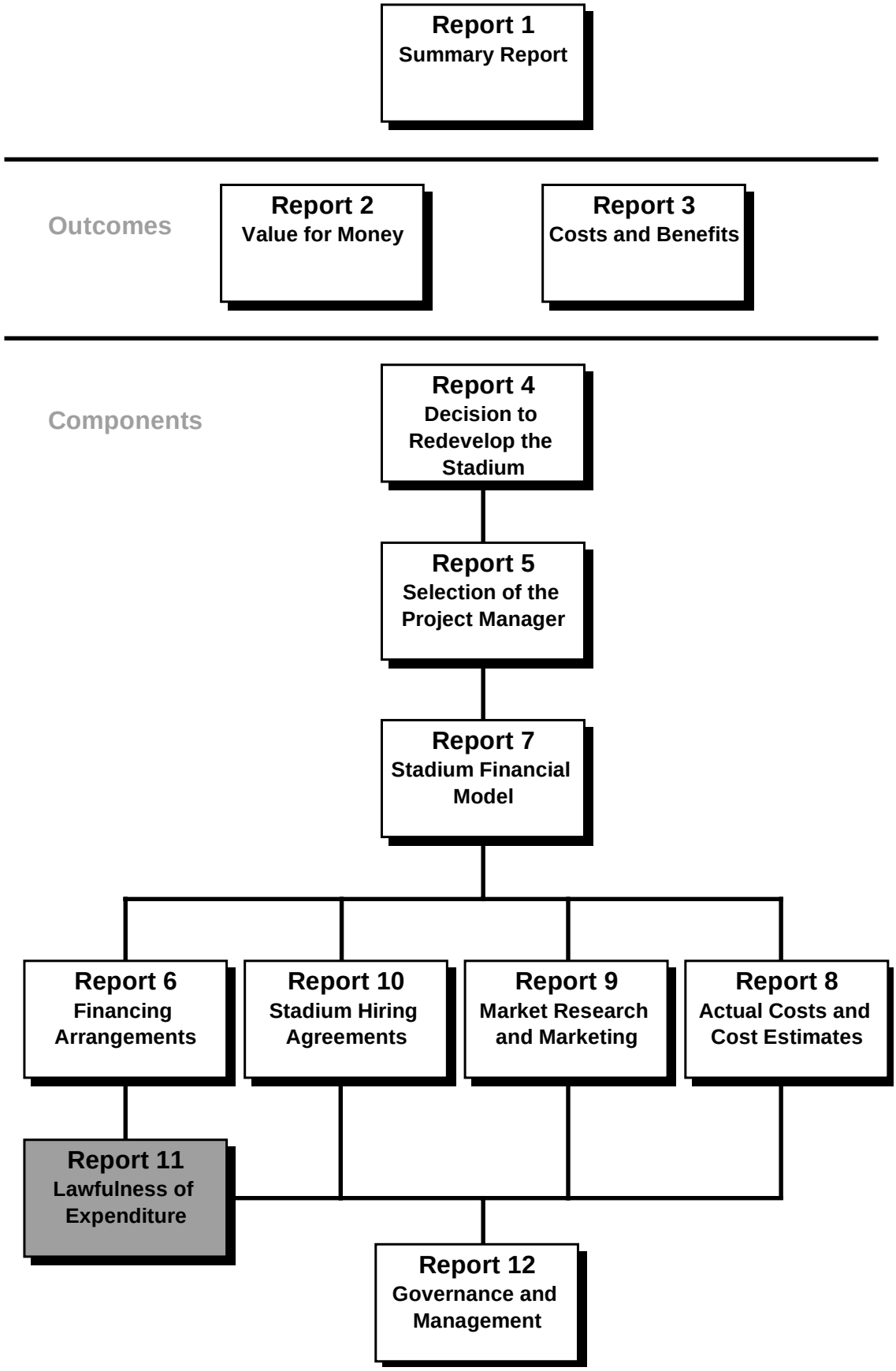
Report 9 Market Research and Marketing In mid 1998, a consortium was appointed to market and sell the Stadium's products. Only a fraction of the forecast revenue was raised. This report provides an opinion on whether the management of market research and marketing has contributed to the commercial viability of the Stadium's operations. Comments are provided on marketing research and the selection and monitoring of the marketing consortium.

Report 10 Stadium Hiring Agreements The redevelopment plan included negotiation of new hiring agreements with the major hirers of the Stadium. Negotiations with the hirers commenced in July 1997 and continued throughout 1998. The agreements included large revenue assurance guarantees, particularly for one hirer. This report provides an opinion on whether the negotiation of the Stadium hiring agreements has contributed, or will, contribute to the commercial viability of the Stadium's operations. The report discusses the Heads of Agreements settled with the teams, negotiation principles agreed by the Executive and the revenue assurance guarantees.

Report 11 Lawfulness of Expenditure After funds appropriated for the redevelopment were exhausted, funds were provided from the Central Financing Unit of the Chief Minister's Department. This report provides an opinion on whether the payments made for the redevelopment in excess of the amounts appropriated were lawful and whether an overnight borrowing on 30 June 1998 was lawful.

Report 12 Governance and Management This Report comments on the governance framework in the Territory and those arrangements specifically set up to oversight and manage all aspects of the project to redevelop and operate the Stadium. The Report provides an opinion on whether governance and management arrangements for the redevelopment project were effective. It comments on submissions to the Executive, operational management and human resourcing arrangements.

REPORTS OF THE AUDIT



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1 LAWFULNESS OF EXPENDITURE

INTRODUCTION

1.1 The issue of whether payments made by the ACT Government for the redevelopment of the Bruce Stadium complied with relevant laws of the Territory was extensively discussed in the Legislative Assembly and in the local media during April to June 1999. The payments totalled $24m. Of this total, $9.7m was paid in 1997-98 and $14.3m in 1998-99. The discussion culminated in a motion of no confidence in the Chief Minister being moved in the Assembly on 23 June 1999. The motion was debated on 30 June 1999 and was defeated by one vote.

1.2 Although the matter has been debated in the Assembly there is an expectation that the Auditor-General will provide an opinion on whether the payments and other related transactions were lawful. The purpose of this Report is to provide that opinion.

SUMMARY OF RELEVANT EVENTS

1.3 The cost of the redevelopment was originally estimated at $27.3m and the Government agreed to provide $12.3m towards this total. As a result, $5.6m and $6.7m were appropriated in the 1997-98 and 1998-99 Appropriation Acts. The difference of $15m was to be obtained from other sources.

1.4 On 8 December 1997, as the $5.6m appropriated for 1997-98 had been committed and the other funding had not eventuated, the Executive agreed that funds from the Government's Central Financing Unit be used to allow the redevelopment to continue until private sector financing arrangements were put in place. The decision arose from an Executive submission titled '*Bruce Stadium Redevelopment — Financing Arrangements*'. The Chief Minister signed the Executive submission on 4 December 1997.

1.5 In the decision, the Executive agreed for the Under Treasurer to establish a commercial vehicle for the redevelopment and noted that the new financing arrangements must be in place and external finance received by 30 June 1998. Consequently Bruce Operations Pty Limited was created on 15 April 1998. In addition, the Bruce Property Trust was created on 1 June 1998.

1.6 By the end of the financial year $9.714m had been drawn from the Central Financing Unit and paid into a Bruce Stadium redevelopment

bank account. The money had then been used to pay contractors engaged on the redevelopment.

1.7 On 26 June 1998, the Under Treasurer requested a loan from the Commonwealth Bank of Australia for $9.714m. On 28 June, the Under Treasurer sought the approval of the Treasurer to the borrowing from the Bank. The Treasurer initialed the Under Treasurer's request. The Bank agreed to the loan on 30 June 1998. The money was paid into the same Central Financing Unit bank account from which the $9.714m had been drawn. On 1 July 1998 the Central Financing Unit repaid the $9.714m loan to the Commonwealth Bank.

1.8 Construction continued throughout 1998-99 and a further $21m was expended on the redevelopment. $6.7m was provided from funds appropriated in the 1998-99 Appropriation Act and a further $14.3m was drawn from the Central Financing Unit.

1.9 On 19 May 1999, the Chief Minister issued Financial Management Guidelines with intended retrospective effect. The intended effect was for payments made from the Central Financing Unit to be retrospectively authorised as a 'prescribed' investment under *Section 38(1)(e)* of the Financial Management Act 1996. As under *Section 38(2)* of the Act, prescribed investments can be made without appropriation the retrospective effect of the guidelines would have made the expenditure lawful. The guidelines were repealed by further guidelines issued on 3 June 1999.

1.10 Efforts to obtain private sector finance were abandoned in June 1999 and the $24.014m was retrospectively appropriated by the Appropriation (Bruce Stadium and CanDeliver Ltd) Act 1999 and amendments to the 1999-2000 Appropriation Bill.

1.11 The redevelopment expenditure referred to in this Report is now funded through moneys appropriated in the 1997-98 and 1998-99 Appropriation Acts and the Appropriation (Bruce Stadium and CanDeliver Ltd) Act 1999. There is no private sector involvement and the Bruce Property Trust is to be dissolved.

AUDIT OBJECTIVE

1.12 The audit objective was to provide an independent opinion to the Legislative Assembly on whether:

- payments made for the redevelopment in excess of the amounts appropriated were lawful; and
- the overnight borrowing on 30 June 1998 was lawful.

1.13 In order to meet the objectives of the Audit the following questions were addressed:

1. Were payments in excess of the amount in the Appropriation Act 1997-98 for the Bruce Stadium redevelopment, legal payments under *section 6* of the Financial Management Act 1996?

2. If the answer to the first question was that the payments were not in accordance with an appropriation as required by *section 6* of the Act, did the payments constitute an investment under *section 38* of the Act?

3. A related question was whether the power provided by *section 67(2)* of the Financial Management Act 1996 to issue guidelines could be used to retrospectively prescribe the unappropriated expenditure on the redevelopment as a prescribed investment under *section 38* of the Act and therefore make it lawful?

4. Did the payments in excess of the amount in the Appropriation Act 1997-98 drawn from the Territory Bank Account comply with *section 37(1)* of the Financial Management Act 1996?

5. Did payments for the Bruce Stadium redevelopment, in excess of the amount in the Appropriation Act 1997-98, comply with *section 58* of the Australian Capital Territory (Self-Government) Act 1988 (Cth)?

6. Did the responsible Chief Executives comply with *section 31* of the Financial Management Act 1996 by ensuring that moneys spent by their Departments on the redevelopment were within appropriations for their departments and also, by ensuring that Departmental officials complied with the requirements of the Act?

7. Did the $9.714m overnight 30 June 1998 borrowing from the Commonwealth Bank comply with the Act?

1.14 The audit opinions in relation to each of the general objectives and the specific questions are set out in the shaded box on page 5 of this Report. The basis of these opinions are set out in the section that commences on page 6.

AUDIT APPROACH

Prior Legal Advice

1.15 Prior to the debate on the no confidence motion in the Legislative Assembly three separate legal opinions had been obtained. The opinions were provided by:

- RRS Tracey, QC , Melbourne, for the Government;
- JR Sacker QC, Sydney, for the Opposition; and
- JE Richardson, Emeritus Professor of Law, Australian National University and J Colquhoun, Colquhoun Murphy Solicitors, Canberra, for an Independent Member of the Legislative Assembly.

1.16 Copies of the three opinions are included at *Appendices 1*, *2* and *3* respectively of this Report.

1.17 The ACT Parliamentary Counsel also provided advice on related matters and this advice was taken into account by the Government's counsel. That advice is at *Appendix 4.*

1.18 The appended materials include the instructions for the Government's legal adviser, the Auditor-General's legal adviser and the ACT Parliamentary Counsel. The instruction for the Opposition's and the Independent Member's advisers are not included in the materials.

Use of Existing Legal Opinions

1.19 The Audit examined the opinions in order to identify consistencies and inconsistencies between them. Where advice was consistent across the opinions the Audit accepted the advice as being reliable and used it to inform the Audit's opinions. Where the advice was inconsistent, the Audit sought further advice.

AUDIT OPINIONS

The payments made for the redevelopment in excess of the amounts appropriated were not lawful at the time they were made.

This opinion is based on:

1. *Section 6* of the *Financial Management Act 1996* was not complied with in that expenditure on the redevelopment was made without being appropriated by the Legislative Assembly;
2. Expenditure on the redevelopment was not of a nature which constituted an investment in accordance with *Section 38(1)* of the Act;
3. Guidelines issued under *Section 67(2)* of the *Act* cannot be given retrospective effect to make lawful the unappropriated expenditure on the redevelopment;
4. *Section 37(1)* of the Act was not complied with in that money for the redevelopment was withdrawn from the Territory bank account without being authorised by a warrant signed by the Treasurer in accordance with an appropriation;
5. *Section 58* of the *Australian Capital Territory (Self-Government) Act 1988(Cth)* was not complied with in that public money of the Territory was spent on the redevelopment without authorisation by enactment; and
6. *Section 31* of the *Financial Management Act* was not complied with in that the responsible Chief Executives did not ensure that moneys spent by their departments were within the appropriations made for their departments; nor did they ensure their department's officials complied with the Act.

The overnight borrowing was not lawful.

This opinion is based on:

7. *Section 40* of the Act was not complied with in that the $9.714m overnight borrowing on 30 June 1998 was not reasonably characterisable as being in the interests of, or for the benefit of, the Territory.

Engagement of a Legal Firm to Assist the Audit

1.20 To assist in the process, a major national legal firm was engaged by the Audit to review the original three opinions and to provide the Audit with advice on the inconsistencies between them. The firm's lawyers who provided the advice were Graeme Johnson, Partner and Geoffrey Kolts, OBE, QC, Special Counsel. Their credentials are summarised at *Appendix 5*.

1.21 The Audit's legal advice took into account all of the arguments contained in the three previous opinions as well as a statement prepared for the Audit by the Under Treasurer on the reasons for the overnight loan. A copy of the Under Treasurer's explanation is at *Appendix 6*. This advice was not available at the time the Government's advice was prepared. In addition, the Audit's advisers also had available to them all of the information provided to the Government's counsel. A copy of the advice from the firm which assisted the Audit is at *Appendix 7*.

BASES FOR AUDIT OPINIONS

Compliance with Section 6 of the Financial Management Act

1.22 *Introduction* — It is a feature of all governments based on the Westminster model that expenditure of public moneys must be authorised by appropriation or by some other legislation passed by the Parliament. The Australian Capital Territory is no exception. The Territory's Financial Management Act 1996 adopts this principle with *Section 6* of the Act being the primary expression of the principle.

1.23 *Section 6* of the Act states:

> 'No payment of public money shall be made otherwise than in accordance with an appropriation.'

1.24 *Original Legal Opinions* — The legal opinions prepared for both the Government and the Opposition addressed the issue of whether expenditure on the redevelopment in excess of that appropriated, complied with *Section 6* of the Act. Both opinions concluded that the expenditure did not comply with Section 6 of the Act. The Independent Member's advice did not address the issue.

1.25 *The Audit's Legal Advice* — As both opinions were that the expenditure did not comply with *Section 6* of the Act, an opinion was not requested from the Audit's adviser.

1.26 *Audit Comments* — The advice provided to both the Government and Opposition agree on this matter. It is accepted that the expenditure was not in compliance with *Section 6* of the Act.

Classification of the Redevelopment Expenditure as an Investment

1.27 *Introduction* — The Government advanced the view that the expenditure in excess of that appropriated was an investment and therefore, in accordance with *Section 38* of the Act, did not need to be authorised by an appropriation. .

1.28 *Section 38* relates to investment of public money and states:

> '(1) The Treasurer may invest any money held in the Territory bank account or departmental bank accounts for such period and on such terms and conditions as he or she thinks fit —
>
> (a) on deposit with a bank;
>
> (b) in the purchase of a bill of exchange that is drawn or accepted by a bank;
>
> (c) in a loan to a person who is a dealer in the short term money market;
>
> (d) in Territory, State or Commonwealth securities; or
>
> (e) in any prescribed investment.
>
> (2) Transfers between the Territory bank account and departmental bank accounts to facilitate investments may be made without appropriation.'

1.29 *Section 3* of the Act defines "prescribed" as follows:

> '"prescribed" means prescribed by the financial management guidelines;'.

1.30 *Original Legal Opinions* – The issue of whether the payments could be classified as an investment was not addressed directly in the Government's legal opinion. The Government's view however is that the payments could be an investment. The Government's view is based on paragraphs 7 to 11 and paragraph 24 of the Government's legal opinion *(Appendix 1)* which, in summary, concludes that if the expenditure had been prescribed as a *Section 38* investment prior to the payments being made the payments would have been lawful.

1.31 The Independent Assembly Member's legal opinion *(Appendix 3)* was that the payments could not constitute an investment under *Section 38* of the Act. The Opposition's legal advice did not address the issue.

1.32 *The Audit's Legal Advice (Appendix 7 — Section 1)* — In summary, the Audit's advice was that the expenditure was not capable of being an investment under *Section 38* of the Act.

1.33 The advice included:

> 'No not on the materials we have considered.'
>
> 'To fall within the scope of the power and of the Guidelines, the dominant purpose of making the expenditure must be to seek to secure a profitable return on the use of the moneys. It is always difficult to assess issues of intention and purpose. There may be evidence of motivations and purposes not apparent from the information reviewed. On the materials provided, however, the authorisation of the provision of the CFU financing appears to have been granted in order to enable the project to continue, and not for the dominant purpose of achieving or securing financial benefits for the Territory by the use of that money. In our view any financial benefit which might ultimately have been secured by the decision was insufficiently connected to the use of the particular money involved for the decision to be characterised as one taken to secure financial benefit. Given this, in our view the expenditure was not an "investment" within the scope of the power granted by *Section 38(1)(e).*
>
> The internal transfer of funds between governmental entities was not an investment. It is not correct legally to describe an intra-Government transfer as a "loan".'

1.34 *Audit Comments* — The advice provided to both the Independent Member and the Audit was that the expenditure could not constitute an investment within the meaning of *Section 38* of the Act. The Audit has concluded that the expenditure was not an investment and therefore was not lawful through the operation of *Section 38*.

Effectiveness of Retrospective Guidelines

1.35 As stated in paragraph 10, Financial Management Guidelines were issued in May 1999 with the intended effect of retrospectively prescribing the redevelopment payments, in excess of appropriation, as an investment made in accordance with *Section 38* of the Financial

Management Act. It was necessary therefore for the Audit to address the issue of whether Financial Management Guidelines issued under *Section 67(2)* of the Financial Management Act can have retrospective effect.

1.36 *Original Legal Opinions* — The Government's legal advice *(Appendix 1)* said, in effect, that without the existence of guidelines prescribing the expenditure as an investment, the expenditure was unlawful. The advice also indicated that guidelines could be issued with retrospective effect. The Government's legal adviser, however, was not asked to advise on the issue and he dealt with it by observing that he had carefully considered Parliamentary Counsel's advice and saw no reason to doubt it. In the opinion of the Government's adviser, expenditure that was unlawful prior to the issue of guidelines, would be rendered lawful once the Guidelines were issued. In contrast both the Opposition's and the Independent Member's legal advice was that guidelines with retrospective application could not be effective.

1.37 *Section 67(2)* of the Act states:

> 'The Treasurer may issue financial management guidelines, not inconsistent with this Act or the regulations, for the purposes of this Act or the regulations.'

1.38 *The Audit's Legal Advice (Appendix 7 — Section 2)* — The advice was that guidelines with retrospective application could not be issued. This advice agrees with that provided to the Opposition and to the Independent Member.

1.39 The reasons provided by the Audit's adviser are:

> It was not legally permissible to issue guidelines under *section 67(2)* of the Financial Management Act with the effect of retrospectively prescribing the Bruce Stadium redevelopment expenditure as an investment.
>
> 'The answer is no. This conclusion is reached on the following grounds:
>
> (a) It is in the very nature of "guidelines" that these must be capable of guiding behavior; the grant of power, by its own words, therefore does not extend to authorise retrospective guidelines.
>
> (b) Considerations of financial accountability, transparency, and the primary role of the Legislative Assembly, indicate that *Section 67(2)* cannot be taken to have been intended to authorise guidelines of retrospective effect.

(c) The established common law presumption that legislation does not have retrospective effect, or authorise subordinate legislation of such effect, is not overcome by the words of *Section 67(2),* thus again indicating that the power does not extend to authorise guidelines of retrospective effect.'

1.40 *Audit Comments* — The Government's legal adviser and Parliamentary Counsel advised that issuing Financial Management Guidelines with retrospective effect could make the redevelopment expenditure lawful. The three other opinions advised this was not legally possible. On the basis of the persuasiveness of the latter advice, the Audit has concluded that guidelines issued under *Section 67(2)* of the Financial Management Act cannot have the retrospective applicability intended by the Government.

Compliance with Section 37(1) of the Financial Management Act 1996

1.41 *Introduction* — The Act stipulates certain requirements in relation to the operation of the Territory's main bank account. The requirements include that moneys can only be paid out of the bank account if authorised by law. This authorisation can occur through an Appropriation Act or other enactments.

1.42 *Section 37* of the Act states:

'(1) Subject to subsection 38(2), money shall not be paid out of the Territory bank account except to a departmental bank account where authorised by a warrant signed by the Treasurer in accordance with an appropriation.'

1.43 *Original Legal Opinion* — Only the Government's legal adviser *(Appendix 1)* addressed this issue. In that adviser's opinion, *Section 37(1)* of the Act had not been complied with because there was not an appropriation for the expenditure and the payments were not an investment in accordance with *Section 38(1)* of the Act. The advice also stated at paragraph 14 that it was not necessary for the Treasurer to authorise by warrant transfers between the Territory banking account and Departmental banking accounts where those transfers are undertaken to facilitate investments of the kind provided for in *Section 38(1)* of the Financial Management Act. In addition the adviser concludes at paragraph 27 of his advice that the making of specific Financial Management Guidelines had the effect of rendering lawful those dealings that he had earlier advised were unlawful in the absence of such

guidelines. That is they ceased to become unlawful as soon as the guidelines existed.

1.44 *The Audit's Legal Advice* —The Audit did not obtain further advice on this matter.

1.45 *Audit Comments* — As outlined previously the expenditure was not appropriated in accordance with *Section 6* and was not in the nature of an investment in accordance with *Section 38*. Accordingly, *Section 37* of the Act was not complied with in that money for the redevelopment was withdrawn from the Territory bank account without being authorised by a warrant signed by the Treasurer in accordance with an appropriation. The matter of the effectiveness of retrospective guidelines has been addressed earlier in this Report.

Compliance with Section 58 of the Australian Capital Territory (Self-Government) Act 1988

1.46 *Introduction* — The Australian Capital Territory (Self-Government) Act 1998 is a Commonwealth Act which effectively is the constitution for the Australian Capital Territory. This Act reflects the Westminster model of government and requires that the expenditure of Territory public money be authorised by enactment.

1.47 *Section 58(1)* of the Act states:

> 'No public money of the Territory shall be issued or spent except as authorised by enactment'.

1.48 *Original Legal Opinion* — Only the Government's legal advice *(Appendix 1)* directly addressed this matter. That advice concluded that *Section 58* of the Act had not been complied with.

1.49 *Audit Comments* — Expenditure was not made in accordance with any Territory Appropriation Act, was not expenditure of a type allowed by the Financial Management Act to be made without appropriation, and was not made in accordance with any other legislation. Accordingly, *Section 58(1)* of the Self-Government Act 1988 was not complied with.

Compliance by Chief Executives with Section 31(2)(a) and (c) of the Financial Management Act

1.50 *Introduction* — The Act contains specific provisions relating to the financial management responsibilities of Chief Executives of departments.

1.51 The relevant parts of *Section 31(2)* are:

> 'The responsible Chief Executive of a department shall be responsible under the responsible Minister, for ensuring —
>
> (a) that the moneys spent by the department are within the appropriations made for the department.
>
> (c) that the officers and employees of the Department comply with the requirements of the ACT and the Financial Management guidelines.'

1.52 *Original Legal Opinion* — The Government's legal advice *(Appendix 1)* was that responsible Chief Executives had not complied with *Section 31(2)(a)* of the Act. As the expenditure was not in accordance with an appropriation, the Chief Executives responsible for the payments cannot be said to have satisfied the obligation imposed on them by *Section 31(2)(a)* of the Act.

1.53 *Response by Chief Executives*— Ms Annabelle Pegrum, noted that she was the Chief Executive of the Department of Business, the Arts, Sport and Tourism from 26 September 1996 to 31 March 1998. She advised during the Audit that any actions that she may have taken regarding the funding of the Stadium in excess of the funds appropriated for the purpose were in accordance with the Executive's decision of 8 December 1997, which was informed by the Submission titled '*Bruce Stadium Financing*'. She also advised to that extent, all actions taken were with the full knowledge and agreement of the Executive.

1.54 Ms Pegrum notes that, as stated in *Section 31(2)* of the Act she was responsible 'under the responsible Minister' for ensuring that moneys spent by her department were within the appropriations made for the department. Ms Pegrum advised that all actions undertaken were in accordance with the decisions of the Minister for Business and Employment and the Executive.

1.55 Ms Pegrum has also advised the Audit that at no time during or after the preparation of the submission does she recall any indication from the then Chief Executive of the Chief Minister's Department, who had responsibility for administration of the Financial Management Act and the Public Sector Management Act, or the Executive, that she or her staff were acting contrary to either Act. Ms Pegrum stated that to the best of her knowledge she was acting in accordance with the laws of the Territory, management standards and at the direction of the Executive.

1.56 Mr Alan Thompson, who was Chief Executive of the Chief Minister's Department from June 1998 to March 1999, also provided a response containing comments of similar nature to Ms Pegrum's.

1.57 *Audit Comments* — The payments above the amounts appropriated were clearly outside the appropriations made for the relevant departments. Consequently, the Chief Executive of the Department of Business, the Arts, Sport and Tourism up to 31 March 1998[1], the acting Chief Executives of the Chief Minister's Department during the period 1 April to 9 June 1998[2] and the Chief Executives of the Chief Minister's Department thereafter[3], did not ensure that the moneys spent by their departments were within the appropriations made for their departments as required by law. That is, *Section 31(2)(a)* of the Act was not complied with. It follows also that those Chief Executives and acting Chief Executives, did not ensure that department officials, who were responsible for the payments, complied with the requirements of the Act as required by *Section 31(2)(c).* While there has been non-compliance with *Section 31(2)(a)* and *(c)* of the Financial Management Act the Audit considers it unlikely that this was the result of conscious non-compliance by the relevant Chief Executives.

Compliance with Section 40 of the Financial Management Act 1996

1.58 *Introduction* — As set out on page 7, an overnight borrowing was made on the 30 June 1998 for the amount of the expenditure above that appropriated.

1.59 *Section 40* of the Act relates to borrowing and includes that:

> 'The Treasurer may, on behalf of the Territory, if necessary or expedient in the public interest to do so —
>
> (a) borrow money.'

1.60 *Original Legal Opinions* — The Government's advice *(Appendix 1)* was that *Section 40* of the Act had not been contravened. The Opposition's advice, however, was that *Section 40* had been contravened because the borrowing could not be said to be 'on behalf of the Territory'.

[1] Annabelle Pegrum.
[2] The relevant acting Chief Executives were Mick Lilley and Linda Webb.
[3] Alan Thompson and Rod Gilmour.

1.61 *The Audit's Legal Advice (Appendix 7 — Section 3)* — The advice was that the borrowing was not in accordance with *Section 40* of the Act. In summary the reasons for that advice were:

> 'The section requires that when money is borrowed it is done "on behalf of the Territory, if necessary or expedient in the public interest to do so". Although this provision grants a broad discretion, any exercise of the power must reasonably be characterisable as in the interests of, or for the benefit of, the Territory. The decision to undertake borrowing does not comply with this requirement because:
>
> - the apparent main purpose of the overnight borrowing was to comply with the requirement of the Cabinet decision of 8 December 1997 that external financing structures be in place by 30 June 1998; yet the overnight borrowing could not satisfy this goal, and the exercise was thus misconceived;
> - the borrowing was at a net cost to the Territory; and
> - if the purpose was to comply with a mistaken view of the requirements of the Financial Management Act, that, in our view, could not have been a proper purpose.
>
> The borrowing thus exceeded the scope of the power granted to borrow money under *Section 40*.'

1.62 *Audit Comments* — The overnight borrowing was not reasonably characterisable as being in the interests of or for the benefit of the Territory. Accordingly, in the Audit's opinion the overnight borrowing was not lawful.

COMPLIANCE WITH PUBLIC SECTOR MANAGEMENT ACT

Introduction

1.63 The Public Sector Management Act 1994 sets out the responsibilities of Chief Executives and the general obligations of ACT public employees.

1.64 *Section 29(1)* of the Act states, inter alia, that:

1.65 ' a Chief Executive shall, in relation to a each administrative unit under his or her control-

1.66 (b) advise the Minister on all matters relating to the unit.'

1.67 *Section 9* of the Act states, inter alia that:

'A public employee shall in performing his or her duties:

(a) exercise reasonable care and skill;

(b) act impartially;

(c) act with probity;

(h) comply with this Act, the management standards and all other laws of the Territory.'

Sections 29 and 9 are included in full at *Appendix 8*.

Relevance to Executives and Officers

1.68 The standard contract of employment for ACT executives includes a requirement that they shall comply with Section 9 of the Act. Those contracts also state that an executive may be suspended or have his or her contract terminated for misconduct. Misconduct is defined to include breaches of Section 9 of the Act. A copy of the relevant part of a standard contract of executives is at *Appendix 9*.

Audit Comments

1.69 As described previously in this report, several actions which were not lawful have occurred. Consequently, one or more Chief Executives may have breached Section 9 (h) of the Act in that, in performing their duties, they failed to comply with Section 31 (2) (a) and (c) of the Financial Management Act. In a response to the Audit[4] it has been advised that the issues were addressed by Mr Rod Gilmour, the then Chief Executive of the Chief Minister's Department, and the Commissioner for Public Administration and that no action was taken on the basis that no breach of the Public Sector Management Act was considered to have occurred.

REMEDIAL ACTIONS TAKEN

1.70 In a response received during the Audit[5] the Chief Executive of the Chief Minister's Department advised that the following remedial actions have been taken or are being taken.

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[4] Robert Tonkin 5 July 2000

[5] Robert Tonkin 5 July 2000

'Independent Review of Superannuation and Insurance Provision Unit and the Central Finance Unit — Mr Bernie Fraser has completed a review that encompassed (1) the structure and governance of the functions of these units (2) appropriate processes and procedures and (3) investment philosophies. Government has considered the report and accepted all recommendations. These are:

- the establishment of a separate Finance and Investment Group responsible directly to the Under Treasurer; and
- the creation of a small Finance and Investment Advisory Board comprised of three 'outsiders' together with the Under Treasurer.

Implementation of the recommendations has proceeded. On 1 July 2000 the operations of the Central Financing Unit and the Superannuation Account amalgamated to form the Finance and Investment Group.

Potential members of the Investment Advisory Board are currently under consideration and the first meeting should take place in early August.

Review of the Financial Management Act 1996

- Guidelines — The guidelines issued under section 67(2) of the FMA were reviewed in 1999, and consolidated financial management guidelines, including some retrospective guidelines, were issued. These replaced and enhanced a number of earlier guidelines. In particular, the power to invest in Territory owned property under clause 3 of the guidelines has been significantly constrained, and a disallowable instrument must be tabled in the Assembly before any such investment is made.
- Delegations — A review of the delegations of the Treasurer's powers under the FMA was also undertaken in 1999, which highlighted some areas where the wording or limitations of the delegations required clarification. As a result of this review the Treasurer considered a revised set of delegations under the FMA and approved several changes. These were signed by the Treasurer in December 1999. There is also currently a review of all Chief Executive Financial Instructions, which will identify any further delegations of power required by agencies to effectively manage their operations.
- Review of the operations under the FMA — DTI had dedicated a senior officer to review and advise upon operations under the provisions of the FMA. This review is focusing on the processes

and practices of the Central Financing Unit, DTI and agencies. This has also provided a central resource to provide ongoing advice on emerging issues within the department and agencies.

- The issues that are emerging as part of this review relate mainly to the provisions and interpretation of the FMA. The review is highlighting the need for greater education throughout the ACT public service on the principles of the FMA and the applications of the FMA in a number of particular circumstances. It is also identifying a need to amend the FMA to eliminate ambiguities and clarify the intent of several provisions. As you will appreciate such a review is timely, after several years of operation under the Act. These issues will be dealt with in the broader review of the FMA.

CONCLUSION

1.71 There have clearly been serious breaches of laws.

1.72 Breaches of the law relating to expenditure of public funds without legislative authority are serious as they contravene a most important principle of the Westminster tradition. Such authority is generally given through Appropriation Acts or other legislation passed by the Parliament.

1.73 The breach related to the overnight borrowing is also serious. On the basis of the Under Treasurer's statement explaining the decision to make the borrowing, it seems clear that the decision was made on the basis of various misconceptions. To quote from the Audit's legal advice 'the explanation reflects misconception heaped upon misconception'.

1.74 The Audit has obtained no evidence that the breaches of law occurred with an intentional disregard of the law. Accordingly, it appears that the breaches occurred as a result of ignorance of the law. In the Audit's opinion, such a pervasive ignorance of the law needs to be addressed.

1.75 The retrospective appropriation legislation passed in June 1999 had the effect of making all the payments referred to in this Report lawful. Accordingly on this the basis all expenditure on the Bruce Stadium to 30 June 1999 has been made lawful.

DEPARTMENTAL RESPONSE

1.76 In accordance with Section 18 of the Auditor-General Act 1996, a final draft of this Report was provided to the Chief Executive of the Chief Minister's Department for his consideration and comments. The Chief Executive's response is set out following.

'This report is predominantly concerned with issues of a legal nature, which have been the subject of often conflicting legal opinions.

The Government's legal advice was provided by RRS Tracey QC, a member of the Melbourne Bar eminent in the practice of administrative law, on the basis of instructions settled (except in relation to two questions submitted for advice) with the Audit Office. Further advice was provided by the ACT Parliamentary Counsel. In both instances, the instructions on which the opinions were provided are presented in the appendices to the report. The same is true of the advice provided to the Auditor-General. However, this is not the case with the other legal opinions which are appended to the report. Such omissions are of concern as the advice of counsel can be influenced by the nature of such instructions.

The pursuit of further legal debate on the issues raised in this report is likely to add little of material effect. There are only three legal issues on which I would comment.

Firstly, there is the question of whether the loans provided by the Central Financing Unit were investments within the scope of the power granted by Section 38(1)(e) of the Financial Management Act 1996.

The Audit conclusion at paragraph 34 of the report is not agreed. On the basis of the advice provided by Mr Tracey QC (Appendix 1, paragraph 24) the Bruce Stadium Project could have been made a prescribed investment under an appropriately worded Financial Management Guideline. This advice is important as it remains the Government's view that a key defect in the actions taken at the time was not that such investments could not be made, but that to do so in accordance with the Financial Management Act required that a specific guideline be issued to authorise the investment. The officials involved at the time erred in not being aware that such a specific guideline was required. They proceeded incorrectly on the basis of the arrangements which prevailed under the Audit Act which was in place before 1996.

In addition, as explained by the Chief Minister in the debate in the Assembly on 30 June 1999, these loans can be characterised as investments for two reasons. There was an interest revenue component to

the loans and the redevelopment was an investment in real property for the purpose of securing a monetary return on the money invested, obtaining rental profit, permitting a subsequent sale or realising capital appreciation.

The second legal issue concerns the financial management responsibilities of Chief Executives. Section 31(2) of the Financial Management Act 1996 requires that Chief Executives "ensure" that the moneys spent by the department are within the appropriations made for the department; and that officers of the Department comply with the requirements of the Act and the Financial Management guidelines. The audit conclusion at paragraph 54 states that certain Chief Executives failed to meet this requirement. That conclusion is not agreed.

The fact of administrative errors resulting in unlawful actions is not denied, although it is equally true that these actions were subsequently regularised by the amendments to the 1999-2000 Appropriation Bill and the Appropriation (Bruce Stadium and CanDeliver Limited) Bill 1999 which provided funding for the Bruce Stadium Redevelopment. The issue turns on the meaning of the term "ensure".

The officers concerned, did not act without diligence or improperly but relied on long-standing practices, which proved to be of dubious legal value. Whilst it is acknowledged that there were administrative shortcomings, actions taken by departmental officers at the time were thought to be lawful.

Clearly Chief Executives, and Ministers, must rely on the advice and actions of others. They meet their accountability obligations by ensuring that officers have a clear understanding of Government policies and management requirements, that appropriate policy guidelines and financial delegations are in place, that officers are made aware of these requirements, receive appropriate training, there is appropriate scrutiny of performance against key outputs and performance measures and effective two-way management communications.

Given the conflicting legal opinions in relation to the effectiveness of retrospective guidelines, the Audit conclusion at paragraph 1.40 is not supported. A more sustainable conclusion would be that this is a matter which remains in dispute, and that, therefore, there is some doubt that guidelines issued under Section 67(2) of the Financial Management Act can have the retrospective applicability intended by the Government.

In relation to this report, the key issues are what happened, why, for what purpose, how has it been remedied and what has been done to ensure that identified errors are not repeated.

In summary what happened was that there was a failure to be aware that a specific financial management guidelines needed to be in place before the loans from the Central Financing Unit were actioned. This error was compounded by a misunderstanding of the implications of the Executive decision that required the loans to be repaid before the end of June 1998. The overnight loan taken out on 30 June 1998 was, in fact, not required.

These errors came about because of an incorrect assumption that the practices which were acceptable under the previous Audit Act were also permitted under the new Financial Management Act which was passed in 1996. The officers involved believed they were acting legally to give effect to decisions which had properly been considered and agreed by the ACT Executive.

It is relevant to note that such defects in administration are not as exceptional as might be implied from this Report. The Chief Minister's speech in the Assembly debate of 30 June 1999, referred to a recent $3 billion retrospective adjustment in New South Wales. As in this case, that error came about in the transition from cash accounting to accrual accounting.

In performance audits, an important consideration is the actions taken or proposed to ensure that identified errors are not repeated. A number of actions have been taken in this instance:

- *An Independent Review of Superannuation and Insurance Provision Unit and the Central Finance Unit has been completed by Mr Bernie Fraser, encompassing the structure and governance of the functions of these units, appropriate processes and procedures and investment philosophies. Government has considered the report and accepted all recommendations.*
- *A review of the Financial Management Act 1996 has been undertaken. The Guidelines issued under section 67(2) of the FMA were reviewed in 1999, and consolidated financial management guidelines, including some retrospective guidelines have been issued. A review of the delegations of the Treasurer's powers under the FMA was also undertaken in 1999, which highlighted some areas where the wording or limitations of the delegations required clarification. As a result of this review the Treasurer considered a revised set of delegations under the FMA and approved several changes. These were signed by the Treasurer in December 1999. There is also currently a review of all Chief Executive Financial Instructions, which will identify any further delegations of power required by agencies to effectively manage their operations.*

- *The Department of Treasury and Infrastructure has allocated a senior officer to review and advise upon operations under the provisions of the Act. This review is focussing on the processes and practices of the Central Financing Unit, DTI and agencies.*
- *The Cabinet Handbook has been revised to take account of recent decisions and to reflect concerns regarding the quality and timeliness of submissions. Amendments have also been made to take account of changed departmental structures and to clarify existing procedures. The revised handbook gives renewed emphasis to the importance of peer review and consideration of risk in the preparation of Cabinet papers.'*

CONCLUDING COMMENT

1.77 The Chief Executive's response to the Report identifies three of the Report's conclusions for specific comment.

1.78 The first is in relation to whether the expenditure on the redevelopment in excess of that appropriated could have been prescribed as an investment under *Section 38(1)* of the Financial Management Act. The Audit's strong view, which is clearly supported by the Audit's legal advice (see *Appendix 7, paragraphs 5.1 to 5.44)*, is that the expenditure was not in the nature of an investment as envisaged by *Section 38* and therefore could not be prescribed as an investment. The Government's view is that the expenditure could have been prescribed as an investment.

1.79 This seems to be a matter which needs to be clarified by the Legislative Assembly through an amendment to the Financial Management Act. The amendment should clarify that, for expenditure to comply as an investment with *Section 38*, the dominant purpose of making the expenditure must be to secure a profitable return on the use of the money. *Section 38* currently does not include a purpose requirement.

1.80 The second matter raised in the Chief Executive's response is related to breaches of *section 31* of the Financial Management Act. While the response does not disagree that *section 31* was not complied with an explanation for the non-compliance is presented. The Audit understands the explanation advanced. Nevertheless the Act was not complied with and the Legislative Assembly should be aware of this. In the review of the Act being conducted careful consideration should be given to the whole of *section 31*. The circumstances of the redevelopment expenditure should be given due regard in the review.

1.81 The third matter raised in the Chief Executive's response relates to whether guidelines issued under *Section 67* of the Financial Management Act can have retrospective effect. The Audit's view supported by its legal advice is that the guidelines cannot have retrospect effect. The Chief Executive considers the matter unresolved. To ensure future confusion is avoided this is an issue which should be clarified through amendment to the Financial Management Act.

APPENDIX 1

GOVERNMENT'S LEGAL ADVICE

APPENDIX 1

IN THE MATTER of
BRUCE STADIUM REDEVELOPNMNT

AND IN THE MATTER of the
FINANCIAL MANAGEMENT ACT 1996 (ACT)

ADVICE

1. This advice deals with a number of significant issues relating to financial management in the public sector of the Australian Capital Territory.

2. I am instructed that:

   (a) In or about 1996 the ACT Government committed $12.3 million towards the redevelopment of the Bruce Stadium. The total cost of the redevelopment was to be $27.3 million. It was anticipated that $15 million would be contributed by the private sector.

   (b) In the 1997-8 financial year $5.558 million of the $12.3 million was appropriated through the Department of Business, the Arts, Sport and Tourism for capital injection to the project.

   (c) In December 1997 the $5.558 million had been spent. The Department approached the Cabinet, seeking to restructure the financial arrangements in order to ensure that works continued.

   (d) In December 1997 Cabinet directed the Under Treasurer to restructure the arrangements. He was authorised to establish commercial vehicles, guarantee the debt component to a successful financier and to sign contracts. Cabinet agreed that, in order to ensure that construction continued, funds were to be provided from the Central Financing Unit to provide project finance for the full redevelopment until a new financing structure was in place.

(e) On 22 December 1997 the Department requested the Under Treasurer's approval for $700,000 to be paid from the Central Financing Unit into the Bruce Stadium Redevelopment bank account. This request was agreed to by the Under Treasurer subject to certain conditions. The conditions included the payment of interest on the loan.

During the remaining part of the financial year further requests were made and granted under the loan facility as follows:

24 February 1998	$1,800,000
30 March 1998	$3,164,700
27 April 1998	$1,226,000
28 April 1998	$ 174,000
28 May 1998	$1,000.000
19 June 1998	$1,650,000

At the end of the financial year the balance of the financial facility was $9,714,700. The moneys advanced under the facility were used to pay contractors engaged on the redevelopment project.

(g) Late in June 1998 the Under Treasurer sought a loan on behalf of Bruce Operations Pty. Ltd. from the Commonwealth Bank. This company was wholly owned by the Territory. The Commonwealth Bank agreed to lend the company $9,715,000 on 30 June 1998. The loan was paid and was used to discharge the obligations of the relevant Departments (by this time, as a result of administrative rearrangements, responsibility for the project had passed from the Department of Business, the Arts, Sports and Tourism to the Department of Business, Employment, Tourism, the Arts, Regulatory Reform and Industrial Relations) to the Central Financing Unit.

(h) On 1 July 1998 the Central Financing Unit repaid the loan to the Commonwealth Bank. This payment is recorded as a loan by the Central Financing Unit to the Chief Minister's Department (which is presently responsible for the Bruce Stadium Redevelopment Project).

3. I have been requested to provide advice on a number of questions relating to these transactions. I am told that some of the questions have been settled by the Auditor-General of the Territory. They are:

(a) Was the public money paid from the Territory bank account (CFU) to the Departments of Business, the Arts, Sports & Tourism and Business, Employment, Tourism, the Arts, Regulatory Reform and Industrial Relations Departmental bank accounts in excess of amounts in the **Appropriation Act** 1997-98, legal payments under s.6 and s.8 of the **Financial Management Act** 1986 (ACT)?

(b) Were the payments expended by the Departments from the Departmental bank accounts on Bruce Stadium redevelopment in excess of the amount in the **Appropriation Act** 1997-98, legal payments under s.6 and s.8 of the **Financial Management Act 1986?**

(c) Do the payments from the Territory bank to the Departmental bank accounts described in my instructions comply with s. 37 (1) of the **Financial Management Act**?

(d) Do all the transactions described in my instruction comply with s.57 and s.58 of the **Australian Capital Territory (Self Government) Act** 1988 (Cth)?

(e) Have the responsible Chief Executives complied with s.31 of the **Financial Management Act** in relation to the transactions between Departments in connection with the Bruce Stadium redevelopment?

(f) Have the responsible Chief Executives complied with s.31 of the **Financial Management Act** in relation to payments in excess of that provided by appropriation for costs, etc. for the Bruce Stadium redevelopment?

(g) Did the borrowing from the Commonwealth Bank comply with the **Financial Management Act**?

(h) Did the repayment to the Commonwealth Bank of the borrowing comply with the **Financial Management Act**?

(i) If, in my opinion, the answer to any of the above questions is "no", is reason based on the process used or because s.38 of the **Financial Management Act** is considered to be incapable of supporting transactions of this kind?

(j) Finally, I am asked to consider the Financial Management Guidelines dated 19 May 1999 and the memorandum of advice of the ACT Parliamentary Counsel of 18 May 1999, and to advise on the effect of the guideline on the answers to questions (a) to (h).

The answers to questions (a) to (h) were substantially completed prior to 19 May 1999. The final two questions were posed after the earlier questions had been answered. Question (j) was put to me on 25 May 1999.

Questions (a), (b) and (d)

4. The requirement that the expenditure of public moneys be authorised by legislative appropriation has been a feature of Parliamentary government based on the Westminister model since the passage of the Bill of Rights in 1688. It is reflected in the Australian Constitution (see ss. 81 and 83; **Sandvik Australia Pty. Ltd. v. Commonwealth** (1989) 89 ALR 213 at 230) and is a requirement that lies at the heart of modern notions of responsible government: cf. **Lange v. Australian Broadcasting Corporation** (1997) 189 CLR 520 at 561. The principle has been adopted and forms part of the system of responsible government which operates in the Australian Capital Territory. Sections 57 and 58 of the **Australian Capital Territory** (**Self Government) Act** 1988 (Cth) provide:

> "57(1) The public money of the Territory shall be available for the expenditure of the Territory.

(2) The receipt, spending and control of public money in the Territory shall be regulated as provided by enactment.

58(1) Subject to sub-section 16(4), no public money of the Territory shall be issued or spent except as authorised by enactment.

(2) The public money of the Territory may be invested as provided by enactment."

Section 16(4) of the Act is of no present relevance. The receipt, spending and control of public money in the Territory is regulated by the **Financial Management Act** 1996 (ACT). Relevantly, it provides:

"6. No payment of public money shall be made otherwise than in accordance with an appropriation.

8. An Appropriation Act shall make separate appropriations in respect of each Department for -

(a) the provision of outputs by the Department;

(b) any capital injection to be provided to the Department; and

(c) any payments to be made by the Department on behalf of the Territory.

9 (1) An appropriation for the provision of outputs may be expressed to be made for the net cost of providing the outputs.

(2) Notwithstanding s.6, where an appropriation for a Department is expressed to be made for the net cost of providing outputs, the Department may apply the revenue received by it from providing the outputs to pay the expenses and liability incurred in doing so. "

It will be seen that, while the Act contains some innovative provisions such as net appropriations for outputs (and see also, for example, ss.7, 14, 15, 18A), it rests firmly, as it must, on the fundamental requirement that the public moneys of the Territory must not be expended otherwise than in accordance with an appropriation.

5. The consequences of a breach of this fundamental Constitutional stipulation are serious. In **Auckland Harbour Board v. R.** [1924] AC 318 the Privy Council considered the question of whether public moneys which had been paid to the appellant without lawful authority were recoverable. The advice of the Privy Council (at 326-27) was:

> "The payment was accordingly an illegal one, which no merely Executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its legal character. For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and *ultra vires,* and may be recovered by the government if it can, as here, be traced."

This principle has been applied by Australian, Canadian and United States Courts over a long period: see authorities collected in **Commonwealth v. Burns** [1971] VR 825 at 828.

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6. The moneys expended by the Department of Business, the Arts, Sports and Tourism on the Bruce Stadium Redevelopment Project, after the $5.558 million which had been appropriated by the legislature had been expended, were provided by the Central Financing Unit. All of the funds expended by the Department of Business, Employment, Tourism, the Arts, Regulatory Reform and Industrial Relations on the project were obtained from the Unit. The Unit was part of the Chief Minister's Department. The appropriation of the $5.558 million for the project was a capital injection to the Department of Business, the Arts, Sports & Tourism. It was made under the 1997-98 **Appropriation Act**: see s.5 and Schedule 1 of the Act and the associated Budget Paper No. 4, Volume 1 at p 214. That appropriation was plainly consistent with the requirements of ss. 6 and 8 of the **Financial Management Act**. I have been unable to find any equivalent appropriation to the Chief Minister's Department in respect of the Bruce Stadium project. None has been drawn to my attention. The additional moneys were paid out of the Territory banking account. That account holds funds received from taxes, fees, fines and Commonwealth Government financial assistance grants. In the absence of an appropriation, the payments by the Unit to the Departments and the subsequent expenditure of the same funds by the Departments was, in my opinion, unlawful.

7. In forming this view I have had regard to the suggestion that the payments made by the Central Financing Unit to the Departments and by the Departments to the project managers might be supported by the provisions of s.38 of the **Financial Management Act**. It provides:

> "38(1) The Treasurer may invest any money held in the Territory banking account or Departmental banking accounts for such period and on such terms and conditions as he or she thinks fit -
>
> (a) on deposit with a banking institution;
>
> (b) in the purchase of a Bill of Exchange that is drawn or accepted by a banking institution;
>
> (c) in a loan to a person who is a dealer in the short term money market;

> (d) in Territory, State or Commonwealth securities; or
>
> (e) in any prescribed investment.
>
> (2) Transfers between the Territory banking account and Departmental banking accounts to facilitate investments may be made without appropriation.
>
> (3) Interest received from the investment of public money shall be paid to the Territory banking account.
>
> (4) The Treasurer may determine the amount of interest to be paid into Departmental banking accounts and such amounts may be paid without further appropriation from the Territory banking account subject to the total amount paid not exceeding the interest received in the Territory banking account. "

The argument, as I understand it, is that the payments by the Unit to the Departments constituted a "Prescribed investment" for the purpose of s.38(1)(e) and that, by reason of the provisions of s.38(2), no appropriation of the sum transferred was required. The moneys paid by the Unit came from the Territory banking account. The first payment of $700,000 was paid by the Unit to the Bruce Stadium Redevelopment Authority bank account which was a Departmental banking account. The subsequent payments were also made into that account.

8. The real difficulty with the argument involves bringing the payments within the meaning of the term "prescribed investment" as used in s.38(1)(e). The word "prescribed" is defined by s.3(1) of the Act to mean "prescribed by the financial management guidelines". The same sub-section defines "financial management guidelines" to mean "the guidelines issued under sub-section 67(2)". The subsection provides that:

> "(2) The Treasurer may issue financial management guidelines, not inconsistent with this Act or the Regulations, for the purposes of this Act or the Regulations. "

Pursuant to the provisions of s.5(1) of the **Administration Act** 1989 (ACT), the Treasurer has delegated her power under s.67(2) to the Under Treasurer. (I am instructed that he is the same person who holds position E026 and is described, in the instrument of delegation with which I have been briefed, as the Executive Director of the Office of Financial Management.) The relevant "financial management guidelines" are said to be contained in "Document C" which is attached to my brief. That attachment, in fact, contains two documents. The first is a Minute from the Under Treasurer to the Director, Economic Management in the Chief Minister's Department. It is dated 22 December 1997. It reads (formal parts omitted):

> **"Purpose**
>
> To advise that a loan facility is to be provided to the Bruce Stadium Redevelopment Authority in accordance with the attached loan facility approval.
>
> **Background/issues**
>
> 2. The Bruce Stadium Redevelopment Authority requires an interim loan facility from the Office of Financial Management to provide working capital to ensure that the redevelopment construction can continue until a new financing structure is in place.
>
> 3. Negotiations are currently continuing with Deutsche Morgan Grenfell and County Natwest for the development of a new financing structure. The new financing structure is to be established and in place along with the receipt of external finance by 30 June 1998.

4. In accordance with the Government's decision, interim project financing will be provided through the Central Financing Unit (CFU) until the new financing structure is in place.

5. A copy of my authorisation and terms and conditions for the loan are attached.

Recommendation

6. That in accordance with the attached loan facility approval, the Central Financial Unit transfers $0.700 million to the Bruce Stadium Redevelopment Authority bank account today (Monday 22 December 1997). "

An annotation on the document indicates that the money was transferred, in accordance with the recommendation, on 22 December 1997. The "authorisation and the terms and conditions for the loan" to which reference is made in paragraph 5 are contained in a letter from the Under Treasurer to a Ms. Moiya Ford, the General Manager, Strategic Business Projects within the recipient Department. It is dated 22 December 1997.

The letter (formal and irrelevant parts omitted) reads:

"I refer to the letter of 22 December 1997 from Ms. Lindy Price in regard to the redevelopment of the Bruce outdoor stadium and the Financing and Management arrangements currently in place. I note that the Bruce Stadium Redevelopment Authority requires an interim loan facility from the Office of Financial Management to

provide working capital to ensure that the redevelopment construction can continue until a new financing structure is in place.

Negotiations are currently continuing with Deutsche Morgan Grenfell and County Natwest for the development of a new financing structure. The new financing structure is to be established and in place along with the receipt of external finance by 30 June 1998.

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In accordance with the Government's decision, interim project financing will be provided through the Central Financing Unit (CFU) until the new financing structure is in place.

I have authorised the establishment of this loan facility and accordingly the terms and conditions for the loan are as follows:

1. The total loan facility is $0.700 million to be drawn down on 22 December 1997. Any additional funding requirements between this time and 30 June 1998 will require separate approval;

2. The total loan balance (including all outstanding interest) must be repaid in full by 30 June 1998;

3. Interest will be charge on the outstanding daily balance and is payable on a quarterly basis (1 April and 30 June);

4. The rate of interest payable will be based on the 90 day bank bill rate (for the first banking day of each quarter) plus a margin of 2%;

5. The interest rate will be reset each quarter;

6. Interest payments and/or principal repayments are to be made to the Central Financing Unit by way of electronic funds transfer ……..

7. Please note that interest repayments as mentioned above are payable on 1 April 1998 and 30 June 1998. Accordingly, the Authority's capacity to make loan interest payments to the CFU should be included in the development of the new financing structure; .....

I trust that the above terms and conditions and administrative arrangements of the loan meet your requirements. "

The subsequent payments by the Unit to the Departments in respect of the project were not expressly made subject to terms and conditions. However, it may be inferred that they were, because clause 1 contemplated further borrowings under the facility.

9. It may be accepted that a document may satisfy a statutory description notwithstanding the fact that it does not, on its face, purport to do so. It may also be accepted that a delegate may validly exercise delegated power without formally stating that he is acting in that capacity. However, bearing these considerations in mind, I am wholly unpersuaded that the Under Treasurer's letter to Ms. Ford constitutes an exercise of delegated power under s.67(2) of the **Financial Management Act**. It responds to a request for ongoing interim financing pursuant to the Cabinet decision and pending the establishment of an alternative financing structure involving the private sector. The Under Treasurer records that he has authorised the establishment of a loan facility and stipulates the terms and conditions on which loan funds will be provided under the facility. Nowhere does the Under Treasurer refer to the fact that he is exercising delegated power under s.67(2) of the Act. Indeed, he makes no reference to the provision at all. Nowhere does he state that the terms and conditions which he imposes constitute "financial management guidelines". Nowhere does he identify the Bruce Stadium Redevelopment Project as an "investment" for the purposes of s.38(1)(e) of the Act. The tenor of the letter, confirmed by the terms of its concluding paragraph, suggests that its purpose was to identify the terms and conditions and the administrative arrangements which were to be attached to a particular loan facility which the Under Treasurer had authorised. It does not contain anything which may fairly be characterised as guidelines for financial management within the public sector.

10. Although the terms and conditions of the loans provided for interest payments, no interest was ever paid. A demand for the April payment was made by the Assistant Manager of the Central Financing Unit by letter dated 26 March 1998. Handwritten notations on different copies of the letter suggest that it led to discussions between the Under Treasurer, the Assistant Manager, Ms. Ford and others, culminating in a decision by the Under Treasurer, on or about 14 April 1998, that the interest owed should be capitalised. The file note records an oral decision by the Under Treasurer to this effect. The decision clearly constituted a variation of the terms and conditions of the loan, although there was no formal amendment to the document which prescribed those terms and conditions. Had that document been an instrument under s.67(2) it could hardly have been subject to variation by such an informal process. At the

end of the financial year neither the April or June interest payments had been made. I am instructed that payment was waived by the Under Treasurer. Again, a significant variation to the terms and conditions occurred without any amendment to the document which it is suggested might be seen to contain guidelines for the purposes of s.67(2).

11. Another consideration which tends against acceptance of the argument that the letter promulgates "financial management guidelines" is that the power conferred by s.67(2) of the Act is qualified by the stipulation that any guidelines made thereunder must not be inconsistent with the Act. Section 6 of the Act prevents any payment of public money being made in the absence of an appropriation. Guidelines issued under s.67(2) cannot, therefore, authorise the establishment of a loan facility consisting of moneys which have not been appropriated by the legislature. All that the guidelines can do, relevantly, is to identify institutions and securities in which public moneys which are surplus to the immediate requirements of government, may lawfully be invested. One would, therefore, expect that, at minimum, any attempt at prescription for the purposes of s.38(1)(e) would expressly state that an investment in a specific legal entity associated with the stadium project or a class of investment which incorporated the project was to be a "prescribed investment" for the purposes of s.38(1)(e). This the letter does not do.

Question (c)

12. Section 37 of the **Financial Management Act** provides:

> "37(1) Subject to sub-section 38(2), money shall not be paid out of the Territory banking account except to a Departmental banking account where authorised by a warrant signed by the Treasurer in accordance with an appropriation.
>
> (2) A warrant shall specify the total amounts of public money to be paid to Departmental banking accounts."

There has been no delegation of the Treasurer's authority to sign warrants under s. 37(1).

13. As already noted, each of the payments presently under consideration was made from the Territory banking account to a Departmental banking account. Typically, a written request was made by an officer of the Department administering the Bruce Stadium project for the payment of a nominated sum. The request was considered by the Under Treasurer who noted his approval by annotating a copy of the letter of request. The annotated letter would then be passed to the Assistant Manager of the Central Financing Unit. He would then sign a document bearing the bold heading "WOGT" authorising and approving the transfer of funds from the Territory banking account to the Departmental banking account. I am instructed that conflicting views exist within the Department of Chief Minister & Treasurer as to the proper characterisation of the "WOGT" documents. The officers who deal with these documents on a daily basis describe them as "journals". More senior Treasury officials, I am told, regard them as "warrants". It is not necessary, for the purposes of providing this advice, to resolve this difference of opinion. Even if the documents are to be treated as warrants, the Assistant Manager had no authority, under s.37(1), to sign them.

14. Section 37(1) is made subject to s.38(2). As a result, it is not necessary for the Treasurer to authorise by warrant transfers between the Territory banking account and Departmental banking accounts where those transfers are undertaken to facilitate investments of the kind provided for in s.38(1).

15. I have already advised that I do not consider the Bruce Stadium project was an investment of the kind contemplated by s.38(1). However, I have been invited to consider the proposition that, in authorising the transfer of money from the Territory bank account to the Departmental bank account, the Assistant Manager purported to act in accordance with the duties of his office in accordance with s. 38(2). I do not know whether the Assistant Manager ever turned his mind to the question of what statutory power he was purporting to exercise when signing the "WOGT" document or, if he did, which particular statutory power he considered that he was exercising. What can be said, however, is that, if a valid financial management guideline had been in place under s.67(2) which prescribed the Bruce Stadium project as an investment for the purposes of s.38(1)(e), the officer concerned would have had authority,

on a broad reading of his duty statement and under direction from the Under Treasurer, to authorise the transfers.

Questions (e) and (f)

16. Section 31 of the **Financial Management Act** imposes certain obligations on the senior public servant in each Government Department. Section 31 provides:

> "31(1) The responsible Chief Executive of a Department shall be accountable to the responsible Minister of the Department for the efficient and effective financial management of the Department.
>
> (2) The responsible Chief Executive of a Department shall be responsible under the responsible Minister, for ensuring -
>
> (a) that the moneys spent by the Department are within the appropriations made for the Department;
>
> (b) that the operations of the Department during a financial year give a financial result at the end of the year that is in accordance with the estimates contained in the Budget papers for that year relating to the Department;
>
> (c) that the officers and employees of the Department comply with the requirements of this Act and the financial management guidelines;
>
> (d) that proper accounts and records are kept of the transactions and affairs of the Department in accordance with generally accepted accounting practice;
>
> (e) that adequate control is maintained over the assets of the Department and assets in the control of the Department; and

> (f) that adequate control is maintained over the incurring of liabilities by the Department. "

I have been asked to advise on whether the various Chief Executives involved in the transactions under review have complied with their obligations under s.31.

17. As already noted, the sum of $5.558 million was appropriated by the legislature as a capital injection, through the Department of Business, the Arts, Sport and Tourism in respect of the Bruce stadium project. Insofar as any Chief Executive had responsibility for the spending of those funds, such dealings will have met the requirements of s.31(2)(a) if, as I am told is the case, the moneys were applied for capital works on the project. Insofar as an issue arises as to the responsibilities of Chief Executives under s.31(2)(a) and (b), the issue relates to their dealings with the moneys advanced by the Unit to support the project on and after 22 December 1997. The Chief Executives involved, as I understand it, were the Chief Executive of the Chief Minister's Department and the Chief Executives of the two Departments which were directly responsible for the project in the latter half of the financial year.

18. I have already advised that, in my opinion, the purported appropriations by the Unit contravene s.6 of the Act and were unlawful. It follows that the relevant Chief Executives responsible for the payments from the Unit to the Departments and by the Departments cannot be said to have satisfied the obligation imposed on them by s.31(2)(a).

19. There has been literal compliance with the requirements of s.31(2)(b). However, that compliance may well have been achieved as a result of a breach of the obligations imposed by s.31(2)(a) and (c) and any such compliance with s.31(2)(b) cannot cure the illegality occasioned by the breaches of s.6 of the Act.

Questions (g) and (h)

20. On 26 June 1998 the Under Treasurer (in his capacity as a Director of Bruce Operations Pty. Ltd.) wrote to a Chief Manager of the Commonwealth Bank. He told the bank that:

> "Initial funding for the commencement of the redevelopment of the stadium has been provided from the ACT Government in the form of a repayable loan during the 1997-98 financial year. The terms of this loan are such that the outstanding loan balance at 30 June 1998 is to be repaid in full.
>
> Negotiations are currently near completion, whereby the funding for the redevelopment project will be provided by an external financier, however it is unlikely that the new financing structure will be finalised before 30 June 1998. In this regard it is likely that a borrowing from another source will be required to extinguish the loan with the ACT Government on 30 June 1998. The amount required will be $9,714,700 and will be repaid on 1 July 1998.
>
> <u>On behalf of BOPL</u> I am asking if the Commonwealth Bank of Australia is prepared to provide the company with a loan of $9,714,700 on 30 June 1998 and what the terms and conditions of the loan would be ….. " (Emphasis added)

(By letter dated 11 September 1998 the Under Treasurer advised the Bank that the borrowing was undertaken "for and on behalf of the Bruce Stadium Trust and not Bruce Operations Pty. Ltd.". Nothing turns on this discrepancy for present purposes.)

On 29 June 1998 the bank officer confirmed that the bank would be prepared to provide the loan to BOPL as requested and advised of the interest rate that would be applicable. On 29 June 1998 the Under Treasurer, in that capacity, wrote to the Chief Manager (formal parts omitted) as follows:

> "I refer to the borrowing approval the Commonwealth Bank has granted to the company, Bruce Operations Pty. Ltd. (BOPL).
>
> I wish to advise you that the Office of Financial Management, Chief Minister's Department has been involved with the establishment of the BOPL company which will have the responsibility for managing the development of the Bruce outdoor stadium project.

> It is my understanding that the loan is for $9,714,700 and will be provided on 30 June 1998. Interest will be charged on the outstanding daily balance of the loan until such time that it is repaid at the rate of 7.45%... In addition, it is my understanding that the loan will be repaid on 1 July 1998 but no later than 31 July 1998 when an alternative financing structure will be in place.
>
> The proceeds for the loan are to be paid to the Central Financing Unit bank account…….. This is also the account from which the loan will be repaid ……."

Thus, although the bank agreed to lend the money to the company, the loan funds do not appear to have been paid into any company account. Rather they were paid into an account operated by the Central Financing Unit within the Chief Minister's Department. That account was, I am instructed, the Territory banking account, notwithstanding the misdescription of it in the letter as "the Central Financing Unit bank account".

21. The borrowing and repayment of money on behalf of the Territory is regulated by Part VI of the **Financial Management Act.** Insofar as it is relevant, it provides:

> "39. The Territory may only borrow in accordance with this Act or another law of the Territory.
>
> 40. The Treasurer may, on behalf of the Territory, if necessary or expedient in the public interest to do so -
>
> (a) borrow money;
>
> (b) ……
>
> (c) ……
>
> 45. Subject to this Act and any other Act, the proceeds of a loan raised on behalf of the Territory …… shall be paid into the Territory banking account.

> 46. The Treasurer may make such payments as are required in respect of expenses incurred in borrowing on behalf of the Territory, and in respect of repayments of borrowing on behalf of the Territory, without further appropriation. "

Section 3(1) of the Act defines the "Territory banking account" as "the banking account referred to in s.33". Section 33 provides for the Treasurer to open and maintain a banking account for the purposes of the Territory.

22. The transaction raises a number of legal issues. They are:

(a) On the assumption that no other law of the Territory authorised the borrowing by BOPL, that borrowing would only be lawful if it was made by the Treasurer on behalf of the Territory: see ss.39 and 40(a). The borrowing was arranged by the Under Treasurer

in that capacity and in his capacity as a Director of BOPL. He had delegated power to borrow the money pursuant to s.40 of the Act under a financial delegation from the Treasurer which is dated 8 January 1998.

(b) The borrowing was sought by and for BOPL. BOPL is wholly owned by the Territory. The executive power of the Territory extends to the establishment of a corporation as a means for carrying out and pursuing activities authorised by the Government: cf. **Davis v. The Commonwealth** (1988) 166 CLR 79 at 94. It may, therefore, be possible to treat a loan to the company as being a loan to the Territory for the purposes of s.40(a) of the Act. The argument is assisted by the fact that the money borrowed was paid by the bank, not to the company, but to the Territory banking account.

(c) When read together, the definition of "Territory banking account" and s.33 of the Act suggest there will only be one banking account which meets the description of "Territory banking account". See also ss.35(4), 36(1) and 38. Section 45 of the Act requires that any borrowings be paid into that account. This was

done. It follows, in my opinion, that the borrowing was undertaken in compliance with the Act.

23. The loan money was repaid to the Commonwealth Bank by the Central Financing Unit on 1 July 1998. As the borrowing was made by the Treasurer on behalf of the Territory, she was, pursuant to s.46 of the Act, entitled to use public funds to repay the borrowing and interest without the need for further appropriation. She did not authorise the repayment. It was purportedly authorised by the Assistant Manager of the Unit. He had no delegated authority to do so. Nor, so far as I can ascertain from the only relevant instrument of delegation with which I have been briefed, did anyone else. The payment was not, in my opinion, authorised by the Act.

Question (i)

24. In dealing with question (c) I have advised that the Bruce Stadium project could have been made a prescribed investment for the purposes of s.38(1)(e) of the Act if an appropriately worded financial management guideline had been promulgated under s.67(2). Had that occurred, all of the questions (save question (h)) to which the answer "no" has been given would have been answered differently. In other words, the unlawful dealings with the funds of the Territory which I have identified (except the repayment of the loan to the Commonwealth Bank) could have been undertaken lawfully had the Bruce Stadium project been rendered a prescribed investment for the purposes of s.38(1)(e).

Question (j)

25. The Financial Management Guidelines made on 19 May 1999 prescribes for the purposes of s.38(1)(e) of the **Financial Management Act** "an investment in Territory owned property" as a prescribed investment: see clause 3(c). A "Territory owned property" is defined, in clause 2, to mean "any property in which the Territory has an interest, whether vested or contingent, or any land the Territory occupies". I assume that the Bruce Stadium falls within the terms of this definition.

26. The Financial Management Guidelines are stipulated to commence on 1 July 1997: see clause 1. They are, therefore, retrospective in operation. The advice of Parliamentary Counsel with which I have been briefed concludes that there is no legal constraint on guidelines, made under s.67(2) of the **Financial Management Act**, being made retrospective in operation. In particular, he concludes that s.7 of the **Subordinate Laws Act** 1989 does not operate in respect of such guidelines. I have not been asked to advise separately on this issue. However, I have read Parliamentary Counsel's advice carefully and I have no reason to doubt that it is correct.

27. I, therefore, conclude that the guidelines have the effect of rendering lawful those dealings which I have earlier advised were unlawful in the absence of such guidelines. The result is that all of the questions (save question (h)) to which the answer "no" has been given would have been answered differently had the guidelines been promulgated on or before 22 December 1997.

Summary of advice

28. For the foregoing reasons I would, on 18 May 1999, have answered questions (a) to (i) as follows:

Question (a) - no.
Question (b) - no.
Question (c) - no.
Question (d) - as to s.57, not relevant; as to s.58, no.
Question (e) - no.
Question (f) - no.
Question (g) -yes.
Question (h) - no.
Question (i) - see para. 24.

29. On and after 19 May 1999 I would have answered questions (a) to (i) as follows for the reasons given in paragraph 27:

Question (a) - yes.
Question (b) - yes.
Question (c) - yes.
Question (d) - as to s.57, not relevant; as to s-58, yes.

APPENDIX 1 (con't)

Question (e) - yes.
Question (f) - yes.
Question (g) - yes.
Question (h) - no.
Question (i) - see para 24.

And I so advise.

Owen Dixon Chambers West
25 May 1999

R.R.S. TRACEY

BRUCE STADIUM REDEVELOPMENT – LAWFULNESS OF EXPENDITURE

APPENDIX 2

OPPOSITION'S LEGAL ADVICE

APPENDIX 2

Re: Bruce Stadium Redevelopment and the Financial Management Act 1996 (ACT)

OPINION

A. Summary of Opinion

- The sum of $9.714 million expended by the A.C.T. Government on the Bruce Stadium redevelopment in the financial year ended 30 June 1998 was comprised of payments by the A.C.T. Government which were unlawful;

- The obtaining of "daylight" accommodation by the A.C.T. Government from the Commonwealth Bank and the repayment of that accommodation between 30 June 1998 and 1 July 1998 was unlawful;

- The purported retrospective Financial Management Act "Guideline" said by the A.C.T. Government to cure the consequences of its unlawful conduct are, in my opinion likely to be held to be:

  (i) unlawful as beyond the power given to make guidelines by the Financial Management Act, 1996; and

  (ii) an improper abuse by the A.C.T. Treasurer of the guideline making power and, thus, unlawful.

- In all the circumstances, the papers in this matter should be referred to the A.C.T. Director or Public Prosecutions.

B. Facts About Which Advice is Sought

1. My advice is sought on behalf of the Leader of the Opposition of the Legislative Assembly of the A.C.T.

2. The facts relevant to this matter are as follows:

(a) In about 1996 the A.C.T. Government committed $12.3 million towards the redevelopment of the Bruce Stadium. The total cost of the redevelopment was expected at that time to be $27.3 million;

(b) The Appropriation Act 1997 - 1998 provided $5.6 million as a capital injection for the project;

(c) In December 1997 the A.C.T. Government directed the A.C.T. Under Treasurer to establish a commercial vehicle for the redevelopment. This resulted in:

(i) On 15 April 1998 the creation of Bruce Operations Pty Limited to manage the stadium; and

(ii) On 1 June 1998 the creation of the Bruce Property Trust as the lessee of the facility;

(d) The A.C.T. Cabinet agreed, despite the fact that only $5.6 million had been provided in the Appropriation Act 1997 - 1998, that funds were to be provided from A.C.T. consolidated revenue, to provide project finance;

(e) As at 30 June 1998 the balance of funds which had been provided by the Central Financing Unit of the A.C.T. Government and paid into a Bruce Stadium redevelopment bank account was $9.714 million. The moneys advanced under that facility had been used to pay contractors engaged on the development project;

(f)On 26 June 1998 the Under Treasurer of the A.C.T., in a purported capacity on behalf of Bruce Operations Pty Limited sought "daylight" accommodation from the Commonwealth Bank of Australia in the amount of $9.714 million. The Commonwealth Bank agreed to lend that sum on 30 June 1998. The money was not paid to the company, but rather, as appears to indicate the true arrangement between the Bank and the Government, was paid to an account operated by the Central Financing Unit within the Chief Minister's Department of the A.C.T. Government;

(g) On 1 July 1998 the Central Financing Unit of the A.C.T. Government repaid the "daylight" facility to the Commonwealth Bank. The payment was recorded in the Government's records as a loan by the Central Financing Unit of the Chief Minister's Department;

(h) On 19 May 1999 "Financial Management Guidelines" were purportedly promulgated having an alleged retrospective operation, the effect of which was intended to provide that the otherwise unlawful payments it had made for the Bruce Stadium redevelopment were retrospectively authorised as a "prescribed" investment within the meaning of that term in Section 38(1) of the Financial Management Act.

3. The questions which I have been asked to advise about arising from these facts are as follows:

(i) Was the amount of $9.714 million expended by the A.C.T. Government on the Bruce Stadium redevelopment during the financial year 1998 lawful expenditure?

(ii) Was either the obtaining of the daylight facility from the Commonwealth Bank or the repayment of that facility by the A.C.T. Government lawful?

(iii) If the answers to questions (i) and (ii) are "No", do the purported retrospective guidelines said to be promulgated under the Financial Management Act cure the consequences of otherwise unlawful conduct by the A.C.T. Government?

C. The Legality of Funding for the Bruce Stadium Redevelopment Project during financial year ended 30 June 1998

4. It is a fundamental requirement of a democratic society that public moneys are only to be expended in accordance with a valid appropriation. The only appropriation for the Bruce Stadium redevelopment in the financial year ended 30 June 1998 was in an amount of $5.558 million which had been appropriated under the 1997 - 1998 Appropriation Act (ACT).

5. Additional funds, namely $9,714,700, were simply paid out of a Territory banking account for the purposes of the Bruce Stadium development. There was no valid appropriation of those funds. The account from which the funds were paid receives funds from taxes, fees, fines and Commonwealth Government financial assistance grants paid to the Australian Capital Territory.

6. In my view it is plain beyond argument that the payment by the A.C.T. Government for the purposes of the Bruce Stadium redevelopment of $9.714 million in the financial year ended 30 June 1998 was an "illegal" payment in the sense that term was used by the Privy Council in **Auckland Harbour Board v. R [1924]** AC 318 at 326-327, namely unlawful or unauthorised.

7. The enduring relevance of this fundamental constitutional principle is underlined by the decision of the High Court in **Northern Suburbs General Cemetery Trust v. The Commonwealth (1992)** 17 CLR 555 particularly at 572 and 581.

D. The Commonwealth Bank of Australia "Daylight Facility" – 30 June 1998

8. The arrangement between the Under Treasurer, purportedly in his capacity as a director of Bruce Operations Pty Limited, and the Commonwealth Bank concerning the "Daylight" Facility is a curious one. On the face of it despite the Under Treasurer expressing himself to be acting "on behalf of Bruce Operations Pty Limited" in his letter of 26 June 1998 to the Commonwealth Bank, it is apparent that he was acting at all times in a capacity on behalf of the A.C.T. Government. That is made clear when one examines the commercial substance of what took place.

9. In the present case in my view the inference is open that the Under Treasurer in acting as he did was motivated by a desire to avoid the consequences of the Government's unlawful conduct and to circumvent the fundamental principle concerning the appropriation of moneys referred to above. The pretence by the Under Treasurer that he was acting on behalf of Bruce Operations Pty Limited can be tested against the actual commercial arrangement with the Commonwealth Bank, which paid the proceeds of the loan direct to the Central Financing Unit of the

A.C.T. Government. This was the account from which the loan was repaid one day later.

10. Accordingly, as at 30 June 1998, the relevant date for statutory reporting purposes, the A.C.T. Government had, rather than an unauthorised investment in the Bruce Stadium redevelopment a loan, on the face of it, from a reputable financial institution, was shown in its accounts.

11. In my opinion it cannot be said that a borrowing of this character, namely a 24 hour loan designed to disguise an unlawful appropriation of public funds could be said to be "on behalf of the Territory" within the meaning of the sole relevant power, Section 40 of the Financial Management Act. Accordingly, it follows that in my view the borrowing was unlawful.

12. As to the repayment of the Commonwealth Bank from the Central Financing Unit account on 1 July 1998, I note that there was no further appropriation for this purpose and no purported exercise by the Treasurer under the Financial Management Act of any powers she may have had to repay that borrowing. Plainly, the Treasurer did not authorise the repayment. It was purportedly authorised by the assistant manager of the Central Financing Unit, a person with no delegated authority to authorise the payment.

13. Accordingly, even if, contrary to my view, the borrowing was authorised the repayment was, on any view, unlawful.

14. The extremely curious circumstances of this matter resemble in significant respects the private prosecution the subject of the report in the High Court of **Sankey v. Whitlam (1978)** 142 CLR 1 wherein the High Court discusses the elements of an offence of conspiracy to effect a purpose that is unlawful under a law of the Commonwealth. I recommend that all of the papers in relation to this matter be referred to the A.C.T Director of Public Prosecutions for his consideration of an offence of that character in the present circumstances.

E. The Purported Retrospective Financial Management Act "Guidelines"

15. On 19 May 1999 the Chief Minister of the Australian Capital Territory purported to issue "Financial Management Guidelines" under section 67(2) of the Financial Management Act. The Guidelines were expressed to "commence on the date of commencement of Section 38 of the Financial Management Act". That date was 1 July 1997, almost two years prior to the promulgation of the "Guidelines".

16. The purported effect of these retrospective "Guidelines" was, for the purposes of paragraph 38(1)(e) of the Financial Management Act, to define as "prescribed investments" the following:

> " …
>
> (b) A loan to a Territory entity; and
>
> (c) An investment in "Territory owned property"

17. The first matter to consider is Section 38(1) of the Financial Management Act. That section provides that:

"The Treasurer may invest any money held in the Territory banking account or departmental banking accounts for such period and on such terms and conditions as he or she thinks fit -

> (a) on deposit with a banking institution;
>
> (b) in the purchase of a bill of exchange that is drawn or accepted by a banking institution;
>
> (c) in a loan to a person who is a dealer in the short term money market;
>
> (d) in Territory, State or Commonwealth securities; or
>
> (e) in any prescribed investment."

18. There is no question that, as at the time of the relevant expenditure, the year ended 30 June 1998 no "prescribed investments" had been made the subject of any "Financial Management Guideline" pursuant to section 67(2) of the Financial Management Act. Section 67(2) provides as follows:

"The Treasurer may issue Financial Management Guidelines, not inconsistent with this Act or the regulations, for the purposes of this Act or the regulations".

19. The relevant link between these Guidelines and a "prescribed investment" is provided by the definition in section 3 of the Financial Management Act of "prescribed" which means "prescribed by the Financial Management Guidelines".

20. The sole question is whether the purported Guidelines have a retrospective operation. In my view, any such purported retrospective operation is plainly outside the power given to the Treasurer by Section 67(2) of the Financial Management Act.

21. Further, given the nature of the legal advice available to the A.C.T. Government at the time the decision was made to proceed by way of retrospective "Guidelines", which advice has only recently come to light, in my view it is likely that a Court will decide that the retrospective operation of the Guidelines was made for an improper purpose. The retrospective guideline is thus unlawful.

22. As to the first question, it seems to me to be tolerably plain that the promulgation of financial management "Guidelines" must be a power given to the Treasurer to provide guidance about the investment of public moneys held in a Territory banking account or departmental banking accounts. So much is clear from the terms of section 38(1) of the Financial Management Act itself. That this power relates to <u>future events</u> rather than past events is made clear when one considers the term used, "Guidelines" and the purpose for which the guideline making power is plainly given by the Act.

23. Section 38(1) provides the legislative authority for the Treasurer, or her delegates, to invest public money in a limited class of highly stable investments, including deposits with banks, bills of exchange drawn or accepted by banks, government securities or short term money market loans.

24. The sole remaining investment avenue is in a "prescribed investment". It is in my view inconceivable that the legislature intended that all delegates of the Treasurer could, prior to any Financial Management "Guidelines" have an unlimited power to make investments. If so, relatively junior unelected officials could invest public funds in highly speculative ventures, and subsequent to the success and failure of those ventures, have the Treasurer determine by way of Guidelines whether or not the investment should be "prescribed" under section 67(2) of the Financial Management Act. This cannot have been the intention of the legislature.

25. This conclusion is underlined by the use of the word "Guidelines", which as the High Court of Australia has pointed out in **Norbis v. Norbis (1986)** 161 CLR 513 at 519 - 520 is a word describing instructions or suggestions about future decisions.

26. The very essence of guidance is assistance to others who will be exercising the Treasurer's investment powers under delegation pursuant to section 38(1) of the Financial Management Act. A retrospective guideline does not provide guidance about the types of investment which may be made. It is fundamentally inconsistent with the scheme of the Act and, for that reason, is in my view outside the power granted by section 67(2) of the Act.

27. This conclusion is underlined by the decision of the Full Federal Court in **Smoker v. Pharmaceutical Restructuring Authority** (1994) 53 FCR 287 and **Riddell v**. **Department of Social Security (1993)** 42 FCR 443 which are both decisions which proceed on the basis that "guidelines", whether mandatory or not (the point of distinction in those cases), are nevertheless instructions or directions about the exercise of judicial discretion in the future.

28. Even if the Guidelines were capable as a matter of construction of being made retrospective, in my view the legal advice available to the A.C.T. Government at the time the retrospective "guidelines" were promulgated makes it likely that a court would conclude that the retrospective guidelines were enacted for an improper purpose of the kind described by the High Court in **The Queen v Toohey: ex parte: Northern Land Council (1981)** 151 CLR 170. In that case, the High Court described as invalid a regulation which was not made for the purpose of the Act which authorised the making of the regulation but for an alien of foreign purpose.

29. On 18 May 1999, the day before the Financial Management "Guidelines" were promulgated, Parliamentary Counsel, Mr Leahy, gave an advice to the A.C.T. Government on the possibility of a retrospective instrument under the Financial Management Act 1996.

30. Whilst I disagree both with Mr Leahy's method and conclusion, there are two critical points which emerge from his advice. The first is that he advised of a proposition, which I regard as clear beyond argument, that it would not, "be possible to make guidelines expressly validating investments already made". Further, he advised that should the regulation making power of section 67(1) be used, it was likely that when challenged such regulations would fail as being neither necessary nor convenient for a purpose directly or in expressly authorised by section 38 of the Financial Management Act.

31. It was, however, thought "possible to make guidelines prescribing investments and to provide that the guidelines take effect from a date before the presently unauthorised investments were made".

32. When one has regard to this advice, it is clear that the retrospective operation of the very broadly worded "Guidelines" was intended as a device in order to recharacterise the real purpose of those Guidelines, namely, to retrospectively validate particular investments already made - the very matter which Mr Leahy himself opined could not be done by use of the Guideline power.

33. Accordingly, if a court were to draw the inference that the Guidelines in the form that they appeared, and to the extent that they were retrospective, was a cloak or a device to mask an ulterior or collateral purpose, the Guidelines would also be unlawful for that reason.

F. Conclusion

34. On the facts given to me:

(i) It is beyond question that $9.714 million expended on the Bruce Stadium redevelopment in the year ended 30 June 1998 was unlawful expenditure by the A.C.T. Government;

(ii) The obtaining of the loan by the A.C.T. Government from the Commonwealth Bank of Australia and the repayment of that loan between 30 June 1998 and 1 July 1998 was unlawful;

(iii) The purported retrospective "Guidelines" said to cure the consequence of that unlawful conduct were themselves unlawful, at least to the extent that they purport to have retrospective operation.

JR Sacker QC
Selborne Chambers
8 June 1999

BRUCE STADIUM REDEVELOPMENT – LAWFULNESS OF EXPENDITURE

APPENDIX 3

INDEPENDENT ASSEMBLY MEMBER'S LEGAL ADVICE

APPENDIX 3

FINANCING OF THE BRUCE STADIUM DEVELOPMENT PROJECT OPINION

1. Arising out of our conference with you last week there are three questions for advice. They are as follows:

   Ql. Did the provision of a loan facility and the advancement of money pursuant to it from the Territory Bank Account to Bruce Stadium Development Authority between December 1997 and June 1998 constitute an investment within the meaning of section 38 of the *Financial Management Act* 1996?

   Q2. Assuming the answer to the first question is yes, was the provision of the loan facility a valid loan within section 38 (1) (e) of the *Financial Management Act?*

   Q3. If a loan was not validly made under section 38 (1) (e) of the *Financial Management Act* can the loan be rendered valid by the Treasurer issuing financial management guidelines under section 67 of the *Financial Management Act* retrospectively to operate from a date preceding the provision of the loan facility?

2. In our opinion the answer to each of these questions is no.

Introductory

3. Section 22 of the *Australian Capital Territory (Self Government) Act* 1988 empowers the Legislative Assembly to make laws for the peace, order and good government of the Territory. In the exercise of the power, the Assembly may raise revenue by various means and provide for the carrying on of those functions of government which are primarily in the hands of the Executive, by the appropriation of revenue.

4. Historically, in the Westminister system, only the Parliament can impose taxation and authorise the expenditure of public monies raised by the laws it has passed. These were vital components of the victory of the House of Commons over the Stuart Monarchy, and the executive government of the Crown culminating in the passage of

the Bill of Rights in 1689. It provided that "the levying of money for or to the use of the Crown ... without grant of Parliament is illegal".

5. As the Privy Council stated in 1924 in *Auckland Harbour Board v. The* King ([1924] A.C. 318 at 326 - 327) "it has been a principle of the British Constitution now for more than two centuries … that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself." Their Lordships added that the days had long since gone by in which the executive government, apart from Parliament could authorise or ratify an improper payment out of the Consolidated Revenue Fund without parliamentary authority. Any such payment was illegal and *ultra vires.*

6. The *Self Government Act* places the Legislative Assembly of the Territory in a similar position. Section 57 of the *Self Government Act* specifically states that the receipt, spending and control of the public money of the Territory should be regulated as provided by an enactment of the Assembly. "Public money of the Territory" is defined in section 3 to mean "revenues, loans and other money received by the Treasury". An "enactment" is a law by any name made by the Assembly. Section 58 *(1) Self Government Act* requires that "no public money of the Territory shall be issued or spent except as provided by enactment". It further states that public money may be invested as provided by enactment of the Assembly.

7. Annual Appropriation Acts provide the funds required by the Executive to carry on the functions of government. As section 6 of the *Financial Management Act* 1996 states, no payment of public money shall be made otherwise than in accordance with an appropriation. It is paramount that the source of any expenditure of public money by the Executive has to be found in an Assembly enactment. Otherwise, such expenditure is illegal.

   Question 1 - Did the provision of a loan facility and the advancement of money pursuant to it from the Territory Bank Account to Bruce Stadium Development Authority between December 1997 and June 1998 constitute an investment within the meaning of section 38 of the *Financial Management Act 1996?*

8. We understand that it is not disputed that the money advanced to the Bruce Stadium Redevelopment Authority in 1997/98 was not covered by a Parliamentary appropriation. However, reliance is placed on section 38 of the *Financial Management Act.*

9. Section 38 (1) of the *Financial Management Act* allows for the investment of public money of the Territory. It reads:

"The Treasurer may invest any money held in the Territory bank account or departmental bank accounts for such period and upon such terms and conditions as he or she thinks fit-

(a) on deposit with a bank;

(b) in purchase of a bill of exchange that is drawn or accepted by a bank;

(c) in a loan to a person who is a dealer in the short term money market;

(d) in Territory, State or commonwealth securities; or

(e) in any prescribed investment."

10. Sections 33 and 34 deal with the establishment of Territory and departmental bank accounts for the receipt of public money.

11. As to a prescribed investment, the word "prescribed" is defined in section 3 to mean prescribed by the financial management guidelines. By section 67 (2) the Treasurer "may issue financial management guidelines, not inconsistent with the Act or the regulations, for the purposes of this Act or the regulations."

12. The question for consideration is what is meant by the word "investment" in paragraph (e). Plainly, section 38 (1) requires that any investment made by the Treasurer pursuant to it will be of a genuine commercial nature.

13. It is beyond question that "investment" is the spending of money or use of capital in order to secure profitable returns, especially interest or income. See, for example The Penguin Macquarie Dictionary of Economics & Finance at p.157.

14. In its widest sense investment may involve expenditure on assets not for current consumption. However, this wider meaning is not immediately relevant if for no other reason than that the question for consideration is the provision of a loan facility involving the advancement of money totalling $9,714,700.00 between December 1997 and March 1998 out of the Territory bank account to a territorial administrative unit called alternatively Bruce Stadium Redevelopment Authority or Bruce Stadium Redevelopment. The loan was expressed to be on commercial terms of interest being interest based on the 90 day bank bill rate plus a margin of 2%.

15. Profit or financial return is the core element of any definition of investment. Thus, in order to be within the meaning of "investment" in sub-section 38 (1) a loan must satisfy the test that it is the use of money in order to gain a profitable return which in the instant case would take the form of payment of interest on the money lent.

16. Consistently with the definition of "investment" the subjects of investment described in the first four paragraphs of sub-section 38 (1) are institutions and persons engaged in financial dealings and established forms of commercial dealings, all of which are external to the ACT Government.

17. The question now arises as to the status of Bruce Stadium Redevelopment Authority.

18. According to information supplied to us at the time the loan was first authorised by the delegate of the Treasurer Bruce Stadium Redevelopment was a unit located within the Department of Business, Arts, Sports and Tourism. From 31 March 1988 however, without any change in its character, it was located as a unit within the Chief Minister's Department.

19. The unit has its own bank account but, as we understand it, it is not a legal entity in its own right such as Bruce Operations Pty Ltd which is a company established under the Corporations Law of Victoria.

20. Part VI of the *Australian Capital Territory Self Government Act* 1988 provides for the establishment of units administratively to assist in the conduct of the public administration of the Government of the Territory which, under Part V of the *Self Government Act* is under the control of the Executive, the members of which are the Chief Minister and her ministers. Section 12 of the *Public Sector Management Act* 1994 constituted the ACT Government Service. Section 13 provides for the establishment of administrative units to assist in the conduct of government administration for which the Executive is responsible. Part V of the Act provides for the appointment of officers and engagement of temporary employees. Our understanding is that Bruce Stadium Redevelopment Authority is a unit staffed by persons employed pursuant to the *Public Service Management Act.*

21. It brooks no argument that an institution cannot invest in itself by lending money to itself any more than a person borrowing money can be the guarantor of the loan made to him. The subject of an investment must be external to the body seeking to invest.

22. Thus, the loan purported to have been made to the Bruce Stadium Redevelopment unit is not in reality a loan at all and therefore cannot be an investment. In their true character, the payments to the unit amounted to a transfer of funds from the Central Financing Unit of the Chief Minister's Department to another unit in the Chief Minister's Department which that unit has expended in payment to contractors involved in the Bruce Stadium Construction Project. In the absence of a covering parliamentary appropriation the use of funds in this way is not supported by section 38 (1). The Chief Minister's Department has itself acknowledged the situation in the following words "the investment did not generate any income for the Territory as it was a transaction between Government agencies." As we have said these "agencies" are not separate legal entities but merely administrative units within the departmental structure of the ACT Public Service. In other words, the so-called investment did

not produce any profit or return for the Territory whereas, as we have observed, interest or other profit is at the core of the meaning of investment as used in section 38 (1).

Question 2 - Assuming the answer to the first question is yes, was the provision of the loan facility a valid loan within section 38 (1) (e) of the *Financial Management Act?*

23. An assumption that Bruce Stadium Redevelopment is a separate legal entity outside the ACT Government Service does not necessarily give an imprimatur to a transaction described as a loan facility. To call a transaction a loan is not the end of the matter. A Court would look beyond the form in order to ascertain whether a transaction in its true nature constituted a loan. Under section 38 (1) a loan must satisfy the test that it is in substance a genuine loan capable of returning a profit, in the instant case, by the payment of interest.

24. We are informed that Bruce Stadium Redevelopment Unit has not paid any interest on the loan, but that after the facility was provided a decision was made to waive the interest at the end of the financial year. Indeed, as far as we are aware, the unit did not have funds at its disposal covered by Parliamentary appropriation or otherwise which it could use to pay interest in any event. In other words, at the time the facility was provided there was no real prospect that the unit would pay interest and the loan was not, in our opinion, a genuine exercise of the power vested in the Treasurer under section 38 (1) (e).

Question 3 - If a loan was not validly made under section 38 (1) (e) of the *Financial Management Act* can the loan be rendered valid by the Treasurer issuing Financial Management Guidelines under section 67 of the *Financial Management Act* retrospectively to operate from a date preceding the provision of the loan facility?

25. It follows from the views we have expressed, that the issue of financial management guidelines retrospectively cannot rectify the situation. Nevertheless, we have looked at the question of retrospectivity.

26. An investment under section 38 (1) (e) must be an investment "prescribed by the financial management guidelines" which the Treasurer may make under section 67 of the *Financial Management Act.* We understand that senior counsel has advised the Government that no financial management guidelines were in place when the facility was provided and hence that the loan was not in accordance with the section.

27. The suggestion has been made that financial management guidelines could be made to have a retrospective operation to justify the exercise of power under section 38 (1) (e). That is to say by giving financial management guidelines a retrospective operation the loan could then be deemed to be an investment made in accordance with the financial management guidelines.

28. Obviously, in the light of the opinions we have expressed, the issue of guidelines with a retrospective operation cannot overcome the basic deficiency that the loan was not an investment within the meaning of the section in the first place, and even if it was it was not a genuine loan transaction. Accordingly, it is not necessary for us to go further. However, in our opinion even if the investment were a valid investment except for the absence of financial management guidelines the deficiency cannot be cured by purporting to make applicable guidelines after the event.

29. There is no doubt that the Assembly has power, at least in some cases, to make laws with retrospective effect, but the question is whether the *Financial Management Act* gives to the Treasurer as a member of the Executive Government a power to issue guidelines retrospectively.

30. In determining whether a statutory power can be given retrospective effect there is a well established legal presumption that a statute is not intended to have such an effect unless it reveals a clear intention to do so.

31. In our opinion, there is no such intention revealed in the *Financial Management Act* but rather a contrary intention. Thus the investment must be one "prescribed by the financial management guidelines" (underlining is ours). The language points to it being a condition precedent to the exercise of the discretionary power that guidelines must be in place at the time the decision is made. A decision made without reference to the guidelines cannot be converted into a decision made in accordance with guidelines operating retrospectively because this would impute to the Treasurer a state of mind which he or she did not have at the time of making the decision.

32. Further, the effect of giving guidelines a retrospective operation would, if valid, be to legalise expenditure of public funds which at the time would be illegal in the absence of a covering Parliamentary appropriation. In our opinion, a Court would, in the light of the *Auckland Harbour Board* case (referred to in paragraph 5 above) decline to uphold an action of the Executive seeking to validate the use of public funds which at the time it had no right to use.

Covering Parliamentary Appropriation

33. It is open to the Assembly to cover expenditure of public funds, illegal at the time of payment by a subsequent appropriation of Government revenue. In our opinion, this would be an appropriate course to pursue in this matter.

Jack E Richardson
Emeritus Professor
Faculty of Law
Australian National University
CANBERRA ACT

Jim Colquhoun
Colquhoun Murphy
Solicitors
Canberra

BRUCE STADIUM REDEVELOPMENT – LAWFULNESS OF EXPENDITURE

APPENDIX 4

ADVICE FROM THE ACT PARLIAMENTARY COUNSEL

APPENDIX 4

PARLIAMENTARY COUNSEL'S OFFICE

SUBJECT : **Retrospectivity of guidelines under Financial Management Act 1996, subsection 67(2)**

Mr Peter Quinton
Director
General Law Group
Policy and Regulatory Division

Question and advice

1. You have asked me to advise whether a retrospective instrument could be made under the *Financial Management Act 1996,* subsection 67(2) such that it would validate investments made under the Act. In my opinion, the answer is 'yes'.

Background

2. The *Australian Capital Territory (Self-Government) Act 1988* of the Commonwealth, subsection 58(2) provides that:

'(2) The public money of the Territory may be invested as provided by enactment.'.

'Enactment' is defined in section 3 of that Act to mean, among other things, 'a law (however described or entitled) made by the [Legislative] Assembly under this Act'.

3. The enactment currently providing for the investment of the public money of the Territory is the *Financial Management Act 1996.* Subsection 38(1) provides:

> '(1) The Treasurer may invest any money held in the Territory banking account or departmental banking accounts for such period and on such terms and conditions as he or she thinks fit-

(a) on deposit with a banking institution;

(b) in the purchase of a bill of exchange that is drawn or accepted by a banking institution;

(c) in a loan to a person who is a dealer in the short term money market;

(d) in Territory, State or Commonwealth securities; or

(e) in any prescribed investment.'.

Subsection 3(1) of the Act defines 'prescribed' to mean 'prescribed by the financial management guidelines' and the 'financial management guidelines' to mean 'the guidelines issued under subsection 67(2)'. Section 67(2) in turn provides:

'(2) The Treasurer may issue financial management guidelines, not inconsistent with this Act or the regulations, for the purposes of this Act or the regulations.'.

4. The Financial Management Act envisages that, in addition to prescribing additional ways in which money ('Territory money') held in the Territory banking account or departmental banking accounts may be invested, the financial management guidelines will deal with other matters (see, eg, s 35(5) (banking of public money)). This advice deals only with the making of retrospective financial management guidelines for paragraph 38(1)(e) prescribing additional ways in which Territory money may be invested.

Reasons for advice

(a) Introduction

5. The answer to the question that you have asked depends in turn on the answers given to 3 questions. First, are retrospective financial management guidelines permitted at all? Second, if retrospective guidelines are permitted, is there power under the *Financial Management*

Act 1996 to make retrospective guidelines validating investments that have already been made? Third, does the *Subordinate Laws Act 1989*, section 7 prevent the making of such retrospective guidelines? The answers to the second and third questions may be linked, because section 7 (like the similarly worded provision in the Commonwealth *Acts Interpretation Act 1901*, s 48(2)) operates both to prohibit the making of certain retrospective subordinate laws and to authorise, by implication, the making of other retrospective subordinate laws (see Comans, *Retrospective Commonwealth Regulations*, (1953) 27 ALJ 231, 232).

(b) Are retrospective guidelines permitted at all?

6. The courts generally apply a strong presumption against retrospectivity in interpreting legislation (see *Maxwell v Murphy* (1957) 96 CLR 261, 267 per Dixon CJ). However, within certain limits that are not relevant to this opinion *(see Polyukhovich v Commonwealth* (1990-91) 172 CLR 501), it is clearly established that Australian Parliaments can make retrospective laws (see, eg, *R v Kidman* (1915) 20 CLR 425 and *Polyukhovich v Commonwealth).* There is no reason to suggest that the principles that apply to Acts of the Commonwealth and State Parliaments do not apply in the same way to Acts of the ACT Legislative Assembly (see the *Marshall's Township Syndicate* case discussed in the next paragraph).

7. The same general approach applies to delegated legislation like the financial management guidelines. The courts will presume that delegated legislation is not intended to operate retrospectively. However, if it is clear that delegated legislation is intended to operate retrospectively, the court will not find the legislation invalid for that reason alone. This approach was taken by the Privy Council in *Marshall's Township Syndicate Ltd v Johannesburg Consolidated Investment Co Ltd* [1920] AC 420. In that case an ordinance of the Transvaal Province purported to invalidate any contract, whether existing or later entered into, under which the person primarily liable to pay a municipal rate under the ordinance sought to transfer the liability to a lessee. The. ordinance was held to be valid. The Privy Council said (at pages 425-6):

'The fact that legislation is retrospective may be a strong argument on the inquiry whether it is just or expedient. But if power is given to the Provincial councils to deal with rating by ordinance, they have the same power of making any enactment relating thereto with retroactive effect as Parliament would have had... That the enactment is retrospective does not make it ultra vires.'.

The same approach has been taken by the High Court (see, eg, *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 and *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161).

8. Financial management guidelines will not, therefore, be invalid merely because they have retrospective operation. However, as the Privy Council suggested in the *Marshall's Township Syndicate* case, the retrospective nature of guidelines validating existing investments is a matter to be considered in deciding whether the guidelines are within the guideline-making power of the *Financial Management Act 1996.*

(c) Are retrospective validating guidelines within power?

9. The power given by the *Financial Management Act 1996* to issue financial management guidelines about investments appears to be a narrow one. First, the power given by paragraph 38(1)(e) itself is only to prescribe investments. There is nothing in the provisions of the Act about investments that suggests a broader role for guidelines in relation to investments. In particular there are no purposes mentioned in those provisions about which guidelines could be made. Second, although subsection 67(2) gives power to issue guidelines 'for the purposes of' the Act or regulations, this power would seem to be narrower than a 'necessary or convenient' power to make guidelines. (On the scope of a 'necessary or convenient' power, see Pearce and Argument, *Delegated Legislation in Australia,* 2nd ed, ppl32-46.) Although the point is not completely clear, the safer view is that the guideline-making power in subsection 67(2) should be regarded as a power to make guidelines for purposes mentioned in the Act. Such a power 'requires that the purpose must be one expressly mentioned in the Act or for which power to make [guidelines] is expressly given' *(Springvale Washed Sand Pty Ltd v City of Springvale* [1969] VR 784, 794 per Mclnemey J). By contrast, the

similarly worded general regulation-making power in subsection 67(1) attracts a 'necessary or convenient' power through the application of the *Subordinate Laws Act 1989*, section 2A.

10. On this view, the only guidelines that may be made about investments are guidelines prescribing additional investments in which Territory money may be invested. It would not, for example, be possible to make guidelines expressly validating investments already made. However, it may be possible to make guidelines prescribing investments and to provide that the guidelines take effect from a date before the presently unauthorised investments were made (eg the date of commencement of section 38). Backdated guidelines of this kind would have the effect of ensuring that the presently unauthorised investments would be retrospectively authorised from the time when they were made.

11. Such an approach has the advantage of limiting the risks of a possible challenge to retrospective guidelines based on a 'necessary or convenient' power to make guidelines (see, eg *Broadcasting Co of Australia Pty Ltd v Commonwealth* (1935) 52 CLR 52). Under this approach the guidelines would do no more than what is directly and expressly authorised by paragraph 38(1)(e). However, the form of the guidelines would raise squarely the application of the *Subordinate Laws Act 1989,* section 7. By contrast, guidelines based on a 'necessary or convenient' power, although perhaps more open to challenge for lack of power, could be drafted in a way that achieved retrospectivity without attracting the application of section 7 (see Comans, *Retrospective Commonwealth Regulations* (1953) 27 ALJ 231, especially at pages 235-6). For example, guidelines that simply validated previous investments would be given retrospective effect without the need to provide that the guidelines took effect from a date earlier than the date on which they were made (see MacAdam and Smith, *Statutes : Rules and Examples,* 3rd ed, pp 131-2).

(d) <u>Does the Subordinate Laws Act 1989, section 7 prevent the making of retrospective guidelines?</u>

12. *The Subordinate Laws Act 1989*, section 7 provides:

'Retrospectivity

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

(a) the rights of a person (other than the Territory or a Territory authority) existing at the date of notification would be affected in a manner prejudicial to that person; or

(b) liabilities would be imposed on a person (other than the Territory or a Territory authority) in respect of any act or omission before the date of notification; and where any subordinate law contains a provision in contravention of this (sub)section, that provision is void and of no effect.'.

The Interpretation Act 1967, subsection 14(1) defines a 'subordinate law' to mean 'an instrument of a legislative nature (including regulations, rules or by-laws) made under an Act'.

13. *The Subordinate Laws Act 1989*, paragraph 6(1)(a) requires subordinate laws to be notified in the *Gazette.* Subsection 6(1) defines a subordinate law for the section in the following way:

' "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.'.

The definition does not include financial management guidelines made under the *Financial Management Act 1996.* Paragraph 6(1)(a) does not, therefore, require guidelines made under that Act to be notified in the *Gazette.* Indeed there is no provision in the *Financial Management Act 1996* or elsewhere requiring guidelines to be notified in the *Gazette* or to be published or notified in any other way.

APPENDIX 4 (con't)

14. The definition of 'subordinate law' in the *Interpretation Act 1967* is not always an easy one to apply. The definition has 3 elements. First, the 'law' must b e an instrument, that is, a document - something made in writing (see *Azevedo v Secretary, Department of Primary Industries and Energy* (1992) 106 ALR 683, 699 per French J). Guidelines under the *Financial Management Act 1996* are not required to be issued in writing, but normally would be expected to be. If issued in writing, they would be an instrument for the definition. (However, in theory, guidelines could be issued orally.) Second, the 'law' must be made under an Act. Guidelines clearly satisfy this element of the definition (see, eg *Chittick v Ackland* (1984) 53 ALR 143). Third, the 'law' must be of a 'legislative nature'. This can be the most problematic element of the definition.

15. 'Legislation' is generally defined by distinguishing between legislative and executive activity. In *Commonwealth v Grunseit* (1943) 67 CLR 58 the High Court held that a direction by a Minister directed to every male refugee alien of a particular description was of an executive, and not of a legislative, character and did not have to be tabled in the Parliament. Lathwn CJ expressed the distinction between legislative and executive activity in this way (at p 82):

> 'The general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.'.

Similarly, in *Minister for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260, the Full Court of the Federal Court stated (at page 265):

> 'The distinction [between legislative and administrative acts] is essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases.'.

In my view, financial management guidelines under the *Financial Management Act 1996* that prescribe additional investments in which Territory money may be invested are of a legislative nature for the definition of 'subordinate law' in *the Interpretation Act 1967*. Paraphrasing Latham CJ, they determine the content of the law by

declaring additional ways in which Territory money may lawfully be invested. Paraphrasing the Full Court of the Federal Court, they create new rules of law having general application by providing additional ways in which Territory money may lawfully be invested. The fact that the guidelines may be limited to particular investments does not affect their legislative nature. To qualify as a subordinate law, a guideline need not be of general application. A rule that extends only to the action of a single person on a single occasion may still be classed as law *(Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 635 per Gummow J).

16. A financial management guideline under, the *Financial Management Act 1996* that prescribes investments for paragraph 38(1)(e) of that Act is, therefore, a subordinate law as defined in the *Interpretation Act 1967*, subsection 14(1). However, definitions in the subsection apply to an Act 'unless the contrary intention appears' (see also *Interpretation Act 1967*, s 6(1)). Any contrary intention would normally be found in the Act to which the definitions were sought to be applied rather than the Interpretation Act itself.

17. The application of the *Subordinate Laws Act 1989*, section 7 to a subordinate law turns on 'the date of its notification in the *Gazette'*. If the subordinate law is not notified in the *Gazette*, section 7 is incapable in its terms of applying to it. Because financial management guidelines are not required to be notified in the *Gazette*, section 7 is incapable of applying to them (unless they are in fact notified in the *Gazette.)* Section 7 therefore, contains a contrary intention that displaces the definition of subordinate law in the *Interpretation Act 1967*, subsection 14(1). Although financial management guidelines are subordinate laws as defined in the *Interpretation Act 1967*, they are not subordinate laws within the meaning of the *Subordinate Laws Act 1989*, section 7.

APPENDIX 4 (con't)

18. *The Subordinate Laws Act 1989*, section 7 does not, therefore, prevent the making of retrospective financial management guidelines under the *Financial Management Act 1996* prescribing investments for paragraph 38(1)(e) of that Act.

Please let me know if I can be of further assistance in this matter.

(John Leahy)
Parliamentary Counsel
18 May 1999

APPENDIX 5

FREEHILL, HOLLINGDALE & PAGE LAWYERS' CREDENTIALS

APPENDIX 5

GRAEME JOHNSON (Partner, Commercial Litigation, Sydney)

PROFILE

Graeme Edward Johnson is a partner in the Sydney office of FREEHILL HOLLINGDALE & PAGE. He was appointed a partner on 1 July 1992, having joined the firm as an articled clerk in 1986.

Mr Johnson holds a Bachelor of Arts and Bachelor of Laws (with First Class Honours) Degree from the Australian National University. Mr Johnson was the University medallist in law at ANU in 1983. His Honours thesis (published at (1985) Fed L Rev 39) was on the subject of natural justice and legitimate expectations. Following completion of his undergraduate degree Mr Johnson became associate to Mr Justice Davies of the Federal Court of Australia, when Davies J was also President of the Administrative Appeals Tribunal.

AREAS OF EXPERTISE

Mr Johnson specialises in public law and commercial dispute resolution. He has acted and advised in a number of complex matters in the Federal Court of Australia and State Superior Courts. Two highlights have been: acting for an insured (CSR Limited) in the NSW Supreme Court Commercial Division in obtaining the largest public liability insurance settlement in Australian history; and representing the same insured in obtaining the definitive ruling from the High Court of Australia on anti-suit injunctions (*CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345).

Currently Mr Johnson is representing Airservices Australia in the dispute with Hughes Aircraft Systems International relating to the tender for Australia's air traffic control system: on liability see (1997) 146 ALR 1.

He has advised and participated in proceedings before various tribunals and commissions including: the ASX; the Federal Administrative Appeals Tribunal; the Victorian Civil and Administrative Tribunal; and the NSW Crime Commission. Mr Johnson has acted for a number of foreign and local corporations in anti-dumping disputes before the

Australian Customs Service and Anti-Dumping Authority. He represents corporations and government agencies in regulatory related work including giving regular advice on: freedom of information, administrative review; judicial review; and other public law issues.

PROFESSIONAL BACKGROUND

Mr Johnson has been Chairman of the Administrative Law Committee of the Law Council of Australia since 1995.

He is author of :

- the original Australian Commentary on Halsbury's Law of England (Parliamentary Elections Law);
- a chapter on Australian consumer protection laws in an International Consumer Protection Comparative Text; and
- (jointly) the Australian analysis in a text on International Commercial Litigation.

GEOFFREY KOLTS O.B.E., Q.C.
(Special Counsel, Government Legal Services Group, Canberra)

Current Practice

Geoffrey Kolts is a part-time Special Counsel to FREEHILL HOLLINGDALE & PAGE. He is based in the Canberra office of the firm.

Experience

Before joining FREEHILL HOLLINGDALE & PAGE, Mr Kolts was a legislative drafter for the Australian Federal Government for nearly 30 years and was the First Parliamentary Counsel (the chief legislative drafter) from 1981 to 1986. He has drafted Acts, regulations, delegations and other subordinate instruments in almost every area in which the Federal Government has been involved and is familiar with most Commonwealth statutes. Major legislation drafted by him included

legislation relating to administrative law, corporations and the securities industry, environment protection, privatisation, income tax and capital gains tax, primary industry regulatory and marketing schemes, statutory authorities, the public service, industrial relations, intellectual property and human rights.

Mr Kolts was a member, for over seven years, of the Administrative Review Council, which has the prime responsibility for keeping under review the legislation relating to administrative law and proposing amendments to that legislation.

Mr Kolts resigned as First Parliamentary Counsel in June 1986 to take up an appointment as Commonwealth and Defence Force Ombudsman. He held that office until November 1987, when he resigned to become a Consultant to FREEHILL HOLLINGDALE & PAGE. He was admitted as a Partner on 1 January 1989 and retired on 30 June 1993 but continued with the firm as a full-time consultant and Special Counsel until 30 June 1999. Since 1 July 1999 he has been a Special Counsel on a part-time basis.

As a Special Counsel to FREEHILL HOLLINGDALE & PAGE, Mr Kolts is involved in the giving of legal advice to government authorities and other clients on matters of constitutional and public law and the interpretation of Acts, statutory instruments and private legal documents such as contracts and leases. While with FREEHILL HOLLINDALE & PAGE, he drafted major legislation in many different areas on instructions from various Commonwealth departments and authorities. He has also drafted significant legislation for State governments and foreign governments.

Professional Background

Mr Kolts is a Queen's Counsel for the Australian Capital Territory and New South Wales, a Solicitor of the Supreme Courts of New South Wales and Queensland and a Barrister and Solicitor of the Supreme Court of the Australian Capital Territory. He holds the degree of Bachelor of Arts, and the degree of Bachelor of Laws with first class honours, from the University of Sydney, and has spoken, and presented papers, at seminars and conferences in Australia and overseas.

APPENDIX 6

UNDER TREASURER'S EXPLANATION OF OVERNIGHT BORROWING

APPENDIX 6

(Please note that the attachments referred to by the Under Treasurer in his explanation have not been included in this Appendix)

Mr J A Parkinson
Auditor General
PO Box 275
Civic Square ACT 2608

Dear Mr Parkinson

I refer to your letter of 7 July 1999, requesting information under the provisions of section 14 of the *Auditor-General Act 1996,* in respect of a borrowing of $9.7m undertaken on 30 June 1998. We subsequently agreed in discussions that the response would be provided by Monday 19 July 1999.

I have attached a response covering the matters which you have raised. I believe that this response includes all relevant information, however, should you require any further information or clarification of the attached document please contact me on 6207 0260.

Yours sincerely

Mick Lilley
Under Treasurer

19 July 1999

APPENDIX 6 (con't)

RESPONSE TO AUDITOR GENERAL DIRECTION UNDER SECTION 14

PERFORMANCE AUDIT OF REDEVELOPMENT OF BRUCE STADIUM

JULY 1999

STATEMENT BY OFFICE OF FINANCIAL MANAGEMENT

On 7 July 1999 the Auditor General gave the following direction to officers in the Chief Minister's Department:

..... *pursuant to Section 14 of the [Auditor-General Act 1996] Act, you are hereby directed to provide me with a comprehensive statement fully explaining why the $9.7 million overnight borrowing on 30 June 1998 was undertaken. Your statement is to include whether or not there were any legal reasons for the decision and whether or not there were any financial benefits or costs associated with the decision."*

1 . The main objective of the Bruce Stadium Redevelopment financing arrangements was to limit the Government's exposure through a structure that resulted in the private sector taking as much risk as could be negotiated. Fundamental to this objective was the aim of minimising the cost of funding.

2. The chronology set out below and supporting documents attached set out the events leading up to the taking of the loan. The chronology and documents show that significant importance was attached by OFM to Cabinet's requirement to extinguish the CFU loan by 30 June 1998. Arrangements were being made for external financing to replace the CFU loans by 30/6/98. When just days before this deadline, these negotiations started to unexpectedly collapse, it was thought necessary to make urgent arrangements to extinguish the CFU loan for 30 June.

3. Officers responsible believed that it was necessary to make the overnight loan in order to comply with a decision of Cabinet in December 1997 and to comply with the *Financial Management Act 1996.*

4. The rationale for Cabinet's decision that the CFU loan be repaid by the end of the financial year was not questioned when the external financing arrangement thought to have been settled with DMG started to collapse in late June 1998. Cabinet's requirement for the external financing to be in place by 30 June 1998 was actually based on the expected timeframe for settling the new financing structure. When faced with the inability to settle private financial involvement by the target date it would have been preferable, with the benefit of hindsight, for OFM to have continued the CFU loan facility.

5. The timeframe and the response by OFM, when the final negotiations with DMG hit the unanticipated hurdle over sales tax, were influenced by a background belief that, for budgetary purposes, the law required expenditure in excess of that permitted in an Appropriation Bill to be repaid by revenue in the course of the year. Applying this understanding of the operation of the *Financial Management Act 1996,* officers within OFM assumed it was essential by 30 June to have acquitted the loans advanced by the CFU. While it is now understood that this is the case in relation to some output based appropriations to which section 9 of the *Financial Management Act 1996* applies and it has no application to appropriations under section 8(b) or 8(c) of the Act, the belief as at 30/6/98 was that a loan of the kind negotiated with the CBA Bank was necessary to comply with the Act.

Chronology of Events

December 1997

6. By December 1997 it was evident that private sector involvement in the Bruce Stadium financing would not occur in sufficient time for the construction to continue without the need for temporary working capital. Moreover, failure to provide such working capital would have caused an interruption in construction work. This would have

had the adverse effect of increasing construction costs, due to delays and re-starting, as well as jeopardising the timing of completion, which was critical to the stadium being fit to host rugby league and union games for the 1998 home and away series. Further, revenue losses would have resulted if delays occurred.

7. Cabinet determined that temporary working capital would be provided from the Central Financing Unit for the redevelopment until a new financing structure was in place. Cabinet also determined that the new financing structures must be in place and external finance received by 30 June 1998. The confident expectation was that private financial involvement would be settled by 30 June 1998.

December 22, 1997

8. In accordance with the Cabinet decision, a temporary loan facility was provided from CFU in the form of an interest bearing, repayable loan. The conditions attached to the loan included the requirement that the loan would be repaid once private sector funding had been obtained and, in any event, by the end of the then current financial year (30 June 1998). (Attachment A)

9. Interest payable on the loan to the Bruce Stadium project was at the quarterly bank bill rate plus 2% (which was equivalent to 7.08% at the inception of the loan). This was the standard interest arrangement for internal loans. The source of funding for the loan was Territory surplus cash accounted for in the CFU Territorial Account which is otherwise invested through the CFU Departmental Account with the ACT Government's appointed external cash manager, National Mutual Funds Management (NMFM).

10. The average investment return from NMFM at the time of the loan was 4.94% so that this transaction was expected to provide a return 2.14% in excess of the norm. It was intended that private sector financing, when obtained, would provide sufficient funds to meet both the principal repayment and any accrued interest obligation. (Refer to the terms and conditions of the Bruce Stadium

Redevelopment Loan set out in correspondence from M Lilley to M Ford on 22 December 1997, Attachment A).

February 20, 1998

11. The Manager, Central Financing Unit, wrote to the Under Treasurer concerning the loan facility. He noted that *"...if a new financing structure in respect of the Bruce Stadium Redevelopment project is not implemented by 30 June 1998 that the total of any interim funding from the CFU* will require support of Treasurer's Advance" (emphasis added, Attachment B).

12. This comment reflects the prevailing opinion at the time within OFM as to the necessity imposed by the Financial Management Act to balance as at 30 June any outlays which were not specifically appropriated for that year, referred to earlier. With the benefit of hindsight, the use of the Treasurer's Advance in the manner proposed would not have had any particular legal significance (under the *Financial Management Act* the Treasurer's Advance needs to be formally activated before money is drawn down rather than at the end of the financial year).

June 23, 1998

13. In the first half of 1998, private sector finance was sought. By late June, negotiations were close to being finalised with Deutsche Morgan Grenfell (DMG). It was expected that the agreement would be closed prior to 30 June.

14. On 23 June 1998 Bato Partners (independent financial advisers under contract to the ACT Government) advised OFM of the sudden emergence of a serious problem in relation to the application of sales tax to the redevelopment once out of government hands (Attachment C). Bato Partners indicated that DMG was now not willing to proceed until a resolution was found. At that time DMG had arranged for Rabobank to provide the finance and Rabobank had received credit approval to do so. OFM had no reason to believe that DMG or Bato Partners had not already considered any relevant sales tax matters.

APPENDIX 6 (con't)

June 25, 1998

15. The Bruce Stadium Project Manager advised the Under Treasurer that the sales tax issue was causing DMG to hold up the completion of the financing arrangement (Attachment D). Particular emphasis was placed on whether the arrangement could be completed by 30 June. Bato Partners expressed doubt that the financial arrangement, either permanently or on a 24 hour hold over basis would be finalised in time. In these circumstances, they suggested that an alternative financing arrangement (a form of bridging finance with another external fund provider) should be used.

June 26, 1998

16. The Under Treasurer and the Bruce Stadium Project Manager met with Bato Partners in the morning. As a result, Bato Partners were to write to DMG suggesting that the transaction be completed by 30 September 1998. Bato Partners advised that the alternative financing arrangements could utilise Bruce Operations Pty Ltd as the vehicle for the loan *"as long as it was repaid before new investors come in"*.

17. Following the meeting, the Under Treasurer wrote to Mr Andrew Bone of the Commonwealth Bank on 26 June 1998 (Attachment E). This letter clearly set out the reasons for taking out the loan. It stated:

    Initial funding for the commencement of the redevelopment of the stadium has been provided from the ACT Government in the form of a repayable loan during the 1997-98 financial year. The terms of this loan are such that the outstanding loan balance at 30 June 1998 is to be repaid in full.

    Negotiations are currently near completion, whereby the funding for the redevelopment project will be provided by an external financier however, it is unlikely that the new financing structure will be finalised before 30 June 1998. In this regard, it is likely that a borrowing from another source will be required to extinguish the loan with the ACT Government on 30 June 1998.

The amount required will be $9,714,700 and will be repaid on 1 July 1998.

On behalf of BOPL I am asking if the Commonwealth Bank of Australia is prepared to provide the Company with a loan of $9,714,700 on 30 June 1998 and what the terms and conditions of the loan would be. I would expect to be in a position to notify you by COB 29 June 1998 if the loan will be required.

18. The Project Manager informed the Under Treasurer later that day (Attachment F) of OFM advice that the repayment could not go direct to CFU but had to first go the to the Department before going to CFU. The Project Manager was told that this approach was necessary to meet ordinary accounting requirements (i.e., *"auditors needing to know what is going on').*

June 28, 1998

19. On 28 June 1998 the Under Treasurer wrote to the Treasurer seeking approval to borrow $9, 714,700 from the CBA (Attachment G). The minute set out the background to the redevelopment. It referred to the December Cabinet decision and, in particular to Cabinet's decision that the new financing structures must be in place and external finance received by 30 June 1998. It concluded *"accordingly, the loan from the Central Financing Unit will be repaid on the 30 June 1998 through a borrowing effected for the Bruce Stadium Property Trust with the Commonwealth Bank of Australia"*. The minute noted that the loan would be repaid on 1 July 1998 and described the terms of the borrowing.

20. This minute cannot be treated as providing legal authority for the borrowing because the borrowing was subsequently made in the name of BOPL and not BPT. This defect does not, however, affect the legality of the loan as Senior Counsel has found that the Under Treasurer at the relevant time had the necessary delegation to take the borrowing under section 40 of the FMA. However, despite this defect, the minute does indicate the state of mind of CFU officers.

June 29, 1998

21. The requirement for a loan was confirmed in correspondence between the Under Treasurer and the Commonwealth Bank dated 29 June 1998 (Attachment H). Again, this letter confirms that the expectation that alternative financing arrangements would be in place by 31 July 1998. On the advice of Bato Partners this loan was made in the name of BOPL. This was not correct and subsequently the Under Treasurer wrote to CBA advising them of the mistake. (Refer to the letter dated 11 September 1998 at Attachment I.)

June 30, 1998

22. The CBA loan of $9.7m was paid into the Territory Bank Account and used to repay the loan from the CFU Territorial Account.

July 1, 1998

23. On 1 July 1998 the external loan to CBA was paid by CFU and a new internal loan was created for Bruce Stadium.

24. The repayment of the CBA loan by BOPL could only be achieved by an injection of an equivalent amount of funds. By implication, therefore, a new loan from CFU was established to effect the repayment and served the purpose of recording the transactions.

Discussion

25. On 28 June 1998 the Under Treasurer wrote to the Treasurer seeking approval to borrow $9, 714,700 from the CBA (Attachment G). This minute clearly shows that the motivation in taking out the loan from the CBA was to meet the requirements of the December Cabinet Decision, which required that external finance was received by 30 June 1998.

26. With the benefit of hindsight, the approach taken prompts several questions:

    - Why was it repaid after one day?

      Alternative finance was originally considered as a form of bridging finance pending closure of the arrangements with DMG. By early 26 June 1998, it was apparent that the arrangements would not be completed until after the financial year. However, at that time a short-term external financing arrangement would still have satisfied part of Cabinet's requirement for the CFU loan to be repaid by the end of the financial year. More importantly, it also satisfied the belief that the law required expenditure in excess of that permitted in an appropriation bill to be repaid by revenue in the course of the year.

    - Why was the CFU loan reinstated?

      Reinstatement of the CFU loan occurred by default. It was intended to be an interim arrangement, as it was believed that a permanent arrangement with an external financier was still imminent. The cheaper cost of internal financing made economic sense since the opportunity cost of the internal funding was less than the cost of the temporary external funding. At the time, the average return on CFU investments, and therefore the opportunity cost of internal funding, was 5.02%. This compared with the short term borrowing rate of 7.45%. The saving from reverting to internal funding for the $9.7m was approximately $20,000 per month.

27. In the circumstances outlined, given the timeframe in which officers were acting and the pressure imposed by DMG's late and unexpected deferral, due to its and Bato Partners failure to identify the sales tax issue, officers reacted in a way they thought was required. It is agreed that, while Cabinet expects officers to implement its decisions, in changed circumstances (such as the late collapse of the external financing arrangements) decisions of this kind should not be complied with mechanistically, but should be raised for review.

28. Ultimately, although it would have been even more cost effective to extend the term of the original loan, officers believed that their primary duty was to comply with the decision of Cabinet. This duty was seen as consistent with the presumed legal requirement to repay the loan. This is evident from the correspondence at the time. This objective having been achieved, officers then met their obligation to effectively manage the ACT Government's financial assets and liabilities by utilising cheaper internal funding.

29. It has been suggested that the loan was designed in some way to avoid disclosure of the previous CFU loans. This is untrue. There is no evidence that any attempt was made to treat the loan in any other than the ordinary manner by way of payment into the Territory Bank Account. Matching transactions clearly pointed to the consequent repayment of the CFU loan. The relevant transactions were fully disclose ' d in the 1997-98 CMD financial statements and were able to be identified without undue effort.

Legal Reasons for Decision

30. With the benefit of hindsight, there was no legal requirement to undertake an external loan on 30 June 1998. In particular, it is now clear that the opinion within OFM that repayment satisfied some appropriation purpose was a misconception about the operation of the FMA. However, at the relevant time, it was a genuine influence on the decisions.

31. While there was no legal requirement to undertake the loan, the action itself was legal. The legal power to undertake the loan is plainly expressed in Section 40 of the FMA. Senior Counsel advised that the borrowing was undertaken in compliance with the Act.

32. Section 46 gives the Treasurer the power to meet the expenses incurred in borrowing and to repay borrowings without further appropriation. Due to an oversight, the instrument which delegated the authority to undertake borrowings failed to include delegated authority to make principal payments (interest payments were included in the delegation), although this was always intended. As a

result, legal counsel found that the repayment of the loan was not authorised by the Financial Management Act.

33. The repayment of loans and interest without appropriation is a common transaction in the management of short term debt by the Government. Since 1 July 1996 these transactions number in excess of 300. This oversight has since been remedied with the issuing of a corrected instrument.

34. In the absence of an appropriate delegation, authorisation by the Chief Minister would have totally validated the repayment of the loan. Alternatively, a properly specified delegation instrument would have legally validated the decision to repay the external loan.

35. It is evident from the correspondence cited above that officers approached the issue of financing Bruce Stadium in good faith and with acted in accordance with their understanding, albeit sometimes misguided, of the Financial Management Act. It needs to be emphasised that at no time was any attempt made to conceal the transactions. On the contrary, officers went to some length to ensure that transactions were authorised and transparent.

36. It needs to be considered that during this period, the Financial Management Act had been in existence for less than two years. In some instances officers were relying on long standing past practices, which although not sustained in the present environment, appeared to be accepted by both internal and external audit reviews. This acceptance led officers to conclude that they were acting appropriately. Where actions were consistent with these long held beliefs, there appeared to be little reason for questioning activities or authorisations.

37. It was only as a result of exhaustive examination by senior counsel that these misplaced beliefs were identified.

Benefits and Costs

38. In order to achieve the best possible financial outcome the Government engaged external advisers to advise of financial structures that, if implemented, would enable the cost of funds to be reduced to the external provider, the benefits of which could be shared with the Government. This would reduce the cost of financing for the Government.

39. The process of establishing such a structure and negotiating financing is a lengthy process. It resulted in delays in finalising arrangements. A more straightforward financing arrangement could have been entered into before 30 June 1998, however, it may have resulted in a higher cost of funds and greater exposure for the Government.

40. It is not possible to directly compare the benefit associated with the more complex financing arrangements with a straightforward borrowing as the latter represents a full acceptance of risk by the Government, whereas the preferred arrangement would have resulted in a sharing of risks and potential benefits with an external financier. The outcome of any such comparison would be heavily dependent on assumptions about the degree of risk and projected benefits.

41. The cost of the overnight loan was $1,982.86. This was based on an annual rate of 7.45%. The opportunity cost of internal funding at the time was 5.02%, based on the annualised rate achieved from the investment of surplus funds for the month of July 1998. By repaying the external debt and establishing an new the internal loan the cost of funding was reduced by 2.43% or approximately $20,000 per month.

BRUCE STADIUM REDEVELOPMENT – LAWFULNESS OF EXPENDITURE

APPENDIX 7

ADVICE FROM AUDIT'S LEGAL ADVISER

APPENDIX 7

Advice to the ACT Auditor-General:

Legal questions relating to expenditure on the Bruce Stadium Redevelopment

Executive Summary

We were requested to provide advice on five questions asked by the Auditor-General.

These questions related to two connected matters. First, the ACT Government expended $9.7147 million on the redevelopment of Bruce Stadium in the period December 1997 to June 1998, without appropriation by the ACT Legislative Assembly (though a retrospective appropriation has since been passed). It has been asserted that this expenditure was legal because it was an investment under section 38 of the Financial Management Act. This argument relies on Financial Management Guidelines issued by the Treasurer on 19 May 1999, under section 67(2) of the Act, purporting retrospectively to authorise certain types of investments, including such investments as the Stadium redevelopment.

The second matter is that on 30 June 1998 the ACT Government borrowed $9.7147 million from the Commonwealth Bank, which was repaid the next day. This was seemingly intended to cancel the nominal internal debt owing from the Stadium redevelopment project to the Central Financing Unit of the government. The internal debt apparently was understood to spring back into place on 1 July 1998 when the overnight borrowing was repaid.

Three opinions were sought by various parties on legal questions arising from these matters. These opinions were provided to the Auditor-General. There was a number of points of disagreement between the opinions. The Auditor-General has sought our advice on the resolution of these inconsistencies.

The questions asked by the Auditor-General, the answers, and summary of the reasons are as follows:

1. WAS THE UNAPPROPRIATED REDEVELOPMENT EXPENDITURE CAPABLE OF BEING PRESCRIBED AS AN INVESTMENT UNDER SECTION 38(1)(E) OF THE FINANCIAL MANAGEMENT ACT 1996 (ACT)?

Answer: No, not on the materials we have considered.

Even if the Financial Management Guidelines made under section 67(2) of the Act, and issued on 19 May 1999 with purported retrospective operation, were capable of operating retroactively (which in our view they were not - see Question 2 below) then two issues remain. These issues are:

(a) whether the Guidelines could make expenditure on real property a "prescribed investment" under section 38(1)(e); and

(b) whether the particular redevelopment expenditure fell within the Guidelines.

Answer (a): Expenditure on real property, and on improvements to real property, could be a "prescribed investment".

Answer (b): To fall within the scope of the power and of the Guidelines, the dominant purpose of making the expenditure must be to seek to secure a profitable return on the use of the moneys. It is always difficult to assess issues of intention and purpose. There may be evidence of motivations and purposes not apparent from the information we have reviewed. On the materials provided to us, however, the authorisation of the provision of the CFU financing appears to have been granted in order to enable the project to continue, and not for the dominant purpose of achieving or securing financial benefits for the Territory by the use of that money. In our view any financial benefit which might ultimately have been secured by the decision was insufficiently connected to the use of the particular money involved for the decision to be characterised as one taken to secure financial benefit. Given this, in our view the expenditure was not an "investment" within the scope of the power granted by section 38(1)(e).

The internal transfer of funds between governmental entities was not an investment. It is not correct legally to describe an intra-Government transfer as a "loan".

2. WAS IT IS POSSIBLE TO ISSUE GUIDELINES UNDER SECTION 67(2) OF THE ACT WITH THE EFFECT OF RETROSPECTIVELY PRESCRIBING THE REDEVELOPMENT EXPENDITURE AS A SECTION 38(1)(E) INVESTMENT?

Given that in our view the expenditure cannot be characterised as an investment, it is not strictly necessary to answer this question in order to establish the legality of the expenditure (alternatively, one could say that it is not necessary to answer the first question if guidelines cannot be retrospective). We have been asked to answer the question nevertheless.

The answer is no. This conclusion is reached on the following grounds:

1 It is in the very nature of "guidelines" that these must be capable of guiding behaviour; the grant of power, by its own words, therefore does not extend to authorise retrospective guidelines.

2 Considerations of financial accountability, transparency, and the primary role of the Legislative Assembly, indicate that section 67(2) cannot be taken to have been intended to authorise guidelines of retrospective effect.

3 The established common law presumption that legislation does not have retrospective effect, or authorise subordinate legislation of such effect, is not overcome by the words of section 67(2), thus again indicating that the power does not extend to authorise guidelines of retrospective effect.

3. WAS THE OVERNIGHT 30 JUNE 1998 BORROWING IN ACCORDANCE WITH SECTION 40 OR ANY OTHER SECTION OF THE ACT?

Answer: The overnight borrowing on 30 June 1998 from the CBA was not in accordance with section 40 of the Act.

The section requires that when money is borrowed it is done "on behalf of the Territory, if necessary or expedient in the public interest to do so". Although this provision grants a broad discretion, any exercise of the power must reasonably be characterisable as in the interests of, or for the benefit of, the Territory. The decision to undertake the overnight borrowing does not comply with this requirement because:

- the apparent main purpose of the overnight borrowing was to comply with the requirement of the Cabinet decision of 8 December 1997 that external financing structures be in place by 30 June 1998; yet the overnight borrowing could not satisfy this goal, and the exercise was thus misconceived;
- the borrowing was at a net cost to the Territory; and
- if the purpose was to comply with a mistaken view of the requirements of the Financial Management Act, that, in our view, could not have been a proper purpose.

The borrowing thus exceeded the scope of the power granted to borrow money under section 40.

4. ARE THERE OTHER IMPORTANT INCONSISTENCIES BETWEEN THE OPINIONS?

Answer: No.

5. IN ALL THE KNOWN CIRCUMSTANCES, SHOULD THE MATTER BE REFERRED TO THE ACT DIRECTOR OF PUBLIC PROSECUTIONS?

Answer: No, not on the materials we have considered.

FREEHILL HOLLINGDALE & PAGE

28 SEPTEMBER 1999

APPENDIX 7 (con't)

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Advice to the ACT Auditor-General:

Legal questions relating to expenditure on the Bruce Stadium redevelopment

1 INTRODUCTION

1.1 We have been asked to provide advice to the Auditor-General of the Australian Capital Territory on certain legal questions arising from the expenditure of money on the redevelopment of Bruce Stadium in Canberra.

1.2 These questions related to two connected matters. First, the ACT Government expended $9.7147 million on the redevelopment of Bruce Stadium in the period December 1997 to June 1998, without appropriation by the ACT Legislative Assembly (though a retrospective appropriation has since been passed). It has been asserted that this expenditure was legal because it was an investment under section 38 of the Financial Management Act. This argument relies on Financial Management Guidelines issued by the Treasurer on 19 May 1999, under section 67(2) of the Act, purporting retrospectively to authorise such investments as the Stadium redevelopment.

1.3 The second matter is that on 30 June 1998 the ACT Government borrowed $9.7147 million from the Commonwealth Bank, which was repaid the next day. This was seemingly intended to cancel the nominal internal debt owing from the Stadium redevelopment project to the Central Financing Unit of the government. The internal debt apparently was understood to spring back into place on 1 July 1998 when the overnight borrowing was repaid.

1.4 Three opinions were sought by various parties on legal questions arising from these matters. These opinions are as follows:

(a) an advice by Mr RRS Tracey QC, obtained by the ACT Government;
(b) an advice by Mr JR Sackar QC, obtained by the Leader of the ACT Opposition; and

(c) an advice by Professor JE Richardson and Mr J Colquhoun, obtained by an Independent Member of the ACT Legislative Assembly.

1.5 An advice was also provided by Mr J Leahy, ACT Parliamentary Counsel, relating to a limited question on retrospectivity.

1.6 These opinions were provided to the Auditor-General. The Auditor-General is not requesting a fourth opinion on the range of legal issues which arise from the redevelopment of the Bruce Stadium. Instead, he has requested advice on certain inconsistencies between the above opinions in relation to certain crucial questions, namely:

(a) whether the unappropriated redevelopment expenditure was capable of being prescribed as an investment under section 38(1)(e) of the Financial Management Act 1996 (ACT);
(b) whether it is possible to issue guidelines under section 67(2) of the Act with the effect of retrospectively prescribing the redevelopment expenditure as a section 38(1)(e) investment; and
(c) whether the overnight 30 June 1998 borrowing was in accordance with section 40 or any other section of the Act.

1.7 The Auditor-General has also asked us:

(a) to identify other important inconsistencies (if any) between the opinions; and
(b) comment on whether, in all the known circumstances, the matter should be referred to the ACT Director of Public Prosecutions.

1.8 Following the Auditor-General's instructions, we confine ourselves to providing advice on these five questions. We have done so in light of the other legal opinions provided in this matter, although we have not confined our researches to the matters listed in those opinions.

1.9 The Auditor-General has provided us with a range of legal and documentary materials relating to the Bruce Stadium redevelopment expenditure. A list of the materials provided to us, and upon which we rely for the purposes of this advice, is set out in Schedule 1. We note that beyond referring to those materials we have not been asked to undertake, and have not undertaken, an investigation as to the facts in this matter.

1.10 The main provisions from the Financial Management Act 1996 which are relied upon in this advice are quoted in Schedule 2.

2 ANSWERS TO THE QUESTIONS ASKED

2.1 The answers to the five questions asked by the Auditor-General are as follows:

(a) Was the unappropriated redevelopment expenditure capable of being prescribed as an investment under section 38(1)(e) of the Financial Management Act 1996 (ACT)?

No, not on the materials we have considered.

(b) Was it possible to issue guidelines under section 67(2) of the Act with the effect of retrospectively prescribing the redevelopment expenditure as a section 38(1)(e) investment?

No.

(c) Was the overnight 30 June 1998 borrowing in accordance with section 40 or any other section of the Act 1996?

No, the borrowing was not in accordance with section 40 of the Act.

(d) Identify other important inconsistencies between the opinions.

There are none.

(e) In all the known circumstances, should matter be referred to the ACT Director of Public Prosecutions?

No, not on the materials we have considered.

3 ABBREVIATIONS EMPLOYED IN THIS ADVICE

"the Act"	Financial Management Act 1996 (ACT)
"BOPL"	Bruce Operations Pty Limited, a company established under the Corporations Law, owned by the ACT
"BSR"	Bruce Stadium Redevelopment, referring to the administrative entity responsible for the redevelopment, which was apparently located within DBAST until 31 March 1998, whereupon it was transferred to the CMD
"CBA"	Commonwealth Bank of Australia
"CFU"	Central Financing Unit, a unit within CMD
"CMD"	Chief Minister's Department (ACT)
"DBAST"	Department of Business, Arts, Sports & Tourism (ACT)
"DPP"	Director of Public Prosecutions (ACT)
"the expenditure"	the money transferred from CFU and spent by BSR in 1997-8 on the Bruce Stadium redevelopment (totalling $9.7147 million), pursuant to a decision by the ACT Cabinet on 8 December 1997
"the Guidelines"	the Financial Management Guidelines issued on 19 May 1999 by the Treasurer/Chief Minister
"OFM"	Office of Financial Management
"the opinions"	the three legal opinions (by Messrs Tracey, Sackar, and Richardson & Colquhoun) which form the background to this advice

4 THE CONSTITUTIONAL BACKGROUND

4.1 It is a fundamental constitutional principle within the Anglo-Australian system of representative and responsible government that the executive may only expend public moneys if authorised by parliamentary appropriation.

4.2 This principle was clearly stated by the Privy Council in *Auckland Harbour Board v R* [1924] AC 318 at 326-7:[6]

> "For it has been a principle of the British Constitution now for more than two centuries ... that no money can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the government if it can, as here, be traced."

4.3 An interlinked principle within representative and responsible government is that the executive branch is accountable for its actions and decisions to the Parliament and, through the Parliament, is accountable to the people. Thus Gaudron, Gummow and Hayne JJ stated in *Egan v Willis* [1998] HCA 71, 73 ALJR 75, that:

> "It has been said of the contemporary position in Australia that, whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure accountability of government activity is the very essence of responsible government"." (paragraph 42, citations omitted; see also McHugh J at paragraph 100)

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6 See also eg *Brown v West* (1990) 169 CLR 195 at 205; *Northern Suburbs General Cemetery Trust v The Commonwealth* (1992) 176 CLR 555 at 572.

4.4 For the ACT the requirement that government expenditure be subject to parliamentary authority is set out in section 58 of the Australian Capital Territory (Self-Government) Act 1988 (Cth), which provides:

> "(1) Subject to subsection 16(4), no public money of the Territory shall be issued or spent except as authorised by enactment.
> (2) The public money of the Territory may be invested as provided by enactment."

4.5 The ACT itself has provided in section 6 of the Financial Management Act 1996 that:

> "No payment of public money shall be made otherwise than in accordance with an appropriation".[7]

4.6 The course of conduct involved in the Bruce Stadium redevelopment must be understood in the light of these fundamental principles.

5 QUESTION 1: COULD THE EXPENDITURE BE PRESCRIBED AS AN INVESTMENT UNDER SECTION 38(1)(E) OF THE ACT?

A The relevant provisions

5.1 Section 38(1) of the Act authorises the Treasurer to invest Territory monies in a range of specified investments or, under section 38(1)(e), in "any prescribed investment".

5.2 In section 3 "prescribed" is defined to mean "prescribed by the financial management guidelines."

5.3 In the same section, "financial management guidelines" is defined to mean "the guidelines issued under subsection 67(2)".

5.4 The power in section 67, which is entitled "Regulations and Guidelines", is as follows:

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[7] As Mr Tracey QC points out, this general principle is qualified by certain provisions of the Act (eg. sections 7,14,15 and 18A) but they are not relevant for present purposes.

> "(1) The Executive may make regulations for the purposes of this Act.
> (2) The Treasurer may issue financial management guidelines, not inconsistent with this Act or the regulations, for the purposes of this Act or the regulations."

B Background

5.5 The ACT, having taken a decision to redevelop the Bruce Stadium (over which it held a lease), had appropriated $5.6 million in 1997/98 for the project. It had been intended to arrange some private sector co-financing of the redevelopment project. By December 1997 this had still not been forthcoming, and the appropriated money had apparently been expended.

5.6 On 8 December 1997 the ACT Cabinet took a decision which was, among other things, to the following effect:

> "(e) agreed that to ensure construction continues, funds be provided from the Central Financing Unit to provide project finance for the full redevelopment until the new financing structure is in place".

5.7 Pursuant to this decision an arrangement described as a "loan facility" was established on 22 December 1997 by the CFU, a unit within the CMD, in favour of the BSR (sometimes also referred to as the "Bruce Stadium Redevelopment Authority"). The BSR was a unit within DBAST. It later apparently became a unit within the CMD.

5.8 During the period December 1997 to June 1998 moneys were transferred from the CFU to the CMD and paid to Bruce Stadium contractors.[8] No parliamentary appropriation was passed prior to these payments being made.

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[8] We have been provided with a copy of a delegation dated 8 January 1998 in which the investment power under section 38(1) is delegated to officials including the Under Treasurer. We have assumed that in making the payments to contractors, officials were acting in accordance with the Treasurer's (via her delegate) instructions. We are instructed that the Under Treasurer is the Executive Director referred to in the instrument. We have not been provided with any earlier instrument of delegation.

5.9 Some time later, on 19 May 1999, the Treasurer issued financial management guidelines under section 67(2) of the Act. These purported to authorise payment of monies in relation to "Territory owned property" (see clause 3(c)) as "investments" for the purposes of section 38(1)(e) of the Act. The notion of "Territory owned property" is broadly defined in the Guidelines as property in which the Territory holds an interest, or land which it occupies (clause 2). The Guidelines were expressed to commence from the date of commencement of the Act (said in the Note to the Guidelines to be 1 July 1997);[9] that is, they purported to have retrospective operation.[10]

5.10 In July 1999 the Legislative Assembly passed the Appropriation (Bruce Stadium and CanDeliver Ltd) Act 1999. This Act retrospectively appropriated the $9.7147 million expenditure.

5.11 On its face, the Bruce Stadium redevelopment falls within the scope of the Guidelines. However, a series of legal questions arise about the matter. If the Guidelines were not legally capable of having retrospective operation, then they could not have authorised the redevelopment expenditure. This question is addressed below in Part 6 of this advice.

5.12 If guidelines can operate retrospectively, it is necessary to address the question of whether the redevelopment expenditure could be an "investment" within the scope of section 38 of the Act. This question has two aspects.

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9 In his opinion, Mr Sackar also states that the Guidelines commenced on 1 July 1997 (paragraph 15). However, section 2 of the Act indicates that the Act commenced on 1 July 1996.

10 We are instructed that the Guidelines were later withdrawn.

5.13 First, it is necessary to ask whether an authorisation which extends permissible investments to expenditure on real property (and, implicitly, to expenditure on improvements to real property) can validly be granted under section 38(1)(e). This question hinges on what the word "investment" means in section 38(1)(e). Section 38 itself is headed "Investment of public money". Subsection (1) begins "The Treasurer may invest ...". The key provision itself simply indicates that the Treasurer may invest relevant monies "in any prescribed investment".

5.14 Secondly, if the power in section 38(1)(e) can extend to authorise investments in the redevelopment of real property (and it is our view that it can), the question then arises whether the particular expenditure on the Bruce Stadium redevelopment can be characterised as an "investment" within the scope of section 38(1)(e) and within the Guidelines.

C Views expressed in the opinions

5.15 Mr Tracey QC appears to have proceeded on the assumption that expenditure on the Bruce Stadium redevelopment could be dealt with as an investment under section 38(1)(e) of the Act. He does not appear to have addressed the question directly, however.

5.16 Mr Sackar QC did not deal with this question.

5.17 Professor Richardson and Mr Colquhoun expressed a firm conclusion that the financial arrangements involved in the redevelopment expenditure could not be considered an "investment" for the purposes of this section.

5.18 They took the view that the arrangement between CFU and BSR was simply a dealing between two administrative units within government, without the intervention of any separate legal or corporate entity, and that this could not be considered an investment.

D Can redevelopment of real property be an "investment"?

(1) Dictionary definitions of "investment"

5.19 The concept of investment is generally a broad one. The *Macquarie Dictionary* defines "investment" as "the investing of money or capital in order to secure profitable returns, especially interest or income". It defines "invest" in similar terms: "to put (money) to use, by purchase or expenditure, in something offering profitable returns, especially interest or income".[11]

5.20 The key element in the notion of "investment", ordinarily understood, is that it involves seeking to secure a profitable return, especially interest or income, by the use of capital.

(2) Authorities on point

5.21 The question of the meaning of the word "investment" or "invest" has been considered in a number of cases in a range of areas. They indicate that the precise meaning is likely to depend on the particular context. Three pertinent points do emerge, however.

5.22 First, the notion can certainly extend, at least in some contexts, to the purchase of real property: eg *In re Wragg* [1919] 2 Ch 58. It would be strange if an investor could purchase an interest in a property but not, within the realm of the "investment", expend money on its improvement.

5.23 Secondly, the caselaw makes clear what is implicit in the dictionary definitions, namely, that the word "invest" (or "investment") is "a purpose word": *In the Will of Sherriff* [1971] 2 NSWLR 438 at 442 per Helsham J; see also eg *In re Power* [1947] 1 Ch 472. In other words, what distinguishes investment from other activity is the pursuit of a particular purpose.

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[11] As is stated in *Halsbury's Laws of Australia*, at [430-4510], such expenditure can be contrasted with "expenditure merely for the purposes of use and enjoyment" (or, to express it another way, with spending on consumption). The Australian Financial Review's *Dictionary of Investment Terms* defines the concept as "An asset acquired for the purpose of producing income and/or capital gains for its owner." Although this definition requires the acquiring of an asset, this would appear to be too narrow. It is common usage to say that improvements to an asset represents an investment (for example refitting a shopping mall, or extending one's house).

5.24 Thirdly, the cases illustrate that the precise requisite purpose will vary depending on how widely "investment" is defined. In the *In re Power* case, the judge spoke of the purpose of "the receipt of income" (at 575). In the *Will of Sherriff* decision, Helsham J spoke of the purpose of "obtaining some return by way of income or pecuniary return for the benefit of those ultimately entitled" (at 442).[12]

(3) Interpreting the provision in its legislative context

5.25 The notion of "investment" should be interpreted as authorising the use of money for the purpose of seeking to secure a profitable return. This definition can extend to expenditure redeveloping real property, depending on the circumstances.

5.26 This definition is adopted for the following reasons:

- it aligns with the ordinary meaning of the words;
- it accords with common, modern commercial investment practice;
- the provision is intended to extend the range of possible investments under section 38(1) beyond those set out in the other sub-provisions;
- there are legitimate reasons why a government may wish to diversify its investments into property areas.

5.27 However, given the constitutional principles at stake, the requisite purpose of seeking to secure a profitable return on the use of money would have to be the *dominant* purpose. If it were otherwise, such that securing a profitable return only had to be one of a range of possible purposes, then it would be too easy to characterise any expenditure as being an investment, which would undermine the fundamental principle set out in section 6 of the Act (that is, that payments of public money must be in accordance with an appropriation).

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[12] In *Perkins v Porter* (NSW Supreme Court, unreported, 17 May 1996) Bryson J took a broader view, stating that the advantage pursued by the investor need not be "an advantage in the nature of interest or income", although he did suggest that it had to be a real and direct economic advantage to the investor.

5.28 On its face, therefore, clause 3(c) of the Financial Management Guidelines issued on 19 May 1999 is within the Treasurer's power to prescribe investments under section 38(1)(e) of the Financial Management Act.

E Was the particular expenditure characterisable as an investment?

5.29 That the Guidelines are valid does not end the issue of whether or not the redevelopment expenditure can fall within the scope of "prescribed investments" within section 38(1)(e) of the Act. Any particular investment decision made under the power granted by the provision (and through the authorisation in the Guidelines) must, in order to be an "investment", be taken for the dominant purpose of seeking to secure a profitable return for the Territory. The question that arises is whether the expenditure on the Bruce Stadium redevelopment was taken for this purpose.

5.30 The key operative decision in relation to the redevelopment expenditure which is the subject of this advice appears to be the decision taken by the ACT Cabinet on 8 December 1997. This was the decision that authorised the provision of funds from the CFU to BSR in order to enable the redevelopment project to continue.[13]

5.31 From the materials provided, it appears that the dominant purpose of this Cabinet decision was:

> "to ensure construction continues ... until the new financing structure is in place". (paragraph (e) of the decision)

5.32 This purpose is also manifested in paragraph 19 of the background document provided to support the Cabinet decision. This indicates a purpose of allowing "the construction to proceed without any hiatus ... pending the finalisation of the new arrangements which must be in place by 30 June 1998".

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[13] See paragraph (e) of the Cabinet decision of 8 December 1997. See also paragraphs 6-8 of Part B of the Government's Brief to Counsel.

5.33 In his 22 December 1997 memorandum the Under Treasurer describes the purpose of the transfer as to provide working capital to ensure that the redevelopment construction can continue until a new financing structure is in place. The memorandum of Ms Lindy Price, Project Officer BSR, to Andrew Clarke of OFM, also dated 22 December 1997, refers to invoices being received for stage 1 and 1b of construction that exceed the 1997-1998 budget allocation.

5.34 These indications of purpose are reflected in the nature of the decision. The background paper and the decision related to the financing arrangements for, and the ongoing progress of, the Bruce Stadium redevelopment. It was not a decision addressed to the question of how to invest territorial money held in the Territory's bank accounts.

5.35 Furthermore, there was no reference in either the background document or the Cabinet decision to whether interest was to be charged on the finance arrangements from the CFU to the redevelopment project. Nor was there any other discussion of the financial benefits which could be gained for the Territory through providing the short term bridging finance.

5.36 On the other hand, the background memorandum does refer to the intention of making Bruce Stadium a profitable project so that it could "distribute returns to investors including the Territory" (paragraph 17). However, these putative long-term benefits were not directly relevant to the financing arrangement proposed in the memorandum and decision. The CFU financing was only to continue until, at the latest, 30 June 1998 (see paragraph (f) of the decision of 8 December 1997). It was not intended that the use of the CFU money would be part of the capital invested in the project at the time that the long-term economic benefits arrived. For this reason, any financial benefits flowing from the expenditure were insufficiently connected for the expenditure to be characterised as taken for the dominant purpose of securing a financial return on use of the particular money.

5.37 It must be acknowledged that it is difficult to assess issues of intention, motivation and purpose. It is possible that other purposes were operative in relation to the decision to expend the money on the redevelopment. We, necessarily, have only been able to assess purpose from the materials provided to us.

F Could the internal transfer be an investment?

5.38 Despite the fact that the relevant officers treated the CFU to BSR transfer as a "loan facility", and interest was nominally payable (though in the end it was apparently waived) in our view it is not correct to describe this transfer of funds as a "loan", as only one legal entity, the ACT Government, was involved. Professor Richardson and Mr Colquhoun argued that the loan purportedly made to the BSR was not a loan at all and cannot be characterised as an investment. They concluded: that such an arrangement produced no net income for the Territory; that it was not a loan but a transfer of money within government; and that it is inherent in the concept of investment that an entity cannot invest in itself (just as one cannot be one's own guarantor). We agree with these views. If there was no loan, then the internal transfer by itself cannot be an "investment".

5.39 The situation might be different if BSR had, at the relevant times, been a separate corporate entity. A loan which is repayable with interest is, generally speaking, readily characterisable as an investment.[14] In such circumstances the loan facility might have been characterisable as an investment in or to a separate legal and non-governmental institution. The question of how that separate entity then spent the money loaned would not be covered by the Act. The money involved, once lent, would no longer be "public money" and thus its expenditure would not be covered by section 6 of the Act. The BSR was not relevantly a separate corporate legal entity in 1997-8. The monies were requested by, and transferred to, BSR. Bruce Operations Pty Limited does not appear to have been involved in these dealings.[15]

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[14] *Perkins v Porter,* NSW Supreme Court, unreported, Bryson J, 17 May 1996 at 14.

[15] In the Government's brief to Counsel, Part B, paragraph 11 it indicates that "The respective departments at the material times used the above monies to pay contractors involved in the Bruce Stadium redevelopment". The requests for the transfer of money pursuant to the loan facility were made by BSR project officers, who signed as

5.40 Even if the transfer from the CFU to the BSR was an investment (an argument that we have rejected) this would not act to authorise the expenditure by the BSR on the Bruce Stadium redevelopment. There is a fundamental distinction between the question of how governmental money is raised or invested, and the issue of whether or not governmental expenditure is authorised. Government budgets will be in deficit or surplus depending on the relationship between the revenue raised and the amount appropriated for expenditure. The fact that a government might be running at a surplus, or has borrowed money to provide itself with cash, does not mean that the government can spend that extra money as it wishes. Any expenditure must still be authorised by an appropriation.

G Conclusion

5.41 On the materials provided to us, the unappropriated redevelopment expenditure was not capable of being authorised as an investment under section 38(1)(e) of the Financial Management Act 1996.

5.42 Expenditure on real property, and on improvements to real property, could be a "prescribed investment".

5.43 However, to fall within the scope of the power and of the Guidelines, the dominant purpose of making the expenditure must be to seek to secure a profitable return on the use of the moneys. It is always difficult to assess issues of intention and purpose. There may be evidence of motivations and purposes not apparent from the information we have reviewed. On the materials provided to us, however, the authorisation of the provision of the CFU financing appears to have been granted in order to enable the project to continue, and not for the dominant purpose of achieving or securing financial benefits for the Territory by the use of that money. In our view any financial benefit which might ultimately have been secured by the decision was insufficiently connected to the use of the particular money involved for the decision to be characterised as one

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such and not as employees of Bruce Operations Pty Limited. The transfers also took place from the Territory bank account to a departmental bank account, account number 009 93002 8.

5.44 taken to secure financial benefit. Given this, in our view the expenditure was not an "investment" within the scope of the power granted by section 38(1)(e).

5.45 The internal transfer of funds between governmental entities was not an investment. It is not correct legally to describe an intra-Government transfer as a "loan".

6 QUESTION 2: CAN GUIDELINES UNDER SECTION 67(2) OF THE ACT OPERATE RETROSPECTIVELY?

A Background

6.1 On 19 May 1999 Financial Management Guidelines were issued by the Chief Minister under section 67 (2) of the Act. The Guidelines were said to commence on the day of the commencement of section 38 of the Act. Clause 3 of the Guidelines provided that:

> "For the purposes of paragraph 38(1)(e) of the *Financial Management Act 1996* the following transactions are prescribed investments -
> (a) a debt instrument;
> (b) a loan to a Territory entity; and
> (c) an investment in Territory owned property".

6.2 The relevant statutory provisions are set out above in Part 5A of this advice. In ascertaining whether it is possible for the Treasurer retrospectively to authorise an investment under section 38(1)(e) of the Act it is necessary to interpret the scope of the Treasurer's power under section 67(2).

B The views expressed in the opinions

6.3 Mr Tracey QC considered and rejected an argument that a Minute and letter, both dated 22 December 1997, constituted relevant Financial Management Guidelines. We have not been asked to consider this question, and have assumed this conclusion to be correct.

6.4 Mr Tracey QC did not himself consider the question of retrospectivity in relation to section 67(2). He indicated that he had read the advice of John Leahy, Parliamentary Counsel for the ACT, and had no reason to doubt that it was correct.

6.5 Mr Leahy took the view that financial management guidelines under section 67(2) could be expressed to take effect from some past date. He also indicated that, in his view, section 7 of the Subordinate Laws Act 1989 (ACT), which limits the potential retrospective operation of subordinate laws, did not apply to the financial management guidelines.

6.6 Mr Sackar QC expressed the view that the retrospective Guidelines were "plainly outside the power" under section 67(2) of the Act. He did so for three reasons: the inherently prospective nature of a "guideline"; considerations of principle relating to parliamentary oversight of expenditure; and that the decision to make the Guidelines was likely to be held to have been taken for an improper purpose.

6.7 Professor Richardson and Mr Colquhoun similarly concluded that guidelines under section 67(2) could not be made to operate retrospectively. They, too, relied on the nature of "guidelines", and considerations of constitutional principle. They also referred to the presumption of statutory interpretation that a statutory instrument is not intended to have retrospective effect unless it reveals a clear intention to do so.

C The arguments

(1) The nature of "guidelines"

6.8 The question of whether financial management guidelines can be made retrospective under section 67(2) of the Act is a question of interpreting the scope of that power. The first place to turn in undertaking that exercise is, of course, the words used in the text itself.

6.9 What the Treasurer is authorised to issue under section 67(2) is "guidelines".

6.10 The *Macquarie Dictionary* defines "guideline" in the following manner:

> "1. A line drawn as a guide for further writing, drawing, etc.
> 2. (*Usually plural*) A statement which offers advice on the implementation of a policy.
> 3. (*Plural*) General instructions."

6.11 It is implicit in this definition that a guideline cannot have a retrospective operation. A guideline involves providing a guide, advice or general instructions to relevant conduct. This is only possible if the guideline is provided before the relevant conduct takes place. It is logically impossible to provide guidance to conduct which has already taken place.

6.12 The requirement that guidelines operate prospectively is clearly assumed in two cases which have considered the notion of guidelines (as referred to by Mr Sackar QC): *Norbis v Norbis* (1986) 161 CLR 513, see 519-20 per Mason and Deane JJ, also 536-9 per Brennan J; *Riddell v Secretary, Department of Social Security* (1993) 42 FCR 443 at 449-50 per Full Federal Court.[16] There is nothing in the context of the section to indicate that some meaning other than the ordinary meaning of the word "guidelines" was intended to be employed by the Legislative Assembly, unlike in *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287 (see pages 289-90, 290-1 and 298-301).

6.13 For this reason, in our view financial management guidelines issued under section 67(2) of the Act cannot operate with retrospective effect, for this is not within the power granted by the section.

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[16] See also *Minister for Human Services and Health v Haddad* (1995) 137 ALR 391 at 400.

(2) Constitutional Principle

6.14 As noted above, and as reflected in section 6 of the Act, it is a fundamental constitutional principle that governmental expenditure must be under the control and supervision of Parliament. Section 38 of the Act, allowing the Treasurer to invest money without the need for appropriation, is a limited partial exception to this basic principle. Nevertheless, in light of constitutional principle and practice, there is good reason to think that section 38 was not intended to withdraw all questions relating to investment of monies from the consideration and oversight of the Legislative Assembly.

6.15 Indeed, the objectives of the Act, as set out in the introductory Outline in the explanatory memorandum, suggests the contrary.[17] The objectives of the Act are said to include establishing a financial management framework which:

> "(a) reinforces the primacy of the Legislative Assembly's role in the parliamentary budget and financial accountability process;
> (b) promotes the highest standards of financial accountability to the Legislative Assembly and to the community;
> (c) enhances transparency in budget decision making at all levels - the Legislative Assembly, the Executive and the ACT public sector; ...".

6.16 If the Treasurer or her delegates could invest Territory money outside the realm of what was authorised by section 38 of the Act, only to be able to cure such defects by retrospective authorisation, then it could not be said that the statutory scheme promoted the highest standards of financial accountability, or enhanced transparency, or reinforced the primacy of the Assembly's role. The process can only be transparent and properly accountable if the Treasurer indicates in advance what further investments, other than those expressly prescribed by section 38(1) of the Act, are permissible vehicles for the use of Territory monies.

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[17] It is permissible to have regard to the Explanatory Memorandum in interpreting the Act: see section 11B(da) Interpretation Act 1967 (ACT).

6.17 Both constitutional principle and the expressed objectives of the Act therefore reinforce the conclusion that it is not possible to endow financial management guidelines with retrospective effect under section 67(2) of the Act.

(3) The presumption against retrospective operation

6.18 There is a well-established principle of interpretation that statutory instruments are presumed not to have retrospective operation: see, for example, *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194 per Fullagar J.

6.19 This principle applies to delegated legislation. There is no question here, however, that the financial management Guidelines were intended to operate retrospectively.

6.20 The issue is whether, in light of the presumption, section 67(2) of the Act can be regarded as authorising the purported retrospective operation of the Guidelines.

6.21 In Broadcasting Co of Australia Pty Ltd v Commonwealth (1935) 52 CLR 52, it was stated that:

> "Where the executive Government attempts to give to a regulation a retroactive operation, the validity of the regulation is necessarily dependent upon the precise term of the grant which the Parliament has conferred upon the Executive".

6.22 The majority of the court went on to hold that a regulation with retrospective operation was not authorised by a general power in the statute to make such regulations as were "necessary or convenient".

6.23 For the reasons given above, it cannot be said that the "precise term of the grant" in section 67(2) is sufficient to authorise retrospective subordinate legislation. Furthermore, it is implicit in the High Court's decision in the *Broadcasting Co* case that a regulation-making power will not readily be construed as authorising subordinate legislation of retrospective effect.[18]

6.24 Mr Leahy conceded in his opinion that there was a reasonable prospect of a successful challenge to any retrospective guidelines if the relevant power had been expressed in "necessary or convenient" terms (paragraph 11). Yet Mr Leahy also accepted that the power to make financial management guidelines in section 67(2) of the Act was narrower than the general regulation-making power in section 67(1) (paragraph 9 of his opinion).

6.25 In light of the High Court's decision in the *Broadcasting Co* case, and in light of the fact that section 67(2) is a narrower power than section 67(1), the better legal view is that, even leaving aside the other considerations, the power in section 67(2) does not extend to authorise financial management guidelines of retrospective effect.

(4) Two other arguments

6.26 Mr Leahy's opinion is directed substantially to the question of whether section 7 of the Subordinate Laws Act 1989 prevents the making of financial management guidelines with retrospective effect. He concludes that it does not because section 7 is incapable in its terms of applying to a guideline that is not required by law to be notified in the Gazette. It is not necessary to consider this argument in light of the above conclusions.

6.27 Nor is it necessary to consider Mr Sackar's argument that, given Mr Leahy's view that guidelines could not expressly validate investments already made, and given the attempt to achieve this end by virtue of generally expressed guidelines, the Guidelines were invalid as an exercise of the power in section 67(2) of the Financial Management Act for an improper purpose (paragraphs 28-33).

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[18] See also *Beard v South Australia* (1991) 57 SASR 65 at 81.

D Conclusion

6.28 It was not legally permissible to issue guidelines under section 67(2) of the Financial Management Act with the effect of retrospectively prescribing the Bruce Stadium redevelopment expenditure as an investment.

6.29 This conclusion is reached on the following grounds:

(a) It is in the very nature of "guidelines" that these must be capable of guiding behaviour; the grant of power, by its own words, therefore does not extend to authorise retrospective guidelines.

(b) Considerations of financial accountability, transparency, and the primary role of the Legislative Assembly, indicate that section 67(2) cannot be taken to have been intended to authorise guidelines of retrospective effect.

(c) The established common law presumption that legislation does not have retrospective effect, or authorise subordinate legislation of such effect, is not overcome by the words of section 67(2), thus again indicating that the power does not extend to authorise guidelines of retrospective effect.

7 QUESTION 3: WAS THE OVERNIGHT BORROWING ON 30 JUNE 1998 IN ACCORDANCE WITH THE ACT?

A The relevant provisions

7.1 Under section 39 of the Act, the Territory "may only borrow in accordance with this Act or another law of the Territory". We have not been informed of any other law of the ACT which might authorise the overnight borrowing that took place on 30 June 1998.

7.2 Section 40 regulates borrowing made on behalf of the Territory. There appears to be no other provision in the Act which could authorise such borrowing. Territory authorities are given certain limited powers to borrow money (sections 41-44). However, a "Territory authority" is defined in section 3 of the Act to mean a body corporate established by an Act. Even if BOPL was involved in the transaction, it was a corporation established under the Corporations Law, and is not a statutory corporation.

7.3 Section 40 relevantly provides as follows:

> "The Treasurer may, on behalf of the Territory, if necessary or expedient in the public interest to do so -
> (a) borrow money;...".

B Factual Background

7.4 As at 30 June 1998 the funds which had been provided by the CFU and paid into a Bruce Stadium redevelopment bank account was $9.7147 million. This was the amount of expenditure in excess of the $5.6 million appropriated. The Bruce stadium redevelopment bank account had been used to pay contractors engaged on the redevelopment project.

7.5 On 26 June 1998 the ACT Under Treasurer, in his capacity as a director of BOPL and on that company's behalf, sought a loan from the CBA in the amount of $9.7147 million.

7.6 On 28 June the ACT Under Treasurer sought the approval of the Treasurer to a borrowing in the amount of $9.7147 million by the Bruce Stadium Property Trust[19] from the CBA. We assume that the Treasurer granted her approval.

7.7 The CBA agreed to lend the $9.7147 million, the loan to take effect on 30 June 1998.

7.8 On 29 June 1998 the Under Treasurer confirmed both in his capacity as Under Treasurer and as a Director of BOPL that BOPL was undertaking the borrowing but that the moneys should be paid into the Territory bank account. In one letter the loan was said to be repayable "on 1 July 1998 but no later than 31 July 1998".[20] In the other letter it was said that the loan would be repaid on 1 July 1998 including overnight interest.

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[19] We are instructed that the Bruce Stadium Property Trust was created on 1 June 1998 and intended to be the lessee of the Stadium.

[20] The letter sent in the capacity as Under Treasurer.

7.9 A file note by CFU Assistant Manager Patrick McAuliffe, dated 30 June 1998, says that:

- BOPL is the borrowing entity;
- CFU will repay the loan to the CBA on 1 July 1998;
- project financing required by BOPL between 1 July 1998 and when new financing arrangements are in place will be provided by the CFU; and
- when the new financing arrangements are in place, BOPL will repay the CFU $9.7147 million, the interest paid to the CBA and any additional loans provided to BOPL between 1 July 1998 and the commencement of the new financing arrangements.

7.10 On 30 June 1998 the CBA paid the money directly into the same CFU bank account from which the $9.7147 million had been drawn.

7.11 On 1 July 1998 the CFU repaid the $9.7147 million loan to the CBA, together with an interest payment of $1982.86.

C The views expressed in the opinions

7.12 Mr Tracey QC concluded that the borrowing itself was authorised under section 40 of the Act. He took the view that:

- the borrowing was sought by and for BOPL, yet could still be characterised as a loan to the Territory because the executive power of the Territory extends to the establishment of a corporation for the purpose of carrying out activities authorised by Government; and
- as the loan moneys from CBA were paid into the Territory banking account "the borrowing was undertaken in compliance with the Act" (paragraph 22(c) of his opinion).

7.13 Section 45 of the Act requires that the proceeds of a loan raised on behalf of the Territory be paid into the Territory bank account.

7.14 It is arguable that, if the loan was indeed sought by and for BOPL and not on behalf of the Territory, then the provisions of Part VI of the Act (which deal with borrowing on behalf of the Territory or Territory authorities) simply do not apply. It seems that Mr Tracey did not address the question of whether the loan could be said to be "on behalf of the Territory" or "necessary or expedient in the public interest".

7.15 Mr Tracey took the view, however, that the *repayment* of the loan was not in accordance with the Act because section 46 indicates that it is for the Treasurer to make such payments as are required, and so far as Mr Tracey was aware there was no relevant delegation of the Treasurer's authority under this section in relation to the repayment of the Bruce Stadium loan. The repayment was not authorised by the Treasurer herself.

7.16 It should be noted that we have been asked whether the overnight *borrowing* was in accordance with the Act, not whether the repayment accorded with the Act's requirement. We have not given separate consideration to this issue. As will appear, it is not necessary to do so in any case.

7.17 Mr Sackar QC also took the view that the repayment was not authorised under the Act (paragraphs 12-13 of his opinion).

7.18 In relation to the borrowing, Mr Sackar took the view that, at the least, the inference was open that the Under Treasurer who had authorised the loan had been motivated by a desire to avoid or disguise the consequences of the unlawful expenditure in relation to the Bruce Stadium redevelopment. He therefore suggested that the borrowing was unlawful because it could not have been said to have been made "on behalf of the Territory" within the meaning of section 40 of the Act. Although Mr Sackar QC did not raise the point, a similar argument could have been made by him in relation to the phrase "if necessary or expedient in the public interest to do so" in the section.

D The nature of the power in section 40

(1) The meaning of "on behalf of"

7.19 The phrase "on behalf of" is used in a range of contexts, and means different things depending on those contexts. It may mean being required to act "for the benefit and in the interest" of the person on whose behalf the decision-maker is acting: *R v Portus; Ex parte Federated Clerks Union of Australia* (1939) 79 CLR 428 at 437 per Dixon J; see also McTiernan J at 440. Similarly, it may mean that the power is "to be exercised for the good" of the relevant person (*Launceston Corporation v Hydro-Electric Commission* (1959) 100 CLR 654 at 662); or being required to act as a trustee for the person represented (*Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No. 2)* (1987) 162 CLR 153 at 165).

7.20 On the other hand, the words may imply a relationship of a less demanding kind. In particular, it may simply imply that the decision-maker is acting as agent of the person represented. In the case of *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374, at 386-7, the High Court had to consider the words "on behalf of" used twice in the same piece of legislation. In one context, it was held to suggest an agency relationship; in the other, it was held to imply a broader trustee relationship.

7.21 If the words "on behalf of the Territory" in section 40 of the Act merely suggest that the Treasurer is acting as agent of the Territory, then it might be difficult to make out the argument that the loan was incurred for an improper purpose. It is quite clear that the loan was taken out by the relevant officers as agents for the Territory. They were not, for example, seeking to use Territory money for their own personal enrichment. If, however, a broader view was taken of the meaning of the words then significant questions would arise about whether the borrowing could be regarded as authorised by section 40.

7.22 It is not necessary here to consider which possible meaning of "on behalf of the Territory" should be adopted. Essentially the same considerations arise in relation to the other qualifying phrase as would arise on the broad view of the words "on behalf of".

(2) The meaning of "if necessary or expedient in the public interest to do so"

7.23 The words "necessary or expedient" or "necessary and convenient" are often used in statutory provisions granting of power to the executive to make regulations: see eg *Shanahan v Scott* (1956) 96 CLR 245. Cases in relation to such provisions are of relatively little use in interpreting the phrase in the present context in section 40 of the Act. It is relevant to note, however, that it has been held that the "criteria of necessity and convenience are not subjective": *Minister for Foreign Affairs v Magno* (1992) 112 ALR 529 at 557 per French J. In other words, it is clear from this line of authority that questions of what is necessary, expedient or convenient are not regarded as being within the sole and unchallengeable discretion of the decision-maker.

7.24 The leading statement on the meaning of the phrase "the public interest" is that of Mason CJ, Brennan, Dawson and Gaudron JJ in *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216, where they stated:

> "the Act provides no positive indication of the considerations by reference to which a decision is to be made as to whether the grant of an application would or would not be in the public interest. Indeed, the expression "in the public interest", when used in a statute, classically imports a discretionary value judgement to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable...given reasons to be [pronounced] definitely extraneous to any object the legislature could have had in view": *Water Conservation and Irrigation Commission (NSW) v Browning* per Dixon J."

7.25 Generally the grant of a power to make a decision as to what is "in the public interest" is taken to imply a broad discretion in the decision-maker: see eg *O'Sullivan v Farrer*, at 216-17; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 381-2 per Toohey and Gaudron JJ. Assessing where the public interest lies will often depend on the balancing of interests, and will be a question of fact and degree: *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1 at 5 per Mason CJ, Wilson and Dawson JJ. Again, however, it is implicit in all these cases that although the grant of power is wide and discretionary, this does not mean the power is without limits or cannot be reviewed.

7.26 Reflecting this, it has been held that relevant decisions must be characterisable as being in the interests of the public as opposed to the interests of an individual or individuals: *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 480 per Barwick CJ; *DPP v Smith* [1991] 1 VR 63 at 75. On the other hand, it has also been recognised that, in some contexts, it may be impossible to draw a real distinction between acting in the public interest and acting in the interests of a section of the public: *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 137 ALR 281 at 307-308.

7.27 On the present facts, it might thus be arguable that the overnight borrowing of 30 June 1998 was not "necessary or expedient in the public interest" and was outside the power conferred on the Treasurer by section 40 of the Act. In particular, as indicated in the leading case of *O'Sullivan v Farrer*, it is possible for a decision-maker to act for improper purposes under such a power.

(3) Possible limitations on challenges to the borrowing decision

7.28 The question of whether the decision to undertake the overnight borrowing on 30 June 1998 was an exercise of the section 40 power for an improper purpose raises an issue of administrative law. Were an administrative law challenge to be mounted in a court, significant arguments might arise in relation to the justiciability of the matter, whether any particular applicant had standing to challenge the decision, and whether the challenge was within relevant limitation periods. A connected argument might be made that, in the absence of a court judgment holding the decision to borrow invalid, the decision remains on foot.

7.29 We have not been asked to provide advice on whether the decision is challengeable, nor on whether the decision is void. The question we have been asked is whether the overnight borrowing was in accordance with section 40, or any other section, of the Act. Answering this requires an assessment of whether the decision to undertake the borrowing was within the power granted by section 40. This requires consideration in turn of the purposes for which the loan was undertaken.

7.30 Whether or not the decision was or is capable of being challenged in the courts does not go to whether it can be regarded as infected with legal error.

(4) Exercising the power for an improper purpose

7.31 The purported exercise of a power will be beyond power and invalid if it is exercised for a purpose other than the purpose or purposes for which the power is granted.

7.32 It may sometimes be difficult to ascertain the purpose or purposes for which a power is granted, particularly if the power is not clearly expressed to be directed towards achieving a particular end. In such instances, the purpose of the Act is gathered from the nature and scope of the power, interpreted within the context of the Act in which it is granted.

7.33 The Treasurer's power in section 40 of the Act is conditioned by the phrase "if necessary or expedient in the public interest to do so". This phrase, perhaps together with the requirement that borrowing be "on behalf of the Territory", indicates that the Treasurer and her delegates are required to act in the interests of, in the sense of for the benefit of, the public when exercising the power. Clearly a very wide scope is provided to the decision-maker here in deciding whether a particular borrowing decision is in the interests of the Territory. But some purposes will simply not be characterisable as having been taken in the public interest.

7.34 Decisions may be taken for a range of purposes. In such instances a decision will be invalid if the improper purpose is "a substantial one in the sense that no attempt would have been made to exercise the power if it had not been made for that purpose": *Thompson v Randwick Municipal Counsel* (1950) 81 CLR 87 at 106. Such a decision will not be invalid if the improper purpose was "entirely subsidiary" to a dominant legitimate purpose: *Samrein Pty Ltd v MWSDB* (1982) 41 ALR 467 at 470.

7.35 The questions for consideration here, therefore, are whether the overnight borrowing was undertaken for purposes including a purpose other than acting in the interests of the Territory; and, if so, whether that improper purpose was a substantial one in the sense that the decision would not have been taken but for its presence.

E Was the overnight borrowing undertaken for an improper purpose?

7.36 The decision to undertake the overnight borrowing appears in substance to have been taken by the Under Treasurer. He was the one who organised the loan with the CBA. He also wrote a minute to the Treasurer and the Chief Executive of CMD on 28 June 1998 recommending that approval be granted for the overnight borrowing to take place. It is not entirely apparent if this approval was in fact provided. Even if it was, it was presumably pursuant to the recommendation and purposes of the Under Treasurer.

(1) The main apparent purpose

7.37 The dominant purpose of organising the overnight borrowing, at least as appears from the documents provided, was to meet the requirement of the Cabinet decision of 8 December 1997, which had "noted that the new financing structures must be in place and external finance received by 30 June 1998".

7.38 That this purpose was the dominant one appears from the minute provided to the Treasurer on 28 June 1998 by the Under Treasurer, and from the "Statement by Office of Financial Management" (see Part 9B below) which asserted that the minute of 28 June 1998:

> "clearly shows that the motivation in taking out the loan from the CBA was to meet the requirements of the December Cabinet Decision, which required that external finance was received by 30 June 1998". (paragraph 25, see also paragraphs 26 and 2-3)

7.39 This purpose cannot be characterised as a proper purpose under section 40 of the Act for two overlapping reasons. First, it might conceivably be argued that complying with Cabinet decisions is in the interests of the public. Yet it is quite clear that the overnight borrowing did not, in substance, comply with the requirement of the Cabinet decision of 8 December 1997 that external finance be in place by the end of the financial year. The decision contemplated the organisation of ongoing private sector funding to complement the Territory's involvement in the project. This requirement could not be satisfied by an overnight loan. The purpose of the decision was therefore misconceived. This decision thus cannot reasonably be characterised as being in the interests of the Territory.

7.40 Secondly, Cabinet decisions themselves are subject to legislative requirements. Regardless of the Cabinet decision, therefore, it has to be asked how the overnight borrowing aided the interests of the Territory. At best, it was a formalistic exercise. Further, as is made plain in the Statement by Office of Financial Management (see section 9B below), to organise private sector funding came at a net financial cost to the Territory (paragraphs 26 and 41). The decision thus brought no gain to the Territory of any substance, and came at some cost. This assessment does not depend on the benefit of hindsight for these matters were always evident. The loan cannot be characterised as bridging finance, for the situation apparently reverted on 1 July 1998 to exactly how it had been the day before: see paragraphs 23 and 24 of the Statement by Office of Financial Management. A decision taken without any real gain for the Territory, and at some cost, cannot reasonably be characterised as being in the interests of the Territory, even taking account of the width of the discretion granted by section 40.

(2) An apparent alternative purpose

7.41 The Statement by the Office of Financial Management suggests that another possible purpose of the decision was to satisfy a belief that "the law required expenditure in excess of that permitted in an appropriation bill to be repaid by revenue in the course of the year" (paragraphs 5 and 26). Even if this were a motivating purpose at the time that the overnight borrowing was organised, it cannot be characterised as a proper purpose.

7.42 The Statement concedes that this understanding of the Financial Management Act "was a misconception" (paragraph 30). There appear to have been misconceptions within misconceptions. If there was any relevant requirement that excess expenditure be repaid by *revenue* over the course of the year, this could not be satisfied by organising a *loan*.

7.43 It cannot be in the interests of the Territory to incur costs in an exercise which is unnecessary, formalistic (at best) and based on a substantial legal misconception.

E Conclusion

7.44 Mr Sackar concluded that the overnight borrowing was unlawful because it was undertaken for the purpose of disguising unlawful conduct. It is not necessary for us to reach a conclusion on this assessment, even if it were possible to do so on the materials provided.

7.45 It should also be noted that the Statement by the Office of Financial Management claims that:

> "officers approached the issue of financing Bruce Stadium in good faith and with [sic] acted in accordance with their understanding, albeit sometimes misguided, of the Financial Management Act" (paragraph 35).

7.46 That an executive decision is taken in good faith does not establish that it was necessarily taken for proper legal purposes. Conversely, a conclusion that a decision was taken for improper legal purposes does not establish that it was taken in bad faith.

7.47 The overnight borrowing on 30 June 1998 from CBA was not in accordance with section 40 of the Act. The decision cannot be characterised as having been in the interests of, or for the benefit of, the Territory. It therefore exceeded the scope of the power granted to borrow money under section 40. Specifically, it cannot be said that the decision meets the requirements in the section that when money is borrowed it is done "on behalf of the Territory, if necessary or expedient in the public interest to do so".

8 QUESTION 4: NO OTHER MAJOR INCONSISTENCIES BETWEEN THE OPINIONS

8.1 In requesting advice from us the Auditor-General has summarised the main inconsistencies, as he saw them, between the opinions. We confirm that the Auditor-General's understanding of the main inconsistencies is correct and for clarity we set out immediately below those inconsistencies as stated by the Auditor-General (with minor formatting and other changes).

Whether the redevelopment was capable of being prescribed as an Investment under section 38(1)(e) of the Act

- Tracey QC is apparently of the view that the redevelopment expenditure could have been prescribed as an investment under section 38(1)(e) of the Act.
- Sackar QC does not address this issue.
- Professor Richardson and Mr Colquhoun have concluded that the redevelopment was not capable of being prescribed under section 38(1)(e).

Whether it was possible to issue Guidelines under section 67(2) of the Act with the effect of retrospectively prescribing the redevelopment as an Investment

- Tracey QC was not asked to advise on this issue, but he indicates that he read Parliamentary Counsel's advice (supporting the power to issue Guidelines with retrospective effect) and had no reason to doubt that it was correct.
- Sackar QC's opinion is that Guidelines with retrospective effect is not possible.
- Professor Richardson and Mr Colquhoun's opinion is that Guidelines with retrospective effect is not possible.

Whether the overnight 30 June 1998 borrowing complied with the Act

- Tracey QC's opinion is that the borrowing complied with section 40 of the Act.
- Sackar QC's opinion is that the borrowing was unlawful as it did not comply with section 40 of the Act in that it could not be said to be "on behalf of the Territory."
- Professor Richardson and Mr Colquhoun did not address this issue.

8.2 There are no other major inconsistencies between the opinions.

8.3 The Auditor-General will appreciate that when some or all of the authors of the opinions have agreed on matters they have not necessarily done so using the same reasoning process. In this advice, where appropriate we have set out the essential nature of competing reasoning.

8.4 There are also other matters in respect of which some or all of the authors are in agreement: for example, the basis of the requirement that expenditure of public monies be authorised by legislative appropriation; and that the repayment of the borrowing was not authorised. We have not considered it appropriate to set out areas of agreement.

8.5 There are also statements of opinion expressed by one or other of the authors that are not dealt with by the other authors: eg, Tracey QC considers and rejects the argument that documentation generated in December 1997 amounted to Guidelines under section 38(1)(e) of the Act; he also concludes that there was non-compliance with the obligations imposed by section 31(2)(a) of the Act. Other than when otherwise necessary we have not commented on such matters.

9 QUESTION 5: IN ALL THE KNOWN CIRCUMSTANCES SHOULD THE MATTER BE REFERRED TO THE DIRECTOR OF PUBLIC PROSECUTIONS?

A Views expressed in the opinions

9.1 Mr Sackar QC expressed the opinion that "a 24 hour loan designed to disguise an unlawful appropriation of public funds [cannot] be said to be 'on behalf of the Territory'" and was therefore "unlawful" (paragraph 11 of his opinion). We consider that when Mr Sackar refers to an "unlawful appropriation" he is referring to unlawful expenditure in the absence of an appropriation.

9.2 After referring to the case of *Sankey v Whitlam* (1978) 142 CLR 1, Mr Sackar went on to "recommend that all of the papers in relation to this matter be referred to the ACT Director of Public Prosecutions for his consideration of an offence ... in the present circumstances".[21] (paragraph 14)

[21] The character of offence referred to by Mr Sackar QC was conspiring to effect an unlawful purpose under a law (of the Commonwealth): section 86(1)(c) Crimes Act 1914 (Cth) (since repealed); see section 349(1)(c) Crimes Act 1900 (ACT).

B The factual background and the Under Treasurer's Explanation

9.3 Mr Sackar's conclusion that the matters warrant reference to the DPP appears to turn on the fact that, in his opinion, the loan was designed to hide the unlawful expenditure and that, as a result of the 24 hour loan:

> "as at 30 June 1998, the relevant date for statutory reporting purposes, the ACT Government had, rather than an unauthorised investment in the Bruce Stadium redevelopment a loan, on the face of it, from a reputable financial institution, was shown in its accounts". (paragraph 10)

9.4 At the time of giving this opinion Mr Sackar did not have the benefit of the "Statement by the Office of Financial Management", provided, under a covering letter from the Under-Treasurer dated 19 July 1999, in response to a request by the Auditor-General for information under section 14 of the Auditor-General Act 1996 (ACT). That request was for:

> "a comprehensive statement fully explaining why the $9.7 million overnight borrowing on 30 June 1998 was undertaken".

9.5 The Statement includes a chronology of events. Events in the week leading up to 30 June 1998 appear to have proceeded with some urgency due to emerging problems with putting external financing in place.

9.6 It is said in the Statement that:

> "officers within OFM assumed that it was essential by 30 June [1998] to have acquitted the loans advanced by the CFU". (paragraph 5)

9.7 As noted above, the borrowing was purportedly undertaken for two main purposes (see especially paragraphs 25-26, OFM statement):

(a) in order to comply with the Cabinet decision requiring that external finance be gained for the redevelopment project by 30 June 1998; and

(b) pursuant to a belief, now accepted to be mistaken, that the money was needed to secure compliance with legal requirements, in particular, with the supposed requirement that money spent in excess of an appropriation had to be repaid by revenue.

9.8 The explanation for repayment after one day is that:

> "it... satisfied the belief that the law required expenditure in excess of that permitted in the Appropriation Bill to be repaid by revenue in the course of the year". (paragraph 26)

9.9 We have observed above (in Part 7D) that this explanation reflects misconception heaped upon misconception.

9.10 It is also noted in the Statement that the cost of external borrowing would have made it more expensive to leave the external loan in place. (paragraphs 26 and 41)

9.11 In answer to the suggestion that the 24 hour loan was designed to avoid disclosure of the unauthorised appropriation it is said that:

> "no ... attempt was made to treat the loan in any other than the ordinary manner of by way of payment into the Territory Bank Account. Matching transactions clearly pointed to the consequent repayment of the CFU loan. The relevant transactions were fully disclosed in the 1997-1998 CMD financial statements and were able to be identified without undue effort".[22] (paragraph 29)

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[22] Although the correspondence with the CBA in late June 1998 refers to BOPL as the borrowing entity, it is acknowledged in the Statement that authority for the borrowing had been sought from the Treasurer in terms that the Bruce Stadium Property Trust would borrow (paragraph 19). It is also acknowledged in the Statement that the loan funds were paid into the Territory Bank Account and not through BOPL's account (paragraph 22).

9.12 We have been provided with a copy of the completed and signed Department of Business, Employment, Tourism, Arts, Regulatory Reform and Industrial Relations financial statements forwarded to the Auditor-General on 19 August 1998 for audit. These statements disclose neither the expenditure of $9.7147 million made without appropriation nor the $9.7147 million loan from the CBA. They are in contrast to the financial statements which were approved some time later by the Auditor-General, and the notes accompanying these statements.[23] These are matters appropriate for comment by the Auditor-General.

9.13 The result of the 24 hour loan was that:

- according to the Under Treasurer's explanation, $1,982.86 of public monies were expended. These moneys need not have been expended; and
- a form of accounts was produced that was different than would have been the case had the loan not been in existence.

9.14 It is evident from the course of conduct that there was a misunderstanding or ignorance of the requirements of the Act. Added to this is the joint conclusion of the "Director, General Law" in the Department of Justice and Community Safety, and the "Director, Finance" in CMD, in a joint briefing paper of 26 May 1999, that "other weaknesses in administrative process under the Act have been identified", including (see paragraph 7 of the briefing paper):

- inadequate delegations;
- issues concerning the issuance of warrants;
- timing of the Treasurer's Advance; and
- the content of, and manner of making, previous guidelines.

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[23] We have been provided with extracts from the financial statements that were prepared after intervention by the Attorney-General. These statements expressly disclose the terms of the loan and its 24 hour nature: note A to Notes to and forming part of financial statements for the year ended 30 June 1998. The Auditor-General has also informed us that the existence of the $9.7147 million is not disclosed in BOPL's accounts nor in the accounts of the Bruce Property Trust.

C Conclusion

9.15 It may correctly be said that the loan transaction was unusual. On the other hand there are the following matters to consider:

- the explanation for the loan and re-payment, as provided by the Under Treasurer (also discussed in Part 7 of this advice);
- the terms of the Cabinet decision;
- the clear lack of understanding of the requirements imposed by the Act, general confusion, including apparent confusion as to the legal entities involved, and the other failures in process; and
- the tight deadlines which relevant officials believed they were working to.

9.16 The question is whether there is currently sufficient admissible evidence to raise a prima facie case of criminal conduct recognising the burden of proof in criminal cases.

9.17 Based on the material we have reviewed there is not such evidence.

9.18 More investigation would need to be performed to determine whether there exists sufficient admissible evidence to raise such a prima facie case. Precisely what investigations would need to be undertaken would require careful consideration and the viability of such investigations would depend upon having appropriate powers of investigation. The areas of investigation would need to extend not only to the acts in question but also to the state of mind of those who carried out the acts.

FREEHILL HOLLINGDALE & PAGE
28 SEPTEMBER 1999

Schedule 1 - Materials provided by the Auditor-General

1. SUMMARY OF RELEVANT EVENTS

(A) Summary
(B) Newspaper Clippings

2. LEGAL OPINIONS

(A) Government's Opinion

Advice by Mr RRS Tracey QC dated 25 May 1999

(B) Opposition Leader's Opinion

Opinion by Mr JR Sackar QC dated 8 June 1999

(C) Independent Member's Opinion

Opinion by Professor JE Richardson of ANU and Mr J Colquhoun of Colquhoun Murphy, Solicitors, undated

(D) Parliamentary Counsel's Advice on Retrospective Guidelines

Letter from Mr J Leahy, Parliamentary Counsel's Office to Mr Peter Quinton, ACT Department of Justice and Community Safety dated 18 May 1999

3. LEGISLATION

(A) ACT (Self-Government) Act 1988 (Cth)
(B) Financial Management Act 1996 (ACT)
(C) Financial Management Bill 1996 Explanatory Memorandum
(D) Appropriation Act 1997-1998 (ACT)
(E) Interpretation Act 1967 (ACT)
(F) Appropriation (Bruce Stadium and CanDeliver Limited) Act 1999 (ACT)
(G) Financial Management Guidelines dated 19 May 1999

4. BRIEF TO GOVERNMENT COUNSEL AND OTHER INFORMATION PROVIDED

(A) Brief to Counsel from ACT Government Solicitor dated 7 May 1999 with Index of Documents but no attached documents

APPENDIX 7 (con't)

(B) Letter from ACT Government Solicitor to Richard Tracey QC dated 20 May 1989 enclosing:
- Financial Management Guidelines signed by Chief Minister on 19 May 1999; and
- Memorandum of further instructions, concerning section 37 of the Financial Management Act 1996 enclosing:
- Warrant signed by Treasurer dated 1 July 1997
- Warrant signed by Treasurer dated 12 September 1998
- Duty Statement dated
- Treasurer's Financial Delegations, Investments dated 8 January 1998

(C) Letter from ACT Government Solicitor to Richard Tracey QC dated 24 May 1999 enclosing:
- Financial Management Guidelines signed by Chief Minister on 19 May 1999

(D) Answers Provided by Government in Response to Questions by Government Counsel with Attachments:
- Attachment 1 - Summary of ACT Government Banking Arrangements
- Attachment 2 - Loan Account Documents (February-June 1998)
- Attachment 3 - Treasurer's Financial Delegations, Borrowings dated 8 January 1998
- Attachment 4 - Further Loan Account Documents (April-May 1998)
- Attachment 5 - Further Loan Account Documents (Repayment)
- Attachment 6 - Minute from Roger Broughton, Manager, Central Financing Unit to Chief Minister and Treasurer dated 30 November 1998 with attachments

(E) Other documents:
- Letter from Kate Carnell, Chief Minister to Michael Del Gigante of ACTEW Corporation Limited, undated with attachments

APPENDIX 7 (con't)

5. BRIEF TO CHIEF MINISTER FROM CHIEF EXECUTIVE DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY

(A) Minute from Chief Executive, Tim Keady, ACT Department of Justice and Community Safety to Chief Minister dated 19 May 1999 with attachments including:

- Minute Paper - ACTBIT Investment into Fixed Interest Markets (7 February 1991)
- Minute Paper - Expansion of Investment Powers (4 March 1991)
- Attachment A - Extract from ACT Audit Act 1989
- Minute Paper - Expansion of Investment Powers - Additional Briefing (14 March 1991)
- Proposed External Management of Superannuation Funds (19 February 1992)
- Minute Paper - Expansion of ACTBIT Operations (21 May 1992)
- Letter from John Leahy, Parliamentary Counsel to Peter Quinton of General Law Group dated 18 May 1999
- ACT Financial Management Guidelines Explanatory Memorandum
- ACT Financial Management Guidelines dated 19 May 1999

(B) Brief to Chief Minister from Office of Financial Management and Department of Justice and Community Safety:

- Letter from Peter Quinton, of ACT Department of Justice and Community Safety and Andrew Clarke of Chief Minister's Office to Chief Minister dated 26 May 1999
- Letter from John Leahy, Parliamentary Counsel to Peter Quinton of ACT Department of Justice and Community Safety dated 24 May 1999
- Treasurer's Financial Delegations dated 27 May 1999

(C) Brief to Chief Minister from Acting Chief Minister (27 May 1999), including:

- Minute from Philip Mitchell, ACT Government Solicitor to Chief Minister dated 27 May 1999

APPENDIX 7 (con't)

6. UNDER TREASURER'S EXPLANATION FOR 30 JUNE 1998 OVERNIGHT BORROWING

(A) Letter from Mick Lilley, Under Treasurer to J Parkinson, Auditor-General dated 19 July 1999

(B) Statement by Office of Financial Management dated July 1999, with attachments:

- Attachment A - Letter from Mick Lilley, Under Treasurer to Moiya Ford, Strategic Business Projects dated 22 December 1997
- Attachment B - Minute from Chris Bellchambers to Mick Lilley dated 20 February 1998
- Attachment C - Memo from Michael Bato/Julian Walter, Bato Partners to Mick Lilley dated 23 June 1998
- Attachment D - Email from Lindy Price to Mick Lilley dated 25 June 1998
- Attachment E - Letter from Mick Lilley to CBA dated 26 June 1998
- Attachment F - Email from Lindy Price to Mick Lilley dated 26 June 1998
- Attachment G - Minute from Mick Lilley to Chief Executive dated 28 June 1998
- Attachment H - Letter from Mick Lilley to CBA dated 29 June 1998
- Attachment I - Letter from Mick Lilley to CBA dated 11 September 1998

7. ADDITIONAL DOCUMENTS

- Extracts from unaudited and audited financial statements (Department of Business, Employment, Tourism, the Arts, Regulatory Reform and Industrial Relations)
- ACT Government Cabinet Minute Decision No 6543 dated 8 December 1997, with attached briefing paper from Minister for Business and Employment
- ACT Government Cabinet Minute Decision No 6590 dated 12 January 1998, with attached briefing paper from Minister for Business and Employment

APPENDIX 7 (con't)

- Minute from Mick Lilley to Director, Economic Management dated 22 December 1997
- Minute from Lindy Price to Andrew Clarke dated 22 December 1997.

Schedule 2 - Main relevant provisions of the Financial Management Act 1996 (ACT)

Necessity for appropriation

6 No payment of public money shall be made otherwise than in accordance with an appropriation.

Territory bank account

33 The Treasurer shall open and maintain a bank account for the purposes of the Territory

Investment of public money

38(1) The Treasurer may invest any money held in the Territory bank account or departmental bank accounts for such period and on such terms and conditions as he or she thinks fit -

(a) on deposit with a bank;

(b) in the purchase of a bill of exchange that is drawn or accepted by a bank

(c) in a loan to a person who is a dealer in the short term money market;

(d) in Territory, State or Commonwealth securities; or

(e) in any prescribed investment.

(2) Transfers between the Territory bank account and departmental bank accounts to facilitate investments may be made without appropriation.

(3) Interest received from the investment of public money shall be paid to the Territory bank account.

(4) The Treasurer may determine the amount of interest to be credited to departmental bank accounts and such amounts may be paid without further appropriation from the Territory bank account subject to the total amount paid not exceeding the interest received in the Territory bank account.

Treasurer may borrow on behalf of Territory

40 The Treasurer may, on behalf of the Territory, if necessary or expedient in the public interest to do so -

(a) borrow money;

(b) give security for the repayment of an amount borrowed or the payment of interest on such an amount; or

(c) enter into a financing lease.

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Payments by Treasurer

46 The Treasurer may make such payments as are required in respect of expenses incurred in borrowing on behalf of the Territory, and in respect of repayments of borrowings on behalf of the Territory, without further appropriation.

Regulations and guidelines

67(1) The Executive may make regulations for the purposes of this Act.

(2) The Treasurer may issue financial management guidelines, not inconsistent with this Act or the regulations, for the purposes of this Act or the regulations.

APPENDIX 8

SECTIONS 9 AND 29 OF THE PUBLIC SECTOR MANAGEMENT ACT 1994

APPENDIX 8

Section 9

General obligations of public employees

9. A public employee shall, in performing his or her duties:

(a) exercise reasonable care and skill;

(b) act impartially;

(C) ACT WITH PROBITY;

(d) treat members of the public and other public employees with courtesy and sensitivity to their rights, duties and aspirations;

(e) in dealing with members of the public, make all reasonable efforts to assist them to understand their entitlements under the laws of the Territory and to understand any requirements which they are obliged to satisfy under those laws;

(f) not harass a member of the public or another public employee, whether sexually or otherwise;

(g) not unlawfully coerce a member of the public or another public employee;

(h) comply with this Act, the management standards and all other laws of the Territory;

(j) comply with any lawful and reasonable direction given by a person having authority to give the direction;

(k) if the employee has an interest, pecuniary or otherwise, that could conflict, or appear to conflict, with the proper performance of his or her duties-

(i) disclose the interest to his or her supervisor, and

(ii) take reasonable action to avoid the conflict;

as soon as possible after the relevant facts come to the employee's notice;

APPENDIX 8 (con't)

(m) not take, or seek to take, improper advantage of his or her position in order to obtain a benefit for the employee or any other person;

(n) not take, or seek to take, improper advantage, for the benefit of the employee or any other person, of any information acquired, or any document to which the employee has access, as a consequence of his or her employment;

(p) not disclose, without lawful authority-

(i) any information acquired by him or her as a consequence of his or her employment; or

(ii) any information acquired by him or her from any document to which he or she has access as a consequence of his or her employment;

(q) not make a comment which he or she is not authorised to make where the comment may be expected to be taken to be an official comment;

(r) not make improper use of the property of the Territory;

(s) avoid waste and extravagance in the use of the property of the Territory;

(t) report to an appropriate authority-

(i) any corrupt or fraudulent conduct in the public sector that comes to his or her attention; or

(ii) any possible maladministration in the public sector that he or she has reason to suspect.

APPENDIX 8 (con't)

Section 29

Responsibilities

29. (1) A Chief Executive, other than a Chief Executive assigned under subsection (2), shall, in relation to each administrative unit under his or her control-

(a) be responsible, under the relevant Minister, for its administration and its business;

(b) advise that Minister on all matters relating to the unit; and

(c) have regard to the interests of the Government and the Service as a whole.

(2) The Chief Minister may assign a Chief Executive (including an unattached Chief Executive) to special duties on behalf of the Territory.

APPENDIX 9

EXTRACT FROM EXECUTIVE SERVICE EMPLOYMENT CONTRACT

APPENDIX 9

Suspension

The Employer may, by written notice, suspend the Executive from duty at any time on terms and conditions specified by the Employer if, in the reasonable opinion of the Employer, the Executive is or may be guilty of misconduct.

For the purposes of clause 13, misconduct includes a breach of Section 9 of the Act.

The notice of suspension will contain:-

(a) the reason(s) for the suspension; and

(b) a review or expiry date for the suspension.

Annexure

Reports Published in 1993

1 Management of Capital Works Projects

2 Asbestos Removal Program

3 Various Performance Audits Conducted to 30 June 1993
- **Debt Recovery Operations by the ACT Revenue Office**
- **Publicity Unaccountable Government Activities**
- **Motor Vehicle Driver Testing Procedures**

4 Various Performance Audits
- **Government Home Loans Program**
- **Capital Equipment Purchases**
- **Human Resources Management System (HRMS)**
- **Selection of the ACT Government Banker**

5 Visiting Medical Officers

6 Government Schooling Program

7 Annual Management Report for the Year Ended 30 June 1993

8 Redundancies

9 Overtime and Allowances

10 Family Services Sub-Program

11 Financial Audits with Years Endings to 30 June 1993

Reports Published in 1994

1 Overtime and Allowances - Part 2

2 Department of Health - Health Grants
- Management of Information Technology

3 Public Housing Maintenance

4 ACT Treasury - Gaming Machine Administration
- Banking Arrangements

5 Annual Management Report for Year Ended 30 June 1994

6 Various Agencies - Inter-Agency Charging
- Management of Private Trust Monies

7 Various Agencies - Overseas Travel - Executives and Others
- Implementation of Major IT Projects

12 Reports were issued prior to 1992. Details can be obtained from the ACT Auditor-General's Office or the ACT Auditor-General's homepage: http://www.audit.act.gov.au.

Annexure (continued)

8 Financial Audits with Years Ending to 30 June 1994

9 Performance Indicators Reporting

Reports Published in 1995

1 Government Passenger Cars

2 Whistleblower Investigations Completed to 30 June 1995

3 Canberra Institute of Technology - Comparative Teaching Costs and Effectiveness

4 Government Secondary Colleges

5 Annual Management Report for Year Ended 30 June 1995

6 Contract for Collection of Domestic Garbage/Non-Salary Entitlements for Senior Government Officers

7 ACTEW Benchmarked

8 Financial Audits With Years Ending to 30 June 1995

Reports Published in 1996

1 Legislative Assembly Members - Superannuation Payments/Members' Staff - Allowances and Severance Payments

2 1995 Taxi Plates Auction

3 VMO Contracts

4 Land Joint Ventures

5 Management of Former Sheep Dip Sites

6 Collection of Court Fines

7 Annual Management Report For Year Ended 30 June 1996

8 Australian International Hotel School

9 ACT Cultural Development Funding Program

10 Implementation of 1994 Housing Review

11 Financial Audits with Years Ending to 30 June 1996

12 Reports were issued prior to 1992. Details can be obtained from the ACT Auditor-General's Office or the ACT Auditor-General's homepage: http://www.audit.act.gov.au.

Annexure (continued)

Reports Published in 1997

1 Contracting Pool and Leisure Centres

2 Road and Streetlight Maintenance

3 1995-96 Territory Operating Loss

4 ACT Public Hospitals - Same Day Admissions
Non Government Organisation - Audit of Potential Conflict of Interest

5 Management of Leave Liabilities

6 The Canberra Hospital Management's Salaried Specialists Private Practice

7 ACT Community Care - Disability Program and Community Nursing

8 Salaried Specialists' Use of Private Practice Privileges

9 Fleet Leasing Arrangements

10 Public Interest Disclosures - Lease Variation Charges
- Corrective Services

11 Annual Management Report for Year Ended 30 June 1997

12 Financial Audits with Years Ending to 30 June 1997

13 Management of Nursing Services

Reports Published in 1998

1 Management of Preschool Education

2 Lease Variation Charges - Follow-up Review

3 Major IT Projects - Follow-up Review

4 Annual Management Report for Year Ended 30 June 1998

5 Management of Housing Assistance

6 Assembly Members' Superannuation and Severance Payments to Former Members' Staffers

7 Magistrates Court Bail Processes

8 Territory Operating Losses and Financial Position

9 Financial Audits with Years Ending To 30 June 1998

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Annexure (continued)

10 Management of Schools Repairs and Maintenance

11 Overtime Payment To A Former Legislative Assembly Member's Staffer

Reports Published in 1999

1 Stamp Duty on Motor Vehicle Registrations

2 The Management of Year 2000 Risks

3 Annual Management Report for the Year Ended 30 June 1999

4 Financial Audits with Years Ending To 30 June 1999

Reports Published in 2000

1. Bruce Stadium Redevelopment — Summary Report

2. Bruce Stadium Redevelopment — Value for Money

3. Bruce Stadium Redevelopment — Costs and Benefits

4. Bruce Stadium Redevelopment — Decision to Redevelop the Stadium

5. Bruce Stadium Redevelopment — Selection of the Project Manager

6. Bruce Stadium Redevelopment — Financing Arrangements

7. Bruce Stadium Redevelopment — Stadium Financial Model

8. Bruce Stadium Redevelopment — Actual Costs and Cost Estimates

9. Bruce Stadium Redevelopment — Market Research and Marketing

10. Bruce Stadium Redevelopment — Stadium Hiring Agreements

11. Bruce Stadium Redevelopment — Lawfulness of Expenditure

12. Bruce Stadium Redevelopment — Governance and Management

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