

# **REGULATION REVIEW COMMITTEE**

**PARLIAMENT OF NEW SOUTH WALES**

**INQUIRY AND REPORT BY THE REGULATION REVIEW  
COMMITTEE INTO A REGULATION UNDER  
THE PUBLIC FINANCE AND AUDIT ACT 1983 RELATING TO  
PAYMENT OF DIVIDENDS OF STATUTORY AUTHORITIES  
TO THE CONSOLIDATED FUND**

**Report No. 12  
APRIL 1991**

REGULATION REVIEW COMMITTEE  
12TH REPORT TO PARLIAMENT ON REGULATIONS

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MEMBERS

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Mr. G.A. Yeomans, B.A., Dip.Ed. M.P. (Vice-Chairman)  
Mr. R.F. Chappell, M.P.  
Mr. R.W.J. Christie, M.P.  
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Mr. J.C. Mills, B.Sc (Hons), M.Sc., A.R.A.C.I., C. Chem., M.P.  
Mr. T.J. Rumble, A.A.S.A  
The Hon. S.B. Mutch, M.A., LL.B., M.L.C.  
The Hon. J.W. Shaw, Q.C., B.A., LL.B.

STAFF

Mr. J.B. Jefferis, B.A. LL.B., Director  
Mr. G.S. Hogg, Dip.Law (B.A.B.), Dip.Crim., Legal Officer  
Ms. P. Azarias B.A. (Hons) (Sydney) M.A. (Oxon) M.P.A.  
(Princeton), Project Officer/Specialist  
Ms. H. Minnican B.A. (Hons) Committee Clerk  
Ms. C. Sciara, Stenographer

INQUIRY AND REPORT BY THE REGULATION REVIEW COMMITTEE  
INTO A REGULATION UNDER  
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1. FUNCTIONS OF REGULATION REVIEW COMMITTEE

Section 9(2) of the Regulation Review Act 1987 states that a function of the Committee is to inquire into, and report to both Houses of Parliament on any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

2. REFERENCE OF MATTER TO REGULATION REVIEW COMMITTEE BY PREMIER AND TREASURER

On 21 January, 1991 the Premier and Treasurer wrote to the Chairman of the Regulation Review Committee in the following terms:

"Dear Mr Cruickshank,

I write with reference to a motion in the Legislative Council on Wednesday 28 November, moved by the Hon. Richard Jones MLC, seeking the disallowance of the amendment to the Public Finance and Audit Regulation 1984 which was gazetted on 15 June 1990 (Government Gazette No. 76, page 4768).

In accordance with the wishes of the majority of members, the Hon. E. P. Pickering, MLC, the leader of the Government in the Legislative Council, has requested me to refer the amendment to the Regulation Review Committee for consideration and report, under section 9(2)(b) of the Regulation Review Act 1987. This I now do, with the terms of reference appended to this letter.

Yours sincerely,

N. Greiner,  
Premier and Treasurer."

### 3. TERMS OF REFERENCE OF INQUIRY

The terms of reference (including background) appended to the letter of the Premier and Treasurer are as follows:

"TERMS OF REFERENCE FOR REVIEW BY THE REGULATION REVIEW COMMITTEE UNDER SECTION 9(2)(B) OF THE REGULATION REVIEW ACT 1987 OF THE AMENDMENT TO THE PUBLIC FINANCE AND AUDIT REGULATION 1984 PUBLISHED IN THE GOVERNMENT GAZETTE NO. 76, DATED 15 JUNE 1990, PAGE 4768, NOTICE OF WHICH WAS LAID UPON THE TABLE OF THE LEGISLATIVE COUNCIL ON 25 OCTOBER 1990

#### Background

Section 59B of the Public Finance and Audit Act 1983 (PF&A Act) provides that the Treasurer may at any time require a prescribed statutory authority to pay a dividend to the Consolidated Fund, in such a way and of such an amount as the Treasurer determines. It is the key provision under which dividends have been sought from GTEs (as distinct from SOCs). [i.e. Government Trading Enterprises, Stated Owned Corporations].

As the PF&A Act itself does not prescribe authorities, prescription must be by regulation. Before 15 June 1990, the only authorities which had been prescribed were the Electricity Commission, the Hunter Water Board and the Water Board.

Accordingly an amendment to the Public Finance and Audit Regulation 1984 was drafted with the objective of allowing the Treasurer to seek dividends under section 59B of the PF&A Act from selected additional statutory authorities. This amendment was gazetted on 15 June 1990.

The amendment prescribed all statutory authorities listed in Schedule 2 to the PF&A Act. Currently dividends are being sought from a subset of the authorities listed in the schedule and it is anticipated that, over time, dividends will be sought from additional authorities as they become more commercial. Dividends

will only be sought from an authority after consultation between that authority and the Treasury, acting on behalf of the Treasurer.

#### Terms of Reference

The Committee is requested to review and report, under section 9(2)(b) of the Regulation Review Act 1987, on the amendment to the Public Finance and Audit Regulation 1984 which was gazetted on 15 June 1990 in order to ascertain

- (1) whether the amendment as drafted is within the general objects of section 59B of the PF&A Act 1983;
- (2) whether the amendment as drafted satisfies the objective with which it was made;
- (3) whether the form or intention of the amendment as drafted calls for elucidation."

#### 4. TEXT OF SECTION 59B OF THE PUBLIC FINANCE AND AUDIT ACT 1983

##### Payment of certain amounts by statutory authority to Consolidated Fund

59B. (1) In this section, "dividend", in relation to a statutory authority, means an amount calculated by applying a rate, determined by the Treasurer, to the assets, or some portion of the assets, of the statutory authority.

(2) Notwithstanding any other Act, the Treasurer may at any time require a prescribed statutory authority to pay to the credit of the Consolidated Fund, at such times and in such manner as the Treasurer directs, such amount by way of dividend as the Treasurer may determine and notify to the statutory authority.

(3) The Treasurer may require a statutory authority to prepare and submit to the Treasurer such accounting statements (if any), required for the determination of

dividends payable by the statutory authority, in such manner (if any) and such form (if any) as the Treasurer determines.

(4) A statutory authority shall comply with a requirement made in respect of it by the Treasurer under this section.

(5) Notwithstanding any other Act, the Treasurer may, in relation to a payment by a statutory authority under this section, make any one or more of the following determinations:

- (a) that the payment shall be deemed to be payment or part payment of another amount, specified by the Treasurer, which the statutory authority is required to pay to the Treasurer;
- (b) that the payment shall be paid in addition to any other amount which the statutory authority is required to pay to the Treasurer;
- (c) that the payment shall be deemed to be an obligation of the statutory authority under the Act by which the statutory authority is constituted."

5. TEXT OF AMENDMENT TO THE PUBLIC FINANCE AND AUDIT REGULATIONS  
1984 PUBLISHED IN GOVERNMENT GAZETTE NO. 76 ON 15 JUNE 1990

"PUBLIC FINANCE AND AUDIT ACT 1983 - REGULATION  
 (Relating to payment of dividends of statutory  
 authorities to the Consolidated Fund)

HIS Excellency the Governor, with the advice of the Executive Council, and in pursuance of the Public Finance and Audit Act 1983, has been pleased to make the Regulation set forth hereunder.

Garry West  
 for Premier and Treasurer.

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The Public Finance and Audit Regulation 1984 is amended by omitting clause 5 and by inserting instead the following clause:

Statutory authorities liable to pay dividends to  
Consolidated Fund

5. For the purposes of section 59B of the Act, the statutory authorities specified in Schedule 2 to the Act are prescribed.

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EXPLANATORY NOTE

Section 59B of the Public Finance and Audit Act provides that the Treasurer may require a prescribed statutory authority to pay to the Consolidated Fund such amount by way of dividend as the Treasurer determines. The object of this Regulation is to prescribe the statutory authorities specified in Schedule 2 to that Act as authorities for the purposes of that section."

6. SCHEDULE OF STATUTORY AUTHORITIES PRESCRIBED FOR PURPOSES OF SECTION 59B.

The list of statutory authorities specified in Schedule 2 of the Public Finance and Audit Act 1983 is set out in Appendix I of this Report.

7. REQUEST TO CROWN SOLICITOR FOR ADVICE

At a meeting held on 21 February 1991 the Committee resolved to write to the Crown Solicitor seeking his views on:

- (a) whether it was necessary for the terminology of the Premier's reference to be clarified;
- (b) whether the amendment as drafted was within the general objects of section 59B of the Public Finance and Audit Act.



(A copy of the letter to the Crown Solicitor is attached as Appendix II of this Report).

On 27 February 1991 the Crown Solicitor advised the Committee that he had formed the view that, given the circumstances, it would be appropriate to brief Counsel at the private bar to advise on the Committee's questions. He informed the Committee that Mr Ronald Sackville of Counsel had agreed to accept a brief and that he would forward his advice as soon as it was to hand.

9. TEXT OF ADVICE FROM CROWN SOLICITOR

On 6 March 1991 the State Crown Solicitor forwarded the advice of Counsel. The text of that advice is set out in Appendix III of this Report.

10. FURTHER ADVICE SOUGHT FROM CROWN SOLICITOR

On 21 March 1990 the Committee examined in detail the advice of Counsel and resolved to seek clarification from Mr Sackville on one matter: the relevance to the objects of section 59B of the ownership of any authority prescribed under that section.

On 28 November 1990, during debate on the motion for disallowance of the regulation, the Hon. E.P. Pickering, Leader of the Government in the Legislative Council, stated: "The key element of the reform program is the payment of dividends by commercial authorities. The Government and the people of this State are the owners of these enterprises. Therefore, they have a right to a return from assets that have been made available to enterprises."

The Committee considered that it would be useful if Mr Sackville could clarify whether the commercial basis of the authority must also be accompanied by a component of Crown or public ownership.

This issue had additional relevance because the Local Government Electricity Association of New South Wales in written notes

provided to the Hon. S. Mutch MLC and tabled with the Committee stated as follows:-

"For a considerable time now, the NSW Government have been looking at ways of improving the business performance of Government and semi-Government trading organisations. An issue which has received considerable attention is the question of "dividends" which might serve as a means of ensuring appropriate returns are earned on the assets employed.

A recent paper by the Governments "GTE Monitoring Unit" outlining the issues involved, is attached as Attachment 5. The paper is based upon the assumption (paragraph 2) that "each of the State's GTEs are businesses owned by the taxpayers and that the State Government, as the "agent" of the taxpayer should be entitled to receive a return on their investment.

The Local Government Electricity Association of NSW, in contrast, believes that there is no ownership relationship between the State Government and electricity councils; the relationship is a regulatory one only.

Over the years, councils' operations and assets have been funded by the industry itself and its customers. The State Government does not have any equity or capital in distribution utilities. Such small payments as have been made from time to time have been to partially pay for community service obligations imposed by the Government.

Against this background, LGEA argues that there is no justification for any imposition of any taxation by way of a dividend to Government. Association policy is that any "excess funds" within a council should be used, in the first instance, to reduce the cost of electricity to that council's customers and secondly, to benefit customers in other county districts."

On 21 March 1991 the Committee wrote to the Crown Solicitor for

the purpose of obtaining additional advice from Mr Sackville on this issue.

11. TEXT OF FURTHER ADVICE FROM COUNSEL

The text of that advice is set out in Appendix IV of this Report.

12. CONSIDERATION OF LEGAL ADVICE

In paragraph 15 of his advice Mr Sackville states that the purpose or object of section 59B "can fairly be described as permitting the Treasurer to require a statutory body operating on a commercial basis, with the assistance of public funds, to pay a dividend (not necessarily out of earnings) to the Consolidated Fund".

Counsel's advice shows that on this view of the objects of section 59B the statutory bodies specified in Schedule 2 of the Public Finance and Audit Act include many which cannot be described as operating or intended to operate on a commercial basis. He comments that this is not surprising because the purpose of Schedule 2 is to specify statutory authorities which must comply with the auditing requirements of Part 3, Division 3 of the Act. This, he notes, is quite a different purpose from that embodied in the regulation making power, insofar as it relates to section 59B of the Act.

Mr Sackville examines the consequences of taking a contrary view of the objects of section 59B. He concludes this would lead to the result that a proportion of the assets, by way of a dividend, could be acquired from any prescribed statutory authority notwithstanding that it did not operate on a commercial basis and did not generate earnings which could service those dividends. He considered this result would not be intended and that a court would strive to avoid it by reference to the underlying purpose or object of section 59B of the Public Finance and Audit Act.

In paragraph 18 of his advice Counsel states:

"18. It seems to me, therefore, to be open to the Committee to conclude that amending regulation, as drafted, is too broad to be within the general objects of s. 59B. This is because it extends to many statutory bodies which do not, and will not in the foreseeable future, operate on a commercial basis. It follows that, in my opinion, it would also be open to the Committee to report that the amending regulation should be reframed so that it covers only those bodies which now operate on a commercial basis or which can reasonably be expected to operate on such a basis in the foreseeable future."

In his further memorandum of advice dated 9 April, 1991 Mr Sackville clarified the relevance to section 59B of the ownership of any statutory authority prescribed under that section. He said he found it difficult to conclude from the materials referred to in his earlier memorandum, that some specified element of Crown or public ownership is a necessary prerequisite to the operation of section 59B. He said, referring to the case of a county council, that he found it difficult to conclude they would be outside the scope of section 59B merely because the Government is not the sole shareholder.

He said:

"8. .... However, if a county council did make profit from trading activities and did so through the exercise of statutory powers and with the assistance of Government financial support, it does not seem to me to be inconsistent with the objectives of s. 59B that the Treasurer should be permitted to require part of the profit to be paid to consolidated revenue. The mere fact that the Government is not the sole shareholder would not, it seems to me, deprive the county council of the character of a public authority trading for commercial purposes. In other words, it seems to me to be within the contemplation of s. 59B that a statutory

authority operating on a commercial basis and for this purpose utilizing specific statutory powers and Governmental financial assistance, might be the subject of a direction in relation to dividends. Of course, whether it is appropriate to exercise the power in a given case is a different matter."

His general conclusion was that he did not consider it implicit in section 59B of the Public Finance and Audit Act that a direction to pay a dividend is available only in relation to a statutory authority which is publicly owned, in the sense of having a shareholding held entirely by Government.

Although advice from Mr Sackville was only sought in relation to the first term of reference the text of his advice effectively answers both of the other issues referred by the Premier to the Committee.

On the basis of that advice the Regulation Review Committee considers that clause 5 of the Public Finance and Audit Regulation 1984 should be amended so that it includes only those statutory authorities which operate on a commercial basis. The Committee does not support the additional inclusion in the regulation of those bodies which can reasonably be expected to operate on a commercial basis in the foreseeable future. Although Counsel was of the opinion that these could legally be included it would seem a preferable course to limit the prescribed authorities to those bodies which operate on a commercial basis.

The Committee suggests this qualification because section 4 and the Guidelines in Schedule 1 of the Subordinate Legislation Act require the Minister to check that the objectives of each amending regulation are in accordance with the objectives of the enabling Act and not inconsistent with stated Government policies (Schedule 1(2)(b)). This would mean that the action of prescribing by regulation any additional statutory authority would have to be accompanied by an explicit justification of the

commercial nature of that authority in terms of the objectives of section 59B. It would also promote consistency between the intentions of the regulation and aspects of Government policy, such as Crown or public ownership of the authority, that might be applicable to it.

That Schedule also obliges the responsible Minister to ensure that administrative decisions are based on adequate information and consultation concerning the need for or consequences of the proposed action. This would serve to draw the particular statutory authority into the consultation process. Of course if the regulation was redrawn by the Parliamentary Counsel in the form of a principal statutory rule it would have to be the subject of a formal regulatory impact statement in accordance with section 5 of the Subordinate Legislation Act 1989.

The Committee is also of the opinion that guidelines, for the information of the public, should be drawn up by the Treasurer setting out the criteria on which statutory authorities would be eligible to be prescribed for the purposes of the regulation. This would promote a consistent and predictable basis on which authorities could be prescribed under the regulation. The Committee also considers that the Minister, when tabling any regulation altering or adding to the list of prescribed authorities referred to in clause 5, should accompany it with detailed supporting reasons for the regulation so that Parliament can effectively examine the matter if it wishes to do so.

On the basis of Counsel's advice the Committee answers the questions referred to it by the Premier as follows:-

Questions 1 and 2: No  
Question 3: Yes

RECOMMENDATIONS

The Regulation Review Committee makes the following recommendations to Parliament:

Recommendation 1:

That clause 5 of the Public Finance and Audit Regulation 1984 be amended so that it includes only those statutory authorities which operate on a commercial basis.

Recommendation 2:

That Guidelines be drawn up by the Treasurer setting out the criteria on which statutory authorities would be eligible to be prescribed for the purposes of the regulation.

Recommendation 3:

That the Minister, when tabling any regulation altering or adding to the list of prescribed authorities referred to in clause 5, accompany it with detailed supporting reasons for the regulation so that Parliament can effectively examine the matter if it wishes to do so.

Dated:

Adrian Cruickshank, M.P.,  
Chairman  
Regulation Review Committee.

APPENDIX IPUBLIC FINANCE AND AUDIT ACT 1983SCHEDULE 2 - STATUTORY BODIES

Administrator of the Fish River Water Supply.  
Administrator of the South-west Tablelands Water Supply.  
Agricultural Marketing Finance Agency.  
Albury-Wodonga (New South Wales) Corporation.  
Archives Authority of New South Wales.  
Art Gallery of New South Wales Trust.  
Auditor-General Office.  
Australian Museum Trust.  
Banana Industry Committee.  
Barristers Admission Board constituted by the Legal Profession Act 1987.  
Bicentennial Park Trust.  
Board of Architects of New South Wales.  
Board of Governors of the University of Western Sydney.  
Board of Optometrical Registration.  
Board of Surveyors of New South Wales.  
Board of Veterinary Surgeons of New South Wales.  
Broken Hill Water Board.  
Building and Construction Industry Long Service Payments Corporation.  
Building Services Corporation.  
Bursary Endowment Board.  
A Catchment Management Trust established under the Catchment Management Act 1989.  
Centennial Park Trust.  
Central West County Council.  
Chipping Norton Lake Authority.



Chiropodists Registration Board.  
Chiropractors Registration Board.  
Coastal Council of New South Wales.  
Cobar Water Board.  
A corporation constituted under the Growth Centres  
(Development Corporations) Act 1974.  
Council of the Macquarie University.  
Council of the University of New England.  
Council of the University of New South Wales.  
Council of the University of Newcastle.  
Council of the University of Technology, Sydney.  
Council of the University of Wollongong.  
Dams Safety Committee.  
Dental Board.  
Dental Technicians Registration Board.  
Election Funding Authority of New South Wales.  
Electricity Commission of New South Wales.  
Energy Corporation of New South Wales.  
Entertainment Industry Interim Council.  
Environmental Education Trust.  
Environmental Research Trust.  
Environmental Restoration and Rehabilitation Trust.  
Fish Marketing Authority.  
Forestry Commission of New South Wales.  
Geological and Mining Museum Trust.  
Government Insurance Office of New South Wales.  
Greyhound Racing Control Board.  
Harness Racing Authority of New South Wales.  
Historic Houses Trust of New South Wales.

Home Care Service of New South Wales.

Homebush Abattoir Corporation.

Hunter District Water Board.

Hunter Valley Conservation Trust.

Illawarra County Council.

Insurance Premiums Committee constituted under the Workers' Compensation Act 1926.

Internal Audit Bureau.

Joint Committee established under paragraph 30 of the Schedule to the Workmen's Compensation (Broken Hill) Act 1920.

Lake Illawarra Authority.

Land Titles Office.

Legal Aid Commission of New South Wales.

Library Council of New South Wales.

Lord Howe Island Board.

Macquarie County Council.

Maritime Services Board of New South Wales.

A marketing board constituted under the Marketing of Primary Products Act 1983.

A marketing committee constituted under the Marketing of Primary Products Act 1983.

Metropolitan Waste Disposal Authority.

Mine Subsidence Board.

Mines Rescue Board.

Minister administering the Environmental Planning and Assessment Act 1979, being the corporation sole constituted under section 8(1) of the Environmental Planning and Assessment Act 1979.

Minister administering the Heritage Act 1977 being the corporation sole constituted under section 102(1) of the Heritage Act 1977.

Monaro County Council.

Motor Accidents Authority of New South Wales.

Motor Vehicle Repair Industry Council.  
Murray River County Council.  
Murrumbidgee County Council.  
Namoi Valley County Council.  
New Darling Harbour Authority.  
New England County Council.  
New South Wales Aboriginal Land Council.  
New South Wales Coal Compensation Board.  
[New South Wales Commercial Fishing Advisory Council].  
New South Wales Dairy Corporation.  
New South Wales Dried Fruits Board.  
New South Wales Film and Television Office.  
New South Wales Institute of Psychiatry.  
New South Wales Land and Housing Corporation.  
New South Wales Lotteries.  
New South Wales Meat Industry Authority.  
New South Wales Medical Board.  
New South Wales Rural Assistance Authority.  
New South Wales Science and Technology Council.  
New South Wales State Cancer Council.  
New South Wales Treasury Corporation.  
Newcastle International Sports Centre Trust.  
North-West County Council.  
Northern Rivers County Council.  
Nurses Registration Board.  
Officer in charge of the State Brickworks.  
Ophir County Council.  
Optical Dispensers Licensing Board.

Parramatta Stadium Trust.

Pathology Laboratories Accreditation Board.

Peel-Cunningham County Council.

Pharmacy Board of New South Wales.

Physiotherapists Registration Board.

Property Services Group.

Prospect County Council.

Protective Commissioner.

Public Sector Executives Superannuation Board of New South Wales.

Public Servant Housing Authority of New South Wales.

Public Trustee.

Real Estate Services Council.

A Regional Aboriginal Land Council constituted under the  
Aboriginal Lands Rights Act 1983.

Rental Bond Board.

Roads and Traffic Authority of New South Wales.

Royal Botanic Gardens and Domain Trust.

Senate of the University of Sydney.

Shortland County Council.

Solicitors Admission Board constituted by the Legal Profession  
Act 1987.

South-west Slopes County Council.

Southern Mitchell County Council.

Southern Tablelands County Council.

Sporting Injuries Committee.

State Authorities Superannuation Board.

State Rail Authority of New South Wales.

State Sports Centre Trust.

State Transit Authority of New South Wales.

Superannuation Tribunal constituted under the Coal and Oil Shale Mine Workers (Superannuation) Act 1941.

Sydney Cove Redevelopment Authority.

Sydney Cricket and Sports Ground Trust.

Sydney Electricity.

Sydney Market Authority.

Sydney Opera House Trust.

Teacher Housing Authority of New South Wales.

Totalizator Agency Board.

[Tow Truck Industry Corporation of New South Wales].

Tow Truck Industry Council of New South Wales.

Trustees of a Fund or Funds Specified in an order published in the Gazette for the purposes of section 3 or 6 of the Technical Education Trust Funds Act 1967.

Trustees of the Anzac Memorial Building.

Trustees of the Museum of Applied Arts and Sciences.

Trustees of the Parliamentary Contributory Superannuation Scheme.

Tumut River County Council.

Ulan County Council.

Under Secretary of the Department of the Attorney-General and of Justice, being the corporation sole constituted under section 4(1) of the Suitors' Fund Act 1951.

Upper Parramatta River Catchment Trust.

Water Board.

Wild Dog Destruction Board.

Wollongong Sportsground Trust.

WorkCover Authority.

Workers' Compensation (Dust Diseases) Board.

Zoological Parks Board of New South Wales.

APPENDIX NO. II

Mr H. K. Roberts,  
Crown Solicitor,  
Goodsell Building,  
Chifley Square,  
SYDNEY 2000.

21 February 1991.

Dear Mr Roberts,

Inquiry into an amendment to the  
Public Finance and Audit Regulation 1984

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Thank you for providing Mr Sackville's advice on this inquiry. It has usefully advanced the Committee's consideration of the issues involved. The Committee examined the advice in detail at its meeting on 21 March 1990 and resolved to seek clarification from Mr Sackville on one matter: the relevance to the objects of section 59B of the ownership of any authority prescribed under that section.

On 28 November 1990, during debate on the motion for disallowance of the regulation Mr Pickering stated: "The key element of the reform program is the payment of dividends by commercial authorities. The Government and the people of this State are the owners of these enterprises. Therefore, they have a right to a return from assets that have been made available to enterprises."

Mr Sackville seems to allude to this aspect in para. 15 when he refers to statutory bodies operating on a commercial basis "with the assistance of public funds". It would be useful if he could clarify whether the commercial basis of the authority must also be accompanied by a component of Crown or public ownership.

This issue already has particular relevance because the Local Government Electricity Association of New South Wales in written notes provided to the Hon. S. Mutch MLC and tabled with the Committee asserts as follows:-

"For a considerable time now, the NSW Government have been looking at ways of improving the business performance of Government and semi-Government trading organisations. An issue which has received considerable attention is the question of "dividends" which might serve as a means of ensuring appropriate returns are earned on the assets employed.

A recent paper by the Governments "GTE Monitoring Unit" outlining the issues involved, is attached as Attachment 5.

The paper is based upon the assumption (paragraph 2) that "each of the State's GTEs are businesses owned by the

taxpayers and that the State Government, as the "agent" of the taxpayer should be entitled to receive a return on their investment.

The Local Government Electricity Association of NSW, in contrast, believes that there is no ownership relationship between the State Government and electricity councils; the relationship is a regulatory one only.

Over the years, councils' operations and assets have been funded by the industry itself and its customers. The State Government does not have any equity or capital in distribution utilities. Such small payments as have been made from time to time have been to partially pay for community service obligations imposed by the Government.

Against this background, LGEA argues that there is no justification for any imposition of any taxation by way of a dividend to Government. Association policy is that any "excess funds" within a council should be used, in the first instance, to reduce the cost of electricity to that council's customers and secondly, to benefit customers in other county districts."

If it would be of assistance Mr Jim Jefferis, Director of the Committee's Secretariat (Ph: 287 6608), and Mr Greg Hogg, its Legal Officer, would be available to discuss the matter with Mr Sackville.

I have attached to this letter a copy of the representations to the Committee from the Local Government Electricity Association on this issue.

Yours sincerely,



Adrian Cruickshank, M.P.,  
Chairman  
Regulation Review Committee.

APPENDIX III

IN THE MATTER OF A REFERRAL TO THE REGULATION

REVIEW COMMITTEE

MEMORANDUM OF ADVICE

INTRODUCTION

1. I have been asked to advise in relation to two matters concerning a reference by the Premier and Treasurer, the Hon. N. Greiner, to the Regulation Review Committee pursuant to s.9(2)(b) of the Regulation Review Act 1987. The terms of reference (including the background) are as follows:

**"Background**

Section 59B of the Public Finance and Audit Act 1983 (PF&A Act) provides that the Treasurer may at any time require a prescribed statutory authority to pay a dividend to the Consolidated Fund, in such a way and of such an amount as the Treasurer determines. It is the key provision under which dividends have been sought from GTEs (as distinct from SOCs).

As the PF&A Act itself does not prescribe authorities, prescription must be by regulation. Before 15 June 1990, the only authorities which had been prescribed were the Electricity Commission, the Hunter Water Board and the Water Board.

Accordingly, an amendment to the Public Finance and Audit Regulation 1984 was drafted with the objective of allowing the Treasurer to seek dividends under Section 59B of the PF&A Act from selected additional statutory authorities. This amendment was gazetted on 15 June 1990.

The amendment prescribed all statutory authorities listed in Schedule 2 to the PF&A Act. Currently dividends are being sought from a subset of the authorities listed in the schedule and it is anticipated that, over time, dividends will be sought from additional authorities as they become more commercial. Dividends will only be sought from an authority after consultation between that authority and the Treasury, acting on behalf of the Treasurer.



### Terms of Reference

The Committee is requested to review and report, under Section 9(2)(b) of the Regulation Review Act 1987, on the amendment to the Public Finance and Audit Regulation 1984 which was gazetted on 15 June 1990 in order to ascertain

- (1) whether the amendment as drafted is within the general objects of Section 59B of the Public Finance and Audit Act 1983;
- (2) whether the amendment as drafted satisfies the objective with which it was made;
- (3) whether the form or intention of the amendment as drafted calls for elucidation."

2. The two matters on which I am asked to advise are as follows:

- (a) Is it necessary for the terminology of the Premier's reference to be clarified?
- (b) Is the amendment as drafted within the general objects of s.59B of the Public Finance and Audit Act?

### The Regulation Review Committee

3. The Regulation Review Committee is a joint committee of members of Parliament, constituted by s.4 of the Regulation Review Act 1987. The functions of the Committee are specified by s.9 of the Act:

"9.(1) The functions of the Committee are-

- (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament;
- (b) to consider whether the special attention of Parliament should be drawn to any such

regulation of any ground, including any of the following:

- (i) that the regulation trespasses unduly on personal rights and liberties;
  - (ii) that the regulation may have an adverse impact on the business community;
  - (iii) that the regulation may not have been within the general objects of the legislation under which it was made;
  - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
  - (v) that the objective of the regulation could have been achieved by alternative and more effective means;
  - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act; or
  - (vii) that the form or intention of the regulation calls for elucidation; and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

(2) Further functions of the Committee are -

- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time; and
- (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or

both Houses of Parliament) that is referred to it by a Minister of the Crown.

- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2)(b) by a Minister of the Crown."

The Committee takes evidence in public, except when the evidence relates to secret or confidential matters: ss.11,12.

#### The Public Finance and Audit Act

4. The Public Finance Act 1983 is an Act, according to its long title, to make provision with respect to the administration and audit of public finances. Part 3, Division 3 deals with "General audit of Statutory bodies". A "statutory body" is required to keep proper accounts and to submit financial statements after each financial year in accordance with the statutory requirements: ss.41, 41A, 41B. The Division also provides for the auditing of accounts and financial statements: ss.41C-43.
5. Section 39(1) provides that a reference to a statutory body is a reference inter alia, to the bodies specified in Schedule 2 to the Act. Schedule 2 specifies a very large number of statutory bodies. Some are commercial in character (such as the Homebush Abbatoir Corporation, the Government Insurance Office and the Electricity

Commission) but many are plainly not (such as the Archives Authority, the University Councils, the Barristers Admission Board and the Legal Aid Commission).

Section 59B

6. In 1987 the Public Finance and Audit Act was amended by the insertion of s.59B:

- "59B(1) In this section, "dividend", in relation to a statutory authority, means an amount calculated by applying a rate, determined by the Treasurer, to the assets, or some portion of the assets, of the statutory authority.
- (2) Notwithstanding any other Act, the Treasurer may at any time require a prescribed statutory authority to pay to the credit of the Consolidated Fund, at such times and in such manner as the Treasurer directs, such amount by way of dividend as the Treasurer may determine and notify to the statutory authority.
- (3) The Treasurer may require a statutory authority to prepare and submit to the Treasurer such accounting statements (if any), required for the determination of dividends payable by the statutory authority, in such manner (if any) and such form (if any) as the Treasurer determines.
- (4) A statutory authority shall comply with a requirement made in respect of it by the Treasurer under this section."

The Treasurer's Second Reading Speech dealt with this amendment as follows:

"The upgrading of the performance of the State's statutory authorities has been a key element of the Government's economic strategy. The measures in the main bill require the payment of dividends by statutory authorities. Such payments, which are to be directed to the

Consolidated Fund, form part of the Government's financial guidelines policy announced in the Budget. It is proposed that a number of authorities, operating on a commercial basis, will be required to meet financial targets, one such target being a divided payment. This type of payment is not innovative to this or other State administrations but it is believed that the extension of the current legislation providing for such payments will go some way toward improving the economic performance of the State's authorities."

7. The term "prescribed statutory authority" is not defined in the Act. However, s.64(1) empowers the Governor to make regulations for or with respect to any matter that is necessary or convenient to be prescribed for carrying out or giving effect to the Act.

#### The Regulations

8. Clause 5 of the Public Finance and Audit Regulation, as originally framed, provided as follows:

"5. The following statutory authorities are prescribed for the purposes of section 59B of the Act:

Electricity Commission of New South  
Wales.  
Hunter District Water Board.  
Water Board."

9. On 15 June 1990 an amendment to the Regulation was gazetted. The amendment omitted cl.5 and substituted a new cl.5:

"For the purposes of s.59B of the Act, the statutory authorities specified in Schedule 2 to

the Act are prescribed."

The explanatory note accompanying the Gazettal stated simply that:

"Section 59B of the Public Finance and Audit Act provides that the Treasurer may require a prescribed statutory authority to pay to the Consolidated Fund such amount by way of dividend as the Treasurer determines. The object of this Regulation is to prescribe the statutory authorities specified in Schedule 2 of that Act as authorities for the purposes of that section."

The amending regulation was tabled in the Legislative Council on 25 October 1990.

#### The Motion for Disallowance

10. On 28 November 1990, the Hon. R.S. Jones moved for disallowance of the amending regulation in the Legislative Council, pursuant to s.41(1)(b) of the Interpretation Act 1987. Mr Jones contended, in his speech, that many of the bodies listed in Schedule 2 are "singularly inappropriate for dividends to be paid by them as they are not government trading enterprises and therefore should not be subject to those payments": Parl. Deb., 28 November 1990, p.10863. In reply the Minister for Police and Emergency Services (the Hon. E.P. Pickering) stated that the Government's intention was that only 15 of the bodies specified in Schedule 2 would be required to pay a dividend. The remainder were included in the list "purely

as a matter of convenience" (see p.10867).

Question (a)

11. I do not think there is any need for the terminology employed in the Premier's letter to be clarified. It is true that the letter uses the word "review" rather than the word "inquire", which would have been more appropriate having regard to the terms of s.9(2)(b) of the Regulation Review Act 1987. But it seems to me clear, as the terms of reference make explicit, that the Premier was making a reference pursuant to s.9(2)(b) and, for that purpose was identifying the question upon which the Committee was to inquire and report. The Premier was clearly not intending to invoke the functions of the Committee relating to a systematic review of regulations based on a "staged repeal", as conferred by s.9(2)(a). In these circumstances the Committee has the power, authority and duty (see the definition of "function" in s.4(2)) to inquire into and report on the questions referred to it by the Premier.

Question (b)

12. Item (1) in the terms of reference of the Committee requires the Committee to review and report, under s.9(2)(b) of the Regulation Review Act 1987, on the amendment, to ascertain

"whether the amendment as drafted is within the general objects of Section 59B of the Public Finance and Audit Act 1983".

This language reflects the wording of s.9(1)(b)(iii) of the Act, which empowers the Committee to consider whether the special attention of Parliament should be drawn to any regulation on the ground that it "may not have been within the general objects of the legislation under which it was made".

13. Neither the Regulation Review Act 1987 nor the Premier's reference to the Committee defines the phrase "general objects of the legislation". Similarly, the Act does not define the somewhat elusive phrase "spirit of the legislation" referred to in s.9(1)(b)(iv). However, the general approach to statutory interpretation adopted by the courts provides some assistance. The courts have been directed by Parliament, in interpreting legislation, to take account of "the purpose or object underlying" an Act. Section 33 of the Interpretation Act (following the form of s.15AA of the Acts Interpretation Act 1901 (Cth)) states as follows:

"In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated...) shall be preferred to a construction that would not promote that purpose or object". (Emphasis added.)



Section 34 of the Interpretation Act permits reference (among other sources) to the Parliamentary Debates to clarify the meaning of an ambiguous provision in an Act.

14. Recent judicial pronouncements cast light on how courts are to ascertain the objects and purpose of legislation. In Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404, 423-4, McHugh JA said this:

"A purposive and not a literal approach is the method of statutory construction which now prevails... In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act. The Acts Interpretation Act 1901 (Cth), s.15AA, and the Interpretation Act 1987 (NSW), s.33, both require this approach to statutory construction....

But first and last the function of the court remains one of construction and not legislation....

Purposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgment as to where the boundary of construction ends and legislation begins. But it is the technique best calculated to give effect to the legislative intention and to deal with the detailed and diverse factual patterns which the legislature cannot always foresee but must have intended to deal with if the purpose of the legislation was to be achieved. Moreover, it is the technique which may finally induce the draftsmen of statutes to state broad principles rather than to draw the detailed enactments which now emanate from the legislatures...

If the objects and purposes of a statute and the means of their achievements are not declared,

they can only be determined by examining the statute as a whole. The ordinary meanings of the individual words together with any statutory definitions will invariably indicate what those objects, purposes and means are. The cumulative weight of their core meanings will indicate the general purpose or purposes of the statute....

Once the object or purpose of the legislation is delineated, the duty of the Court is to give effect to it in so far as, by addition or omission or clarification, the relevant provision is capable of achieving that purpose or object....

In Norcal Pty Ltd v D'Amato (1988) 15 NSWLR 376, 388-389,

Clark JA commended on s.33 of the Interpretation Act:

"It should also be borne in mind that when recourse is made to the Interpretation Act 1987, s.33, there is a need to exercise care in determining the precise purpose or object underlying the legislative provision in question. If that purpose or object is expressly stated in the Act then, in general, no difficulty arises although it may be questionable whether the particular section under consideration touches on that purpose or object. When, as here, there is no expression in the Act of the purpose or object the court is required to look to the terms of the legislation and the extrinsic materials referred to in the Interpretation Act 1987, s.34, in order to glean the relevant purpose or object. Even when the purpose of the legislation is ascertained it is necessary to consider whether the construction of the particular section under consideration is affected by the purpose or object underlying the legislation.

15. Section 59B of the Public Finance and Audit Act does not specify an "underlying purpose or object". Reference to the wording of the section alone perhaps might suggest that the section is not necessarily to be confined exclusively to commercial organisations capable of generating profits or earnings. The word "dividend" is

defined by reference to a proportion of the undertaking's assets and is not expressly confined to amounts paid out of earnings (its usual meaning). Nonetheless, the use of the word "dividend", despite the extended meaning, suggests that s.59B is concerned with statutory bodies operating (to use the Minister's words) "on a commercial basis". Its purpose or object can fairly be described as permitting the Treasurer to require a statutory body operating on the commercial basis, with the assistance of public funds, to pay a dividend (not necessarily out of earnings) to the Consolidated Fund. If there is ambiguity or doubt, this view of the purpose or object of s.59B is clearly supported by the Minister's Second Reading Speech, to which reference might be made under s.34 of the Interpretation Act 1987. I appreciate that the phrase "on a commercial basis" is itself by no means precise. Nonetheless there are clearly some statutory authorities which operate on a commercial basis and others which clearly do not and never could do so (at least without substantial restructuring).

16. If the reasoning in paragraph 15 is correct, it is plausible to read the regulation making power in s.64(1) of the Public Finance and Audit Act as authorising statutory authorities to be prescribed for the purposes of s.59B only where:
  - (a) they can reasonably be regarded as currently operating on a commercial basis; or

- (b) it can reasonably be expected that they will operate on a commercial basis within the foreseeable future.

It is clear, on any view, that the bodies specified in Schedule 2 of the Public Finance and Audit Act include many which cannot be described as operating or intended to operate on a commercial basis. This is not surprising, given that the purpose of Schedule 2 is to specify statutory authorities which must comply with the auditing requirements of Part 3, Division 3 of the Act. This purpose is of course quite different from that embodied in the regulation making power, insofar as it relates to s.59B of the Act.

17. The point of this analysis is not to conclude that the amending regulation is necessarily invalid (although I think a plausible argument to this effect could be mounted, at least in relation to bodies which plainly do not operate on a commercial basis). Rather, it is that the purpose or object of the Act, within the meaning of s.33 of the Interpretation Act, can be described in the terms used in the previous paragraph. Similarly, I think the same description can be applied to "the general objects of the legislation", as that phrase is used in s.9(1)(b)(iii) of the Regulation Review Act and in the Premier's letter of reference to the Committee.
18. It seems to me, therefore, to be open to the Committee to

conclude that amending regulation, as drafted, is too broad to be within the general objects of s.59B. This is because it extends to many statutory bodies which do not, and will not in the foreseeable future, operate on a commercial basis. It follows that, in my opinion, it would also be open to the Committee to report that the amending regulation should be reframed so that it covers only those bodies which now operate on a commercial basis or which can reasonably be expected to operate on such a basis in the foreseeable future.

19. I should add that this conclusion is reinforced by a further difficulty with the amending Regulation. It incorporates by reference the statutory authorities specified in Schedule 2 to the Public Finance and Audit Act. It is not clear whether this is intended to mean Schedule 2 in its current form, or Schedule 2 as amended from time to time. I think the latter is the more likely interpretation. If that is correct - and assuming a Regulation formed in this manner is not invalid - the disparity between the "general objects" of s.59B and the list of prescribed statutory authorities for the purposes of s.59B becomes, potentially at least, even more pronounced.
20. Further support for the above conclusion can be obtained by considering the consequences of a contrary view. If the Treasurer can require a "dividend" (as defined) from

any of the statutory authorities in Schedule 2, regardless of whether they operate on a commercial basis, he may utilise the power to obtain a proportion of the assets of every one of those authorities, notwithstanding that most do not operate on that basis and do not generate earnings which can service dividends. I do not think this result was intended and I think a court would strive to avoid it by reference to the underlying purpose or object of s.59B of the Public Finance and Audit Act.

CONCLUSION

21. I answer the questions asked of me as follows:

(a) "No".

(b) It is open to the Committee to answer this question, "No".

22. I would be happy to clarify or expand upon any aspect of this evidence.

Chambers,

6 March, 1991.



RONALD SACKVILLE.

APPENDIX IV

MEMORANDUM OF ADVICE

IN THE MATTER OF A REFERRAL TO THE REGULATION REVIEW COMMITTEE

1. In a Memorandum of Advice dated 6 March 1991, prepared for the Regulation Review Committee of the New South Wales Parliament, I addressed the question of whether an amendment to the Public Finance and Audit Regulation Act 1984, which was gazetted on 15 June 1990, was within the general objects of s.59B of the Public Finance and Audit Act 1983. I answered that question as follows:

"It is open to the Committee to answer this question, "No"."

Section 59B is reproduced in paragraph 6 of my earlier Memorandum.

2. I do not repeat here the reasoning which led me to that conclusion. However, in paragraph 15 of my earlier Memorandum, I said the following:

"Section 59 of the Public Finance and Audit Act does not specify an 'underlying purpose or object'. Reference to the wording of the section alone perhaps might suggest that the section is not necessarily to be confined exclusively to commercial organisations capable of generating profits or earnings. The word 'dividend' is defined by reference to a proportion of the undertaking's assets and is not expressly confined to amounts paid out of earnings (its usual meaning). Nonetheless, the use of the word "dividend", despite the extended meaning, suggests that s.59B is concerned with statutory bodies operating (to use the Minister's words) 'on a commercial basis'. Its purpose or object can fairly be described as permitting the Treasurer to require a statutory body operating on a commercial basis, with the assistance of public funds, to pay a dividend, (not necessarily out of earnings) to the

Consolidated Fund. If there is ambiguity or doubt, this view of the purpose or object of s.59B is clearly supported by the Minister's Second Reading Speech, to which reference might be made under s.34 of the Interpretation Act 1987. I appreciate that the phrase "on a commercial basis" is itself by no means precise. Nonetheless, there are clearly some statutory authorities which operate on the commercial basis and others which clearly do not and never could do so (at least without substantial restructuring)."

3. I have now been asked to clarify my advice on one matter, namely, the relevance to the objects of s.59B of the ownership of any authority prescribed under that section. The Chairman of the Committee has pointed out that during the debate on the motion for disallowance of the amending regulation, on 28 November 1990, the Minister stated as follows:

"The key element of the reform program [of the present Government] is the payment of dividends by commercial authorities. The Government and the people of this State are the owners of these enterprises. Therefore, they have a right to a return from assets that have been made available to enterprises."

The Chairman refers to the phrase "with the assistance of public funds", used in paragraph 15 of my earlier Memorandum, and requests clarification of whether the commercial basis of the authority must also be accompanied by "a component of Crown or public ownership". The Chairman refers specifically to a submission from the Local Government Electricity Association of New South Wales, which contends that:

"There is no ownership relationship between the State Government and Electricity Councils; the relationship is a regulatory one only."



The Association has argued that there is no justification for imposing taxation by way of a dividend to government.

5. I note at the outset that the observations made by the Minister in the course of the disallowance debate cannot, in my opinion, be taken into account in determining the "general objects" of s.59B of the Public Finance and Audit Act. As discussed in my earlier Memorandum, these must be ascertained by reference to the language of the section and the construction of the Act as a whole, having regard to such extrinsic materials as it may be permissible to consult (such as the relevant Parliamentary debates). These materials are ordinarily contemporaneous with the passage of the legislation under consideration.
  
6. One difficulty in determining whether "a component of Crown or public ownership" is required for an authority to come within s.59B is that the meaning of the concept of "public ownership" is by no means self-evident. There may be statutory authorities which are publicly owned, in the sense that the government is the sole shareholder or the sole supplier of risk capital. There may be other statutory authorities which have no shareholding (governmental or otherwise), but the government, in practice, supplies the "risk capital" or, perhaps, guarantees the funds advanced to the organisation. Many statutory authorities, regardless of formal "ownership" have powers not available to private sector commercial

organisations, for example as a statutory monopoly on the supply of particular services. They may also have the benefit of government support, for example through subsidised loans or state guarantees to assist in the raising of capital. In addition, it is possible for a body created by statute to be wholly privately owned, in the sense that all shareholders are members of the public or of a section of the public. Such a body might or might not enjoy special statutory powers and might or might not have the benefit of government financial support.

7. The problem of identifying the precise characteristics of "public ownership" as a pre-condition to the application of s.59B are illustrated by the county council themselves. The structure and role of the St George County Council was the subject of analysis by the High Court in The Queen v Trade Practices Tribunal; ex parte St George County Council (1974) 130 CLR 533. In that case, Gibbs J. pointed out that county councils are constituted by the issue of proclamation pursuant to Part 29 of the Local Government Act 1919. Delegates to a county council are elected by city councils or shires of the relevant district. The Governor delegates certain functions to the county councils, and these may (and apparently usually do) include the supply of water, gas or electricity for the benefit of the county district. Gibbs J. observed that the

"provisions of Pt.29 generally make it clear that a county council is a municipal body, set

up by the Governor under the authority of the Act for the purpose of exercising or performing powers or duties which would otherwise be exercised by the municipal or shire councils within the county district." (At 556).

His Honour also referred to the "public nature of a county council". He pointed out that a constituent council is obliged to purchase gas or electricity from the relevant county council (s.564(4A)(d)) and that the Treasurer may guarantee the repayment of moneys borrowed by a county council for the purpose of electricity works (s.564D). The county council itself may be able to levy rates (s.572). Ordinarily, county councils have delegated to them the powers conferred by ss.416-419 of the Local Government Act, relating (among other things) to the conduct of trading operations for the supply of gas and electricity. These powers include powers of compulsory acquisition.

8. It seems to me difficult to conclude from the materials referred to in my earlier Memorandum that some specified element of "crown or public ownership" is a necessary precondition to the operation of s.59B. In particular, it seems to me difficult to conclude that a county council must be outside the scope of s.59B merely because the Government is not the sole shareholder. In other words, if it is assumed that a county council carries on trading activities for profit (a matter referred to further below), I do not think it would necessarily be exempt from the operation of s.59B, although of course there may

be very good reasons for the Treasurer not to exercise the powers conferred on him by that section. The High Court regards county councils as having a "public nature"; they exercise statutory powers and privileges not available to private sector organisations; they may be the recipients of government assistance (whether in the form of guarantees or otherwise) and these may bear directly on their capacity to generate income and profits. The precise nature of the relationship between county councils and government may vary depending upon the particular policies and practices followed at any given time. However, if a county council did make profit from trading activities and did so through the exercise of statutory powers and with the assistance of government financial support, it does not seem to me to be inconsistent with the objectives of s.59B that the Treasurer should be permitted to require part of the profit to be paid to consolidated revenue. The mere fact that the government is not the sole shareholder would not, it seems to me, deprive the county council of the character of a public authority trading for commercial purposes. In other words, it seems to me to be within the contemplation of s.59B that a statutory authority operating on a commercial basis and for this purpose utilizing specific statutory powers and governmental financial assistance, might be the subject of a direction in relation to dividends. Of course, whether it is appropriate to exercise the power in a given case is a different matter.

9. The opinion expressed in the previous paragraph may need to be qualified in one respect. As noted in paragraph 6, it is possible for Parliament to create a statutory authority which is wholly privately owned and which has no special statutory powers or privileges and no access to government funds or financial assistance. I do not know whether any of the bodies currently specified in Schedule 2 to the Public Finance and Audit Act add to this description. However, if there are such bodies, it may well be that the general objects of s.59B would not extend to authorising the Treasurer to require a dividend to be paid by them. The reason is that any profits generated could not be said to be the result of the exercise of statutory powers or privileges or any form of governmental assistance.

10. Since the question asked of me has apparently been prompted by a submission from the Local Government Electricity Association of New South Wales, it may be appropriate to add a comment concerning the specific position of the county councils. This comment is based, not on whether the county councils are government owned, but on whether they are capable of generating profits. In the St George County Council case, Gibbs J. placed emphasis upon the provisions of s.419(1) of the Local Government Act 1919. This section provides as follows:

"(1) Subject to the provisions of this Act...  
the council shall endeavour so to conduct

each trading undertaking that without any loss being incurred the service, product, or commodity of the undertaking may be supplied to the consumer as cheaply as possible."

In relation to electricity, His Honour observed that:


"It is obvious that electricity could be supplied more cheaply if the county council made no profit than if it made a profit. The inevitable inference is that in the conduct of the electricity undertaking the county council is required to endeavour to avoid making a profit." (at 560)

It follows from the judgment of Gibbs J. that he regarded the St George County Council as essentially a non-profit making organisation, albeit one engaged in trading activities. I would have thought that there is a strong argument that county councils engaged in non-profit making trading activities are outside the scope of s.59B. This follows from what I said in my earlier Memorandum, where I concluded that the "underlying purpose or object" of s.59B is to permit dividends to be required from commercial organisations capable of generating profits or earnings. If a trading organisation is required by its governing legislation to operate on a non-profit basis (by providing services as cheaply as possible to the consumer) I doubt that the statutory procedure providing for a compulsory dividend would be regarded as applicable. Of course, I do not have detailed information as to the current profitability of county councils but I think this would be a relevant consideration in determining whether the general objects of s.59B extend to such organisations.

11. It follows from what I have said that I do not think it implicit in s.59B of the Public Finance and Audit Act that a direction to pay a dividend is available only in relation to a statutory authority which is publicly owned, in the sense of having a shareholding held entirely by government. However, the application of s.59B to county councils may be affected by the requirement, as interpreted by Gibbs J. in the St. George County Council case, that they operate on a non-profit basis and therefore do not generate profits capable of servicing dividends.
12. I am conscious that it is difficult to give advice in relation to categories of statutory authorities, without individual consideration of their particular powers and methods of operations. If further advice is required in relation to particular statutory authorities or on any other matter requiring clarification arising out of this Memorandum, I would be happy to assist.

Chambers,

9 April, 1991.



RONALD SACKVILLE.