

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

REPORT NO. 13 OF 1992

15 September 1992

TERMS OF REFERENCE

- (1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;
- (2) the Committee shall with respect to any instrument of a legislative nature which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act consider whether the instrument -
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
 - (e) or the explanatory statement accompanying it meets the technical or stylistic standards to which such an instrument or explanatory statement ought, in the opinion of the Committee, to conform;
- (3) the Committee shall with respect to the clauses of Bills introduced into the Legislative Assembly consider whether such Bills -
 - (a) unduly trespass on personal rights and liberties;
 - (b) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
 - (f) or the explanatory memorandum accompanying it meets the technical or stylistic standards to which such a Bill or explanatory memorandum ought, in the opinion of the Committee, to conform;
- (4) the Committee shall consist of three members;
- (5) if the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) the foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

BILLS

Bills upon which no comment is offered

The Committee has examined the following Bills and makes no comment.

Consumer Affairs (Amendment) Bill 1992

This Bill amends the Principal Act to make the definitions consistent with those in the Fair Trading Act, to establishing a Product Safety Advisory Committee, to enable product standards to be prescribed and to enable the Minister to make orders requiring the recall or public notification of unsafe or defective goods.

Crown Proceedings Bill 1992

This Bill provides for the bringing of proceedings by or against the ACT Crown and the Crown in right of the other States and Territories, but does not extend to the Crown in right of the Commonwealth unless there is a regulation relating to this Act in force under section 27 of the *Australian Capital Territory (Self-Government) Act 1988* of the Commonwealth.

Bill upon which comment is offered

The Committee has examined the following Bill and makes the following comments:

Fair Trading Bill 1992

This Bill provides for fair trading laws between traders and consumers.

Reversals of the Onus of Proof

There are two clauses in which reversals of the onus of proof occur.

The first occurs in clause 6 which defines "consumer". The explanatory statement describes the effect of the clause 6(1) and (2) by stating that:

"an individual or a corporation is a 'consumer' when he, she or it acquires any goods or services from a supplier. However, individuals or corporations are not consumers if the goods or services were acquired in the course of business for the purpose of resupply, for use as a raw material or as an adjunct to a manufacturing process or for use in the repair or maintenance of other goods or property."

However, the explanatory statement does not mention the effect of clause 6(3). It provides that, if, in any proceedings relating to the Act, it is alleged:

"that a person was a consumer in relation to particular goods and services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods and services."

Clause 50(1), (2) and (3) provide that in proceedings under the Act the Court may make an order under the relevant provision in relation to conduct that was engaged in "whether before or after the commencement of (the subclauses)". It is noted that the provisions follow the form of section 87(1), (1A) and (1B) of the Commonwealth *Trade Practices Act 1974*.

This means that conduct occurring before the present Bill becomes law may affect liability. To that extent the provisions appear to be prejudicially retrospective.

Further, it is noted that the provisions of section 87(1CA) of the *Trade Practices Act 1974* impose limitation periods of 2 or 3 years, but, as the explanatory memorandum states, under the present Bill:

"No time limit is set out for the bringing of an action under this provision. Consequently, the *Limitation Act 1985* applies."

This means that it is possible for prejudicial retrospectivity to be effective for much longer periods under the present Bill than under the *Trade Practices Act 1974*. Of course, in relation to offences under clause 41(1), as opposed to other liability, there is a limitation period of 3 years imposed by clause 41(6).

Were no Offences Intended to be Created?

Clauses 12 and 13 outlaw misleading or deceptive conduct and unconscionable conduct respectively. These two provisions are excluded from the offence provisions of clause 41, although, subject to some exceptions, clause 13 is caught by an order under clause 50. In relation to clause 12 (but not clause 13) an action for damages could be brought under clause 46.

However, do breaches of clauses 12 and 13 trigger offence provisions in the Bill? Have the Committee overlooked a provision, or are there relevant offence provisions in other legislation?

SUBORDINATE LEGISLATION

Subordinate legislation upon which no comment is offered

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

Subordinate Law No. 15 of 1992 being the Physiotherapists Registration Regulations (Amendment) increases the initial and annual registration fees for physiotherapists.

Subordinate Law No. 16 of 1992 being the Supreme Court Rules (Amendment) amends the citation of the Rules to be the Supreme Court Rules, inserts new provisions relating to the failure to conduct proceedings, sets out the procedure for requiring a plaintiff to provide security for costs, expands the jurisdiction of the Master and makes minor amendments.

