# STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

REPORT NO 4 of 1990

27 March 1990

## STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

### MEMBERS OF THE COMMITTEE

**Ms C Maher MLA (Presiding Member)**
**Mr B Stefaniak MLA**

**Secretary: Mr T Duncan**
**Legal Advisor: Emeritus Professor D Whalan**

### 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 (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-viewable decisions; and
   (d) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;

(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) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
   (c) make 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;

(4) the committee shall consist of three members

(5) the majority of members constitutes a quorum of the committee;

(6) the committee be provided with the necessary additional staff, facilities and resources; and

(7) 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.

## ROLE OF THE COMMITTEE

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

The Committee has examined the following Bills:

Business Leases Review Bill
Credit (Amendment) Bill

**BUSINESS LEASES REVIEW BILL**

This Bill provides for a scheme of review of business leases by a Business Leases Review Board, by providing for determination of fair rents, for compensation for improvements, loss of use and enjoyment and termination of lease and for provisions relating to renewal and assignment of leases.

(a) Possible Drafting Deficiencies and Technical Flaws

The Committee does not purport to have picked up all of the possible difficulties that exist in the Bill under this heading as the Bill is drafted slightly differently from the usual manner adopted these days. Some of the points that are raised under this heading would have important substantive consequences if they were to remain unaltered in the Bill, but the Committee has put them under this heading because they involve only minor drafting changes.

The following points are raised for possible consideration:

Clause 1

The Committee notes that the Act would be the Business Leases Review Act 1983 (instead of 1990).

Clause 2 and other clauses throughout the Bill:

There are references to other Acts. Some of them may well be Acts now with the advent of self-government. However, there would need to be a check made in case some of the Acts are, in fact, still Ordinances under the constitutional arrangements that are presently in place.

Clause 14:

The Committee makes two points here.

Firstly, it is doubtful if the terms Clerk and Deputy Clerk would now be used. They are not wrong, of course, but the Committee has been advised that they are not used in this kind of legislation now.

Secondly, there is a reference to the Public Service Act 1922. This is Commonwealth legislation and would be inappropriate in ACT legislation.

<u>Clause 49(1)(b)(i)</u>:

The provision reads thus:

"made before the commencement of this "

Perhaps the word "Act" should be inserted.

<u>Clause 73</u>:

The committee makes two points here.

Firstly, the third and fourth lines contain this seemingly unnecessary addition:

> "20/12/83 Sigrid Martyn, Justice - no app'n for consent provision, perhaps should be included."

Secondly, clause 73(1)(b) has the phrase "for obtaining or making available a key" enclosed in square brackets.

Each of these points needs to be looked at.

<u>Clause 84</u>:

Again the Committee makes two points.

Firstly, there is a reference in clause 84(1)(b) to the <u>Administrative Appeals Tribunal Act 1975</u>. As that is a Commonwealth Act, perhaps the reference should be changed to our own ACT <u>Administrative Appeals Tribunal Act 1989</u>.

Secondly, clause 84(2) provides that the validity of a decision is not affected by a failure to include a notice about the rights to appeal to the Tribunal. The Committee has taken this issue up in other Bills with the aim of having standard forms of notice that would cover this point. Already the Attorney-General has replied favourably on this in the context of the Clinical Waste Bill.

(b) <u>More Substantial Points</u>

(i) <u>Sexist Language</u>

The Committee noted sexist language in the following clauses with multiple uses in some clauses: Clauses 10, 11, 12, 15, 19, 20, 26, 49, 51, 58, 62, 66, 68, 72, 73 and 82.

<u>Presumptions and Deeming Provisions</u>

Clause 52 provides that the Board may refuse to allow compensation where there is to be redevelopment or use of the premises where the improvements on the property do not increase the value of the property. However, the Board must fix a time and, if the redevelopment or other things do not occur and an application is made for compensation,

> "it shall be presumed that the lessor does not intend to undertake that redevelopment or made that use of the premises, but that presumption is rebuttable."

This is a fairly strong presumption, but it is at least rebuttable.

The presumption in clause 80 is even stronger as it is a conclusive presumption. Clause 80 provides that

> "Where a person pays rent in respect of business premises <u>it should be conclusively presumed</u> that -
>
> (a) a lease exists in respect of the premises;
> (b) the person who pays the rent holds the premises as lessee of the person to whom, or to whose agent, the rent is paid; and
>
> (c) the person to whom or to whose agent the rent is paid is the lessor from whom the lessee holds the lease of the premises". (Emphasis added.)

If any one of those facts happened to be untrue, the truth could not be proved because of the conclusive presumption. Incidentally, if the provision were to be retained, perhaps it would be better drafted if it said "it <u>shall</u> be conclusively presumed".

In contrast to these two clauses the deeming provisions in clauses 68 and 69 would probably be reasonably necessary, if the provisions were to be effective. Clauses 68 and 69 deal with applications to the Board by a lessee for consent to assign the lease.

In clause 68 the lessor is given 60 days to advise the lessee whether the lessor consents to the assignment and, if the lessor fails to consent, the lessor is

> "to be taken to have refused that consent".

Clause 69 is even clearer if the policy of the Bill (upon which the Committee makes no comment, of course) is accepted. It deals with the situation where the Board gives consent to an assignment. Once the Board gives a consent, the lessor is

> "taken to have consented to that assignment".

(iii) Retrospectivity

Clause 89 provides that from 5 March 1983 until the date of commencement of the Act

"(a) a lease of business premises was renewed;
(b) an option to renew a lease of business premises was exercised; or

This involves a period of retropsectivity of more than 7 years, which could create considerable uncertainty. The Committee noted that clause 89 appears to be incomplete and clause 90 (which appears in the table of provisions) is not included in the Bill as presented.

CREDIT (AMENDMENT) BILL

Retrospectivity

The purpose of this Bill is to validate the status of interstate credit unions who have been, and are, doing business in the ACT, but are now found to have been invalidly registered.

Clause 2(2) of the Bill provides that the validation will be retrospective to 28 February 1985. The period of retrospectivity is long, but the Explanatory Memorandum says that the

> "Amendments will ensure that the credit unions' and their borrowers' rights and obligations are preserved for the period in which the credit unions were not validly registered".

It would appear that the date of 28 February 1985 was probably chosen in the validating Bill to coincide with the date of coming into operation of most of the provisions of the Credit Ordinance 1985 (now the Credit Act 1985) and of the coming into operation of the first Regulations made under that Act.

The first Regulations under the Act, ACT Regulations 1985 No. 5, are dated 25 February 1985 and were notified in the Commonwealth of Australia Gazette on 28 February 1985.

Paragraph 2 of the ACT Regulations 1985 No. 5 provided that they were to

> "come into operation on the day on which Part III of the [Act] commences".

The Act is dated 22 February 1985, was notified in issue S53 of the Commonwealth of Australia Gazette on 26 February 1985 and most of it (including Part III) was brought into operation on 28 February 1985 after publication of a notice in issue S59 of the Commonwealth of Australia Gazette on 27 February 1985.

However, the Committee recognises that because of the problems that would arise if the Bill were not to be made retrospective, retrospectivity may be justified in the present instance.