

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

**REPORT NO 13 of 1990**

**30 August 1990**

# LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON  
SCRUTINY OF BILLS AND  
SUBORDINATE LEGISLATION

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Mr D J Prowse MLA  
Speaker  
ACT Legislative Assembly  
CANBERRA ACT 2601

Dear Mr *Prowse* Prowse

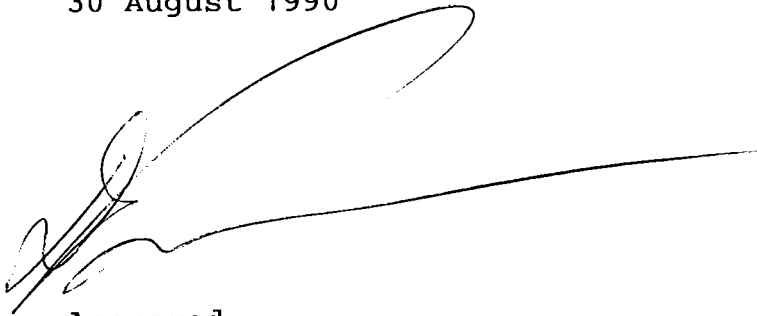
Please find enclosed a copy of Report No 13 of 1990 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under the resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. Accordingly, I seek your approval to print and circulate Report No 13 of 1990.

Yours sincerely



Carmel Maher MLA  
Presiding Member

30 August 1990



Approved  
David Prowse  
Speaker

30 August 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**

**Mr T Connolly 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) if the Assesmbly 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.

## 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 legislation. 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 and delegated legislation that comply with the high ideals set out in the Terms of Reference.

The Committee has examined the following Bills:

DOMESTIC VIOLENCE (AMENDMENT) (NO 2) 1990

This Bill would amend the Principal Act to extend the classes of persons who could apply for a domestic violence protection order as well as making a number of minor amendments.

The Committee offers no comment on this Bill.

DOOR-TO-DOOR TRADING 1990

This Bill would repeal the existing door-to-door trading legislation (except in relation to contracts made before the commencement of this Bill) and substitute a new regime for door-to-door trading. The Bill is based on draft uniform legislation for Australian jurisdictions, but does vary it in some respects.

(a) Commencement Provisions

Clause 2 contains the commendable requirement that, if the Bill is not brought into operation before that time, the Bill will commence automatically after 6 months elapse from the date of its notification in the Gazette as an Act.

This is one of a number of beneficial variations from the legislation in the States of Tasmania and Western Australia, for example, which are also based on the draft uniform legislation.

(b) Onus of Proof on a Defendant

There are four clauses in the Bill, clauses 4(5), 6(4), 7(4) and 19, in which the burden of proof is relevant. In only one case, clause 19, does the Explanatory Statement mention the burden of proof, and in none is any reason advanced for the need to shift the burden.

Clause 19 is an evidentiary provision which provides that, where an allegation is made in a complaint that the conduct of a defendant was such as to suggest that the person was acting as a dealer, that allegation

"shall, in the absence of proof to the contrary, be evidence that the defendant was acting in that capacity." (Emphasis added.)

The provision can loosely be classified as an averment. Probably the most influential statement on the burden of proof in Australia, the 1982 Report of the Senate Standing Committee on Constitutional Affairs, The Burden of Proof in Criminal Proceedings, recommended to the Federal Parliament that

"as a matter of legislative policy averment provisions should be kept to a minimum."

The Report went on to set out the circumstances in which their use may be justified.

Here, too, it is pleasing to note that this provision in clause 19 has been changed from that in the Tasmanian and Western Australian legislation by varying the wording from being proof to being evidence.

Clause 7(4), which is concerned with the acknowledgement by a consumer of receipt of a document containing the requirements about prescribed contracts, is similarly worded. Interestingly, in this instance, although differently worded to clause 7(4), the legislation in the States is to similar effect.

Given the favourable ACT change to clause 19 and the form of clause 7(4), the Committee considers that the provisions are reasonable ones in the circumstances.

In contrast to these ameliorations, clauses 4(5) and 6(4), which deal with proceedings relating to a contract and a prescribed contract respectively, follow the stricter form of the State legislation. They provide that, if proceedings allege that a contract or prescribed contract is one

"to which this Act applies, the contract shall be presumed to be such a contract in the absence of proof to the contrary."

Although these provisions are probably not as strong as the State equivalents to our clause 19 (which has commendably been softened), it is suggested that some softening of the provisions here, too, would fit in more readily with the yard-stick criteria of the Senate Report that the Committee looks to in applying burden of proof matters.

Incidentally, although there is a deeming provision in the ACT Door-to-Door Sales Act 1969 that would be repealed by this Bill, there are no provisions in that Act that cause problems with the burden of proof.

(c) Service of Notice of Rescission

Clause 12 gives a consumer a right of rescission in certain circumstances and clause 13 provides the means of exercising this right by giving notice of rescission to the supplier. Under clause 13(2), the notice of rescission can be given to the supplier personally or by sending it to the supplier by post.

Clause 13(3), which also follows the form used in the State legislation, provides, most unusually, that

"A notice of recission sent by post to a supplier in accordance with subsection (2) shall be deemed to have been given to the supplier at the time of posting." (Emphasis added.)

While accepting that this is consumer protection legislation, this provision does seem unjust to a supplier. In short, it provides that a supplier is deemed to know something at a time when it is totally impossible for him or her to know it. Given the possible effect on property rights set out later in the Bill, this could work quite unjustly.

There is a legal maxim which, translated from the Latin, states that

"The law forces no one to do what is impossible."

Unless there is an even stricter requirement that the notice is to be served by security post or certified post, the customary provision in such cases is to provide that the person being served with notice by post is deemed to know when the communication would be received in the ordinary course of post. Indeed, s.18 of the ACT Interpretation Act 1967 provides as follows:

"Where an Act authorizes or requires a document to be served by post, whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing and posting (under prepaid post) the document as a letter, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post." (Emphasis added.)

The Committee suggests that the ACT Interpretation Act 1967 provision be adopted in the present case to negate the possibility of injustice occurring, as it could with the present provision.

#### (d) "Reasonable Excuse" Defences

There is a number of offences created in the Bill and it is worthy of favourable comment that in clauses 7(3), 8(3), 10(1) and (3), 14(7) and 17(5) defences of "reasonable excuse" are provided for. Clause 17(3) also provides for a "could not reasonably have known" defence.

4.

In all except one of these, clause 17(3) where the State provisions are similar, this is yet another respect in which this Bill departs from the State provisions and the departure is to be commended.

A handwritten signature in cursive script, appearing to read 'Carmel Maher', with a long, sweeping horizontal line extending to the right.

Carmel Maher  
Presiding Member

August 1990