

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

REPORT NO. 6 OF 1993

7 April 1993

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION

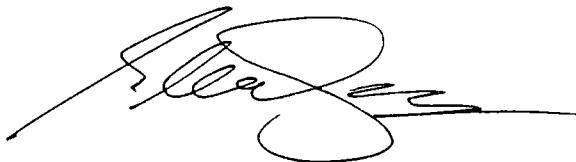
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Ms Roberta McRae, OAM, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear Ms McRae

Please find enclosed a copy of Report No. 6 of 1993 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its 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. 6 of 1993.

Yours sincerely



Ellnor Grassby, MLA
Presiding Member

7 April 1993



Approved
Roberta McRae, OAM, MLA
Speaker

7 April 1993

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.

MEMBERS OF THE COMMITTEE

Mrs E. Grassby, MLA (Presiding Member)
Mr G. Humphries, MLA (Deputy Presiding Member)
Ms H. Szuty, MLA

Legal Advisor: Emeritus Professor D. Whalan
Acting Secretary: Ms M. Weeks
Deputy Secretary: Ms B. Irvin

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate 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 subordinate legislation that comply with the high ideals set out in the terms of reference.

BILLS

Bills Upon Which no Comment is Offered

The Committee has examined the following Bills and offers no comment:

Buildings (Design and Siting) (Amendment) Bill 1993

This Bill extends the meaning of "external design" to include developments not related to the erection of a building, provides for implementation plans and broadens the range of controlled activities to which the Principal Act applies.

Children's Services (Amendment) Bill 1993

This Bill provides that a reparation order may be made against a parent of a child convicted of an offence.

Dog Control (Amendment) Bill 1993

This Bill amends the Principal Act to increase the powers for seizure of dogs that have attacked people or other animals, provides for the impounding of such dogs and that, if the keeper of a dog is convicted, the Court must order the dog's destruction unless satisfied that there are extenuating or other special circumstances.

Land (Planning and Environment) (Consequential Provisions) (Amendment) Bill 1993

This Bill provides that leases issued under repealed legislation since the commencement of the *Land (Planning and Environment) Act 1991* are taken to have been granted under that Act, leases granted by the Commonwealth over National Land, which becomes Territory Land, are also deemed to have been granted under that Act and the protection of places likely to be placed on the Heritage Places Register are protected for a further 6 months.

Liquor (Amendment) Bill 1993

This Bill introduces provisions relating to the determination and enforcement of occupancy loadings for licensed premises, enables the issue of loss of amenity in the vicinity of licensed premises to be dealt with as part of the complaint provisions, permits the Registrar of Liquor Licences to confer certain powers on the Deputy Registrar and enables police to institute proceedings for all offences.

Magistrates Court (Amendment) Bill (No. 2) 1993

This Bill makes amendments to the Principal Act consequent upon the amendments made to the parking infringement notice and traffic infringement notice schemes by the Motor Traffic (Amendment) Bill 1993 [No. 2].

Motor Traffic (Amendment) Bill 1993

This Bill provides for armoured security vehicles to have an exemption from a number of provisions while the vehicle is parked in the course of carrying out business.

Motor Traffic (Amendment) Bill 1993 [No. 2]

This Bill removes the penalties for parking infringement notices so that they can be transferred to regulations, reinserts two provisions accidentally omitted, provides for the transfer of parking infringement notices and traffic infringement notices to the criminal jurisdiction, provides for licences to be suspended rather than cancelled in certain circumstances and removes sexist language.

Motor Traffic (Alcohol and Drugs) Bill (No. 2) 1993

This Bill removes a penalty relating to traffic infringement notices and provides that it will be prescribed by the Motor Traffic Regulations.

Traffic (Amendment) Bill 1993

This Bill removes a penalty relating to traffic infringement notices and provides that it will be prescribed by the Motor Traffic Regulations.

Bills Upon Which Comment is Offered

The Committee has examined the following Bills and offers the following comments:

Commercial Tenancies Bill 1993

This Bill sets up a Tribunal to consider certain decisions relating to rents and leases.

Some Possible Problems

There may be some possible problems with mistakes and infelicities in this Bill.

First, the following words or phrases appear not to follow normal drafting practice:

- . "landlord/s and tenant/s" (definition of "relevant dispute in clause 3) and in clauses (13)(1) and (14)(1) and (14)(1)(b). In contrast, the plurals "tenants" and "landlords" are used in clause 4(a) and (b) and the singular "tenant" and "landlord" in clauses 5, 7(a)(i)(b) and (ii)(b). These become "Landlord" and "Tenant" in clause 6(e);
- . "owner/landlords/managers" appears in clause 4(b);
- . "and/or" appears in clauses 4(b), 7(a) and (14)(1)(b).

Secondly, the use of capital letters and punctuation is inconsistent. For instance, sometimes there is no punctuation where one would expect it. Again, sometimes there are full stops where no punctuation or semi-colons have been used in other similar provisions. In most instances this would probably not create a problem for a Court interpreting the legislation, but some uncertainty could be created.

Thirdly, the numbering of the sections, subsections, paragraphs and subparagraphs seems to be inconsistent. The following illustrate the point:

4. This Act ... (a), 7(a)(i)(a), 8(1)(a), 9(1)(a)(i)(A) and (13) (1)(a).
Incidentally, although there is a "7(a)", there does not seem to be a "7(b)".

It is possible that these inconsistencies may have led to other possible errors referred to later.

Fourthly, clause 4 provides that the Act applies to a decision "in respect of tenants renting premises for the purpose of commercial trading in the Act" or (it seems) a decision "in respect of any persons who are owner [sic]/landlords/managers who receive monies for rent and/or are party to lease agreements".

It will be noted that the second provision is not restricted to commercial lease agreements. Possibly the long title to the Bill could be called in aid to restrict the provision to commercial leases; but, as the first provision is specifically restricted to commercial trading, perhaps the intention of the second provision should be clarified.

Fifthly, clause 7(a)(ii)(b) refers to the Tribunal taking into account "the current market value of equivalent spaces and CPI". The meaning of this paragraph perhaps needs to be spelled out.

Sixthly, there perhaps needs to be some sorting out done in relation to the meaning and application of "Tribunal".

In some places it is referred to as "the Tribunal" as if it is a permanent entity. For example, in clause 5 the reference to making an application to "the Chairperson of the Tribunal" suggests a permanency; otherwise there is no-one to whom a complaint can be made. However, in other places, the Bill refers to "a Tribunal" and seems to contemplate a Tribunal being set up ad hoc to deal with each specific problem. For example, clause 6 refers to the fact that "a Tribunal is required to be appointed to resolve the dispute". This ad hoc nature of a Tribunal (or the Tribunal) seems to be followed through in clauses 8 to (14) [sic].

Seventhly, there seem to be several errors in clauses 8 and 9 where the clauses refer to other provisions. Clause 8(2) refers at the end to "the member referred to in section (8)[sic] (1)(a)(d) and [sic] (e)". Apart from the obvious mistakes, clause 8(1) does not have paragraphs (d) or (e). It could be intended to be a reference to clause 6, except that clause 6 has no subsection 6(1), but is drafted as 6(a), (b) etc. This same possible error seems to recur in subclauses 9(2)(a), 9(2)(c) and 9(4).

Eighthly, there seems to be another mistake in clause 9. Clause 9(1) refers to "section 8(a)". Was "section 8(1)" perhaps intended?

Ninthly, some sorting out needs to occur in clause 9 in relation to what appears to be an intended possibility of the Director of Consumer Affairs delegating his or her powers to some extent. Clause 8(1)(a) requires the Director of Consumer Affairs to be a member of a Tribunal (the Tribunal?). Yet, clause 9(2)(b) states "if the person was a member referred to in section 8(1)(a)", as if there was a possibility of delegation of powers. (Emphasis added.) Similar problems seem to exist with clause 9(3).

Finally, is there a problem with "will", "shall" and "may"?

Among other provisions that provide similarly, clause 7(a)(i) provides that "the Tribunal will take into account [certain matters]". That is clear enough.

Later in clause 7(a) the wording changes to "shall", which is also clear, even if it is not consistent with what went before.

Then clause 7(a)(v) provides that "the Tribunal may resolve the dispute". (Emphasis added.) Clause 7(a)(vi) uses the same phrase. Thus the Tribunal appears to have a discretion rather than an obligation to resolve the dispute. However, this discretion, in addition to being considered in conjunction with the other provisions of clause 7, possibly needs to be re-considered in conjunction with clause 9(5), which states that "[w]here a Tribunal is reconstituted under this section, the Tribunal as reconstituted shall begin or continue (as the case may be) the review and resolve the dispute". (Emphasis added.)

It is also noted that clause (13) provides that a Tribunal "shall not make a decision ... unless it has afforded both the commercial tenant/s and the landlord/s ... [certain rights]". Clause (14) provides that the Tribunal may request information or documents, but cannot require such information or documents to be furnished or produced. The differences here are no doubt intentional.

Questions of Powers and Protections

This last comment raises the issue of the protection of rights. As was noted, in clause (13), which deals with procedure, it is provided that people must be given the rights to attend, address, and place relevant documents before, a Tribunal before a decision is made. Clause (14) provides that a Tribunal may request information to be furnished or information or documents to be produced.

There are no protective provisions in the Bill.

There are no provisions that give the members of a Tribunal or any person who appears before a Tribunal or who gives information or produces documents to a Tribunal any of the usual protections that are afforded in such legislation.

Nor are there any provisions in the Bill specifically permitting representation before a Tribunal. This could perhaps be covered under the provisions relating to a Tribunal determining its procedure under clause 12(7), but it is appropriate for such rights to be set out in the legislation.

Again, the Bill does not provide for any independent review of the decisions made by a Tribunal.

Radiation (Amendment) Bill 1993

This Bill adds a second Ministerial appointee to the membership of the Radiation Council, adds to the qualifications required to be held by some members, enables the Minister to require the Council to inquire into, and provide the Minister with a report on, any matter, lengthens the periods for which licences or registrations may be granted to renewed and removes sexist language.

Two Possible Small Mistakes

First, clauses 6(a) and (b) and 7(a) and (b) make amendments to sections 31 and 50 respectively. The amendments lengthen the periods for which licences or registrations may be granted or renewed. All four provisions provide that a phrase in the two sections is to be omitted and a different phrase lengthening the period be substituted. The phrase to be omitted from section 31(1) will illustrate, as all four provisions appear to make the same mistake. It is the phrase "until the expiry of the period of 12 months after the date on which it was granted". (Emphasis added.)

In the reprint that the Committee examined (and the original Ordinance of 1983 is also the same), the word used is not "expiry" but "expiration".

Secondly, the Committee was pleased see the removal of sexist language from yet another Act, but a slight addition may be appropriate to ensure that there is no doubt or possible inconsistency.

Clause 11(3) provides that the phrase "or her" be added after "his" in a number of sections, including sections 57(1) "(second occurring only)" and 58 "(second occurring only)".

Before the present amendments are made, sections 57(1) and 58 both start off with this phrase: "A person who has in his possession or under his control ...". After the amendments made by clause 11(3), the phrases will read thus: "A person who has in his possession or under his or her control ...".

Section 58 is further amended by clause 11(4) and the Schedule using this phrase that appears on page 7: "Section 58 - Omit 'his' (first occurring)". This amendment ensures that there is no doubt. However, inconsistently with this, clause 11(4) and the Schedule amend section 57(1) by stating (also at page 7) "Subsection 57(1) - Omit 'his'".

To ensure consistency and complete certainty perhaps the phrase on page 7 should become "Subsection 57(1) - Omit 'his' (first occurring)".

SUBORDINATE LEGISLATION

Subordinate Legislation Upon Which Comment is Offered

The Committee has examined the following subordinate legislation and offers the following comment:

Determination No. 21 of 1993 made under section 21 of the *Prostitution Act 1992* determines the fee to accompany an application for registration of a brothel or escort agency.

Determination No. 27 of 1993 made under section 59 of the *Administrative Appeals Tribunal Act 1989* revokes the previous determination, determines witnesses fees and allowances and determines a reduced application fee, exemptions therefrom and the refund thereof if there is a favourable outcome for the applicant.

Determination No. 28 of 1993 made under section 257 of the *Magistrates Court Act 1930* revokes Determination No. 95 of 1992 and Determination No. 18 of 1993 and determines fees for the purposes of the Act.

Determination No. 29 of 1993 made under section 307B of the *Magistrates Court (Civil Jurisdiction) Act 1982* revokes Determination No. 96 of 1992 and determines fees for the purposes of the Act.

Determination No. 30 of 1993 made under section 50A of the *Small Claims Act 1974* revokes Determination No. 97 of 1992 and determines fees for the purposes of the Act.

Subordinate Law No. 13 of 1993 being the *Supreme Court (Fees) Regulations (Amendment)* made under section 37 of the *Supreme Court Act 1933* substitutes a new Schedule of fees, updates the exceptions from fees, sets the fees for opening the Registry out of hours, introduces some new fees mainly related to the introduction of the Master and increases other fees.

High Standard of Explanatory Statements

The Committee wishes to comment on the fact that the explanatory statements for all of these instruments of subordinate legislation are of a uniformly high standard.

A handwritten signature in black ink, appearing to read 'Ellnor Grassby', with a long horizontal flourish extending to the right.

Ellnor Grassby, MLA
Presiding Member

7 April 1993

