STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

REPORT NO 8 of 1990

5 June 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 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.

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

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

David
Dear Mr Prowse

Please find enclosed a copy of Report No. 8 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. 8 of 1990.

Yours sincerely

Carmel.

Carmel Maher MLA
Presiding Member

5 June 1990

Approved
David Prowse
Speaker

5 June 1990

The Committee has examined the following Bills:

Publications Control (Amendment) 1990 [No 3]
Taxation (Administration)(Amendment)(No 3) 1990
Registration of Interests in Goods 1990
Registration of Interests in Goods (Consequential Amendments) 1990
Water Supply (Chemical Treatment)(Amendment) 1990
Business Franchise ("X" Videos) 1990
Director of Public Prosecutions 1990
Director of Public Prosecutions (Consequential Provisions) 1990
Rates and Land Tax (Amendment)(No 2) 1990

In relation to the Taxation (Administration)(Amendment) Bill (No 3) 1990, the Registration of Interests in Goods (Consequential Amendments) Bill 1990 and the Water Supply (Chemical Treatment)(Amendment) Bill 1990, the Committee offers no comment.

PUBLICATIONS CONTROL (AMENDMENT) 1990

(a) Title of Bill

Given that two other Bills with the same title have been introduced to the Assembly this year, the Committee queried whether the title should be amended to include (No 3) in the title. The Secretary informed the Committee that the practice had been adopted whereby all Assembly documents (ie Notice Paper, Bills List) would refer to the title of the Bill as Publications Control (Amendment) Bill 1990 [No 3]. This should help distinguish the Bill from those previously introduced and negatived at the agreement-in principle stage.

BUSINESS FRANCHISE ("X" VIDEOS) 1990

This Bill sets up a scheme to licence manufacturers and distributors of "X" videos and to impose a franchise fee on "X" videos.

(a) Incorporation of Provisions of Another Act

In the Committee's Report No 5, the question of the use of legislative shorthand by incorporating the provisions of the Taxation (Administration) Act 1987 was taken up in relation to the Ambulance Service Levy Bill 1990 (now Act, of course). Clause 3 of the present Bill adopts exactly the same technique. It is suggested that the same comment is appropriate here as the Committee made then, namely:

> "However, given that the incorporated provisions are essentially administrative in character, the committee considers that in this case it is acceptable."

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(b) Appropriate Exoneration Provisions

The Attorney-General, Mr Collaery, in his response of 26 April 1990 responded favourably to the Committee's concerns about a number of obligations imposed on licensees to do things within a specified time or else an offence was committed. The Attorney-General agreed to include defences of "reasonable excuse" in the Bill concerned.

It is pleasing to note that in the similar provisions in clauses 7, 11 and 12 of the present Bill "reasonable excuse" provisions have been inserted.

In addition, another of the Committee's concerns about the need for the prompt return of a licence by the authorities has been met here in clause 8 by requiring the commissioner to return an amended licence within 7 days. The Committee noted that there was not a return period in Clause 7, and wondered whether there was a reason for this.

(c) Right to Review - Standard Form

Clause 22 deals with notification of decisions. Here, too, Mr Collaery has responded favourably to the committee's suggestion that a standard form of notification be developed which, among other things, would incorporate a statement indicating to an applicant that there is a right to apply to the Administrative Appeals Tribunal for a review of the decision. Favourable responses were received both in relation to the Clinical Waste Bill 1990 (now Act) (in Mr Collaery's response to Report No 1) and the Motor Dimensions and Mass) Bill 1990 (in his letter of 2 May 1990).

The Committee now asks if it can assume for the future that such standard forms will be developed so that the matter can be dropped.

REGISTRATION OF INTERESTS IN GOODS BILL 1990

This Bill introduces a system for the registration of interests in goods by joining with New South Wales to provide for the registration in a public register of interests, such as a mortgage or other encumbrance, held over goods or chattels. The legislation applies to any "declared goods" that are also "prescribed goods" in New South Wales, but the immediate intention is that it will be applied to motor vehicles. In essence, it seems to be a "creditors and dealers beware" Bill as it aims to give greater protection to innocent non-dealer purchasers.

(a) Good Aspects of the Bill falling within the Committee's Terms of Reference

Clause 2(3) provides for commencement of the Act 6 months after notification in the Gazette and thus ensures that the legislation does not lie fallow on the books.

Clause 6(3) is carefully drawn so that a certificate issued under the NSW Act is to be prima facie and not conclusive evidence of matters specified in the certificate.

Clause 7(3) provides that a declaration by the Minister of the kinds of goods that may be covered by the registration process is to be a disallowable instrument. Thus Assembly scrutiny and control is maintained over any declarations of kinds of goods.

(b) "Incorporation " of New South Wales Legislation in ACT Law

This Bill virtually "incorporates" into ACT law the New South Wales Registration of Interests in Goods Act 1986 and, because of the definition of "this Act" in s.3(1), probably any New South Wales regulations.

Unlike the Business Franchise ("X" Videos) Bill 1990 dealt with above which incorporated another A.C.T Act, the Taxation (Administration) Act 1987 the present Bill virtually makes New South Wales legislation part of the A.C.T. In recent years there have been strenuous and quite successful efforts to disentangle the ACT law from that of New South Wales. Another difference in the present case of the Taxation (Administration) Act 1987 is essentially administrative in character, whereas the New South Wales Act also contains substantive provisions.

The Committee looked at a number of possible practical difficulties arising from the "incorporation".

There may be some difficulty in getting access to the law.

A.C.T. legislation is, of course, more readily available here than New South Wales laws. Indeed, in recent times, it has often been difficult to get New South Wales legislation.

Furthermore, unless local arrangements are made, there will be practical problems with getting access to compensation with the Commissioner and the Commercial Tribunal being in New South Wales. But, of course, this disadvantage can be offset against the advantages of protection that the system will give.

There may also be a practical problem of getting access to the Register which will be kept in New South Wales. It is important that ordinary, non-dealer, prospective purchasers should have

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ready and easy access to the records and be able to get a search certificate as easily and promptly as dealers. Because dealers will be constant users, no doubt they will take advantage of the telephone account system that the system provides for, whereas this would not be very practical for the one-off, ordinary purchaser. Obtaining easy and prompt access is particularly important because of the short life of the protection given by the search certificate.

Modern technology is such that a system of access should be able to be organized and no doubt thought has been given to solving these difficulties for both dealers and non-dealer purchasers.

Presumably A.C.T. Consumer Affairs could be involved in solving both the problem of access to the law and access to the Register.

The Committee notes the comments made by the Attorney-General in his agreement in-principle speech, where he stated:

> "I should hasten to add that the adoption of the New South Wales scheme does not mean that this Government can or will always accept legislation prepared by other states."

The Committee is of the view that only very rarely and in very special circumstances should A.C.T. citizens have to depend upon the law of another jurisdiction and its administration. Subject to the comments above, the Committee considers that this Bill may be one of those instances.

DIRECTOR OF PUBLIC PROSECUTIONS BILL 1990

This Bill, which closely follows the form and content of the Commonwealth Director of Public Prosecutions Act 1983, sets up an independent statutory office of Director of Public Prosecutions.

(a) Date of Commencement

Unlike clause 2(3) of the Registration of Interests in Goods Bill 1990, the commencement provisions of the current Bill in clause 2 do not provide for the automatic commencement of the Act 6 months after notification in the Gazette.

The Committee wondered why the automatic commencement was not used on this occasion.

The Committee is concerned that Bills do not lie fallow on the statute books. So, if an automatic commencement period of 6 months is not included in the Bill, the committee wondered if it would be feasible for the explanatory memorandum of the Bill to reflect the reason for leaving the commencement date open-ended.

(b) Indemnity from Prosecution

Clause 9 empowers the Director to give an indemnity to a witness or informant who supplies evidence in proceedings. Undertakings given under clause 9(2), (5) or (8) not to use the evidence against a person supplying it are absolute, except that an undertaking given under clause 9(2) is not absolute in relation to proceedings in relation to the falsity of the evidence given by the person indemnified.

The committee considers that the protection against self-incrimination in clause 9 is satisfactory.

(c) Directions and Guidelines

(1) Directions and Guidelines by Director

Clause 12 provides that the Director may give directions or furnish guidelines to a number of people and must give the Attorney-General a copy. These directions and guidelines are not disallowable, but are to be included in the Director's Annual Report to the Attorney-General, which is to be tabled by the Attorney-General.

Although this means that the directions and guidelines are not immediately subject to the scrutiny and control of the Assembly, they will be open to debate in the Assembly in the context of the Annual Report.

It could possibly be argued that it may be appropriate for the general directions or guidelines to be more immediately subject to the Assembly's scrutiny, although a counter argument may be that this would militate against the building up of the Director as an independent statutory authority. More clearly, it would seem to be inappropriate for the Assembly to become directly involved with directions or guidelines relating to a specific case.

The Committee considers the provisions here to be an acceptable compromise.

(2) Directions and Guidelines by Attorney-General

Clause 20 provides that, afters consultation with the Director, the Attorney-General may give general directions or guidelines only to the Director. Such directions or guidelines are to be published in the Gazette and are to be tabled, but are not disallowable.

The Committee considers this procedure, too, to be adequate in the circumstances.

(d) Functions and Powers of Director

(1) Delegation of Functions or Powers by Director

Clause 17 provides for the delegation of the performance or exercise of a function or power of the Director to a member of the staff of the Office.

The Committee notes that the provisions of clause 17 do not include the restriction included in s.31(1) of the Commonwealth Act in relation to delegation of powers concerning the signing of indictments in s.9(2) of the Commonwealth Act. The similar powers of signature are in clause 7(2) of the present Bill.

These are very significant powers and the Committee wondered why the Commonwealth pattern of restricting delegation was not followed.

(2) Appearances by Director

Clause 16 sets out very clearly the powers of the Director to appear before a court either in person or by a representative who is a qualified practitioner.

The Committee assumes that these quite specific powers qualify any powers of delegation that the Director may have under clause 17 to delegate the very extensive powers that the Director has in relation to proceedings under clause 6.

DIRECTOR OF PUBLIC PROSECUTIONS (CONSEQUENTIAL PROVISIONS) BILL 1990

This Bill makes changes consequential upon the Director of Public Prosecutions Bill 1990 passing into law.

As with clause 2 of the main Director of Public Prosecutions Bill 1990, the commencement provisions in clause 2 of the current Bill do not provide for the automatic commencement of the Act 6 months after notification in the Gazette.

As in the case of the Director of Public Prosecutions Bill, the Committee wonders why the automatic commencement was not used on this occasion.

RATES AND LAND TAX (AMENDMENT) BILL (NO 2) 1990

This Bill fixes the rates and land taxes for 1990/91 and makes other machinery amendments to the principal Act.

(a) A Possible Injustice to an Innocent Bystander

Clause 8 inserts new s.22AAA to provide that where a ratepayer is in default, the Commissioner can recover direct from a debtor of the ratepayer. Section 22AAA(76) provides that

> "Where, but for this subsection, money is not due or repayable on demand to a person unless a condition is fulfilled, for the purposes of this section the money shall be taken to be respectively due or repayable on demand notwithstanding that the condition has not been fulfilled."

The Explanatory Memorandum has this to say about the provision:

> "sub-clause (7) provides that where money is not due or payable to the ratepayer unless a condition is fulfilled, the money is, for the purposes of this section, due or payable notwithstanding that the condition has not been fulfilled."

The provision seems to be an interference in the relationship between the ratepayer and the debtor. The debtor is not yet liable to pay, and can be described as "a debtor-provided-that-a-condition-is-fulfilled". It seems that the provision may have serious consequences for the totally innocent debtor.

It appears that the debtor's debt has not yet become payable to the defaulting ratepayer, because of the existence of a condition. Indeed, the debt may never become payable, because the condition may never be fulfilled. Yet the debtor could be called upon to pay direct to the Commissioner, despite not yet being liable to pay to his or her creditor. This seems to be grave interference with the rights of a totally innocent third party and could cause great injustice to the "nearly-but-not-yet-liable-and-may-never-be-liable-debtor".

The Committee discussed the following possible illustration. Two partners dissolve their partnership and there are disagreements over a debt one allegedly owes to the other and also about the ownership of certain vehicles. A compromise settlement is reached under which one partner acknowledges that he or she owes a debt of $10,000.00 to the other who, quite by chance happens to be a defaulting ratepayer. But the debt is only payable on condition that the ratepayer partner transfers the vehicles into the debtor's name. Along comes the commissioner who uses s.22AAA on the totally innocent debtor. He or she pays up, but not only does the defaulting ratepayer not fulfil the condition of transferring the agreed vehicles, but goes bankrupt. The

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innocent debtor seems to have missed out, if the bankrupt pays 2 cents in the $.

The Committee would be grateful for further comments on the possible impact of the sub clause.

(b) Notice of Transfer Form not Disallowable

Clause 12 repeals and substitutes s.23 concerning the giving of notice of a transfer of rateable land. Section 23(2) provides that the notice is to

> "be in writing, in a form approved by the Commissioner...".

Previously s.23 provided that Form A in the Second Schedule, which Schedule is repealed by clause 14, was to be used. The present amendment thus takes scrutiny and control away from the Assembly and, indeed, from the Minister, as the form not only disappears from the Schedule, but its replacement will not be subject to scrutiny, and, if needs be, disallowance, by the Assembly.

The problem is ameliorated considerably in the present case because s.23(2) sets out details of what is to be included in the form. However, as the Committee took up in its Report No 5 of 1990 (at pages 1-2), this is a matter which the Committee will in future be watching to ensure that control is vested in the Assembly rather than in the Minister or officials.

Carmel Maher
Presiding Member

5 June 1990