

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

REPORT NO 16 of 1990

17 October 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-reviewable 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 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.

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.

DELEGATED LEGISLATION

(a) Delegated Legislation upon which no Comment is offered.

The Committee has examined the following delegated legislation and offers no comment.

1. Determination of Fees being ACT Determination No. 62 of 1990 made under section 44A of the Business Franchise (Tobacco and Petroleum Products) Act 1984 determines fees for petroleum product wholesalers and some retailers in respect of licences commencing on or after 1 November 1990.

2. ACT Determination No. 64 of 1990 made under section 99 of the Taxation (Administration) Act 1987 sets the wages threshold below which an employer is not required to lodge returns and pay payroll tax under the Payroll Tax Act 1987.

3. ACT Determination No. 65 of 1990 made under section 99 of the Taxation (Administration) Act 1987 sets the payroll tax rates for the purposes of the Payroll Tax Act 1987 that are effective from 1 October 1990.

4. ACT Determination No. 66 of 1990 being the Financial Institutions Duty Determination 1990 made under section 99 of the Taxation (Administration) Act 1987 sets the rates of duty for the purposes of the Financial Institutions Act 1987 that are effective from 1 October 1990.

5. ACT Determination No. 67 of 1990 made under section 99 of the Taxation (Administration) Act 1987 revokes an earlier determination made for the purposes of the Stamp Duties and Taxes Act 1987 and remakes the provisions but varies the consideration upon which the duty will be calculated.

6. ACT Regulations 1990 No. 15 being Finance Regulations (Amendment) extend the matters upon which directions may be given to include the issue, transmission and transfer of securities, their registration, the payment of interest in respect of them and their redemption and also widen the categories of persons who may give directions to officers of their administrative units.

(b) Delegated Legislation upon which Comment is Offered

I draw the attention of the Committee to these matters in the following delegated legislation.

7. Determination of Fees and Charges being ACT Determination No. 63 of 1990 made on 18 September 1990 under section 78 of the Community and Health Service Act 1985 cancels ACT Determination No. 28 of 1990 and determines hospital, nursing home and various other health fees to take effect from 27 September 1990.

(c) Some Errors Still Remain and Committee Questions
Remain Unanswered

In its Report No. 11 of 29 June 1990 the Committee made some comments about Community and Health Service Determinations and repeated several of the comments in Report No. 12 of 14 August 1990. Unfortunately, the same errors remain in the present Determination and the Explanatory Statement accurately states that

"The only changes are increases in fees under the Determination of Fees and Charges in relation to increased charges for accommodation at Health Service Hostels, Nursing Homes and for Nursing Home Type Patients".

The Committee restates some concerns raised in earlier reports.

First, the Committee notes the continued use of sexist language in the Determination. Examples exist on page 5 in the definition of "private patient" and on page 11 in paragraph (b) of G.

Secondly, a definition of "inpatient" is given at page 3, but, in all except one case, it still appears to be given as "inpatient".

Thirdly, the Explanatory Statement would be more helpful to Members of the Assembly if it had set out the old and new fees as other Explanatory Statements are now doing.

Fourthly, in the course of checking the other matters, the Committee asked in both Reports, if the Committee could be given confirmation that s. 4 of the Self-Government (Transitional Provisions) Act 1989 is the source of power under which the General Manager of the Australian Capital Territory Community and Health Service acts as the delegate of the Minister for the purposes of s. 78 of the Community and Health Services Act 1985? If it is not, could the Committee be told what the source of power is? As this could affect the validity of the collection of any monies under this Determination and its predecessors, the answer to this question is significant.

Finally, in Report No. 11 in Item 1 on pages 1 and 2 the Committee raised a question of possible retrospectivity of an Amendment and the Committee does not seem to have had a reply to its question. As this, too, could affect the validity of the collection of monies, it is of significance.

The Committee would be grateful to receive a response to its concerns.

8. ACT Determination No. 68 of 1990 made under clause 3 of Part 1 of the Scheme for Providing and Assisting in Providing Dwelling Houses which is deemed to be under the Housing Assistance Act 1987 revokes the fee payable prior to a variation of a mortgage.

9. ACT Determination No. 69 of 1990 made under clause 8 of the Scheme for Providing Concessional Home Loans which is deemed to be under the Housing Assistance Act 1987 revokes the fee payable prior to a variation of a mortgage.

10. ACT Determination No. 70 of 1990 made under clause 9(2) of the Scheme for Providing or Assisting in Providing Dwelling Houses deemed to be under the Housing Assistance Act 1987 revokes the fee payable prior to a variation of a mortgage.

(d) Missing Explanatory Statements and Possible Errors

In these three cases the practice that came into effect on 1 June 1990 of supplying Explanatory Statements has not been followed. The Housing Assistance Act 1987 is an area which the Committee used as an example at page 7 of its Report No.12 of 14 August 1990 where the provision of an Explanatory Statement would be of great value to Members of the Assembly in assessing the importance of particular pieces of delegated legislation.

In the present cases Explanatory Statements would be valuable because the principle Schemes go back for some time (in one case to 1930 and amended from time to time since then) and it takes a considerable time for the background of the present Determinations to be dug out.

The Committee raises the following questions about the Determinations.

First, Determination No. 70 is headed Scheme for Providing Concessional Homeloans. Is this the same as the Scheme in Determination No. 69 which is called the Scheme for Providing Home Loans?

Secondly, in Determination No. 70 why is there a reference to one Scheme called the Scheme for providing concessional home loans in the heading and to another called the Scheme for Providing or Assisting in Providing Dwelling Houses in the body of the Determination?

Thirdly, is the Scheme referred to in the body of Determination No. 70 the same as the Determination in Determination No. 68 which is called the Scheme for Providing and Assisting in Providing Dwelling Houses. Certainly, "and" is used in ACT Gazette No. 30 of 1 August 1990 at page 797, but "or" is used in Commonwealth Gazette No. S13 of 21 January 1986.

If the determinations are, in fact, exactly correct there is, of course, no difficulty. But, if there are inaccuracies, it is just possible that they could affect validity.

Furthermore, there is no rationale given for the revocation of the fee at a time when most other areas are seeing fees imposed or increased. No doubt there is a proper explanation and it would be helpful for Members of the Assembly to have it.

Statements may have addressed some of these queries. It is appropriate for the Members of the Legislative Assembly to be

informed, as the delegated legislation is being made under Acts within the jurisdiction and responsibility of the Legislative Assembly.

(e) Pleasing Response to Committee's Initiative

The Committee notes that the six Determinations in this Report where no comment is offered all have excellent Explanatory Statements.

Secondly, the Committee had commented on the absence of a number of Explanatory Statements in some of its earlier Reports. We have now been given excellent Explanatory Statements for Determinations Nos. 60 and 61 dealing with fees under the Associations Incorporation Act 1953 and the Business Names Act 1963. The Committee thanks those responsible for ensuring that these helpful explanatory statements were provided.

COMMERCIAL ARBITRATION (AMENDMENT) BILL 1990 - GOVERNMENT RESPONSE:

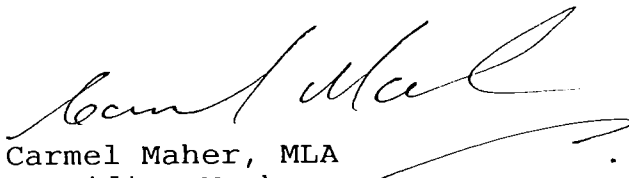
The Committee reported on the above mentioned Bill in Report No. 14 which was tabled in the Assembly on 19 September 1990. The Committee has since received a response from the Attorney-General which is attached.

The Committee thanks the Attorney-General for his positive response.

DOOR TO DOOR TRADING BILL 1990 - GOVERNMENT RESPONSE

The Committee reported on the above mentioned Bill in Report No. 13 which was tabled in the Assembly on 12 September 1990. The Committee has since received a response from the Attorney-General which is attached.

The Committee thanks the Attorney-General for his well researched and very positive response.


Carmel Maher, MLA
Presiding Member

17 October 1990



Australian Capital Territory

Deputy Chief Minister

1 Constitution Ave
Canberra ACT 2601

Ms Carmel Maher MLA
Presiding Member
Standing Committee on Scrutiny of Bills and Subordinate
Legislation

Dear Ms Maher

I write to convey to the Committee the Government's response to Report No 13 insofar as it deals with the Door to Door Trading Bill 1990 which I presented to the Assembly on 15 August 1990.

Firstly I would, on behalf of the Government, like to thank the Committee for the careful consideration it has given to the Bill, for its commendation of the Bill in many respects and for the constructive comments it has made in respect of some matters.

You will recall that some concerns were expressed by the Committee in comments about two kinds of provision in the Bill:

- (a) two clauses placing the onus of proof on defendants in respect of particular matters in proceedings; and
- (b) one clause providing for a "postal rule" whereby a supplier of goods was deemed to have received a notice from a consumer at the time the notice was posted.

As a general point I would like to stress that this legislation is intended to be uniform legislation. The legislation was developed and agreed on through the process of the Standing Committee of Consumer Affairs Ministers (SCOCAM). The Government fully endorses as a fundamental legal policy the desirability of working towards uniformity in many areas of legislation. In the area of legislation regulating commercial activity this goal has obvious benefits. When uniform legislation is developed in such a process it is inevitable that the participating States and Territories will be involved in compromises in reaching agreement. There will always be a tension between what may be achieved by agreement and what particular jurisdictions may favour for a variety of reasons.

That is not to say that the Government should not always look first and foremost to the welfare and good government of the ACT. That is its duty. However, the Government believes that in many cases that duty is best served by working with other jurisdictions towards uniformity and that it is unfortunate when the narrower interests of particular jurisdictions interfere with that process. In the case of the present legislation four jurisdictions (Western Australia, South Australia, Queensland and Tasmania) have enacted the uniform legislation agreed on through SCOCAM. The Northern Territory has introduced a Bill for a Fair-Trading Act containing the uniform provisions. The ACT therefore will be the sixth jurisdiction to adopt the uniform law.

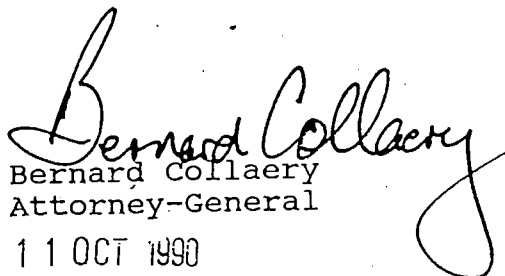
As I said when presenting the Bill to the Assembly, the Government does not believe that it should feel constrained by the position in New South Wales from enacting legislation in the public interest which is not consistent with NSW law. In the case of the present Bill, of course, the main substantive provisions are consistent with the NSW law even though that State has not adopted the uniform legislation and has retained legislation inferior to the uniform legislation in a variety of respects.

The Government acknowledges that it has departed in the present Bill from the uniform legislation in a few fairly minor matters - in one case to soften a provision of the category (a) type, and the Committee has commended the Bill for this. However, I do not believe that further departures from uniformity can be justified in relation to this category. In addition to the issue of uniformity, my reasons are threefold. Firstly, the 1982 Senate Committee Report on the Burden of Proof referred to by the Committee did acknowledge that such provisions may be justified in a range of situations - notably when the matter at issue is within the knowledge of the defendant and when, without such provisions, a virtually insurmountable difficulty would be faced by a prosecutor. These reasons go a long way in my view to justifying the provisions in the present Bill. Secondly, the onus of proof is reversed in these provisions only in respect of relatively technical matters - whether a contract falls into two artificial categories created by the Bill in order to aim it at unsolicited commercial door to door trading and not at invitees, charities and so on. These matters may be distinguished from those dealt with in the provision where the Government did decide to soften the provision. That provision goes to a matter of substance - whether or not a trader was a dealer engaged in door to door trading. Thirdly, the policy of these provisions is an important aspect of the overall thrust and nature of the Bill as a consumer protection measure. They simplify proceedings and render them less costly, and they restrict the scope of traders to argue technical legal points in proceedings and help to focus proceedings on the substantive consumer protection aspects of the

legislation. Of course, a trader is not wholly precluded from arguing in defence that the contract is not, for example, a "prescribed" contract for the purposes of the Act, but if that argument is run then the onus is rightly on the defence.

In respect of the "postal rule" provision, I must say that I am inclined to agree with the arguments advanced by the Committee. I am also convinced that the departure from uniformity involved will cause no disadvantage to consumers or practical problems for cross-border traders. I therefore intend to suggest to the Government that this provision be modified so that the already existing provision covering such matters in the Acts Interpretation Act is allowed to apply.

Yours sincerely


Bernard Collaery
Attorney-General
11 OCT 1990



Australian Capital Territory

Deputy Chief Minister

1 Constitution Ave
Canberra ACT 2601

Ms C Maher MLA
Presiding Member
Standing Committee for the Scrutiny
of Bills and Subordinate Legislation
ACT Legislative Assembly
1 Constitution Avenue
CANBERRA ACT 2600

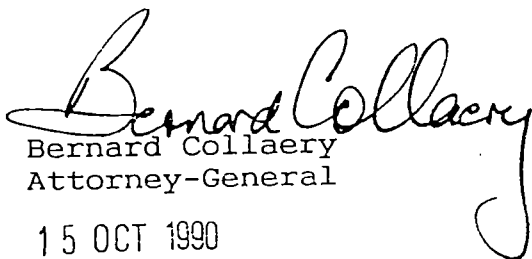
Dear Ms Maher

In its Report No. 14 of 1990, the Committee commented on the commencement provision in the Commercial Arbitration (Amendment) Bill 1990 (as it then was). The Committee drew attention to the fact that the Bill did not contain a 'default provision' which would ensure commencement of the substantive provisions of the Bill six months after notification of the Act in the Gazette.

As the Committee correctly surmised, the operation of the substantive provisions (clauses 3 - 5) is not subject to the ultimate control of the ACT. Their operation is entirely dependent upon Rules of Court being made by the Supreme Court of the ACT under section 28 of the Australian Capital Territory Supreme Court Act 1933 of the Commonwealth - see subclause 2(2) of the Bill.

Accordingly, the inclusion of an otherwise desirable automatic commencement mechanism is not necessary in this instance.

Yours sincerely


Bernard Collaery
Attorney-General
15 OCT 1990