SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

ARCHITECTS BILL 2003

Presented by Hon Adele Farina MLC (Chairman)

Report 17
June 2004

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed:
April 11 2002

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**7. Uniform Legislation and General Purposes Committee**

7.1 A *Uniform Legislation and General Purposes Committee* is established.

7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.

7.3 The functions of the Committee are –

(a) to consider and report on bills referred under SO 230A;

(b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to consider and report on any matter referred by the House.

7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:
Hon Adele Farina MLC (Chairman)
Hon Simon O'Brien MLC
Hon Paddy Embry MLC

Staff as at the time of this inquiry:
Anne Turner, Advisory Officer (Legal)
Sheena Hutchison, Committee Clerk

Address:
Parliament House, Perth WA 6000, Telephone (08) 9222 7222
Website: http://www.parliament.wa.gov.au
ISBN 1 9208 8612 5

CONTENTS

SUMMARY OF RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

ARCHITECTS BILL 2003

RECOMMENDATIONS

Recommendations are grouped as they appear in the text at the page number indicated:

Page 13

Recommendation 1: The Committee recommends that during debate in the Council on the Architects Bill 2003, the responsible Minister address the matters raised in relation to the abrogation of the privilege against self-incrimination and the form of indemnity provided by clause 13.

Page 23

Recommendation 2: The Committee recommends that Schedule 2 , Item 11 of the Architects Bill 2003 be amended to remove the ability of transitional regulations to have retrospective effect and a Henry VIII aspect. This can be effected in the following manner:

On page 68, lines 12 to 16 - to delete the lines.

On page 68, line 19 to page 69, line 3 - to delete the lines.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

ARCHITECTS BILL 2003

---

1 REFERRAL OF THE BILL

1.1 On Thursday, May 6 2004 the Architects Bill 2003 (**Bill**) stood referred to the Uniform Legislation and General Purposes Committee (**Committee**) pursuant to standing order 230A. Standing order 230A(4) requires that the Committee report to the Legislative Council (**Council** or **House**) within 30 days of referral. Pursuant to standing order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee. The Committee was due to report the Bill by Friday, June 4 2004. However, the House granted an extension to June 29 2004.

1.2 The purpose of the Bill, as indicated by the Long Title, is to provide for the registration of natural persons as architects and the licensing of corporations as architects.

2 INQUIRY PROCEDURE

2.1 The Committee was aware that the Bill would be subject to standing order 230A when it was introduced into the Council and would probably stand referred to the Committee.[1]

2.2 On May 7 2004, the Committee first wrote to the Executive seeking information about the Bill and documents supporting its implementation. The Committee specifically sought any relevant Memorandum of Understanding, Minutes or Inter-Governmental Agreement. The Hon Nick Griffiths MLC, Minister for Housing and Works (**Minister**) responded to the Committee's request for information on May 28 2004.

2.3 The Committee did not advertise for or invite submissions because of its strict reporting timeframes. However, details of the inquiry were placed on the parliamentary website at: www.parliament.wa.gov.au.

---

[1] Letter from Mr G. Burkitt, Chief of Staff to the Minister for Housing and Works, dated April 13 2004.

3 UNIFORM LEGISLATION

Scrutiny of uniform legislation by the Western Australian Parliament

3.1 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991 both the Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of uniform legislation.[2]

3.2 More recently during the Thirty-Sixth Parliament until the appointment of the Committee, the scrutiny of uniform legislation fell within the terms of reference for the Council Standing Committee on Legislation. In November 2001 the relevant Council standing order (standing order 230A) was amended to consolidate matters relevant to uniform legislation and to facilitate automatic referral of such bills to the Committee for inquiry and report within 30 days.

Legislative structures

3.3 National legislative schemes of uniform legislation were addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (**1996 Position Paper**). The 1996 Position Paper emphasised that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. However, it does question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.

3.4 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the executive that consistency with the legislative form agreed among the various executive Governments is a 'given'.[3]

3.5 National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth (refer to standing order 230A(1)(b)), can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on

---

[2] For discussion of the history behind the scrutiny of uniform legislation and standing order 230A refer to: Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, August 2002, pp5 - 6.

[3] For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp7-12 attached as Appendix 1 to Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Position Paper: Scrutiny of National Schemes of Legislation*, October 17 1996.

national consistency or uniformity of laws and adaptability have been identified. The legislative structures are summarised in Appendix 1.[4]

3.6 The Explanatory Memorandum describes the Bill as 'harmonising' legislation.[5] The Second Reading Speech also refers to how the Bill satisfies 'national harmonisation agreements'.[6] Harmonisation refers to the process of aligning legislation across jurisdictions so provisions are compatible, but not necessarily identical.

3.7 The Minister explained that there are advantages for Western Australia to participate in a harmonisation process. For example, in the case of architects, a national set of standards for the registration of architects and their professional development is desirable to achieve consistency across the nation for the architectural profession. Harmonisation will assist in the re-registration process which is a requirement when architects move from one jurisdiction to another. Having different sets of registration requirements in different jurisdictions causes confusion and delay. Further, widely divergent regulatory requirements between jurisdictions for the same professional group is not desirable in the interests of mutual recognition.[7] Other advantages include Western Australia being able to:

> *…opt out of the harmonisation agreements at any time, there is only an in principal agreement to pursue harmonisation of the Acts. The Bill, once enacted, can be amended at any time it is considered necessary by the Western Australian government. There is no agreement required between Australian jurisdictions*.[8]

Scrutiny principles

3.8 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:

- does the Bill trespass unduly on personal rights and liberties;[9]

  and

---

4 Ibid. Also see reports of the Parliament of Western Australia, former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

5 Explanatory Memorandum, Introduction.

6 Second Reading Speech, p2.

7 Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, dated May 28 2004, received June 1 2004, p2.

8 Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, dated May 28 2004, received June 1 2004, p2.

9 For example: strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, inappropriate search and seizure powers, decision-making safeguards (that is: written decisions and reasons for decisions), personal privacy, decisions unduly dependent on administrative decisions.

- does the Bill inappropriately delegate legislative powers?[10]

3.9 In addition, in recent times, the Committee has considered the impact of any proposed legislation on the application of parliamentary privilege.[11] Although not adopted formally by the Council as part of the Committee's terms of reference, these principles can be applied as a convenient framework for the scrutiny of legislation.

4 BACKGROUND TO THE BILL

4.1 On August 4 2000, the Commonwealth's Productivity Commission released its Report into the regulation of architects in Australia.[12] The Productivity Commission's inquiry stemmed from the National Competition Policy[13] (**NCP**) legislative review program and was conducted by the Productivity Commission on behalf of all States and Territories (except Victoria).

National Competition Policy

4.2 Under the *Competition Principles Agreement* (**CPA**), Commonwealth, State and Territory governments agreed to identify, and then review, all their anti-competitive legislation against the public interest test, and implement any necessary reforms.[14]

4.3 The CPA committed all parties to a timetable for reform. It originally set 2000 as the deadline for governments to complete their programs, but in November 2000, the Council of Australian Governments extended this timeframe to 30 June 2002.[15]

4.4 The CPA also commits the Commonwealth to making substantial payments to the States and Territories subject to their meeting agreed milestones for the reform agenda

---

10 For example: 'Henry VIII clauses', insufficient parliamentary scrutiny of the exercise of legislative power.

11 Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, pp7–10; and Report No 11: *Higher Education Bill 2004*, Western Australia, September 2003, pp 24-34.

12 Productivity Commission, *Review of Legislation Regulating the Architectural Profession*, 2000, (Report No. 13).

13 Acting on the recommendations contained in the 1992 *Hilmer Report*, a set of agreements signed in April 1995 between the Commonwealth and all State and Territory governments, formed a package called National Competition Policy (NCP). NCP is essentially a combination of laws, principles and processes. The legislation and agreements collectively form the NCP, with each component an integral part of the whole and designed to achieve a uniform and effective policy. The fundamental purpose of NCP is to introduce competition reform where it is in the overall community interest. NCP is a broad umbrella of national reforms, covering the expansion of the *Trade Practices Act 1974 (Cth)*, competitive neutrality and the structural reform of public monopolies.

14 The CPA covers the six major areas of competition reform: prices oversight for government business; structural reform of public monopolies; competitive neutrality; legislation review; access to essential infrastructure; and the application of competition principles to local government.

15 National Competition Council, *Legislation Review Compendium*, 4th edition, February 2002, p1.

and timetables.[16] Complying jurisdictions receive funding from two sources: shares in "competition payments" and guaranteed increases in financial assistance grants. However, the CPA also requires that States not undertaking the required reforms within the specified time will have their share retained by the Commonwealth.[17]

NCP and the review of legislation

4.5 Reviewing legislation for anti-competition restrictions is one of the major undertakings in NCP. Over 1700 pieces of legislation were identified by governments for review, extending across a range of industries and sectors.[18] The areas range from the regulation of professions, statutory marketing arrangements for agricultural commodities (such as the Australian Wheat Board) to the regulation of shop trading hours and liquor and taxi licensing.

4.6 Clause 5 of the CPA is the guiding principle behind the review of legislation program. It provides that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs; and the objectives of the legislation can only be achieved by restricting competition.

The Productivity Commission Report

4.7 The Productivity Commission's Report recommended the repeal of all the Architects Acts in Australia and the development of a national, non-statutory certification and course accreditation system.[19] However, the architectural profession objected to those recommendations.[20]

4.8 A Working Group of Senior Officials of the States and Territories (**Inter Government Working Group**) was convened to officially respond to the Productivity Commission's Report. The Inter Government Working Group saw risk in a non-statutory approach. It argued that:

---

16 Western Australia Competition Policy Unit, *Legislation Review Guidelines*, Perth: Department of Treasury, April 1997, pp2-3.

17 In December 2001, the Commonwealth Treasurer announced that $270,000 was to be permanently deducted from Queensland's 2001-02 competition payments because of the Townsville City Council's failure to objectively analyse the cost effectiveness of two-part tariffs in relation to water reform before the agreed June 2001 deadline. Department of Treasury, Treasurer's Press Release No. 097, December 14 2001.

18 National Competition Council, *Legislation Review*, http://www.ncc.gov.au (viewed at June 11 2004).

19 The Productivity Commission said the costs of current regulation outweigh its benefits because claimed benefits of Architects Acts could be achieved more effectively by a self regulating profession.

20 States and Territories Working Group on a Coordinated Response to the National Competition Policy review of Legislation regulating the Architectural Profession, www.dhw.wa.gov.au/policy/policy_architectsbackground.cfm (viewed at May 6 2004).

- with the small number of architects in Australia, more than one certifier would not be economically viable, leading to a single certifier acquiring a monopoly position. A single certifier could be open to undue influence by organised interest groups, leading to reduced usage by the profession;

- a single certifier could decrease market information about the qualifications and experience of people claiming to be architects;

- private certification may not be readily exposed to public, professional or parliamentary review and, isolated from the political process, could become internally focused; and

- correcting these potential failures would entail legislative or administrative intervention at further cost to the profession and/or the public.[21]

4.9 According to the Second Reading Speech, the Department of Housing and Works completed its review of the *Architects Act 1921* in June 2001. At the Australian Procurement and Construction Ministerial Council (**APCMC**) meeting on June 14 2002, a proposal to harmonise Architects Acts across jurisdictions was agreed by Ministers. The APCMC Resolutions were:

- in principle, to pursue harmonisation of Architects Acts;

- that the APCMC facilitate the harmonisation process; and

- that all States and Territories ask their Boards of Architects to work cooperatively in developing administrative measures to achieve mutual recognition and in identifying and implementing other opportunities for harmonisation.[22]

4.10 The Minister explained that the Bill is not part of a uniform legislation agreement.[23] It is subject to a 'harmonisation' agreement between Australian jurisdictions that contains the following principles:

- architectural services should be of a standard that will protect and enhance the public's health, safety and welfare, economic, social, cultural and environmental interests;

---

21 States and Territories Working Group on a Coordinated Response to the National Competition Policy review of Legislation regulating the Architectural Profession, www.dhw.wa.gov.au/policy/policy_architectsbackground.cfm (viewed at May 6 2004).

22 Draft APCMC Minutes, June 14 2002, p24.

23 Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, dated May 28 2004, received June 1 2004, p1.

- architectural services should be provided by and under the control of architects appropriately qualified by virtue of education, training and experience and who have the necessary competence and resources;

- no person should be permitted to use the title "Architect" or otherwise represent to the public (by use of derivatives of the word "architect") that the person is an architect unless registered under the Act;

- no statutory control over the practice of architecture; and

- recognition of nationally consistent standards for registration and professional development, and the assessment of those standards, through a national standard setting body - the Architects Accreditation Council of Australia.[24]

4.11 The Second Reading Speech emphasises that the Bill delivers the Government's commitment to NCP principles to review legislation regulating the architectural profession.[25] In addition to repealing the *Architects Act 1921*, the *Architects' Board of Western Australia By-laws 1965* are also repealed.

5 OVERVIEW OF THE BILL

5.1 The Bill contains 81 clauses in 9 Parts with 2 Schedules and a list of tabulated, defined terms.

Preliminary Observation

5.2 In the Second Reading Speech, Hon Nick Griffiths MLC, Minister for Housing and Works stated:

> *This legislation incorporates a new procedure for hearing and determining disciplinary matters with the establishment of the SAT. SAT removes any perception of a conflict of interest with the Board of Architects acting as the registering body and also a disciplinary body*.[26]

5.3 Both the Second Reading Speech and the Explanatory Memorandum to the Bill contain this statement. Each may be characterised as a source of extrinsic material under section 19 of the *Interpretation Act 1984* aiding statutory interpretation of the new Act.

---

[24] Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, May 28 2004, received June 1 2004. The nationally consistent standards for registration and professional development were to be adopted by jurisdictions through regulations. Jurisdictions were free to structure their registration Acts to suit their own particular environment.

[25] Second Reading Speech, p1.

[26] Ibid, p5.

5.4 The Committee observes the statement quoted above may raise an implication that previous decisions of the former Board might involve more than just a perception of a conflict of interest. Some aggrieved persons may consider that its previous decisions are in fact actually biased, simply because the State Administrative Tribunal will exist to correct the perception of a conflict of interest.

5.5 The Committee considered a recommendation to provide for an express, declaratory clause validating the previous decisions and determinations of the former Board, to put the matter beyond doubt. However, after consideration, the Committee is satisfied that the savings and transitional provisions in Schedule 2 Item 3, referring to the new Board being the same entity as, and a continuation of the former Board, with the rights and liabilities of the former Board continuing to the new Board, is evidence of validation.

6 COMMENT ON CLAUSES OF INTEREST IN THE BILL

Clause 2 - Commencement

6.1 The Committee alerts the House to the fact that the Bill if passed, can be enacted but will not come into operation until Part 2, Division 8, of the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Bill 2003 (**Conferral Bill)** is passed.[27]

6.2 The purpose of the Conferral Bill is to amend 142 enabling Acts and repeal two other Acts so as to confer jurisdiction on the proposed State Administrative Tribunal. If the Conferral Bill is passed, it will consequentially amend the *Architects Act 1921* to take into account the new appeal and review mechanisms to the State Administrative Tribunal. Once the Conferral Bill is passed, the Bill can come into operation and the *Architects Act 1921* will then be repealed by clause 78 of the Bill. Therefore, the Bill depends on the Conferral Bill being enacted.

Clause 12(1)(d)

6.3 Clause 12(1)(d) states that *"the Board may carry out any investigation that the Board considers necessary or expedient for the purposes of… detecting offences under this Act."* The Committee sought clarification of the term "detecting" from the Minister, given the very significant powers of entry provided for in clauses 12(4)(c) and 12(9) and whether it would extend to cover surveillance activity.

6.4 The Minister said that the definition of "detecting" is that located in the Macquarie Dictionary definition which is: *"..to discover the presence, existence, or fact of the commission of an offence"*. This would include checking written material, drawings, project signs and so on for false claims that a designer is an architect. The Minister

[27] Part 2, Division 8 concerns the repeal and amendment of various sections in the *Architects Act 1921.*

pointed out that any powers to conduct surveillance of people would need to be expressly provided for in the Bill.

6.5 The Committee concluded from the Minister's response that it is not intended that "detecting" include surveillance activities.

Clause 12(2)

6.6 Clause 12(2) states that "*the Board is not to investigate a complaint that is made more than 3 years after the conduct is alleged to have occurred…"* with two exceptions. The Committee requested an explanation of how the three year limit was determined. The Minister said:

> *…the 3 year period for investigating a complaint anticipates that any problems would be likely to manifest early in the process, and this limited time frame would ensure information and evidence remained available to assist the investigation.*

6.7 The Minister further stated that Parliamentary Counsel was specifically asked to consider the matter of time limitations for taking disciplinary action, noting that the limit for taking proceedings for offences is already established under the *Justices Act 1903* as 12 months.[28] Parliamentary Counsel advised the Minister of the provenance and background of the clause. These were the legal profession model laws project changing the time limitation to three years and specific limitation periods for disciplinary matters not provided for in Western Australia.

6.8 The Minister confirmed that this matter was not part of the national harmonisation process for Architects Acts.

6.9 The Committee also questioned whether the limit is similar to that imposed on a builder or engineer. The Minister said that there is no Western Australian legislation for regulating engineers or complaints against engineers. However, under section 21A of the *Builders' Registration Act 1939*, complaints in relation to builders, for any contravention, must be sworn within 12 months of the date on which the offence was committed. Under section 31(1)(b) of the *Home Building Contracts Act 1991*, complaints in relation to builders, must be sworn within three years after the alleged commission of the offence. The three year limit set in the Bill therefore aligns with that imposed on builders.

6.10 The Committee also queried whether the three year period runs from the time of discovering the fault in the architect's drawings, which may not occur for some years, or from when the executed contract for those drawings is performed.

6.11 Mr Peter Gow, Executive Director, Office of Policy and Planning, Department of Housing and Works explained that clause 12(2), when read in its entirety, provides that the three year limit is subject to the discretion of the Board to extend the limit if it thinks to do so is just and fair, or in the public interest. In a situation where faulty architectural drawings may not be discovered for many years, the Board has discretion to extend the time limit.[29]

6.12 Mr Gow said that clause 12 contemplates complaints relating to current actions, such as falsely holding oneself out to be an architect when unregistered and failing to comply with conditions of registration, rather than incompetence in the design or documentation of a building where that incompetence would not become apparent until after construction commences. Mr Gow advised the Committee that a building owner or developer is more likely to rely on civil action to recover damages for professional negligence rather than complain to the Architects Board where no damages can be awarded.[30]

6.13 Mr Gow said the Department of Housing and Works is currently preparing proposals for a new Building Act that will update the approval process. These proposals include the requirement for a designer of a building to provide a certificate to the building licence issuing authority that the designer takes legal responsibility for the soundness of the design. This will reinforce the building owner's ability to identify and take action against the designer, including a registered architect. [31]

Clause 13

Abrogation of the privilege against self-incrimination

6.14 Under its terms of reference the Committee is to "consider" the Bill and in doing so, it may question whether the Bill has sufficient regard to the rights and liberties of individuals. In this case, the Committee considered whether there is appropriate protection with respect to the common law privilege against self-incrimination, which is abrogated by clause 13. The Explanatory Memorandum to the Bill states that other jurisdictions have this clause.

6.15 The privilege against self-incrimination is considered one of the fundamental common law principles, a human right, safeguarding against the infringement of individual

---

28 Section 51 *Justices Act 1903* states: *"In any case of a simple offence or other matter, unless some other time is limited for making complaint by the law relating to the particular case, complaint must be made within 12 months from the time when the matter of complaint arose"*.

29 E mail letter from Mr Peter Gow, Executive Director, Office of Policy and Planning, Department of Housing and Works, June 9 2004, p1.

30 Ibid.

31 Ibid.

rights.[32] Historically, the privilege developed to protect individual persons from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt. The modern rationale is substantially the same as the historical justification, that is, it discourages ill-treatment of individuals and dubious confessions.[33]

6.16 Methods of punishment are now different. Modern-day sanctions involve fines and/or imprisonment, rather than excommunication or physical punishment. Further, the philosophy behind the privilege has become more refined - the privilege is now seen to be one of many internationally recognized human rights. The modern and international treatment of the privilege sees it as a human right, protecting personal freedom, privacy and human dignity.[34]

6.17 The right not to be compelled to testify against oneself or to confess guilt is also embodied in Article 14(3)(g) of the *International Covenant on Civil and Political Rights*. The language of that Covenant makes it clear that the purpose of its provisions is to protect individual persons.[35]

6.18 According to *Wigmore on Evidence*, the privilege prevents torture and other inhumane treatment of a human being. It also contributes to the concept of a 'fair state' where governments are required to leave the individual alone until good cause is shown for disturbing him or her and by requiring governments, in their contests with the individual, to shoulder the entire load.[36]

6.19 The Minister said clause 13 was not part of the national harmonisation process and was included by Parliamentary Counsel to ensure the Bill conformed to similar registration legislation in Western Australia. The Minister stated that Parliamentary Counsel had advised that the clause was based on amendments proposed in the Conferral Bill to insert proposed new section 31A into the *Architects Act 1921*. The Minister explained that similar wording is used in the Conferral Bill in relation to the *Land Valuers Licensing Act 1978*, the *Motor Vehicle Dealers Act 1973*, the *Podiatrists Registration Act 1984* and the *Psychologists Registration Act 1976*.[37]

---

32 Some of the other fundamental rights are the right to liberty, the right to freedom from taxes or penalties in the absence of express statutory authority and legal professional privilege.

33 *Environment Protection Authority v Caltex Refining Co. Pty Limited* (1993) 178 CLR 477.

34 *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at p150, per Murphy J.

35 The relevance of this Covenant was explained by Mason CJ and Toohey J in *Environment Protection Authority v Caltex Refining Co. Pty Limited* (1993) 178 CLR 477. The Judges said: *"As this Court has recognized, international law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights."*

36 *Wigmore on Evidence* (McNaughton rev. 1961), pp310-317.

37 Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, dated May 28 2004, received June 1 2004, p4.

Forms of immunity

6.20 The Committee has previously considered the common law privilege against self-incrimination and its statutory abrogation in the context of proposed amendments to the *National Crime Authority (State Provisions) Act 1985* to remove derivative use immunity.[38]

6.21 The Committee is conscious of the need good government has for enough information to enable it to properly carry out its duties to the community. This might necessitate the obtaining of information which can only be obtained, or can be best obtained, by forcing someone to answer questions or provide information even if this would incriminate the person.

6.22 Whilst, in some circumstances, the Committee does not necessarily see the privilege against self-incrimination as absolute, it is interested as to whether the public benefit which is to follow from its removal outweighs the resultant harm to the maintenance of the rights and liberties of an individual.

6.23 When the privilege against self–incrimination is abrogated one factor the Committee may consider is the subsequent use that may be made of any incriminating disclosures. The legislation abrogating the common law privilege may provide for an immunity in respect of the use of information disclosed. In this respect, immunity has been described as having two forms – 'transactional immunity' and 'use immunity'.[39] For present purposes 'use immunity' can be further considered as either:

- immunity from a prosecution that could otherwise be commenced on the basis of the documents produced or answers given - what might be termed '*immediate use'* immunity (also known as '*direct use'* immunity); and

- '*derivative use'* immunity (also known as '*indirect use'* immunity). This prevents evidence sourced from the self-incriminating documents or answers provided being used to support a prosecution against the person independently of what was obtained under immediate use immunity.

6.24 Clause 13 provides the first type of immunity, that is - '*direct use*' immunity, to mitigate the harshness of the abrogation of the privilege. This type of immunity means that a prosecution cannot be commenced on the basis of the documents produced or answers given. The clause relevantly states:

> *… but the information or answer given, or document produced, by the person is not admissible in evidence in any proceedings against the*

[38] Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp14–18.

[39] L. Cobden, 'The Grand Jury – Its Use and Misuse', *Crime and Delinquency*, April 1976, p152.

person other than proceedings in respect of an offence under section 14(1)(b).

6.25 The Committee observes that clause 13 does not prevent the '*indirect use*' (or 'derivative use') of incriminating material, that is – it does not prevent the use of *other* evidence obtained from the incriminating evidence from being used as the basis of a prosecution.[40]

6.26 The Committee considers that abrogating a common law privilege, the singular justification (as advised by the Minister), being that it is in the Conferral Bill, (which is modelled on Victorian legislation) is an insufficient explanation for diminishing this important, historical privilege. The Committee noted that the Taskforce Report on the Establishment of the State Administrative Tribunal (**Barker Report**) recommended immunity only in criminal proceedings, not civil.[41] In that regard, although clause 13 of the Bill abrogates the privilege, the Committee concedes that it provides immunity for "any proceedings", thus covering both civil and criminal actions.

Recommendation 1: The Committee recommends that during debate in the Council on the Architects Bill 2003, the responsible Minister address the matters raised in relation to the abrogation of the privilege against self-incrimination and the form of indemnity provided by clause 13.

Clause 20

6.27 This clause concerns the relationship between the Board and the Minister. The Committee notes that the Minister will now appoint Board Members, (currently it is the Governor) and that the Minister may issue Ministerial Directions.

6.28 The Committee understands that as a result of the *Burt Commission on Accountability* (**Burt Commission**), it has become standard practice to include provisions in new or amending legislation, for ministers to issue Ministerial Directions.[42] The Burt Commission highlighted that it is fundamental to parliamentary accountability for statutory authorities to be subject to ministerial control.

6.29 Case law establishes that where a minister has statutory power to give directions:

---

40 Such provision might say "*that any answer given or document or thing produced, as the case may be, or any information, document or thing obtained as a direct or indirect consequence of the answer of the production of the first-mentioned document or thing, will not be used in evidence in any proceedings against that person …*". Section 19(5) of the *National Crime Authority (State Provisions) Act 1985*.

41 Barker Report, May 2002, p153, clause 89.

42 Department of the Premier and Cabinet Public Sector Management, *Guidelines for Instructing Officers - Machinery of Government Issues*, April 2003, http://www.dpc.wa.gov.au/psmd/index.html (viewed at June 15 2004). (Commission on Accountability, Commission on Accountability. Report to the Premier, the Honourable P. McC. Dowding, LLB; MLA, Perth 1989).

- the ministerial power cannot remove the discretion conferred upon the decision maker so as to authorise the Minister substituting his or her own opinion for that of the decision maker;[43]

- the direction in such a case would be invalid;[44]

- the exercise of power by the decision maker in complying with a Ministerial Direction, without exercising an independent discretion, is invalid;[45] and

- if a minister has overriding reserve powers under a statutory power of direction, the independent discretionary power of the decision maker may be overridden.[46]

6.30 The Committee was uncertain whether clause 20 would apply to parliamentary committees of inquiry. Given the width of this clause, the Committee queried whether the Minister could issue a direction that the Board, in a particular matter, not provide documents to a parliamentary committee.

6.31 The Minister said *"…it is not intended to limit Parliament by the operation of this clause."* The Minister advised that the Board would be obliged to provide documents to a parliamentary committee if ordered to do so pursuant to sections 4 and 8 of the *Parliamentary Privileges Act 1891*. Further, the Minister noted that pursuant to section 6 of the *Statutory Corporations (Liability of Directors) Act 1996*, the Minister cannot direct the Board not to do something that it is obliged to perform.[47]

6.32 The Committee concluded that clause 20 could not be used to issue a Ministerial Direction denying a parliamentary committee access to information. This is because the clause contains no express, exceptional reserve power for the Minister to so direct and in any event, the *Parliamentary Privileges Act 1891* would operate to ensure the production of the requested information.[48]

Clause 30

6.33 Clause 30(2) states that the Board "may impose" insurance cover as a condition of renewal of registration. The Second Reading Speech refers to how insurance cover is

---

43 *Zayen Nominees Pty Ltd v Minister for Health* (1983) 47 ALR 158.

44 *Perder Investments Pty Ltd v Lightowler* (1990) 25 FCR 150.

45 *Bosnjak's Bus Service Pty Ltd v Commissioner for Motor Transport* (1970) 92 WN (NSW) 1003.

46 *New South Wales Farmers' Association v Minister for Primary Industries and Energy* (1990) 94 ALR 207. In this case the Minister was provided with a statutory power to direct in exceptional circumstances.

47 Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, dated May 28 2004, received June 1 2004, p4.

48 As expressed by Murphy J in *Hammond v Commonwealth* (1982) 152 CLR 188 at 200: *"The privileges of Parliament are jealously preserved and rightly so. Parliament will not be held to have diminished any of its privileges unless it has done so by unmistakable language."*

likely to be regulated through the *Professional Standards Act 1997*. However, section 46 of that Act also uses the phrase "may" to make it clear that an occupational association "may require" its members to hold insurance against occupational liability and that such a requirement may be imposed as a condition of membership.

6.34 The Committee noted that the phrase "may impose" in the Bill is discretionary pursuant to section 56 of the *Interpretation Act 1984* as is "may require" in the *Professional Standards Act* 1997. The Committee requested an explanation from the Minister as to why "may impose" is not an imperative function, given the focus on consumer protection in the Bill.

6.35 The Minister said the volatile insurance market was a consideration in using the expression "may impose" in relation to insurance cover. This is because at the time of drafting the Bill the insurance market was in crisis and many professionals were unable to access insurance due to high costs and the unavailability of insurance for many services. The Minister said:

> *…we did not wish to impose a condition on registration and renewal that we were not certain that applicants could meet in the future. We did not wish to reach a situation whereby few or no architects could be registered, or renew their registration, due to the unavailability of insurance cover and the conflicting requirement in the legislation that insurance cover be in place as a condition of registration/renewal*.[49]

6.36 Another reason advanced by the Minister for the phrase "may impose", is the proposal to develop a framework for a number of different tiers or levels of registration for architects. The Minister advised that it is proposed there be two main groups:

- ordinary registration for academics, teachers and similar who do not require insurance coverage, that is those not actively engaged in designing buildings; and

- practising registration requiring insurance cover for those architects actively engaged in designing buildings.

6.37 The Committee accepts that although the Bill has an important consumer protection focus, a clause providing for compulsory insurance for all architects is not feasible. The discretionary nature of clause 30(2) facilitates flexibility in view of insurance markets and tiered insurance frameworks.

---

[49] Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, dated May 28 2004, received June 1 2004, p4.

Clause 39

6.38 This clause concerns the licensing document itself. The Committee notes that there is no requirement for the licence document to be prominently displayed at an architect's place of business. The Committee notes that clause 66 expressly provides for persons to refrain from making or publishing a document which states or implies that a person is an architect when the person is not registered or licensed, yet there is no compulsion for a registered architect or corporations licensed as architects to display their respective documentation.

6.39 The Second Reading Speech indicated that the Bill is concerned with the adequacy of consumer protection and asked the Minister if this might be a subject matter for amendment in the Bill or contemplated for subsequent regulation.

6.40 The Minister said that this matter was not expressly provided for in the Bill so as not to make the Bill too prescriptive. The Minister confirmed that regulations will address the display of a licence or registration. The Committee agrees that regulations are an appropriate means for prescribing the display of a licence or registration document.

Clause 49

6.41 This clause enables the Board to direct the Registrar to remove the name of a person who has not practised architecture for five years. Given that the term "practised architecture" is not defined in the Bill and the fact that clause 49(1)(a) contains two elements - that is, the person must not have practiced *and* not maintained current skills, the Committee sought clarification about how this clause will affect academics and teachers of architecture. These applicants may not have actually practised architecture but would be knowledgeable and skilled.

6.42 The Minister said that it is intended there will be various divisions of registration prescribed by the regulations that relate to different categories of registered persons or licensed corporations. Different standards for registration will apply to the different categories. It is intended to provide a specific registration classification for academics to ensure they can be registered and that clause 49 will not impact on them. [50]

6.43 The Committee was satisfied with this explanation.

Clause 51(3)

6.44 This clause states that a person whose name is removed from the register following disciplinary action cannot re-apply for restoration for at least two years. The Committee requested an explanation from the Minister about how the two year period was determined and if a person is suspended from the register, whether the two year

[50] Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, dated May 28 2004, received June 1 2004, p5.

period would run from the time of suspension or when the disciplinary intervention is finalised. The Minister said the inclusion of this clause was not part of the national harmonisation process. The Minister advised that it is based on similar provisions in, what were at the time of drafting, the two most recent registration Acts in relation to particular professions, specifically the *Nurses Act 1992* and the *Osteopaths Act 1997*. The Minister advised that time runs from the removal of the architect's name from the register.

Clause 56(2)

6.45 This clause concerns the definition of "unprofessional conduct". The Committee noted that clause 56(1) is replete with matters that can constitute unprofessional conduct, yet clause 56(2) states that regulations can further prescribe the meaning of that phrase.

6.46 The Explanatory Memorandum to the Bill states that the *"use of regulations will allow the Board to adopt a national Code of Conduct …to provide the basis for professional conduct... and a foundation for disciplinary proceedings under the Act"*.[51] However, clause 71(3) will provide for regulations to wholly or partly adopt any "standards, rules or code". Thus, the Committee queried why clause 56(2) is required given that clause 56(1) adequately covers the type of behaviour sought to be proscribed.

6.47 The Minister explained that clause 56(1) is about the causes for disciplinary action, the first of which is stated to be engagement in unprofessional conduct as an architect. The general meaning of this term can be added to by way of regulation under clause 56(2). The Minister observed that there are other causes for disciplinary action, set out in clause 56(1)(b) to (e), which do not necessarily fall within the concept of unprofessional conduct as an architect but nevertheless would constitute grounds for disciplinary action.

6.48 The Minister said it was intended that clause 71(3) be applied generally whereas clause 56(2) was inserted to ensure there was a clear link between the clause of the Bill that deals with disciplinary proceedings and the national Code of Conduct for Architects.[52]

6.49 The Committee was satisfied with this explanation.

---

51 Explanatory Memorandum, p8.

52 Letter from Hon Nick Griffiths MLC, Minister for Housing and Works, dated May 28 2004, received June 1 2004, p5.

Schedule 2, Item 11

6.50 Item 11, clause (2) provides the Governor with wide powers to make regulations stipulating that specific provisions of the Act either do not apply, apply with modifications or do not apply at all in relation to any transitional matter. The Committee has reservations about the width of Item 11, clause (2) and how it derogates from parliamentary sovereignty, whilst providing the executive with an express power to alter the Act.

6.51 The Committee concedes that this power is only for transitional purposes; that the regulations must be made within 12 months of commencement and that they cannot operate so as to prejudice or impose liabilities on any person. However, the regulations can have retrospective operation under clause (4).[53]

6.52 The Minister said that Item 11 is modelled on the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003*.[54] The Committee noted that the Amendment and Repeal (Courts and Legal Practice) Bill 2003 was not scrutinised by a parliamentary committee and during Committee of the Whole in the Council, the transitional clauses were not debated and passed as a whole.

6.53 According to Bennion, a noted commentator on statutory interpretation, an Act may confer power for the amendment of itself or another Act by delegated legislation and such amendment *"is as effective as if made directly by an Act."*[55] By another name, this is known as a Henry VIII clause.

6.54 The practice of including these amending powers in Acts began in the second half of the 19th century and despite the frequency of the use of this method by common law Parliaments, there is judicial dislike of the practice.[56] The power has been described as 'remarkable' and 'startling' with a persisting judicial view that it is constitutionally improper for delegated legislation to amend Acts of Parliament.[57]

6.55 According to Bennion, apart from a power to amend the enabling Act, delegated power may be given to modify its effect from time to time.[58] Schedule 2, Item 11 clause (2) is one such example. Bennion points out that all subordinate legislation

---

53 The retrospective nature of transitional regulations was canvassed in detail in the Committee's 15th report concerning clause 64 of the Australian Crime Commission (Western Australia) Bill 2003.

54 This Act repealed the *Legal Practitioners Act 1893* and set out the transitional arrangements to the new legislation. A number of consequential amendments to other related Acts were made in this Act, largely to specify the *Legal Practice Act 2002* as the basis for defining legal practitioners. The Committee noted that during Committee of the Whole, these clauses were not debated.

55 Francis Bennion, *Statutory Interpretation A Code*, Fourth Edition, Butterworths, London, 2002, p244.

56 *R v Secretary of State for Social Security, Ex Parte Britnell* [1991] 1 WLR 198.

57 Francis Bennion, *Statutory Interpretation A Code*, Fourth Edition, Butterworths, London, 2002, p245.

58 Ibid, p201.

alters the effect of the principal Act and it is this power of the executive, by means of subordinate legislation, to override the intention of Parliament as expressed in an Act, that causes consternation over Henry VIII clauses.[59]

6.56 According to Parliamentary Counsel, such clauses also include the power to make substantial changes in the future to Acts not only by regulations but also by *"… proclamations, orders or other instruments used by the Governor, the Executive Council or the Minister without coming back to the Parliament."*[60] The rationale is that this saves valuable parliamentary debating time, which would otherwise have to consider the subject matter in an amending or omnibus Bill.

6.57 Indeed the Committee considered and expressed dissatisfaction with the provisions of another item of legislation in which an "Order' could be made to address transitional matters, with such orders being able to operate with retrospective effect and with a Henry VIII aspect.[61]

Impact on national schemes

6.58 The 1996 Position Paper alerts all Australian scrutiny committees to be wary of Henry VIII clauses.[62] The Working Party seeks to ensure that the legislation is subject to effective parliamentary scrutiny and has serious reservations over the use of Henry VIII type clauses in national schemes.[63] The Working Party concluded that the use of Henry VIII type clauses should be curtailed as they inappropriately and notoriously delegate legislative power.

6.59 However, Parliamentary Counsel has expressed the view, in another parliamentary inquiry, that the only inappropriate delegations per se, are in relation to offences. Mr Greg Calcutt, Senior Parliamentary Counsel said:

> *…the only inappropriate delegations per se are in relation to offences. Any delegation of power to create serious offences is inappropriate and I regard as inappropriate any delegation of power to alter a penalty for an offence created by statute. There may be other powers beyond those which the Parliament considers*

59 They are so named because that King is regarded popularly as the impersonation of executive autocracy. King Henry also used them himself, for example his "Statute of Proclamations" allowed Henry to issue proclamations which had the force of an Act of Parliament.

60 Mr Greg Calcutt, Senior Parliamentary Counsel, Ministry of Justice during a hearing into the Legislation Committee's Corporations Bills Inquiry, *Transcript of Evidence*, June 11 2001, p26.

61 Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1 Offshore Minerals Bill 2001; Offshore Mineral (Registration Fees) Bill 2001; and Offshore Mineral (Consequential Amendments) Bill 2001*, June 2002, pp52-66.

62 The Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, Scrutiny of National Schemes of Legislation Position Paper, October 1996.

63 The Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, Scrutiny of National Schemes of Legislation Position Paper, October 1996, p24.

> *inappropriate; however, that is strictly a matter for the Parliament, not for officers*.[64]

6.60 The Committee considers that the Henry VIII provision in Schedule 2, Item 11 clause (2) of the Bill:

- offends the theory of the separation of powers; and
- gives insufficient regard to the institution of Parliament as the supreme legislature by eroding the sovereign function of Parliament to legislate.

6.61 The Committee submits that the separation of powers breaks down as between the executive and the legislature because the executive is usually granted the power to make subsidiary legislation. The object of subsidiary legislation is to compliment and carry out the objects and purposes of the Act - to fill in the detail. In the Committee's view, Henry VIII clauses go beyond this by permitting an Act to be amended by subsidiary means.

6.62 The Committee considers that the scrutiny of instruments made pursuant to Henry VIII clauses is limited. There is no first, second or third reading of these instruments as in the case of an amendment bill. If the executive instrument is a regulation, scrutiny is limited to disallowance by operation of Part VI of the *Interpretation Act 1984* on the making of regulations and as disallowance is not retrospective its effect may be illusory in a given case. If the executive instrument is not a regulation, but, for example, an 'order', parliamentary scrutiny is further reduced as 'orders' are not subject to the tabling and disallowance provisions in section 42 of the *Interpretation Act 1984*. Therefore, the use of a Henry VIII clause can provide an opportunity for the executive to circumvent parliamentary scrutiny. However, in the case of Schedule 2, Item 11, the Committee concedes that clauses (3) and (6) attempt to ameliorate the operation of the clause.

6.63 Many parliamentary committees' reports have alerted the House to the problem of Henry VIII clauses.[65] In Western Australia these have included the:

- Legislative Council, Standing Committee on Legislation: *Report No 1: Corporations (Ancillary Provisions) Bill 2001, Corporations (Administrative Actions) Bill 2001, Corporations (Commonwealth Powers) Bill 2001, and Corporations (Consequential Amendments) Bill 2001,* (June 19 2001);

---

64 Mr Greg Calcutt, Senior Parliamentary Counsel, *Transcript of Evidence*, June 11 2001, p26.

65 For example, the Report by the Committee on Ministers' Powers (the Donoughmore Committee), His Majesty's Stationary Office, London, 1932; Parliament of Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The Use of "Henry VIII Clauses" in Queensland Legislation*, January 1997, p50.

- Legislative Council, Standing Committee on Legislation *Report No 2: Agricultural and Veterinary Chemicals (WA) Amendment Bill 2001 and Co-operative Scheme (Administrative Actions) Bill 2001* (June 28 2001);

- Legislative Council, Standing Committee on Legislation *Report No 3: Road Traffic Amendment Bill 2001,* (September 13 2001);

- Legislative Council, Standing Committee on Legislation *Report No 12, Corporations (Consequential Amendments) Bill (No 2) 2001,* (March 14 2002);

- Legislative Council, Standing Committee on Legislation *Report No 13, Corporations (Consequential Amendments) Bill (No 3) 2001,* (March 20 2002);

- Legislative Council, Standing Committee on Public Administration and Finance, *Report No 1: Planning Appeals Amendment Bill 2001*, (March 27 2002);

- Legislative Council, Joint Standing Committee on Delegated Legislation *Report No 34 - Spent Convictions (Act Amendment) Regulations 1998*, (June 25 1998);

- Legislative Council, Joint Standing Committee on Delegated Legislation *Report No 38 - Spent Convictions (Act Amendment) Regulations (No 3) 1998*, (December 16 1998); and

- Legislative Council, Joint Standing Committee on Delegated Legislation *Report No 53 - Spent Convictions (Act Amendment) Regulations 2000 & Spent Convictions Act (Act Amendment) Regulations (No 2) 2000*, (November 2000).

6.64 This Committee has also, in previous reports to the House, expressed dissatisfaction with such clauses and discussed the means to afford greater parliamentary scrutiny.[66] Authoritative texts also warn of the danger. For example, Pearce and Argument in the first edition of their book *Delegated Legislation in Australia and New Zealand* stated:

> *This is an approach to legislating that should be resisted. Parliamentarians pay too little heed to the regulation-making sections*

[66] Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1 Offshore Minerals Bill 2001; Offshore Mineral (Registration Fees) Bill 2001; and Offshore Mineral (Consequential Amendments) Bill 2001*, June 2002.

> *of Acts. If Henry VIII clauses are allowed to pass by default, the parliamentary institution is placed in jeopardy.*[67]

6.65 Twenty two years later in their second edition, Pearce and Argument commented on how Henry VIII clauses in the Australian jurisdictions have become more, rather than less common. However, what has also occurred is that the various parliamentary committees charged with reviewing the exercise of such powers have largely been able to monitor and report on their use, ensuring that the various Parliaments are at least conscious of the use of these mechanisms.[68]

6.66 The Committee is of the view that Henry VIII clauses should not be used as 'insurance' against unforseen consequences or as a substitute for careful drafting or for mere administrative convenience. As the Queensland Scrutiny of Legislation Committee commented in its 1997 report on Henry VIII clauses:

> *Henry VIII clauses should not be inserted into hastily drafted legislation to be introduced in a restrictive timetable as a substitute for careful well developed drafting.*
>
> *…A common reason given for use of the Henry VIII clause is the shorter length of time taken to promulgate delegated legislation compared to the parliamentary procedure required to amend an Act. There are longstanding and traditional reasons why the procedures for enactment of legislation is structured in the way that it is, not least of which is the fact that the monarch after whom the circumvention of this process has been named is regarded popularly as the impersonation of executive autocracy*.[69]

6.67 The Committee notes the view of Pearce and Argument that to *"…deny the Parliament the capacity to delegate power is, of itself, a restriction of the supremacy of the Parliament"*.[70] However, the Committee considers that whilst the ability to make transitional regulations may be desirable such regulations:

- should not be able to be have retrospective effect;
- should not be able to amend the operation of the principal Act (Henry VIII aspect); and

---

67 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia and New Zealand*, Butterworths, Sydney, 1977 at para 15.

68 Professor Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, Second Edition, Butterworths, Sydney, 1999, p15.

69 Parliament of Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The Use of "Henry VIII Clauses" in Queensland Legislation*, January 1997, p50.

70 Professor Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, Second Edition, Butterworths, Sydney, 1999, p6.

- must be made within 12 months of the Act's commencement.

6.68 Accordingly, the Committee recommends retaining Schedule 2, Item 11, clauses (1) and (3) but deleting clauses (2), (4), (5) and (6).

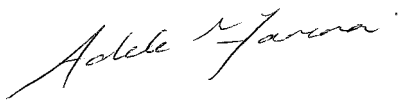
Recommendation 2: The Committee recommends that Schedule 2 , Item 11 of the Architects Bill 2003 be amended to remove the ability of transitional regulations to have retrospective effect and a Henry VIII aspect. This can be effected in the following manner:

On page 68, lines 12 to 16 - to delete the lines.

On page 68, line 19 to page 69, line 3 - to delete the lines.

7 CONCLUSION

7.1 The Committee commends this Report to the House for consideration during debate on the Bill.



Hon Adele Farina MLC
Chairman
June 29 2004

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation*. For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power*. The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition*. Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model*. Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.