THIRTY-EIGHTH PARLIAMENT

REPORT 61

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

OCCUPATIONAL LICENSING NATIONAL LAW (WA) BILL 2010

Presented by Hon Adele Farina MLC (Chairman)

April 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:
17 August 2005

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

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 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 review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 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 Liz Behjat MLC
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IN RELATION TO THE

OCCUPATIONAL NATIONAL LICENSING LAW (WA) BILL 2010

EXECUTIVE SUMMARY

1 The Committee has concluded that the Occupational Licensing National Law (WA) Bill 2010 should not in its current form be passed.

RECOMMENDATION

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Recommendation 1: The Committee recommends that the Occupational Licensing National Law (WA) Bill 2010 not be passed.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

OCCUPATIONAL LICENSING NATIONAL LAW (WA) BILL 2010

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1. CONCERNS AND CONCLUSIONS

1.1 The Occupational Licensing National Law (WA) Bill 2010 (**Bill**) raises two questions:

- almost nothing beyond the process for developing an occupational licensing system has been decided,[1] so **- why is the Bill before the House now?**; and
- **what is uniform about the proposed licensing system**?

1.2 The Bill does not introduce national occupational licensing. It proposes a process for developing a national licensing system. Other than that, it largely consists of a list of matters about which regulations may be made. It is not uncommon for uniform legislative schemes to leave detail to regulations. However, the Bill goes beyond this. It requires the substance of the licensing scheme to be in regulations.

1.3 Given this, it is particularly important that the Bill meet minimum standards for good legislation. It should provide a reasonable degree of certainty and coherence as to the legislative framework , to which the regulation-making powers relate. The Bill does not meet this standard. It lacks clarity. Too often the Bill is silent. Too much is still to be developed. Too many options are left open. Too much is left to regulations. The Bill is not clear on what is permitted and what is not, what is to occur and what is not.

1.4 As a result, it is not clear whether the Bill asks Parliament to delegate its legislation-making power (to a Ministerial Council) in respect of the proposed licensing system or abrogate it.

1.5 The interim decisions that have been made largely detract from uniformity. Historical differences between the jurisdictions are proving hard to overcome. Whether a national licensing system will ever be developed is not known.

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[1] The Bill is so skeletal that the Department of Commerce described its responses to the Committee's attempts to ascertain the purpose and effect of provisions as a "*mantra*" of "*this is to be developed as part of the national regulations*".[1] (Mr Gary Newcombe, Director Strategic Policy and Development, and Mr Andrew Lee, Manager Strategic Policy, Department of Commerce, *Transcript of Evidence*, 16 February 2011, p6.) (***Transcript of Evidence*, 16 February 2011**.)

1.6 The underdeveloped state of the proposed licensing system means the Committee is unable to determine its practical effect. However, it is clear that the Bill proposes an extra layer of bureaucracy, permits different jurisdictional requirements regarding licensees and is likely to result in higher licence fees.

1.7 It is the Parliament's duty and privilege to determine the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws. State Ministers and departments need to justify a national scheme: explain why it is necessary and why it is in the best interests of the Western Australian public to enact the legislation.[2]

1.8 The Committee has concluded that the Bill is too uncertain to be good law.[3] At the current underdeveloped state of the proposed licensing system, its advantages are not sufficiently clear to warrant the degree to which Parliamentary sovereignty is lost under the Bill.

1.9 This report provides the following illustrations of the Committee's concerns:

- Uncertainty as to when a licence is required as decisions have not been made - lack of clarity as to what activities will be licensed and inconsistent use of terms in the Bill (see paragraphs 2.1 to 2.22);

- Uncertainty in exercise of regulation-making power as decisions not made - disclosure of criminal charges and Henry VIII clauses (see paragraphs 3.1 to 3.15);

- Uncertainty in exercise of regulation-making power and gaps in legislative framework as interim decisions not reflected in the Bill - "*primary jurisdiction*" (see paragraphs 4.1 to 4.17);

- Uncertainty in degree of uniformity - different activities licensed in different jurisdictions, conduct regulation leading to different disciplinary standards,

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2 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004, p10, and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 52, *Health Practitioner Regulation National Law Bill (WA) 2010*, 22 June 2010, p5.

3 "*All of the other values associated with the rule of law such as accessibility, certainty, stability, etc. of* [sic] *little moment if the practical significance of the law is not high. There must be a narrow gap between, as it is sometimes put, 'law on the books' and 'law in action'. Unless this gap is a narrow one, then the rules contained in law will not provide a clear signal about what is permitted and what is proscribed. Persons will never acquire the requisite degree of security and predictability in their dealings with others*". (Chief Justice Spigelman, New South Wales Supreme Court, *Address at International Legal Services Advisory Council Conference*, 20 March 2003 quoted by Rule of Law Association of Australia at: http://www.ruleoflawaustralia.com.au/principles.aspx - viewed on 20 March 2011).

different disciplinary processes, no common fee, different fidelity fund regulation (see paragraphs 5.1 to 5.5);

- Uncertainty as to the primary objective and anticipated benefits of the uniform scheme as decisions not made - reduction of regulatory burden or labour mobility? *laissez faire* or regulatory approach? whether mobility will result? (see paragraphs 6.1 to 6.8);

- Technical issues arising in particular clauses of the Bill - see **Appendix 1**; and

- **Known consequences of passing the Bill - additional layer of bureaucracy and increased costs** (see paragraphs 7.1 to 7.6).

Referral and inquiry process

1.10 Referral of the Bill and the inquiry process is set out in **Appendix 2**.

2. LACK OF CLARITY IN ACTIVITIES TO BE LICENSED AND INCONSISTENT TERMS

Licences issued will not necessarily be national

2.1 The policy provisions of the Bill apply to the broad occupational areas confusingly called a "*licensed occupation*" in the Bill.[4] A "*licensed occupation*" is not an occupation for which a licence will issue. It is a broad grouping from which activities that "*appropriately*" warrant a licence will be selected through the policy development process.[5]

2.2 In fact:

- **not all occupations, sub-groups or work performed within a specified (or later prescribed) "*licensed occupation*" will be subject to a licence;**

- **if an occupation, sub-group or work is subject to a licence, that licence may apply in some jurisdictions but not others. That is, the licence is not necessarily "*national*";**[6] **and**

- **a decision not to require a particular occupation, sub-group or work within specified (or later prescribed) "*licensed occupation*" to obtain a**

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4 See clause 4 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

5 Mr Gary Newcombe, Director Strategic Policy and Development, and Mr Andrew Lee, Manager Strategic Policy, Department of Commerce, *Transcript of Evidence,* 7 February 2011, p2 and p3. (***Transcript of Evidence,* 7 February 2011**) (Although the Department did later explain use of this term on the basis that there may in the future be a "*licensed occupation*" for which a licence did issue. *Transcript of Evidence,* 7 February 2011, p12).

6 *Transcript of Evidence,* 7 February 2011, p4.

licence through the national licensing system will not preclude a State or Territory from subjecting that activity to a jurisdictional licence.[7]

2.3 The Bill anticipates that one day a national occupational licensing system may be established. Until that occurs - if it ever occurs - there will be a myriad of national, multi-jurisdictional and jurisdiction-specific licences, and jurisdictionally varying obligations and rights that attach to those licences.

Inconsistent Provisions cause Lack of Clarity as to when a Licence is Required - *"Licensed Occupation", "Occupation", "Category of Licence", "Scope of work"* and *"Prescribed Work"*

Confusion

2.4 For policy development purposes, the proposal that only certain activities falling within a broad occupational grouping will be licensed is not a problem. However, confusion is created by use of the term "*licensed occupation*" in the licensing provisions of the Bill. Some provisions imposing rights and obligations appear to capture activities that will not be licensed as well as those that will.

Different terms used

2.5 The Bill does not state that a licence is required. The requirement to obtain a licence is implied. The Bill is not, however, consistent in its implications:

- various provisions imply that a licence issues for a "*licensed occupation*". For example, an application is made for "*a licence for a licensed occupation*"[8] and eligibility requirements are to be prescribed in relation to a "*licence for a licensed occupation*";[9]

- a smaller number of offence provisions imply the licence issues for "*prescribed work*". For example, it is an offence to carry out "*prescribed work*" without a licence or exemption;[10]

- the definition of "*prescribed work*" is ambiguous as to whether a licence issues for a "*scope of work*" or "*prescribed work*";[11] and

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7 *Transcript of Evidence*, 7 February 2011, p4.

8 Clause 15 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

9 Clause 18 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010. The disciplinary provisions apply in the event a jurisdiction has declared that the relevant Division applies to "*licensees carrying out the licensed occupation for which the licensee is licensed*" (see clause 57).

10 Clause 9 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

11 "*Prescribed work*" is defined to be work "*within*" the "*scope of work*" that may only be carried out under a licence (clause 4 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010).

- other provisions speak of obligations arising in respect of an "*occupation*".[12]

2.6 The relationship between these terms is not clearly established in the Bill. "*Scope of work*" is found in the regulation-making power. Regulations may provide for different "*categories of licence*" for "*licensed occupations*" and the "*scopes of work*" that may be carried out under the categories of licence.[13] "*Prescribed work*" is defined to be work within a "*scope of work*" requiring a licence. This seems to establish a hierarchy but the Bill does not implement this consistently. It sometimes relates a licence to the "*licensed occupation*" and sometimes to "*prescribed work*" or occupation, not the scope of work.

2.7 To add to the mix, an "*occupation*" may be prescribed as a "*licensed occupation*" [14] but the current "*licensed occupations*" appear to be occupational groupings, rather than occupations. For example, "*property-related occupations*" is a "*licensed occupation*".

2.8 Addition of a licensed occupation (or occupation), category of licence, scope of work and prescribed work are all to occur by way of regulation. However, different development processes are required by the Bill.[15] Clarity as to whether what is occurring is addition of a licensed occupation, occupation, category of licence, scope of work or prescribed work is, therefore, required.

Department's explanation inconsistent

2.9 The Committee sought to clarify the hierarchy of levels and, therefore, when a licence is required, with the Department of Commerce (**Department**). It had no success.

2.10 The Department's evidence as to the way in which the various terms inter-relate was inconsistent. It said:

- *It is only the prescribed work, not a licensed occupation, that is the focus of the regulation … an individual must hold a licence to carry out prescribed work; not the licensed occupation … that is continued through the remainder of the offence provisions*;[16] (However, see paragraph 2.11.)

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12 For example, power to stop and search a vehicle may be exercised regarding commission of an offence in relation to a "*relevant occupation*" (clause 73 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010).

13 Clause 161(1) of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

14 Clause 162(1) of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

15 See clauses 161(1), 161(2) and 162 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

16 *Transcript of Evidence*, 7 February 2011, p8.

- *No, the licence will be, again, if I refer to that communiqué, it will be the licensed occupation*;[17]

- *the process is to develop individual scopes of work that will require a particular licence*.[18]

- *as you have seen in the definition, again if we look at real estate, is property related, you will not get a property-related licence, you will get one of the ones, which is one of the categories that have been set out, and that will have a defined scope of work*;[19]

- *You can have a category of licence that is not defined, from memory, and a scope of work that relates to the prescribed work they carry out. The term "category of licence" is not defined, but I do not think that it creates any inconsistency, because you have the licence, the scope of work and "category of a licence" is a definition of the, you know, where it would fit. And you can see from the communiqué that the term "licence category" is used to talk about things like: they are a real estate agent, or you are a strata manager. So, it is a subset of the licence*;[20] and

- "*Scope of work" is a subset of the definition of "prescribed work", so the definition of "prescribed work" says it is work within the scope of work*" and "*There is no difference between those two*".[21]

2.11 One offence provision appears to require both a licence for a licensed occupation and a licence for prescribed work.[22] The Department's response was that this was necessary as there may in the future be a "*licensed occupation*" prescribed that had no sub-levels.[23] The Committee considers that it would still be necessary to define the relevant work through "*prescribed work*" or "*scope of work*".

2.12 So, the licence will be for, respectively: "*prescribed work*", the "*licensed occupation*", the "*scope of work*", a "*category of licence*" that will have a "*scope of work*" but which is a subset of "*the licence*", and either of "*scope of work*" or "*prescribed work*" - which are subsets of each other! At the second hearing, the Department used the

17 Ibid, p12.

18 Ibid, p2.

19 Ibid, p12.

20 Ibid.

21 Ibid, p11.

22 Clause 12 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010 creates offences of, without a licence, holding out that a person is licensed to carry out "*prescribed work*" or a "*licensed occupation*" unless the person holds a licence for the "*prescribed work*" or "*licensed occupation*".

23 *Transcript of Evidence*, 7 February 2011, p12.

term "*category of licence*" to identify when a licence would be required.[24] Ironically, this term is not used in any provision of the Bill to imply the requirement to hold a licence.[25]

2.13 The proposition appeared to be that wherever "*licensed occupation*" or "*prescribed work*" is used in the Bill, those terms should be understood as transposable or as a reference to any of the other terms used, depending on what is finally decided in respect of particular activities falling within the broad groupings.[26] The Bill, however, defines the terms "*licensed occupation*" and "*prescribed work*" in a particular way. It does not set up a series of terms that may be interchanged depending on what the regulations eventually provide.

2.14 Legislation is to be read in accordance with the definitions provided in the legislation. Legislation cannot be read as if terms different from those used are used instead.[27]

Consumer confusion

2.15 The Committee raised concern that there was potential for consumer confusion as to when a licence was required. Designating a broad occupational grouping as a "*licensed occupation*" creates an expectation that all activities falling within its ambit require a licence, when in fact they will not[28]. The Department's response was that it was not known at this time what activities would require a licence but "*that will all be worked through*"[29] and that:

> *I have to say* [the Bill] *is not aimed at overcoming that difficulty from a consumer perspective; it is just not.*[30]

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24 *Transcript of Evidence,* 16 February 2011, pp4, 12 and 24.

25 Clause 27 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010, however, uses the term "*licence of that category*".

26 For example, offence clauses 9,11,12 and 14 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010 impose a penalty of imprisonment for a third offence when the licence is for a "*specified licensed occupation*". In response to the question of what level the "*specified licensed occupation*" will be prescribed, the Department advised it could be any of the "*licensed occupation*" used in the Bill, occupation, category of licence or prescribed work. The criteria for specification have not yet been developed. (*Transcript of Evidence,* 16 February 2011, p4)

27 "*It is no part of the function of any judge to amend legislation. The task of the courts is to determine what Parliament meant by the words it used, not to determine what Parliament intended to say*". *(R v Young* (1999) NSWLR 681 at 686.) In *Parks Holdings Pty Ltd v Chief Executive Officer of Customs* [2004] FCA 820, although the court accepted that there had been a clerical error in referring to section 165 of the Excise Act 1901, it refused to read 'Excise Act' as meaning 'Customs Act'. See also Pearce, D C and Geddes R S, *Statutory Interpretation in Australia,* LexisNexus Butterworths, Australia, 2006, pp23-61.

28 Submission No 9 from the Master Builders Association of Western Australia, 14 January 2011, pp4-5.

29 *Transcript of Evidence,* 7 February 2011, p3.

30 Ibid, p10.

Conclusions

2.16 Rule of law is the foundation of democratic society. It requires good legislation:

> *Good quality legislation is understandable and accessible.*[31]

2.17 The overall trend of the Department's evidence was that particular licences will be required for various "*prescribed work*", "*scopes of work*" or "*categories of licences*" (which of these is not clear), not the broad occupational groupings that constitute a "*licensed occupation*".[32]

2.18 The Bill does not separate aspiration - the "*licensed occupation*" which captures activities that may be licensed - from the activities that are to be licensed under the law. The decisions necessary for this to occur have not been made. When this is combined with the necessity to imply the requirement for a licence from provisions using inconsistent terms, the circumstances in which a licence will be required (and the level at which regulations, such as those setting eligibility criteria, are to be made) are, at best, ambiguous.

2.19 Whether licensing a particular activity will require prescription of a new licensed occupation, category of licence, scope of work or prescribed work is also unclear.

2.20 The Department's response to this was that the law will be understandable when regulations are made:

> *The difficulty, I think, that* [sic] *you are looking at the framework act, and at the moment the detail is not there.*[33]

Whether the Bill will be clear when the regulations are made is not known. The regulations are not yet available.

2.21 However, if primary legislation cannot be understood without reference to subsidiary legislation, it is bad law. Subsidiary legislation cannot be used as an aid to interpretation of primary legislation:

> *In Australia the general rule has been that delegated legislation made under an Act should not be taken into account for the purposes of interpretation of the Act itself. … 'the intention of Parliament in*

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31 New Zealand, Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_2.html, (viewed on 18 March 2011).

32 *Transcript of Evidence*, 7 February 2011, pp2 and 9. .

33 Ibid, p7.

enacting an Act is not to be ascertained by reference to the terms in which a delegated power to legislate has been exercised'.[34]

2.22 Regulations should implement the legislative framework provided by the Parliament, not provide the framework.

3. UNCERTAINTY IN HOW REGULATION-MAKING POWER WILL BE EXERCISED

Eligibility and disclosure of criminal charges

3.1 Eligibility for a "*licence for a licensed occupation*" depends on a number of requirements that are to be prescribed, including prescribed personal probity standards relating to criminal history.[35] "*Criminal history*" includes "*charges made against the person*", as well as convictions.[36]

Inconsistent terms - unclear which level determines relevance of charge to licence application

3.2 Recognising issues arise from eligibility being based on unproven charges, the Department stressed that charges required to be revealed under regulations "*will have to be **directly relevant** to the inherent requirements of the job*".[37] However, the Bill does not impose that standard. It requires only a "***connection***" between the prescribed criminal history and the inherent requirements of the "*occupation*" for which the licence is sought.[38]

3.3 What is meant by "*occupation*" for the purpose of determining relevance of a charge is ambiguous. The Department sometimes suggests "*job*" ("*prescribed work*"), sometimes "*category of licence*" (see paragraph 3.5). As seen above, occupation is sometimes used in the Bill to suggest "*licensed occupation*", being an occupational grouping.

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34 Pearce, D C and Geddes R S, *Statutory Interpretation in Australia*, LexisNexus Butterworths, Australia, 2006, pp104-5: *"More recently, in Webster v McIntosh (1980) 32 ALR 603 at 606 Brennan J, with whose judgment Deane and Kelly JJ agreed, commented that 'the intention of Parliament in enacting an Act is not to be ascertained by reference to the terms in which a delegated power to legislate has been exercised'."* (Ibid.) An exception to the general position is that: *"regard can be had to regulations where it is useful to refer to them to ascertain the nature of a legislative scheme: One looks at regulations, not to construe an overall scheme or to throw light on ambiguity in a statutory provision, but to ascertain what the scheme is*." (Ibid p105) The Department, however, is relying on matters the Department advises it is intended to address in the regulations to construe the overall scheme and throw light on ambiguities in the Bill.

35 Clauses 18 and 19 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

36 Clause 4 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

37 Committee emphasis. *Transcript of Evidence*, 16 February 2011, p15.

38 Committee emphasis. Clause 19(2)(a) of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

3.4 If prescription is at the higher levels, it may be that particular convictions and charges impacting on eligibility are "*connected*" to that level (and prescription is therefore authorised) but are not relevant to the activities (job) the licensee will perform.

Uncertainty as to degree of relevance that is required

3.5 Adding to the uncertainty, the regulations may only provide a framework for the eligibility criteria. Whether a charge is relevant is intended to be left to self-assessment:

> *The regulations are intended to set out **the framework** for what criminal matters would be relevant to what particular licence category. … So that will provide **the guidance** that you will need to disclose offences, charges or pleas in relation to those matters.* [39]

3.6 When framework regulations are combined with lack of clarity in relevance of a charge to particular activities, an applicant is faced with a difficult self-assessment. Failure to correctly self-assess may lead to revocation of a licence or disciplinary action. [40]

Regulation-making power may affect rights beyond policy purpose

3.7 Unproven charges are said to be relevant to eligibility for a licence because it is thought that outstanding charges could reveal a pattern of behaviour affecting suitability. Ability to reapply for a licence on resolution of a charge in the applicant's favour is considered to meet any concerns as to judgements made on unproven charges.[41]

3.8 In fact, the regulation-making power is not confined to identifying outstanding charges for the regulator's consideration. It includes charges dropped or resolved by acquittal.[42]

3.9 The Department cited the working with children legislation as a precedent for this regulation-making power.[43] The Committee is not persuaded that example is relevant to the activities that will be licensed by the Bill.[44]

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39 Committee emphasis. *Transcript of Evidence,* 16 February 2011, p14.

40 Clauses 44 - due to it being issued in error - and 48(1)(i) - licence obtained on the basis of false or misleading information - of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010. See *Transcript of Evidence*, 16 February 2011, pp18 and 20.

41 Ibid, p13.

42 "*The strict reading is all charges. But, again, the controls about that are that they have to be relevant to the inherent criteria of the job*" (Ibid, p14).

43 Ibid, p15.

3.10 The Committee queried whether the provision had the effect that the regulator "*gets to play judge again*" in respect of charges dropped and acquittals. The response was that this was unknown and would be determined by the regulations: "*Well, again, the regulations have not been sorted yet*".[45]

Henry VIII clauses

3.11 The Bill provides that Commonwealth Acts - the *Privacy Act 1988, Freedom of Information Act 1982* and *Archives Act 1983* - apply to the Occupational Licensing National Law applied by the Bill.[46] Equivalent State Acts are excluded except to the extent that functions are exercised by State entities.[47] On each occasion of application of a Commonwealth Act, power is conferred for regulations to be made amending the primary legislation as it applies to the national law.

3.12 This raises two issues: uncertainty in where the lines will be drawn when records are both State and national and Henry VIII clauses.

Lack of clarity in legislation applying to records

3.13 On the first issue, the Department was dismissive of stakeholder concerns about lack of clarity as to which legislation would apply to particular records. The Department's view was that practical problems might arise but they should be resolved administratively.[48]

Rationale for Henry VIII clauses - "policy decision" and work had not been done

3.14 In response to views that privacy rights and obligations should be in primary legislation, the Department simply advised that the policy decision was that this would be left to the regulations.[49]

3.15 With respect to all Commonwealth Acts, the Department advised that it did not know what provisions it was proposed to alter as the work had not been done.[50]

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44 The Committee also notes that draft guidelines were available for exercise of the equivalent regulation-making power under the relevant Act. (Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 45, W*orking with Children (Criminal Record Checking) Amendment Bill 2009,* 4 March 2010, p19). This is not the case with the Bill.

45 *Transcript of Evidence,* 16 February 2011, p14.

46 Clauses 135, 137 and 141 of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

47 Clause 6 of the Occupational Licensing National Law (WA) Bill 2010.

48 *Transcript of Evidence,* 7 February 2011, pp33-5.

49 Ibid, p35.

50 *"I do not know" is the answer. They will be developed through the national regulations. … the work has not yet been done."* (Ibid, p35).

4. GAPS IN LEGISLATIVE FRAMEWORK AS INTERIM DECISIONS NOT REFLECTED IN THE BILL - "*PRIMARY JURISDICTION*"

Jurisdictional regulators retain licensing functions

4.1 For an indefinite period, the licensing functions conferred on the national body by the Bill will be exercised by the various jurisdictional regulators.[51] The Bill leaves this option open. It does not state what is to occur. (See Part 7)

4.2 Common licence fees could not be agreed. Different fees may be imposed in different jurisdictions for the same licence. Some jurisdictions will impose a tax, not a "*fee*".[52]

4.3 The proposal that there be no standard fee, and that fees be set according to an applicant's primary jurisdiction, is a significant feature of the delegated agency model proposed for the national licensing system. That framework should be established in the Bill. It is not.

Lack of agreement on fees - jurisdiction shopping

4.4 Non-standard fees raise the prospect of 'jurisdiction shopping' (where an applicant applies for a licence in the lowest fee jurisdiction).

4.5 The requirement for an applicant to nominate a "*primary jurisdiction*" (that is a principal place of residence or business) when making an application for a licence[53] is, in part, directed at this issue:

> *While this provision is intended to assist regulatory authorities to know who is operating within their State or Territory, it has also been inserted to minimise an applicant's ability to 'jurisdiction shop' for the jurisdiction with the lowest licensing fees where no single national fee is prescribed.*[54]

4.6 However, the Bill does not provide a mechanism by which nomination of a primary jurisdiction can be used to restrict jurisdiction shopping. At hearing the Department

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51 Clause 5.11 of the Intergovernmental Agreement for a National Licensing System for Specified Occupations, 6 and *Transcript of Evidence,* 7 February 2011, p19 and 22-5.

52 *You might say, "Well, is that the case, and why isn't there a standard licence fee?" The reason that there is not is that some jurisdictions use licence fees now as a tax; they raise revenue out of them. Others set their licence fees to recover costs, which is pretty much what we do in this state, and you do not have to have a separate taxing bill and so on. The politics of it was that those jurisdictions that charge more were not prepared to give away their licence revenue. The only way the compromise was reached was that individual jurisdictions can have different fees.* (*Transcript of Evidence,* 7 February 2011, p9.)

53 Clause 16(2)(a) of Schedule 1 to the Occupational Licensing National Law (WA) Bill 2010.

54 Explanatory Memorandum to the Occupational Licensing National Law (WA) Bill 2010, p29.

advised that an unidentified provision in the Bill required a licence application to be made in an applicant's "*primary jurisdiction*".[55] There is no such provision.

Regulations to link fees to "*primary jurisdiction*", not Act

4.7 Later advice is that the national regulations will set the application fee by reference to the applicant's primary jurisdiction (regardless of where the application is made).[56]

4.8 It is inappropriate to make provision for such a significant matter, around which the current uniform scheme pivots - and which is essential to preserving the balance of the scheme between the participating jurisdictions - in subsidiary legislation.

Uncertainty as to what is meant by "*primary jurisdiction*" to be resolved by regulations

4.9 The Committee received a submission identifying lack of clarity in the definition of "*primary jurisdiction*".[57] For example, for a corporation, the primary jurisdiction is the "*principal place of business*", which is not defined. Questions arose as to what was meant by this term - whether this was the registered office, the main business premises or if there were some other criteria.

4.10 The Department's response was that "*it will be a self-assessment arrangement*" but the "*expectation*" was that regulations would provide "*some correct criteria*".[58]

4.11 It is inappropriate to define a term used in primary legislation in subsidiary legislation. As previously noted, regulations cannot be used to resolve ambiguity in an Act. The primary legislation should be certain in what it provides.

4.12 The Bill does not state the meaning of "*principal place of business*" is to be found in regulations. It does not require regulations to be made clarifying that term as used in the primary legislation. If the term is to be defined in subsidiary legislation, there should at least be some requirement that occur - particularly if there is to be a "*self-assessment arrangement*".

No provision for notification that operating in other jurisdictions

4.13 The Explanatory Memorandum identifies the main purpose of the requirement to nominate a primary jurisdiction as being to "*assist*" regulators in knowing who

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55 *Transcript of Evidence*, 7 February 2011, p 45. See also, p10.

56 Answers to Questions Taken on Notice at Hearing of 7 February 2011, 15 February, p5.

57 Submission No 5 from the Strata Titles Institute of Western Australia, 12 January 2011, p2.

58 "[I]*n essence, the normal definition of "principal place of business" is a fairly complex one that looks at a range of things, and no, it is not necessarily a registered office. It is actually the principal place where they carry out business and that covers things like the work that they undertake; where, potentially, the majority of their contracts are entered into; where they meet; and a whole range of criteria. The expectation is that the national licensing authority will identify some criteria."* (*Transcript of Evidence*, 7 February 2011, p45.)

operates in their jurisdiction. However, the Bill does not impose any obligation to notify any entity of the other jurisdictions in which a licensee operates. When the necessary decisions are made it is "*expected*" that regulations will deal with this:

> *There are some practical considerations about enabling people to come and operate in different jurisdictions; they relate to compliance activity, access to fidelity funds and other things. That is a matter that has been identified — that we would look to have some means of saying, "We are licensed but, by the way, we are now operating in Western Australia". Exactly what that would be is not clear yet.*[59]

Bill does not state what conduct and disciplinary provisions will apply to a licence

4.14 As the quote above illustrates, there will be variations between the jurisdictions on the obligations attached to a licence. In particular, the conduct requirements imposed and the disciplinary procedures that may be followed will vary. Questions arise as to whether the obligations imposed on a particular licensee will be those in respect of the nominated primary jurisdiction, the jurisdiction granting the licence or the jurisdiction in which the relevant act or omission occurred.

4.15 This is not resolved in the Bill.

Issue with incomplete Bill

4.16 This example illustrates a fundamental issue with the Bill. It does not constitute the full or final legislative framework. When important decisions have been made, that framework will be established in the regulations. In the meantime, the Bill leaves all options open. No, or insufficient, guidelines are provided for the making of the eventual regulations. The Bill is incomplete.

4.17 When this is combined with the ambiguity in objectives (see Part 6), the Parliament is not provided with any confidence as to how the extensive regulation-making powers will be exercised by the nominated Ministerial Council. (**Appendix 3** is a list of the matters in respect of which regulations can be made.)

5. UNCERTAINTY IN DEGREE OF UNIFORMITY

Licences issued will not necessarily be the same across the jurisdictions

5.1 The Department said:

[59] Ibid.

*national licensing is **intended** to say, where there is a licensed category and jurisdictions do licence that category, that **it will be the same**.*[60]

5.2 However, there will be variations in licences between the jurisdictions. For example:

- conduct provisions will be jurisdiction-specific;[61]
- some jurisdictions will have a "*show cause*" process for disciplinary matters: others will not;[62]
- fidelity fund regulation will be different;[63]
- a spent conviction may render a person ineligible for issue of a licence in some jurisdictions but not others;[64]
- there will be different licence "*fees*". (In fact, some jurisdictions will impose a tax.)[65]

5.3 Also, in the circumstances that:

- there is considerable scope for different views on how matters should be dealt with in regulations (see Part 6);
- Western Australia, South Australia, The Northern Territory, and possibly the Australian Capital Territory, will permit the national regulations to be disallowed or varied by those jurisdictions;[66]

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60 Committee emphasis. *Transcript of Evidence*, 7 February 2011, p4.

61 "[Y]*ou must be consistent and you would enable portability of anybody where there is licensing of strata title managers, they would all be the same, the qualification requirements would be the same, and they would all be able to operate within those licensed jurisdictions. Where there is the potential for some difference is the conduct rules, not what it is to be licensed and get a licence, but what you have to do—what are your trust account obligations, what are your reporting obligations. All of those sorts of things would have to be in either a separate strata title managers' bill or we could add them to the real estate act or find a spot for it. But it would be no good just creating a licence because then you would require the licence but there would be no regulation of what you have to do."* (Ibid, p18. See also p31.)

62 Clause 51 of Schedule 1 of the Occupational Licensing National Law (WA) Bill 2010. *Transcript of Evidence*, 7 February 2011, p42.

63 "*The policy position to date has been that it is preferable, in relation to fidelity funds, to leave that as state based—it is going to be a state-based obligation under existing state legislation that regulates that particular occupation, so it will stay in the Real Estate Act." (*Transcript of Evidence*, 16 February 2011, p8. See also,* Transcript of Evidence*, 7 February 2011 p45.)*

64 "*So in those jurisdictions that prevent the* [dis]*closure of spent convictions, it is intended that you will have regard to that. But in some jurisdictions that is not the case."* (*Transcript of Evidence*, 16 February 2011, p13.)

65 *Transcript of Evidence,* 7 February 2011, p9.

66 Ibid, p35.

- the national regulation-making powers, which are conferred on a Ministerial Council, may not be exercised "*for all matters or occupations within the national licensing system*";[67] and

- Western Australia will have an independent power to make State regulations "*necessary or convenient*" for the purposes of the licensing law,[68]

the degree to which regulation and, therefore, the substance of the licensing system, will be uniform is uncertain.

5.4 On this, the evidence was that even the general direction is not known and may never be resolved:

> *there is a whole range of reasons why licensing is different in different jurisdictions. A lot of it is political. A lot of it relates to the views of the industry associations and whether that is supported or not. Some people's view is that the New South Wales system is far too regulatory, far too onerous, and does not work. Other people might have a view that Western Australia is too laissez faire and so on. But those views have been formed politically in each of those jurisdictions.*
>
> ***Hon LINDA SAVAGE**: It sort of again begs the question why a lot of this has not been resolved prior to the bill coming in —*
>
> ***Mr Newcombe**: I do not think it can be resolved.*[69]

5.5 The Bill merits the recent criticism of legislation by the Chief Judge of the Federal Court:

> *Often, you could almost be forgiven for thinking that when legislation is being drafted, people come to a difficulty, and think, 'We could actually resolve that, but that would require a level of disputation that we don't want to have among ourselves at this stage, so we will leave it for the judges to work out.*[70]

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67 Explanatory Memorandum to the Occupational Licensing National Law (WA) Bill 2010, pp103-4.

68 Clause 9(1) of the Occupational Licensing National Law (WA) Bill 2010. Explanatory Memorandum to the Occupational Licensing National Law (WA) Bill 2010, p15.

69 *Transcript of Evidence*, 7 February 2011, p11.

70 Eyers J, '*Top judge hits out at federal laws*', The Australian Financial Review, 21 January 2011, pp1 and 14.

6. DIFFERING VIEWS AS TO PRIMARY OBJECTIVE AND ANTICIPATED BENEFITS

Reduction of regulatory burden or labour mobility?

6.1 The Explanatory Memorandum identifies the object of the occupational national licensing system as being:

> *to remove overlapping and inconsistent regulation between jurisdictions for the licensing of occupational areas.*[71]

Improvement of labour mobility is one of a number of 'flow on' effects from this removal. This is also the hierarchy in the Second Reading Speech.[72]

6.2 At hearing, however, the Department, gave priority to mobility when identifying the primary object of the scheme. The Minister also identifies the advantages of participating in the scheme in terms of increased mobility.[73] This is a subtle but telling difference, illustrated by the following exchanges regarding difficulty in identifying when a licence will be required:

> *I have to say it is not aimed at overcoming that difficulty from a consumer perspective; it is just not. The primary aim is about licensing and mobility. That is where it comes from. It comes out of a skills recognition approach. … Its intention is about mobility and ensuring that people, when they are licensed, only need to be licensed once in Australia and do not need to move around.*[74]

and

> ***Hon LIZ BEHJAT**: And this is a simplification of the whole process?*

> ***Mr Newcombe**: Well, I do not know if we are going that way! Well, you see, the argument is, as I say, that it is grounded in making qualifications to be transportable. I am not guaranteeing that makes anything simpler!*[75]

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71 Explanatory Memorandum to the Occupational Licensing National Law (WA) Bill 2010, p1.

72 Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 November 2010, pp9630-1.

73 Letter from Hon Bill Marmion MLA, Minister for Commerce, undated, "*Information Required by Ministerial Office Memorandum MM2007/01*", p2. Initially, the focus of occupational licensing reform was labour mobility. However, business regulation and competition reforms shifted the focus to reduction of regulatory burden. (The Allen Consulting Group, *Evaluation of COAG initiatives for full and effective Mutual Recognition*, June 2008, pvii.)

74 *Transcript of Evidence*, 7 February 2011, p11.

75 Ibid, p13.

Inconsistent identification of primary object relevant to underdeveloped Bill

6.3 Inconsistency in identification of the primary objective of the uniform scheme appears relevant to presentation of the legislation at the current, premature, stage of development of the licensing system.

6.4 If the primary objective of the licensing system is limited to making qualifications transportable, agreement as to the substance of the system and removal of inconsistent regulatory burden, which pose difficult political decisions, may be dismissed as irrelevant - whatever is eventually agreed, it will be transportable.

6.5 However, as illustrated by Part 5 and the issues surrounding notification of jurisdictions other than the "*primary jurisdiction*" in which a licensee will operate, whether mobility will be enhanced is dependent on decisions that have not been made.

Lack of decision on priority of objectives means ambiguity in exercise of regulation-making powers

6.6 The Bill contains objectives of both national consistency and mobility.[76] It also 'rolls up' a number of other matters that require decision. For example, inconsistent approaches amongst the jurisdictions include the fact that the primary focus of regulation may be: "*consumer protection, occupational health and safety and/or public and worker safety*."[77] The Bill identifies all of these as a single objective, together with ensuring economic efficiency.[78] There is no prioritisation of these considerations.

6.7 As seen in the quote in paragraph 5.4, the Department was asked why the differing views as to how the licensing system should operate - even on the basic question of whether the system should reflect a "*laissez faire*" or "*regulatory*" approach - had not been resolved prior to the Bill being introduced. The Committee was told: "*I do not think it can be resolved*".[79]

6.8 Unresolved issues raise questions as to how the extensive regulation-making powers will be exercised. It is not possible to determine whether the eventual licensing system will prioritise mobility over consistency (resulting in a system that differs little from the mutual recognition scheme) or will be less or more regulatory than the current State system.

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76 Clauses 3(e) and 3(a) of Schedule 1 of the Occupational Licensing National Law (WA) Bill 2010.

77 Explanatory Memorandum to the Occupational Licensing National Law (WA) Bill 2010, p2.

78 Clause 3(b) of Schedule 1 of the Occupational Licensing National Law (WA) Bill 2010.

79 *Transcript of Evidence*, 7 February 2011, p11.

7. BILL INTRODUCES EXTRA LAYER OF BUREAUCRACY AND INCREASED COSTS

7.1 The Bill establishes a national licensing authority to develop occupational licensing policy and administer the "*national*" licensing system. However, it also permits delegation and sub-delegation of all but the policy functions. The Bill does not say whether the licensing functions will be performed by the national licensing authority, delegate jurisdictional regulators or a combination, in which it is performed in some jurisdictions by the national body and in others by jurisdictional regulators.

7.2 The initial structure is the delegated agency model. The national licensing authority's licensing, administration, compliance, investigation and enforcement functions will be delegated to State and Territory regulators. In Western Australia, the first level of delegation will be to the appropriate officer of the Department with second levels of delegation to various occupational boards and other licensing bodies.[80]

7.3 Legislation will be developed through a complex interaction between: the national licensing authority, the advisory committees to be established under the Bill for various occupational areas; jurisdictional regulators; and Ministerial Councils and their advisory committees. The somewhat misnamed "*flow-chart*" at **Appendix 4** was provided to illustrate the process. Appendix 4 does not fully outline the situation in Western Australia, where two Departments and three Ministers are to be involved in policy and legislation development.[81]

7.4 It will not surprise the House that the following question was put to the Department:

> ***The CHAIRMAN****: … would you please explain how the decision-making process set out in this flowchart will result in a less bureaucratic process than currently applies to occupational licensing, and the cost savings for licences?*[82]

7.5 The Department pointed out that the current situation was "*almost as complicated*" but, with refreshing frankness, said:

> *I cannot tell you that there are going to be cost savings in this scheme at all. What the scheme does introduce is a new layer of bureaucracy in the National Occupational Licensing Authority, which we do not pay for at the moment.*[83]

7.6 If the current (and past) Government policy of cost recovery is maintained, it is anticipated that licence fees will increase under the national licensing system:

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80 Ibid, p32.

81 Ibid, pp22-4 and p27.

82 Ibid, p27.

83 Ibid.

> *jurisdictions will have to pay for the operation of this scheme. … At the moment, the state funds its licensing regimes from licence revenue—not totally. We do not have full cost recovery across the field but the general policy is to move towards full cost recovery. If that continues,* ***one would expect licence fees would go up, not down****.* ***There is likely to be a loss of revenue to the state in any case*** *because a number of people who currently pay licence fees in Western Australia will no longer be required to, because they live in other states and they fly in. Western Australia is more affected by that than anybody else, except the ACT … We have a number in the electrical field in particular who will cease to pay licence revenue in Western Australia. Licence revenue probably will drop because of the number of people who have to pay for a licence. The costs will probably go up, and therefore the government will be faced with a decision as to how it funds that.*[84]

8. MODEL FOR UNIFORM LEGISLATION IN THE FUTURE

8.1 The skeletal nature of the Bill, requiring "*more detail* [in] *regulations than would be normal*", is proposed as the new national model for uniform legislation:

> *As I have said to you as well, it is the new national model. The health regulation bill, which came to this committee, was the first example of that. I know you had an interesting time with that bill, but what I can say to you is that it represents the model. It is the model that is proposed by the national parliamentary counsel's committee, and has been endorsed at political levels as the model for dealing with national schemes.* ***The general argument is that with national schemes, if you are requiring legislation, it is very difficult to get legislation through eight Parliaments in any form of timely manner, and very complicated,*** *so that to be efficient and effective and obtain the advantages of a national scheme, it is appropriate to put more detail into regulations than would be normal*.[85]

8.2 The Committee does not support the view that State Parliaments, and in particular this State Parliament, need to accept the model used in this Bill as the new model for uniform legislation. The model unnecessarily abrogates State Sovereignty, lacks detail and is bad law. To ask a State Parliament to pass legislation in the form of this Bill because the jurisdictions have not been able to sort out their differences and agree to the details of the uniform scheme is absurd. If the Commonwealth and State jurisdictions want to implement uniform legislation they need to work out the detail of

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84 Committee emphasis. Ibid, pp27-8.

85 Ibid, p35.

the scheme and include this in the Bill before presenting a Uniform Bill to Parliament for adoption.

9. RECOMMENDATION

9.1 The Committee has concluded that the Occupational Licensing National Law (WA) Bill 2010 should not in its current form be passed.

Recommendation 1: The Committee recommends that the Occupational Licensing National Law (WA) Bill 2010 not be passed.

Hon Adele Farina MLC
Chairman

Date: 14 April 2011

APPENDIX 1

TECHNICAL ISSUES WITH THE BILL

(UP TO CLAUSE 101)

APPENDIX 1

TECHNICAL ISSUES WITH THE BILL (UP TO CLAUSE 101)

Application provisions

- Clause 5 - amendments to be made by way of order - should be by bill;
- Clause 6 - consequences of exclusion of the *Auditor General Act 2006* and *Financial Management Act 2006*;
- Clause 6 - uncertainty in whether State or Commonwealth *Freedom of Information Acts*, and *State Records Act 2000* (WA) or *Archives Act 1983* (Commonwealth) will apply to documents;
- Clause 6 - application of *Public Sector Management Act* - evidence is that it will apply but no proviso in clause 6(f) "*except to the extent that functions are being exercised by a State entity*";
- Clause 6 - provides that the *Interpretation Act 1984* does not apply; clause 8 that it does apply in part - whether clause 6 should have an introductory term "*Except as provided in clause 8*";
- Clause 7(a) - issues arising in the variety of courts and State Administrative Tribunal nominated to issue an injunction (whether there is an inconsistency in legal v administrative principles on which an injunction may issue);
- Clause 8 - omission of section 42(4) of the *Interpretation Act 1984*;
- Clause 8 - regulations applying in Western Australia are not published as consolidated version;
- Clause 9 - overlap in State and national regulation-making powers;
- Clause 9 - (2)(d) - process of declaring the application of Parts 4 or 5 appears inconsistent with the national law;
- Clause 9 - (2)(d) - given the evidence that the show cause process is not a desirable process and only included because other jurisdictions wish to maintain it, whether Part 4 should be deleted from the sub-clause;
- Clause 9(2)(d) - amendment of grammatical error ("*declare - … (d) declaring*");

- Clause 9 - (2)(a) unnecessary unless there is an intent to declare someone other than the State Administrative Tribunal a disciplinary body. The Department's evidence was that this is not intended. Whether the Parliament wants to review the appointment of an entity/person as a disciplinary body; and

- Clause 9 (2)(b) and (c) - the identity of entities to be declared corresponding disciplinary bodies and the Acts to be declared corresponding prior Acts - whether Acts should be specified in the Bill, given they are identified and that disciplinary and eligibility consequences flow from prescription.

Occupational Licensing National Law - Schedule 1 to the Bill

Part 1 - interpretation

1.1 Clause 4:

- "*criminal history*" - ambiguous impact on spent convictions legislation, inclusion of infringement notices, inclusion of charges whether or not a person acquitted or not yet tried, rationale for traffic offences;

- "*Ministerial Council*" - nomination of the Ministerial Council for Federal Financial Relations does not appear on the COAG website (despite clause 95 conferring powers on the "*Ministerial Council*" in respect of "*implementation*" of the law and the national law passing in Victoria);

Licensing provisions

1.2 Clause 11(1) - the Department's evidence is that this clause is intended to create three offences. On a 'plain reading' of the clause, this does not seem to be what has occurred.

1.3 Clause 11(2) - reversal of onus of proof.

1.4 Clause 12 - (1)(a) and (b) are duplicative: as drafted the clause is confusing. The same issue arises with clause 12(2).

1.5 Clause 13 - relationship with clause 7 is ambiguous or duplicative.

1.6 Clause 16 - application for licence, requirement for strict compliance with "*approved*" form; requirement for declaration of "*primary jurisdiction*" - whether this is a matter that should be in the Act.

1.7 Clauses 18, 19, 20, 21 and 22 - eligibility for licence:

- introduction, explaining how these work together and that no discretion in whether or not to grant a licence - whether 'rule of law' or 'rule by law';

- clause 19(2) - issues canvassed at hearing 16 February 2011;

- clause 19(3) - ambiguity in the meaning of the terms "*relevant person*" and "*authority or influence*";

- clause 21(1)(c)(ii) - exclusion from eligibility to hold a licence on the basis of cancellation of a licence under a previous law without a period of disqualification - deletion of "*corresponding prior Act*"?;

- clause 21(1)(d) - the Department's explanation of this clause left some questions unanswered;

- clause 21(1)(e) - ambiguity in meaning of "*close associate*";

- clause 21(1)(g) - power to exclude persons from eligibility to hold a licence by way of regulation.

1.8 Clause 23 - whether it should be expressly stated in the Bill that an applicant has a right of review.

1.9 Clause 24 - deeming an application to be refused after 120 days.

1.10 Clause 27 - no discretion in respect of imposition of conditions on a licence and no power to grant a licence on imposition of particular conditions.

1.11 Clauses 35-39 - uncertainty in whether restoration of a licence operates as expiry and issue of a new licence or continuation of the licence. (Insurance issues may arise).

1.12 Clause 44 - absence of a requirement to provide reasons for revocation of licence (see, by contrast, clauses 42(2)(c) and 23(2)(a)).

Disciplinary action, monitoring and enforcement

1.13 Whether there will be duplicative proceedings for the same matters and relationship to clause 4.2 of the Intergovernmental Agreement for a National Licensing System for Specified Occupations, 30 April 2009 (objective that there not be duplicative legislative provisions);

1.14 Clause 48:

- that disciplinary action may be taken for breach of prescribed Acts and regulations of the Commonwealth/other jurisdictions; and

- prescription of disciplinary grounds for immediate suspension.

1.15 Clause 49:

- immediate suspension on a person being charged with an offence;
- evidence that the intent is to except employees from suspension on grounds of bankruptcy - should this be in the Act?

1.16 Clause 79 - forfeiture of seized things.

1.17 Clause 83(3) and (5) - no compensation for damage caused in "*purported*" exercise of powers, whether intent to change the common law.

Appeals and Review

1.18 Clause 88 - whether Act should specify persons who may apply for a review, with power to prescribe additional persons.

1.19 Clause 92(3) - deeming a decision confirmed in the event a review of the decision is not concluded within 28 days.

Governance structure and accountability

1.20 Clause 99(3):

- (g) - why the national licensing authority has been given power to regulate the conduct of licensees and whether this clause should be deleted; and
- (h) - whether the national licensing authority requires specific power to conduct prosecutions with respect to offences against corresponding prior Acts.

1.21 Clause 101 - power to issue "*directions*" about how the licensed occupation is carried out.

APPENDIX 2

REFERRAL AND INQUIRY PROCESS

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REFERRAL AND INQUIRY PROCESS

1.1 The Bill was referred to the Committee on 25 November 2010.

1.2 Pursuant to Standing Order 230A(4) (as it then applied), the Committee was to report on the next sitting day after the expiration of 30 days, being 15 February 2011. Due to key departmental officers being unavailable to attend a hearing throughout January 2011, the Committee sought and was granted an extension of time to report to 14 April 2011.

ADVERTISEMENT AND STAKEHOLDERS

1.3 The Committee's inquiry was advertised in *The West Australian* on 4 December 2010. The Committee wrote to stakeholders inviting submissions. Details of the inquiry were also published on the Committee's webpage.

1.4 The Real Estate Institute of Western Australia supported the Bill as drafted.[86]

1.5 The Australian Institute of Conveyancers WA Division Inc, National Electrical and Communications Association, Strata Titles Institute of Western Australia, Master Builders Association, Western Australia and Land Valuers Licensing Board generally supported the intent of a national occupational licensing system. However, each either reserved endorsement until regulations became available or raised issues of ambiguous or inadequate provision in the Bill.[87]

1.6 The Director of State Records raised lack of clarity in the circumstances in which federal or State record legislation would apply[88] and The Law Society of Western Australia raised some technical issues and concerns that particular matters should be addressed in primary legislation.[89]

1.7 The Committee raised the issues identified by the various submissions during its hearings. The response of the Department of Commerce to the stakeholder concerns can be viewed in the transcripts of the hearings available at:

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86 Submission No 1 from Real Estate Institute of Western Australia, 16 December 2010, p1.

87 Submission No 2 from Australian Institute of Conveyancers WA Division Inc, 7 January 2011, p3. Submission No 3 from National Electrical and Communications Association, 11 January 2011, p2. Submission No 5 from Strata Titles Institute of Western Australia, 12 January 2011, pp1-3. Submission No 9 from Master Builders Association of WA, 14 January 2011, pp3-5. Submission No 8 from Land Valuers Licensing Board, 14 January 2011, pp1-2.

88 Submission No 6 from State Records Office of Western Australia, 13 January 2011, p3.

89 Submission No 10 from The Law Society of Western Australia, January 2011, pp1-6.

http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Legislative+Council+-+Current+Committees

1.8 The Committee thanks all persons and entities providing submissions.

Supporting documents

Full provision of supporting documents

1.9 The Committee is pleased to report that the supporting documents required by Ministerial Office Memorandum MM2007/01 were fully provided by the previous Minister for Commerce, albeit only after referral to the Committee and not on introduction to the Legislative Assembly as required by MM2007/01.

Hearings

1.10 The Committee held hearings on 7 and 16 February 2011, which were attended by:

- Mr Gary Newcombe, Director Strategic Policy and Development; and
- Mr Andrew Lee, Manager Strategic Policy,

both of the Department of Commerce.

1.11 Answers to questions taken on notice at the hearing of 7 February 2011 were provided on 15 February 2011. Answers to written questions were provided on 25 February 2011. Answers to questions taken on notice at the hearing of 16 February 2011 were provided on 3 March 2011.

1.12 As in its recent experiences with the Department, the Department of Commerce was well prepared and helpful in the assistance provided for the Committee's inquiry.

APPENDIX 3

MATTERS THAT MAY BE PRESCRIBED

APPENDIX 3

MATTERS THAT MAY BE PRESCRIBED

The following clauses specify matters to be prescribed (or declared):

1. APPLICATION PROVISIONS

Clause 9

1.1 State government may make State regulations declaring:

- a person or body to be a 'disciplinary body';
- an entity to be a 'corresponding' disciplinary body;
- an Act to be a 'corresponding prior Act' for the purposes of clause 21 of Schedule 1; or
- that Part 3, Division 4 (show conduct process) or 5 (disciplinary proceedings before tribunal or court) applies to licensees.

2. SCHEDULE 1

Clause 4 - Definitions

2.1 In the definition of:

- "*disciplinary body*", a person or body declared under an Act to be a disciplinary body for the purposes of the Occupational Licensing National Law (WA);
- "*jurisdictional regulator*", an entity prescribed by national regulations as a jurisdictional regulator for a licensed occupation;
- "*licensed occupation*", any occupation prescribed by national regulations;
- "*prescribed work*", work that under the national regulations is within the scope of work that requires the authority of a licence; and
- "*vehicle*", any type of transport, machine or equipment prescribed by the national regulations.

Clauses 9 (individual), 10 (body corporate/partnership) and 11 (advertising to carry out prescribed work)

2.2 National regulations may exempt a person from the requirement to hold a licence to perform prescribed work.

2.3 The national licensing authority may, in accordance with the national regulations, exempt a person from requirement to hold a licence to perform prescribed work.

Specified licensed occupation

2.4 National regulations may "*declare*" a licensed occupation to be a "*specified licensed occupation*" for the purpose of attracting higher penalties for repeat offences of carrying out work without the licence, contracting to carry out the work, advertising, holding out that possesses a licence and allowing another to use a licence.

Clause 15

2.5 An application for a licence may be made by a person who is a member of a prescribed class.

Clause 16

2.6 An application for a licence is to be accompanied by a prescribed fee and paid to a prescribed person.

2.7 National regulations may prescribe requirements in respect of nominees for licences. (Nominees are required for corporate applicants.)

Clause 18

2.8 A person is eligible for a licence if they:

- have the prescribed qualifications, skills, knowledge and experience;
- satisfy the prescribed personal probity requirements;
- satisfy the prescribed financial probity requirements;
- are not "*excluded*" persons (see clause 21); and
- satisfy any other requirements prescribed.

Clause 19

2.9 In addition to other matters, national regulations regarding personal probity may "*provide for*" requirements in relation to criminal history, conduct of persons in carrying out business and security clearances.

2.10 The national regulations may prescribe who is a "*relevant person*" in respect of a corporation for these requirements.

Clause 20

2.11 In addition to other matters, national regulations regarding financial probity may provide a person who is bankrupt, insolvent, compounds with creditors etcetera is not eligible for a licence or that a person who fails to pay a penalty, fine or other amount ordered by a court or tribunal to be paid under the law is not eligible for a licence.

Clause 21

2.12 The national regulations may exclude persons from eligibility for a licence.

Clause 26

2.13 National regulations may prescribe a period of not longer than 5 years for a licence.

Clause 27

2.14 National regulations may prescribe conditions for licence.

Clause 28

2.15 National regulations may prescribe matters which, if changed, must be notified to the national licensing authority.

Clause 29

2.16 National regulations may specify occupations for which a licence must be returned on notice from the national licensing authority.

Clause 31

2.17 National regulations may prescribe when and how applications for renewal of a licence may be made and the fee and information to be provided.

Clause 35

2.18 National regulations may prescribe specified occupations for which a person can apply for restoration of a licence. Such an application must comply with the requirements of the national regulations.

Clause 40

2.19 National regulations may prescribe criteria for variation of licences.

Clause 43

2.20 The national regulations may prescribe the requirements for surrendering a licence.

Clause 47

2.21 The national licensing authority may impose a penalty of not more than the prescribed amount in a disciplinary action.

2.22 The national licensing authority may cancel a "*specified licence*" and disqualify a person form applying within 5 years or for life (47(1)(h) and (i)).

Clause 48

2.23 Grounds for disciplinary action include, the licensee has:

- contravened a prescribed Act or regulation;
- licensee has contravened a prescribed provision of an Act or regulations;
- not completed prescribed skills, maintenance or training requirements;
- not paid a fee or amount required to be paid under a prescribed Act or regulation; and
- not maintained the insurance required by the national regulations.

2.24 National regulations may prescribe grounds for immediate suspension or cancellation of a licence.

Clause 49

2.25 National regulations to prescribe the class for whom bankruptcy or insolvency results in suspension of licence.

2.26 National regulations may prescribe offences for which being "*charged or convicted*" results in immediate ineligibility to hold licence.

Clause 63

2.27 A licensee is required to produce for inspection by an authorised officer a document that the licensee is required to keep under a prescribed Act.

Clause 65

2.28 An authorised officer may enter and inspect a place for the purpose of investigating whether a prescribed Act is being complied with and whether work being carried out in accord with a prescribed Act.

Clause 72

2.29 National regulations may prescribe a "*relevant occupation*" for the purposes of power to stop and search vehicles.

Clause 73

2.30 Power to stop and search vehicles applies in respect of suspected offences against prescribed Acts.

Clause 83

2.31 National regulations may prescribe the matters a court is to take into account in deciding whether to make a compensation order against the national licensing authority for damages caused by exercise of search and seizure powers.

Clause 88

2.32 National regulations may prescribe who may apply for an internal review of a decision. In addition to the specified decisions, a decision that may be subject to internal review may be prescribed.

Clause 92

2.33 Appeals against internal review decision may be made in accordance with the regulations.

Clause 104

2.34 The functions of the Licensing Board include those given to it "*by or under*" the Occupational Licensing National Law.

Clause 106

2.35 National regulations may prescribe the remuneration tribunal that sets the remuneration for members of the Licensing Board.

Clause 121

2.36 The terms and conditions on which staff of the national licensing authority is to be employed are to be prescribed.

Clause 125

2.37 In addition to specified persons, national regulations may prescribe persons, or classes of persons, who can be appointed as authorised officers.

Clause 126

2.38 An authorised officer holds the position on conditions imposed by the instrument of appointment or those prescribed. The instrument, or national regulations, may also impose limits on the powers conferred.

Clause 134

2.39 National regulations may "*provide for*" the appointment of members to the Advisory Committees and procedures of those Committees.

Henry VIII - clause 135

2.40 Regulations may modify application of the *Privacy Act 1988* (Cwlth) for the purposes of the Occupational Licensing National Law.

Clause 136

2.41 "*Protected information*" includes information coming into possession of a person exercising function under a prescribed Act.

Henry VIII - clause 137

2.42 National regulations may modify the application of the *Freedom of Information Act 1982* (Cwlth) for the purposes of the Occupational Licensing National Law.

Clause 138

2.43 A "*law*" may require, authorise or permit the disclosure of protected information.

2.44 National regulations set the guidelines for publication of protected information in respect of a conviction.

2.45 Protected information may be disclosed by a "*prescribed entity*" or as otherwise authorised by the national regulations.

Clause 140

2.46 The national licensing authority must keep the registers and records required by the national regulations.

2.47 Amongst other things, the national regulations may "*provide for*":

- the information that must be collected and recorded about licensees;
- the information that is to be included in the public register;
- the way the public registers are to be kept;
- the inspection of public registers by members of the public; and
- publication of information included in the public register.

Henry VIII clause - clause 141

2.48 National regulations may modify the application of the *Archives Act 1983* (Cwlth) for the purposes of the Occupational Licensing National Law.

Clause 143

2.49 Moneys may be directed to the authority fund by any "*law*" of a participating jurisdiction or as prescribed by the national regulations.

Clause 147

2.50 The Annual Report must include any "*other matters*" required by the national regulations and be prepared in a way required by the national regulations.

2.51 National regulations may provide that financial statements are to be prepared in accordance with Australian Accounting Standards and for auditing.

Henry VIII clause - clause 150

2.52 National regulations may modify the *Ombudsman Act 1976* (Cwlth) for the purposes of the Occupational Licensing National Law.

Clause 160 - national regulations

2.53 The national regulations are to be made by a Ministerial Council.

2.54 In addition to the matters noted above, national regulations may be made "*for the purposes of*" the Occupational Licensing National Law and provide for:

- refund, waiver and late fees;
- arrangements for the publication of fees;
- conduct of licencees, including making and adoption of codes of practice;
- matters relating to compliance with and enforcement of the law, including: complaints and establishment of a 'demerit point system' and infringement notice system;
- duties and obligations of directors and members of body corporate licensees;
- duties and obligations of employees of licensees and vicarious liability for those persons;
- matters relating to the appointment, obligations and duties of receivers and managers of businesses and winding up or carrying on of businesses;
- fidelity funds and indemnity funds held in relation to licensees;
- matters related to trust funds held by licensees;
- penalties for contravention of regulations;
- criteria or procedure to be used by national licensing authority in developing new policy and admission of new occupations; and
- transitional provisions.

Retrospective effect

2.55 Savings and transitional provisions may have retrospective operation to a day not earlier than the participation day.

Clause 161

2.56 National regulations may prescribe:

- different categories of licence, registration and accreditation for licensed occupations;
- the scope of work that may be carried out under the different categories;
- different types of licences registration and accreditation;
- the way in which work is to be carried out; and

- the records to be kept by licensees.

Clause 162

2.57 An "*occupation*" may be prescribed as a "*licensed occupation*".

Schedule 1

Clause 8

2.58 Documents may be declared to be a relevant document for the purpose of interpreting the Occupational Licensing National Law.

APPENDIX 4

NATIONAL OCCUPATIONAL LICENSING SYSTEM: PRE-PARLIAMENTARY LEGISLATION-MAKING PROCESS

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