



THIRTY-SEVENTH PARLIAMENT

REPORT 3

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**TRADE MEASUREMENT BILL 2005
AND**

**TRADE MEASUREMENT
ADMINISTRATION BILL 2005**

Presented by Hon Simon O'Brien MLC (Chairman)

October 2005

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

August 17 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.”

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION
AND STATUTES REVIEW**

IN RELATION TO THE

**TRADE MEASUREMENT BILL 2005 AND
TRADE MEASUREMENT ADMINISTRATION BILL 2005**

1 REFERENCE

- 1.1 On September 1 2005, the Trade Measurement Bill 2005 (**Main Bill**) and the Trade Measurement Administration Bill 2005 (**Administration Bill**) (referred to as '**the Bills**') stood referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A.
- 1.2 Pursuant to Standing Order 230A(4) the Committee is required to report to the Legislative Council within 30 days of the first reading of the Bills which was September 30 2005. However, an extension of time to report was sought and granted to October 20 2005.
- 1.3 Standing Order 230A(5) prevents the Committee inquiring into the policy of the Bills.

2 INQUIRY PROCEDURE

- 2.1 The Committee did not seek submissions with respect to the Bills, however, details of the inquiry were available on the Parliament website www.parliament.wa.gov.au.
- 2.2 On September 12 2005, Hon John Kobelke, MLA, Minister for Consumer and Employment Protection (**Minister**), provided to the Committee the standard information that it seeks in relation to uniform bills.¹

3 UNIFORM LEGISLATION

- 3.1 The Bills have been referred to the Committee because they contain uniform legislation within the meaning of Standing Order 230A(1). In particular, the Bills, by reason of their subject matter, introduce a uniform scheme throughout the Commonwealth.
- 3.2 National legislative schemes implementing uniform legislation take a variety of forms. Nine different structures, each with a varying degree of emphasis on national

¹ Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, September 12 2005.

consistency or uniformity of laws and adaptability, have been identified. The structures are summarised in **Appendix 1**.

- 3.3 When examining uniform legislation, the Committee considers what are known as ‘fundamental legislative scrutiny principles’. Although not formally adopted by the Legislative Council as part of the Committee’s terms of reference, the Committee applies the principles as a convenient framework for the scrutiny of uniform legislation.² These principles are set out in **Appendix 2**.

4 BACKGROUND TO THE BILLS

- 4.1 Pursuant to section 51(xv) of the *Commonwealth Constitution*, the Commonwealth has power in relation to ‘weights and measures’. The *National Measurement Act 1960* (Cth) establishes a national system of units and standards of measurement.³

- 4.2 Although the Commonwealth has constitutional responsibility for weights and measures it has not enacted trade measurement legislation. Trade measurement legislation requires that all goods sold by measurement, weight, length, volume, area or count are accurately measured and labelled and the correct price is calculated.⁴ The responsibility for this legislation has remained with the State and Territory governments.⁵

- 4.3 On January 1 1990, the Commonwealth and all the States and Territories, except Western Australia, entered into an intergovernmental agreement on Uniform Trade Measurement Legislation and Administration.⁶ Pursuant to that agreement, each signatory jurisdiction enacted model uniform trade measurement legislation.

- 4.4 The Main Bill and the Administration Bill seek to introduce the model uniform trade measurement legislation in Western Australia. It is important to note that Western Australia is not a signatory to the intergovernmental agreement and thus the Bills will operate as ‘stand alone legislation’. This means that the State Parliament retains full rights to amend the legislation although the Minister indicated that future amendments

² Further information on fundamental legislative principles can be found in a report by the predecessor Committee, the Standing Committee on Uniform Legislation and General Purposes. Refer to Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, November 2004, pp4-9.

³ See the website of the National Measurement Institute <http://www.measurement.gov.au/index.cfm?event=object.showContent&objectID=C3E98EAD-BCD6-81AC-10F4C581E6CC213E>, (viewed on September 9 2005). See also section 4(1), *National Measurement Act 1960* (Cth).

⁴ See the website of the National Measurement Institute <http://www.measurement.gov.au/index.cfm?event=object.showContent&objectID=C3E98EAD-BCD6-81AC-10F4C581E6CC213E>, (viewed on September 9 2005).

⁵ Ibid.

⁶ See Intergovernmental Agreement in relation to the adoption of Uniform Trade Measurement Legislation and Administration enclosed in letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, September 12 2005.

would need to be carefully considered given the intention to retain national consistency for core provisions.⁷

4.5 The Minister indicated that all other States have agreed to make further amendments to their model uniform trade measurement legislation and these are known as ‘Batch 2’ amendments.⁸ The drafting of the ‘Batch 2’ amendments was endorsed by the Ministerial Council on Consumer Affairs in 2001 and they are currently being implemented in other jurisdictions.⁹ The Main Bill incorporates the ‘Batch 2’ amendments.¹⁰

4.6 The Bills were tabled on November 26 2004 in the Legislative Assembly by the Minister as ‘green bills’¹¹ which, according to the second reading speech, were the subject of extensive consultation with stakeholders over a four-month period.¹²

5 PURPOSE OF THE BILLS

5.1 Trade measurement relates to the regulation of weights and measures in trade to ensure that businesses and consumers receive what they pay for and are not sold a short measure when they purchase goods.¹³ Currently, trade measurement in Western Australia is regulated by the *Weights and Measures Act 1915*.

5.2 The Bills propose to repeal the regime operating under the *Weights and Measures Act 1915* and replace it with a regime based on the model uniform trade measurement regime operating in other States and Territories.

5.3 According to the second reading speech, the regime under the *Weights and Measures Act 1915* needs to be replaced because:¹⁴

- The *Weights and Measures Act 1915* is inconsistent with trade measurement laws that apply in the rest of Australia which, through advances in transport and technology, operates as a single market. To have different States

⁷ Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, September 12 2005, p3.

⁸ Ibid, p4.

⁹ Hon Kim Chance, Minister for Agriculture; Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, September 1 2005, p4934.

¹⁰ Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, September 12 2005, p4.

¹¹ Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, November 26 2004, pp8599-8600. Green bills are draft bills that are tabled in the Parliament when the Government is seeking public consultation on the proposed legislation.

¹² Hon Kim Chance, Minister for Agriculture; Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, September 1 2005, p4933.

¹³ Ibid, p4934.

¹⁴ Ibid.

operating under different trade measurement requirements adds unnecessary costs to business and could impede trade.

- The *Weights and Measures Act 1915* does not conform to modern management practices and imposes inefficient practices on business and government. Under the current system, government inspectors are required not only to verify instruments that they check themselves, but also to recheck all work done by private repairers.
- The existing regulatory regime does not place sufficient emphasis on traders and industry assuming responsibility for maintaining the accuracy of their own measuring instruments and relies too heavily on government inspectors with those inspectors required to check all measuring instruments at least every two years. Given the number of weighing machines or measuring instruments in use, this is no longer practical.
- The regulations contain references to imperial measurements and old fashioned terminology.
- The *Weights and Measures Act 1915* contains archaic licensing provisions and inadequate penalties for dealing with breaches and requires all offences to be prosecuted through the courts.

5.4 According to the second reading speech, under the new regime:¹⁵

- Businesses with servicing licences will be provided with the necessary powers to check, repair and certify all measuring instruments.
- The government's role will change from directly checking all instruments to administering the system and providing technical expertise. The government will undertake monitoring, audit and compliance functions. Instrument owners will be more responsible for maintaining the accuracy of their measuring instruments.
- There will be greater certainty for international, national and domestic suppliers, retailers and consumers because the regime brings Western Australia into line with other jurisdictions.
- There will be substantial penalties for breaches of the legislation.

¹⁵ Ibid.

6 OVERVIEW OF THE BILLS

6.1 The Main Bill contains a regulatory regime for trade measurement that reflects the model uniform trade measurement regime. That regime applies to:¹⁶

- the sale of goods by weights and measures;
- the labelling of pre-packaged articles;
- weighing and measuring instruments used in trade;
- certification for the accuracy of weighing and measuring instruments;
- licensing of organisations that check measuring instruments; and
- licensing of public weighbridges.

6.2 The Administration Bill supports the Main Bill making provision in relation to:¹⁷

- the administrative framework of the regime including the appointment of a Commissioner and inspectors;
- the power to make regulations prescribing fees and charges;
- infringement notices which may issue where an offence is committed; and
- search warrants.

7 SCOPE OF THE REPORT

7.1 In light of the reporting time frame, the Committee focused on applying the fundamental legislative scrutiny principles to the clauses of the Bills. These principles are detailed in Appendix 2.

8 MAIN BILL

Clause 8 - Regulations may make this Act inapplicable to certain matters

8.1 Clause 8 enables regulations to be made which provide that the Main Bill does not apply to a measurement or measuring instrument of a prescribed kind or for a prescribed purpose. By allowing regulations to be made that alter the effect of the proposed Act, clause 8 falls within the description of what is known as a 'Henry VIII clause' which may be defined as:

¹⁶ Explanatory Memorandum, Trade Measurement Bill 2005, p1.

¹⁷ Explanatory Memorandum, Trade Measurement Administration Bill 2005, p1.

*a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.*¹⁸

8.2 Concerns regarding ‘Henry VIII clauses’ have been succinctly described as follows:

*It is the 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”. These clauses are sometimes regarded as having insufficient regard for the doctrine of separation of powers and ultimately, for the institution of Parliament.*¹⁹

8.3 The Committee notes that the Trade Measurement Acts in other jurisdictions do not contain an equivalent provision and, instead, the measurements and measuring instruments to which those Acts do not apply, are listed in the principal Act.

8.4 The Committee carefully scrutinises the use of ‘Henry VIII clauses’. In light of the Committee’s view about regulation making powers generally in the Bills (see paragraphs 8.5 to 8.7) and the technical nature of the subject matter, the Committee is of the view that the clause may be agreed.

Regulations generally

8.5 Regulations are used in framing legislation to provide for:²⁰

- matters of administration;
- technical or detailed matters; and
- situations where matters are likely to change rapidly.

8.6 In applying fundamental legislative scrutiny principles, the Committee considers whether a bill allows a delegation of legislative power (for example, the power to make regulations) only in appropriate cases and to appropriate persons. In examining the Bills, the Committee noted that a number of clauses set up a framework whereby the details of the new trade measurement regime will be contained in regulations.

8.7 The Committee notes that this appears to reflect the current regime under the *Weights and Measures Act 1915*. In particular, there are extensive regulation making powers in that Act including sections 27R, 35 and 52 and the *Weights and Measures*

¹⁸ Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The Use of “Henry VIII” clauses in Queensland legislation*, January 1997, p24.

¹⁹ Ibid, p7.

²⁰ Morris, Cook, Creyke and Geddes, *Laying Down the Law*, Butterworths, Sydney, 1992, p139.

Regulations 1927 comprise 170 pages.²¹ Given the detailed nature of the regulation of trade measurement, the Committee is of the view that the delegation of legislative power in the Bills is appropriate.

Clause 9 - Regulations may provide for exemptions from this Act

- 8.8 Clause 9 enables the Minister to make regulations exempting a specific person, matter, measuring instrument, article, transaction (or a specified class of these) from all, or any, of the provisions of the Act.
- 8.9 The Committee notes that this clause is technically a ‘Henry VIII clause’. In relation to clause 9, the Committee reiterates its comments at paragraph 8.4.

Clause 11 - Notice to remedy breach of section 10 may be given

- 8.10 Clause 10 requires persons using measuring instruments for trade to ensure that the instruments bear an inspector’s or licensee’s mark. A person who fails to do so commits an offence punishable by a fine. However, clause 11 provides that if an inspector finds a contravention occurring, he or she may issue a notice to remedy the contravention within a stated period.
- 8.11 Clause 11(4) provides that if the notice is complied with, the person “*may not*” be prosecuted for an offence against clause 10. The Committee asked the Minister whether the effect of clause 11(4) is that compliance with a notice means the person shall not (and cannot) be prosecuted for an offence against clause 10. The Minister advised that:

*I can confirm that the objective of the proposed amendment is to ensure that a person cannot be prosecuted for using a non-compliant instrument when complying with written instructions to have the non-compliance corrected.*²²

Clause 15 - Notice to remedy breach of section 14 may be given

- 8.12 Clause 14 creates offences relating to measuring instruments that are incorrect or unjustly used. However, clause 15 provides that an inspector may issue a notice to remedy a breach within a stated period

²¹ There are also regulations in the *Weights and Measures (Exemptions) Regulations 1997*, the *Weights and Measures (Lower Accuracy Instruments) Regulations 2003* and the *Weights and Measures (Pre-packed Articles) Regulations 1987*.

²² Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, October 3 2005, p1.

8.13 Similarly to clause 11, clause 15(3) provides that if a notice is complied with, the person “*may not*” be prosecuted for an offence against clause 14. With respect to the application of this phrase see paragraph 8.11.

Clause 82 - Powers of entry etc

8.14 Clause 82 confers on inspectors the power to enter and search non-residential premises without a warrant or the consent of the owner.

8.15 Parliamentary committees, including this Committee, carefully scrutinise powers of entry and search because at common law, every unauthorised entry onto private property is a trespass.²³ Parliamentary committees often require adequate justification and safeguards relating to powers to enter premises and search for and seize documents or other property without a warrant or consent.²⁴

8.16 The Committee has considered the powers in clause 82 and notes the following limitations on the powers:

- the powers do not relate to parts of a premises used for residential purposes in relation to which the occupier’s consent or a warrant is required;
- the powers are limited to situations where an inspector is investigating an offence that he or she reasonably believes has been committed or when the inspector is exercising functions under the Act; and
- the powers are to be exercised at a “*reasonable time*”.

8.17 Additionally, when requested to do so, an inspector must produce their certificate of authority issued under the Administration Bill (clause 89).

Clauses 83 and 84 - Powers in relation to measuring instruments and articles

8.18 Clauses 83 and 84 provide inspectors with powers in relation to measuring instruments and articles. As part of these powers, an inspector may require a person:

- who is in the building, place or vehicle (clauses 83(1)(b)(i) and 84(1)(c)(i)); or

²³ See for example, Commonwealth, Senate, Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, April 6 2000; and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 1, *Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals Consequential Amendments Bill 2001*, June 2002, pp46-49; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 25, *Petroleum Legislation Amendment and Repeal Bill 2005*, June 2005, pp17-18.

- who the inspector reasonably believes may be able to provide relevant information (clauses 83(1)(b)(ii) and clause 84(1)(c)(ii));

to answer questions or produce records.

- 8.19 The Committee notes that other Australian jurisdictions limit the powers of inspectors to persons in the building, place or vehicle and do not extend to other persons (as indicated in paragraph 8.18, bullet point two).²⁵
- 8.20 However, the Committee notes that the extension of these powers is limited to persons who the inspector “*reasonably believes*” may be able to provide relevant information. The Committee understands that this limitation requires the inspector to have more than a suspicion²⁶ that the person can provide relevant information. Thus the Committee considers that the extended powers are subject to appropriate limits.

Clause 88 - Self-incrimination

- 8.21 Clause 88 affects the privilege against self-incrimination. The privilege against self-incrimination is:

*The common law right of a person not to answer questions or produce material which may tend to incriminate the person of a criminal offence or expose the person to a civil penalty.*²⁷

- 8.22 Clause 88 provides that the privilege against self-incrimination will not excuse a person from answering a question or producing a record to an inspector and thus abrogates the privilege.
- 8.23 Although a person is compelled to answer the questions of an inspector or produce documents to them, the person is provided with compensatory protection.²⁸ Clause

²⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 1, *Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals Consequential Amendments Bill 2001*, June 2002, pp46-49. See also Commonwealth, Senate, Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, April 6 2000.

²⁵ Sections 61 and 62, *Trade Measurement Act 1990* (Qld); *Trade Measurement Act 1989* (NSW); *Trade Measurement Act 1993* (SA); *Trade Measurement Act 1995* (Vic) and *Trade Measurement Act 1999* (Tas).

²⁶ For a consideration of the difference between a reasonable suspicion and a reasonable belief, see *George v Rockett* (1990) 93 ALR 483 at 490-491.

²⁷ Dr P Nygh and P Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p924 citing *Sorby v Commonwealth* (1983) CLR 281. For further consideration of the historical basis of the privilege against self-incrimination, see Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 5, *National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp14-17.

²⁸ The phrase ‘compensatory protection’ in the context of the abrogation of the privilege against self-incrimination was referred to in *A v Boulton* (2004) 204 ALR 598 at 613 citing *Mansfield v Australian Crime Commission* [2003] FCA 1057; BC 200305747 and at 616.

88(2) provides that the answer given or the document produced is not admissible in criminal proceedings against the person (except for an offence relating to clause 93 - false or misleading statements).

8.24 Clause 88 includes two limitations on the compensatory protection, namely:

- it relates only to later criminal proceedings and does not extend to civil proceedings; and
- it is limited to **direct use immunity**.

8.25 There are two forms of compensatory protection which may be created by a statute when the privilege against self-incrimination is abrogated. These are:²⁹

- **direct (or immediate) use immunity** - this constitutes immunity from a prosecution that could otherwise be commenced on the basis of the documents produced or the answers given; and
- **indirect (or derivative) use immunity** - this prevents evidence sourced from the self-incriminating documents or answers being used to support a prosecution against the person.

8.26 The Committee draws to the attention of the Legislative Council the abrogation of the privilege against self-incrimination in clause 88 and the limitations on the compensatory protection set out in clause 88(2) as outlined in paragraph 8.24.

Clause 106 - Further provision may be made for this Part

8.27 Part 9 of the Main Bill contains provisions that delay the application of the new trade measurement legislation for a period of two years with respect to specific alcoholic liquor namely, beer, stout, ale, brandy, gin, rum, whisky and vodka. Part 9 contains transitional provisions to enable parts of the current regime to continue to operate pending the application of the provisions of the Bill to the trade measurement of these alcoholic liquors.

8.28 Clause 106(1) enables regulations to be made for the purposes of Part 9 “*where there is no sufficient provision for any matter or thing necessary or convenient to give effect to the purposes*” of the Part. Clause 106(3) enables those regulations to commence prior to their publication in the *Government Gazette*, that is, to have a retrospective effect. For example, regulations may be made in December 2005 that alter a state of affairs in October 2005.

²⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, Report 5, *National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p16.

8.29 In applying fundamental legislative principles, the Committee considers whether a bill affects rights and liberties or imposes obligations retrospectively. The undesirability of the retrospective operation of regulations has been the subject of comment in recent reports of the committees of the Legislative Council.³⁰ The Committee notes that clause 106(4) seeks to ameliorate the retrospective effect of clause 106(3) by providing that any such regulations do not operate so as:

- (a) *to affect in a manner prejudicial to any person (other than the State) the rights of that person existing; or*
- (b) *to impose liabilities on any person (other than the State) in respect of anything done or omitted to be done.*

8.30 The Committee notes that the Council has previously considered such provisions and made amendments to provide a check and balance by ensuring that.³¹

- the power to make retrospective regulations expires after a certain period of time; and/or
- the regulations themselves expire after a certain period of time.

8.31 The Committee asked the Minister whether these mechanisms could apply to clause 106(3). The Minister advised that these mechanisms would not be appropriate in the context of Part 9. In particular, he stated:

*If the power to provide for transitional regulations were to expire after 12 months then any transitional issue that arose after 12 months would only be able to be dealt with by amendment to the legislation. This is a time consuming process and it may expose industry operators to significant disadvantage. Terminating transitional regulations after 12 months may defeat the purpose of the transitional arrangements which may have to apply for a period longer than 12 months to ensure a smooth transition to the new regime.*³²

³⁰ Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report 1, *Planning Appeals Amendment Bill 2001*, March 2002; Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, Report 1, *Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, June 2002, pp60-64; Western Australia, Legislative Council, Standing Committee on Legislation, Report 21, *Corruption and Crime Commission Act 2003 and Corruption and Crime Commission Amendment Bill 2003*, December 2003, p182; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 15, *Australian Crime Commission (Western Australia) Bill 2003*, June 2004, pp57-60.

³¹ See previous footnote for the relevant references.

³² Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, October 3 2005, p2.

8.32 The Committee notes that any retrospective regulations would only apply in relation to the trade measurement of certain alcoholic liquors over a transitional period of two years³³ and therefore would have a relatively limited effect.

9 ADMINISTRATION BILL

Clause 18 - Obliteration of marks if fees or charges are not paid

9.1 Clause 18 provides that if a fee or charge is not paid, an inspector *may* obliterate any inspector's mark or licensee's mark so the instrument can no longer be used for trade because of the lack of verification or certification.

9.2 The Committee was concerned that a relatively minor outstanding fee or charge could lead to a trader being unable to trade with that measuring instrument and sought the Minister's advice about this clause. The Minister advised that:

This provision would only be used as a last resort for a recalcitrant trader who fails to pay appropriate fees and ignores or disobeys notices and reminders to do so bearing in mind that the recovery of unpaid fees and charges is a considered a debt to the Crown.

The sanction of obliteration has appeared in numerous earlier drafts of the Trade Measurement Administration Bill dating back to 1998 and appeared in the Trade Measurement Administration Green Bill that was released for public consultation in November 2004. To the best of my knowledge, this matter has not previously been raised as an issue by any stakeholders over the many years of consultations.³⁴

Clause 20 - Prescribed offences

9.3 Part 4 of the Administration Bill creates an infringement notice process. An inspector who has reason to believe that a *prescribed offence* has been committed is able to issue an infringement notice to an alleged offender (clause 22). The infringement notice advises the alleged offender that if they do not want to be prosecuted for the offence they may pay a modified penalty (clause 23).³⁵

9.4 Payment of the modified penalty is not taken as an admission for the purposes of any later proceedings and prevents the bringing of proceedings and the imposition of penalties (clauses 26 and 27).

³³ Ibid.

³⁴ Ibid.

³⁵ Clause 23. Pursuant to clause 21(2), a modified penalty cannot exceed 20% of the maximum penalty.

- 9.5 The infringement notice process only applies to *prescribed offences* as set out in regulations.
- 9.6 In applying fundamental legislative scrutiny principles, the Committee considers whether a bill allows the delegation of legislative power only in appropriate cases and to appropriate persons. Clause 20 delegates the legislative power to determine the relevant offences.
- 9.7 Given the importance of the infringement notice process, the Committee asked the Minister for advice about:
- the types of offences which will be prescribed for the purposes of the section; and
 - why these offences are not specified in the Administration Bill.
- 9.8 The Minister advised that in accordance with normal practice, the regulations will not be drafted until the Bills have attained passage through the Parliament. However, infringement notices would only be used for offences that are simple and where the elements of the alleged breach are evident or easily established without the need for a lengthy investigation to establish a *prima facie* case.³⁶ The Minister further advised that it is common practice to allow for infringement notices to be prescribed by regulation as this allows for greater flexibility rather than incorporating such matters within the body of the Act.³⁷

Clause 22 - Giving of notice

- 9.9 Clause 22(2) requires an inspector who wants to issue an infringement notice to do so within six months of the alleged offence.
- 9.10 The Committee notes that similar infringement notice processes in section 228 of the *Fish Resources Management Act 1994* and section 73 of the *Fair Trading Act 1987* require the infringement notice to be given within 21 days of the alleged offence.
- 9.11 In response to a Committee query, the Minister advised that the time limit was a policy decision and that:

The advantage of setting a 6 month time period limitation is that it provides more opportunities for matters to be dealt with by way of the more efficient infringement notice process. Many offences may not come to light until after a 21 day period has expired and the 6 month period allows for more time to identify the offence and take

³⁶ Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, October 3 2005, p3.

³⁷ Ibid.

*appropriate action. It would be possible to impose a time limit of 21 days instead of 6 months, but this is likely to mean that the option of proceeding by way of infringement notice is not available in many circumstances. This would, in fact, be to the disadvantage of traders and the public as it would result in more offences having to be prosecuted through the courts.*³⁸

Clause 33 - Proceedings

- 9.12 Clause 33 provides that proceedings for an offence against the Main Bill or the Administration Bill must be commenced within three years after the offence was committed.
- 9.13 The Committee notes that section 12 of the *Trade Measurement Administration Act 1990* (Qld) sets the time limit for instituting proceedings for offences at 12 months.
- 9.14 In relation to the time limit, the Minister advised the Committee that:

A policy decision was taken to set a time limit of 3 years for instituting proceedings. This is consistent with the time limits that apply under the Real Estate and Business Agents Act 1978; Settlement Agents Act 1981; Land Valuers Licensing Act 1978; and the Builders' Registration Act 1939 that are also administered by the Department of Consumer and Employment Protection.

*New South Wales and Victoria's trade measurement legislation also have a 3 year time limit while South Australia has a general 2 year time limit that can be extended to 3 years with the Attorney General's approval. Under these circumstances and having regard for the fact that all States are entitled to factor in their own administrative arrangements under model trade measurement legislation, I believe that proper policy consideration and the public interest would be better served by placing a limit on proceedings so that they are commenced within 3 years after the offence was committed.*³⁹

Schedule 1, clause 9 - Further transitional provisions may be made

- 9.15 Schedule 1 of the Administration Bill contains the transitional provisions relating to the administration of trade measurement. Clause 9(1) of Schedule 1 enables regulations to be made if there is no sufficient provision for any matter or thing necessary or convenient to give effect to the transition from the *Weights and Measures*

³⁸ Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, October 3 2005, p4.

³⁹ Ibid.

Act 1915 to the Main Bill and the Administration Bill. Clause 9(2) enables such regulations to have retrospective effect. However, clause 9(3) prevents those regulations operating to prejudicially affect a person's rights or impose liabilities.

- 9.16 Similar issues arise in relation to clauses 9(2) in Schedule 1 as arose with respect to clause 106(3) of the Main Bill. In this regard, see paragraphs 8.29 and 8.30.
- 9.17 The Committee asked the Minister about limiting the power to make any retrospective transitional regulations and the period for which they operate. The Minister advised that:

*The purpose of clause 9 is to allow for further transitional provisions to be made as and when required to ensure the smooth transition to the new regime and deal with any unforeseen circumstances that may arise. I believe a sunset clause or 12 month expiry period would serve no useful purpose other than to limit the capacity to efficiently deal with any transitional issues that arise.*⁴⁰

Double jeopardy

- 9.18 The Committee notes that the relevant Trade Measurement Administration Acts in other jurisdictions contain a provision concerning double jeopardy⁴¹ to prevent a person being dealt with for an offence under the principal Act *and* an offence under the law of the Commonwealth or another State or Territory.⁴² There is no equivalent provision in the Administration Bill.
- 9.19 With respect to this issue, the Minister advised that this was a deliberate omission and that:

After careful consideration, a policy decision was made not to incorporate a double jeopardy clause in Western Australia's new legislation. The basis for this decision was a concern that if a person or business that is trading in a number of States was committing the same offence in (for example) three States, it might result in that person avoiding prosecution in the second or third State if they had

⁴⁰ Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, October 3 2005, p5.

⁴¹ Double jeopardy can be defined as "placing an accused person in peril of being convicted of the same crime in respect of the same conduct on more than one occasion". Dr P Nygh and P Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p386.

⁴² Section 15, *Trade Measurement Administration Act 1990* (Qld); section 17, *Trade Measurement Administration Act 1989* (NSW); section 12, *Trade Measurement Administration Act 1993* (SA) and section 13, *Trade Measurement Administration Act 1995* (Vic).

*already been prosecuted for the same offence in the first State. This would be an unacceptable result.*⁴³

10 CONCLUSION

- 10.1 The Committee has examined the clauses of the Bills and sought further information from the Minister in relation to a number of those clauses. The Committee is satisfied with the advice of the Minister and commends its Report to the House.



Hon Simon O'Brien MLC
Chairman

October 19 2005

⁴³ Letter from Hon John Kobelke, MLA, Minister for Consumer and Employment Protection, October 3 2005, p5.

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 Working Party of Representatives of Scrutiny Committees throughout Australia in the 1996 Position Paper entitled *Scrutiny of National Schemes of Legislation*. 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 regulations 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.

APPENDIX 2

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. **Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?**
2. **Is the Bill consistent with principles of natural justice?**
3. **Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?** Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. **Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?**
5. **Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?**
6. **Does the Bill provide appropriate protection against self-incrimination?**
7. **Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?**
8. **Does the Bill confer immunity from proceeding or prosecution without adequate justification?**
9. **Does the Bill provide for the compulsory acquisition of property only with fair compensation?**
10. **Does the Bill have sufficient regard to Aboriginal tradition and Island custom?**
11. **Is the Bill unambiguous and drafted in a sufficiently clear and precise way?**

Does the Bill have sufficient regard to the institution of Parliament?

12. **Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?**

13. **Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?**
14. **Does the Bill allow or authorise the amendment of an Act only by another Act?**
15. **Does the Bill affect parliamentary privilege in any manner?**
16. **In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?**