

PARLIAMENT OF WESTERN AUSTRALIA

LEGISLATIVE COUNCIL

STANDING COMMITTEE
ON
GOVERNMENT AGENCIES

REPORT
ON THE
STATUTORY
CORPORATIONS
(DIRECTORS' LIABILITY)
BILL

Presented by the Hon. TOM STEPHENS, MLC (Chairman)

December 7 1989

STATUTORY CORPORATIONS (DIRECTORS' LIABILITY) BILL 1989

1. RECOMMENDATIONS

After considering the evidence submitted to the Committee in relation to the Bill, the Committee makes the following recommendations:

1. That the Bill in its present form proceed no further, and be discharged from the Notice Paper.
2. That the State Government, in consultation with the proposer of the Bill, taking into consideration the principles of the Statutory Corporations (Directors' Liability) Bill and the issues raised in this report, prepare a Bill for presentation to the Standing Committee on Government Agencies.
3. That the Standing Committee on Government Agencies consider this Bill during its proposed future inquiry into the establishment and scrutiny of government agencies in Western Australia, which may include the development of a Statutory Corporations Act or Code relating to government agencies.

2. INTRODUCTION

2.1 On October 19 1989 the House resolved in favour of the following motion -

HON J M BERINSON (North Metropolitan - Attorney General) [4.29 pm]: I move -

That the Bill be referred to the Standing Committee on Government Agencies and that the committee report its findings and recommendations, if any, on the Bill not later than four weeks from the day on which this motion is passed.

2.2 The Committee considered the Statutory Corporations (Directors' Liability) Bill [the Bill] at its meetings of October 26, November 2, 11, 23, and 30 1989. The Committee is appreciative of the co-operation of the witnesses that appeared before the Committee: Mr Mike O'Connor of Corporate Affairs; Mr Alan Smith and Mr Robert Horspool of the Auditor General's Department; the Hon Peter Foss, MLC; and Mr Peter Johnston, legal counsel.

2.3 The Committee is also appreciative of the written submissions made by the Corporate Affairs Department, the Auditor General, the Fremantle Port Authority, Mr Robert E Peters, the State Government Insurance Commission, the Companies' Directors' Association of Australia, the Western Australian Meat Marketing Corporation, Mr Peter Johnston, the Totalisator Agency Board and the Civil Service Association.

3. REASONS FOR THE COMMITTEE'S RECOMMENDATIONS

- 3.1 From the evidence received from witnesses and written submissions presented to the Committee, it would seem that the basic intent of the Bill has been well received by a majority of parties. The Bill proposes to impose on those principally responsible for administering various statutory corporations many of the same obligations that apply to directors of private companies operating under the *Companies (Western Australia) Code 1981* [the Companies Code].
- 3.2 However, the coverage of the Bill, its application to statutory corporations and the terms in which it is drafted, presents a number of fundamental difficulties for those who made submissions to the Committee. Accordingly many objections are highlighted which stem from the difficulty of fitting legislation drafted for private sector companies to public sector corporations.
- 3.3 The major difficulties that were raised in relation to the contents of the Bill by those who made submissions to the Committee are as follows:

Section 2

- 3.4 The definition of "statutory corporation" is considered to be far too broad to be functional and it does not take into account the diverse range of statutory corporations, some of which are similar to private commercial companies and others of which have social rather than economic goals. This definition in its present form could leave it to the statutory corporations to determine for themselves whether they are within the definition and thus subject to the Bill's provisions. This definition would catch a diverse range of public bodies and (as pointed out by many of the submissions made to the Committee) the contents of the Bill would not be applicable to all these bodies. It was suggested that an Act of this type would be far more serviceable if it had a definition indicating the statutory corporations that it covers, thus eliminating any doubt as to who would be affected by the legislation.
- 3.5 There is a similar problem with the definition of the word "director" which was queried by many of the submissions. The diversity of management structures highlighted by the submissions made to the Committee creates the problem of just who is a "director" in a statutory corporation.

Section 3

- 3.6 The use of the word "shareholder" in this section creates difficulty in defining who is a shareholder: this could be the Government of Western Australia or the general public as suggested by the Hon Peter Foss in his second reading speech. The concept of a shareholder does not seem to fit the nature of most statutory corporations in Western Australia.
- 3.7 The Bill makes reference to the Companies Code in both Section 3 and 4 and this raises the issue of referential legislation (legislation that uses sections from other Acts). The Companies Code is a Federal piece of legislation designed for the private sector. As such this legislation could be subject to change or revocation which would pose great difficulties then for any legislation enacted through this Bill. The use of this referential legislation in the Bill was seen as being unsuitable or unworkable by many of the submissions received by the Committee.
- 3.8 It was pointed out that the Common Law relating to directors liabilities by itself is not satisfactory, as it is considered to be too nebulous. Instead the submissions generally saw it as being desirable that any legislation of this kind state explicitly, in its own terms, standards of conduct which should be expected of those in control of the relevant statutory corporations. Western Australia would then have legislation specifically designed to enforce the duties and penalties for the breach of those duties by the directors of statutory corporations.

Section 4

- 3.9 The issue of referential legislation has already been dealt with under Section 3. The schedule of specific Companies Code sections incorporated under Section 4 posed many problems in their application to statutory corporations, especially in relation to the liabilities of directors. Presently the Companies Code limits the ability of directors to indemnify themselves against an action for breach of duty; however it would appear that through indirect means indemnification can be obtained. In any case, the Companies Code may soon be changed to allow indemnification, so the prohibition of this under the Bill is considered to be harsh by some submissions made to the Committee.
- 3.10 It is considered that while some of the provisions of the Companies Code would provide a suitable basis for ensuring honest and responsible actions by directors of some statutory corporations, others would require adaptation and others are considered unnecessary. It was also pointed out by the submissions that other provisions of the Companies Code would need to be included in order for the Bill to be workable.

Section 5

- 3.11 The proposal to permit a suit for damages as a mode of enforcement of the Bill's provisions causes a great deal of concern amongst the parties who made submissions to the Committee. The disproportionate nature of the sanctions in relation to the seriousness of the breach is also a concern to some of those who made submissions to the Committee. It is considered that the focus of this section should be away from the judicial and more to direct sanctions, such as dismissal or suspension for deemed misconduct or criminal sanction if the matter was sufficiently serious.
- 3.12 The perceived ease at which a person could seek leave of the Court to bring an action against the directors of a statutory corporation was raised in many submissions; they consider that it could be used for purposes not related to the management of the statutory corporation and ultimately serve as a hindrance to the corporation's functioning.
- 3.13 It is suggested that the use of judicial sanction could impede the workings of parliamentary scrutiny by tying up members of a statutory corporation by legal actions. There was also concern that under the Bill the judicial system could be seen as undermining the parliamentary process of accountability.

Section 6

- 3.14 It was considered by all but one of the submissions made to the Committee that this section placed the director of a statutory corporation in an extremely difficult and even unworkable position. It is suggested that it could displace many of the features of the prevailing Westminster System relating to Ministerial responsibility to the Parliament. The section is in conflict with the enacting legislation of some of the statutory corporations who made submissions, for example, the *State Government Insurance Commission Act 1986* which places the responsibility for the directive on the minister, not the director.

4. GENERAL COMMENTS

The Committee has been considering for some time the possibility of an in-depth inquiry into the establishment and scrutiny of government agencies in Western Australia, and considers that this Bill is relevant to that proposed inquiry.

The Committee therefore believes that the Bill should be redrafted by Parliamentary Counsel in consultation with the proposer of the Bill and that the redrafted Bill be submitted to the Committee for consideration within the context of its proposed future inquiry.

This inquiry will consider the need for a Statutory Corporations Act and/or Code relating to the conduct of statutory authorities and their "directors".

The inquiry will also consider whether the redrafted Statutory Corporations (Directors' Liability) Bill should be incorporated in any Statutory Corporations Act, or be incorporated in the *Financial Administration and Audit Act 1985*, or stand alone.