

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

**TRADE MEASUREMENT LEGISLATION
(AMENDMENT AND EXPIRY) BILL 2010**

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 13 OCTOBER 2010**

Members

**Hon Adele Farina (Chairman)
Hon Nigel Hallett (Deputy Chairman)
Hon Linda Savage
Hon Liz Behjat**

Hearing commenced at 10.43 am**NEWCOMBE, MR GARY****Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, sworn and examined:****MILFORD, MR GERALD****Manager, Strategic Policy, Department of Commerce, sworn and examined:**

The CHAIRMAN: Gerry and Gary, thank you very much for coming, and Anna. My name is Adele Farina, in case you do not know who I am; I am the Chair of the committee. We have only three members of the committee today—Hon Liz Behjat and Hon Nigel Hallett. To my left is our legal adviser for the committee, and Mark, I think you have had some communications with already.

Mr Newcombe: Indeed.

The CHAIRMAN: Hansard are recording today's proceedings. I have some formal stuff that I need to go through at the beginning, and then we will try to keep it relatively informal; I am always comfortable using first names if you are okay with that.

Mr Newcombe: Certainly.

The CHAIRMAN: On behalf of the committee I would like to welcome you to the meeting. Before you begin, I would ask you to take either the oath or affirmation; Mark will help with that.

[Witnesses took either the oath or affirmation.]

The CHAIRMAN These proceedings are being recorded by Hansard, and a transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document or report that you refer to during the course of today's hearing. Also, please be aware of the microphones; try to talk into the microphones and try not to shake or rattle any paper in front of the microphones, please.

I need to remind you that your transcript will become a matter for public record. If, for some reason, you wish to make a confidential statement during the course of today's proceedings, you should request that the evidence be taken in private or in closed session. The committee will then consider that request and let you know whether we are prepared to hear it in closed session. While we do not have members of the public present at the moment, they are able to attend at any time during today's hearing. Regardless of whether there is someone from the public here or not, if you want evidence taken in closed session, please ensure that you ask for it, otherwise it will just be part of the public proceedings.

Mr Newcombe: Sure.

The CHAIRMAN: Please note that until such time as the transcript of your public evidence is finalised it should not be made public. I advise that the publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that material published or disclosed is not subject to parliamentary privilege. Do you have any questions in relation to any of that?

Mr Newcombe: No, that is all fine, thank you.

The CHAIRMAN: I understand that we have sent you a general guideline—a précis—of the sort of questions and areas that we will be touching on.

Mr Newcombe: Yes, you did.

The CHAIRMAN: So I have a range of questions I need to run through with you. If you need the questions repeated or you are unclear about what we are asking, please feel free to say so.

What were the reasons for Western Australia's decision not to participate in the intergovernmental agreement in relation to the adoption of uniform trade measurement legislation and administration in 1990?

Mr Newcombe: As you can appreciate, in effect, that is a policy question for government, and it goes back several governments. What I can say is that it was a decision of the then minister, Yvonne Henderson, who was unsatisfied with the UTML, as we know it—the uniform trade measurement legislation. Our understanding—because it predates all of our involvement—is that the minister had some concerns that the legislation did not provide for standard package sizes; but, beyond that, I am afraid I really cannot give you much other information as to why the decision was made.

The CHAIRMAN: That is fine. Would you please identify the differences between the commonwealth and the state trade measurement legislation?

Mr Newcombe: So here we are talking about the new trade measurement legislation at the commonwealth level that commenced on 1 July. It was based on the legislation that was already in place in all of the existing jurisdictions—uniform trade measurement legislation. So, in effect, there is very little difference between the commonwealth regime and the previously existing state regimes. The one area of difference is in relation to reverification of measuring instruments. Under the Western Australian legislation we have provision for reverification, so a measuring instrument might be tested to see that it is accurate, and then the legislation provides either between one or two years, depending on the nature of the instrument, that it would be reverified, and so on. The commonwealth, in introducing its regime, decided not to implement reverification as a standard. They have reverification for public weighbridges, so they have established a reverification methodology for them. The legislation enables them to prescribe regulations setting out additional reverification requirements, but, to date, they have not done so. They have indicated that they will be reviewing the need for reverification. The commonwealth, as I understand it, has not yet started that process, but they will look at whether either reverification is needed at all or whether more rigorous reverification programs are required. So that is the only difference.

The question about what continues to apply in this state or not is really a little more complex and it relates to some constitutional questions about the application of the commonwealth legislation to Western Australia. This is probably an answer to some of the other questions as well; I am ready to admit I am not a constitutional law expert, but I will sort of take you through some of the issues as I understand them. The intention was—I think we provided you with a copy of the second reading speech for the commonwealth legislation and some other background information—that the commonwealth would take over regulation of trade measurement entirely. It was intended to replace a range of state schemes with one uniform scheme, one uniform administration. It was certainly the understanding of the parties that the commonwealth would legislate to do that based on its constitutional authority under section 51(xv) of the Australian Constitution for weights and measures. On that basis, if the commonwealth did then regulate to cover the field in trade measurement, then the advice is that state legislation just would not apply because the commonwealth had covered the field and there would be no role for state legislation in the same area. However it was a little unclear as to whether the commonwealth legislation was effectively drafted so as to cover the field. While WA is the only jurisdiction that raised a concern about that, a concern was raised that perhaps the commonwealth legislation was not correctly drafted and there was room for the state legislation to continue to operate.

That leads to your question. If the commonwealth covers the field, the answer is that none of our provisions continue to have any force because section 109 of the Constitution would provide that they are inconsistent and that the commonwealth law would apply. If the commonwealth does not

cover the field, then any provisions of our legislation that are different or not within the scope of the commonwealth legislation could continue to apply, and the one there is the reverification requirement.

That was quite a longwinded answer, but, I guess, what I am saying, in summary, is it is that either none of our provisions apply at all, by virtue of the commonwealth legislation, and that was the intent; or it is possible that there has been an oversight in the drafting of the commonwealth legislation, and the reverification provision of our legislation might continue to apply.

[10.50 am]

The CHAIRMAN: What is the implication of that for those that rely on this legislation in Western Australia?

Mr Newcombe: We became aware of this potential difficulty in the drafting of the commonwealth legislation in March this year. There was an immediate concern for us as to how this would apply, because the intention was there would be a very smooth transition on 1 July, even if the state legislation could not get through by that time. In the advice that we sought, we also identify that there is a capacity under the state act to create exemption regulations to exempt people—either people generally or a class of people—from any or all of the requirements of the legislation. The advice was that we could use that power to exempt from compliance with our act anybody who was licensed under the commonwealth act as of 1 July, and that is what has happened. So exemption regulations have been made, so that any person who is licensed under the commonwealth legislation is not obliged to comply with the provisions of the state legislation, so they would not be required to comply with the reverification process; and certainly we are not—we have had no administrative arrangements in relation to trade measurement laws since 1 July. So that, coupled with, obviously, this legislation, which, as you know, has some retrospective elements to it, is intended to make it very clear that there is no intention the state will still be in the field, and the combination of the exemption regulations and the operation of the commonwealth legislation, we believe, deal with that.

The CHAIRMAN: So what was the purpose of the reverification, and why was it considered necessary in Western Australia, but not necessary by the commonwealth?

Mr Newcombe: Again, I have to say that I am not a trade measurement expert, coming from a general policy point of view, so you will have to excuse me; I will probably give you a general answer to this. But there are differing views about the validity and the effectiveness of reverification in the marketplace. Part of that is that measuring instruments are becoming more and more accurate and self-correcting, so that the technology is actually being more effective in reverification than having a process, which is very labour intensive, of continually going out and checking measuring instruments; and, of course, as you would appreciate, there has been an explosion in what is a measuring instrument over the time. So I think that, in summary, was the view. It was looked at fairly extensively. The transition period for the commonwealth taking over was about three years, and I think there was a range of discussions about what would be in the commonwealth's policy. Obviously, the commonwealth administration that has taken over has a long history in trade measurement. Even though they have not been responsible at the state level, the National Measurement Institute has been in place since Federation and has a long history in that area, and their view was that, apart from public weighbridges, the cost benefit of having a reverification scheme did not justify applying it across the board. But, as I said earlier on, they have indicated they will conduct a review of that, and I think that will have an opportunity to assess how their administration has been running without reverification. They will have an opportunity to test the marketplace to see whether inaccuracies are occurring. So they will be well placed to determine whether there actually should be a return to some form of reverification. We did argue for it. Our view was, based on our officers' experience, that there was a preference for it, but it was not supported by other jurisdictions or the public.

The CHAIRMAN: How will the commonwealth trade measurement regime operate? What mechanisms and entities will be established to implement the legislation, or have been established?

Mr Newcombe: Sure. Well, as I say, the transfer actually did take place on 1 July. The administration is vested in the National Measurement Institute, which, as I say, has been in place a long time. It historically was responsible for setting the standard units of measure and dealing with all of Australia's international relations on measurement and so on. So it is the authority which is responsible for the policy and the administration of national trade measurement going forward. The decision to go to a national scheme was made in 2007, effectively, since a three-year transitional process was put in place. There were a large number of consultative committees put in place to deal with all of the issues about human resources and transfer of assets and all those sorts of things, so they will work through, we believe, effectively. We came to an agreement as well that the staff who had all of the expertise at state level would be offered transfer to the commonwealth, so that expertise was carried over. All but three of our staff transferred to the commonwealth. There was an agreement they would keep their premises; so they have taken over the premises. So, from a customer point of view, there is probably very little change. They go to exactly the same place they used to, they are dealing with exactly the same people, and the law, apart from that reverification issue, has hardly changed at all. So we see it as being effectively a seamless transition, and to date that seems to have been verified. We are not aware of any particular issues in that.

The CHAIRMAN: Sorry; the transition process has been completed?

Mr Newcombe: Yes. All the staff are transferred. The state agreed to transfer the assets. We have, you know, standard measuring instruments and those sorts of things. They were all transferred to the commonwealth. The premises were dealt with, and also regulations were made to provide that anybody who had a licence under the state legislation would continue that for 12 months, and the state would not have to pay or apply for a new licence. So they were transitioned into the new scheme as well—so very seamless from the point of view of industry; and, from the point of view of consumers, it is not a major area of consumer complaint, but we have a whole range of transfer systems in place if people continue to contact us. So if they contact our contact centre, they are directly referred to a commonwealth number. The commonwealth agency has put in place a range of processes to deal with any consumer complaints as well. They have got a standard website and online forms and all the rest of it. So, yes, we believe it has been a seamless transition, and no issues that we are aware of have arisen as a result.

The CHAIRMAN: Just out of curiosity, the three staff members who did not transfer across, are they still with the department, just in different capacities, or were they retrenched?

Mr Newcombe: No, we did not retrench anybody. We are subject to a large number of these COAG reforms, so change management is an important issue for the department. One of those officers was on long-term secondment with the Department of Health and secured a position there, so did not actually, I think, ever return to us. We have an internal redeployment arrangement. We do not advertise any position in Consumer Protection unless it has been first provided to anybody displaced as a result of the COAG reform. The two officers are at the moment working in our motor vehicle branch in an inspectorate role, which is very similar to the role they had in trade measurement. That is currently temporary. They are still considering whether they would like to do that, but we are offering them a range of options. So no retrenchment; no staff member has suffered any loss of level. Yes, we think that at the moment they seem quite satisfied with the process.

The CHAIRMAN: So if we look for a date of transition, would that be 1 July?

Mr Newcombe: Yes.

The CHAIRMAN: So that was all effected by that date?

Mr Newcombe: That is correct, yes.

The CHAIRMAN: Okay. Just confirming, the state licensees—their licences were just transferred across to the commonwealth on transition without the requirement of additional fees being paid?

Mr Newcombe: That is correct, yes.

The CHAIRMAN: And they are now, from this point on, being licensed under the commonwealth scheme?

Mr Newcombe: That is correct, yes.

The CHAIRMAN: Are there any differences in the rights or obligations imposed in respect of licences issued by the state and those issued by the commonwealth?

Mr Newcombe: Not that I am aware of, no. I have to say, you know, I have not recently done a detailed assessment of the licensing obligations, but the point of it was that because the legislation is effectively identical, the licensing construct is the same. There was a clear desire for the National Measurement Institute to be able to take people on in a seamless way, at lowest cost to business, and that includes licensees. So I am not aware of any fundamental differences at all, no, and certainly none has been raised with us, or were raised with us, in the lead-up to the transfer.

[11.00 am]

The CHAIRMAN: Has the reduction of three staff members in this area created any problems with clients?

Mr Newcombe: Not that I am aware of. Obviously, the transfer was entirely voluntary, so those staff made a decision that it was not in their best career interest to go. I understand that the National Measurement Institute will seek to do some additional recruitment in Perth. Obviously, that is a matter for them. But there was an indication at the point of transfer that they might seek to recruit some additional staff. And it is even possible that some of those staff that did not go across might apply for new vacancies. It is an area where there is a very limited pool of people with expertise. Given the informal discussions that have been had with the staff that are now responsible, there does not seem to be any indication of diminution of service as a result.

Hon LIZ BEHJAT: Those staff who transferred, there was no loss of entitlements or seniority, or anything like that?

Mr Newcombe: No.

Hon LIZ BEHJAT: And they have maintained all of their conditions?

Mr Newcombe: As you probably appreciate, this was the area of the biggest negotiation because long service leave is different at the commonwealth compared to the state, and superannuation arrangements are slightly different. There was certainly no reduction in level and, in general, whilst there might be some movement, we believe it probably opened up some career opportunities because they were very specialist areas. So within Consumer Protection, they largely were an isolated unit. They are now within a group of people that are all in the same expertise and there are some opportunities for career progression that did not exist. I have to remind myself.

Mr Milford: We started on the premise that there would be no disadvantage to any employee, and that is the way they were originally brought in.

Mr Newcombe: So we negotiated. That was our negotiating position: that there would not be any diminution in their rights. There was a bit of a trade-off in long service, so people made a judgement about that. It depended where they were in their career and when their next long service arrangement came up. From memory, the difference is 10 years in the commonwealth and seven years in the state. In superannuation, they were entitled to negotiate an agreement. They are entitled to continue contributing to the state fund, so that was approved by the Treasurer to enable those people—because we had some people who were at 25 or 30 years' service, so that superannuation was a fundamental issue for them. That was satisfied and they were advised of that in writing before

they accepted the transfer. For junior staff that was less of an interest. So with everybody it was made very clear to them what their entitlements were. We involved the union in the negotiations all the way through, and all staff were provided with a written offer and made a judgement on that basis.

The CHAIRMAN: I just have a question here in relation to the reverification which continues to apply in relation to weighbridges. Is that private and public weighbridges?

Mr Newcombe: It is certainly public weighbridges. I am not sure about private weighbridges.

The CHAIRMAN: I do not know if any exist, but I have just been asked the question so I assume that my colleague knows that some do.

Mr Newcombe: No, I think it is all public.

Hon NIGEL HALLETT: I wonder where you stand if you have your own private weighbridge, as far as verification goes.

Mr Newcombe: I must admit I am not a trade measurement expert. We might be able to come back to you on this, but my understanding is it is the public weighbridges that are acquired, because the issue there is the verification of the measurement. Those public weighbridges are used to assess payment, quantities and so on, so it is very important that they are accurate. The use of a private weighbridge does not have the same consequences because you may still need to go to a public weighbridge, in certain circumstances. So it does not provide you with that authenticity. I do not think the private weighbridges are assessed in the same way, but I would have to come back to you on that.

Hon NIGEL HALLETT: Having had one, the trade measurement guys would come through. Now with the deregulation of the grain trade it is more important than ever with the private traders using it, as it is to a public one. That was part of the changes that I felt came through. If you could come back on that.

Mr Newcombe: I apologise, but we will have to check that and determine whether —

The CHAIRMAN: We will take that as question on notice 1 in relation to the checking and reverification of private weighbridges.

Mr Newcombe: We will come back to you. It looks like probably they are both covered, but we had better check.

The CHAIRMAN: If I could just turn to section 39(a) of the bill that contemplates a continuance of investigations and prosecutions for offences under the state trade measurement legislation, despite that legislation ceasing to have effect. Which entity will conduct these investigations and prosecutions?

Mr Newcombe: The answer to that would be Consumer Protection at a state level, if we were going to be doing that. There are no matters on foot. There are no complaints. There are no compliance issues, and there were none in the lead-up either. This was one of the issues that was part of the transition to ensure that matters were clear and, as I say, there are none.

The CHAIRMAN: If an issue were to come up requiring investigation or prosecution, do you have the staff with expertise left in the state department to handle this?

Mr Newcombe: It would be an issue. Clearly we have a couple of staff who have remained, and they have the expertise in terms of the investigation, and they are both very long serving, so they do have a lot of expertise in trade measurement. That would be the first port of call, in terms of those staff, but it would have been an issue that we would have had to negotiate and, very likely, we probably would have had a negotiation with the National Measurement Institute. But the fundamental question would be: is there a public benefit and is there a purpose in the prosecution, or is it a matter that the National Measurement Institute could deal with appropriately post 1 July?

Certainly it was recognised that if matters carried over after the transition date, we were not intending to keep the expertise. But, as I say, nothing has eventuated; there was a lot of work done to ensure that that was not the case so we have not been presented with that issue.

The CHAIRMAN: I am a bit unclear about the statutory provisions that would confer power on the department to conduct the investigations and prosecutions if now those licences have transferred across as commonwealth licences.

Mr Newcombe: These provisions are in relation to offences which were committed before the transition day, and it keeps the act going. The existing Trade Measurement Act and the Trade Measurement Administration Act are continued for the purposes of the investigation, so it is those acts which give us the authority and this preserves that act in its operation, post the transition day, for the purposes of doing so. This is a reasonably common procedure to enable transitional matters to be dealt with. It keeps the act on foot for these restricted purposes. It is more relevant in areas that have a very high turnover in compliance matters than trade measurement, so the Trade Measurement Act and the Trade Measurement Administration Act would be on foot; they would be the acts which we were previously administering through Consumer Protection. We would still have the capacity to do that. The only fundamental issue is that the staff that have the day-to-day role in doing that, the majority have left the department so that would have created that problem you have identified.

The CHAIRMAN: The other problem that we have is that the transition provisions do not actually have effect yet, because we have not passed the bill.

Mr Newcombe: No, I appreciate that. But equally on that basis the Trade Measurement Administration Act and the Trade Measurement Act have not been repealed or expired, so they continue now as well so our powers under those acts also continue.

The CHAIRMAN: I suppose the point of confusion is the fact that you have appeared to have, in practical terms, transferred the licences across to commonwealth licences, now I do not know whether it now says this is a commonwealth licence or what has happened in terms of effecting that, but you have still got a state act in operation, and I do not know how you could take a prosecution action under the state act for a commonwealth licence.

Mr Newcombe: No, and this provision only relates to offences which were committed before the transition date, before 1 July, so there it is clear they are a state licence holder and they were not a commonwealth licence holder. This provision does not relate to any offence which has been committed post 1 July.

[11.10.am]

The CHAIRMAN: Okay; what about for offences that are committed post 1 July? Which act would actually prevail in those circumstances, because you have got a commonwealth licence, but you have a state act that has not yet been repealed, and you have transition of provisions that have not yet been put into effect?

Mr Newcombe: Yes; a couple of things. I mean, the intent is that it rests with the National Measurement Institute and it would be dealt with as a commonwealth matter. They are now a commonwealth licence holder; they are subject to the commonwealth legislation because there is no constitutional doubt that the commonwealth legislation is in place, and they have the authority to have it. So they are subject in the marketplace now, with commonwealth legislation, to a commonwealth licence and a commonwealth administrator. Unfortunately, because this bill was not passed prior to that date, we have this issue of two sets of legislation being in the marketplace. That is why the bill contains some retrospective elements. That is why there were also some clear statements to the industry and consumers at the time that the full intention is 1 July is the transition date and you will be answerable to the commonwealth. But it is recognised that until this bill is passed, technically, there are two pieces of legislation in the marketplace. The question of whether

ours applies or not comes back to that constitutional question as to whether, if the commonwealth has covered the field, then our law, even though it has not been repealed, is of no effect. If that is not the case, then we are relying on the retrospective element of this and we are saying that administratively we are not going to deal with this legislation in the shadow of retrospective legislation. We are not going to take action in relation to trade measurement matters in the marketplace that occur now, because there is a commonwealth regime in place that is valid.

I appreciate it is a little complicated and it does obviously depend on this bill being passed. But what we are saying is, “Yes, this bill is retrospective, but everybody who is affected by the operation, the administration and so on, has been told this is what would happen; your expectation and your understanding should be that, as of 1 July, it is a commonwealth matter, a commonwealth issue. The commonwealth has all the valid powers to deal with it and we would refer all matters to the commonwealth.

Mr Milford: If I can just add to that too, the National Measurement Act actually contains a provision for licensees that are licensed under state legislation to be deemed licensed under the National Measurement Act as from the transition day. So that is why they are licensed under the commonwealth legislation as we speak.

The CHAIRMAN: Proposed section 39(e) provides for the continuation of review under section 81 of decisions made by the commissioner under the state trade measurement legislation prior to 1 July 2010. Have any relevant commissioner decisions been made subsequent to 1 July 2010?

Mr Newcombe: No.

The CHAIRMAN: Okay. I am not sure that this is relevant. What will happen in respect of applications made under the state trade measurement legislation prior to July 2010, but not decided at that date? They are just deemed —

Mr Newcombe: There are no outstanding matters, and that was part of the planning of the transition.

The CHAIRMAN: Does proposed section 40 permit a person to be charged with and convicted of an offence for which that person cannot be punished?

Mr Newcombe: Sorry; you will have to repeat the question. I am not quite sure —

The CHAIRMAN: This looks at the different wording in the two pieces of legislation.

Mr Newcombe: Yes; sure.

The CHAIRMAN: Does proposed section 40 permit a person to be charged with and convicted of an offence for which that person cannot be punished? Our concern is that this may occur in the event that the offence with which the person is charged under state legislation does not constitute an offence under the commonwealth legislation.

Mr Newcombe: Yes. Because the commonwealth legislation is based so closely on the uniform trade measurement legislation, effectively they mirror one another in terms of the requirements. There may well be individual provisions that do not marry up, so I cannot answer for each and every provision is the answer to that. However, if it is not an offence under the commonwealth legislation, then 40(2) provides that you should not be dealt with. The idea of 40 in its totality is about saying, “We recognise there is a transfer to the commonwealth, and the commonwealth is going to take it over.” So people, around the transition period, should not be charged with offences unless it is also an offence under the national legislation because we want to keep people to the same level; and equally provides that they should not suffer penalties that are greater than they would suffer under the commonwealth. So the intent of these provisions is to recognise this transition and say that we should not really, once the transitions occur, have people that did something at a state level getting treated differently than they would under the commonwealth legislation. As I say, I cannot tell you that there are no provisions in the commonwealth act that do

not provide an offence that match up to something they might be charged with under the state act. If you have got something, we are happy to consider it.

The CHAIRMAN: I might, by way of explanation, just read out some text to you. Proposed section 40(2) provides that a person charged with an offence under the state trade measurement act after the transition day cannot be punished, unless at the time of the act or omission constituting the offence would constitute an offence under the commonwealth trade measurement act. Section 40(3) provides that the lesser of the state or the commonwealth penalties applies. The explanatory memorandum advises that the distinction between “charge” and “punish” in proposed section 40 allows for, one, a person only to be punished in the event an offence under the state trade measurement act is also an offence under the commonwealth trade measurement act, and, two, for the lesser of the penalty under the two acts to apply. The committee notes that, as currently worded, proposed section 40 appears to permit a person to be charged with, and possibly convicted of, an offence for which that person cannot be punished under the commonwealth act.

Mr Newcombe: Okay; well I do not read it that way. I would like to have a consideration about that. My understanding is that you cannot be charged after the transition date under the state act unless it is an offence under the commonwealth act. Now, if it is an offence under the commonwealth act, it would have a penalty. We do not have offence provisions without penalties, so I cannot imagine circumstances in which there would not be a penalty. The only issue is the penalty needs to be the lesser of the commonwealth penalty or the state penalty.

The CHAIRMAN: Our concern is that section 40 makes a difference between the word “charged” and the word “punished”. Perhaps you could take that as a question on notice and have a look at that and come back to us with your advice on whether section 40 does in fact make a distinction between “charged” and “punished” and the implication that that might bring.

Mr Newcombe: Okay. We are happy to look at that. Obviously, there are differences in the process between charging somebody and someone being punished as a result of that. In a practical sense, clearly, you would not charge somebody if it was not an offence under the commonwealth act because there would be no point in doing so. The net result of it is that if somebody were charged—my belief would be—administratively and we proceeded with, let us say, a prosecution action on the basis of that, the court before which that prosecution action was taken would, in reference to this provision, say they cannot impose a punishment on the individual. And that is the intention. What it does not do—I appreciate that maybe it is a draft here—it does not prohibit the charging of the person if the offence under the state act is not also an offence under the commonwealth act. So it does not prevent the charging, and maybe it could have been drafted that way to say you cannot be charged. That is the possible distinction, I think. The practical reality, I believe, is no different in that, whilst technically you might be able to charge somebody, you clearly would not do so if you made the charge when they could not be punished for it. There is just absolutely no point in doing so. I appreciate there is a distinction and it is possible the drafting could have been done differently. We will have to have a look at the drafting, obviously. There may be a view from the draftsman about this wording. But they would my response to that; there is a difference in the wording. I do not think that in a practical sense it has any real implications.

The CHAIRMAN: Would you mind taking that question on notice and perhaps talking to the Parliamentary Counsel about the drafting of that and come back to the committee.

Mr Newcombe: Yes; sure.

Hon LIZ BEHJAT: We also found the use of the word “punish” quite interesting as well. We thought that was rather archaic, did we not?

The CHAIRMAN: Yes, but that is just the way the commonwealth do it.

Mr Newcombe: Yes.

Hon LIZ BEHJAT: Is that common in commonwealth legislation that they use “punish” rather than “penalise”?

Mr Newcombe: It is and including “found guilty” and other sorts of things, because punishment can cover a whole range of possible penalties. So yes, it is quite common and it is actually used a lot in the commonwealth legislation.

[11.20 am]

The CHAIRMAN: Just to clarify, that question in relation to the distinction between “punished” and “charged” is question on notice number 2.

[*Supplementary Information No 2.*]

The CHAIRMAN: Having a look at proposed section 43(3), why is proposed section 43(3) conferring power to make regulations continuing the application of the state of trade measurement legislation for transitional purposes other than those set out in the bill and why is that required?

Mr Newcombe: The issue of the capacity to make transitional regulations has actually become quite a standard drafting provision; in fact, there are pieces of legislation that went through the Council this year that had the same provision. In fact, there are a number of acts over the last years that have included it. The reason for it is that there is a concern that you do not capture all the transitional issues in the body of the book itself and that if something is overlooked, it can have a very significant practical implication in the marketplace. If we looked at this as an example, it might be in trade measurement and a period when the Parliament is not sitting, so you cannot amend the legislation over the length of the Christmas break. The regulations enable you to fix up, I guess, anything that has been overlooked in that transitional process.

The CHAIRMAN: Those other four pieces of legislation that slipped through the Legislative Council clearly did not come before this committee.

Mr Newcombe: They probably would not have, I guess. One did, I think.

The CHAIRMAN: Did it? Okay. This committee does have a concern about these sorts of catch-all transitional provisions, because it can leave the person impacted by the legislation caught out and unaware because a regulation is made that they could then fall foul of, and it tends to indicate a level of laziness in the preparation of the bill, because in putting these sorts of bills to Parliament, we should actually be aware of what the likely ramifications will be, and either capture them in the bill, if they need to be captured, or make that decision that they are not relevant and do not need to be captured, rather than having a catch-all provision. Can you advise us of what sorts of things might come up that have not been included in the transitional —

Mr Newcombe: We do not believe there will be anything at this stage. Just in response to those points, I guess there are different views about whether it reflects laziness or not. As I said, the concern is that you cannot necessarily pre-empt every issue that arises in the marketplace. If you do deal with everything in the act and do not have any other recourse, the individuals that suffer are the individuals in the community. It is almost never the government; it is the community that suffers as a result of that, and usually the businesses that are regulated by it. I think that is the difference. We would not see it, and I do not think parliamentary counsel see it, as an issue about laziness but rather belts and braces to ensure that you can appropriately respond to all of the issues. The regulations obviously do come to Parliament for disallowance, so there is continued scrutiny of them.

The CHAIRMAN: Except the problem is that the regulations do have an effect on the day that they are enacted and Parliament does not consider disallowance until Parliament resumes, so a regulation could be made, a person can fall foul of that regulation and the Parliament can then disallow the regulation. That person has still fallen foul of the regulation while the regulation was in force, and that person is then unfairly dealt with because they were in breach of the regulation when it was in

force, but the Parliament has then considered that that regulation is not warranted and should not have any legal effect and disallows it. So the implication for a person caught in that sort of situation can be quite dire.

Mr Newcombe: I would accept that in some circumstances theoretically that is a possibility; I accept that.

The CHAIRMAN: It is more than theoretical; it has actually happened.

Mr Newcombe: It can happen, but we would just reiterate that in our view it has become a standard drafting provision. We have a list of legislation that this provision is in that have gone through Parliament and that have not been the subject of amendment or rejection. So from our point of view in drafting, it is an appropriate provision to include. I guess from your point of view, if the committee wishes to make some statements about it, obviously that is a matter for you to consider, but, as I say, I would just identify that it is quite common and has appeared regularly probably since at least 2003 in legislation.

The CHAIRMAN: And has been struck out in a fair bit of the legislation as well since 2001. Having a look again at proposed section 43(3), this proposed section confers power to make regulations overriding proposed sections 3A of both state acts, and proposed section 3A of each act provides that other than in respect of the matter as proposed in clause 8 of the bill, the state acts will cease to have effect. The explanatory memorandum was a bit vague about the rationale for proposed section 43(3), and the committee would be interested in understanding what that rationale is.

Mr Newcombe: In fact, the answer is the same as the answer to the previous question. The purpose of this provision in proposed section 43(3) is to enable transitional regulations to be made to deal with things when there has not been sufficient provision in the act. Again, that is the purpose of it. It is a power to make transitional regulations where there is not sufficient provision in the rest of the act. That is the entire point of it. Again, I guess I would say that our view is that this provision is not unusual. If it were an unusual provision, we would have included more in the explanatory memorandum about it, but it is not, and the explanatory memorandum is pretty consistent with the others that have gone through with the legislation. The Pharmacy Act, which went through this year, is an example of that.

The CHAIRMAN: Also, still looking at proposed section 43, proposed section 43(4) permits regulations to be made in respect of transitional matters that provide that the state of affairs is taken to have existed or not existed from a day earlier than the day on which the regulations are gazetted. Why is it necessary to confer power to make regulations with retrospective effect?

Mr Newcombe: I guess this again is tied to an attempt to deal with the smooth transition of the legislation. It is recognising that the legislation is actually going through after the transition date. So they do have a retrospective element. The impact of that retrospective element is limited by proposed subsection (5), which limits the capacity to have any prejudice on the rights of individuals. But, again, this is the standard drafting provision. Again, it has existed in a number of acts. The Pharmacy Bill, which went through this year, had exactly the same provision in it. It has become the standard sort of drafting model to enable the whole transitional issue to be dealt with.

[11.30 am]

The CHAIRMAN: It is also excluded in a number of bills when it is picked up. What problems would arise if the power to make regulations with retrospective effect is not conferred in the act—if it was deleted?

Mr Newcombe: I think the practical reality at this stage, because there are not any outstanding transitional issues, is that it would have no impact, I suspect. There is no current intention to make any regulations under this provision. Bear in mind, obviously, this was drafted at a time when it was not clear how the transition would have taken place. I mean, if something comes out of the woodwork and we do not have that provision, there is a problem. If it came out of the woodwork in

December, it would be a problem because no Parliament. But if you ask that question now, on the best knowledge I have, the answer is that we are not intending to use this provision.

The CHAIRMAN: Just looking at the words “state of affairs is to be taken to have existed, or not to have existed” at a certain time, why is it necessary to confer that sort of power that can deem whether a certain state of affairs existed or not at a particular point in time?

Mr Newcombe: In terms of identifying a particular example, I am not certain that we have a particular example to illustrate it for you. The reality is, in the terms of this provision, we sought advice from parliamentary counsel about what was appropriate to deal with the issues, and, as I said, this has effectively become a quite common provision. But I guess there may be circumstances, if regulations were needed, to say that something had happened in the period post the transition date, but I cannot think of an exact example.

The CHAIRMAN: The bottom line is if we were to delete this provision, it is unlikely that any problems would result?

Mr Newcombe: That is correct. At this point now, we could say that if you wanted to amend the bill to remove that provision, we do not believe it would cause a problem.

The CHAIRMAN: What would be the practical consequences in the event the state trade measurement legislation ceases to have effect on enactment of the bill rather than retrospectively?

Mr Newcombe: Potentially, I guess, there are a range of issues. It would mean that between 1 July and the date that this bill comes into operation, all of the licensees—again, I guess it depends on that constitutional question, because the answer is this bill may not be needed at all; that is one sense, and if the commonwealth legislation covers the field, our legislation is invalid. Let us put that to one side and say that it is not and the two acts have continued on in the marketplace and all of the licensees should have been complying with our act, and they have not been; there should have been re-verification, and there has not been. Then people within the marketplace potentially might have committed some offences in those circumstances, because they would not satisfy the re-verification requirements. I think there potentially would be a number of ramifications that would come from that. Certainly all of the parties’ understanding was that that would not be the case and that from 1 July it was commonwealth and commonwealth only. For those people in the community who are affected by the legislation, that would come as quite a surprise to them, and, as I say, potentially could create some difficulties. I think it would certainly create a very complex legal environment, because there are all those constitutional issues that are tied into this, which, as I said, we did not believe should have existed, but it seems on the basis of the way that the commonwealth has drafted its law, they do. We would be relatively concerned about that from a practical point of view in terms of those people in the marketplace.

The CHAIRMAN: Arguably, those concerns apply anyway because the bill has not passed.

Mr Newcombe: Absolutely. It is based on an intent and an understanding. So, for example, if there is a clear statement ahead of time for retrospective legislation and there is retrospective legislation enacted, there is a lot of law about people’s obligations, responsibilities and so on in the shadow of retrospectivity, no need to comply. However, if that retrospectivity is removed that position has disappeared, and I think it becomes much more complex than if the legislation is actually enacted with retrospective effect, which was announced or advised before the transition date, and it was a clear public policy position that the legislation would, if it did not get through by that date, be retrospective.

The CHAIRMAN: Does presentation and enactment of the bill after 30 June 2010 have any consequences for the state’s receipt of funding under the National Partnership Agreement to Deliver a Seamless National Economy?

Mr Newcombe: No, we do not believe so, because the national partnership payments are based on whether the reforms are implemented or not. This reform was about a national scheme to be

administered by the National Measurement Institute. That has been in place since 1 July. I mean, that has been in place throughout Australia. We believe that—there has been no indication to the contrary—because we participated in and facilitated that process through the staff transfers, the transfer of assets and everything else, that the state did everything that was necessary administratively to enable that system to be put in place, and that is the reform outcome that has been achieved. The passage of the state legislation, as I said, from the starting point initially, was that it was seen only as necessary in a tidy-up sense because the commonwealth legislation would override it and, potentially, you could not do it at all and it would not be an issue. We do not see this bill as being part of the national scheme per se. Therefore it is not tied to the national partnership payments issue.

The CHAIRMAN: Do you know how much money the state got out of that arrangement?

Mr Newcombe: The payments are progress payments over five years. Payments were made in 2008–2009, that is the first year, and through to 2012–2013. I believe the state has received all of the payments to date to which it was entitled and, no, I cannot recall off the top of my head what that amount is. I think it is in the order of about \$23 million, but I would not want to be quoted on that, but it is around that order. I think half of it is paid in the first two years. There is a hiatus period and then the last tranche is paid at the end of the five-year period. But those payments are in relation to the overall completion of the COAG reform. There is no formula, so there is no amount of dollars tied to any particular reform and the decision about penalties on those payments is not made by the commonwealth government, it is made by the COAG review council, which is an independent statutory body that assesses annual reports and makes a judgement as to whether states have done all that is reasonably necessary to implement the reforms and then it will recommend reductions in payment. The state will not actually know the final position until probably 12 months after each payment period. To date, the state has received them, but there is a lot of work still to be done on those COAG reforms.

The CHAIRMAN: The amendments to the Trade Measurement Act 2006 proposed by part 2 of the bill rely on enactment of amendments to the Trade Measurement Administration Act 2006 proposed by part 3 of the bill. It is therefore necessary for the Legislative Council to consider the provisions of part 3 of the bill prior to determining whether to pass part 2. This requires the Legislative Council to depart from its usual practice of considering the clauses of the bill in sequential order. This is an ongoing issue for us in the Council because we consider a bill in sequential order, but sometimes we are considering a subsequent provision before considering the primary change. That makes it very difficult to argue and to carry through in debate in the Parliament. The committee is interested in why part 2 of the bill did not deal with the substantial amendments to the Trade Measurement Administration Act 2006 and part 3 deal with the dependent trade measurement amendments so that they were in sequential order? It seems in the drafting of this bill it could have been done easily.

Mr Newcombe: Again, that is a drafting issue. The reason it is done is that it simply follows the acts in their alphabetical order, the Trade Measurement Act and the Trade Measurement Administration Act. I think it would be useful, if the committee has a concern about that, or the Council, to feed some of that back to parliamentary counsel, because I have to say it is not something that we would really think about in terms of the process. However, to us the structure follows a logical sequence because the major act nonetheless is the Trade Measurement Act. The administration act is just to allow the administration of those provisions. From our point of view that makes sense because the Trade Measurement Act is the main act and, equally, it is the alphabetical order of the two acts, and so you progress through. I guess, as I said, I think that would be a useful point to pass through because it is not something that we would have looked at, but clearly parliamentary counsel might want to address that issue.

The CHAIRMAN: Okay. That is all the questions I have. do members of the committee have any questions? No. Is there any concluding comment that you would like to make?

Mr Newcombe: No, we are fine, thank you.

The CHAIRMAN: Terrific. Just to recap, there are two questions on notice. Mark or Susan—I am not sure who—will contact you to confirm in writing what those two questions on notice are. We will need the answers to those two questions on notice by close of business Monday.

Mr Newcombe: That is fine.

The CHAIRMAN: Terrific. On behalf of the committee, thank you very much for your time and for your very detailed and courteous responses to the questions.

Mr Newcombe: You are welcome.

Hearing concluded at 11.43 am